

ANALYSIS OF THE RECENT COMMERCIAL ARBITRATION DEVELOPMENT PLAN OF THE KOREAN GOVERNMENT – SOME SUGGESTIONS FOR VIETNAM’S ARBITRATION LAW AND POLICY

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Abstract

The settlement of commercial disputes by commercial arbitration is gradually becoming popular in the business community. In the course of economic integration, Vietnam has acknowledged the role of arbitration and attempted to develop its arbitration legal framework in compliance with international practices. However, Vietnam’s arbitration system still faces various issues and thus, has required further reform. There are often cancellations of the referee’s decision, the procedure to cancel the award often lacks clarity, and the venue for the arbitration center’s dispute to be resolved is limited. In addition, the management, quality assessment and training of arbitrators is one of Vietnam’s problems. In Asia, Korea is known as one of the most pro-arbitration jurisdictions in the region. Since the adoption of the Arbitration Act in 1966 that governs both domestic and international proceedings, the Korean arbitration legal framework has always been kept consistent with generally accepted international practices. Recently, the Korean government has introduced an action plan to further promote the robust development of the commercial arbitration industry over the five-year period, from 2019 to 2023, and the goal is to turn Korea into one of five countries that have the world’s best arbitration system. Given the close cultural background and integration strategy of Vietnam and Korea, it is believed that the Korean experience can serve as a good reference for Vietnam in developing commercial arbitration law and policy.

This paper begins with analyzing the background of the Vietnamese arbitration system and highlighting some limitations of Vietnamese arbitration. It then switches to the Korean arbitration system and development plan on promotion of dispute settlement by arbitration. The paper focuses on analyzing four main strategies that would: (1) strengthen the foundation of the arbitration industry; (2) activate domestic arbitration; (3) secure competitiveness in the arbitration industry; (4) expand the attraction of international arbitration. The Korean action plan can suggest some interesting strategies for Vietnam to further strengthen its commercial arbitration system.

Keywords: commercial arbitration, arbitration industry, KCAB, SIDRC, VIAC

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1. Introduction

Commercial arbitration, as an alternative dispute settlement method allowing parties to settle disputes out-of-court, has contributed significantly to the stability and efficiency of commercial activity. Currently, settling international commercial disputes by arbitration has become a popular method chosen by the international business community. Supporting the development of arbitration is also considered as an essential element of national integration policy.

Vietnam has been expanding international trade cooperation relations with many countries around the world by promoting the negotiation and signing of bilateral, multilateral, and regional free trade agreements (FTA). It has signed over 14 FTAs, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP), EU-Vietnam Free Trade Agreement (EVFTA), Regional Comprehensive Economic Partnership (RCEP) and Korea-Vietnam Free Trade Agreement (KVFTA). Obviously, the opportunities and positive effects of integration are undeniable; however, at the same time there is a rising number of international commercial disputes. These pose challenges for domestic enterprises because the Vietnamese economy has a low level of development and there's limited competitiveness in the business community. With that context, Vietnam shall adopt an active strategy to promote its national arbitration system so that its businesses can have their international disputes settled in Vietnam (instead of using international arbitration systems overseas).

In Vietnam, since the introduction of the Law on Commercial Arbitration in 2010 (LCA),¹ arbitration has gained increasing popularity amongst enterprises, especially those with foreign investment capital. According to reports of the Vietnam International Arbitration Centre (VIAC), the biggest and most reputable arbitration institution in Vietnam, the total number of disputes by arbitration has had a significant steady increase in the last five years. Accordingly, there were 274 disputes settled at VIAC in 2019, an increase of 4-5 times compared to 2010.²

¹ Luật số 54/2010/QH12 của Quốc hội : Luật Trọng tài thương mại, http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=4&mode=detail&document_id=98345 [accessed 23 September 2020].

² VIAC (2019), 'Thống kê hoạt động giải quyết tranh chấp năm 2019', <https://www.viac.vn/thong-ke/thong-ke-hoat-dong-giai-quyet-tranh-chap-nam-2019-s31.html> [accessed 23 September 2020].

Currently, in the world, there are many international arbitration centers, many of them have just been established only in the last few decades in the light of globalization. In Asia, aside from arbitration centers in Singapore, Hong Kong, China, etc., Korea is the country with an advanced commercial arbitration system that can be a good example for study. Korea has been continuously strengthening its arbitration development policy to ensure that its arbitration system is advanced and attractive for the international business community. The Korean Commercial Arbitration Board (KCAB INTERNATIONAL) was established on 20 April 2018 as an independent division of the Korean Commercial Arbitration Board to meet the growing demand for cross-border commercial dispute resolution.

This research will focus on the Korean government's policy for the development of arbitration in the future. In addition, this research also offers solutions to the issues of Vietnamese commercial arbitration.

2. Overview of the Vietnamese arbitration system

2.1. Research on Vietnamese arbitration

a. Development history of commercial arbitration in the Vietnamese legal system

Through many historical periods, Commercial Arbitration, as an out-of-court dispute settlement mechanism, has contributed significantly to the stability of commercial activities in the world.³ In our country, the process of formation and development of Commercial Arbitration is demonstrated through three main phases: the primitive stage (before 2003), the transition period (2003 - 2010), and the integration stage (2010 - Present). In the 1990s, non-governmental arbitration with two agencies existed in Vietnam, the Foreign Trade Arbitration Tribunal and the Vietnam Maritime Arbitration Tribunal. It was later merged by the Prime Minister into the Vietnam International Arbitration Center under Decision No. 204/TTg dated March 28, 1993 in collaboration with Vietnam's Chamber of Commerce and Industry. In 1995, Vietnam joined the New York Convention which marked a significant improvement in the legal environment to facilitate the attraction of foreign investment.⁴

³ Nam N. T., 'Hòa giải thương mại tại Việt Nam', https://www.viac.vn/images/Resources/Legal-Research-and-Study/200722_HGTM-tai-VN_NTNam/Papers_Hoa-giai-thuong-mai-tai-Viet-Nam_NamNT_191029.pdf [accessed 23 September 2020].

⁴ Dung T. V. (2016), 'Recognition and Enforcement of Arbitral Awards Relating to International Commercial Disputes in Vietnam', *Kutafin University Law Review*, 1(5), p. 29.

On February 25, 2003, the Standing Committee of the National Assembly issued the Commercial Arbitration Ordinance demonstrating Vietnam's great integration efforts as well as marking a transition period in the development of arbitration law in our country. Although there has been a lot of progress, there are some provisions of the Ordinance revealing inadequacies and have become no longer suitable for new circumstances after more than six years of application and along with socio-economic developments such as the unclear identification of the scope of dispute settlement as well as the subjects settled by arbitration. There are still many shortcomings in the regulation of arbitration agreements, the weak supporting role of the court, and the wide bases for rejecting the arbitration judgement.

Entering a new stage, the Law on Commercial Arbitration 2010 was passed by the National Assembly on June 17, 2010 and officially took effect on January 1, 2011. The Law on Commercial Arbitration consists of 13 chapters and 82 articles.⁵ This law has overcome the unclear identification of the jurisdiction of arbitration over commercial disputes. The LCA has extended the jurisdiction of arbitrators to various types of commercial disputes. Especially, it recognizes the arbitrability of the disputes between parties where one of the parties is engaged in commercial activities. The term commercial is interpreted in accordance with Vietnamese commercial law as activities for profit-making purposes, including, not only the sale or purchase of goods and the provision of services, but also investment activities and commercial promotions, a definition intended to correspond to the meaning of commercial activities in international practice. This development on jurisdiction of the arbitral tribunal is in line with the UNCITRAL Model Law.

The LCA limits the situations making arbitration agreements invalid. Accordingly, there are only six grounds to claim the invalidity of an arbitration agreement, including:

- (i) Disputes arise in areas not falling under the jurisdiction of the arbitration in accordance with the LCA;
- (ii) The person who entered into the arbitration agreement lacked the authority;

⁵ Luật Trọng Tài Thương Mại, 54/2010/QH12, <https://thuvienphapluat.vn/van-ban/thu-tuc-to-tung/Luat-Trong-tai-thuong-mai-2010-108083.aspx> [accessed 28 August 2020].

- (iii) The person who entered into the arbitration agreement lacked civil legal capacity pursuant to the Civil Code;
- (iv) The arbitration agreement lacks a formal requirement;
- (v) One of the parties has been deceived, threatened or coerced during the formulation of the arbitration agreement and requests a declaration that the arbitration agreement is void;
- (vi) The arbitration agreement breaches a prohibition of the laws.⁶

The LCA also provides a settlement direction in case of an unclear arbitration agreement. There are also provisions on Vietnam's international commitments on arbitration services. Last but not least, the law clearly defines the relationship between the arbitration with the court in the dispute settlement process.

The LCA expanded the jurisdiction of the Arbitration Tribunal and applied the principle of prohibiting conflicting acts in proceedings. Where the parties in dispute already have an arbitration agreement but one party commences court proceedings, the court must refuse to accept jurisdiction unless: (i) there has been a Court decision to set aside the arbitral award or to set aside the decision of the Arbitral Tribunal on recognizing the parties agreement; or (ii) there has been a decision by the Arbitral Tribunal to stay the dispute resolution process as provided in Article 43.1, Article 59.1(a)(b)(d) and (dd) LCA; (iii) the arbitration agreement is defined as incapable of being performed due to exclusive circumstances.⁷

Overall, The LCA represents a great effort of the Vietnamese policy makers in developing a legal framework to facilitate the

⁶ Article 18, LCA.

⁷ Article 4, Resolution 01/2014/HDTP-TANDTC of the Supreme People's Court: "Five circumstances which make an arbitration agreement incapable of being performed: (i) The parties have agreed to resolve the dispute at a specific arbitration centre but such centre has ceased to operate without any successor arbitration centre, and the parties fail to agree on other arbitration centre to resolve the dispute. (ii) The parties have agreed on the choice of Arbitrator for an ad hoc arbitration, but at the time a dispute arises, that Arbitrator is unable to conduct the arbitration because of a force majeure event or for any other objective reason, or the arbitration centre or the Court cannot find an Arbitrator as the parties have agreed, and the parties fail to agree on any alternative arbitrator; (iii) the parties have agreed on the choice of Arbitrator for an ad hoc arbitration but at the time a dispute arises, the Arbitrator refuses the appointment or the relevant arbitration centre refuses to appoint that Arbitrator and the parties fail to agree on any alternative Arbitrator. (iv) The parties have agreed to resolve the dispute at a specific arbitration centre but have also agreed to apply the Rules of Arbitration of another arbitration centre, and the charter of the arbitration centre chosen for the dispute resolution does not allow the application of the rules of any other arbitration centre; and the parties fail to agree to apply the rules of the chosen arbitration centre. (v) Goods and/or service providers and consumers already have an arbitration clause in the standard conditions for the provision of goods and/or services which are pre-determined by the providers but when a dispute arises, the consumers do not agree to use Arbitration to resolve the dispute".

arbitration in Vietnam. The law not only emphasizes the arbitration but also ensures its compatibility with existing legal documents, enhances feasibility in practice, and moves closer to international standards.⁸

b. Dispute settlement process by commercial arbitration

When all conditions for dispute settlement by commercial organizations such as valid arbitration agreements are considered, the parties shall implement the steps according to the arbitral proceedings.

Step 1: Submit the petition and attached documents.

Step 2: The defendant submits the self-defense form, Article 35 of the LCA).

Step 3: Establish Arbitration Tribunal.

Step 4: Reconciliation (under Article 58 of the LCA).

Step 5: Organize the dispute settlement meeting (Article 55 of the LCA).

Step 6: The Arbitration Tribunal makes a decision.

Unless otherwise agreed by the parties, the time of commencement of the arbitration proceedings shall either be upon receipt by the arbitration centre of a statement of claim from the claimant in the case of a dispute resolution at an arbitration centre or upon receipt by the respondent of a statement of claim from the claimant, accompanied with the arbitration agreement and originals or copies of relevant materials in the case of *ad hoc* arbitration. If the parties do not have an agreement on the place of arbitration, then the location shall be as decided by the arbitration tribunal. The seat of arbitration and the place of hearing can be either within the territory of Vietnam or abroad as allowed by Article 11 of the LCA.

During the dispute resolution process, the parties are entitled to make a complaint to the arbitral tribunal if they find that the tribunal has exceeded its jurisdiction. Otherwise, they may be deemed as having waived their right to object. The arbitral tribunal must, before dealing with the merits of a dispute, consider their jurisdiction over the dispute in accordance with Article 43 of the LCA. Within five

⁸ Duong V. A., 'Thực tiễn thi hành luật trọng tài tại trung tâm trọng tài quốc tế việt nam', https://www.viac.vn/images/Resources/Legal-Research-and-Study/20722_Thuc-tien-thi-hanh-luat-trong-tai/Papers_Bao-cao-10-nam-Luat-Trong-tai-thuong-mai_VADuong.pdf [accessed 23 September 2020].

working days from the date of receipt of the arbitral decision on jurisdiction, a party has the right to petition to a competent court to review such a decision – be it negative or positive finding on jurisdiction from the Tribunal. The decision of the court shall be final and cannot be appealed. While the competent Court is reviewing the Decision on Jurisdiction of the Tribunal, the arbitration may still proceed.

According to Articles 54 of the LCA, the parties are entitled to negotiate and execute a mutual agreement not to have a hearing. Article 56.3 specifically allows the Arbitral Tribunal to decide the dispute without the actual presence of the parties and to consider the dispute on documents alone. Unless agreed by the parties, decisions on the time and location for holding hearing sessions shall be made by the Arbitration Tribunal or in accordance with the rules of the arbitration centre. The LCA also honored the principle of confidentiality in the arbitration. The entire arbitration proceedings shall be conducted in private unless parties agreed otherwise. The Arbitral Tribunal has the statutory obligation to keep confidential the material submitted and information disclosed in the proceedings, as well as the content of the case in general, unless the tribunal is required to provide information to a competent state authority in accordance with the law.⁹

The LCA also ensures the speedy dispute resolution by arbitration by framing the time period for issuance of arbitral award within 30 days from the date of final hearing. The arbitral award must be sent to the parties immediately. On top of it, the arbitral award will become effective and enforceable like a court's judgement if no party does not request the competent court to set aside the arbitral award within 30 days from the date of receipt of the award.¹⁰ There are five grounds that a party can rely on to challenge an arbitral award under the LCA: (i) there is no arbitration agreement or the arbitration agreement is null and void; (ii) the arbitration proceedings were inconsistent with the agreement of the parties or contrary to the laws; (iii) the dispute is outside the jurisdiction of the arbitration tribunal; (iv) evidence on which the arbitral tribunal relied to issue the award is forged or improper conduct of an arbitrator prejudices the objectivity and impartiality of the arbitral award; or (v) the arbitral award is contrary to the fundamental principles of the law

⁹ Article 21, LCA.

¹⁰ Article 69, LCA.

of Vietnam.¹¹ A party with sufficient evidence proving that the Arbitral Tribunal issued the arbitral award in any of the cases prescribed above has the right to submit a petition to the competent court to set aside the arbitral award within 30 days from the date of receipt of such an award. The court shall open a hearing to consider the petition and its decision shall be final and binding. The courts are not allowed to review the merits of the dispute that the arbitral tribunal has already resolved, unless they find the arbitral award has breached the fundamental principles of the law of Vietnam.

2.2. Contemporary issues of development of arbitration in Vietnam

Currently, arbitration for resolving commercial disputes in Vietnam has made a lot of progress and achieved credibility internationally, but there are still some issues to be resolved about the team of lawyers, arbitrators, and mediators. The number of lawyers in Vietnam in recent years has increased rapidly (about more than 13,000), but the proportion of practitioners in the fields of economics, business, and commerce remains low, especially the knowledge of mediation and the number of arbitrators to resolve the dispute is not much. On the other hand, due to foreign language restrictions, it is difficult for lawyers to advise and participate deeply in corporate disputes when the case is related to foreign elements and there is difficulty accessing prior knowledge towards Alternative Dispute Resolution – ADR.¹²

The Vietnamese legal system is relatively complete and has made relevant progress. Besides the LCA, the Civil Procedural Code also contains a whole chapter that deals with the recognition of foreign awards in Vietnam. Additionally, there are a number of by-laws guiding the implementation of the LCA, such as the Decree No. 63/2011/ND-CP of the Government on detailing and guiding certain articles of the LCA on arbitral institutions¹³ and the Resolution 01/2014/NQ-HDTP of the Council of Judges of the Supreme People's Court

¹¹ Article 68, LCA.

¹² “Alternative dispute resolution” is understood to be an “alternative” to the normal proceedings of the Court. Thus, arbitration is also a dispute settlement mechanism on behalf of the Court. Compared to the courts, the arbitration mechanism provides more confidentiality as well as flexibility for the parties. However, the function of the judge and arbitrator is both the adjudicator, both do not provide a way to quickly resolve the dispute but assign the parties’ responsibility to the dispute. <https://www.viac.vn/thu-tuc-trong-tai/phuong-thuc-giai-quyet-tranh-chap-thay-the-adr-la-gi-a52.html> [accessed 28 August 2020].

¹³ Decree 63/2011/ND-CP of the Government detailing and guiding a number of articles of the Law On Commercial Arbitration, dated 28 July 2011, https://dragonlaw.vn/news_detail.asp?new=800&decree-no.63/2011/nd-cp-detailing-and-guiding-a-number-of-articles-of-law-on-commercial-arbitration.htm [accessed 18 January 2021].

to provide guidance on certain provisions of the LCA, passed on 20 March 2014 (“Resolution 01/2014”).¹⁴ The Resolution 01/2014 is considered as one of the most important components of the current arbitration regime in Vietnam as it provides the Supreme People’s Court explanation on implementation of numerous vague legal provisions on validity of arbitration agreement and grounds for setting aside arbitral award. It clarifies the supervisory and supporting role of the courts over arbitration (including foreign arbitration seated in Vietnam). However, the implementation of the arbitration activities in practice still has many shortcomings.

First of all, it is observed that the provisions of the LCA are still not consistent with the provisions of some other legal areas; there is no effective mechanism to control the court’s rejection of an arbitral award.¹⁵ Despite the fact that the Supreme People’s Court has enacted a special Decision 01 guiding the subordinate courts to apply the LCA,¹⁶ the courts in Vietnam have not been fully supporting the promotion of arbitration.¹⁷ The courts still interfere with the merits of the arbitral awards.¹⁸ Besides, there is a delay in the enforcement of the arbitration judgement and the ratio of the application form for an arbitration judgement is not high, reducing the attraction of the arbitration operation.¹⁹ This has seriously jeopardized the role and effectiveness of the arbitration process. The lack of full supports from the courts is considered as one of the most principal issue for development of the national arbitration system.

Secondly, although the LCA has transplanted many rules under the UNCITRAL Model Law on International Commercial Arbitration, Vietnam is not yet recognized by the international

¹⁴ Nghị quyết số 01/2014/ND-HĐTP, <https://thuvienphapluat.vn/van-ban/Thuong-mai/Nghi-quyet-01-2014-NQ-HDTP-huong-dan-Luat-Trong-tai-thuong-mai-234283.aspx> [accessed 18 January 2020].

¹⁵ Hoa D. Q. (2018), ‘Luật Trọng tài thương mại năm 2010: những bất cập và kiến nghị hoàn thiện’ (Law on Commercial Arbitration 2010: inadequacies and recommendations for improvement), <http://lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=207443> [accessed 28 August 2020].

¹⁶ Net L., Choong-il S. (2018), ‘Developments in Commercial Arbitration in Vietnam’, *East Asian Law*, 79, pp. 257-286.

¹⁷ Duong V. A., *supra* note 08.

¹⁸ Hau D. V. (2019), ‘Bàn về sự phân biệt giữa Tòa án và trọng tài’ (Discuss the distinction between court and arbitration), <https://www.tapchitoaan.vn/bai-viet/phap-luat/ban-ve-su-phan-biet-giua-toa-an-va-trong-tai> [accessed 23 September 2020].

¹⁹ Dung N. M., Trang N. T. T. (2015), ‘Thực trạng sử dụng trọng tài thương mại tại Việt Nam: Một số giải pháp nâng cao sức hấp dẫn của trọng tài’, <http://dzungsrt.com/wp-content/uploads/2015/03/20150831-Du-thao-Tham-Luan-tong-ket-thi-hanh-LTTTM-updated-clean.pdf> [accessed 28 August 2020].

community as a country following the UNCITRAL Model Law.²⁰ This prevents international businesses from accessing arbitration in Vietnam, as they would prefer having the arbitration proceeding in a jurisdiction that adopts the UNCITRAL Model Law to avoid misunderstanding the procedural rules. Since arbitration is more often chosen for dispute settlement in international commercial transactions this can be considered as a limitation that prevents the development of international arbitration in Vietnam.

Thirdly, the number of arbitration centres in Vietnam is established relatively high in comparison with other countries in the region. According to a report of the Ministry of Justice, by the end of 2018, there were 22 arbitration centres in Vietnam;²¹ the biggest and the most reputable one is VIAC (established in 1993), which is also relatively small in size compared to other regional arbitration centres.²² It is observed that the facilities of the majority of the arbitration centers in Vietnam have not met the requirements to serve the arbitrators' activities. The management and administration of some centres lacks professionalism and effectiveness. Meanwhile, the arbitration activities can gain popularity amongst the business community only upon receipt of common acknowledgement of their impartiality, fairness, and efficiency. One should not ignore that arbitration is a new alternative dispute resolution method in Vietnam, which has been developed upon adoption of a market economy in the 1990s. Therefore, acknowledgement and awareness of individuals, agencies, organizations, and especially the business community, is still incomplete.

Last but not least, the awareness of the Vietnamese businesses of the ADR is still limited. The state management of ADR activities has not been given due attention to solving problems and difficulties in the organization and operation. To date, training on ADR in general and arbitration in particular is rather limited. Vietnamese law does not have regulations for training a "mediation profession" and

²⁰ EuroCham, 'Hòa Giải Thương Mại', https://www.viac.vn/images/Resources/Legal-Research-and-Study/200708_Hoa-giai-thuong-mai-EUROCHAM/200805_Hoa-giai-thuong-mai_Whitebook-Eurocham.pdf [accessed 28 August 2020].

²¹ Kien L. C. (2020), 'Phương thức giải quyết tranh chấp kinh doanh bằng trọng tài thương mại trong hội nhập kinh tế quốc tế' (Methods of settling business disputes by commercial arbitration in international economic integration), *the Financial Journal*, the 1st period of May, <http://tapchitaichinh.vn/tai-chinh-kinh-doanh/phuong-thuc-giai-quet-tranh-chap-kinh-doanh-bang-trong-tai-thuong-mai-trong-hoi-nhap-kinh-te-quoc-te-328420.html> [accessed 05 October 2020].

²² VIAC's Annual Report (2018), <https://www.viac.vn/en/annual-report.html> [accessed 28 August 2020].

“arbitration profession”. According to Professor Tran Viet Dung of Ho Chi Minh University of Law, the current training institutions do not have their own subjects, ADR textbooks, short training periods, and the combination of “learning with practice” is just a formality.²³ To promote the private settlement regime like arbitration, it is expected that the peoples in the community appreciate the roles and value of arbitration.

3. Overview of the development of arbitration system in Korea

Today, with its fast-growing economy, Korean companies are among the largest in the world using international arbitration.²⁴ In 2017, South Korea ranked 6th on the list of nationalities of the parties to the arbitration of the Hong Kong International Arbitration Center (“HKIAC”) and 9th in the top foreigners using Singapore International Arbitration Center (“SIAC”). In 2016, the Korean parties participated in 82 new International Chamber of Commerce (“ICC”) arbitration cases.

Korea’s legal system has been considered as pro-arbitration. Enacted in 1966, the Korean Arbitration Act substantially incorporates the 1985 UNCITRAL Model Law on International Commercial Arbitration, including the latest amendments adopted in 2006. The Arbitration Act also incorporates the New York Convention on the recognition and enforcement of awards, to the extent the award was made by another contracting state and relates to a commercial dispute as defined by Korean law.²⁵ Korea is also a party to the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) as well as a number of bilateral investment promotion and protection agreements that assure enforcement of arbitral awards relating to investor-state disputes. Further, the Korean Commercial Arbitration Board (“KCAB”), Korea’s sole arbitral institution, has been strongly supported by the Korean judicial system. The Korean courts would always recognize and enforce the arbitral decisions, unless there is a serious breach of the public order. This policy has contributed significantly to the promotion of the reputation of KCAB nationally and internationally.

²³ Ibid.

²⁴ Legal Briefings (2018), ‘A View From Seoul: How Is Arbitration Viewed In Korea And How Is It Changing?’, <https://www.herbertsmithfreehills.com/latest-thinking/a-view-from-seoul-how-is-arbitration-viewed-in-korea-and-how-is-it-changing> [accessed 28 August 2020].

²⁵ Ibid.

The latest effort to promote Seoul as an international arbitration centre began with the launch of the Seoul International Dispute Resolution Centre in 2013 and amendments related to the Arbitration Act and Rules KCAB in 2016.²⁶ The legal basis for promoting arbitration in Korea is provided in the Arbitration Sector Promotion Act. Enacted on December 27, 2016, the Act provides a legal framework to promote Korean arbitration by mandating the development of infrastructure such as dispute settlement facilities and arbitration institutions.

To achieve this goal, in September 2016, Korea further amended the Arbitration Act to reflect the Model Law regime. Key modifications include expanding the scope of arbitrable disputes to include non-monetary disputes and amending the interim remedial regime to allow courts to enforce Korean judgments. The Arbitration Act also provides flexibility for parties to choose arbitration for non-traditional disputes, such as disputes on unfair trade practices or intellectual property rights.²⁷ Other important modifications include expanding the court's ability to gather evidence with the help of Korean courts and simplifying arbitration proceedings. Furthermore, the recognition and enforcement of arbitral awards now require only court orders, significantly reducing the time and costs involved in the process. These amendments demonstrate that the government promotes increased cooperation between Korean courts and tribunals, and builds on the Korean judiciary's supportive, non-interference stance.

In December 2016, Korea enacted the Arbitration Sector Promotion Act to further encourage the development of the arbitration industry, setting up a basis to attract domestic and foreign arbitrators with the aim of making Korea one of the top 5 countries with the most reputable international dispute settlement in the world.²⁸

The Ministry of Justice has been assigned by the government to support and promote the arbitration system in Korea. The Ministry has taken efforts to research and develop a five-year plan for promotion of the arbitration industry.²⁹ Based on the development plan, it can be seen

²⁶ Ibid.

²⁷ Kim D. H. (2012), 'A Review on Expedited Procedures in International Arbitration -Focusing on the Revised International Arbitration Rules of the Korea Commercial Arbitration Agency', *Hongik Law*, 13(3), pp. 691-716.

²⁸ Ministry of Justice of Korea (2018), 'Basic Plan for Promotion of Arbitration Industry 2019-2023'.

²⁹ Arbitration Industry Promotion Act, *중재산업 진흥에 관한 법률*, Enforcement 2017. 6. 28., Act No. 14471, 2016. 12. 27, enacted.

that Korea has identified the significance of establishment, operation, and promotion of dispute settlement facilities and research projects, such as research and international cooperation, to set the foundation for developing the arbitration industry. Effective implementation of the development plan is considered as strategically important to turn Korea into a world-class international arbitration centre.³⁰

4. The Korean government's commercial arbitration development plan

4.1. Strategic considerations upon designing the commercial arbitration development plan

To achieve the objective of making Korea one of the world's leading international arbitration centres, it is of high significance to identify the problems and weaknesses of the national arbitration system. The Korean Ministry of Justice has defined several outstanding challenges that the Korean arbitration industry must overcome to achieve the objective of the arbitration development policy.³¹ One of the most important challenges is the weak arbitration base sufficient to serve international arbitration. Despite the development of arbitration practices in recent decades, it is viewed that high-quality human resources in the field of dispute settlement are lacking. Korea does not have many good lawyers to participate in the field of arbitration. In addition, domestic arbitrators still do not have a high enough understanding of international arbitration trends, and the sharing of information is still limited. The research and development needed to complete the legal system of Korean arbitration industry is still limited and has not been standardized. Another weakness is that the Korean arbitration industry is not yet competitive internationally. The competitiveness of Korean arbitration industry is still low due to the inability to provide differentiated services. The operation of the dispute settlement agency is not flexible and does not have much experience in handling disputes.

Since 2019, the Ministry of Justice has launched four main strategies to develop the domestic arbitration industry. The first strategy is to strengthen the foundations of the arbitration industry. That means the development of facilities as well as high quality arbitration personnel. The second strategy is to enable domestic

³⁰ Shin K.-J. (2017), 'A Study on the main Characteristics of KCAB's revised International Arbitration Rules', *Korea International Commerce Review*, Vol. 32, No. 03, September 2017, pp. 3-24.

³¹ Ministry of Justice of Korea (2018), *supra* note 28.

arbitration to raise awareness of the arbitration system of Korean domestic firms. The third strategy is to ensure the competitiveness of the arbitration industry and direct Korean arbitration to settle disputes at a world class level. The fourth strategy is to expand international arbitration in Korea, to attract foreign enterprises to use Korea to settle disputes. This strategy is intended to assist in attracting cooperation among countries to enhance the reputation of the Korean arbitration industry.

4.2. Four strategies promoting Korean commercial arbitration industry

a. Strategy 1: Strengthening the foundation of the arbitration industry

In this strategy, the Korean government sets goals such as nurturing arbitrators. Expanding arbitrator staff in fields such as education and association with universities. At Korean law universities, holding seminars with attendance of conciliation specialists for law school students to study. Practical courses on disputes in Korea and internationally are conducted to help Korean students gain exposure to the international legal environment while still studying in the university. The government also sets up a scholarship fund to invest in international dispute settlement research. Participants are master's and doctoral students at universities in Korea. An example is the Korean BK21 scholarship for dispute resolution.³²

The Korean government also encourages programs to invite leading Korean experts to teach in law faculties. In addition, the Korean government also encourages vocational classes and professional dispute settlement classes for those working in enterprises to create opportunities for everyone to learn about dispute settlement.³³ The government encourages schools and professional training institutions in professions such as dispute conciliation and in-depth training for conciliation in areas such as business, construction, and maritime information technology. The Korean government's proposed developmental direction also enhances the convenience of law learners and aims to reduce costs through the opening of online courses. In addition, the Korean government also conducts education for state employees. This helps state employees understand more

³² DoS.P.(2018), 'Astradeincreases,disputeresolutionprofessionalswillbecomemoreimportant', <http://www.kookje.co.kr/news2011/asp/newsbody.asp?code=00&key=20180329.22029012413> [accessed 28 August 2020].

³³ Kim B.-T., Sohn, T.-W. (2012), 'Study on the features and development trends of the commercial arbitral institution in Korea', *Law Research*, 53(2), pp. 245-264.

about the country's conciliation laws. More specifically, in 2020, the Korean National Official Human Resource Development Center was established and created training courses on dispute settlement by arbitration.

The Korean Ministry of Justice also proposed to create domestic arbitration evaluation systems. This arbitration rating system helps to improve the quality of arbitration in Korea and also builds curriculum and writes law textbooks.³⁴ The Ministry of Justice coordinates with arbitration associations to review the criteria for evaluating arbitration ratings and enforcing the arbitration ranking system by 2021. Arbitration agencies for dispute settlement not only focus on training for arbitrators but also training for the arbitrator's assistants. The staff of the International Arbitration Center are also trained to become professional arbitration staff. Examples of roles that need to be trained are the secretary of the conciliation team, the arbitration meeting minutes drafting staff, the results assessment assistant, and the document receiving staff in each step and dispute settlement operation process.³⁵ The Korean government emphasizes that these support staff are also very important so the Korean Ministry of Justice is always interested in providing support programs to help improve the quality of the arbitration international center.

In addition, in this strategy, it is also important to promote the effectiveness of dispute settlement by enterprises so that enterprises can clearly understand the objectives to improve the enterprise's perception of the importance of commercial arbitration. The Korean international arbitration agency needs to promote services of providing legal information to enterprises.³⁶ The specific action is to publish the newsletter and provide the latest conciliation information by mailing service to the business and according to the Korean Ministry of Justice; this method will be carried out in 2021. Another way to improve the quality of Korean commercial arbitration is to establish a comprehensive information management system. The information management system is one of the important tools, and the Korean government also focuses on investment. Because setting

³⁴ Lee W. J., Kim S. R. (2012), 'Comparative analysis of small sums and expedited procedures between London Maritime Arbitrators Association (LMAA) and Korea Commercial Arbitration Agency (KCAB) in maritime arbitration', *Korean Maritime Law School Board*, 34(1), pp. 263-290.

³⁵ Shin K.-J. (2017), *Supra* note 30, pp. 3-2.

³⁶ Suk K. H. (2012), 'Amendment Direction of Arbitration Law -Focusing on the Aspect of International Commercial Arbitration', *Seoul National University Law School*, 53(3), pp. 533-588.

up a comprehensive and diversified information management system is effective in providing a lot of data to monitor survey results on international disputes. A good and reputable information system will help in the improvement of judgment-making results of past cases. More specifically, the decisions of international arbitration which have been widely announced are also systematic. The international dispute database information management system will be effective so that Korean arbitrators can have more information and accommodation to improve their capacity, and most importantly, provide the most accurate dispute settlement.

The Korean government encourages regular consultations and meetings between academic institutions such as the Korea Commercial Arbitration Association, the Korean dispute settlement association, the international dispute settlement association in Korea, and the lawyer's association and experts in the dispute settlement industry. The Korean government encourages the organization of competitions for international dispute conciliation content and focuses on academic research in law. Investment activities on research improve the qualifications of arbitrators, and lawyers are one of the most important and top factors. The effects of the human factor development investment will be effective in supporting the development of the international arbitration industry.

b. Strategy 2: Activation of domestic arbitration activities

The main goals in this strategy are to promote the settlement of arbitration disputes to enterprises and people in Korea. The Korean government encourages the works such as increasing the information promotion about laws and events related to conciliation, disputes and promoting the role of Korean commercial arbitration. The promotional methods are using internet media, SMS, and the establishment of the Korean dispute settlement center website.³⁷ The websites are often very attractive with quick updates of information, providing knowledge about dispute law, and many different languages to help international enterprise customers in the world to have an easy access to Korean arbitration centers. A typical example is the Korean arbitration center which has published documents on international dispute law by arbitration in seven main languages: Arabic, Chinese,

³⁷ Kim J. (2020), 'Lawyer, let's become the BTS of international arbitration!', <https://www.legaltimes.co.kr/news/articleView.html?idxno=51058> [accessed 23 September 2020].

English, German, Japanese, Vietnamese, and Korean.³⁸

In addition, to raise awareness about the effectiveness of arbitration, the Korean government also organizes contests and visual tours, creating opportunities for people to learn about commercial arbitration services. Articles related to Korean trade dispute settlement are regularly updated and these action strategies will be implemented in 2022.

Standard contracts with terms of use of arbitration to settle disputes are made available and posted on the website of the Korean Arbitration Association. Contract forms are available in English and Korean in many other fields and allow free downloads. In terms of the model contract provided by the arbitration centers, there is a dispute settlement clause when a conflict occurs; the arbitration method to settle is clearly noted in the valid sample results of promoting arbitration dispute settlement.³⁹ This is one of the very smart strategies of the Korean government and the Korean arbitration center because it has created convenience for enterprises in drafting contracts. And more than that, it is effective for widely promoting among enterprises regarding the importance of dispute settlement by commercial arbitration.

From 2023 onwards, the Korean government will take action to improve the convenient access to the arbitration process for businesses. That is to help people to better understand the role of the arbitrator in resolving disputes. The action strategies promoted by the Korean Ministry of Justice include publishing and distributing various guidebooks and manuals on the arbitration system.⁴⁰ The arbitration proceedings handbook and the arbitration award enforcement handbook and arbitration judgements in advanced countries will be edited. Korea will invest in developing a mobile application that allows users to check the status of a dispute settlement by arbitration. Moreover, other information about arbitration law will be accessible to everyone easily in the future through a phone app. This proves that the Korean government has taken advantage of the popular

³⁸ The 2016 Rules are available in the following 7 languages, http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub020101&CURRENT_MENU_CODE=MENU0008&TOP_MENU_CODE=MENU0007 [accessed 28 August 2020].

³⁹ KCAB, 'Standard contract', Ex: AGENCY AGREEMENT: *Article 16. Settlement of Dispute and Governing Law: Any dispute arising out of or in connection with this contract shall be finally settled by arbitration in Seoul in accordance with the Arbitration Rules of the Korean Commercial Arbitration Board*, http://www.kcab.or.kr/html/kcab_kor/data/data_list02.jsp [accessed 28 August 2020].

⁴⁰ Kim T., & Cha K. (2012), 'A review on the recent revisions of the Korean Commercial Arbitration Board (KCAB) arbitration rules', *Intervention Studies*, 22(1), pp. 3–22.

Korean trend of using information technology and captures the public's sentiment about convenience. This correct policy will help Korean arbitrators to be easily and effectively disseminated in the country so that people will be encouraged to use arbitration to settle international disputes.

c. Strategy 3: Securing competitiveness in the arbitration industry

In the strategy of ensuring fair competition in the arbitration industry, the main goal is to turn Korea into a world-class dispute settlement facility. The government promotes the development of quality arbitration centers by improving the facilities and security system of the arbitration center in Seoul and establishing professional secretaries of the Korean commercial arbitration agency

In this strategy, the government also encourages strengthening the capacity to handle disputes and improving the professionalism of arbitrators and the entire commercial arbitration body. Government agencies have set up an advanced legal education system to enhance the Korean commercial arbitration panel's capacity to handle cases. Korean arbitration centers recruit experts in the field of international arbitration to work in Korean commercial arbitration, always seeking to diversify the options for clients who want to use arbitration to settle disputes. The government encourages fostering new areas of arbitration related to different disciplines. Currently, there are many areas that Korea is interested in, such as disputes in the fields of information technology, entertainment, media content, etc. The government shows serious interest in all the areas with the right development orientation.

Market research and analysis of the world's international dispute settlement cases are also studied. Exchange programs between arbitrators in Korea and international arbitration were organized by the government arbitration agencies. Meetings were conducted between businessmen and experts in the arbitration industry.⁴¹ In 2019, the ISDS Northeast Asia conference was successfully held.⁴² The objective of the seminars is to enable Korean arbitrators to be more developed with contact and experience through exchanges with international dispute handling agencies of advanced countries.

⁴¹ Choi S. (2012), 'Determination of the law governing international commercial arbitration proceedings', *Gachon Law*, 5(1), pp. 473-500.

⁴² Kim Y. (2019), 'Ministry of Justice dreams of a power in arbitration', <https://www.weeklytrade.co.kr/news/view.html?section=1&category=3&no=48490> [accessed 28 August 2020].

d. Strategy 4: Expansion of international arbitration attraction

The main content of the strategy to attract international arbitrators is to attract the attention of international arbitrators to Korea. The specific measure is the Ministry of Justice and the Korean International Arbitration Association and the strategic committees to promote job referrals to foreign experts. The aim is to create opportunities for foreign experts to come to Korea to work in the field of international dispute settlement. This helps to create diversity in international arbitration in Korea.

In addition, the Korean government supports the expansion of operations of representative offices of Korean commercial arbitration services in other countries such as in Los Angeles, the US; Hanoi, Vietnam; and Shanghai, China.⁴³ The Korean government and the Ministry of Justice will check the operations of their overseas offices and evaluate their performance on a regular basis to check the effectiveness as well as gather information through arbitration offices abroad. In addition, the Korean government as well as the arbitration agencies of Korea hold briefings, discussing topics on which countries are likely to cause international disputes.⁴⁴ The countries that are prone to disputes and need conciliation become regular topics of discussion to help capture the best international information and current situation.

The Korean government has also enhanced the position of the arbitration center by hosting international arbitration events such as the dispute arbitration festival in Seoul in 2019 and Korean referees participating in the festivals and foreign arbitration events. The Korean arbitrators are encouraged to participate and promote co-chairing the various meetings of the ICC international commercial Arbitration Tribunals, joining the international lawyer association and the foreign arbitration agencies.⁴⁵ Advertisements and interviews on dispute settlement programs from international arbitration experts and content on effective roles of national arbitrators will be published in domestic and international journals to help promote

⁴³ Korean Commercial Arbitration Board (KCAB), <http://www.kcabinternational.or.kr/main.do> [accessed 28 August 2020].

⁴⁴ Tu B. (2017), 'Doanh nghiệp Việt chưa giải quyết tranh chấp bằng trọng tài thương mại' (Vietnamese enterprises have not yet resolved their disputes by commercial arbitration), *Vietnam Financial Times*, <http://thoibaotaichinhvietnam.vn/pages/kinh-doanh/2017-07-13/doanh-nghiep-viet-chua-giai-quyet-tranh-chap-bang-trong-tai-thuong-mai-45433.aspx> [accessed 23 September 2020].

⁴⁵ Eun-Kyung Y. (2013), 'Remarks on sanctions for violation of the arbitrator's obligations: Focusing on the case of arbitrators at the Korea Commercial Arbitration Board', *Kyunghee Law*, 48(3), pp. 189-212.

effectively the use of arbitration in dispute settlement. The Korean government implements a strategy to maximize the promotional effect of arbitration by participating in large-scale events that support conciliation sessions during the annual conference in Seoul.⁴⁶

The Korean government establishes and operates arbitration information systems so that people can look it up online and can update other laws such as the latest arbitration law or additional amendments to arbitration laws. The arbitration commercial services are publicly available and updated to make it possible for everyone to comment. The main purpose of these jobs is to build and develop Korean international arbitration that could be more developed in 2023.

5. Some recommendations and strategy for Vietnam

Through analysis of the development of Korean arbitration system, it can be observed that Vietnam has many issues like that of Korea. Both Korea and Vietnam lack senior human resources (lawyers, trade solicitors), the international arbitration base. During the development process in the 1980s-1990s, there was a lot of foreign private and private investment in Korea, however, the foreign parties do not prefer Korea as a place of arbitration. This is pretty similar to the current status of Vietnam, there are increasing international commercial disputes but most of the big arbitration cases are settled by the overseas arbitration, such as ICC, SIAC, HKIAC. Therefore, it is necessary for Vietnam to consider the model and policy to develop commercial dispute settlement by international arbitration. If Vietnamese arbitration industry is well developed, it will give the Vietnamese companies one more option, when a dispute occurs. In addition, it also saves costs and time for Vietnamese companies.

Currently, the Government of Vietnam is also actively listening and receiving comments on issues of building and improving the legal and institutional system related to investment and business activities. The Vietnamese government is listening to Vietnamese experts and lawyers from Vietnam business forums (VBF), international organizations, and business associations such as VCCI, KOCHAM, EUROCHAM, AMCHAM. Vietnam has also taken many steps to join international dispute settlement provisions.

⁴⁶ Kim J. (2020), *Supra* note 37.

From the above analyses, we would like to give some recommendations to improve commercial arbitration in resolving commercial disputes in Vietnam as follows:

Firstly, Vietnam must strengthen the legal framework so that arbitration decisions are enforced efficiently. The Vietnamese judges must see arbitration not as a barrier to courts judicial practice but as alternative means to ensure the development of state of law. The courts must offer strong support to arbitration practices. The court must not only refrain from interfering with the arbitral award, but also support enforcement of interim measures by the Arbitration Tribunals. This is fundamental for development of trust of the business community in the arbitration industry.

Secondly, enterprises need to equip themselves with better knowledge about commercial arbitration. They must understand the impacts and requirements of arbitration proceedings. Furthermore, they must incorporate a proper content for the arbitration clause in their contract so that it can be enforced when disputes arise.

Thirdly, in order for the arbitration mechanism to become an indispensable element in commercial activities in the coming time, arbitration centers in general and VIAC in particular still need to continuously assert their adjudicating capacity. The centers of talent need to move forward not only to be a reliable support for Vietnamese enterprises but also to be the choice of foreign enterprises in international transactions.

Fourthly, it is necessary to further improve the qualifications and capacities of arbitrators, increase training and further training in professional skills in arbitration proceedings, and at the same time, take advantage of the state's support in funding headquarters.

Fifthly, the State should pay more attention in propagating and disseminating the arbitration law; international cooperation in the field of arbitration; guide the training and fostering of arbitrators; strengthen inspection, examination and handling of arbitration law violations.

6. Conclusion.

Commercial arbitration is one of the four basic forms of commercial dispute settlement regulated in most countries around the world as well as in Vietnam. To satisfy the requirements of international

integration, Vietnamese arbitration industry must also be developed. Vietnam can learn many experiences from Korea in developing its arbitration system. Korea has developed specific institutions and strategies to promote arbitration. The Seoul International Dispute Settlement Centre was established in 2016. to promote development in arbitration. In addition, the Arbitration Committee of Korea (“ACK”) provides funds to research on arbitration law in Korea, law in the world, which helps to provide a solid theoretical base for development of legal framework on arbitration. The government and the Ministry of Justice also organize domestic and international sessions and international arbitration events to give the opportunity to exchange and learn from experience for the arbitrators.

Last but not least, the Korean government also opened arbitration branches of representative offices in other countries such as in Los Angeles, USA, Shanghai, China, and Hanoi (Vietnam) to promote the Korean international arbitration practices. These practical actions show that the Korean government is very interested in investing in preferential policies and developing the arbitration industry.

To further promote the advantages of commercial arbitration in Vietnam, it requires the attention and efforts of all counterparts, including the business community, universities and research institutions, courts , and relevant ministries. By doing this, the arbitration practices can be developed in accordance with international law and practice, thereby creating a solid legal foundation for enterprises to enter the integrated environment. ●

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