

# Kluwer Arbitration Blog

## Conditional Awards: A Pre-emptive Shield for Chain Disputes in Arbitration

Truong Cong Hong (ANHISA) · Thursday, June 19th, 2025

Amidst the chaos of the COVID-19 pandemic, I represented a Chinese trader (“B”) ensnared in a supply chain dispute that exposed a glaring void in arbitration practice. B, bound by a back-to-back contract with a Vietnamese fruit juice seller (“A”), faced a lawsuit from a downstream Chinese buyer (“C”) due to A’s late delivery. When B was about to commence arbitration against A at the Vietnam International Arbitration Centre (“VIAC”), B was facing only a first-instance court judgment in favor of C, with an appeal that had been pending for six months. Hence, B had not yet suffered “actual damage”. However, the two-year limitation period for commercial claims under Vietnamese law was ticking down. Accordingly, an issue that arose in the VIAC arbitration proceedings was whether the tribunal could issue a conditional award, which awarded damages to B on the condition that B’s appeal against the first-instance court judgment in favor of C was unsuccessful.

Although B ultimately settled with A, the question lingers: can conditional awards shield middle parties in chain disputes from such legal limbo? This post, drawing on international practice and Vietnam’s evolving legal framework, explores how conditional awards, enforceable upon a future event, can break this deadlock.

### The Chain Dispute Trap

Supply chains are prevalent in commercial disputes. In a construction scenario, a main contractor commonly has to deal with an employer’s claim for delays caused by a subcontractor. The problem is exacerbated by the applicability of time bars to these supply chain disputes. In M&A transactions, indemnity claims for breaches of representation or warranty often expire 24 to 36 months after closing.

Consider a case where a share purchase agreement (“SPA”) requires notice of claims to be raised within 24 months. If the buyer receives a notification from the tax authority about a potential Value-Added Tax penalty for the target company but the final ruling on the penalty is delayed, waiting for damages to crystallize could cause the notice period to lapse, leaving the buyer without a remedy despite a contractual breach.

Filing for a conditional award before the time bar expires, contingent on the tax ruling, could

preserve the buyer's rights, thereby bridging the gap between anticipated risk and actual loss. This pre-emptive approach transforms time limitations from obstacles into manageable procedural checkpoints, which is particularly valuable in cross-border transactions where enforcement timing is critical.

### Conditional Awards: A Global Perspective

While still relatively novel, conditional awards are gaining recognition in international arbitration. They resolve liability fully but subject the rulings on liability to conditions like third-party decisions or downstream claims, thereby offering a pragmatic solution to multi-tiered disputes in supply chains, M&A, and construction.

In *Konkola Copper Mines v U&M Mining Zambia* [2014] EWHC 2374 (Comm), the English High Court upheld a conditional award with a “show cause” provision, affirming its validity. Cooke J emphasized at [97] that there is no reason why, as a matter of principle, “an award cannot be final and conclusive in its terms where it clearly provides for specific relief ... which only bites at a point in the future, in the absence of submission and evidence from an absent party to the contrary”.

Similarly, in *Voltas Ltd v York International Pte Ltd* [2024] SGCA 12, the Singapore Court of Appeal upheld a conditional award imposing a payment obligation contingent on a third-party payment, affirming its validity as a final award. The Court emphasized at [42] that there is “no reason for thinking that a conditional award may not constitute a final award”, and the “key inquiry is whether the conditions in such an award make it necessary for the tribunal to reopen or reconsider the matter” (see further analysis in [this blog post](#)). The Singapore courts also differentiate “conditional” awards from “provisional” awards which “do not definitively or finally dispose of either a preliminary issue or a claim in an arbitration” and are better regarded as orders rather than awards (see *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30 at [50]).

These decisions reflect an emerging consensus: conditional awards are consistent with the principle of finality, provided they definitively resolve the dispute and delegate no further authority to the tribunal to reopen or reconsider the dispute. By enabling tribunals to address contingent risk without fragmenting proceedings, conditional awards represent a useful and enforceable remedy in complex cross-border arbitration.

### Vietnam's Legal Lens: From Ancient Maxim to Modern Tension

Vietnam's insistence on proving “actual damages” (Vietnam's Civil Code 2015, Article 584) stems from its civil law tradition, which is deeply influenced by French legal doctrine. Historically, Roman law's *damnum emergens* (actual loss) principle shaped civil codes, requiring tangible harm for compensation—a legacy Vietnam inherited.

In practice, Vietnamese courts insist on proven actual losses when enforcing liquidated damages clauses. In the *Supreme Court's Decision No. 15/2016/KDTM-GDT*, a 5% delay penalty in a construction contract was challenged due to insufficient evidence of damage or severity of breach,

reflecting the reluctance of the Supreme People’s Court of Hanoi (“Hanoi Supreme Court”) to enforce such clauses without proof of actual loss.

Likewise, in *Toepfer v Sao Mai* (2011), the Hanoi Supreme Court rejected the grant of liquidated damages in an award issued by a tribunal constituted under the Grain and Feed Trade Association Arbitration Rules. The court deemed the tribunal’s award of a fixed sum, which lacked proof of harm or of any attempt by the award creditor at mitigation (as required under Vietnam’s Commercial Law 2005, Articles 304 and 305), a violation of fundamental principles of Vietnamese law on damages. Therefore, awards lacking proof of harm may conflict with public policy, hindering foreign award enforcement under the New York Convention’s Article V(2)(b).

Yet, Vietnam’s legal framework is not entirely rigid. Vietnam’s Commercial Law 2005 (Article 292) allows for remedies beyond damages—such as agreed penalties or “other measures not contrary to fundamental principles”. [Vietnam’s Law on Commercial Arbitration 2010](#) (Article 4.1) reinforces party autonomy and grants tribunals broad discretion. Hence, if parties agree to include in their contracts clauses like “the tribunal may award appropriate remedies”, conditional awards could fall within the scope of such terminology, thereby sidestepping the hurdle of being required to prove actual damage.

## Recommended Practical Strategies

Assuming that conditional awards can indeed be issued, in order to effectively leverage conditional awards in chain disputes, it is recommended that parties consider adopting the following contract drafting approaches:

- **Incorporate Explicit Contingent Relief Provisions:** “If Party A is held liable to Third Party under the [Upstream Contract] for losses arising from [Event], Party B shall indemnify Party A for all such liabilities within 30 days of written notice”.
- **Address Time-Bar Concerns in Supply Chains:** “Seller acknowledges that Buyer may face claims from downstream customers. Any notice of potential claim from Buyer, even before damages crystallize, shall preserve Buyer’s right to indemnity, provided that final quantum is determined within 12 months thereafter”.
- **Empower Tribunals with Remedial Flexibility:** “The tribunal may issue any award it deems appropriate to protect the parties’ rights, including conditional awards contingent on future events or third-party determinations”.
- **Select Award-Friendly Jurisdictions:** Choose arbitral seats with demonstrated receptiveness to innovative remedies (*e.g.*, Singapore, London) and institutional rules that expressly recognize a tribunal’s powers to issue provisional or partial awards.

Should parties find themselves caught in a chain dispute, it is recommended that the following tactical manoeuvres be considered:

- **Preserve Rights Through Pre-emptive Filing:** Initiate arbitration before limitation periods expire, even when damages remain unquantified. Support your application with evidence of impending harm (including correspondence documenting claims, proceedings in related contracts, and expert assessments of potential liability).
- **Request Specific Procedural Orders:** Explicitly seek tribunal confirmation that conditional

relief is within its powers under the applicable rules and law, ideally at the case management conference stage. In the event the tribunal is unwilling to make an order or ruling that it has the jurisdiction and/or power to issue conditional relief, request a stay of proceedings pending the actualization of damages.

- **Utilize Settlement Dynamics:** Position conditional award requests as leverage in settlement negotiations. The certainty of a tribunal’s determination—even if contingent on future events—often drives earlier, more favorable settlements than might otherwise materialize, as demonstrated in the Vietnamese fruit juice dispute case study outlined at the start of this post.

## Conclusion: A Shield Worth Forging

Conditional awards offer a precise antidote to a glaring flaw in modern commerce: the plight of the middle party snared in chain disputes.

While recent institutional reforms like Rule 17 of the [7<sup>th</sup> Edition of the Arbitration Rules of the Singapore International Arbitration Centre](#) regarding Coordinated Proceedings (discussed in [this blog post](#)) attempt to address this issue through coordinated case management, they face significant practical limitations. Notably, the effectiveness of such coordination is hindered by the requirement that each arbitration agreement must refer to the same institutional rules, which is not always provided for. Additionally, some parallel disputes, such as those involving tax authorities, may be non-arbitrable under certain jurisdictions’ laws, further restricting the scope of coordinated solutions.

Constituting tribunals with consistent composition across disputes with different arbitration agreements also introduces challenges arising from arbitrator appointments, conflicts of interest, and jurisdictional complexities—such as reconciling varying scopes, applicable laws, or institutional rules. Even when coordination of parallel disputes is achieved, the risk of inconsistent findings remains when different applicable laws are applied to the same facts across cases or when parties in the middle of the chain advocate for opposing outcomes in related disputes. These risks may undermine the intended efficiency by complicating decision-making and prolonging proceedings.

Conditional awards elegantly sidestep these complications, and transform deadlines from obstacles into tactical advantages. Their widespread adoption depends on three pillars: institutional endorsement, judicial support in enforcement proceedings, and practitioner implementation in contract-drafting and dispute resolution strategies. For jurisdictions like Vietnam, they represent an opportunity to harmonize civil law traditions with modern commercial needs.

The true test will be cross-border enforcement, where a key challenge lies in the enforceability of conditional awards. Since these awards are contingent on a subsequent development for the relief to crystallize, they may not definitively resolve an issue or claim. Hence, contrary to the position in Singapore, some courts may view such awards as “provisional”, and therefore as mere orders rather than final awards. If successfully enforced despite this ambiguity, conditional awards will enhance—but not revolutionize—arbitration’s fundamental purpose of delivering efficient, business-oriented dispute resolution.

*The author acted as counsel for party B in the case study mentioned in the opening paragraph.*

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