

# Kluwer Arbitration Blog

## The Vietnamese Courts Have Spoken: Consular Authentication of Foreign Powers-of-Attorney Is a Must to Initiate a Vietnamese Arbitration

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A recent decision of the Hanoi People's Court, **Decision No. 12/2023/QĐ-PPT** dated 4 July 2023 ("Decision 12"), held that a power-of-attorney ("POA") signed outside of Vietnam and authorizing the signing and filing of an arbitration in Vietnam must have received consular authentication. In doing so, the Court clarifies the approach taken by the Ho Chi Minh City People's Court in **Decision No. 1768/QĐ-PQTT** dated 6 October 2020 ("Decision 1768"), which was discussed in a [recent post](#) on this Blog.

Neither decision has been classified as a precedent by the Judicial Council of the Supreme People's Court (the "SPC"). However, they are decisions of two separate three-judge panels to set aside arbitral awards under Article 68 of the Law on Commercial Arbitration (the "LCA") that, in addition, have been published on the SPC's electronic portal.<sup>1)</sup> Accordingly, they should have reference value in the absence of other authority on point.

The guidance from the courts is clear: POAs executed outside of Vietnam to authorize the signing and filing of an arbitration in Vietnam should have received consular authentication.<sup>2)</sup> Below, we review Decision 12.

### Decision 12

#### *Factual Background*

Decision 12 involves a dispute between parties to an agreement to transfer shares in a Vietnamese company. The buyer / claimant, a Singapore company, brought an arbitration to enforce certain put obligations of the seller / respondent under the agreement and, by extension, those of a guarantor / respondent of the seller's obligations.

The buyer's original Request for Arbitration was accompanied by (i) board resolutions authorizing one of its officers to act as its authorized representative in the arbitration, and (ii) two POAs signed by the officer further authorizing three individuals to act as authorized representatives of the claimant for purposes of the arbitration. Neither the resolutions nor the POAs had received

consular authentication. The respondents repeatedly protested that the lack of consular authentication, among other grounds, made the resolutions and the POAs invalid and therefore deprived the arbitral tribunal of jurisdiction.

After a jurisdictional hearing, the tribunal disagreed. The respondents appealed to the courts. The court hearing on the appeal was delayed for a long time. The tribunal decided to proceed with a hearing on the merits and issued an award in favor of the buyer / claimant. The respondents then petitioned the Hanoi People's Court to set aside the award.

### *The Court's Holding and Analysis*

The Court granted the respondents' petition to set aside the arbitral award. Given the arbitral tribunal's ruling that it had jurisdiction notwithstanding the lack of consular authentication, the Court had to squarely face the jurisdiction issue.

The Court specifically rejected the arbitral tribunal's determination that it had the right to waive the requirement in Article 4.2 of Decree No. 111/2011/ND-CP of the Government on Consular Authentication ("Decree 111"), dated 5 December 2011, which provides that:

**To be recognized and used in Vietnam, instruments and documents from a foreign country must have received consular authentication, except for cases provided for in Article 9 of this Decree** [including Article 9.4 discussed below].

As a starting point of its analysis, the Court observed that:

The Law on Commercial Arbitration and the legal documents guiding the implementation of the Law on Commercial Arbitration do not have any specific provisions requiring that instruments sent from a foreign country to Vietnam to authorize initiation of proceedings, as well as participation in such proceedings, must have received consular authentication in order to be used in the arbitration, **but this is not synonymous with accepting all bases of standing to participate in the arbitration or eliminating the legal status and legality of a plaintiff's standing to sue and to participate in the arbitration in accordance with law**. The parties to the dispute have agreed that this contract shall be governed and interpreted in accordance with Vietnamese law.

The Court then turned its attention to Article 9.4 of Decree 111, which provides that the consular authentication requirement can be waived for:

Instruments and documents for which the receiving agency of Vietnam or of a foreign country does not require consular authentication in accordance with the **relevant laws and regulations of Vietnam** or of that foreign country.

The Court concluded that a waiver in Vietnam had to be permissible under the relevant laws and regulations of Vietnam. Given the silence of the LCA and related regulations, the Court decided, by analogy to the Civil Code 2015, that the Civil Procedure Code 2015 (“CPC 2015”) was the general law that had to fill in the gaps.

Specifically, the Court pointed out that under Article 478 of the CPC 2015, Vietnamese courts will take judicial notice of “[i]nstruments, documents and their legalized and certified Vietnamese translation, all of which have received consular authentication.” Thus, the Court held that:

Accordingly, the law provides that **instruments sent from a foreign country to Vietnam must have received consular authentication** and therefore, **the Tribunal’s acceptance of jurisdiction to resolve the case when the claimant’s instruments had not received consular authentication**, especially when the respondents had objected and disagreed with the legal validity of the resolutions and powers-of-attorney, **is a serious violation of litigation procedure (determination of standing to initiate the proceedings)**.

The Court concluded that the failure to obtain consular authentication of the relevant resolutions and POAs was a violation of the fundamental principles of Vietnamese law. The Court also held that a subsequently submitted set of resolutions and POAs with proper consular authentication could not retroactively cure the lack of legal validity of the original instruments.

## Key Takeaways

Two three-judge panels in the two most important jurisdictions in Vietnam have come to the same conclusion in cases involving similar facts and the same legal issues. The judicial consensus is therefore clear: POAs made outside of Vietnam which are used to initiate an arbitration in Vietnam should have received consular authentication.

Decision 12 also makes several points clear:

1. The issue of consular authentication of a POA is an issue concerning the standing to sue, which goes directly to the jurisdiction of the arbitral tribunal rather than an issue of documentary form.
2. Consular authentication should also be obtained for other instruments and documents made outside of Vietnam that are used in connection with the initiation of an arbitration in Vietnam.
3. A subsequent submission of documents with proper consular authentication will not retroactively cure the original defect in the documents submitted by a foreign claimant.
4. Decision 12 effectively eliminates the use of the waiver provision of Article 9.4 of Decree 111 in arbitration proceedings.
5. Article 478 of the CPC 2015 suggests that all foreign instruments and documents should be the subject of consular authentication prior to their use in Vietnam. The question is whether the parties to an arbitration can agree in a procedural order to waive consular authentication for all “foreign” documentary evidence. Since the evidence relates to the substance of the dispute rather than the standing of the claimant, courts will presumably not be able to set aside an award even if the foreign documentary evidence had not received consular authentication.<sup>3)</sup>

In sum, when in doubt, obtain consular authentication. The benefits of avoiding a challenge to the award for lack of proper consular authentication must surely outweigh the costs of obtaining the same.

## Implications for Foreign Arbitrations

Under current Vietnamese law, arbitrations (i) seated outside of Vietnam involving a Vietnamese party, or (ii) seated in Vietnam but using foreign arbitration rules or conducted under the auspices of an arbitration institution not located in Vietnam are considered to be foreign arbitrations (collectively, “FAs”).<sup>4)</sup> Decision 12 has important implications for FAs:

1. Should consular authentication be obtained for a Notice of Arbitration (“NOA”)? In our view, if the NOA is to be served upon a party resident in Vietnam, then consular authentication is required because the NOA is used in Vietnam.
2. Should consular authentication be obtained for board resolutions or POAs submitted separately from the NOA? In our view, consular authentication is required if those documents are served upon a party resident in Vietnam (for FAs seated outside Vietnam) or used in Vietnam (for FAs seated in Vietnam with the hearing taking place in Vietnam).<sup>5)</sup>
3. If the Vietnamese party does not appear or participate in the arbitration, should documents relating to the appointment of arbitrators or the procedures of the arbitration receive consular authentication? In our view, consular authentication should be obtained for these documents prior to service upon a party resident in Vietnam.

There are undoubtedly other implications that will become clear over time and in other cases.

For foreign claimants, however, the risk to be managed remains the risk that a party resident in Vietnam may defend against an application for recognition and enforcement of a foreign arbitral award based upon Article 459.1(c) of the CPC 2015, codifying Article V(1)(b) of the 1958 New York Convention. That article allows a Vietnamese court to deny recognition and enforcement if:

The agency, organization or individual against whom the award is invoked was not notified in a timely and **proper manner** of the **appointment of arbitrators** or of the **procedures for resolution of the dispute by foreign arbitration**, or, for other legitimate reasons, they were not able to exercise their litigation rights [...]

This is the risk that must be considered when deciding whether to obtain consular authentication of the NOA and the related documents.

*For full disclosure, YKVN was counsel to the respondents in the arbitration who, following the award, petitioned the Hanoi People’s Court to have the award set aside. YKVN was also counsel to the petitioners in the Hanoi proceedings.*


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### References

- 1 Court decisions setting aside arbitration awards are final and non-appealable (Article 71 of the LCA), but the parties are entitled to re-litigate the dispute in the courts. In contrast, parties to an application for recognition and enforcement of a foreign arbitral award have a right of appeal from a ruling of the court of first instance (Articles 461 and 462 of the Civil Procedure Code 2015).
- 2 “Consular authentication means a competent Vietnamese government agency’s certification of the stamp, signature and title appearing on foreign instruments and documents in order that they may be recognized and used in Vietnam”. (Article 2.2 of Decree No. 111/2011/ND-CP dated 5 December 2011)
- 3 Article 71.4 of the LCA bars courts from reviewing the substance of the dispute and the merits of the award.
- 4 See Articles 3.11 and 3.12 of the LCA. See also Article 424.3 of the CPC 2015.
- 5 If the hearing does not take place in Vietnam, then there may be an argument that the documents are not being used in Vietnam. However, it is unclear whether a Vietnamese court would be receptive to this argument.

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