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VIOLATION OF DUE PROCESS IN ARBITRATION

Dutch Business Association in Vietnam

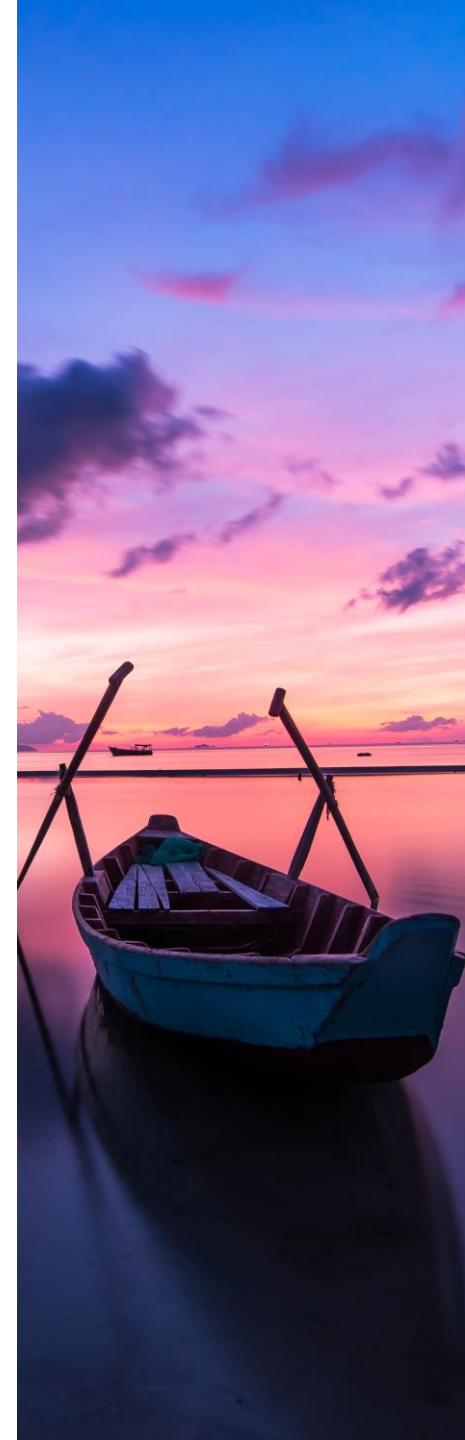
Minh Nguyen – Special Counsel and Head of Dispute Resolution of ACSV Legal

Dan Tan – Principal of Dan Tan Law Firm

30 September 2022

AGENDA

1. Violation of Due Process in Arbitration in Vietnam
2. Case Study



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1. VIOLATION OF DUE PROCESS IN ARBITRATION
IN VIETNAM

1.1 WHAT MEANS VIOLATION OF DUE PROCESS?

■ Violations

- *Law on Commercial Arbitration of 2010 (“LCA”)*

Article 68. Grounds for setting aside arbitral awards

- 2. An arbitral award shall be set aside in any of the following cases:
 - b/ The composition of the arbitral tribunal or the arbitration proceedings were not in conformity with the parties’ agreement or were contrary to the regulations of this Law;

■ Seriousness of the Violation

- *Resolution No. 01/2014/NQ-HDTP of Judges’ Council of The People’s Supreme Court of Vietnam*

Article 14. Grounds for setting aside arbitral awards under Article 68 of the LCA

- 2(b) “The composition of the arbitral tribunal or the arbitration proceedings were not in conformity with the parties’ agreement or were contrary to the regulations of the LCA” means the cases where the parties’ agreement contains the composition of the arbitral tribunal or arbitration rules but the arbitral tribunal failed to comply with these, or the cases where the arbitral tribunal failed to comply with the regulations of the LCA in this regard, and the competent court finds that such violation is serious and is subject to annulment if the arbitral tribunal fails to rectify the violation at the request of the court as prescribed in Article 71.7 of the LCA.



1.2 ARBITRATOR'S IMMUNITY AND "VIOLATIONS OF DUE PROCESS"

- **Vietnamese law DOES NOT recognise the concept of "arbitrator's immunity"**
- **The arbitrators who negligently approved the granting of interim reliefs may be sued at Court**
 - *Vietnam's LCA*
 - Article 49. The Tribunal's jurisdiction to grant interim relief*
 - 5. If an arbitral tribunal orders a different form of interim relief or an interim relief which exceeds the scope of the application by the applicant, thereby causing loss to the applicant, or to the party against whom the interim relief was applied or to a third party, then the party incurring loss shall have the right to institute court proceedings for compensation in accordance with the law on civil proceedings.
- **Interpretation of Article 49.5 of the LCA**
 - *Who could be sued?*
 - *Can you bring a separate lawsuit against each arbitrator, or must you bring ONE lawsuit against ALL relevant arbitrators for their joint liability?*



1.3 RE-SUBMIT THE DISPUTE FOR RESOLUTION AFTER THE ARBITRAL AWARD WAS SET ASIDE

■ Vietnamese Approach

- *Vietnam's LCA*

Article 71. Resolving the request for setting aside arbitral awards

- 8. In case the Hearing Panel decides to set aside the arbitral award, the parties may negotiate to form a new arbitration agreement to submit their dispute to arbitration or either of them may initiate a lawsuit at court. [...]

■ Different Approach

- *German Arbitration Act of 1998*

Section 1059. Application for setting aside

- (5) Setting aside the arbitral award shall, in the absence of any indication to the contrary, result in the arbitration agreement becoming operative again in respect of the subject matter of the dispute.



1.4 ARBITRATOR IMMUNITY UNDER OTHER INSTITUTIONAL RULES

ICC: Article 41 of the *ICC Rules 2021* states that arbitrators “shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law”.

LCIA: Article 31.1 of the *LCIA Rules 2020* states that an arbitrator shall not “be liable to any party howsoever for any act or omission in connection with any arbitration, save:

- Where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party.
- To the extent that any part of this provision is shown to be prohibited by any applicable law.

UNCITRAL: Article 16 of the *UNCITRAL Rules 2010*:

“[...] save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration”.



1.5 ARBITRATOR IMMUNITY UNDER OTHER NATIONAL LAWS

England: Section 29 of the English Arbitration Act 1996:

- “An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith”.

Singapore: Arbitrators will not be liable for:

- negligence in respect of anything done or omitted to be done in the capacity of arbitrator; or
- any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an award

Arbitration Act, s 20 and International Arbitration Act, s 25.

United States: An arbitrator enjoys immunity from liability for all acts or omissions performed in the exercise of his judicial decision-making unless he has acted intentionally, or arbitrarily, or has committed a fraudulent act.



1.6 DUE PROCESS

The abuse of due process has led to the phenomena of due process paranoia, defined in the 2015 Queen Mary International Arbitration Survey as “*a perceived reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully.*”

Singapore: Natural justice under s 24(b) of the International Arbitration Act

China Machine New Energy Corp v Jaguar Energy Guatemala [2020] SGCA - set aside an arbitral award on the basis of breach of natural justice due to tribunal’s case management decisions:

- (a) allowing the respondent’s rolling production of documents,
- (b) not granting CMNC a further extension of time to file a responsive expert report (the “Report”) or admitting the Report,
- (c) not admitting CMNC’s supplementary expert report, and
- (d) allowing the respondent’s disclosure of documents in a disorganized manner were in breach of natural justice.



SGCA in *China Machine New Energy*:

CMNC therefore had failed to discharge its burden of demonstrating that the tribunal's conduct of the proceedings fell outside the realm of what a reasonable and fair minded tribunal might have done.

Such challenges were often used as grounds to *"improperly attack the award"*, and that this *"undermines and cheapens the real importance of due process"*, which could *"erode the legitimacy of arbitration as a whole and its critical role as a mode of binding dispute resolution."*

BZW and another v BZV [2022] SGCA 1, breach of the fair hearing rule could arise from the chain of reasoning which the tribunal adopts in its award): To comply with the fair hearing rule, the tribunal's chain of reasoning must be (i) one which the parties had reasonable notice that the tribunal could adopt; and (ii) one which has a sufficient nexus to the parties' arguments. To set aside an award on the basis of a defect in the chain of reasoning, a party must establish that the tribunal conducted itself either irrationally or capriciously such that *"a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award"*



CEF and CEG v CEH [2022] SGCA 54

“The Tribunal explained that it was applying a “flexible approach” to proof of damage as “it is impossible to lay down any definitive rule as to what constitutes sufficient proof of damage”.

Set aside damages order: “The Tribunal’s chain of reasoning in respect of the Damages Order was not one which the parties had reasonable notice that the Tribunal could adopt, nor did it have a sufficient nexus to the parties’ arguments.”

CBS v. CBP, Singapore Court held that an arbitrator’s refusal to hear any witness evidence, despite one party contending that witness evidence was necessary in relation to a key issue in the case, breached the requirements of natural justice.

In Singapore, the test is whether the ‘rights of any party have been prejudiced’, which the courts have interpreted as requiring that the breach denied the applicant the benefit of arguments or evidence that had ‘a real as opposed to a fanciful chance of making a difference to [the arbitrator’s] deliberations’ ***L W Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd and another appeal*** [2013] 1 SLR 125, para. 54,



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2. CASE STUDY

CASE STUDY

Claimant: Vinh Son-Song Hinh Hydropower Joint Stock Company (“**VSH**”)

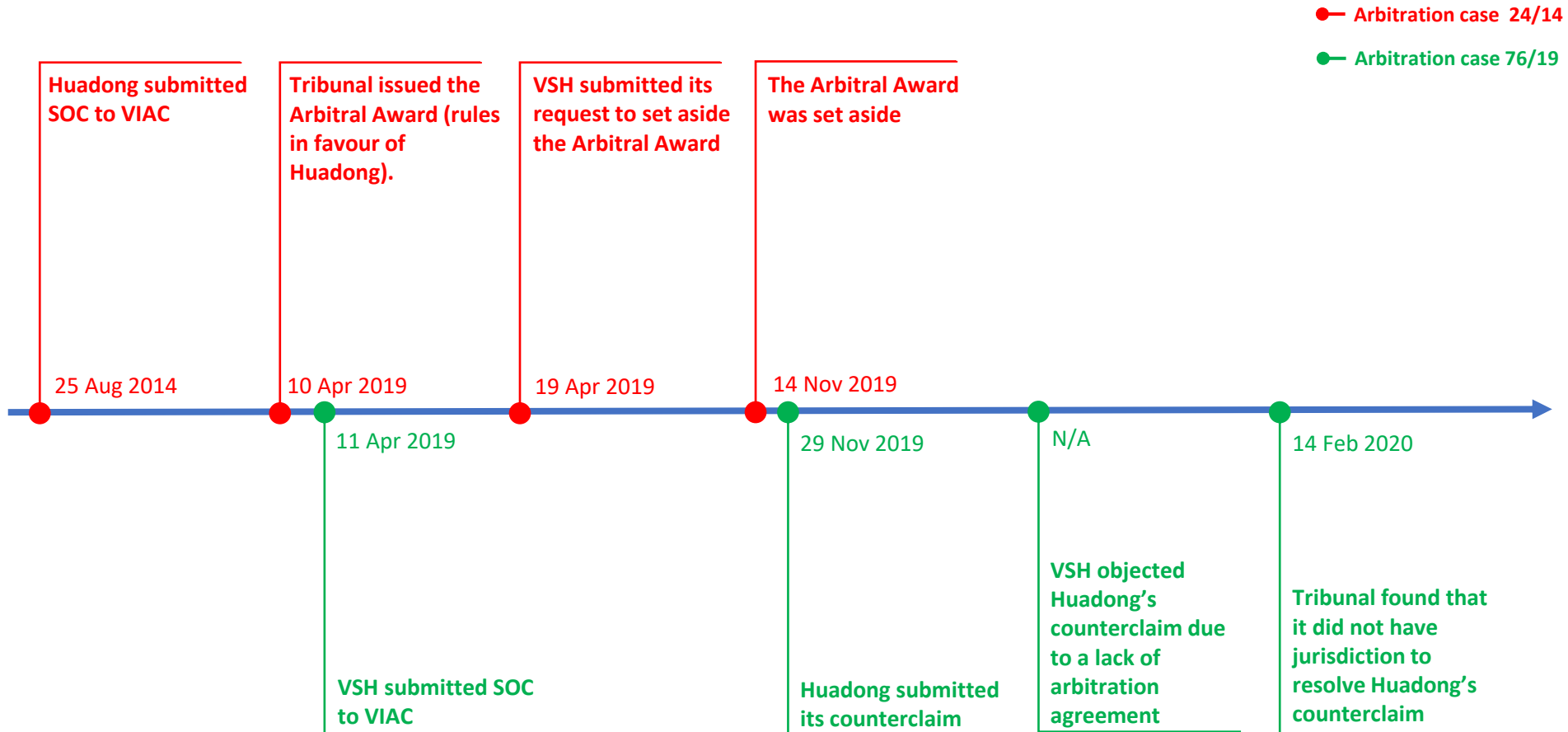
Respondents: (i) Hydrochina Huadong Engineering Corporation; and
(ii) China State Railway Group Company Limited
(collectively, “**Huadong**”)

Dispute value: ~100mil USD



CASE STUDY (CONTINUED)

PROCEDURAL TIMELINE



CASE STUDY (CONTINUED)

Three legal issues from Huadong v. VSH case:

1. Two foreign arbitrators in Arbitration Case No. 24/14 were sued before the People's Court of Hanoi in relation to the issuance of an interim relief (refer to Article 49.5 of Vietnam's LCA).
2. The arbitral award of Arbitration Case No. 24/14 was set aside for several reasons, including violation of due process (refer to Article 68.2(b) of Vietnam's LCA).
3. The Tribunal of Arbitration Case No. 76/19 rejected to hear Huadong's counterclaim which has the same scope as the claim approved by the Tribunal of Arbitration Case No. 24/14 in the award being annulled (refer to Article 71.8 of Vietnam's LCA)



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CONTACT US

MARK OAKLEY
MANAGING PARTNER

 +84 868 100 510
 mark.oakley@acsvlegal.com

MINH NGUYEN
SPECIAL COUNSEL
HEAD OF DISPUTE RESOLUTION

 +84 77 865 3936
 minh.nguyen@acsvlegal.com

ACS LEGAL VIETNAM COMPANY LIMITED (ACSV LEGAL)
LEVEL 11, EMPRESS TOWER, 138-142 HAI BA TRUNG STREET
DISTRICT 1, HO CHI MINH CITY, VIETNAM
T: +84 28 3822 4539 F: +84 28 3822 4239
WWW.ACSVLEGAL.COM

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