

**VBLC SEMINAR ON
INTERNATIONAL COMMERCIAL ARBITRATION**

16 DECEMBER 2016

CASE STUDY

FACTS

In January 2012, Vietpower, a Vietnamese company, entered into a joint venture contract with International Strong Power (**ISP**), a Japanese company, to establish Dream Power, a Vietnamese limited liability company to build and operate a hydropower project in Vietnam. Vietpower holds a 35% interest and ISP holds a 65% interest in Dream Power.

Dream Power completed construction in January 2014 and started operation to sell power to the national grid. However, due to a long drought in 2015, Dream Power did not produce enough power and continued to suffer serious operational losses for an extended period. Vietpower and ISP kept injecting cash into Dream Power to sustain its loss-making operations. In January 2016, Vietpower was unable to continue this cash injection and indicated its desire to sell its 35% interest to ISP. ISP agreed.

On 1 May 2016, Vietpower and ISP entered into a Capital Transfer Agreement (**CTA**) whereby Vietpower agreed to transfer to ISP 35% interest in Dream Power for a price of US\$ 15 million. Under the CTA, Vietpower was obliged to obtain the government approval required to complete the transfer within 3 months. Upon the issue of such approval, ISP would pay the total price and the transfer would be completed.

However, after many attempts, by October 2016, Vietpower was still unable to obtain the necessary government approval to complete the transfer. Meanwhile, recently it has rained a lot in the area and Dream Power has been operating at its full capacity. The value of the 35% interest of Vietpower is now US\$25 million and the transfer is not yet

completed. On 15 November 2016, Vietpower informed ISP that Vietpower could not obtain the government approval for the transfer.

On 1 December 2016, ISP filed a notice of arbitration at the Singapore International Arbitration Centre (**SIAC**) to claim compensation from Vietpower for breach of contract. This was done pursuant to the arbitration clause in the CTA which states:

“In case of any dispute arising out of or in connection with this Agreement, the parties may, as they mutually agree, settle it by arbitration under the arbitration rules of the Singapore International Arbitration Centre. There shall be three arbitrators. The language of the arbitration shall be English.

This Agreement shall be governed by the law of Vietnam”.

ISP has appointed an arbitrator. The SIAC has sent the notice of arbitration to Vietpower who has filed a response contesting the jurisdiction of the tribunal. Nevertheless, it has also appointed an arbitrator. The SIAC has then appointed the presiding arbitrator.

NOTICE OF ARBITRATION

To: The Singapore International Arbitration (**SIAC**)

1. We act for International Strong Power (Claimant) and now wish to file this notice of arbitration to start an arbitration proceeding against Vietpower (Respondent) under the arbitration rules of the SIAC.
2. This dispute has arisen out of the Capital Transfer Agreement (**CTA**) entered into between the Parties on 1 May 2012. The facts of this case are attached to this Notice of Arbitration.
3. The arbitration agreement and the governing law clause in the CTA are as follows:

“In case of any dispute arising out of or in connection with this Agreement, the parties may, as they mutually agree, settle it by arbitration under the arbitration rules of the Singapore International Arbitration Centre. There shall be three arbitrators. The language of the arbitration shall be English.

This Agreement shall be governed by the law of Vietnam”.

4. The Claimant contends that the Respondent has breached its obligation to obtain the government approval required to complete the transfer under the CTA within the time required. This has caused huge losses to the Claimant.
5. The Claimant requests the Tribunal to order the Respondent to pay the Claimant an amount of US\$ 10 million in damages, plus interest and costs to be determined.
6. The Claimant appointed xxxx as an arbitrator.

Your sincerely,

RESPONSE TO NOTICE OF ARBITRATION

To: The Singapore International Arbitration Centre

Ref: Arbitration No. 01111/SIAC.

1. We act for Vietpower (Respondent) and now wish to file a response to the Notice of Arbitration from International Strong Power (Claimant) in this matter.
2. We contend that the arbitration clause in the CTA requires a new agreement of the parties in order to start arbitration and, in the absence of such agreement in this case, the Tribunal has no jurisdiction to hear this matter.
3. In any event, we deny the Respondent has any liability for obtaining the required approval pursuant to Article 294.1(d) of the Commercial Law which states that:
*“A party in breach shall be released from liability in the following case:
(d) the act of breach of that party is due to the implementation of a decision of a competent state administrative body which the parties could not have known at the time of concluding the contract”.*
4. Nevertheless, we wish to appoint xxx as an arbitrator, without prejudice to our objection to the jurisdiction of the tribunal.
5. We request the Tribunal to dismiss the claim of the Claimant with full costs to the Respondent.
6. We also request that the Tribunal bifurcate the proceedings into a jurisdictional stage and a merit stage.

Yours sincerely,