How international arbitration should be understood in Vietnamese law?

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1. OVERVIEW ON DEVELOPMENT OF ARBITRATION

Arbitration appeared in Vietnam during the sixties of the 20th century with the specific features reflecting the operation of the mechanism of centrally planned economy. During this period, in the legal system of Vietnam there was economic arbitration. Economic arbitration was established in 1960, i.e., in the year Vietnam started building centrally planned economy following the Soviet model. Economic arbitration was established under the administrative management agencies. It carried two-tier function: management and dispute resolution. The competence of economic arbitration was to inspect the performance of the state plan quota by socialist economic entities, to reveal the violations against the assigned State plan quota and to solve disputes arising among socialist economic entities (referred to SOEs and collective farms). Even though being named arbitration, the economic arbitration, due to its legal nature, the provided functions and competence, was specific functional units of administrative agencies.

To solve disputes arising between Vietnamese and foreign organizations, Vietnam established two arbitration organizations, namely Maritime Arbitration and Foreign Trade Arbitration. Foreign Trade Arbitration was established in 1963 by the Decision No 59/CP on 30/4/1963. Maritime Arbitration was established in 1964 by Decision 63/CP on 5/10/1964. These two arbitration organizations were regarded as non-Governmental, operating on their own procedural rules. However, in the reality, due to the mechanism of centrally planned economy, these two arbitration organizations could not be totally independent and non-governmental. They were put under the management of the Ministry of Foreign Trade and the Ministry of Transportation. The role of these two arbitration organizations was vague since trade partners of Vietnam at that time were mainly from the former socialist countries and therefore the majority of

disputes were resolved via the respective government arrangements as the countries rendering and receiving aids.

The Renovation policy carried out by Vietnam and shifting to socialist-oriented market economy has brought crucial changes to the legal system of Vietnam including the arbitration system. The system of economic arbitration was abolished in parallel with the previous legal acts on economic contracts. The Ordinance Economic contracts and then the Ordinance on Procedure of solving economic disputes had laid grounds for establishment of economic court and system of non-governmental arbitration centers. Economic court had been established within the system the People's courts and empowered to solve economic disputes arising from business activities. System of really non-governmental arbitration centers started their existence with the establishment of Vietnam International arbitration Center (VIAC) beside the Vietnam Chamber of Commerce and Industry (VCCI). Vietnam International Arbitration Center was established by Decision 2004TTg on 28/4/1993 on the basis of merger of Foreign Trade Arbitration and Maritime Arbitration. VIAC is competent to handle disputes arising from international economic relations, i.e. the disputes with foreign elements. Later, in 1994, Government issued Decree 116/CP on 5/9/1994 that endorsed establishment of non-governmental arbitration centers. After the Decree took effect, some arbitration centers were established in few cities and provinces. They are competent to solve economic disputes arising among domestic economic entities. In 1996, Government issued Decree 114/CP on widening the competence of arbitration centers. According to this Decree, Vietnam International Arbitration Center was granted competence to solve economic disputes arising not only between Vietnamese and foreign economic entities but also arising among Vietnamese economic entities. Arbitration centers established by the Decree 116/CP were granted competence to solve economic disputes that previously had been in exclusive jurisdiction of VIAC. So, by this Decree, Vietnamese law provides a uniform legal status for non-Governmental arbitration centers. However, as the matter of fact, the activities of these arbitration centers were limited. Arbitration centers even though is very small[1] in number but they almost were lacking of cases for solving. The weakness of arbitration centers was explained by various reasons. Among them, it needs to list firstly the limitation of the legal system. For instance, according to Article 1 of

[1] Up to the present time, in the whole country there are only 6 arbitration centers

Decree 116/CP the competence of arbitration centers was limited to 3 kinds of disputes, namely disputes arising from: economic contracts, from the corporation life, and from sales of shares and bonds. Many other kinds of business activities were excluded from the competence of arbitration centers due to the narrow interpretation of the concept of an economic activity.

In 2003, Vietnam adopted Ordinance of Commercial Arbitration of 2003. The drafting of the Ordinance was in charge of Vietnam Lawyers Association. The Ordinance is regarded as big step forward in development of arbitration in Vietnam. The Ordinance provides dispute resolution mechanism with many principles that are commonly accepted in solving international trade disputes in most arbitration centers in the world. Such principles as the right of the involved parties to form arbitration tribunal; close trial; determination of arbitration jurisdiction basing on arbitration clause and etc. are introduced by the Ordinance. Apart from these, the following points can also be regarded as embodiment of economic integration in the 2003 Ordinance on Commercial Arbitration.

Firstly, The Ordinance provides the parties involved in disputes with foreign element with right to apply foreign law for solving the disputes on condition that the applicable foreign law does not contradict the basic principles of Vietnam law. This provision reflects the reaction of Vietnamese law to the international integration tendency.

Secondly, The Ordinance permits the involved parties to select foreign arbitrators for solving the disputes with foreign elements. Choice of foreign arbitrators or the request foreign courts to appoint arbitrators shall be made in accordance with the law of respective country.

Thirdly, Apart from provision on the choice of foreign arbitrators, the Ordinance permits the parties to choose the procedural rules of other arbitration centers for handling their case. Choice by the parties of languages, place of trial is also permissible according to the 2003 Ordinance on Commercial Arbitration.

Apart from the mentioned positive steps towards international economic integration, the Ordinance still leaves untouched some issues that are very important for

the topic of this paper, namely, how should we differentiate international arbitration as opposed to domestic arbitration.

To have better understanding of the arbitration system in Vietnam, it is important to analyze the two following aspects:

Firstly, what is an arbitration center according to the Ordinance; and

Secondly, are the current arbitration centers in Vietnam international or domestic with competence on disputes with foreign elements?

2. WHAT IS AN ARBITRATION CENTER UNDER VIETNAMESE LAW?

The term "economic arbitration center" appeared in the legal system of Vietnam with adoption of Decree 116-CP on September 5, 1994. The term was used to indicate the economic arbitration centers that came to replace economic arbitration that had been established under different bodies of the executive branch. The new term reflects not only the change of name but also the nature of economic arbitration centers. The 2003 Ordinance on Commercial Arbitration uses the term "arbitration center" identifying arbitration centers that were established pursuant the Decree 116/CP and the newly established pursuant to the Ordinance.

Arbitration centers are dealt with in Chapter V of the Ordinance. Even though the Ordinance does not provide any definition of an arbitration center but all its provisions may lead to the conclusion that an arbitration center is an institution established by permission of the competent government agency to solve disputes arising from commercial activities that include one or several trading acts of merchants or business or organizations such as sales of goods, service provision; distribution; trade representation and agency; consignment; renting and leasing; financial leasing; construction; consultancy; technology; licensing; investment; financing; banking; insurance; exploration and exploitation; transport of goods and passengers by air, sea, rail, land, and other commercial acts as prescribed by law.

The 2003 Ordinance on Commercial Arbitration clearly stipulates that an arbitration center is a non-governmental organization, the association of those who wish to involve in settlement of commercial disputes as arbitrators. The striking feature of an

arbitration center is its status of a legal person, i.e. it is an artificial creature having rights and obligations as if a natural person has. As a legal person (or entity) an arbitration center has its own name, property, seal and structure, can sue or be sued at the court. The status of a legal person also means the limited liability of those who establish the center. The status of a legal person arises from the moment when an arbitration center receives establishment permission. However, for carrying out activities an arbitration center must register its activities with the department of justice in the respective province. As a legal person, an arbitration center has right and duty to adopt its own charter, by-laws for regulating the internal affairs. One of the conditions for getting permission to establish an arbitration center is, among other things, submission of its proposed charter.

The 2003 Ordinance on Commercial Arbitration sets forth some conditions for establishing an arbitration center. Compared to the Decree 116/CP, the conditions are, from one hand very liberal and at the same time very restrictive on other hand. The easiness in establishment of an arbitration center can be found in the absence of requirement of having arbitrator certificates by the promoters, the indefinite term of existence, one-tier mechanism of getting permission of establishment. Concretely, according to the former regulations, an application for establishment of an arbitration center was sent both to the respective provincial People's Committee and to the Minister of Justice. The respective People's Committee after receiving the application had to consult with the Ministry of Justice who then decided to permit or not to permit establishment of the center. Now pursuant to the Ordinance, the application is sent only to the Ministry of Justice for permission.

The 2003 Ordinance on Commercial Arbitration stipulates that now arbitration centers are permitted only in cities and provinces with more commercial activities. This is one of restrictions in regard of establishment of arbitration centers. Moreover, at the present time, one more step to be made in order to establish arbitration centers, namely, the consultation with the Vietnam lawyers Association (VLA). According to the Ordinance, the VLA along with the Ministry of Justice will consider the application for establishment of arbitration centers. The Minister of Justice will decide to permit or not to permit establishment of a given arbitration center.

The 2003 Ordinance on Commercial Arbitration requires arbitration centers to adopt their own charters for regulating internal affairs. The charters of arbitration centers must be approved by the Minister of Justice simultaneously with granting registration certificates. The procedure seems still cumbersome and not in accordance with the provisions of law regulating process of establishment of enterprises. It is worthy noting that since 1999, the procedure of establishment of enterprises has been simplified and the permission system has been abolished. The reinstatement the permission system in this field may be explained by the intention of the Government to prevent meaningless booming of arbitration centers or their establishment for fraudulent purposes.

Arbitration centers may open branches or representative offices in other places of the province where they registered or in other provinces for facilitating their activities. This right is rarely used by arbitration centers. Except VIAC, there is no other arbitration center that has branches and representative offices in other provinces. The Ordinance does not regulate in detail the structure of arbitration centers but requires them to have an appropriate board for management of affairs.

One other striking feature of an arbitration center is its own procedural rules. The presence of arbitration procedural rules makes arbitration more operational and independent. As the Ordinance provides only general principles of handling cases, it is important for an arbitration center to have their own rules. However, it is worthy noting that the procedural rules of any arbitration center must be in accordance with the basic principles provided in the Ordinance.

An arbitration center is entitled to establish arbitration councils from the arbitrators appointed by the involved parties or in case the parties fail to appoint within the provided time, by the president of arbitration centers. The establishment of arbitration councils is carried out in accordance with the provisions of the Ordinance and the procedural rules of the arbitration center. An arbitration center also is entitled to set forth arbitration fees to cover the expenses incurred by the arbitration tribunals.

The reality shows that ADR in Vietnam in general and arbitration in particular are not popular form of dispute settlement. This conclusion may be derived from the organization and activities of arbitration centers. At the present time, nation-wide, there are only 6 arbitration centers with 136 arbitrators who are mainly listed with the VIAC.

More importantly, five from these 6 centers either has not been functioning or weakly functioning. The VIAC is the only arbitration center that is still functioning.

3. INTERNATIONAL ARBITRATION CENTER OR DOMESTIC ARBITRATION CENTER WITH COMPETENCE OVER DISPUTE WITH FOREIGN ELEMENTS?

Before adoption of the 2003 Ordinance of Commercial Arbitration, the arbitration law of Vietnam clearly provided two types of arbitration competences. The first was the competence of arbitration centers in solving cases with international elements. Such competence was vested only with Foreign Trade Arbitration and Maritime Arbitration. When the Vietnam International Arbitration Center was established on basis of merger of these two arbitration centers in 1993, it inherited the competence to solve international disputes therefrom. Thus, international arbitration existed in Vietnam only in sense that it was conferred on the competence to solve international disputes. International characteristics of arbitration centers are reflected not in the way of their creation, i.e. by two or more States, or by international organization but in its competence over international disputes. Obviously, Vietnam International Arbitration Center (VIAC) is not an international center in meaning that it is has been created by States and organization and accredited in Vietnam. VIAC is domestic arbitration center that is competent to solve international disputes or disputes with foreign elements. Before the adoption of the Decree 116, there was quite clear boundary between VIAC and other arbitration centers, established pursuant to Decree 116/CP on 5/9/1994. The latter are usually understood as domestic arbitration centers whose competence was limited to disputes arising from transactions among domestic entities and merchants while VIAC was named "international" with competence to solve disputes with foreign element.

As noted above, according to the Ordinance, arbitration centers in Vietnam are provided with the competence to solve commercial disputes arising among Vietnamese businesses and between them and foreign partners in commercial transactions. Thus, the competence of commercial arbitration has been much widen due to the following factors:

Firstly, the Ordinance reinstates the provisions of the Decree 114/CP by which the competence of arbitration centers established pursuant to Decree 116/CP had been widened to cover disputes with foreign elements and competence of VIAC had been also broaden to include disputes arising among Vietnamese businesses and individual merchants.

Secondly, the scope of coverage in regards of subject-matter of disputes has been widened by introduction new concept of a commercial activity. The new concept overcomes the limited coverage of subject-matter in competence of arbitration centers that included just disputes arising from economic contracts, disputes arising out the company life and sales of shares and bonds.

The expansion by the Ordinance of the competence of arbitration centers to cover both domestic disputes and disputes with foreign elements makes these centers uniform in competence in dispute solution and thus the international nature of the VIAC is no more noticeable. In the Ordinance there is no provision on international arbitration as an institution but there are provisions on competence of arbitration centers over disputes with foreign elements. It can be said that there are no international arbitration centers in Vietnam in real sense of the term. Any domestic arbitration center in Vietnam may become "international" if it has competence to solve a dispute with foreign element. All this means that the name of a given international center does not have significant importance in determining its international nature. The importance lies in the competence of this or that arbitration center over disputes with foreign elements. Therefore it is important for us to define the foreign elements" of a case in order to determine the "international competence" of arbitration centers. The competence of an arbitration center is determined on basis of arbitration agreement of the parties involved. Arbitration agreement not only triggers arbitration jurisdiction but determines the nature, formalities of arbitration trials. Let analyze Article 7 of the Ordinance. Article 7 provides the principles for law application in an arbitration case as follows:

"1. For disputes between Vietnamese parties, arbitration Council shall apply Vietnamese laws to settling them.

2. For disputes involving foreign elements, an Arbitration Council shall apply the laws chosen by the involved parties. The choice and application of foreign law must not contravene the fundamental principles of Vietnamese law. Where the involved parties fail

to make a choice of law for settling their disputes the competent arbitration council shall make decision".

Foreign elements in an arbitration case gives it some "international characteristics" such as application of foreign law, selection of foreign arbitrators, and use of foreign languages etc.. Where one party or all parties involved request foreign courts to appoint arbitrators, the competent courts shall perform the request pursuant to the law of the respective foreign countries. Thus, foreign elements are very important in determining the nature of an arbitration council, i.e. in making it international or domestic. The presence of any foreign element provided in the Ordinance gives the competent council the possibility of application of foreign law and/or arbitration litigation rules of foreign or international arbitration centers; possibility of having the case handled in a place outside Vietnam.

The procedure of solving disputes with foreign elements is provided in detail in Article 7 and 49 of the Ordinance. Article 7 provides the following:"Arbitration councils shall apply the foreign law that the involved parties have chosen. The choice and application of the chosen foreign law must not contradict the basic principles of Vietnamese law". Article 49 of the Ordinance sets forth the rules for solving disputes with foreign elements as analyzed in the next paragraph. Thus, according to the provisions of the Ordinance foreign elements in an arbitration case give the arbitration preceding some specific features that an ordinary case, i.e. case without foreign element does not have. The specific features of procedure for handling arbitration with foreign elements are the following:

Firstly, as regard to the arbitration councils. The involving parties may have their disputes solved by an arbitration council that is formed through their selection of arbitrators. This means that the parties involving in a dispute with foreign element have the same right to establish the arbitration council as the parties in other ordinary arbitration case have but with broad choice of arbitrators.

Secondly, on application of arbitration rules. The arbitration council established by the parties shall have to apply the litigation rules chosen by the involving parties. This means that the arbitration council shall have to apply the litigation rules of other centers, including foreign and international arbitration centers. The choice of litigation rules other than those of the center may bring the arbitration center some difficulties. However,

when the involving parties have chosen other litigation rules, the council must apply them.

Thirdly, The Ordinance neither limits the appointment of arbitrators within an arbitration center's list of arbitrators nor appointment only of Vietnamese arbitrators. The involved parties may appoint anybody, including foreign arbitrators as the members of the arbitration council. The appointment of foreign arbitrators, of course, also makes the litigation more complicated since handling the dispute involves use of foreign languages and other formalities relating to appointment of foreign arbitrators. For instance, where one party or all parties involved request foreign courts to appoint arbitrators, the competent requested courts shall appoint arbitrators according to the law of the respective countries. Among advantages and disadvantages, as a trade-off for complicatedness of involvement of foreign arbitrators, such an arbitration council will be more qualified and internationalized.

Fourthly, the involved parties may agree on law and/or international commercial practices that will be applied to handle the disputes brought under the competence of the arbitration council in accordance with the provisions of Clause 2, Article 7 of the Ordinance. Similar to the consequences of application of other litigation rules the application of foreign law also causes some difficulties for the council, especially for those arbitrators who do not have background in international and comparative law. However, the provision of the Ordinance is a big step forwards in arbitration development in Vietnam.

Fifthly, the involved parties may agree on the places for settling their disputes, either in Vietnam or in a foreign country. If the involved parties fail to reach an agreement as regard to the place of trial, the Arbitration Councils shall decide this issue taking into consideration the convenience for the involved parties. The involved parties may also agree on the language(s) to be used in arbitral proceedings. If they have no agreement thereon, the language used in arbitral proceedings shall be Vietnamese.

The mentioned above facts show the importance of foreign elements in determination of the "international nature" of arbitration cases. Therefore, it is critical to fully understand legal concept of "foreign elements" in Vietnamese law. To have appropriate understanding of the meaning of "foreign elements" one should refer to Article 2 of the Ordinance as well as Article 45 of the Civil Procedure Code of 2003. Point 4, Article 2 of the Ordinance stipulates as follows: "Disputes with foreign elements

are those arising from commercial activities involving one or all parties who are foreign legal persons or individuals, or those whose grounds of creation, modification or termination have arisen abroad or those involving properties located abroad". The 2003 Civil Procedure Code also has the similar approach in defining foreign elements. Point 2, Article 405 of the Code defines "foreign element" as follows: "A civil case with foreign element is a case that involves at least one party being foreign individual or Vietnamese residing abroad or a case arising from relations among Vietnamese citizens, Vietnamese organizations but the grounds for creation, modification or termination of such relations have arisen abroad or the property involved in such relations is located abroad".

Thus, a foreign element in Vietnamese law can be reflected in one of the following facts: (i), one party or parties are foreign individuals, i.e. subjects participating in arbitration procedure are foreign; (ii), grounds of creation, modification or termination of the relations between parties have arisen abroad; (iii), the property involved in the case is located in other country. Let analyze these three factors according to Vietnamese law.

Firstly, what does "a foreign party" mean?

The wording of the Ordinance and the Code gives quite clear definition: "At least one party being a foreign individual or organization". Does a foreign individual mean any person coming from other country or it refers to his/her citizenship? There is a difference in understanding the term "foreign individual". Some interpret the term to include all persons having the citizenship other than Vietnamese, including Vietnamese residing overseas and/or having citizenship of other countries, individuals who do not have citizenship of any country. In contrary, some interpret the term to exclude Vietnamese who reside overseas and maintain Vietnamese citizenship. To fully understand meaning of a foreign individual, one needs to refer to the whole legal system of Vietnam. For instance, the Law on Investment No 59/2005/QH11 lists as investors subject to its governing foreign individuals and organizations, Vietnamese residing in other countries, foreign individuals residing in Vietnam.

So the precise meaning of a "foreign individual" should include individuals (including individuals of Vietnamese origin) having citizenship of any other country. In our opinion, individuals having no citizenship of any country and residing in Vietnamese should be treated as Vietnamese citizens. The problems arising from cases with foreign elements often relate to application of foreign law. Since there is no linkage between individuals having no citizenship with any legal system, Vietnamese law, including

arbitration law should be applied in regard of individuals having no citizenship and residing in Vietnam.

A complicated issue arises in dealing with foreign legal entities in this regard. In the reality, a lot of commercial organizations involve in commercial activities. Some of these organizations are legal entities and some are not. Consequently, arbitration cases may involve foreign parties who may have the status of a legal person or may not have. The most complicated aspect in dealing with the issue of a foreign party as to determine the jurisdiction of arbitration councils is recognition of the legal status commercial organizations and their nationality. In Vietnamese law as in the law of foreign countries there still exist some differences in defining a legal entity and the nationality of organizations. The differences in this regard also exist in some bilateral trade agreements between Vietnam and other countries. In some countries, the legal status and nationality of trade organizations are determined on basis of law in the place where they conduct main activities while in other countries they are determined by the law of the place where they have been established. Moreover, status of a legal entity is not so important for involvement of commercial organizations in commercial activities as well as for enjoyment of preferences pursuant to these trade agreements.

According to the legal system of Vietnam, the status of a legal person and nationality of commercial organizations in particular and of artificial creatures in general are determined by the law of the place where they are established. This means if a commercial organization is established in Vietnam by whomever, foreign or Vietnamese individuals or organizations, its legal status will be determined by Vietnamese law and its nationality will be Vietnamese. The 2003 Ordinance on Commercial Arbitration stipulates that a foreign element in an arbitration case occurs when it involves one or all parties being foreign individuals and organizations. The precise interpretation of this provisions should be as the follow: *Any commercial organizations, notwithstanding being legal persons or not, any individuals carrying out commercial activities, having the nationality of other countries, shall be a party or parties in the arbitration case that will be handled with some specific rules provided in the Ordinance.*

Secondly, how to understand the grounds of creation, grounds of creation, modification or termination of the relations between parties are abroad.

The wording of this provision may cause some confusion. The word “abroad” does not necessarily mean the location outside Vietnam. For instance, a contract that is signed between two foreign companies who meet in one trade fair held in Vietnam is understood “arising abroad”. In contrary, a contract signed between Vietnamese companies in Bangkok at a trade fair held therein cannot be referred to as “grounds arising abroad”. Therefore, the precise understanding and interpretation of “arising abroad” is that the grounds of creation, modification and termination of the relationship between the involved parties are determined by foreign law. There is one issue the Ordinance leaves uncertain, namely, the issue as whether “grounds arising abroad” covers the cases when the involved parties enter the contract in question basing purely on international law or customs.

Thirdly, the property involved in the case is located in foreign countries. The meaning of this wording also faces the similar challenges as the above-mentioned provision does. Some properties even though being located abroad, permanently or temporarily cannot be regarded as “located abroad” for the purpose of determination of foreign elements. In contrary, some properties even though being located in Vietnam but can be regarded as “located abroad” for the mentioned above purpose. Consequently, it is important to determine the true will of the drafters of the Ordinance in regard of criteria “located abroad”. Obviously, the Ordinance’s provision on determination of “property located abroad” as the foreign element for application of specific procedures in arbitration cases falling under Article 7 and 49 needs to be official interpretation by the competent body.

The analysis of the Vietnamese law on arbitration as presented above may bring up the following conclusions:

Firstly, in Vietnam at the present time, there is no any arbitration center in meaning that it is established by different states or by international organizations.

Secondly, Vietnam International Arbitration Center is a domestic arbitration center whose competence is to solve disputes arising among Vietnamese businesses, among foreign businesses, and between Vietnamese and foreign businesses in carrying out commercial activities. This means that VIAC is competent to solve disputes with foreign elements.

Thirdly, VIAC is not only the center with such a competent in Vietnam. According the acting law, any arbitration legally established may have the competence to solve disputes with foreign element (or international disputes) if a dispute that has been brought under its jurisdiction involves one of three foreign elements provided in Article 2 of the 2003 Ordinance on Commercial Arbitration.