



LEGAL UPDATE

PRIVILEGE AND EVIDENCE IN ARBITRATION: RISK OF ANNULMENT UNDER VIETNAMESE LAW?

The concept of privilege - the right to withhold certain communications or documents from disclosure or document production in legal proceedings - is well established in common law jurisdictions but largely absent in civil law systems such as Vietnam. The IBA Rules on the Taking of Evidence in International Arbitration issued on 17 December 2020 (“**IBA Rules**”) are widely used in international arbitration and incorporate the common law concept of privilege. This article considers how an arbitral tribunal seated in Vietnam, applying the IBA Rules and recognising privilege, would be treated under Vietnamese law.

1. Privilege under the IBA Rules

Article 9.2(b) of the IBA Rules provides that a tribunal may exclude from evidence or production any document, statement, or oral testimony or inspection on the ground of “legal impediment or privilege.” In practice, this allows a tribunal to (i) refuse a party’s request to produce documents deemed privileged and (ii) exclude privileged materials from being admitted or relied upon as evidence. Article 9.4 of the IBA Rules provides that, when considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any applicable mandatory legal or ethical rules, the arbitral tribunal may take into account various factors, including:

- i. Legal advice privilege, which protects confidential communications between a client and a professional legal adviser made for the purpose of seeking, obtaining, or providing legal advice.
- ii. Settlement privilege, which protects communications made during genuine settlement negotiations from being used adversely in subsequent proceedings.

- iii. The expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen.

The IBA Report on the Uniform Guidelines on Privilege in International Arbitration¹ recommends adopting consistent standards for three principal categories of privilege: legal advice, settlement, and litigation privilege. The latter protects materials prepared for, or in contemplation of, legal proceedings, including internal analyses, litigation strategies, and communications with witnesses or experts for the purpose of preparing a party’s case.

2. Privilege under Vietnamese Law

2.1 In-Court Proceedings

Vietnamese law does not recognise the privilege concept as understood in common law. For the attorney-client privilege concept, protection for client communications arises from the lawyer’s statutory duty of confidentiality under the 2006 Law on Lawyers.

Under the Civil Procedure Code (“**CPC**”), “evidence” is broadly defined in Article 93 as “*what is real and is submitted or presented by the parties, agencies, organisations, or individuals to the court during proceedings, or collected by the court in accordance with this Code.*” Article 108 of the CPC further requires that evidence be lawfully obtained, meaning that any material collected unlawfully will be excluded. In addition, Article 6.2 of the CPC obliges courts to assist parties in collecting evidence, without recognising any limitation based on the privileged nature of the materials requested.

¹<https://www.ibanet.org/document?id=Report-on-Uniform-Guidelines-on-Privilege-in-International-Arbitration> accessed 26 November 2025



Consequently, documents that would ordinarily be protected by privilege in the common law system, such as lawyer–client communications or settlement agreements, may still be subject to disclosure, admitted as evidence, and relied upon by the Vietnamese courts in adjudicating disputes.

2.2 In Arbitration Proceedings

If the parties choose to apply the IBA Rules as a part of the procedural rules and the tribunal applies the privilege doctrine while resolving the case, could the resulting award be annulled in Vietnam, assuming that the seat of arbitration is Vietnam?

Under Article 68.2 of the 2010 Law on Commercial Arbitration (“LCA”), the potentially relevant grounds for annulment of an arbitral award are: (i) violation of due process; or (ii) the arbitral award is contrary to the fundamental principles of Vietnamese law.

Regarding the first ground of violation of due process (or in other words, the arbitral procedure was not in accordance with the LCA), the only provision of the LCA relating to evidence is Article 46, which grants the arbitral tribunal authority to collect evidence as necessary for resolving the dispute. The LCA otherwise provides no specific rules on evidentiary matters or privilege.

As to the second ground that the award is contrary to the fundamental principles of Vietnamese law, to determine whether the recognition of privilege could constitute such a breach, it is necessary to identify what the fundamental principles governing the collection, disclosure, and assessment of evidence under Vietnamese law are. While the LCA does not specify these principles, the CPC contains detailed provisions on evidence matters. However, given the differing nature of court and arbitral proceedings, direct application of the CPC’s evidentiary rules to arbitration would not be entirely appropriate. Having said that, some scholars and arbitration practitioners are of the view that in the context of Vietnam, the CPC should be a

gap filler when any equivalent procedural rule is absent in the LCA.

3. Review of Court Decisions on Applications for Annulment of Arbitral Awards

A review of court decisions on applications to annul arbitral awards in Vietnam appears to indicate a fairly consistent judicial approach that the collection and assessment of evidence in arbitral proceedings are matters of substantive determination, which fall within the arbitral tribunal’s discretion and are not subject to review by the court in annulment proceedings. Article 71.4 of the LCA provides that, when considering an application to set aside an arbitral award, the court shall not re-examine the merits of the dispute already decided by the arbitral tribunal.

- i. In Decision No. 373/2022/QĐ-PQTT dated 30 March 2022², the Ho Chi Minh City People’s Court considered an application to set aside an arbitral award arising from a machinery sale contract. The applicant argued that the arbitral tribunal had failed to grant the respondent’s request to collect evidence (specifically, to inspect and test the machinery’s performance capacity) and had improperly disregarded the inspection minutes submitted by the respondent, which recorded that the machinery failed to meet specifications. The applicant contended that this amounted to a breach of the tribunal’s authority to collect evidence. The court, however, held that the decision to accept or reject a party’s request for evidence collection (including inspection) and the evaluation of the evidence submitted by the parties fall entirely within the arbitral tribunal’s competence under Article 46 of the LCA. The court further affirmed that evidence assessment and consideration of the parties’ claims relate to the substance of the dispute, which it would not re-examine.
- ii. In Decision No. 1579/2019/QĐ-PQTT dated 7 November 2019³, also by the Ho Chi Minh City People’s Court, concerning a dispute over a frozen

²<<https://congbobanan.toaan.gov.vn/2ta1338201t1cvn/chi-tiet-ban-an>> accessed 26 November 2025

³<<https://congbobanan.toaan.gov.vn/2ta475392t1cvn/chi-tiet-ban-an>> accessed 26 November 2025



seafood sales contract, the claimant sought to annul the award on the grounds that the arbitral tribunal had refused to collect certain documents requested by the claimant and had failed to assess the evidence objectively and comprehensively. The court found no indication that the arbitral tribunal had violated the arbitration procedure and reaffirmed that it would not review the merits of the dispute. The court decision did not specify what documents the claimant had requested to be collected.

- iii. In Decision No. 229/2025/QĐ-PQT dated 23 July 2025⁴, the Ho Chi Minh City People's Court heard an annulment application relating to a dispute over payment obligations under a contract for the supply of ready-mixed concrete for a construction project. The respondent argued that the arbitral tribunal had failed to collect from the respondent the respondent's power of attorney authorising its representatives to sign the debt confirmation minutes with the claimant while still relying on those minutes in rendering the award. The court rejected this argument, holding that the issue concerned the merits of the case and would not be reviewed in annulment proceedings.

Vietnamese law does not recognise the concept of privilege. While existing court decisions on annulment of arbitral awards indicate that the collection and assessment of evidence are generally left to the arbitral tribunal's discretion, it remains unclear how a Vietnamese court would view the tribunal's application of privilege under the IBA Rules. The issue continues to carry a degree of uncertainty.

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⁴<<https://congbobanan.toaan.gov.vn/2ta1972033t1cvn/chi-tiet-ban-an>>
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