

# WAIVER OF THE RIGHT TO REQUEST THE COURT TO SET ASIDE AN ARBITRAL AWARD

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In many jurisdictions<sup>1</sup>, parties to arbitration may agree to waive their right to request a court to set aside an arbitral award. This mechanism, grounded in the principles of freedom of contract and party autonomy - cornerstones of both contract law and commercial arbitration - reinforces the finality of arbitral awards, reduces judicial interference, and strengthens arbitration as a reliable dispute resolution tool.

Vietnam's arbitration system has made notable progress in recent years, yet its effectiveness remains contested. A key concern is the risk of arbitral awards being annulled by the courts. According to statistics from the Vietnam Lawyers' Association (*Hội Luật Gia*), between 2011 and 2024, 181 annulment applications were filed, with 43 granted - an annulment rate of roughly 23%.<sup>2</sup> That is nearly one in four awards overturned - a rate that sends a chilling signal to investors. For businesses considering arbitration, this figure is not merely a statistic; it is a warning light flashing red. Why should investors commit time, money, and trust to arbitration if the outcome can be undone at the courthouse steps? Instead of delivering certainty, arbitration in Vietnam too often resembles a detour - because in the end, all roads lead back

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<sup>1</sup> Bundesgesetz über das Internationale Privatrecht [IPRG] [Federal Act on Private International Law] Dec. 18, 1987, SR 291, art. 192 (Switz.). and Code de procédure civile [C.P.C.] [Code of Civil Procedure] art. 1522 (Fr.).

<sup>2</sup> Vietnam Lawyers Ass'n, Report No. 186/TTr-HLGVN, Proposing the Amendment to 2010 Commercial Arbitration (June 3, 2024) (Viet.).

to the court. Unless this perception changes, arbitration risks being viewed not as a reliable solution, but as a gamble.

To address these challenges and improve Vietnam's investment climate, the Government has introduced several significant reforms. Chief among them is the establishment of the International Commercial Arbitration Center ("**ICA**"), operating under the International Financial Center in Ho Chi Minh City and Da Nang. The ICA is expected to serve as a forum for resolving disputes among Financial Center members, as well as disputes between members and external parties.

A distinctive feature of the ICA, setting it apart from existing arbitration institutions in Vietnam, is the legal recognition of Waiver Agreements - allowing parties to waive their right to request judicial annulment of arbitral awards. This waiver applies not only to arbitral awards but also to decisions recognizing parties' settlements, collectively referred to as "Awards" in this paper.

This article examines the current legal framework governing Waiver Agreements, highlights potential practical challenges, and offers recommendations to enhance the effectiveness of their implementation.

## **A. Legal Framework Governing the Waiver of the Right to Request Judicial Annulment of the Awards**

Article 68.1 of the Law on Commercial Arbitration 2010 ("**LCA 2010**") provides that a court shall consider an application to set aside the Award upon the request of a party. Article 69.1 further stipulates that parties have 30 days from the date they receive the Award to file an annulment request based on the grounds set forth in Article 68. However, the LCA 2010 leaves unresolved a critical question: can the right to request a competent court to set aside an Award be waived?

Resolution No. 222/2025/QH15 ("**Resolution 222**") and Decree No. 328/2025/ND-CP ("**Decree 328**") expressly introduce a significant development in this area of law. Article 30.3 of Resolution 222, together with Articles 4.5 and 4.6 of Decree 328, expressly recognizes the ability of parties arbitrating under ICA to agree to waive their right to request the court to set aside the Award. Accordingly, where a valid written Waiver Agreement exists, courts must refrain from entertaining an application for annulment.

Under the current legal framework, a Waiver Agreement will be recognized as valid only when all four of the following conditions are satisfied:

1. Membership requirement: At least one party to the Waiver Agreement must be a member of ICA. Agreements concluded solely between non-members are not yet recognized under Vietnamese law, as the waiver mechanism applies exclusively within the ICA framework.<sup>3</sup>
2. ICA Jurisdiction Requirement: The underlying dispute must be resolved at ICA.

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<sup>3</sup> Article 30.3 of Resolution 222 and Articles 4.5 of Decree 328

Consequently, the waiver mechanism only applies to arbitral awards issued by ICA tribunals. Awards rendered by other arbitration institutions remain outside the mechanism's scope.<sup>4</sup>

3. Compliance with Article 18 - LCA 2010: As the Waiver Agreement is treated as an integral part of the arbitration agreement, it must not fall within any grounds for invalidity under Article 18 of LCA 2010. It will therefore be invalid if: (i) the dispute lies outside the arbitral jurisdiction defined in Article 2; (ii) the signatory lacks authority or lacks legal capacity under the Civil Code; (iii) the agreement fails to comply with the formal requirements of Article 16 of LCA 2010; (iv) a party entered into the agreement under deception, threat, or coercion; or (v) the agreement violates a statutory prohibition.<sup>5</sup>
4. Timing Requirement: The Waiver Agreement must be concluded before any party files an application to set aside the award. If the agreement is executed after the filing of such application, the court will disregard the waiver and proceed to consider the annulment request.<sup>6</sup>

## B. Key Issues Concerning the Waiver of the Right to Request Judicial Annulment of Awards

The explicitly statutory recognition of party autonomy to waive annulment rights marks a notable development in Vietnam's arbitration landscape. It promises greater finality of awards, reduced judicial intervention, and enhanced investor confidence. Yet, ambiguities in the framework raise challenges for consistent application. Key issues include:

### a. *Inconsistencies with LCA*

Although Resolution 222 stipulates that it prevails in the event of conflict, several inconsistencies remain between the LCA 2010 and the new instruments. These inconsistencies may create difficulties in applying the law, particularly in the following areas:

While Resolution 222 and Decree 328 expressly introduce a mechanism allowing the disputing parties at the ICA to waive their right to request annulment of the Award, the ambiguous wording of the LCA 2010 raises a fundamental issue: whether the right to request a competent court to set aside the Award can be waived under the LCA 2010? And if yes, can it be similarly applicable in other arbitration institutions than ICA? Or is it a mandatory statutory right - one that traditionally could not be waived or modified by the party agreement?

Also, the LCA 2010 requires courts to "refuse acceptance" (*từ chối thụ lý*) of cases with valid arbitration agreements, whereas Decree 328 requires courts to "refuse

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<sup>4</sup> Article 30.3 of Resolution 222

<sup>5</sup> Article 4.6.a of Decree 328

<sup>6</sup> Article 4.6.b of Decree 328

resolution” (*từ chối giải quyết*) of annulment requests when a waiver exists. Whether these terms carry identical legal effect is unclear, raising questions about jurisdiction and procedure.

Without doctrinal coherence, courts and tribunals may struggle, underscoring the need for eventual amendment of the LCA 2010.

#### **b. Unclear Boundaries of Permissible Waiver**

International practice generally imposes limits on the scope of waivers. For example, Section 69 of the Arbitration Act 1996 allows parties to waive certain grounds for annulment, but they cannot waive the right to challenge for “serious irregularity”.

In Vietnam, Decree 328 provides that a Waiver Agreement is invalid if it falls within any ground of invalidity under Article 18 LCA 2010, suggesting that the agreement will be subject to certain restrictions.

However, neither Resolution 222 nor Decree 328 clarifies two critical questions: (i) May parties waive their right to challenge an award even if such award violates fundamental principles of Vietnamese law? (ii) If a valid waiver exists but the Award itself contravenes fundamental legal principles, must the court still refuse to entertain an annulment request - or is it obliged to annul the award?

Furthermore, Article 43.1 of the LCA 2010 obliges arbitral tribunals to examine the validity of the arbitration agreement before addressing the merits. Since Decree 328 treats the waiver as part of the arbitration agreement, an important procedural question arises: if the Waiver Agreement is incorporated into the arbitration agreement at the outset, is the tribunal obliged to assess its validity alongside the arbitration agreement itself? If so, failure to do so could arguably constitute a procedural defect, paradoxically opening grounds for annulment despite the waiver’s intended effect. This uncertainty exposes a doctrinal gap: while the legislation affirms the enforceability of the Waiver Agreement, it does not clarify whether tribunals are required to verify its validity as part of the arbitration agreement or whether this review is reserved exclusively for the courts. The absence of guidance leaves open the possibility that an inadequately assessed waiver could undermine the Award, thereby creating the very annulment risk it was designed to eliminate.

The lack of guidance risks inconsistent practice and may expose the Awards to unnecessary challenges.

#### **c. Timing of Waiver**

Under Decree 328, a Waiver Agreement is considered legally valid and binding only if it is concluded prior to the filing of any application to set aside the award. Article 17.6(b) of Decree 328 mandates that courts must continue to consider an annulment application even if the parties execute a Waiver Agreement after the filing of that

application.

The rationale for imposing this timing requirement remains unclear. Is it intended to limit the parties' rights, or is it primarily an administrative safeguard within the court system?

From the author's perspective, the decisive consideration should be whether the Waiver Agreement is executed before the hearing. If so, the agreement ought to be recognized as valid. In such circumstances, the Waiver Agreement should be treated as tantamount to the applicant's withdrawal of its request, thereby bringing the case resolution process to an end.

**d. Fairness and limited scope of application**

If the waiver mechanism is exclusively confined to disputes resolved under the ICA, it may hinder broader reforms within Vietnam's arbitration ecosystem. Specifically, unless this waiver mechanism is first implemented on a pilot basis before being extended to other arbitration centers, its exclusive application to disputes resolved under the ICA may raise significant policy concerns including questions of equal treatment among arbitration institutions and the risk of distorting competition within the arbitration services market.

In conclusion, the introduction of waiver agreements represents a progressive step toward enhancing arbitration's finality in Vietnam. If effectively implemented, this mechanism can strengthen the finality of the Awards, reduce (unnecessary) judicial intervention, and enhance investor confidence in Vietnam's legal and investment environment.

However, unresolved ambiguities - ranging from procedural inconsistencies to fairness concerns - highlight the need for clearer legislative guidance. To ensure stable and effective operation, however, the legal framework requires further refinement. Specifically, amending the LCA 2010 to formally incorporate the waiver mechanism, issuing detailed implementing regulations, and developing consistent case law are essential. Only through comprehensive and coherent reforms can the waiver mechanism evolve into a truly modern and effective legal tool - balancing party autonomy, arbitral finality, and the safeguarding of legal order. In doing so, Vietnam will be better positioned to establish itself as a dependable and arbitration-friendly jurisdiction both regionally and globally.



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