



VILAF
VIETNAM INTERNATIONAL LAW FIRM

Exclusive jurisdiction of Vietnamese courts over disputes relating to rights over real properties in Vietnam

The concept of “jurisdiction” usually refers to a court’s legal power and authority to hear and decide on a case. To say that a court has exclusive jurisdiction means that the law considers such court as the sole court where a dispute can be submitted for resolution; and no other court has the jurisdiction to hear and determine such case, even both parties purport to submit to it.

The exclusive jurisdiction of Vietnamese courts was regulated for the first time in 2004 Civil Procedure Code which has currently been repealed by 2015 Civil Procedure Code (“2015 CPC”). Under Article 470.1 of 2015 CPC, a civil case with a foreign element (*vụ án dân sự có yếu tố nước ngoài*) shall be subject to the exclusive jurisdiction of Vietnamese courts in three following circumstances: First, such case involves the rights over real property in the territory of Vietnam (Article 470.1.a of 2015 CPC). Second, it is a divorce case between a Vietnamese citizen and a foreign citizen, or a person of no nationality, if both of them reside, work or live on a long-term basis in Vietnam (Article 470.1.b of 2015 CPC). Third, it is a civil case where the parties may select Vietnamese

courts for resolution in accordance with Vietnamese law or an international treaty to which Vietnam is a member, and the parties agreed to select a Vietnamese court (Article 470.1.c of 2015 CPC).

This paper, however, will focus on the exclusive jurisdiction of Vietnamese courts in the first circumstance (i.e., civil cases relating to rights over real properties in Vietnam) as stipulated in Article 470.1.a of 2015 CPC only. In particular, it will discuss about the ambiguity of the Article 470.1.a, examine the current views of the local courts thereon via practical cases before making suggestions in terms of how this article should be understood and applied in practice.

The views and opinions expressed in this article are those of the author and do not necessarily reflect the views and opinions of the author’s law firm.

1. Ambiguities of Article 470.1.a of 2015 CPC

According to Article 470.1.a of 2015 CPC (or Article 411.1.a of 2004 Civil Procedure Code, previously) “*The following civil cases with a foreign element fall under the exclusive jurisdiction of Vietnamese courts: (a) A civil case involving rights over property being real property in the territory of Vietnam [...]*” Based upon the examination of the wordings of this article and relevant regulations, three key points below are unclear:

Firstly, whether the provision of 2015 CPC on the exclusive jurisdiction of Vietnamese courts is applied against foreign courts only or it extends to both foreign and domestic arbitration as well. The report of Institute of Judicial Science (*Viện khoa học Xét xử*) on clarifying and adjusting the draft of the resolution of Council of Judges of Supreme People’s Court guiding a number of articles on Commercial Arbitration Law dated 31 December 2014 mentioned about two following views on the exclusive jurisdiction of Vietnamese courts under Article 411 of 2004 Civil Procedure Code (which is quite similar to Article 470 of 2015 CPC): The first view is that the regulation on exclusive jurisdiction (under 2004 Civil Procedure Code) draws a distinction between the jurisdiction of Vietnamese courts and that of foreign courts and arbitration. Thus, cases falling under exclusive jurisdiction of Vietnamese cannot be settled by foreign courts and arbitration regardless of such arbitration is international or domestic. However, the opponents believe that the exclusive jurisdiction is applied against foreign courts and foreign arbitration only, excluding domestic arbitration. Unfortunately, neither of these views has been enshrined in the laws or official guidance. Thus, whether the regulation on the exclusive jurisdiction of Vietnamese courts is applied against foreign courts only or extends to both foreign and domestic arbitration as well is still a question not yet answered.

Secondly, in the context of Article 470.1.a of 2015 CPC, which rights in particular can be considered as “*the rights over property being real property*”? More specifically, whether these rights (a) only include those regulated in Articles 158 and 159, 2015 Civil Code comprising (i) ownership rights (*quyền sở hữu*) embodying the rights of an owner to possess (*quyền chiếm hữu*), use (*quyền sử dụng*) and dispose (*quyền định đoạt*) of the property of the owner in accordance with the law and (ii) other rights with respect to property (*các quyền khác đối*

với tài sản) including rights to adjacent immoveable property (*quyền đối với bất động sản liền kề*), usufruct (*quyền hưởng dụng*) and surface right (*quyền bề mặt*) or (b) extend to other relevant rights (e.g., rights of shareholders/capital-contribution members to transfer their shares/capital contribution in a real estate company or other contractual rights relating to immoveable assets) as well?

Last but not least, how the word of “involving” in the context of “cases involving the rights over property being real property” should be understood and interpreted in practice? Should it mean any case relating to any right over a real property regardless how distant such relation is or should it be limited to civil cases in which the subject of the dispute (*đối tượng của vụ tranh chấp*) is the ownership rights or other rights to real properties as set forth in Articles 158 and Article 159 of 2015 Civil Code only?

While the above wordings of the law are unclear, there has been no official guidance on these issues until now. Therefore, as a matter of practice, how this Article 470.1.a should be understood and applied in practice will heavily depend on the subjective viewpoint of the local courts.

2. Current approach of the local courts on the exclusive jurisdiction under Article 470.1.a of 2015 CPC

In the absence of guidance on how this provision needs to be interpreted and applied, observing the court’s view in practical cases seems to be the most feasible option to find out the answer for the above unclear points. Accordingly, based upon the published database, the following cases seem to be the most relevant ones which to some extent can help to clarify the ambiguities above.

Case 1: Decision No. 33/2016/QDPT-KDTM dated 8 August 2016 of High People’s Court in Ho Chi Minh¹

On 15 May 2007, SML Company and BCCC² Company signed a capital contribution transfer agreement (the “SPA”) under which SML Company shall transfer all its capital contribution in a joint venture company which was established and operating under the laws of Vietnam and had part of its charter capital being contributed in form of (i) the land use right to the land parcel of 2,638 square meters for 40 years and (ii) a building having the address at 61 Nguyen Du Street, District 1, Ho Chi Minh City.

1 Đỗ Văn Đại. (2017). *Pháp luật Trọng tài Thương mại Việt Nam*. Nhà Xuất Bản Hồng Đức – Hội Luật Gia Việt Nam.

2 In the cited source, the name of this company is referred inconsistently, so for ease of reference and consistence the author in this article uses the name of “BCCC”.

BCCC Company, however, failed to comply with its obligations to obtain necessary licenses to complete the transaction under the SPA. SML Company then brought the case to SIAC and claimed for USD50million as damages due to the contractual violation of BCCC Company. On 28 May and 24 July 2012, the tribunal issued the awards No. 39 and 59 respectively in favor of SML Company.

After the issuance of the arbitral awards, SML Company sought for recognition and enforcement of such awards in Vietnam which was rejected by Ho Chi Minh People's Court at the first-instance level. At the appeal trial, High People's Court in Ho Chi Minh affirmed the first-instance decision by relying upon Article 470.1.a of 2015 CPC on the exclusive jurisdiction of Vietnamese courts in resolving civil cases involving the rights to real property in Vietnam.

Case 2: Decision 28/2020/QDKDTM-PT of High People's Court in Ho Chi Minh³

Ms. Oh (the “**Seller**”), a Korean citizen, was the sole owner of P One Member Limited Liability Company which was established and operating under the laws of Vietnam (the “**Company P**”) and owned the land use right to the land parcel of 10,000 m2 together with buildings, other construction works thereon.

On 4 April 2014, the Seller and S Limited Liability Company (the “**Buyer**”) signed a capital transfer agreement (the “**SPA**”) under which the Seller shall transfer the Buyer all her capital contribution in Company P in exchange for USD3.5 million. The parties further agreed that any dispute arising out of the SPA will be resolved by Seoul District Court in Korea.

Around 2016, due to the Buyer failed to comply with its payment obligations under the SPA, the Seller filed a lawsuit against the Buyer in Seoul District Court (Korea) which then issued a judgement in favor of the Seller. After the issuance of the judgement of Korean court, the Seller filed an application for recognition and enforcement of the said judgement in Vietnam, which was resolved by People's Court of Long An Province at the first-instance level in 2019 and People's High Court in Ho Chi Minh at the appeal level in 2020.

However, while Long An Province Court seemingly opined that the transfer of capital contribution un-

der the SPA was in nature the transfer of land use rights and assets attached to land of Company P (but not capital contribution transfers), High People's Court in Ho Chi Minh reasoned that the capital contribution under the SPA was related to the land use right and assets attached to the land which is classified as “*immovable properties*” under the laws of Vietnam. Accordingly, pursuant to 470.1.a of 2015 Civil Procedure, this case was under the exclusive jurisdiction (*thẩm quyền riêng biệt*) of Vietnamese courts, but not Korean courts. The Seller's application for recognition and enforcement of the foreign court judgment in Vietnam was therefore rejected.

Based upon the above cases, the following conclusions can be made in terms of the current approach of Vietnam courts about its exclusive jurisdiction under Article 470.1.a of 2015 CPC:

First, while whether or not the exclusive jurisdiction of Vietnamese is applied against domestic arbitration is still a question yet to be answered, these cases clearly show that the exclusive jurisdiction of Vietnamese courts under the Vietnamese civil procedures codes does apply against both foreign courts and foreign arbitration.

Second, Vietnamese courts have currently taken a very broad approach in interpreting and applying Article 470.1.a (i.e., civil cases involving the rights over real properties in Vietnam). Accordingly, any case relating to any right pertaining to a real property whether directly or indirectly could be considered as the civil case involving the rights over the real property in Vietnam, including share/capital contribution transfer in a company owning a real property in Vietnam.

Notably, the facts show that the above approach has seemingly been applied quite consistently amongst competent courts in Ho Chi Minh. For example, in an appeal case between P&DK Company and Lucky Vietnam Construction Company in 2019, the court reasoned that “*since the purpose of P&DK and Lucky Vietnam Construction when establishing VKH, a joint venture company, was to implement the residential housing project of Saigon-Castle, the dispute between these companies was a civil case pertaining to properties being the immovable within the territory of Vietnam. Therefore, pursuant to Article 470.1.a of 2015 Civil Procedure Code, this dispute falls under the exclusive jurisdiction of Vietnam.*”⁴ Back to 2012, in another dispute on the assignment agreement relating to capital contributi-

³ <https://congboanan.toaan.gov.vn/2ta507307t1cvn/chi-tiet-ban-an>

⁴ https://htpldn.moj.gov.vn/SMPT_Publishing_UC/TinTuc/PrintTL.aspx?idb=2&ItemID=2&I=/noidung/tintuc/Lists/Cacvuviectvuongmacph

on in the form of land use right, the Appellate Court in Ho Chi Minh in its Decision 86/2012/QDPT-KDTM dated 20 February 2012 did conclude the same when contracting parties opted to settle their dispute under a the capital contribution agreement via foreign arbitration.⁵

3. Is the above approach of the local courts on exclusive jurisdiction appropriate?

While the wordings of Article 470.1.a of 2015 CPC are quite ambiguous, there is no official guidance on how it should be understood and applied in practice. Thus, it would be very challenging to conclude that the above approach of the local courts is legally wrong. However, from the author's personal perspective, the court's approach in above cases seem to be inappropriate and unconvincing in terms of the following aspects:

Primarily, while the exclusive jurisdiction under Article 470.1.a of 2015 CPC is to carve out certain important types of disputes being exclusively resolved by Vietnamese courts, the current approach of the courts in the above cases have tendency to expand the governing scope of this article, making all disputes whether directly or indirectly pertaining to real properties subject to the exclusive jurisdiction of Vietnamese courts. This approach therefore appears to be inconsistent with the legislative aim of the article itself.

Moreover, according to the current approach of courts in Ho Chi Minh, any dispute having a foreign element pertaining to real estate business/projects in Vietnam (e.g., agreements on shares/sales in real estate companies, office/housing lease agreements or the like) could be classified as those within the scope of Article 470.1.a above, forcing contracting parties to have no choice but settling their dispute at Vietnamese courts. This approach (if applied) will infringe upon or even strip off the freedom to choose dispute resolution forums of contracting parties stipulated in the laws of Vietnam such as the freedom to choose forum for dispute resolution of foreign investors under Article 14.3 of 2020 Investment Law.

4. In search of an alternative approach

If the above approach is inappropriate, the next question would be that what is the suitable approach to the interpretation and application of this Article 470.1.a? According to the theory on international private laws,

the exclusive jurisdiction of a national court on immovable assets is established based upon the close link between the doctrine of *lex situs* (i.e. the law of the place in which property is situated) and that of *forum rei sitae* (i.e. the forum where the thing is situated). Specifically, the rights on the immovable are generally governed by the *lex situs* which mostly has mandatory character so that the exclusive jurisdiction conferred to the *forum rei sitae* is necessary and the best option to assure the application of these mandatory rules.⁶

Therefore, according to the author, the provisions of exclusive jurisdiction under 2015 CPC in general and Article 470.1.a thereof in particular should be read and understood in conjunction with the aforementioned principles of international private laws as reflected in relevant laws of Vietnam as well as with a reference to international convention or regulations on the same issue, for example:

"If the subject in dispute is property, only the Court of the locality in which the property is situated has jurisdiction to resolve [such dispute]" (Article 39.1.c of 2015 CPC)

"Where the subject matter of a contract is immovable property, the law applicable to transfer of ownership rights and other rights with respect to property being immovable property, [applicable to] lease of immovable property or use of immovable property in order to guarantee the performance of obligations shall be the law of the country in which the immovable property is located." (Article 683.4 of 2015 Civil Code)

"The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated. However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;" (Article 22 of Brussel I Regulation (now known as Brussel I Recast).

5 Dzungst & Associates LLC. (2016). *Insight and experience on arbitration and ADR in Vietnam*. https://www.academia.edu/42917083/INSIGHT_AND_EXPERIENCE_ON_ARBITRATION_AND_ADR_IN_VIETNAM_DZUNGST_and_ASSOCIATES_LL_C_A_Boutique_Shipping_and_ADR_Law_Firm

6 Ulrich Magnus & Peter Mankowski. (Eds). (2007). *European Commentaries on Private International Law*. Sellier. European Law Publishers.

“(2) This Convention shall not apply to the following matters -

[...]

1) rights in rem in immovable property, and tenancies of immovable property;

[...]

(3) Notwithstanding paragraph 2, **proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings.** *In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings [...]*” (Article 2, Hague Convention of 30 June 2005 on the Choice of Court Agreements)

Reading these above regulations together, the author believes that it would be more appropriate if the court, instead of taking a very broad approach as discussed above, narrows down its current interpretation to the Article 470.1.a above so as to cover civil cases having the subject in dispute (*đối tượng tranh chấp*) is the right over real properties in Vietnam only. Other related disputes in which the right over the immovable is not the subject being disputed e.g., disputes on share or capital-contribution transfer as mentioned in the cases above should not be considered falling into the ambit of this article. Additionally, the rights over real property being the subject in dispute should be limited to (i) ownership rights comprising the rights of an owner to possess, use and dispose of the property of the owner in accordance with the law) and (ii) other rights with respect to property including right to adjacent immovable property, usufruct and surface rights, as regulated in Articles 158 and 159 2015 Civil Code.

In conclusion, while the wordings of Article 470.1.a of 2015 CPC are quite ambiguous, the current approach of competent courts in Vietnam seems to be too broad. A further guidance on this issue is thus necessary to ensure the accuracy and consistency in understanding and applying the laws and avoid

infringing upon the freedom to choose forum of contracting parties in general and foreign investors in particular under the laws of Vietnam.

FOR MORE INFORMATION PLEASE CONTACT:



Linh D. Nguyen
Senior Partner
Hanoi
(84-24) 3934 8530
linh@vilaf.com.vn

Loi Pham
Associate
Hanoi
(84-24) 3934 8530
loi.pham@vilaf.com.vn

The views and opinions expressed in this article are those of the author and do not necessarily reflect the views and opinions of the author's law firm.