

THE 2010 LAW ON COMMERCIAL ARBITRATION OF VIETNAM

IMPORTANT INNOVATIONS COMPARED WITH THE 2003 ORDINANCE ON COMMERCIAL ARBITRATION

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INTRODUCTION

Arbitration is a method of alternative dispute resolution which has appeared quite early in the historical development of international trade activities. This method has been recognized and widely used in Western countries for the hundreds of years. In particular, the incorporation of many prestigious international commercial arbitration organizations in the world such as the Court of International Arbitration in London (1892), the Arbitration Institute of Stockholm - Sweden (1917), the Court of International Arbitration of the International Chamber of Commerce (1923), American Arbitration Association (1926), etc., along with the promulgation of separate laws regulating the operations of commercial arbitration in developed countries have created a breakthrough development for the method of commercial dispute resolution by arbitration in the world.

However, arbitration operations in Vietnam over the past century have still been in the first instance and have not entered into the era of actual development and integration with the common trend. Undeniable efforts of the Government of Vietnam in the past enabling and encouraging the establishment of economic and international arbitration centres, dissolution of economic arbitration system of the State, and promulgation of laws for regulation of arbitration operations (Decree No. 116/CP dated 5 September 1994, the 2003 Ordinance on Commercial Arbitration) etc. were just the initial efforts in the whole process of development of commercial arbitration in Vietnam.

To meet the urges and compelling demands of the process of economic integration and globalization, and as well as the objective needs for perfection of the dispute resolution system, the issuance of the 2010 Law on Commercial Arbitration in Vietnam is an indispensable step in nature. Obviously, with a new and separate legislation applied to regulate such arbitration operations, enterprises, investors, arbitrators, and as well as other related subjects have reasons to hope for a brighter future for commercial arbitration operations in Vietnam with high level of transparency and global recognition.

Within the scope of this article, DC LAW wishes to present to readers in a general yet detailed way about the commercial arbitration legal system in Vietnam, especially the fundamental contents and the important innovative points of the 2010 Law on Commercial Arbitration compared with the previous regulations, in which the 2003 Ordinance on Commercial Arbitration is the main comparison target. The article will be primarily based on the foundation of comparison of fundamental legal provisions on commercial arbitration operations stated in two legal documents such as determination of the jurisdiction of dispute resolution by arbitration, the Arbitration Agreement, the order and procedures of the arbitration proceedings, the relations between the court and arbitration, etc.

I. AN OVERVIEW OF THE LAWS ON COMMERCIAL ARBITRATION OF VIETNAM

1. A brief of establishment and development of commercial arbitration in Vietnam

In the late 19th and early 20th centuries, commercial courts and arbitration rules previously existed in the civil proceedings law in Vietnam¹. However, due to various reasons and different circumstances, arbitration has not been known and used widely.

Later in 1963 and 1964, the Foreign Trade Arbitration Council and the Maritime Arbitration Council were established in northern Vietnam. Then in the 1970s, a system of the State's Economic Arbitration Bodies from the district and provincial levels to central level was established to resolve disputes between State-owned enterprises and cooperatives. However, at that time, economic arbitration centres were in fact the State administrative bodies with functions of dispute resolution between State-owned enterprises that did not perform the role of arbitration centres as they were meant to. Meanwhile, the People's Court had no jurisdiction to resolve such disputes but was only entitled to resolve civil disputes in the issues of marriage and family or disputes relating goods for the purpose of personal use and consumption.

On 28 April 1993, the Government issued Decision 204/TTg allowing the establishment of Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry ("VIAC") on the basis of consolidation of the Foreign Trade Arbitration Council and the Marine Arbitration Council.

¹ For example, Judgment of the Court of Appeals of Saigon dated 8 July 1897 relating to the resolution of land dispute between Duong Thi Lanh and Vo Van Thu clearly stated that *arbitration was recognized by the law of An Nam*". See Dr. Do Van Dai, "How to do so that Vietnamese arbitration can be a support for enterprises?" Nghien Cuu Lap Phap Magazine, No. 2/2008

See more: Vietnam jurists' association, the Statement on Draft Law on Commercial Arbitration dated 2 May 2009

Then, with the issuance of Decree 116/CP dated 5 September 1994 of the Government, the arbitration operations in Vietnam have been turned to a new page; a series of economic arbitration centres were also established such as Saigon Economic Arbitration Centre (currently known as Commercial Arbitration Centre of Ho Chi Minh City), Hanoi Economic Arbitration Centre (currently known as Hanoi Commercial Arbitration Centre), Can Tho Economic Arbitration Centre (currently known as Can Tho Commercial Arbitration Centre), etc.

In 1998, the economic arbitration system was dissolved. After that, the resolution of economic disputes was mainly carried out by two ways: the Economic Court of the People's Court system and the State's Economic Arbitration Bodies and International Arbitration Organizations. To ensure the legal basis for the operation of the commercial arbitration centres replacing State's Economic Arbitration Bodies and simultaneously to perfect the system of laws on arbitration in Vietnam, on 25 February 2003, the Standing Committee of the National Assembly promulgated Ordinance on Commercial Law which took effect from 1 July 2003 ("OCA").

In the situations where Vietnam takes deeper and wider integration into the world economy, previous legal frameworks on commercial arbitration become more and more backward and out-of-date. Therefore, the issuance of the 2010 Law on Commercial Arbitration adopted by the National Assembly of Legislature XII on 17 June 2010 ("LCA") is an indispensable result of the development process of the system of the laws on commercial arbitration in Vietnam.

2. General evaluation on the 2003 Ordinance on Commercial Arbitration

(a) Successes

Practical implementation of OCA for over the past 6 years shows significant successes as follows:

In consistence with the practice of many countries in the world, OCA recognizes two forms of arbitration including Institutional Arbitration and Ad Hoc Arbitration². The recognition of the two forms of arbitration is a significant innovation of OCA. This is the very first time the form of Ad Hoc Arbitrations is officially recognized in OCA. Such provisions create the conditions for the parties in dispute freely to choose the most appropriate form of arbitration for alternative dispute resolution.

OCA determines the scope of competence by listing the types of disputes which the arbitration is permitted to resolve³. Accordingly, the arbitration has the competence to resolve disputes arising from commercial activities that are broadly construed in accordance with the spirit of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (the "*UNCITRAL Model Law*"). The introduction of the definition of commerce was a big breakthrough which showed the initiative work of the legislation at that time.

OCA sets out a more appropriate mechanism to determine the legal validity of the Arbitration Agreement⁴ and provides the fundamental bases for demarcation of the competence between arbitration and the court. Accordingly, arbitration has the competence to resolve disputes when the parties have an Arbitration Agreement, and the court must refuse to settle disputes when the parties have an Arbitration Agreement, unless the Arbitration Agreement is invalid. In addition, OCA has carefully defined the cases where Arbitration Agreements become invalid and the parties may initiate a lawsuit before a court right after disputes arise. This provision ensures that all commercial disputes will be resolved in protection of the lawful rights and interests of the parties in dispute.

² Article 4 of the 2003 Ordinance on Commercial Arbitration

³ Article 2.3 of the 2003 Ordinance on Commercial Arbitration

⁴ Article 10 of the 2003 Ordinance on Commercial Arbitration

OCA clearly determines the two most important principles of arbitration proceedings which are the respect of self-disposal and equality between the parties in dispute. During arbitration proceedings, the parties are free to choose the form of arbitration and the way of appointment of arbitrators, change of arbitrators, location of arbitration, the arbitration language and applicable law to resolve the dispute, etc. In addition, there are mandatory principles that the arbitrators must comply with in the dispute resolution process, such as the confidentiality of information about the disputes and way of dispute resolution, etc. These are the common principles which were determined by the UNCITRAL Model Law and commonly recognized in arbitration operations in the world.

OCA enhances the support of competent bodies of the State to arbitration operations in which the relationship and intervention of the court to arbitration operations are clearly stated through a series of provisions from the determination of the legal validity of the Arbitration Agreement, appointment of arbitrators and settlement of complaints about the competence of the Arbitration Tribunal, application of preliminary injunctive relief, settlement of the demand for setting aside arbitral awards and archiving the arbitration files. This is an important issue that is mostly concerned by the enterprise community. By issuing a series of provisions which differs the role of the court to arbitration, OCA has filled the "gap" of the previous arbitration legal system. This will contribute to enhancement of the attractiveness and efficiency of arbitration, and contribute to enhancement of the development of arbitration.

OCA has established the legal validity of arbitral awards and validity of arbitral awards. Now, arbitral awards are legally valid and enforceable as judgments of the court, and are trusted by enterprises. This has completely overcome the previous situation where an arbitral award was pronounced and there was no enforcement mechanism. This causes a loss of the confidence of enterprises when it comes to choose arbitration for dispute resolution.

(b) Drawbacks

In addition to the above-mentioned advantageous points, OCA has revealed many drawbacks and shortcomings as follows:

OCA is the first legal document of the laws of Vietnam which provided a relatively complete concept of commercial arbitration, in which the terms "commerce" were interpreted within the scope of 14 commercial activities under the 1997 Commercial Law⁵.

However, during the implementation of OCA, there are different interpretations of the terms "commerce" in OCA. This gives rise to a controversy in determining the scope of dispute resolution by arbitration. Controversial issues are whether internal disputes arising within the enterprise and disputes relating to the purchase of stocks and bonds shall be resolved by arbitration or not? One says that these disputes fall within the competence of arbitration; however, another one says that only the court shall have the competence to resolve these disputes. Due to the different term interpretations and term applications, arbitration is considered as an unsecured dispute resolution because arbitral decisions may be not recognized by the court and enforced.

According to OCA, only subjects being "organizations and individuals doing business" have the right to choose arbitration as the form of dispute resolution⁶. Regarding the terms "individual doing business", because OCA and other documents guiding implementation of OCA do not explain what the definition of "individual doing business" is, there are many different interpretations of the terms. One says that any individual who uses capital to make investment and do business, regardless of the scope and scale of business is referred to as an individual doing business. However, another says that to be called an "individual doing

business", such individual must register a business in Vietnam under his/her name. Regarding the terms "business organization", in fact, there are many organizations which are not business organizations such as project management units, administrative bodies participating in tendering or entering into contracts including government procurement contracts, which use arbitration as recommended by sponsors and international financial institutions such as the World Bank, Asian Development Bank, etc. In the world, these subjects absolutely have the right to choose arbitration to resolve disputes; however, in Vietnam, these subjects are not permitted to choose arbitration because they are not business organizations and individuals doing business. In addition, the 2005 Law on Investment determines that arbitration has the competence to resolve disputes to which one party is the subject being a State management body⁷. Therefore, the provisions of OCA become no longer appropriate in the new situation.

OCA does not clarify whether the disputes arising from "non-contractual relations" will be resolved by arbitration or not. This issue has an important meaning in determining the competence of arbitration as well as the recognition and enforcement of arbitral decisions. According to OCA, "An Arbitration Agreement is an agreement between the parties to undertake to resolve by arbitration as alternative dispute resolution that may arise or have arisen in commercial activities"⁸. In fact, commercial relations are very diverse and plentiful. Many relationships can be determined by the specific contract which is entered into between the parties but also many conflicts do not arise from contractual relationships. For example; a ship collides a dock; a ship collides another ship, etc. However, OCA does not contain provisions on these cases.

OCA stipulates that "An Arbitration Agreement must be in writing; An Arbitration Agreement in the form of a letter, telegraph, telex, fax, email or

⁵ Article 2.3 of the 2003 Ordinance on Commercial Arbitration

Article 45 of the 1997 Law on Commerce of Vietnam

⁶ Article 2.3 of the 2003 Ordinance on Commercial Arbitration

⁷ Article 12 of the 2005 Law on Investment

⁸ Article 2.2 of the 2003 Ordinance on Commercial Arbitration

other written form clearly showing the intention of the parties to resolve the dispute by arbitration is considered a written Arbitration Agreement"⁹. This provision determines a criterion on the mandatory form that an Arbitration Agreement must be made in writing. However, the comprehension of the concept of "writing" is still narrow compared with the UNCITRAL Model Law and the laws on arbitration of other countries.

In addition, OCA stipulates that An Arbitration Agreement shall be invalid in the following cases: Any dispute arising does not belong to commercial activities; a signatory to the Arbitration Agreement does not have the authority to enter into it; one party to the Arbitration Agreement lacks full civil legal capacity; the Arbitration Agreement fails to specify, or specify clearly the subjects of the dispute or the arbitration organization authorized to resolve disputes and after that the parties have failed to enter into any supplementary agreement; the Arbitration Agreement was not made in accordance with the form stipulated by OCA; a party to the Arbitration Agreement was deceived or threatened and had the requests that the Arbitration Agreement be declared invalid.

A restriction in the practical application of OCA is it is easy for the losing party in the lawsuit to take advantage of the circumstance in which the Arbitration Agreement fails to specify or specify clearly the subjects of the dispute or the arbitration organization authorized to resolve disputes and afterward the parties have failed to enter into any supplementary agreement in order to request the court to declare the Arbitration Agreement invalid or to reject the competence of the arbitration centre for dispute resolution. Although it is the intention that the parties choose arbitration for dispute resolution, due to negligence, the arbitration clause fails to specify the arbitration centre for dispute resolution and of course, the losing party in the lawsuit shall not cooperate to agree to supplement an accurate Arbitration

Agreement clause, which is easy to result in the fact that the arbitral award shall be set aside in this case.

One of the reasons for causing an increase in the number of arbitral decisions required to be set aside is that the mechanism to set aside arbitral awards is too simple. OCA stipulates that "*within a time limit of 30 days from the date of receipt of an arbitral award, if any party disagrees with the arbitral award, such party shall have the right to file an application with a provincial court in the place where the Arbitration Tribunal issued such arbitral award requesting that the arbitral award be set aside*"¹⁰. Normally, an arbitral decision is difficult to satisfy both parties. Meanwhile, according to OCA, the only condition on "failure to agree to the arbitral award" is required, the making of a petition for setting aside shall be allowed. This has by chance encourages the parties to make a petition to set aside an arbitral award for various purposes, particularly for extending the time limit for enforcement of an arbitral award and promptly dispersing assets. Once a petition for setting aside is submitted to a court, the procedures for resolving the petition for setting aside in the court must go through two levels which are first instance and appellate levels and the time for resolution at the court is also not determined.

Thus, if the parties wish to resolve a dispute by arbitration because arbitration has the advantages which are quick and simple, the actual provisions of OCA are not expected by parties. This problem should soon be overcome to prevent intentional abuse by the parties, especially the losing party in arbitration. If this problem is not resolved soon, arbitral awards will be at the risk of becoming the "first instance" judgments.

OCA stipulates that a limitation period for instituting proceedings for dispute resolution by arbitration is 2 years from the date on which the dispute arises¹¹. However, in the

⁹ Article 9.1 of the 2003 Ordinance on Commercial Arbitration

¹⁰ Article 50 of the 2003 Ordinance on Commercial Arbitration

¹¹ Article 21 of the 2003 Ordinance on Commercial Arbitration

case where a dispute arises, a party has instituted proceedings to arbitration in the prescribed time limit and the resolution of such dispute at the arbitration was ended by a decision of the Arbitration Tribunal. However, after that if a court declares such arbitral award to be set aside, then how the limitation period for instituting proceedings for such dispute is determined? Can the time for dispute resolution at the arbitration be deducted from determination of a limitation period for instituting proceedings? This issue should be clearly stipulated.

Some provisions of OCA are too general. For example, OCA allows a too long time limit to submit a statement of defense of the Defendant. Accordingly, the Defendant can submit a statement of defense at any time, provided that such submission must be made before the time when the Arbitration Tribunal opens a meeting to resolve the dispute. It is easy for the parties without goodwill to abuse this to extend the arbitration proceedings. In respect of this provision, the Defendant may submit a statement of defense at the trial, and then the meeting will be postponed so that the Arbitration Tribunal can read the statement of defense and that the Plaintiff can have the opportunity to present its view on the statement of defense of the Defendant.

Similar issues are postponement of meetings to resolve the dispute, whereby, if they have legitimate reasons, the parties may request the Arbitration Tribunal to postpone a meeting to resolve the dispute. However, OCA does not clearly define what legitimate reasons are and how long it will take for a request for postponement before the date on which the Arbitration Tribunal opens the meeting to resolve the dispute. If not, it is possible that any party may at any time ask for postponement of the meeting and that the meeting to resolve the dispute will be delayed many times at the request of one party. In fact, the Arbitration Tribunal may comprise arbitrators of various nationalities. If the trial is postponed for many times, large costs shall arise and the time shall be prolonged. Therefore, OCA should give the right to arbitration centres to be proactive in specifying

the periods of time in the arbitration proceedings. In the context of many arbitration centres being established, each of them should have proceeding rules which are attractive and satisfy the needs of the parties in dispute to the fullest extent.

According to VIAC, while the People's Court of Hanoi City in 2007 heard nearly 9,000 cases of which about 300 cases are economic disputes and the People's Court of Ho Chi Minh City heard nearly 42,000 cases, including 1,000 economic disputes, VIAC as the largest arbitration centre in Vietnam received only 30 cases in 2007 and 58 cases in 2008; while each judge of the Economic Court of the Hanoi City heard more than 30 cases per year, at the Economic Court of Ho Chi Minh City, each judge heard 50 cases per year, then each arbitrator of VIAC only heard 0.25 case per year!¹²

Thus, the above figures showed that arbitration practice is less commonly used by enterprises to resolve disputes in Vietnam regardless of the big efforts of the Government, arbitration centres and organizations. In addition to the reasons relating to the habit and psychology of enterprises during commercial dispute resolution, this is due to the lack of necessary legal bases for implementation of a consistent policy to encourage the use of arbitration. In the provisions of the applicable laws, there are many risks for setting aside an arbitral award and creating concerns about the validity of an arbitral award. These factors contribute to reduction of the trust of the parties to resolve disputes by arbitration.

Because of such limitations and shortcomings, it is necessary to promulgate a new law on commercial arbitration in order to replace OCA on the basis of overcoming the drawbacks and inheriting progressive and appropriate provisions of OCA in combination with new provisions which are more complete and effective.

¹² Vietnam Jurist's Association, Report on the Evaluation of Estimated Impacts of the Law on Arbitration dated 30 April, 2009

3. The 2010 Law on Commercial Arbitration - an important milestone in the improvement process of the laws on commercial arbitration in Vietnam

As mentioned above, although arbitration operations have appeared and in fact have been recognized in Vietnam since over a century, the actual role of arbitration has not been shown properly.

Obviously, during the past, the efforts of the Government of Vietnam to improve and standardize the legal frameworks on commercial arbitration operations have failed to bring in the results as desired. The issuance of Decree 116/CP in 1994 and OCA is a remarkable progress in this process. Nevertheless, for many objective reasons as well as subjective reasons, these legal documents have actually failed to promote their full validity, especially in the background of the Vietnamese and international economies which are in the progress of development at an increasingly high speed. In addition, these documents are not strongly valid and substantial legal documents, which also have considerable impacts on the psychology of enterprises in search of the best method of dispute resolution for them. The fact that a separate law regulating arbitration operations in Vietnam has not been developed is a big disadvantage not only for commercial arbitration operations in particular but also for the whole system of the commercial laws in general.

Profoundly recognizing the increasingly urgent requirements and demands in practice, since 2008, Vietnam has officially started to research and develop LCA in place of OCA which becomes increasingly weak and backward. The result of this process is the issuance of LCA. It may be stated that LCA has opened a new page for the development process of the laws on arbitration in Vietnam for the following reasons:

- ✚ For the first time in Vietnam, arbitration operations are regulated by a separate law, which has been performed by many

other countries in the world for a long time.

- ✚ The LCA continues to improve and fortify a firm legal foundation for arbitration operations in Vietnam through inheritance of the achievements of OCA as well as selective acquisition of appropriate and progressive stipulations of the laws on arbitration of other countries and the world.

- ✚ LCA has partially overcome the shortcomings and limitations of OCA, and strictly followed the urgent demands and requirements from local and international commercial practices.

- ✚ The issuance of LCA is a strong evidence of constant efforts of the Government of Vietnam in the past in order to shorten the distance between the commercial laws of Vietnam and those of other countries and regions in the world.

II. BASIC CONTENTS OF THE 2010 LAW ON COMMERCIAL ARBITRATION - COMPARED WITH THE 2003 ORDINANCE ON COMMERCIAL ARBITRATION

1. General introduction

The Law on Commercial Arbitration comprises 13 chapters and 82 Articles, specifically as follows:

- Chapter I: General provisions, including 15 Articles;
- Chapter II: Arbitration agreements, including 4 Articles;
- Chapter III: Arbitrators, including 3 Articles;
- Chapter IV: Arbitration centres, including 7 Articles;
- Chapter V: Instituting arbitration proceedings and acceptance of jurisdiction over the dispute, including 9 Articles;

- Chapter VI: Arbitration Tribunal, including 9 Articles;
- Chapter VII: Preliminary injunctive relief measures, including 6 Articles;
- Chapter VIII: Dispute resolution sessions, including 6 Articles;
- Chapter IX: Arbitral awards, including 5 Articles;
- Chapter X: Enforcement of arbitral awards, including 3 Articles;
- Chapter XI: Setting aside arbitral awards, including 5 Articles;
- Chapter XII: Organization and operation of foreign arbitration in Vietnam, including 7 Articles; and
- Chapter XIII: Implementing provision, including 3 Articles.

2. Basic legal issues

2.1 Arbitration jurisdiction

In the method of dispute resolution by arbitration, the determination of specific scope of competence of arbitration has a great conceptual and practical meaning. The reasonable determination of the scope of disputes which may be resolved by arbitration shall facilitate more rapid and efficient resolution of disputes and better protection of the lawful rights and benefits of the parties. On the other hand, the determination of the scope of proper competence of arbitration shall maximize and promote the advantages of the arbitration method in dispute resolution, contribute together with other methods, to the formulation of a diverse, flexible, efficient and close system for dispute resolution, hence contributing to the improvement of the legal frameworks in general for local and international commercial activities.

One of the limitations of OCA is the very narrow and unclear scope of competence of

arbitration determined¹³. This causes many difficulties to commercial arbitration operations in Vietnam in practice as well as creates an unnecessary distance between the laws on arbitration of Vietnam and the common practices and the laws on arbitration of other countries and in the world. For the purpose of overcoming this weakness, LCA has specified a larger and more reasonable scope of competence of arbitration. Accordingly, commercial arbitration shall be permitted to resolve all disputes arising in the commercial sector, including:

- (i) Disputes between parties arising from commercial activities.
- (ii) Disputes arising between parties at least one of whom has commercial activities.
- (iii) Other disputes between parties which in accordance with the laws, shall be resolved by arbitration¹⁴.

In the case (i), the scope of disputes which may be resolved by arbitration shall be determined based on the “commercial” nature of the disputes. LCA allows the arbitration to accept and resolve the disputes arising from “commercial activities”. Unlike OCA, the definition of “commercial activity” in LCA must be construed in compliance with the 2005 Commercial Law, whereby the “*commercial activity means activity for profit-making purposes, comprising purchase and sale of goods, provision of services, investment, commercial enhancement, and other activities for profit-making purposes*”¹⁵. Therefore, in order to determine whether a specific activity is a commercial activity or not, we shall base on the nature and the purpose of such activity rather than consideration of its form. It is deniable that the provisions of LCA have extended the scope of disputes falling within the jurisdiction of arbitration. However, in practice, such extension has not been proper. It is because, in addition to the disputes arising “**from**” commercial activities, there are many disputes arising “**in connection**

¹³ See item 1.2(b)

¹⁴ Article 2 of the 2010 Law on Commercial Arbitration

¹⁵ Article 3.1 of the 2005 Law on Commerce

with” commercial activities in practice. Hence, pursuant to LCA, do these disputes fall within the jurisdiction of arbitration?

In the case (ii), LCA has given another criterion to determine whether the dispute falls within the jurisdiction of arbitration, which is a sign relating to the subjects of the dispute. If the subjects of the disputes resolved by arbitration as prescribed in OCA must be “organizations and individuals doing business”¹⁶, LCA only requires one party being the subject satisfying the sign of “having commercial activities”. In this case, whether the subject “having commercial activities” has performed the business registration or not is not an important criterion for consideration. Therefore, pursuant to this provision, in addition to normal commercial disputes, the laws have granted the arbitration the competence to resolve the disputes arising in connection with the subjects which are organizations and bodies established by the State such as research establishments, schools; newspaper and media organizations. Although such organizations do not do businesses, they engage in many transactions having commercial characteristics and select arbitration for dispute resolution.

In the case (iii), the scope of disputes which is determined belonging to the jurisdiction of arbitration continues to be extended to “other disputes”, in addition to the disputes specified in the cases (i) and (ii). The definition of “other disputes” may be construed as disputes arising from specialized legal relationships which are separately regulated by specific legal documents such as the Law on Negotiable Instruments, the Law on Securities, the Law on Construction, the Marine Law, the Law on Investment, etc.

Thus, it may be found that LCA has extended the scope of the competence to resolve disputes of arbitration. However, in comparison with the complicated social practices on issues giving rise to disputes, the competence of arbitration remains restricted.

¹⁶ Article 2.3 of the 2003 Ordinance on Commercial Arbitration

See more Item 1.2(b)

The arbitration has not yet been granted the competence to resolve disputes arising in connection with real estates, disputes arising from contractual or non-contractual obligations among civil subjects, marriage and family, inheritance, bankruptcy, labor, etc.

In addition, with regard to the principle of determination of the competence of arbitration, there is an important question: “which body shall have the final-say to decide whether the arbitration shall have the competence to resolve a specific dispute or not?” In order to answer this question, both OCA and LCA unanimously recognize a principle of “competence of competence”, pursuant to which the Arbitration Tribunal shall have the authority to consider the jurisdiction of arbitration through evaluation of the validity of the Arbitration Agreement as well as the provisions of the relevant laws¹⁷. In the case where one party or the parties fail to agree to a decision of the Arbitration Tribunal thereon, such party(ies) shall be entitled to request the competent court to review the competence of arbitration¹⁸. However, both OCA and LCA fail to recognize the case where the Arbitration Tribunal has not been established or has been improperly established; how to determine the proper authority to consider the competence of arbitration with respect to the Institutional Arbitration and the Ad Hoc Arbitration?

2.2 Arbitration Agreement

As a body of “private” jurisdiction, the jurisdiction of arbitration shall only arise in practice with respect to a specific dispute when the parties being subjects of the dispute have clearly and directly proved their unanimous intention in selection of the arbitration method. Such unanimous intention is shown in a compulsory form which is an Arbitration Agreement. Unlike the court proceedings, arbitration proceedings shall be performed

¹⁷ Article 30.1 of the 2003 Ordinance on Commercial Arbitration

Article 43.1 and 43.2 of the 2010 Law on Commercial Arbitration

¹⁸ Article 30.2 of the 2003 Ordinance on Commercial Arbitration

Article 44.1 of the 2010 Law on Commercial Arbitration

only when an Arbitration Agreement between the parties in dispute is made and comes into force and effect. It is necessary to affirm that if there is no Arbitration Agreement, there will be no arbitration proceedings. The Arbitration Agreement may be made before a dispute arises or after a dispute has arisen and may exist independently as a separate agreement or as a clause in a contract (Arbitration Clause).

On the basis of heritage from OCA and in compliance with the common practices and laws on arbitration of other countries and the world, LCA has affirmed that the compulsory form of an Arbitration Agreement is in writing. The definition of "in writing" must be construed in compliance with the interpretation of other relevant legal documents, whereby the form "in writing" of the Arbitration Agreement may exist in the form of the following documents:

- (i) An agreement established via an exchange between the parties by telegram, fax, telex, email or other form prescribed by the laws;
- (ii) An agreement established via the exchange of information in writing between the parties;
- (iii) An agreement prepared in writing by a lawyer, notary or competent organization at the request of the parties;
- (iv) Reference by the parties during the course of a transaction to a document such as a contract, source document, company charter or other similar documents which contain an Arbitration Agreement;
- (v) Exchange of a statement of claim and a statement of defense which express the existence of an agreement proposed by one party and not denied by the other party¹⁹.

It should be noted that the form of the Arbitration Agreement is not the only factor

determining the validity of the Arbitration Agreement. In addition to the form requirement, an Arbitration Agreement shall be considered valid if it does not fall within the following cases:

- (i) The dispute arises in a sector outside the competence of arbitration prescribed in Article 2 of LCA.
- (ii) The person who entered into the Arbitration Agreement does not have the authority as stipulated by the laws.
- (iii) The person who entered into the Arbitration Agreement lacks civil legal capacity pursuant to the Civil Code 2005.
- (iv) One of the parties was deceived, threatened or coerced during the process of formulation of the Arbitration Agreement and requests a declaration that such Arbitration Agreement is void.
- (v) The Arbitration Agreement breaches a prohibition prescribed by the laws²⁰.

Basing on this provision, it may be concluded that the required conditions for the validity of an Arbitration Agreement are as follows:

- (i) Conditions on the form: An Arbitration Agreement must be made in writing in accordance with Article 16 of LCA;
- (ii) Conditions on the subjects: the subjects which entered into an Arbitration Agreement must satisfy the following conditions:
 - Having the authority to enter into the Agreement in accordance with the laws, which is usually the legal representative of the enterprise or the representative authorized directly; and
 - Having full capacity for civil acts in accordance with the civil laws;

¹⁹ Article 16 of the 2010 Law on Commercial Arbitration

²⁰ Article 18 of the 2010 Law on Commercial Arbitration

- (iii) Conditions on the contents: The disputes recorded in the Arbitration Agreement by the parties in order to grant the competence to the arbitration for dispute resolution must be subject to the scope specified in Article 2 of LCA; in addition, the contents of the Arbitration Agreement must not breach the prohibitions under the applicable laws of Vietnam;
- (iv) Conditions on the principles of formulation: The Arbitration Agreement must be made in the principle of freedom, voluntary undertaking and agreement, which is a very basic principle of civil laws. In case of sufficient evidence indicating that a party to the Arbitration Agreement was deceived, threatened or coerced, etc. to enter into such Agreement and such party has made a request a declaration that the Arbitration Agreement be null and void, then such Arbitration Agreement may be considered as null and void.

LCA also continues to recognize and affirm the principle of independent validity of the Arbitration Agreement. Accordingly, *“An Arbitration Agreement shall exist totally independently from the contract. Any modification, extension or rescission of the contract, or invalidity or unenforceability of the contract shall not result in the invalidity of the Arbitration Agreement”*²¹.

In addition, LCA makes a remarkable progress when recognizing the principle of protection of the rights and benefits of consumers in formulation of such Arbitration Agreement. Accordingly:

“For disputes between a goods and/or service provider on the one hand and consumers on the other hand, even if such provider has drafted and inserted an arbitration clause in its standard conditions on supply of such goods and services, a consumer shall still have the right to select arbitration or a court to resolve the disputes. A goods and/or service provider shall only have the

*right to institute arbitration proceedings if the consumer so consents.”*²²

In legal practices, it now can be found that with respect to disputes between the enterprises and the consumers, the arbitration clause is usually recognized in the general conditions on providing goods and/or services already prepared by the producers/the suppliers. Then, the consumers are always placed in a position with high risks of disadvantage due to the conditions and terms in the printed contract by the goods sellers or the service providers. In the event that the consumers are satisfied with and accept such arbitration clause, the dispute shall be resolved by arbitration as agreed by both parties in such printed contract. However, there are cases where the consumers are satisfied with the conditions on arbitration clause or “accept” the arbitration clause in the contracts or the general provisions; this shall not mean that the consumers officially accept the dispute resolution by arbitration. In this case, the consumers shall still be entitled to select the method of dispute resolution by arbitration as specified in the Arbitration Agreement or refer such dispute to a court for resolution.

2.3 Form of Arbitration

By tradition as well as in common practices of arbitration in the world, the method of dispute resolution by arbitration shall be performed in two forms: Institutional Arbitration is the form of arbitration conducted at an arbitration centre and comply with the proceedings rules of the arbitration centre; and Ad Hoc Arbitration is the form of arbitration selected and established by the parties for each specific matter.

Previously, OCA used the terms “Arbitration Tribunal” for both forms of arbitration established at the arbitration centre and established by the parties. This issue results in confusion and difficulty in distinction between both forms of arbitration.

²¹ Article 19 of the 2010 Law on Commercial Arbitration

²² Article 17 of the 2010 Law on Commercial Arbitration

To prevent and overcome this issue, LCA has distinguished both of the aforesaid forms of arbitration more specifically. In particular, the terms “Ad Hoc Arbitration Tribunal” is officially used in LCA to distinguish it from the Arbitration Tribunal established at the Arbitration Centre. Concurrently, LCA also sets out several provisions exclusively for Ad Hoc Arbitration²³.

2.4 Order and procedures of arbitration proceedings

2.4.1 Instituting proceedings and Counterclaim

(a) Instituting proceedings

The arbitration proceedings are commenced with a statement of claim of the Plaintiff. Together with the statement of claim, the Plaintiff shall be obliged to prepare in full other documents and materials related to the lawsuit, of which an Arbitration Agreement is a compulsory legal basis and the most important thing in all lawsuits referred to the arbitration. The time of commencement of arbitration proceedings is first determined by an agreement between the parties, or if there is such agreement, it shall be determined based upon the date of receipt by the arbitration centre (in case of the Institutional Arbitration) or the Defendant (in case of the Ad Hoc Arbitration) of the statement of claim from the Plaintiff.

The contents of a statement of claim, in general, are stipulated almost similarly between OCA and LCA, including:

- ✚ Date on which the statement of claim is made;
- ✚ Names and addresses of the parties, and names and addresses of witnesses, if any;
- ✚ Summary of the matters in dispute;
- ✚ Grounds and evidence, if any, for

²³ Article 41 of the 2010 Law on Commercial Arbitration

instituting proceedings;

- ✚ Specific relief sought by the Plaintiff and value of the dispute;
- ✚ Name and address of the person whom the Plaintiff selects as arbitrator or requests for an arbitrator to be appointed²⁴.

However, in detailed comparison, there are appropriate additions and amendments to LCA as follows:

- Firstly, pursuant to LCA, the statement of claim may be sent to the arbitration centre if the parties have agreed to select the Institutional Arbitration for dispute resolution or sent to the Defendant in case of selection by the parties of the Ad Hoc Arbitration. Meanwhile, OCA only stipulates that the Plaintiff is requested to send the statement of claim to the arbitration centre.²⁵
- Secondly, it appears that LCA requests the Plaintiff to prepare the statement of claim in more details and more specifically with the contents which have not been previously specified by OCA such as information on the witnesses, the grounds and evidence for instituting proceedings, request for appointment of arbitrators, etc.

In the case where a statement of claim is sent to the arbitration centre, unless otherwise agreed by the parties or otherwise stipulated by the proceedings rules of the arbitration centre, the arbitration centre must send the Defendant a copy of the statement of claim and copy of documents and materials related to the lawsuit within 10 days²⁶. This time limit is extended longer than that specified in OCA (in which

²⁴ Article 30.2 of the 2010 Law on Commercial Arbitration
Article 20.1 of the 2003 Ordinance on Commercial Arbitration

²⁵ Article 30.1 of the 2010 Law on Commercial Arbitration
Article 20.1 of the 2003 Ordinance on Commercial Arbitration

²⁶ Article 32 of the 2010 Law on Commercial Arbitration

the time limit is 5 working days)²⁷.

Regarding the limitation period for instituting proceedings, both OCA and LCA stipulate the limitation period of 2 years for disputes resolved by arbitration. However, the method for determination of the limitation period is different between the two documents. In particular, pursuant to OCA, the limitation period is determined as follows: if the law stipulates a limitation period, such limitation period shall be applied and if the law does not stipulate a limitation period, the limitation period shall be 2 years from the date on which the dispute arises, except for the events of force majeure. Meanwhile, LCA stipulates in a simpler manner; unless otherwise stipulated by specialized laws, the limitation period in accordance with arbitration proceedings shall be 2 years from the point of time of infringement of lawful rights and interests without mentioning events of force majeure.

Therefore, in respect of the limitation period, obviously, LCA has a backward improvement in that the events of force majeure are mentioned in comparison with OCA and concurrently it fails to resolve the concerns upon implementation of OCA²⁸ as well as fails to catch up with the provisions of other applicable laws as appropriate, e.g. the recommencement of the limitation period for instituting proceedings stipulated in the Civil Code.

(b) Counterclaim

Pursuant to LCA, after receipt of the statement of claim from the Plaintiff, within 30 days if the parties have no other agreement, the Defendant must send a statement of defense to the arbitration centre (in case of the Institutional Arbitration) or the Plaintiff and the arbitrators (in case of the Ad Hoc Arbitration).

LCA also recognizes the right of the Defendant to counterclaim against the Plaintiff on issues

related to the dispute²⁹. A statement of counterclaim must be submitted at the same time as the statement of defense of the Defendant³⁰. Within 30 days from the date of receipt of the statement of counterclaim, the Plaintiff shall be obliged to send a statement of claim defense to the arbitration centre (in case of the Institutional Arbitration) or the Defendant and the Arbitrator(s) (in case of the Ad Hoc Arbitration).

2.4.2 Establishment of Arbitration Tribunal

(a) Arbitrators

OCA has referred lots of conditions for an individual to become an arbitrator but three most important criteria are: being a Vietnamese citizen, having a university degree and having 5 years' work experience³¹. In which, the criterion on being a Vietnamese citizen has partially restricted the development of arbitrators with high professional qualifications for persons with foreign nationality, and persons who have reputation and work experience are restricted by having the university degree. In this case, until now the number of arbitrators of 7 arbitration centres established in accordance with OCA in Vietnam only reaches 207 persons. The number of arbitrators who resolve 6 lawsuits to 10 lawsuits per year only represents 18%. Many arbitrators have not ever resolved any dispute since their joining arbitration centres until now.

On inheritance from OCA, LCA still sets out the minimum standards for arbitrators in order to form a team of key arbitrators with qualifications, professionalism, expertise and social reputation in Vietnam. Whereupon, an individual who has the capacity for civil acts, a university education or higher and practical work experience of 5 years or more may become an arbitrator³². In addition to such minimum standards, for the purpose of further enhancement of the reputation and the competitiveness of arbitration centres, LCA

²⁷ Article 20.5 of the 2003 Ordinance on Commercial Arbitration

²⁸ See item 1.2(b)

²⁹ Article 36.1 of the 2010 Law on Commercial Arbitration

³⁰ Article 36.2 of the 2010 Law on Commercial Arbitration

³¹ Article 12 of the 2003 Ordinance on Commercial Arbitration

³² Article 20 of the 2010 Law on Commercial Arbitration

allows arbitration centres to stipulate higher arbitration standards than those stipulated by the laws; for example, having a certificate of improvement of legal knowledge and a certificate of improvement of arbitration skills. Simultaneously, overcoming the limitations of OCA, LCA does not require an arbitrator to have the Vietnamese nationality. This means that foreigners may be appointed as arbitrators in Vietnam if they are trusted by the parties in dispute or by the arbitration organizations. This provision satisfies the actual demand in the period when Vietnam increases her integration into the international economy.

(b) Composition of Arbitration Tribunal

The Arbitration Tribunal shall be obliged to resolve a specific dispute unanimously referred by the parties. The composition of the Arbitration Tribunal may consist of one or more arbitrators as agreed by the parties³³. If the parties fail to agree on determination of the number of arbitrators, an Arbitration Tribunal shall consist of three arbitrators³⁴.

³³ Article 39.1 of the 2010 Law on Commercial Arbitration

³⁴ Article 39.2 of the 2010 Law on Commercial Arbitration

(c) How to establish Arbitration Tribunal

<i>Arbitration Tribunal at Arbitration Centre</i>	<i>Ad Hoc Arbitration Tribunal</i>
Within 30 days from the date of commencement of arbitration proceedings, the Defendant (s) must (unanimously) select an arbitrator for it or (unanimously) request the arbitration centre to appoint an arbitrator; or otherwise, within another 7 days, the Chairman of the arbitration centre shall appoint an arbitrator for the Defendant.	Within 30 days from the date of receipt of the statement of claim, the Defendant must select an arbitrator and notify the Plaintiff; or otherwise, the Plaintiff shall have the right to request the competent court to appoint an arbitrator for the Defendant.
Within 15 days from the date of such selection or appointment, the arbitrators must unanimously elect a third arbitrator as the Chairman of the Arbitration Tribunal; or otherwise, within another 7 days, the Chairman of the arbitration centre shall appoint the Chairman of the Arbitration Tribunal.	Within 15 days from the date of such selection or appointment, the arbitrators must unanimously elect a third arbitrator as the Chairman of the Arbitration Tribunal; or otherwise, the parties shall have the right to request the competent court to appoint the Chairman of the Arbitration Tribunal.
Where the parties agree to have the dispute resolved by a sole arbitrator but fail to select an arbitrator within 30 days, then at the request of one party or the parties, the Chairman of the Arbitration Centre shall appoint a sole arbitrator within 15 days from the date of receipt of such request.	Where the parties agree to have the dispute resolved by a sole arbitrator but fail to select an arbitrator within 30 days, then the parties shall have the right to request an arbitration centre to appoint a sole arbitrator, or otherwise, a competent court shall appoint a sole arbitrator at the request of one party or the parties.

(d) Replacement of arbitrators

After the Arbitration Tribunal has been established, an arbitrator must refuse to resolve the dispute, or the parties shall have the right to request for replacement of an arbitrator in the following cases:

- (i) The arbitrator is a relative or representative of a party;
- (ii) The arbitrator has an interest related to the dispute;
- (iii) There are clear grounds demonstrating that the arbitrator is not impartial or objective;
- (iv) The arbitrator was a mediator, representative or lawyer for either of the parties prior to the dispute being brought to arbitration for resolution,

unless the parties provide written consent.³⁵

With respect to the Institutional Arbitration, if an Arbitration Tribunal has not yet been established, then the Chairman of the arbitration centre shall make the decision on replacement of the arbitrator. If an Arbitration Tribunal has already been established, then the remaining members of such tribunal shall make the decision on replacement of the arbitrator. If the remaining members of the Arbitration Tribunal are unable to make a decision or if the arbitrators or the sole arbitrator refuses to resolve the dispute, then the Chairman of the arbitration centre shall make the decision on replacement of the arbitrator³⁶.

³⁵ Article 42.1 of the 2010 Law on Commercial Arbitration

³⁶ Article 42.3 of the 2010 Law on Commercial Arbitration

With respect to the Ad Hoc Arbitration, the replacement of arbitrators shall be decided by the remaining members of the Arbitration Tribunal. If such remaining members are unable to make a decision or if the arbitrators or the sole arbitrator refuses to resolve the dispute, then within 15 days from the date of receipt of a request from one or more arbitrators as mentioned above, or from one or all parties in dispute, the chief judge of the competent court shall assign a judge to make the decision on replacement of the arbitrator³⁷.

2.4.3 Application of preliminary injunctive relief

OCA stipulates that *“If, during the course of dispute resolution by an Arbitration Tribunal, the lawful rights and interests of the parties are infringed or are in danger of being directly infringed, the parties shall have the right to apply to the provincial court in the place where the Arbitration Tribunal accepted jurisdiction over the dispute to take one or a number of the following preliminary injunctive relief measures, etc.”*³⁸.

Pursuant to the aforementioned provision, if the application of preliminary injunctive relief measures is required, the parties must wait until an Arbitration Tribunal has been established. However, if it is a must to wait like that, in some cases, these measures shall become meaningless. Because the preliminary injunction relief measures are quick, urgent and timely in nature, these measures must be applied immediately when a party realizes that its lawful rights and interests are in danger of being infringed; it is not necessary to wait until the initiation of proceedings or an Arbitration Tribunal has been established.

OCA gives a restriction that only the court of the place where such Arbitration Tribunal accept jurisdiction over the dispute shall be entitled to make decisions on application of preliminary injunctive relief. This may cause difficulties to both the court and the parties in application of this provision. For example,

when the parties institute proceedings at the Vietnam International Arbitration Centre, pursuant to OCA, if a party desires to request for application of preliminary injunctive relief, it shall be only permitted to make an application requesting the People’s Court of Hanoi to make an order of application of preliminary injunctive relief. This shall be reasonable and advantageous only if both parties concurrently have their head offices located in Hanoi or the assets required for such application are located in Hanoi. If the assets are located elsewhere, especially in a foreign country, it shall be unfeasible and unreasonable to request the People’s Court of Hanoi to make a decision on application of preliminary injunctive relief.

LCA has improved the role of arbitration remarkably by giving permission to arbitration to apply a number of preliminary injunctive relief measures, in addition to the right to select a court for application of preliminary injunctive relief. This makes the activities of arbitration proceedings more efficient. The preliminary injunctive relief measures applied by an Arbitration Tribunal comprise:

- (i) Prohibition of any change in the status quo of the assets in dispute;
- (ii) Prohibition of acts by, or compelling one or more specific acts to be taken by a party to the dispute, aimed at preventing conduct adverse to the process of the arbitration proceedings;
- (iii) Attachment of the assets in dispute;
- (iv) Requirement of preservation, storage, sale or disposal of any of the assets of one or all parties in dispute;
- (v) Requirement of interim payment of money between the parties; and

³⁷ Article 42.4 of the 2010 Law on Commercial Arbitration

³⁸ Article 33 of the 2003 Ordinance on Commercial Arbitration

- (vi) Prohibition of transfer of asset rights of the assets in dispute³⁹.

Besides granting permission to arbitration to apply the preliminary injunctive relief measures, LCA also recognizes a number of restrictions in relation to the request for application of preliminary injunctive relief such as:

- (i) A request for the court's application of an preliminary injunctive relief shall not be deemed a denial of the Arbitration Agreement or a waiver of the right to dispute resolution by arbitration⁴⁰;
- (ii) If a request for the court's application of preliminary injunctive relief had been already made, the Arbitration Tribunal shall refuse a similar request⁴¹;
- (iii) Prior to application of preliminary injunctive relief, the applicant must perform its financial obligations⁴²; or
- (iv) If the application of preliminary injunctive relief causes any damage, compensation must be made in accordance with the laws⁴³.

2.4.4 Dispute resolution sessions

(a) In respect of the location for dispute resolution sessions

Pursuant to OCA, the location for dispute resolution shall be agreed by the parties. If there is no such agreement, the Arbitration Tribunal shall make a decision on the location

which must ensure convenience to the parties during dispute resolution⁴⁴.

However, OCA fails to specify what convenience to the parties is, which shall be easy to result in a situation that the losing party in the lawsuit alleges its inconvenience in order to request for setting aside the arbitral award; and/or if the parties agree to select the location for dispute resolution abroad, it remains a question whether arbitration centres or arbitration organizations of Vietnam will approve and satisfy it or not when OCA fails to make clear explanation.

LCA has overcome the aforesaid shortcomings by stipulating that the location for arbitration may be inside or outside the territory of Vietnam and unless otherwise agreed by the parties, an Arbitration Tribunal may hold the sessions at a location as may be deemed appropriate for mutual consultation among the members of the Arbitration Tribunal, collection of the testimony of witnesses, consultation of experts, or examination of goods, assets or other materials⁴⁵.

(b) In respect of the language to be used in dispute resolution sessions

Pursuant to OCA, the parties have the right to agree on the language to be used in arbitration proceedings. If the parties do not have such agreement, the language to be used in arbitration proceedings shall be Vietnamese⁴⁶. However, this provision shall only apply to disputes with foreign elements. For disputes without foreign elements, OCA keeps silent.

LCA sets out a separate provision on determination of the language to be used during arbitration proceedings. Accordingly, the Law specifies more clearly the language to be used in specific cases as follows: the Vietnamese language shall be used in case of disputes without foreign elements, and the

³⁹ Article 49 of the 2010 Law on Commercial Arbitration

⁴⁰ Article 48.2 of the 2010 Law on Commercial Arbitration

⁴¹ Article 49.3 of the 2010 Law on Commercial Arbitration

⁴² Article 49.4 of the 2010 Law on Commercial Arbitration

⁴³ Article 49.5 of the 2010 Law on Commercial Arbitration

⁴⁴ Article 23 of the 2003 Ordinance on Commercial Arbitration

⁴⁵ Article 11 and Article 54.1 of the 2010 Law on Commercial Arbitration

⁴⁶ Article 49.7 of the 2003 Ordinance on Commercial Arbitration

language agreed by the parties or decided by the Arbitration Tribunal shall be used in case of disputes with foreign elements⁴⁷.

(c) In respect of the order and procedures of dispute resolution sessions

Both OCA and LCA unanimously recognize the “in private” principle of dispute resolution sessions⁴⁸. This originates from the traditional characteristics of the method of dispute resolution by arbitration and absolutely complies with common practices and the laws on arbitration of other countries and the world.

Pursuant to LCA, the attendants of a dispute resolution session shall include an Arbitration Tribunal, the parties in dispute, the lawful representatives of the parties, or the witnesses, the person protecting the legal rights and interests of the parties (if required by the parties) and other subjects (as permitted by the Arbitration Tribunal based on the consent of the parties)⁴⁹.

During the dispute resolution, the Arbitration Tribunal must, at the request of the parties, conduct mediation in order for the parties to reach an agreement on resolution of their dispute. If the mediation between the parties is successful, the Arbitration Tribunal shall prepare a minutes of successful mediation and then issue a decision recognizing the agreement results of the parties⁵⁰. Then, the dispute resolution process shall be terminated.

A dispute resolution session may be suspended for a certain period at the reasonable request of one party or the parties and decided by the Arbitration Tribunal. During the acceptance and resolution of the dispute, the Arbitration Tribunal or the Chairman of the arbitration centre shall be entitled to make a decision on suspension of dispute resolution in one of the cases stipulated in Article 59.1 of LCA as follows:

⁴⁷ Article 10 of the 2010 Law on Commercial Arbitration

⁴⁸ Article 55.1 of the 2010 Law on Commercial Arbitration
Article 38.3 of the 2003 Ordinance on Commercial Arbitration

⁴⁹ Article 55 of the 2010 Law on Commercial Arbitration

⁵⁰ Article 58 of the 2010 Law on Commercial Arbitration

- (i) The Plaintiff or Defendant being an individual dies, without anyone inheriting his or her rights and obligations;
- (ii) The Plaintiff or Defendant being an body or organization has terminated its operation, is bankrupt, dissolved, consolidated, merged, demerged, separated or converted its organizational form without any body or organization taking over the rights and obligations of such body or organization;
- (iii) The Plaintiff withdraws its statement of claim or the statement of claim is deemed to be withdrawn pursuant to Article 56.1 of LCA, except where the Defendant requests that the dispute resolution be continued;
- (iv) The parties reach agreement on termination of the dispute resolution;
- (v) The court issued a decision that the dispute does not fall within the jurisdiction of the Arbitration Tribunal, that there is no Arbitration Agreement, or that such agreement is null and void or unenforceable in accordance with Article 44.6 of LCA⁵¹.

2.4.5 Arbitral awards

The process of dispute resolution by arbitration, if not falling within the cases of postponement, suspension or successful mediation, will only be considered finished when the Arbitration Tribunal makes the final award. Also, in the process of dispute resolution, the Arbitration Tribunal can make specific and different decisions in each phase of the proceedings. Therefore, it is necessary to make clear distinction among these "decisions" to avoid confusion.

Unfortunately, OCA does not distinguish arbitral decisions in the process of proceedings such as a decision on application of preliminary injunctive relief, decision on postponing the meeting, decision on

⁵¹ Article 59.1 of the 2010 Law on Commercial Arbitration

suspending dispute resolution with the final decision on resolution of the dispute.

For the purpose of overcoming such weakness, LCA uses the terms “arbitral award” for distinction from arbitral decisions in the proceedings. Accordingly, arbitral decisions are understood as separate and (possibly) temporary decisions of the Arbitration Tribunal in the process of dispute resolution. On the other hand, an arbitral award is a decision of the Arbitration Tribunal on resolution of the whole contents of the dispute and termination of the arbitration proceedings⁵². Thus, it is understandable that an arbitral award is the final decision on the contents of the statement of claim after the Arbitration Tribunal has studied the files, collected evidence and the testimony of witnesses, heard the presentations by the parties; and after the arbitrators have discussed and voted by the majority rule.

In principle, an arbitral award has the final validity and is enforced immediately after its pronouncement⁵³. The enforcement of an arbitral award must be first made through the voluntary implementation of the party which must implement such arbitral award. In the case where one party which must implement such arbitral award fails to voluntarily implement the arbitral award, the party for which the arbitral award will be enforced shall have the right to request a competent body to make a compulsory enforcement of such arbitral award in accordance with the applicable laws on enforcement of civil judgments. However, it should be noted that the Law on Enforcement of Civil Judgments which is effective from 1 July 2009 still uses the terms “arbitral decision” which will be implemented under the order and procedures on enforcement of civil judgments”, and does not recognize the terms “arbitral award” as appropriate. This will cause confusion in application of the laws by civil judgment enforcement bodies.

However, an arbitral award can also be set aside by the competent court at the request of one party or the parties in dispute if such arbitral award, or the arbitration proceedings from which the arbitral award is pronounced, falls within one of the following cases:

- (i) There was no Arbitration Agreement or the Arbitration Agreement is null and void;
- (ii) The composition of the Arbitration Tribunal was or the arbitration proceedings were inconsistent with the agreement of the parties or contrary to the provisions of this Law;
- (iii) The dispute was not within the jurisdiction of the Arbitration Tribunal; where an arbitral award contains an item which falls outside the jurisdiction of the Arbitration Tribunal, such item shall be set aside;
- (iv) The evidence supplied by the parties on which the Arbitration Tribunal relied to issue the award was forged; or an arbitrator received money, assets or other material benefits from one of the parties in dispute, which affected the objectivity and impartiality of the arbitral award;
- (v) The arbitral award is contrary to the fundamental principles of the laws of Vietnam⁵⁴.

2.4.6 Applicable law for resolution of disputes

OCA distinguishes the application of the laws to resolve disputes by arbitration by two criteria: in case of dispute between the Vietnamese parties, the laws of Vietnam will be applied, and in case of a dispute with a foreign element, the law chosen by the parties will be applied⁵⁵. However, the selection and application of foreign laws must not be

⁵² Article 3.9 and 3.10 of the 2010 Law on Commercial Arbitration

⁵³ Article 61.5 of the 2010 Law on Commercial Arbitration

⁵⁴ Article 68.2 of the 2010 Law on Commercial Arbitration

⁵⁵ Article 7 of the 2003 Ordinance on Commercial Arbitration

contrary to fundamental principles of the laws of Vietnam. In the case where the parties fail to choose laws for resolution of the dispute, the Arbitration Tribunal will decide which laws shall be applied.

The drawback of the selection in the above-mentioned criteria is that parties in dispute are Vietnamese parties but bases for establishment, alteration or termination of such relationship are subject to foreign laws; or the property in dispute is located abroad; the question is whether it is appropriate for the arbitration applying the laws of Vietnam for resolution or not. This issue is not stated clearly. Furthermore, OCA also keeps silent on whether international practices and customs shall be applied to dispute resolution or not. In addition, the provisions on principles of application of laws above are not appropriate and consistent with principles of application of laws to resolution of civil relations with foreign elements in accordance with the civil laws of Vietnam⁵⁶.

LCA has overcome this drawback of OCA regarding application of laws to dispute resolution in the points mentioned above with the following specific provisions:

- (i) For disputes without foreign elements, the Arbitration Tribunal shall apply the laws of Vietnam to resolve the dispute.
- (ii) For disputes with foreign elements, the Arbitration Tribunal shall apply the laws chosen by the parties; if the parties do not have an agreement on the applicable law, then the Arbitration Tribunal shall make a decision to apply the laws which it considers the most appropriate.
- (iii) If the laws of Vietnam or the laws chosen by the parties do not contain specific provisions relevant to the matters in dispute, then the Arbitration Tribunal shall be permitted to apply international practices to resolve the dispute if such application or the consequences of such application are not contrary to the

fundamental principles of the laws of Vietnam.

LCA make an obvious progress in using the terms "dispute without a foreign element" and "disputes with foreign element" to determine the criteria of choosing the applicable laws for the dispute resolution process. This is entirely consistent with the provisions of the Civil Code 2005⁵⁷. For disputes without foreign elements, the application of the laws of Vietnam to dispute resolution is natural and fully in compliance with the principles of application of the laws in general. However, for disputes "with foreign elements" involved or coming into existence, it is not true that, in all cases, the parties are entitled to choose the laws for resolution. For example, with respect to disputes related to real estates in Vietnam or disputes arising from the relationships which are established and implemented completely in Vietnam, the subjects of such disputes shall not be allowed to choose the applicable law, even the Arbitration Tribunal also has no right to subjectively decide the applicable law, but the applicable law must be determined based on the principles stipulated in the Civil Code 2005⁵⁸.

In addition, recognition of the principle of "application of international practices" to resolve disputes by arbitration is also a progress of LCA compared with OCA. This provision also ensures conformity with the principle for application of laws stipulated in the Civil Code 2005⁵⁹ as well as in conformity with international practices. However, unfortunately, LCA does not mention the application of international treaties as a source of laws to resolve disputes as well as recognize the principle that the international treaties will prevail in such application as OCA did recognize⁶⁰.

3. The relationship between the court and arbitration

⁵⁷ Article 758 of the 2005 Civil Code

⁵⁸ Article 769 of the 2005 Civil Code

⁵⁹ Article 759 of the 2005 Civil Code

⁶⁰ Article 8 of the 2010 Law on Commercial Arbitration

⁵⁶ Part VII of the 2005 Civil Code

One of the most important points of LCA is to handle the relationship between the arbitration and the court in the whole process of resolution of the dispute of the parties. LCA sets out a series of new provisions to determine this important legal relationship.

3.1 Principle of determination of the competence of the court over arbitration operations

The first important issue in handling the relationship between the court and arbitration is to determine which court has competence to impact or interfere with arbitration operations.

This issue is almost not recognized in OCA. Obviously, this is a “gap” which should not exist in the legal system of arbitration in general. For the purpose of overcoming such weakness, LCA has set out some quite detailed provisions as the legal basis for determination of the competence of the court in its interactive relationship with the arbitration as follows:

- In the general principle, the competence over the activities of assistance, interference, influence, etc. over arbitration determined shall belong to the courts of provinces and cities under central authority⁶¹.
- For determination of a specific court for each specific matter, LCA firstly allows the parties to the Arbitration Agreement to select a court⁶². If the parties do not have an agreement to select a court, then the competence of the court shall be determined appropriately and in corresponding with each specific issue during the arbitration⁶³.

The issue required to be clarified is how to understand exactly “the right to select a court” by the parties. Pursuant to the principle of determination of the competence of the court stipulated in the 2004 Civil Proceedings

Code⁶⁴, the principle of the right to select a court by the parties in dispute is not set out. Therefore, in comparison between the provisions of LCA and the provisions of the Civil Proceedings Code, it is easy for use to find out the following unclear points:

- Firstly, pursuant to the laws on civil proceedings of Vietnam, may the competence of the court arise from the agreement by the parties? If so, how can this selection be made? It is assumed that if the provisions of LCA were reasonable, would it be efficient for the parties in dispute to select a court which is absolutely not related to the dispute as well as the arbitration operations (e.g. the People’s Court of Hanoi City) for interference with and resolution of the matters pertaining to arbitration operations during the resolution of a specific dispute which occurs in another locality (e.g. Ho Chi Minh City)? Obviously, it is very difficult to obtain the highest actual efficiency from the interference of the court in this case.
- Secondly, it is assumed that the parties has selected a specific court for resolution of one or certain matters arising during the arbitration proceedings; however, pursuant to the provisions of the laws on civil proceedings, such court has no competence to resolve such matters. So finally, shall the court which has been selected by the parties have competence (as selected by the parties) or no competence (as stipulated by the laws)? The reasonable answer for this question shall be a big challenge to courts as well as the arbitration during actual application of the laws. However, in generally theoretical aspect, it is not persuasive for us to agree to the imposition of personal intention (unanimous intention of the parties in dispute) over the provisions of the laws.

⁶¹ Article 7.3 of the 2010 Law on Commercial Arbitration

⁶² Article 7.1 of the 2010 Law on Commercial Arbitration

⁶³ Article 7.2 of the 2010 Law on Commercial Arbitration

⁶⁴ Chapters 3 and 35 of the 2004 Civil Proceedings Code

3.2 Court refusal to accept jurisdiction if there is an Arbitration Agreement

First, it is necessary to affirm that OCA has officially recognized the principle of delimitation of the competence between a court and arbitration. Accordingly, the court will refuse to accept jurisdiction over the dispute for which an Arbitration Agreement established by the parties unless the Arbitration Agreement is invalid⁶⁵. However, OCA again lacks a very fundamental regulatory issue; such as the fact that an Arbitration Agreement is “*unfeasible or unenforceable*”. This is a very common matter in international trade. In practice, there are many arbitration clauses which are valid in accordance with the laws; the scope of the dispute falls within the jurisdiction of arbitration; the signatory to the Arbitration Agreement has competence and capacity for acts; the Arbitration Agreement clearly specified the object of disputes and arbitration organization authorized to resolve the dispute, but such dispute could not be resolved by arbitration. For example, some arbitration clauses read as follows: “*Any dispute arising from this contract will be resolved first at the Vietnam International Arbitration Centre and then will be finally resolved in a court, or Disputes (if any) will be resolved at the Vietnam International Arbitration Centre under the arbitration rules of the ICC*”, etc.

In legal form consideration, the above-mentioned arbitration clauses are fully effective because they have satisfied the conditions prescribed by the laws. However, these arbitration clauses cannot be implemented in practice because such agreement contains confusion and contradiction, inconsistency with the principle of dispute resolution by arbitration. Therefore, if a dispute arises, how the above-mentioned arbitration clauses will be settled? If the parties referred the dispute to an arbitration centre, the arbitration centre will refuse such dispute because of conflict and contradiction with the procedures for dispute resolution of arbitration centres. Where the parties referred the dispute

to a court, the court also refuses the dispute. OCA stipulates that “*in case of the dispute having an Arbitration Agreement, if one party initiates proceedings to the court, the court must refuse to accept jurisdiction over the dispute, unless the Arbitration Agreement is invalid.*” Therefore, many disputes shall arise but will not be solved by any body and the parties shall take all risks by themselves.

For the purpose of overcoming these shortcomings, LCA adds rules for determining the competence between courts and arbitration as follows: “*Where the parties in dispute already have an Arbitration Agreement and one party initiates proceedings before a court, the court must refuse to accept jurisdiction over dispute, unless the Arbitration Agreement is invalid or the Arbitration Agreement is unenforceable*”⁶⁶.

3.3 Role of the court in the registration of ad hoc arbitral award

Previously, OCA used the terms “arbitration” established by the parties and there is no provisions of OCA mentioning the registration of a decision of the arbitration established by the parties before requesting a judgment enforcement body for enforcement thereof.

LCA has changed the terms “arbitration” established by the parties by the Ad Hoc Arbitration. Ad Hoc Arbitration is established by the parties through selection of any person who have reputation, experience and high expertise, and does not belong to any arbitration centre. Therefore, the encouragement and allowing the parties to register Ad Hoc Arbitration awards with the competent court is to legitimize and formalize arbitral awards of the Ad Hoc Arbitration, especially in order to facilitate conditions to implement such arbitral awards.

It should be noted that the registration of an arbitral award with the competent court is not a mandatory requirement set out for the parties in dispute but absolutely depends on their individual intentions. Arbitral awards of the Ad Hoc Arbitration have final legal

⁶⁵ Article 5 of the 2010 Law on Commercial Arbitration

⁶⁶ Article 6 of the 2010 Law on Commercial Arbitration

validity and enforceability after their pronouncement; therefore, the registration of or failure to register arbitral awards does not affect the contents and legal validity of such arbitral awards⁶⁷.

3.4 Collecting evidence and summoning witnesses

OCA does not give a mechanism of support of the court to arbitration in collecting evidence and summoning witnesses. This is the important provision in the arbitration proceedings. A dispute resolution process does not only consist of the parties. In many cases, it is related to a third person or third parties. While the court has certain competence to summon these subjects, the arbitration has no competence to do so. In this regard, the UNCITRAL Model Law and the laws on arbitration of other countries have clear provisions stating that the Arbitration Tribunal or one party with approval of the Arbitration Tribunal may request the competent court to support it in collecting evidence and summoning witnesses to be present at the arbitration. Because there is no support mechanism as mentioned above, lawyers and enterprises are still confused in choosing Vietnamese arbitration to resolve disputes.

LCA has overcome the above-mentioned situation by providing that if the Arbitration Tribunal cannot collect evidence and/or summon witnesses, it may send a written request to the court to ask for support. Then, the assigned judge will issue a document to request bodies, organizations and individuals to provide evidence or summon witnesses. If failing to provide and having reasonable reason, such bodies, organizations or individuals will be dealt with in accordance with the laws and the witnesses must strictly abide by the court's summons; and there is no sanction such as escorting witnesses if they do not abide by the summons of the court⁶⁸.

3.5 Role of the court relating to setting aside an arbitral award

As presented in Section 2.4.5, an arbitral award may be set aside by the competent court in certain specific cases. This is stipulated specifically and directly in OCA and LCA. Thus, it is possible to realize that the court can directly impact the arbitration operations. However, this impact is not a violent intervention in the contents of the dispute resolution process of arbitration but it is only the support or supervision of procedural formality. Indeed, under the provisions of LCA, when reviewing an arbitral award, the competent court will only care about issues related to the orders, procedures of proceedings or jurisdiction of arbitration without hearing or not allowed to rehearing dispute contents.

Also, it should be noted that the intervention of the court to operation of arbitration in this case is not obvious interventions but must come from the requirements of one or more parties to the dispute.

4. Foreign arbitration in Vietnam

In addition to the basic contents as described above, LCA also has a chapter making provisions on organization and operation of foreign arbitration in Vietnam. This is a completely new content and can be regarded as an important progress of the law on commercial arbitration of Vietnam in the process of improving and shortening the distance with the arbitration laws of other countries and the world. However, in this Chapter, LCA only gives the provisions of the basic principles and puts the initial foundation for recognition and management of operations of foreign arbitration in Vietnam⁶⁹.

⁶⁷ Article 62.1 of the 2010 Law on Commercial Arbitration

⁶⁸ Article 46 and 47 of the 2010 Law on Commercial Arbitration

⁶⁹ Chapter XII of the 2010 Law on Commercial Arbitration

CONCLUSION

In general, by issuance of LCA, Vietnam makes an appropriate and correct step in improving the legal system on commercial arbitration as well as encouraging the development of arbitration operations in Vietnam. Thus, the incorporation of LCA is an important achievement from the efforts of community of Vietnam to build an appropriate legal framework for the purpose of regulating the activities of commercial dispute resolution by arbitration in the best efficient manner.

In comparison with OCA, LCA has reached remarkable achievements by reducing and overcoming the weaknesses, shortcomings and backward points, inheriting and continuing to promote the appropriate and progressive provisions of OCA, concurrently adding and developing new stipulations in a reasonable and scientific manner through selectively learning about constitutional achievements of the laws on commercial arbitration of other countries and the world. Some important, outstanding and innovative new points of LCA are specified in the provisions on extending the competence of arbitration; recognizing the principles of protection of the interests of the consumers in formulation of the Arbitration Agreement; specially and officially determining the forms of arbitration permitted to be used in dispute resolution; specifying in details the order and procedures of arbitration proceedings in compliance with the nature, functions and tasks of arbitration; enabling foreigners to become arbitrators; specifically stipulating and efficiently resolving at the first step the relationship between the court and the arbitration, etc.

With the aforesaid progressive points, it can be said that until now, enterprises, investors, arbitration centres and organizations and other subjects have grounds to hope for a brighter development for commercial arbitration in Vietnam in future. However, it is still too soon to affirm anything definitely. The efficiency and the true value of LCA still require verification through its application in practice.

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