Kluwer Arbitration Blog

Vietnamese Court Sets Aside Arbitral Award for Failure to Legalize POA: An Abuse of Due Process Requirements

Tony Nguyen, Manh Pham (EPLegal) · Wednesday, July 26th, 2023 · Vietnam International Arbitration Centre (VIAC)

Under the Law on Commercial Arbitration 2010 ("LCA"), both domestic and international arbitral awards can be set aside on the basis that the arbitral award contravenes the "fundamental principles of Vietnamese law." This concept, however, is undefined and broad, causing much uncertainty, especially in light of decisions of the Vietnamese courts.

In 2020, the People's Court of Ho Chi Minh City ("HCMC Court") set aside a Vietnam-seated arbitral award on the basis that a power of attorney issued by a foreign company to its Vietnamese lawyers to represent it in the arbitration was not legalized by the consulate of Vietnam in Cambodia. The HCMC Court held that the arbitral tribunal's acceptance of the power of attorney that was not legalized contravenes the fundamental principles of Vietnamese law and therefore the award was liable to be set aside. This controversial decision has invited much criticism from the legal profession in Vietnam as the wide and uncertain grounds under which a party may challenge an award under the LCA continue to hinder Vietnam's popularity as a seat for international arbitration.

Summary of Decision 1768/Q?-PQTT Dated 10 June 2020 ("Decision 1768")

On 25 September 2016, Tai Seng Bavet Sez Co., Ltd ("Tai Seng") (a Cambodian company) and Chunghwa Telecom Vietnam Co., Ltd ("Chunghwa") (a Vietnamese company) signed a service contract ("Contract"). Article 22 stipulated that if resolution through negotiation and conciliation cannot be reached, *"the arbitration body of Vietnam, Cambodia or a third party will conduct arbitration"* and that "*[the] undisputed parts must still be performed.*"

A dispute subsequently arose between the parties, whereby Tai Seng alleged that Chunghwa did not fulfil its obligations under the Contract. Tai Seng commenced an arbitration against Chunghwa with the Vietnam International Arbitration Center ("VIAC"). In accordance with the VIAC Rules, a tribunal consisting of three arbitrators was appointed. On 5 June 2019, the tribunal issued its final arbitral award, Award No. 44/18 HCM, wherein the tribunal upheld some of Tai Seng's claims and awarded to Tai Seng damages of USD 61,290, legal costs of USD 7,279, arbitration costs of USD 75,107, and other reasonable expenses in the sum of USD 3,178.52.

Chunghwa challenged the award before the HCMC Court on the grounds that the power of

attorney issued by Tai Seng to its Vietnamese lawyers to represent it in the arbitration (the "POA") was not legalized by the consulate of Vietnam in Cambodia and therefore was non-compliant with the provisions of Article 4 of Decree No. 111/2011/ND-CP ("Decree 111/2011").[1] Consequently, the arbitral tribunal should not have accepted the POA. According to Chunghwa, the arbitral tribunal's acceptance of the POA therefore contravenes the fundamental principles of Vietnamese law and the award should be set aside.

The Procuracy's Opinion

Commenting on this case, the Procuracy[2] opined that the POA was not legalized in accordance with Article 2.2 of Decree 111/2011 and was therefore not valid under Article 4.2 Decree 111/2011 for use in Vietnam. Pursuant to Article 68.2.(dd) of the LCA (which provides that an arbitral award shall be set aside if it contravenes the "fundamental principle of Vietnamese law"), the Procuracy advised the competent court to set aside Award No. 44/18 HCM.

The Court's Decision and Reasoning

The HCMC Court agreed with the Procuracy's opinion and added that the POA is not a type of document that is exempted from legalization under Article 9 of Decree 111/2011. Additionally, the HCMC Court held that the arbitration clause did neither specify a form of arbitration (*i.e.*, *ad hoc* or institutional arbitration) nor which arbitration institution should administer the arbitration. Therefore, it was wrongful for VIAC to have accepted Tai Seng's notice of arbitration and to have administered the arbitration between the parties.

On these grounds, the Court issued Decision 1768 to set aside Award No. 44/18 HCM.

The Problems with Decision 1768

According to Decision 1768, a failure by a foreign party to legalize a power of attorney in Vietnamese arbitral proceedings would amount to a contravention of "the fundamental principles of Vietnamese Law." Yet, the HCMC Court did not explain how a non-legalized power of attorney could result in a breach of the fundamental principles of Vietnamese law, for example because it threatens the justice and impartiality of the Vietnamese legal system, nor did it identify the types of documents that must be legalized for use in arbitration in Vietnam. In fact, it is absurd and irreconcilable with other Vietnamese laws and regulations on arbitration.

Firstly, Article 9(4) of the Decree 111/2011 provides that papers and documents need not be legalized if not required by the receiving Vietnamese or foreign organization under the relevant Vietnamese or foreign laws. The receiving organization in this case would be VIAC. Nothing in the Rules of VIAC or Vietnamese legislation requires that a POA issued by a party to an arbitration must be legalized. There was therefore no legal basis for the HCMC Court to find that a non-legalized POA in arbitration proceedings would violate any law or regulation of Vietnam, much less "the fundamental principles of Vietnamese law." The Procuracy and the HCMC Court may

have confused arbitration with Vietnamese court proceedings, where a represented party must obtain a POA that is apostilled and legalized.

Secondly, Article 14(2)(dd) of Resolution 01/2014 issued by the Supreme People's Court of Vietnam clarifies that the fundamental principles of Vietnamese law means "the fundamental rules of conduct having overall effect over formulation and implementation of Vietnamese Law." It is unclear how the issue of legalization of a POA could violate the fundamental rules of conduct having overall formulation and implementation of law. The form of a POA granted by a party to its counsel has no impact on the fairness or impartiality of an arbitration.

Thirdly, Article 13 of the LCA provides that if a party, having been aware of an (alleged) violation of the Law or the arbitration agreement, continued with the arbitral proceeding without objecting to it within the regulated timeline, it will lose the right of objection in arbitration and in court. The HCMC Court did not take into account the fact that Chunghwa never objected to the non-legalized POA until the arbitral award was issued.

Decision 1768 is therefore arguably wrong and places foreign parties arbitrating in Vietnam at a significant disadvantage. A construction arbitration like the case at hand usually involves copious amounts of documents and evidence. If a foreign Claimant is required to legalize all of its "foreign" documents to be used in arbitration in Vietnam, that would place a huge burden on the foreign party and would create an unfair advantage for domestic counter-parties because they can point to any non-legalized document used in the arbitration as a ground to apply for the setting aside of the arbitral award.

Decision 1768 is also irreconcilable with the best practices in international arbitration. None of the popular arbitration seats (*e.g.*, New York, England & Wales, Hong Kong, and Singapore) impose any legalization requirements on documents to be used in arbitration (which matter is for the tribunal to determine). For example, SIAC Rules 2016, Article 19.2 provides: "The Tribunal shall determine the relevance, materiality and admissibility of all evidence. The Tribunal is not required to apply the rules of evidence of any applicable law in making such determination."[3)] Similarly, the UNCITRAL Arbitration Rules 2021, Article 27.4 provides: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."

In relation to the failure of the arbitration agreement to specify an arbitral institution to administer the arbitration, the HCMC Court did not make it clear whether such failure rendered the arbitration clause invalid, or whether such failure merely meant that any arbitration commenced under the Contract would be an *ad hoc* arbitration. The Court's reasoning is inconsistent with Article 43(5) of the LCA, which states that if the arbitration clause fails to indicate the form of arbitration or cannot identify a specific arbitration institution, and the parties could not reach agreement on the same, then the form of arbitration or the arbitration institution to settle the dispute shall be selected at the claimant's discretion.

Mitigating the Risks Arising from Decision 1768

The VIAC Rules are so far silent on the issue of legalized POAs. To avoid uncertainty, parties are advised to obtain a legalized POA when they authorize their counsel representing them in arbitration proceedings in Vietnam.

From the VIAC's perspective, it should formally issue guidance to the disputing parties in relation to whether a POA has to be legalized under its Rules. Such guidance must set out the formality requirements applicable to each category of documents/evidence. Alternatively, VIAC may specify in its Rules that where a party provides a POA in writing, certification and legalization of the POA is not required ***unless*** requested by the opposing party(ies) giving notice within a certain period.

As for potential law reform, the LCA should be amended to clarify that the strict procedural rules of court proceedings shall not apply to arbitration; instead, procedural requirements under the LCA should be simplified to allow arbitral institutions to define their own requirements in relation to procedural matters. More importantly, the concept of contravention of the "fundamental principles of Vietnamese law" must be redefined in the LCA to include only very serious defects or breaches in the award or in the conduct of the arbitral proceedings that contravene the public policy of Vietnam of maintaining the fair and orderly administration of justice.

Conclusion

Decision 1768 is a controversial decision which has invited much criticism from the legal profession in Vietnam and has caused ripples of uncertainty in Vietnamese arbitration practice. It highlights the significant hurdles to Vietnam establishing itself as a safe seat for arbitration, especially for foreign parties.

References

?1 Article 4.2 of Decree 111/2011 dated 5 December 2011 (which regulates the consular certification and legalization process in Vietnam) provides that: “To be recognized and used in Vietnam, papers and documents of foreign countries must be consularly legalized, except the cases specified in Article 9 of this Decree.”

?2 Under Vietnamese law, hearings for all civil cases are attended by the People’s Procuracy of Ho Chi Minh City (“Procuracy”) (*i.e.*, the public prosecutor of Vietnam), who will express its independent opinion on the case. The Procuracy’s opinions are not binding on a judge but will have advisory value.

?3 LCIA Arbitration Rules 2020, Article 22.1.(iv) also allows the Arbitral Tribunal to order any party to make documents available for inspection by the Arbitral Tribunal, other party or expert.

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