

Vietnam: Interim Measures During Foreign Arbitral Proceeding

Asia Newsletter

March 23, 2023

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1. With the increasing number of cross-border transactions involving Vietnam, the popularity of foreign arbitration has grown. In 2021, the number of disputes between Vietnamese and foreign parties submitted to the Singapore International Arbitration Center (SIAC) and the Vietnam International Arbitration Center (VIAC) were 55¹ and 49,² respectively. A foreign party to a cross-border transaction tends to choose foreign arbitration to settle any arising dispute, which has shown to be more advantageous than courts or domestic arbitration in some respects, namely in terms of neutrality, procedural flexibility, and temporal efficiency. Moreover, the ability to select professional arbitrators with profound expertise and experience in the field of dispute influences this choice as well. The question is whether foreign arbitration is actually an efficient choice in settling a dispute where an interim measure may be in order or even crucial for the enforcement of the arbitral award (for example, to prevent the defendant from dissipating assets out of which an award would be paid).

2. Under the laws of Vietnam, interim measures granted in a domestic arbitration shall be enforced the same as those granted by a competent court.³ The procedure for enforcement of such interim measures will comply with the Law on Civil Judgement Enforcement. However, when it comes to foreign arbitral interim measures, there is no ground for the enforcement of such measures (even when the interim measure order is styled as an interim “award”).

Vietnam is a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)⁴ but the New York Convention is silent on arbitral interim measures.⁵⁶ Indeed, the New York Convention provides for the recognition and enforcement of an “arbitral award as binding”⁷ and Vietnamese laws construe the phrase to indicate (and thus make the convention only applicable to) an award resolving the entire dispute and terminating the arbitration proceedings.⁸ As such, an interim measure order in a foreign seated arbitration does not qualify as an enforceable arbitration award in Vietnam. Comparatively, a domestic arbitral award in Vietnam contrast with an interim measure, given that the latter is applied temporarily to protect evidence or prevent adverse effects to the subject of the dispute and may be rescinded, suspended, or varied by the pronouncing tribunal.

3. On this issue, we need to consider the Law on Commercial Arbitration (“LCA”) and Resolution No. 01/2014/NQ-HDTP (“Resolution 01”) guiding LCA. LCA sets out (i) that a foreign arbitration is an arbitration established under a foreign law on arbitration and selected and agreed by the parties to settle a dispute outside or within the Vietnamese territory (Article 3.11), and (ii) court which has certain general authority relating to arbitrations (Article 7.2, especially interim measure in subsection d thereof), without distinguishing domestic arbitration and foreign arbitration. In other part of LCA, only organization and activity in Vietnam are stated in regard to foreign arbitration (Articles 73 to 79). On the other hand, Resolution 01 provides that when

determining the court's competence over foreign arbitrations' activities in Vietnam, where foreign arbitration is conducted to resolve a dispute and there is a request for a Vietnamese court to support its activities, the Vietnamese court has competence over activities of the foreign arbitration in accordance with subsections a to e of Article 7.2 of LCA (Article 5.5(a)). These supports are similar to those provided to Vietnamese arbitration, which means that interim measure can also be included in the authority of Vietnamese court.

However, the issue here is Resolution 01 stated "foreign arbitration activities in Vietnam", rather than using the wording of "foreign arbitration" in LCA. The inconsistency causes confusion as to whether courts will have jurisdiction over the former or the latter. In cases of the latter (which is a broader interpretation), it is considered that Vietnamese competent courts may grant interim measures upon disputing party request even when the dispute has been submitted to "foreign arbitration".

The argument to support the latter interpretation that Vietnamese courts has the jurisdiction over "foreign arbitrations" is that Article 48.1 of the LCA regulates for arbitration in general without excluding foreign arbitration and Resolution explicitly provide for the courts' jurisdiction over foreign arbitration, thus, the courts have jurisdiction over foreign arbitrations regardless of whether such foreign arbitrations operate in Vietnam or not.

The opposing argument supporting the former interpretation relies on the principles of the laws. Firstly, considering that the CPC provides for the jurisdiction of courts over arbitrations' activities and LCA only provide for the procedures to exercise the courts' power without exerting any additional power, the courts' jurisdiction should be framed over "Vietnamese arbitration" only. Secondly, considering that a legal document of Vietnam shall only have effective within the territory of Vietnam, except otherwise provided by international treaties to which Vietnam is a member. The CPC only regulates Vietnamese arbitration and LCA only regulates foreign arbitrations operating in Vietnam, in the absence of explicit provision of law granting the court's power over foreign arbitration, there is no ground to subject foreign arbitration to Vietnamese court's jurisdiction. Thirdly, if Vietnamese competent courts have jurisdiction over foreign arbitrations, this will open an unsettled issue on the conflict of jurisdiction between the Vietnamese court and the courts where the foreign arbitration is seated, which appears unreasonable.

There is a precedent case where the court of Vietnam issued an interim measure order in relation to a dispute submitted to SIAC.⁹ Apparently, it is still possible to request a Vietnamese court to grant an interim measure even when the dispute concerned is submitted for resolution by foreign arbitration. However, the granting of interim measures by competent courts in Vietnam seems limited, even in support of domestic arbitrations. Comparing the total number of cases handled by VIAC up to 2019, less than 2.5% involved the granting of interim measure orders by competent courts.¹⁰ Given such ratio and the additional factor of different jurisdiction, Vietnamese court intervention in foreign arbitration interim measure applications is of extremely limited likelihood.

4. Therefore, when drafting arbitral clauses in contracts, parties should consider whether potential disputes are likely to require the application of interim measures. Under such circumstances and in the light of the above, the practical solution for a dispute where the application of an interim measure is vital, should be the choice of domestic arbitration.

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- 1 [Annual report in 2021 of SIAC](#)
 - 2 [Annual report in 2021 of VIAC](#)
 - 3 Article 26 of Decree 63/2011/ND-CP (“**Decree 63**”).
 - 4 Vietnam has been a party to the New York Convention since 1995, when the President of Vietnam ratified it via Decision 453/QD-CTN on July 28, 1995.
 - 5 Dispute Settlement - International Commercial Arbitration, United Nations Conference on Trade and Development, (available at https://unctad.org/system/files/official-document/edmmisc232add42_en.pdf)
 - 6 Martin J. Valasek and Jenna Anne de Jong, “[Enforceability of interim measures and emergency arbitrator decisions](#)”, Norton Rose Fulbright, May 2018.
 - 7 New York Convention, Article III
 - 8 Civil Proceeding Code, Article 424.3
 - 9 Decision No. 544/2016/QD-ADBPCTT dated 09 August 2016 of the People’s Court of Hai Phong City.
 - 10 [Annual report in 2021 of VIAC](#)