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Arbitration Agreements in Consumer Contracts: Vietnam Reinforces its Pro-Consumer Approach

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Around the world, there are [divergent approaches](#) towards the enforceability of arbitration agreements in consumer contracts. Vietnamese laws protect consumers, who are buyers or users of goods or services for consumption or daily activities, against mandatory arbitration. The Council of Justices of the Supreme People's Court ("Council") recently adopted a court decision as a Precedent that reinforces the current pro-consumer approach in Vietnam.

Statutory Consumer Protection Against Mandatory Arbitration

In 2010, Vietnam's National Assembly promulgated the [Law on Commercial Arbitration](#) ("LCA") and the [Law on Protection of Consumers' Rights](#) ("LPCR"). Both laws contain express provisions protecting consumers against mandatory arbitration.

Article 17 of the LCA provides that:

“Concerning disputes between businesses and consumers, even if an arbitration agreement has been incorporated in the general conditions for the sale of goods or the provision of services drafted by the business, the consumer may choose arbitration or a court to settle the dispute. The business can only initiate lawsuits at arbitration if so consented by the consumer.”

In their [Commentary on the Draft LCA dated 20 July 2009](#), the drafters found that the LCA should protect consumers because they were at significant risk of being unfairly treated by virtue of the businesses' terms and conditions. Hence, Article 17 is formulated to give consumers a choice of dispute resolution method. If the consumer agrees to arbitrate, the dispute will be resolved by arbitration as agreed by the business and consumer. On the contrary, if the consumer feels disadvantaged by being compelled to arbitration, the consumer should have an opportunity to choose dispute resolution in court.

In the [Resolution no. 01/2014/NQ-HDTP](#), the Council clarifies that an arbitration agreement is “incapable of being performed” where the consumer does not agree to arbitration under Article 17

even if there is an arbitration agreement contained in the general conditions for the sale of goods or the provision of services drafted by the business.

Further, Article 38 of the LPCR prescribes that:

“Before concluding a contract, the business must notify the consumer of the arbitration agreement, which the consumer must accept. In case the business incorporates the arbitration agreement in its model contract or general terms and conditions, when a dispute arises, the individual consumer may choose another dispute resolution method.”

In short, the LCA and the LPCR provide statutory protection for consumers against mandatory arbitration.

Consumer Protection Against Mandatory Arbitration in Practice

In line with the LCA and the LPCR, Vietnamese courts have consistently safeguarded the consumers' choice of dispute resolution method. There have been at least two cases where consumers exercised their option to rescind pre-dispute consumer arbitration agreements.

First, in the case of *Ms. Th v. Company B* (2014), Ms. Th and Company B concluded a contract for the sale of an apartment in July 2010. According to the contract, Company B was obligated to hand over the apartment to Ms. Th in December 2011. However, Company B only handed over the apartment two years later, on 31 December 2013.

In June 2014, Ms. Th initiated a lawsuit against Company B at the People's Court of Binh Tan District, Ho Chi Minh City. She asked the court to order Company B to pay the penalty for the late hand-over.

In the sales contract, the parties agreed to negotiate, mediate, and arbitrate at the Ho Chi Minh City Commercial Arbitration Centre (TRACENT). However, Ms. Th argued that she had not been notified about the arbitration agreement when she signed the contract. Hence, Ms. Th refused to arbitrate and requested that the court hear her case.

In the first instance judgment no. 608/2014/DS-ST dated 16 September 2014, the court ruled that the contract, which contained an arbitration agreement, was a model contract drafted by Company B. Hence, Ms. Th, as a consumer, could refuse to arbitrate and had the right to request the court to hear her case. The court found that it had jurisdiction over the dispute. On the merits, the court accepted the claim and ordered Company B to pay the penalty for the late hand-over after setting off the penalty for the late payment.

Second, in the case of *Mrs. T and Mr. S v. Company V* (2018), Mrs. T and Mr. S concluded a timeshare contract with Company V in February 2017. The value of the contract was VND 388 million. As of 15 March 2017, Mrs. T and Mr. S paid a deposit of VND 300 million.

In December 2017, Mrs. T and Mr. S initiated a lawsuit against Company V at the People's Court

of Nha Trang City, Khanh Hoa Province. They asked the court to nullify the contract and to order Company V to reimburse the deposit.

Initially, the court refused to receive the claimants' petition because there was an arbitration agreement in the contract, in which the parties agreed to arbitrate at the Singapore International Arbitration Centre ("SIAC") under the SIAC Rules. However, the court later reversed its initial decision and decided to receive the petition.

In the [first instance judgment no. 54/2018/DS-ST](#) dated 16 November 2018, the court ruled that the contract, which contained an arbitration agreement, was a model contract drafted by Company V. Hence, Mrs. T and Mr. S, being consumers, could refuse to arbitrate and had the right to request the court to hear their case. The court found that it had jurisdiction over the dispute, but the court rejected the claim on the merits.

Reinforcement of the Consumer Protection Against Mandatory Arbitration

On 24 February 2021, the Council adopted judgment no. 54/2018/DS-ST to become [Precedent no. 42/2021/AL](#), which binds Vietnamese courts from 15 April 2021. Pursuant to [Resolution no. 04/2019/NQ-HDTP](#) (formerly [Resolution no. 03/2015/NQ-HDTP](#)), judges and jurors must research and apply precedents to resolve cases and ensure that similar cases shall be resolved in a manner consistent with [Precedent no. 42/2021/AL](#).

Within the first few weeks after the adoption of [Precedent no. 42/2021/AL](#), three preliminary observations can be made:

First, [Precedent no. 42/2021/AL](#) is the first precedent in Vietnamese courts concerning arbitration law. The adoption of [Precedent no. 42/2021/AL](#), which derives from a first instance judgment of a district court, is exceptional because most precedents arise from cassation decisions of the Supreme People's Court or the Superior People's Courts. These circumstances reflect the growing importance of protecting consumers' access to the court and the necessity of having a Council's precedent on this matter.

Second, [Precedent no. 42/2021/AL](#) clarifies the scope of consumer protection against mandatory arbitration under Article 17 of the LCA and Article 38 of the LPCR. Even if a business' model contract contains an arbitration agreement that refers disputes to international arbitration, the consumer may still refuse to arbitrate and request a competent Vietnamese court to hear the case. One question may be about the legal consequences if a foreign arbitral tribunal is constituted, conducts proceedings, and even renders an arbitral award. Arguably, the competent Vietnamese court may refuse to recognize and enforce such an arbitral award in Vietnam, at least on the grounds of public policy (Article V(2)(b) of the [New York Convention](#) and Article 459(2)(b) of the [Civil Procedure Code](#)). Thus, [Precedent no. 42/2021/AL](#) emphasizes that consumer protection against mandatory arbitration may apply to any consumer contract to which a Vietnamese consumer is a contracting party.

Third, [Precedent no. 42/2021/AL](#) also gives clues on what constitutes a consumer's refusal to arbitrate. Here, the act of filing a claim in court is sufficient for the court to conclude that the consumer had requested to cancel the arbitration agreement. Thus, consumers should be cautious in choosing the most appropriate dispute resolution method when a dispute arises.

Conclusion

For a decade, Vietnamese law has been protecting consumers against mandatory arbitration. The recently adopted Precedent no. 42/2021/AL once again prioritizes the consumers' choice of dispute resolution method. Further, Precedent no. 42/2021/AL sheds light on some remaining legal issues and strengthens the current consumer protection regime.

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This entry was posted on Monday, April 12th, 2021 at 7:54 am and is filed under [Consumer contracts](#), [Consumer disputes](#), [Vietnam](#)

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