



NEWS LETTER

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TABLE OF CONTENTS

Event recap

EPLegal continues to be highly ranked in Asialaw Profiles 2022 and Asialaw Leading Lawyers 2022

Enforcement of Arbitral Awards in Asia: Theory & Practice – Part 9: Thailand and Vietnam

Can Covid-19 serve as force majeure?

Solutions for export businesses in the digital transformation process

CISG and the laws of Vietnam governing the international sale of goods contract – Comparison of similar general incompatible issues

Avoiding pathological arbitration agreements – Dos and Don'ts in drafting process

Mediation in business cooperation disputes in the context of Covid-19 pandemic

International Symposium: Mediation in our culture and traditions

Oil & Gas, Energy Disputes in the Covid-19 era: An Asian Perspective

Upcomming events

VIArb Writing Contest 2021

Legal update

Decision No. 29/2021/QĐ-TTg prescribing special investment incentives.

Decree 85/2021/NĐ-CP on E-Commerce

Decree 58/2021/NĐ-CP regulating the provision of credit information services

Decree 62/2021/NĐ-CP detailing a number of articles of the Law on Residence

Decree 66/2021/NĐ-CP on Elaboration of some articles of the Law on Natural disaster management and Law on Amendments to some articles of the Law on Natural disaster management and Law on Dikes

Decree 69/2021/NĐ-CP on renovation and reconstruction of apartment buildings

Decree 70/2021/NĐ-CP Amending governments Decree No. 181/2013/NĐ-CP dated November 14, 2013, on Elaboration of some articles of the Law on advertising

Decree 64/2021/NĐ-CP on the signing and implementation of international agreements on behalf of the General Department; Departments under ministries; Ministerial-level agencies; Specialized agencies under Provincial People's Committees, District-level People's Committees, Commune-level People's Committees in border areas; Provincial agencies of the organization

Decree No. 90/2021/ND-CP on Vietnam's special preferential import tariff schedule to implement the Trade Agreement between the Government of the Socialist Republic of Vietnam and the Government of the People's Democratic Republic Laos from October 4, 2020 to October 4, 2023

Decree No. 83/2021/ND-CP stipulating special preferential import tariffs aims to implement an agreement on boosting bilateral trade between Vietnam and Cambodia in 2021-2022

Circular 06/2021/TT-BCT amending and supplementing a number of articles of the Minister's Circular 16/2014/TT-BCT dated May 29, 2014. The Ministry of Industry and Trade stipulates the implementation of electricity selling prices

Circular 45/2021/TT-BTC guiding the application of prior agreement on tax calculation method in tax administration for associated transactions.

Circular 46/2021/TT-BTC guiding a number of contents on financial handling and enterprise valuation when transferring state-owned enterprises and one-member limited liability company with 100% charter capital invested by a state-owned enterprise into a joint-stock company

Circular 60/2021/TT-BTC amending to some articles of the Circular No. 38/2014/TT-BTC dated March 28, 2014, on Elaboration of some articles of the government's Decree No. 89/2013/ND-CP dated August 06, 2013, on Elaboration of some articles of the law on prices regarding price appraisal

Circular 09/2021/TT-BTNMT amending some articles of circulars elaborating and providing guidelines for law on land

Legal Analysis

Is a unilateral option clause valid in Vietnam?

EVENT RECAP

EPLegal continues to be highly ranked in Asialaw Profiles 2022 and Asialaw Leading Lawyers 2022



We are thrilled to share that EPLegal has once again been recognised as Highly Recommended Law Firm in the Energy practice area in Asialaw Profiles 2022. Our firm has also amongst Recommended Law Firms in Dispute Resolution and Banking & Finance practice areas this year.

In addition, our Founding Partner, Mr Tony Nguyen has been named as a Distinguished Practitioner in Dispute Resolution and Energy in Asia Leading Lawyers 2022 Edition.

We would like to express our gratitude to our Partners and Clients for all their time and effort spent working with EPLegal's team.

For more details, please visit:

<https://www.asialaw.com/Firm/epllegal-vietnam/Profile/1523#profile>

Enforcement of Arbitral Awards in Asia: Theory & Practice – Part 9: Thailand and Vietnam

On 27/10/2021, Mr. Nguyen Trung Nam and Mr. Nguyen Manh Dzung participated as Vietnamese lecturers for the training course "Enforcement of Arbitral Awards in Asia: Theory & Practice" hosted by SIAC Academy.

At the seminar, both speakers shared and discussed on the matters of:

- Overview of Vietnam arbitration law
- Recognition and enforcement of arbitral awards, including: Definition of an arbitral award; domestic vs foreign arbitral award; the enforcement of recognised/non-challenged domestic awards and grounds for annulment of domestic awards; the recognition and enforcement of a foreign arbitral award; etc.
- The approach of People's Court in practice
- Practical aspects on strategies for finding and identification of an award debtors's assets in Vietnam

Can Covid-19 serve as force majeure?

The current pandemic negatively impacts the foreign trade activities, especially in the context of the international sale of goods contract. In this situation, the affected parties invoke a force majeure event which is the ongoing pandemic to release themselves from the liability. However, they often make mistakes of applying the force majeure clause.

Therefore, we are pleased to introduce the article "Can Covid-19 serve as force majeure?" written by our Partner Tony Nguyen and associate Son Nguyen on Vietnam Investment Review No 1566 dated 18/10/2021. The article shows common missteps made by the breaching parties and provides recommendations to avoid them.

The full article can be assessed at:
<https://vir.com.vn/can-covid-19-serve-as-force-majeure-88539.html>



Solutions for export businesses in the digital transformation process

On September 29, 2021, Vietnam International Arbitration Centre (VIAC) in collaboration with the Investment and Trade Promotion Centre of Ho Chi Minh City (ITPC) and the Vietnam E-commerce Association (VECOM) held an online webinar on "Solutions for export businesses in the digital transformation process".

Mr. Nguyen Trung Nam from EPLegal and experts from VIAC and VECOM discussed the strategy of digital transformation to improve business operations in the context of the Covid-19; the risks arisen such process (for instance: the inconsistency in regulations for formatted data messages, identity authentication); and dispute settlement mechanism.

CISG and the laws of Vietnam governing the international sale of goods contract – Comparison of similar general incompatible issues

On 9 July 2021, Mr. Tony Nguyen attended a webinar hosted by VBLC with the topic "CISG and the laws of Vietnam governing the international sale of goods contract – Comparison of similar general principles and incompatible issues". The webinar took a close look on the following issues:

- (i) Important issues on the application of the laws of Vietnam to the international sale of goods contract
- (ii) The application of CISG 1980 to the international sale of goods contract – General principles, issues and key terms to focus on
- (iii) Differences between CISG and the law of Vietnam, experience in the application of CISG in Vietnam, and suggestions on how to flexibly apply these two sources of law

Avoiding pathological arbitration agreements – Dos and Don'ts in drafting process

On 15 July 2021, Mr. Tony Nguyen attended a VIAC webinar on “Avoiding pathological arbitration agreements – Dos and Don'ts in drafting process” as a keynote speaker. This webinar is Webinar 07 of 2021 VIAC's Arbitration Series.

The webinar focused on the core elements of an effective arbitration agreement, and provided the participants with the solutions to deal with a pathological/defective arbitration clause. The webinar is also an opportunity for the business community to exchange and discuss directly with domestic and international speakers who are reputable experts in arbitration.

Mediation in business cooperation disputes in the context of Covid-19

On 27 July 2021, Mr. Tony Nguyen attended VMC webinar on “Mediation in business cooperation disputes in the context of Covid-19 pandemic”. The webinar focused on the impact of the Covid-19 pandemic on the performance of the business cooperation contract as well as the experience on the selection of the dispute resolution mechanisms to resolve unexpected disputes

Oil & Gas, Energy Disputes in the Covid-19 era: An Asian Perspective

On 17 August 2021, EPLegal and Peter & Kim cooperated to hold a specialised webinar on “Oil & Gas, Energy Disputes in the Covid-19 era: An Asian perspective”

Besides our partners Ms. Annie Ngo and Mr. Tony Nguyen, it is our honored to cooperate with outstanding partners and experts in the fields of oil and gas, energy and construction. Those are Mr. Konstantin Christie, Ms. Charis Tan from Peter & Kim, and Mr. Matthew Finn from Ankura Consulting.

The webinar provided insights on the dynamics and suggestions for dispute resolution in the oil & gas and energy sectors, with a focus on construction disputes, gas agreement disputes and tax-related disputes. It also touched on particular issues, such as the use of experts and technical witnesses in energy disputes while travel restrictions remain in place.

Distinguished panelists with diverse backgrounds and participants dynamically discussed instances from Vietnam, Korea, and other Asian countries in discussion. The webinar attracted more than 80 participants with 100% satisfied feedback, which is the motivation for EPLegal to hold other events in the future.

International Symposium: Mediation in our culture and traditions

The International Symposium: "Mediation in our culture and traditions" promoted by the active Mediator's Global Group was successfully held from August 4 to September 30, 2021. This is the first international symposium with the participation of more than 70 experts from more than 30 countries.

On September 15, 2021, Mr. Tony Nguyen from EPLegal was honoured to be the representative of Vietnam to share and discuss the practice of mediation in line with Vietnamese culture and traditions; and the context of Vietnam's consideration of joining Singapore Convention.

UPCOMING EVENTS

VIArb Writing Contest 2021



The VIArb Writing Contest 2021 organized by the Vietnam International Arbitration Institute (VIArb) has officially opened for all law students and young legal practitioners in Vietnam with 3 topics around the regulation and practice of arbitration in Vietnam and international arbitration.

VIArb Writing Contest 2021 is an opportunity for the participants to gain experience and necessary practicing skills. All submissions will be evaluated by reputable and leading lawyers and arbitrators.

The deadline for all submissions is by November 14, 2021. EPLegal is honored to accompany the candidates in this Contest. For more information, please visit: <https://viarb.vn/wp-content/uploads/2021/09/cuoc-thi-viet-viarb-2021.pdf>

LEGAL UPDATE

Decision No. 29/2021/QĐ-TTg prescribing special investment incentives

On October 6, 2021, The Prime Minister Promulgated Decision No. 29/2021/QĐ-TTg prescribing special investment incentives ("Decision 29").

Accordingly, Decision No. 29/2021/QĐ-TTg specifically provides regulations on levels for application of corporate income tax incentives to investment projects as prescribed in Clause 2 Article 20 of the Law on investment as follows:

First, the preferential tax rate of 9% shall be applied within a period of 30 years to incomes earned by the business entity from the investment projects in the business line eligible for special investment incentives with an investment capital of at least VND 30,000 billion and disbursing at least VND 10,000 billion within 03 years from the issuance date of the investment registration certificate or the approval for investment guidelines.

Second, the preferential tax rate of 7% shall be applied within a period of 33 years to incomes earned from one of the following investment projects:

(i) A project on investment in establishment (including the expansion of such establishment project) of innovation centers and research and development centers with a total investment capital of at least VND 3.000 billion of which at least VND 1.000 billion is disbursed within 03 years from the issuance date of the investment registration certificate or the decision on approval for investment guidelines.

(ii) An investment project specified in Point b Clause 2 Article 20 of the Law on investment and meets any of the following criteria: It is a level-1 high technology project; There are Vietnamese enterprises joining the value chain at level 1; The value added is accounted for more than 30% to 40% of the prime costs of total finished products of the business entity; It meets level-1 technology transfer criteria.

Third, the preferential tax rate of 5% shall be applied within a period of 37 years to incomes earned from activities of one of the following investment objects or projects:

(i) The national innovation center established under the Prime Minister's decision.

(ii) An investment project specified in Point b Clause 2 Article 20 of the Law on investment and meets any of the following criteria: It is a level-2 high technology project; There are Vietnamese enterprises joining the value chain at level 2; The value added is accounted for more than 40% of the prime costs of total finished products of the business entity; It meets level-2 technology transfer criteria.

Besides, Decision 29 also stipulates other special investment incentives such as: the land and water surface rent is exempted or reduced.

Decree 85/2021/ND-CP on E-Commerce

On September 25, 2021, the Government issued Decree 85/2021/ND-CP on Amendments to Government's Decree No. 52/2013/ND-CP dated May 16, 2013 on E-Commerce ("Decree 85"). Decree 85 supplemented a number of regulations to enhance the level of consumer protection, specifically:

Firstly, Decree 85 added traders providing logistics services as subjects of commercial activities. Accordingly, traders providing logistics services in general and goods transportation for e-commerce platforms are officially recognized as subjects of e-commerce activities. Thus, Decree 85 also stipulates responsibilities of logistics service providers during transactions through e-commerce platforms.

Secondly, Decree 85 supplemented responsibilities to provide detailed information about the goods and services introduced and published on the websites. Accordingly, sellers shall provide mandatory content shown on the goods label, and detailed information to accurately determine the characteristics of the goods and services introduced on the e-commerce website. This regulation is expected to limit the situation of buying fake goods, goods of unknown origin posted by the sellers.

Thirdly, Decree 85 stipulated responsibilities of the third parties in providing information about goods and services. Not only is the seller responsible for providing information about goods, services and products to the buyer, organizations and individuals providing e-commerce services will also take this responsibility as a third party. This additional regulation has fulfilled the responsibilities of the parties to provide information to consumers, and is consistent with the provisions of the Law on Protection of Consumer Rights.

Last but not least, Decree 85 provided stricter regulations regarding handling the consumer's complaints on e-commerce platforms. Accordingly, traders providing e-commerce platforms are responsible for representing foreign sellers on e-commerce platforms to settle the buyers' complaints related to goods and services provided by foreign traders; is the contact point to receive and settle the buyer's complaints in case a transaction with more than 02 parties is performed on an e-commerce platform. Thus, consumers will be "more secure" when conducting transactions on e-commerce platforms with more than 02 parties or with foreign traders.

Decree 58/2021/ND-CP regulating the provision of credit information services

On June 10, 2021, the Government issued Decree No. 58/2021/ND-CP regulating the provision of credit information services ("Decree 58").

Decree 58 supplemented conditions for providing credit information services. Accordingly, credit information companies only provide credit information services (data, statistic, relevant data of borrowers at participating institutions of credit information companies) after being certified by the State Bank.

Decree 58 also supplemented and clarified the conditions for being granted a Certificate. Some of the new conditions amended in Decree 58 include:

- Requirements for enterprise managers, members of the Supervisory Board;
- Minimum contents of the written agreement on provision of information and credit information products between the credit information company and the participating institution.

Decree 58 takes effect as of August 15, 2021.

Decree 62/2021/ND-CP detailing a number of articles of the Law on Residence

On June 29, 2021, the Government issued Decree 62/2021/ND-CP detailing a number of articles of the Law on Residence ("Decree 62"). Here are some notable points of Decree 62:

First, regarding papers and documents proving lawful residence:

- Supplementing Construction permits for completed works;
- Documents on purchase, lease-purchase, donation, inheritance, capital contribution, housing exchange in accordance with the Law on land and housing;
- Documents certified by the Commune/ District People's Committee where there is no commune-level administrative unit for housing, residential land and that there is no dispute over house ownership or residential land use rights.
- Eliminating notarization and authentication requirements for some documents.

Second, eliminating the household registration book and change some papers proving personal relationships, for example:

- Proof of husband-wife relationship: supplement a certificate of marital status;
- Proof of parent-child relationships: supplement a valid passport containing information showing the parent's personal relationship with the child; Court decisions, civil status extracts or documents of health agencies and assessment agencies, competent authorities certifying the parent-child relationship.

Decree 62 also changes the procedure and time for deletion of permanent residence registration and supplements instructions for deletion of temporary residence registration.

Decree 62 takes effect as of July 1, 2021.

Decree 64/2021/ND-CP on the signing and implementation of international agreements on behalf of the General Department; Departments under ministries; Ministerial-level agencies; Specialized agencies under Provincial People's Committees, District-level People's Committees, Commune-level People's Committees in border areas; Provincial agencies of the organization

- On June 30, 2021, the Government issued Decree No. 64/2021/ND-CP on the signing and implementation of international agreements on behalf of the General Department; Departments under ministries; Ministerial-level agencies; Specialized agencies under Provincial People's Committees, District-level People's Committees, Commune-level People's Committees in border areas; Provincial agencies of the organization ("Decree 64")

Decree 64 details the implementation of a number of provisions in the Law on International Agreements on the signing and implementation of international agreements on behalf of affiliated units.

Agencies-organizations that have signed international agreements shall implement the reporting regime on an annual basis or irregularly as follows: Department-level agencies shall send reports to the focal point of international cooperation under the Ministry; Department-level agencies send reports to Provincial-level foreign affairs agencies; The organization's provincial agency shall send a report to the foreign affairs management agency of the organization's provincial agency, and at the same time send it to the provincial foreign affairs agency; etc

In addition, the organization's provincial agency shall publicize its international agreement by posting it on the organization's website, on the mass media or in the form of other appropriate means, except for the case of non-posting, publicizing as prescribed by law or as agreed with the foreign contracting party.

Decree 64 takes effect as of July 1, 2021.

Decree 66/2021/ND-CP on Elaboration of some articles of the Law on Natural disaster management and Law on Amendments to some articles of the Law on Natural disaster management and Law on Dikes

On July 06, 2021, the Government issued Decree No. 66/2021/ND-CP on Elaboration of some articles of the Law on Natural disaster management and Law on Amendments to some articles of the Law on Natural disaster management and Law on Dikes ("Decree 66").

According to the Decree 66/2021, "Disaster-related emergencies" is defined in order to solve problems of local authorities about power and procedures for deciding to declare and terminate a disaster-related emergency, also supplements specific provisions on measures applied in case of emergency. The regulation of power based on levels makes the responsibilities of each level in disaster response transparent. Resources used to carrying out disaster recovery are also regulated according to power. A new point in Decree 66/2021 is the concretization of benefits for communal voluntary forces in charge of natural disaster management, including salaries and wages for participants in voluntary forces, medical benefits, accident and death benefits, v.v This promotes the role of the communal voluntary forces better.

Decree 66/2021/ND-CP takes effect as of 20/8/2021.

Decree 69/2021/ND-CP on renovation and reconstruction of apartment buildings

On July 15, 2021, the Government issued Decree No. 69/2021/ND-CP on renovation and reconstruction of apartment buildings ("Decree 69").

Decree 69 solves many problems in the reconstruction of apartment buildings by important regulations, such as:

- Proposing some principles to speed up the keep up with progress of investment projects. Accordingly, an apartment renovation and reconstruction project is considered a relocation project in order to apply the regulations on land appropriation and land transfer according to Law on Land, aim to renovate, improve urban areas.
- Allowing investors to divide investment into stages in order to reconstruct apartment buildings.
- Identifying apartment renovation and reconstruction projects are not required to spare land area for construction of social houses.
- Specifying the scope of the projects to serve as the basis for developing compensation, financing, relocation, and temporary residence assignment solutions.
- Stipulating terminating project implementation to recover the inability to keep up with the progress of investment projects.

Especially, Decree 69 clearly states that competent authority is responsible for preparing, appraising, and approving detailed planning of areas where apartment buildings and apartment complexes are required to be renovated and reconstructed to guarantee feasibility and unification.

Decree 69/2021/ND-CP takes effect as of 01/09/2021.

Decree 70/2021/ND-CP Amending Governments Decree No. 181/2013/ND-CP dated November 14, 2013, on Elaboration of some articles of the Law on advertising

On July 20, 2021, the Government issued Decree 70/2021/ND-CP on Amending governments Decree No. 181/2013/ND-CP dated November 14, 2013, on Elaboration of some articles of the Law on advertising ("Decree 70").

Accordingly, Decree 70 removes unnecessary regulations in Decree 181/2013 and replaces them with more feasible and up-to-date regulations. Specifically, advertisement distributors and advertisers can conclude the contract directly with advertising service providers. Decree 70 also adds regulations to increase the effectiveness of advertising management, including foreign organizations and individuals involved in the provision of cross-border advertising services in Vietnam have to notify the Ministry of Information and Communications of the contact information; procedure and penalties for handling of illegal advertisements as requested within 24 days; advertising service providers are requested to take technical solutions to control and remove advertisements against Vietnamese law; the responsibilities of Vietnamese advertising service providers cooperating with foreign entities in providing cross-border advertising services in Vietnam and Departments of Information and Communications for submitting reports on an annual basis or upon request on provision of cross-border advertising services. Decree 70/2021/ND-CP takes effect as of 15/09/2021.

Decree No. 90/2021/ND-CP on Vietnam's special preferential import tariff schedule to implement the Trade Agreement between the Government of the Socialist Republic of Vietnam and the Government of the People's Democratic Republic Laos from October 4, 2020 to October 4, 2023

On October 19, 2021, the Government issued Decree No. 90/2021/ND-CP on Vietnam's Special Preferential Import Tariffs to implement the Trade Agreement between the Government of the Socialist Republic of Vietnam and the Government of the People's Democratic Republic Laos from October 4, 2020 to October 4, 2023. ("TA") ("Decree 90"). Accordingly, 385 types of taxes specified in Appendix II issued with Decree 90 would not be entitled to tariff preferences under the TA when imported into Vietnam.

In addition, Decree 90 also stipulates preferential import tax rates for goods imported from Laos into Vietnam with Certificates of Origin Form S, including: the special preferential import tax rate of 0%; 50% reduction of Vietnam's special preferential import tax rate for the implementation of the ASEAN Trade in Goods Agreement ("ATIGA tax rate"); and special preferential import tax rates for imported goods subject to the annual tariff quota regime. As follows:

First, the special preferential import tax rate of 0%: for imported goods originating from Laos, except for imported goods: (i) are entitled to a 50% reduction of the ATIGA tax rate specified in Appendix I; (ii) are not entitled to tariff preferences under the Vietnam-Laos Trade Agreement as provided for in Appendix II; and (iii) are entitled to the annual tariff quota regime specified in Appendix III of Decree 90.

Second, reduce the ATIGA tax rate by 50% for goods imported from Laos, on the list of goods specified in Appendix I issued with Decree 90. In case the ATIGA tax rate is higher than the preferential import tax rate specified in Decree No. 57/2020/ND-CP and Decree No. 125/2017/ND-CP (referred to as "the MFN Tariff"), the special preferential import tax rate shall be 50% tax rate of the MFN Tariff.

Third, goods are entitled to the annual tariff quota regime according to the TA: According to Decree 90, 3 types of rice taxes; 13 types of taxes on unprocessed tobacco and tobacco waste as specified in Appendix III of the Decree would be entitled to a special preferential import tax rate of 0% for the quantity within the prescribed import quota. specifically, 70,000 tons/year for rice and 3,000 tons/year for unprocessed tobacco leaves and tobacco waste.

Decree No. 83/2021/ND-CP stipulating special preferential import tariffs aims to implement an agreement on boosting bilateral trade between Vietnam and Cambodia in 2021-2022.

On September 13, 2021, Decree No. 83/2021/ND-CP ("Decree 83") regulates duty rate of the special preferential import tariffs and conditions for applying special preferential import duty under the Agreement on Bilateral Trade Promotion between the Government of the Socialist Republic of Vietnam and the Government of the Kingdom of Cambodia 2019-2020 is extended for the period 2021-2022 (Vietnam-Cambodia Agreement extended for the period 2021-2022).

This Decree includes 3 attached appendices. Appendix I: Tariff schedule of Vietnam's the special preferential import tariffs for the implementation of the Vietnam-Cambodia Agreement in the period of 2021-2022; Appendix II: List of goods imported under Vietnam's tariff quotas for the implementation of the Vietnam-Cambodia Agreement in the period of 2021-2022; Appendix III: List of pairs of border gates allowed to clear goods enjoying special preferential import tax rates under the Vietnam-Cambodia Agreement in the period of 2021-2022.

The subjects the incentives of Decree 83 include the following 3 subjects:

- Taxpayers according to the provisions of the Law on Import and Export Tax.
- Customs authorities, customs officers.
- Organizations and individuals have rights and obligations related to imported goods originating from the Kingdom of Cambodia.

According to Decree 83, the Vietnam will apply the 0% tax rate to the Cambodian goods including 31 items, such as live poultry, meat and poultry by-products, lemons, rice, pork preparations (closed packaging for retail sale), unprocessed tobacco leaves.

The list of goods including unprocessed rice and tobacco leaves is subject to the rate duty of 0% for the quantity within the quota specified in Appendix II. Specifically, rice code: 10.06 (with a quota of 300,000 tons/year), unprocessed tobacco leaves - code: 2401.20 (with a quota of 3,000 tons of tobacco leaves/year).

Decree 83 also stipulates that imported goods eligible for Vietnam's special preferential import tax rates to implement the Vietnam-Cambodia Agreement in the period 2021-2022 must fully satisfy the following conditions:

- Belonging to the Tariff Schedule special preferential import tariffs for the implementation of the Vietnam-Cambodia Agreement from January 1, 2021 to December 31, 2022 in Appendix I issued together with the Decree.
- Having a certificate of origin form S (C/O form S) issued by a competent authority of the Kingdom of Cambodia.
- Clearance through the pairs of border gates mentioned in Appendix III issued by this Decree.

Circular 06/2021/TT-BCT amending and supplementing a number of articles of the Minister's Circular 16/2014/TT-BCT dated May 29, 2014. The Ministry of Industry and Trade stipulates the implementation of electricity selling prices

On August 6, 2021, the Ministry of Industry and Trade issued Circular 06/2021/TT-BCT amending and supplementing a number of articles of the Minister's Circular 16/2014/TT-BCT dated May 29, 2014. The Ministry of Industry and Trade stipulates the implementation of electricity selling prices. ("Circular 06")

Accordingly, electricity retailers in industrial parks, in combination with purchasing electricity from the national electricity system, at the same time as other power sources to retail electricity to electricity-using customers in industrial parks are responsible for constructing The electricity price scheme for electricity users in the area shall be submitted to the Department of Industry and Trade for verification, then submitted to the People's Committee of the province or city for approval annually.

Regarding the wholesale price for industrial parks and clusters regulated as the following:

- The wholesale price of electricity at 110 kV busbars of 110 kV substations of industrial parks and clusters applies to the case where electricity retailers buy wholesale electricity at 110 kV busbars of industrial parks to retail for customers using electricity in industrial parks and industrial clusters. The wholesale electricity price applied to each 110 kV substation is determined by reference to the total capacity of 110 kV transformers installed in industrial parks and industrial clusters. Wholesale price of electricity at medium-voltage busbars of 110 kV substations or at branching points of medium-voltage lines entering industrial parks or industrial clusters, applicable to electricity retailers buying wholesale for sale retail electricity for customers using electricity in industrial parks and clusters in the medium voltage side.
- The wholesale price of electricity sold by the Electricity Company to the electricity retailer on the medium-voltage side of the low-voltage substations is equal to the retail price of electricity applicable to the manufacturing industries at the corresponding medium-voltage level.
- The wholesale price of electricity at 110 kV busbars at 220 kV substations or at branching points of 110 kV lines entering industrial parks or industrial clusters is equal to the selling price of electricity at 110 kV level or higher for in case the electricity retail unit buys wholesale electricity to retail electricity to customers using electricity in industrial parks or industrial clusters at 110 kV voltage level.

Effective date: September 25, 2021.

Circular 45/2021/TT-BTC guiding the application of prior agreement on tax calculation method in tax administration for associated transactions

On June 18, 2021, the Ministry of Finance issued Circular No. 45/2021/TT-BTC guiding the application of prior agreement on tax calculation method (APA) in tax administration for associated transactions ("Circular 45"). APA is applied on the principle that tax authorities and taxpayers cooperate, exchange and negotiate on the application of legal provisions related to the performance of profit tax obligations for associated transactions within the scope of APA in accordance with the principle of independent transactions and the principle that the nature of operations, transactions determine tax obligations.

The application of APA aims to improve the efficiency of tax administration, reduce the cost of tax compliance, determine the associated transaction price of taxpayers, prevent double taxation and tax evasion, and minimize the dispute on determining the price of the associated transaction.

Transactions proposed to apply APA must be “associated transactions” and also meet the following conditions:

- (i) Actual transactions have arisen in the taxpayer’s production and business activities and would continue to take place during the application period of the APA; and
- (ii) Transactions have a basis to determine the nature of the transaction, which determine the tax liability and have a basis for analysis, comparison and selection of independent comparison objects; and
- (iii) Transactions are not subject to tax disputes or complaints; and

Transactions are made transparently, not for the purpose of evading taxes or taking advantage of Tax Agreements. The APA application process under Circular 45 would reduce the burden of administrative procedures as the consultation phase is no longer required. However, the APA application process continues to require other mandatory phases, including: APA formal application submission, appraisal, negotiation, signing and implementation of the APA.

Circular 45 takes effect as of August 3, 2021.

Circular 46/2021/TT-BTC guiding a number of contents on financial handling and enterprise valuation when transferring state-owned enterprises and one-member limited liability company with 100% charter capital invested by a state-owned enterprise into a joint-stock company

On June 23, 2021, the Ministry of Finance issued Circular No. 46/2021/TT-BTC guiding a number of contents on financial handling and enterprise valuation when transferring state-owned enterprises and one-member limited liability company with 100% charter capital invested by a state-owned enterprise into a joint-stock company (“Circular 46”). Some notable points about the handover between equitized enterprise and joint-stock company:

First, the basis for making a dossier and organizing the handover to a joint-stock company: the financial statement at the time of first registration of a joint-stock company (audited); tax settlement and amounts payable to the state budget with tax authorities; settlement of proceeds from equitization; settlement of equitization costs; settlement funding support for redundant employees (if any); the decision to disclose the actual value of the state capital at the time the equitized enterprise is officially transformed into a joint-stock company by the owner’s representative agency, and financial statement is re-established at the time of official transformation into a joint-stock company after the approval decision of the agency representing the owner is obtained.

Second, in case an equitized enterprise includes a parent company and one-member limited liability companies in which 100% of charter capital is held by the parent company, the handover of equitization to the one-member limited liability company with 100% charter capital held by the parent company is carried out similar to the handover of equitization for the parent company.

Third, in case the land price is officially approved after equitization, the owner’s representative agency directs the enterprise to remit into the state budget the entire difference between the value of the land use right, which has been temporarily calculated into the value of the enterprise and the value of the land use right re-determined by the authorities (if any).

Circular 46 takes effect as of August 7, 2021.

Circular 60/2021/TT-BTC amending to some articles of the Circular No. 38/2014/TT-BTC dated March 28, 2014, on Elaboration of some articles of the government's Decree No. 89/2013/ND-CP dated August 06, 2013, on Elaboration of some articles of the law on prices regarding price appraisal

On July 21, 2021, the Ministry of Finance issued Circular No. 60/2021/TT-BTC amending to some articles of the Circular No. 38/2014/TT-BTC dated March 28, 2014, on Elaboration of some articles of the government's Decree No. 89/2013/ND-CP dated August 06, 2013, on Elaboration of some articles of the law on prices regarding price appraisal ("Circular 60").

Accordingly, Circular 60 amends and supplements new regulations on submission of an application for price appraisal practice for its price appraisers, the documents in an application for issuance or re-issuance of the Certificate of eligibility to provide price appraisal services, conditions to provide price appraisal services, the expense for purchasing professional liability insurance of the price appraisal enterprise, the cases of payment of contributions to fund for provisions against professional risks, reporting, control of the quality of price appraisal services, the responsibility of every price appraisal enterprise for constructing a price appraisal database serving its professional operations.

In addition, the Circular also amends the regulations on the time limit for retaining price appraisal documents, the responsibility of the price appraisal enterprise's legal representative.

Circular 60/2021/TT-BTC takes effect as of 03/09/2021.

Circular 09/2021/TT-BTNMT amending some articles of circulars elaborating and providing guidelines for law on land

On June 30, 2021, the Ministry of Natural Resources and Environment issued Circular No. 09/2021/TT-BTNMT amending some articles of circulars elaborating and providing guidelines for law on land ("Circular 09").

Accordingly, Circular 09 supplements and amends some regulations:

- Adding the cases of land repurposing require permission from the competent authority, specific case is repurposing of land for economic/service activities into non-agricultural business land
- Supplementing application for issuance of the certificate of land use rights and ownership of housing and other property on land in case of "land lot regrouping".
- Stipulating the cases of agricultural land area for assistance in living stabilization upon land use rights revocation.
- Adding two cases are granted the new certificate of land use right when registering the change to land and property on land, including (i) land lots split to receive separate Certificates for cases where a Certificate is granted to multiple lots or (ii) change to land area of a land lot having garden, pond and housing due to residential area redetermination per regulations

About the compensation and assistance for remaining land ineligible for use after land use rights revocation: the compensation and assistance upon land use rights revocation by the State must be included in the compensation, assistance and relocation plan and funding for compensation, assistance and relocation of the investment project.

In addition, Circular 09 stipulates also the cases that applications for registration of land/property on land or certificate issuance do not require the applicant's identity card or military ID card or family register or another documentary proof of identity.

Circular 09/2021/TT-BTNVMT takes effect as of : 01/09/2021.

LEGAL ANALYSIS

IS A UNILATERAL OPTION CLAUSE VALID IN VIETNAM?

Ngan Tran - EPLegal

1. Introduction

A “bilateral” or “symmetric” dispute clause gives each party equal rights in relation to the dispute resolution: both parties have the same rights to refer their disputes to courts or to arbitration. Conversely, a unilateral option clause (“UOC”) is one that grants only one party the right to choose between arbitration and litigation but leaving the other party with no such choice.

The UOCs are very common in finance transactions. The rationale behind these types of clauses is that they will ensure better enforcement against assets of debtors which may be located in several jurisdictions. For instance, in the situation where the debt for loan is obvious and there is no dispute in this regard, the lender (bank or financial institution) could bring a lawsuit against the borrower in the state court of location of his assets instead of referring it to arbitration. Because litigation provides an opportunity to recover the debt within a shorter period of time, whereas the commencement of arbitration may be too expensive and time consuming.

2. Different types of the UOC

There are two types of UOC. The first one is the UOC that establishes the litigation as a main option while the arbitration is only available to one party. For instance:

“Notwithstanding the submission to jurisdiction of English Courts clause, the Lender may, at any time before instituting any court proceedings, or otherwise submitting to the jurisdiction of a court, elect to have any dispute finally settled by arbitration. The arbitration shall be conducted in accordance with the Rules of the Singapore International Arbitration Centre in effect at the time of the arbitration (the “Rules”), except as they are modified by the provisions of this Agreement.”

The second one is the UOC that provides for arbitration as a mean of dispute resolution, while retaining the right of one party to refer to national court. We could take the following clause as an example:

“All disputes, claims, controversies, and disagreements relating to or arising out of this Agreement, or the subject matter of this Agreement, shall be finally resolved by arbitration in accordance with [add institutional arbitration rules]. Notwithstanding the foregoing, [Party A] shall be free at its sole option to seek judicial relief...”

3. Vietnam’s position towards the UOC

The Vietnamese courts have not examined the validity of UOC in the context of finance transactions. However, we could find an answer to such a question in the Resolution 01/2014/NQ-HĐTP (“Resolution 01”). In particular, Article 2.4 Resolution 01 lists two different situations and addresses them as follows:

¹ Gary B. Born, International Commercial Arbitration, 3rd edition, Kluwer Law International 2021, p. 866

² Deyan Draguiev, Unilateral Jurisdiction Clause: The Case for Invalidity, Severability or Enforceability; Peter Ashford FCIARB, Is an Asymmetric Disputes Clause Valid and Enforceable

³ NB Three Shipping Ltd vs. Harebell Shipping Ltd (2004); Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd (2016)

⁴ Mme X v. Rothschild [2012]

- (i) If the claimant submits the dispute to arbitration before bringing it to the court, or submits the dispute to arbitration when the court has not yet accepted the case, the court shall apply Article 6 of the Law on Commercial Arbitration 2010 (“LCA”) or Article 192.1(i) of the Civil Procedure Code to refuse the jurisdiction to decide the case.
- (ii) If the claimant brings its dispute to the court, the court shall immediately determine whether or not one of the parties had submitted the disputes to arbitration. If the court determines that either party had already submitted the dispute to arbitration, the court shall refuse the jurisdiction. Otherwise, the court shall accept the jurisdiction over the dispute.

It could be found that the laws of Vietnam adopts a friendly approach to the validity of the UOC. To a certain extent, Vietnam could be considered as a pro-arbitration jurisdiction in that regard. Even if one party brings the dispute to the court in the first place, the court will always prioritize the arbitration option of the UOC. Before seizing the jurisdiction over the case, the court always makes sure that neither party had referred the dispute to arbitration.

Moreover, the courts will recognise the validity of UOC granting a consumer an option to choose between litigation and arbitration. In particular, Article 17 of the LCA provides that even if a goods or service 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 dispute. A goods and/or service provider shall only have the right to institute arbitration proceedings if the consumer so consents. If the consumer does not consent to this arbitration, such arbitration agreement will be rendered unenforceable.⁵

4. Jurisdictions upholding the validity of UOC

In many pro-arbitration jurisdictions such as England and Singapore, the UOC is consistently presumed to be valid.

In England, some early national court decisions held that an arbitration agreement would only be valid if both parties were granted mutual rights to refer their disputes to arbitration. The Court of Appeal in *Baron vs. Sunderland Corp* (1966) stated that: “It is necessary in an arbitration clause that each party shall agree to refer disputes to arbitration; and it is an essential ingredient of an arbitration clause that either party may, in the event of a dispute arising, refer it, in the provided manner, to arbitration. In other words, the clause must give bilateral rights of reference”. This decision was followed in *Tote Bookmakers Ltd vs. Development and Property Holding Co Ltd* (1985).⁶

However, the English courts changed their approach to the validity of UOCs. In *Pittalis vs. Sherefettin* (1986), the Court of Appeal, referring to the consent of the parties in respect of unilateral arbitration clause, overruled early decisions. Lord Justice Fox reasoned that: “I can see no reason why, if an agreement between two parties confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration. There is a fully bilateral agreement which constitutes a contract to refer. The fact the option is exercisable by one of the party only seems to me to be irrelevant. The arrangement suits both parties.” Moreover, the court in *Law Debenture Trust Corp v Elektrim Finance BV* (2005) followed the approach of *Pittalis* case and declared that: “[..] a unilateral clause gives an additional advantage to one of the parties but this should be treated in the same vein as any other contractual clause giving advantage and not as a peculiarity on its own”.

In *Dyna Jet* case, the High Court found that UOC did constitute an arbitration agreement, and was therefore generally enforceable under the Singapore International Arbitration Act.⁷

⁵ Article 4.5 Resolution 01/2014

⁶ *Tote Bookmakers Ltd vs. Development and Property Holding Co Ltd*, 2 All E.R. 555, 1985.

⁷ *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* (2016)

5. Jurisdictions refusing to enforce the UOC

In Sony Ericsson case⁸, the Russian Court reversed consistent approach in Russia and refused to recognize the validity of such a clause. The Russian Court relied on the right to a fair trial stipulated in Article 6 of the European Convention on Human Rights to render its decision.

However, it should be noted the principle of equal treatment comes into being when a procedure has already begun⁹. In *Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd. & Sujana Universal Industries Ltd.* (2013), the English Court confirmed that: “the public policy to which that was said to be inimical was ‘equal access to justice’ as reflected in Article 6 of the ECHR. But Article 6 is directed to access to justice within the forum chosen by the parties, not to choice of forum”. In other words, the UOC has no effect on the procedural equality between the parties. Such a clause only puts the parties in a unfavourable position in the pre-arbitration or pre-litigation stage. Therefore, it could not be argued that the UOC contradicts the principle of equal treatment.

In *Rothschild* case¹⁰, the French Supreme Court determined that a dispute resolution clause referring all disputes to the courts of Luxembourg but granting one party the unilateral right to refer disputes to any other court of competent jurisdiction was not an agreement conferring jurisdiction within the meaning of Article 23 of the Brussels I regulation, but rather the imposition of terms by one party on the other. Such an imposition qualified as a “condition potestative” and rendered onesided jurisdiction clauses ineffective, thereby also casting doubt upon the French courts’ attitude to the UOCs.

6. Conclusion

The UOC is an attractive tool for the commercial parties, especially in the context of finance transactions.

Internationally, the validity of UOCs remains uncertain. Some pro-arbitration jurisdictions such as England and Singapore have consistently upheld the validity of UOCs. Vietnam also adopts a friendly approach to the validity of UOCs. Although there has not been any case dealing with the validity of UOC so far, the Vietnamese courts will recognize the validity of this clause based on the Resolution 01. Meanwhile, some jurisdictions such as Russia and France have invalidated UOCs for a variety of concerns, especially the equality concerns.

Therefore, the parties to a loan agreement must keep that uncertainty in mind. The parties entering into a UOC should also ensure that the UOC: (i) is governed by the law of a UOC-friendly jurisdiction; and (ii) provides for UOC friendly jurisdictions and seats of arbitration. Besides, the parties should also consider where their potential arbitral awards may be enforced. In some jurisdictions, the principles of equality may rise to the level of public policy under Article V(2)(b) of the New York Convention. This may bar the enforcement of the award in that jurisdiction.

There are two types of UOC, one of which allows both parties to refer the case to arbitration while only one party is entitled to litigation. The other type grants both parties the right to bring dispute to litigation while the arbitration is available to only one party. During the drafting process, the parties should exercise caution to decide to insert the former or the latter in the contract. The parties are recommended to apply the former type in their arbitration clause to minimise the chance of the clause being held invalid. As both parties are entitled to arbitration, it is difficult for a party to challenge the jurisdiction of the arbitral tribunal regardless of the option for litigation by one party.

⁸ *Russian Telephone Company v. Sony Ericsson Mobile Communication Rus* (2012)

⁹ *Deyan Draguiev, Unilateral Jurisdiction Clause: The Case for Invalidity, Severability or Enforceability*

¹⁰ *Mme X v. Rothschild* [2012]