

# LEGAL NEWSLETTER



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## *Notable Activities in November, 2023*

The European Union (EU) has announced the implementation of the carbon border adjustment mechanism in EU countries. Accordingly, the carbon tax on some goods exported to this market is based on the intensity of greenhouse gas emissions in the production process in the host country. However, since the EU region is a large, potential export market for Viet Nam, the imposition of carbon taxes by EU countries will significantly impact Vietnamese businesses.

Regarding this issue, the Business and Law Program - under the framework of the interdisciplinary legal support program for small and medium-sized enterprises for 2021-2025 chaired by the Ministry of Justice, has discussed with experts on the topic: **Challenges with carbon tax barriers**. Mr. Nguyen Anh Minh - Partner of NHQuang&Associates Law Firm is one of two guests of the program.

See the full program at: <https://vtv.vn/video/kinh-doanh-va-phap-luat-thach-thuc-voi-hang-rao-thue-carbon-649450.htm>

# JURISDICTION OF COMMERCIAL ARBITRATION IN DISPUTES OVER NON- DISCLOSURE AGREEMENTS

## QUOC DUNG

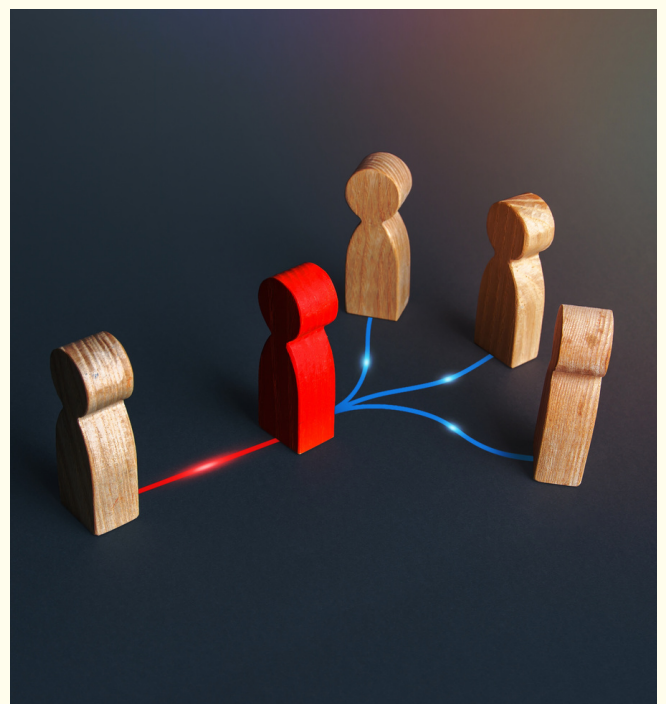
On October 1, 2023, the Supreme People’s Court announced 7 new precedents according to Decision No. 364/QD-CA of the Chief Justice of the Supreme People’s Court. These precedents will be applied in trials starting from November 1, 2023. Among them, Precedent No. 69/2023/AL (**Precedent 69**) regarding the jurisdiction of commercial arbitration in disputes over non-disclosure agreements (**NDA**) is a noteworthy one.

Precedent 69 is formulated based on Decision No. 755/2018/QD-PQTT of the People’s Court of Ho Chi Minh City dated June 12, 2018, regarding the civil case titled “Request for annulment of arbitral award” with Ms. Do Thi Mai T as the requester and the entity with related interests, obligations being R Company Limited (**Company R**). According to the dispute contents, Company R filed a lawsuit against Ms. T at the Vietnam International Arbitration Center (**VIAC**), seeking compensation because Ms. T violated the provisions of the NDA by working for another company in the same field immediately after unilaterally terminating the labor contract with Company R. Company R’s request was accepted by the Arbitration Council; however, Ms. T disagreed with the arbitral award and filed a lawsuit at the People’s Court of Ho Chi Minh City requesting a review and annulment of the entire content of the arbitral award. One of her grounds was that *the dispute was beyond the jurisdiction of the Arbitration Council*.

The Application Review Council under the People’s Court of Ho Chi Minh City rejects the arguments and requests of Ms. T and provides specific legal grounds and determinations for the rejection. According to clause 2, Article 2, Law on Commercial Arbitration 2010, “*Arbitration’s jurisdiction to settle disputes: Disputes among parties at least one of whom conducts commercial activities*”. Company R is a trader, registered for business, and engaged in commercial activities under Commercial Law 2005. Therefore, the Application Review Council determines that the

arbitration agreement is subject to the jurisdiction of VIAC and complies with relevant legal provisions. Additionally, the Application Review Council also refers to clause 4 Article 35 Law on Commercial Arbitration 2010, which specifies that “*When the defendant assumes that the dispute falls beyond the jurisdiction of arbitration, or there is no arbitration agreement, or the arbitration agreement is invalid or unrealizable, the defendant should indicate the same in the self-defense statement*”. However, in the Self-Defense Statement as well as throughout the arbitration proceedings, Ms. T did not raise any objections to the jurisdiction of the arbitrators but continued her involvement in the arbitration proceedings and engaged in dispute resolution sessions. Therefore, Ms. T waived the right to object to the jurisdiction of the Arbitration Council under Article 13 Law on Commercial Arbitration 2010 and its guidelines in Article 6 Resolution 01/2014/NQ-HDTP.

Furthermore, the Application Review Council also rejects Ms. T’s assertion that the dispute between the parties is a labor dispute subject to the Court’s jurisdiction, as the NDA is an integral part of the labor contract between Ms. T and Company R. Specifically, in paragraph 11 of the Legal Argument dated January 18, 2018 by the lawyer defending Ms. T’s legal rights and interests at VIAC, and at the final meeting, Ms. T’s lawyer reaffirmed that the NDA was completely independent of the labor contracts between Company R and Ms. T. Therefore, the Application Review Council determines that the NDA is an independent agreement, and in the event of a dispute, it falls under the jurisdiction of arbitration as selected by the parties at the time of signing.



## Comments and recommendations

The Labor Code 2012 and the Labor Code 2019 do not confer the jurisdiction to arbitrators to resolve individual “labor disputes”. This competence is exclusively vested in labor conciliators, labor arbitration councils, and the People’s Court. Therefore, before the issuance of Precedent 69, there were various opinions and interpretations regarding the jurisdiction for NDA dispute resolution. Some believe that NDA disputes are a type of conflict arising from relationships directly related to labor relations, and since labor laws only prescribe three methods of dispute resolution, the parties cannot choose other dispute resolution methods including commercial arbitration. In contrast, proponents of the view that NDA disputes fall under the jurisdiction of arbitrators contend that employers are entities engaged in commercial activities and following clause 2 Article 2 Law on Commercial Arbitration 2010, arbitrators have jurisdiction to resolve disputes if at least one party is engaged in commercial activities. Consequently, Precedent 69 has established a consistent guidance and application to the jurisdiction in dispute resolution, determining that NDAs are independent of labor contracts, which means that NDA disputes are not limited by the three methods of dispute resolution as prescribed in labor laws.

Enterprises should study and stay updated on the Court’s opinions in precedents issued under Decision No. 364/QD-CA to ensure the protection of their legal rights and interests and minimize the occurrence of unnecessary legal risks.

# NEW REGULATIONS ON THE REDUCTION OF LAND RENTS IN 2023

TRANG NHUNG

To support enterprises during difficult economic periods, on October 3, 2023, the Prime Minister issued Decision 25/2023/QĐ-TTg on the reduction of land rents in 2023 (**Decision 25**). The below outlines some outstanding contents of Decision 25:

*Firstly*, regarding the subjects for land rent reduction. According to Decision 25, beneficiaries of land rent reduction are organizations, units, enterprises, households, and individuals that are directly leasing land from the State under Decisions or Contracts or Certificates of land use rights and rights to ownership of houses and other properties on land issued by competent authorities under the method of land lease with annual rental payment (**Land lessees**). This regulation also applies to cases where Land lessees do not qualify for land rent exemption or reduction, have reached expiration of land rent exemption or reduction, and are having their land rents reduced under the regulations of land laws and other relevant laws.

*Secondly*, regarding the rate of land rent reduction. Under Decision 25, the reduction in land rents is 30% of land rents payable (generated receivable amounts) of 2023 for Land lessees, no tax reduction is applied to outstanding land rents and late payment penalties (if any). In the case that a Land lessee is enjoying a reduction in land rents as prescribed by laws and/or a deduction of compensation and ground clearance from land rents under regulations of laws on land rents, the 30% reduction shall apply to the land rents payable (if any) after making such reduction or/and deduction (except for land rents that have been reduced according to Decision 01/2023/QĐ-TTg dated January 31, 2023 of the Prime Minister).

*Thirdly*, regarding procedures for reduction of land rents. To be considered for a reduction in land rents, Land lessees should prepare the dossier for land rent reduction including (i) An application form for reduction of land rents under the Form stipulated in Annex II Decision 25; (ii) The Lease Decision or Lease Contract or Certificate of land use rights and rights to ownership of houses and other properties on land issued by



competent authorities (Copies). Land lessees shall submit such dossier to one of the following authorities from the effective date of Decision 25 to the end of March 31, 2024: (i) Tax authority assigned to collect land rents; (ii) the Management Board of relevant Economic Zone, Hi-Tech Park; (iii) Other agencies as prescribed by laws on tax administration. Besides, Decision 25 also sets out some notes for performance as follows:

- The regulation on reduction of land rents under this Decision shall not be applied to Land lessees who submit their applications after March 31, 2024;
- In the event that the competent authority has decided to reduce the land rent for a Land lessee under the provisions of Decision 25 but then the State management agency discovers, through inspection and examination, that the Land lessee is not eligible for land rent reduction, the Land lessee must repay the same to the State budget;
- If land rent reduction is granted by the competent authority after a Land lessee has paid the land rent of 2023, any overpaid rent shall be deducted from the land rent payable in the next period or the next year following provisions of the laws on tax administration and other relevant laws. In the case where land rents will no longer be paid for any period, the overpaid rent shall be offset or refunded as prescribed by laws on tax administration and other relevant laws.

## COMMENTS AND RECOMMENDATIONS

Decision 25, which is promulgated by the Prime Minister and comes into force from November 20, 2023, has contributed to reducing businesses' burden in the context where the economy is facing numerous fluctuations, creating opportunities as well as motivation for enterprises to overcome the current difficulty. Decision 25 has specific regulations on the procedures to apply for a reduction in land rents, forms for preparing applications, and deadlines for submitting applications to be considered for reduction; therefore, enterprises need to keep this in mind for proper and prompt implementation to ensure their legitimate interests.

# SOME NEW REGULATIONS OF THE LAW ON BIDDING 2023

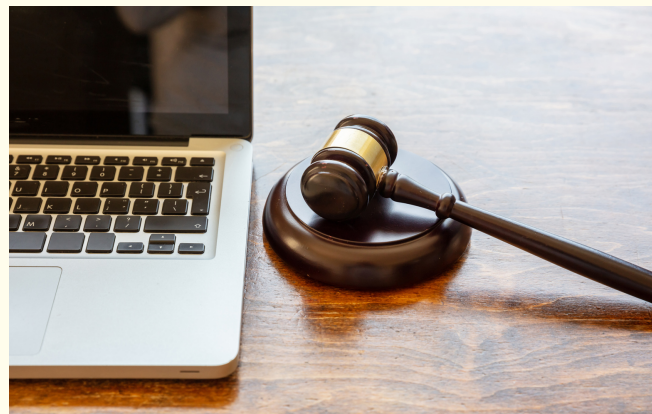
HAI LINH

The promulgation of the Law on Bidding 2013 has created a legal basis for procurement, management, and use of state capital and assets, ensuring openness, transparency, and competition in bidding. However, after more than 9 years of implementation, the provisions of the Law on Bidding 2013 have revealed many limitations and shortcomings when implemented in practice, and are no longer suitable for the current socio-economic situation. Therefore, to improve the regulations on bidding, on June 23, 2023, the National Assembly passed the Law on Bidding 2023, replacing the Law on Bidding 2013 and taking effect on January 1, 2024. In this Legal Newsletter, NHQuang&Associates will analyze some new regulations of the Law on Bidding 2023 that probably affect the business activities of enterprises.

## **Amending and supplementing prohibited acts in the Law on Bidding**

Currently, the Law on Bidding 2013 has not yet addressed many violations and frauds in bidding, thus these violations have not been promptly handled, leading to negative effects in bidding. Amending and supplementing prohibited acts in bidding will help to minimize possible violations, increase transparency in bidding, and ensure fairness among contractors and investors. The Law on Bidding 2023 has amended and supplemented prohibited acts in bidding in Article 16, in particular:

- Supplementing prohibited acts of bid rigging such as pre-arranging or forcing party(ies) to submit or withdraw bids to secure bid winning by a pre-determined bidder; pre-arranging to refuse to provide goods or services, sign subcontracts; or engaging in other forms of agreement in advance to limit competition so that a pre-selected bidder wins the bid;
- Supplementing acts classified as obstruction such as obstruction of competent persons, project owners, auctioneers, contractors, and investors in selecting contractors and investors; intentionally filling false complaints, denunciation; or proposing untruthful information to obstruct bidding;
- Amending and supplementing prohibited acts of bid transfer. Accordingly, several acts of bid transfer are prohibited in the Law on Bidding 2023, including:



- A contractor transfers to another contractor the work portion of the bidding package which is beyond the maximum value allocated for subcontractors and the workload for special subcontractors as stated in the contract;
- A contractor transfers to another contractor the work portion of the bidding package which is within the maximum value of the work allocated for subcontractors as stated in the contract but beyond the scope of work proposed in the bids and documents of proposals without approval from the project owner or supervision consultants;
- A project owner or a supervision consultant approves the contractor to transfer the work that exceeds the maximum value of the work for subcontractors as stated in the contract.

## **Supplementing regulations on the investment contract**

Compared to the Law on Bidding 2013, these are new regulations supplemented in the Law on Bidding 2023 to ensure consistency with procedures for implementing investment projects under investment laws. The regulations on investment contracts are specified in Section 2, Chapter 7 of the Law on Bidding 2023, including conditions for signing investment contracts, documents of investment contracts, and basic contents of the contract, etc.

*Firstly*, the Law on Bidding 2023 stipulates that the signing of an investment contract must meet the following conditions:

- At the time of signing the contract, the selected investor's bids are still valid.
- At the time of signing the contract, the selected investor must ensure the technical and financial capacity to implement the investment project under the requirements of the bidding document
- The signed investment contract must be compatible with the contents in the bidding documents, bids, decisions on approving investor selection results, and minutes of contract negotiation.

- The signed investment contract must be compatible with the contents in the bidding documents, bids, decisions on approving investor selection results, and minutes of contract negotiation.

*Secondly*, the basic contents of an investment contract include:

- Information about the parties to the contract, the effective date of the contract, and the contract duration;
- Information about the investment project, for example, objectives, location, project implementation progress; scale and total investment capital; conditions for land and other resource usage (if any);
- Responsibility for compensation, support, resettlement, and organizing the construction of auxiliary structures (if any); land allocation, land lease (if any);
- Obligations of the investor in implementing the commitments proposed in the bids; the establishment of an enterprise to manage the investment project (if any);
- Completion bonds; principles and conditions for contract adjustment and termination; transfer of rights and obligations of the parties;
- The governing law and dispute resolution mechanisms.

*Thirdly*, forms of completion bonds are also regulated as below:

- The investors must ensure responsibility for implementing the investment contract before or at the same time that the contract takes effect by (i) *submitting a letter of guarantee* by a domestic credit institution or foreign bank branch established under Vietnamese laws or (ii) *submitting a guarantee insurance certificate* by a domestic non-life insurance enterprise or a branch of a foreign non-life insurance enterprise established under Vietnamese laws. The total amount of the guarantee is stipulated in the bidding documents, which is from 1% to 3% of the total investment capital based on the scale and nature of the investment project.
- The completion bonds will not be refunded to the investors if they: (i) refuse to implement the contract when the contract has taken effect; (ii) breach the contractual agreements; or (iii) fall behind schedule in contract performance due to the investor's fault but refuse to extend the validity of the completion bonds.

#### **Amending and supplementing regulations on types of contracts with contractors**

The Law on Bidding 2023 supplements 4 forms of contracts signed with contractors, including (i) Charge-plus cost-based contracts; (ii) Output-based contracts; (iii) Percentage-based contracts; and (iv) Mixed contracts. Previously, under the Law on Bidding 2013, the lump-sum contract was the most basic form of contract; bidding packages on the provision of consulting services, simple non-consulting services, bidding packages for small-scale procurement of goods, construction, and installation, and combinations must apply the lump-sum contract. The Law on Bidding 2023 has abolished the above regulations and amended the regulations to allow investors and competent persons to decide the appropriate contract form for each bidding package based on the scale, nature, and conditions of each bidding package, aiming to resolve inadequacies in the application of contract forms. For example, the output-based contract is applied to jobs and services where payment is based on the results of contract performance that are accepted in terms of quality, quantity, and other factors.

The Law on Bidding 2023 also specifies regulations on cases of contract adjustments to comply with the principles stipulated in the Civil Code 2015 and construction laws. Accordingly, contracts are adjusted in the circumstances agreed by the parties in the signed contract following the relevant legal provisions, in cases of hardships under the Civil Code, etc. The contents of adjustments may include volume, schedule, price, and the application of additional purchase options, but all adjustments must not result in prolonging the implementation duration of the bidding package as stated in the contract, methods, formulas, and categories. The Law on Bidding 2013 only provides general principles in adjusting contracts in Article 67 without detailed regulations on conditions and contents of contract adjustments.

It can be seen that the Law on Bidding 2023 provides many amendments and supplements to improve the legal framework on bidding, enhance transparency, and ensure fairness in bidding activities in reality. Enterprises need to update and study the regulations of the Law on Bidding 2023 as well as legal normative documents detailing and guiding the implementation of the provisions of the Law on Bidding that will be issued soon for appropriate application in their business. In addition, it is necessary to pay attention to the transitional contents specified in the Law on Bidding 2023 such as the provisions on the application of legal regulations for the selection of investors to implement investment projects using land before the effectiveness of the amended Land Law, the organization of investor selection, signing and management of contract implementation for approved business investment projects and issuance of bidding documents before the effective date of the Law on Bidding 2023 (January 1, 2024).

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