

COMMERCIAL ARBITRATION INCREASING CONFIDENCE IN FOREIGN DIRECT INVESTMENT

“COMMERCIAL ARBITRATION – NEW OUTSTANDING ELEMENT TO ATTRACT FOREIGN INVESTMENT !”

Nguyen Manh Dzung, MCI Arb

ICC Court Member

VIAC Arbitrator

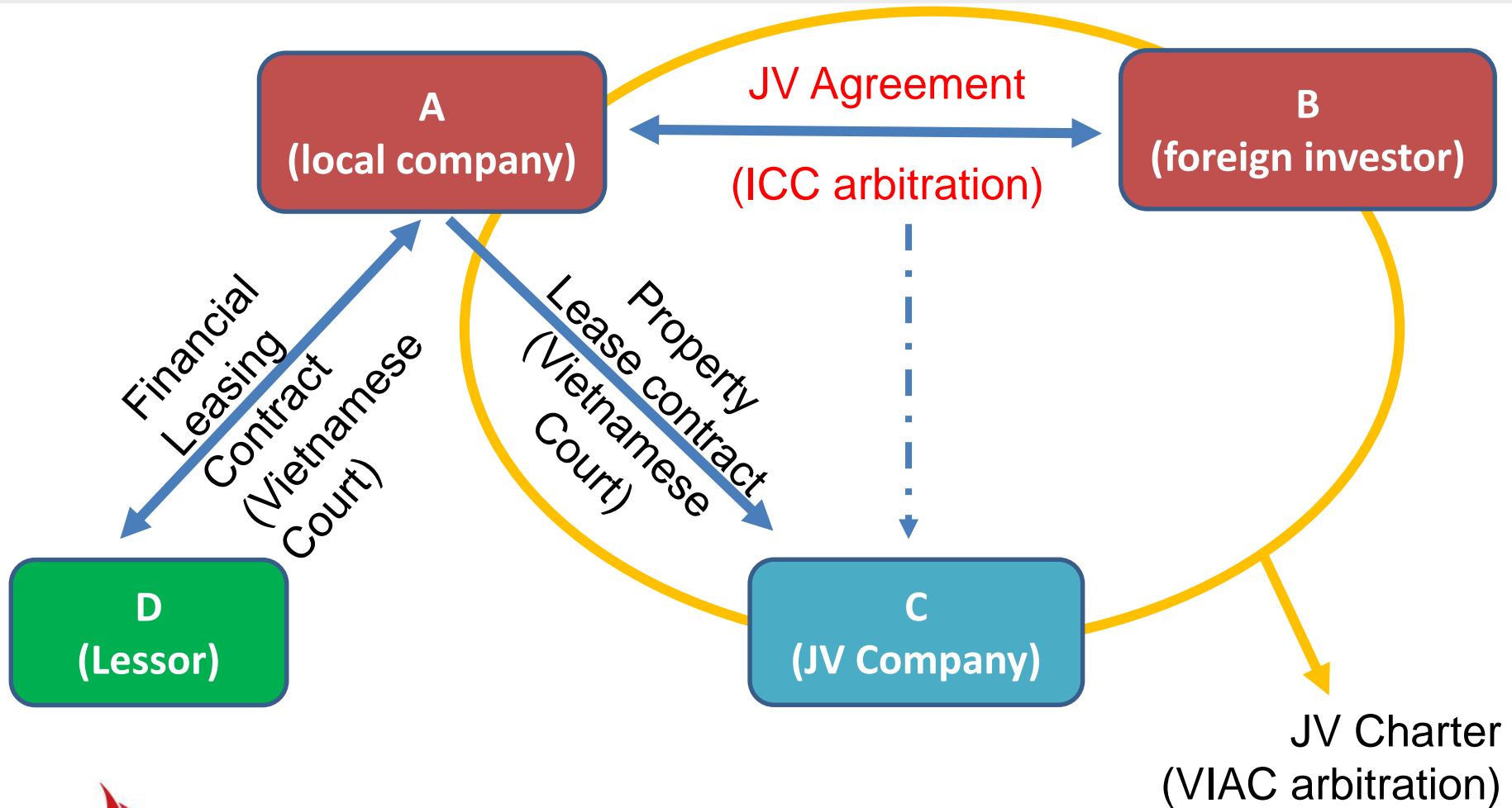
Of Counsel of Dzungsr & Associates LLC

Hanoi, 11th May 2018

CONTENT

1. Commercial Arbitration and Foreign Direct Investment (FDI)
2. Commercial Arbitration and Foreign Portfolio Investment (FPI)
3. Investment Arbitration (ISDS)
4. Investment Tribunal System (EV-FTA)

JOINT VENTURE DISPUTE



COMPETENCE - COMPETENCE

- Intention of the parties & Interpretation of the arbitration agreements
 - Extension of the tribunal's jurisdiction
 - Extension of the scope of the arbitration clause;
- Compatibilities of the dispute resolution clauses;
- The possibility of consolidating claims under different contracts in a single arbitration;

JURISDICTIONAL CHALLENGE

ICC Rules

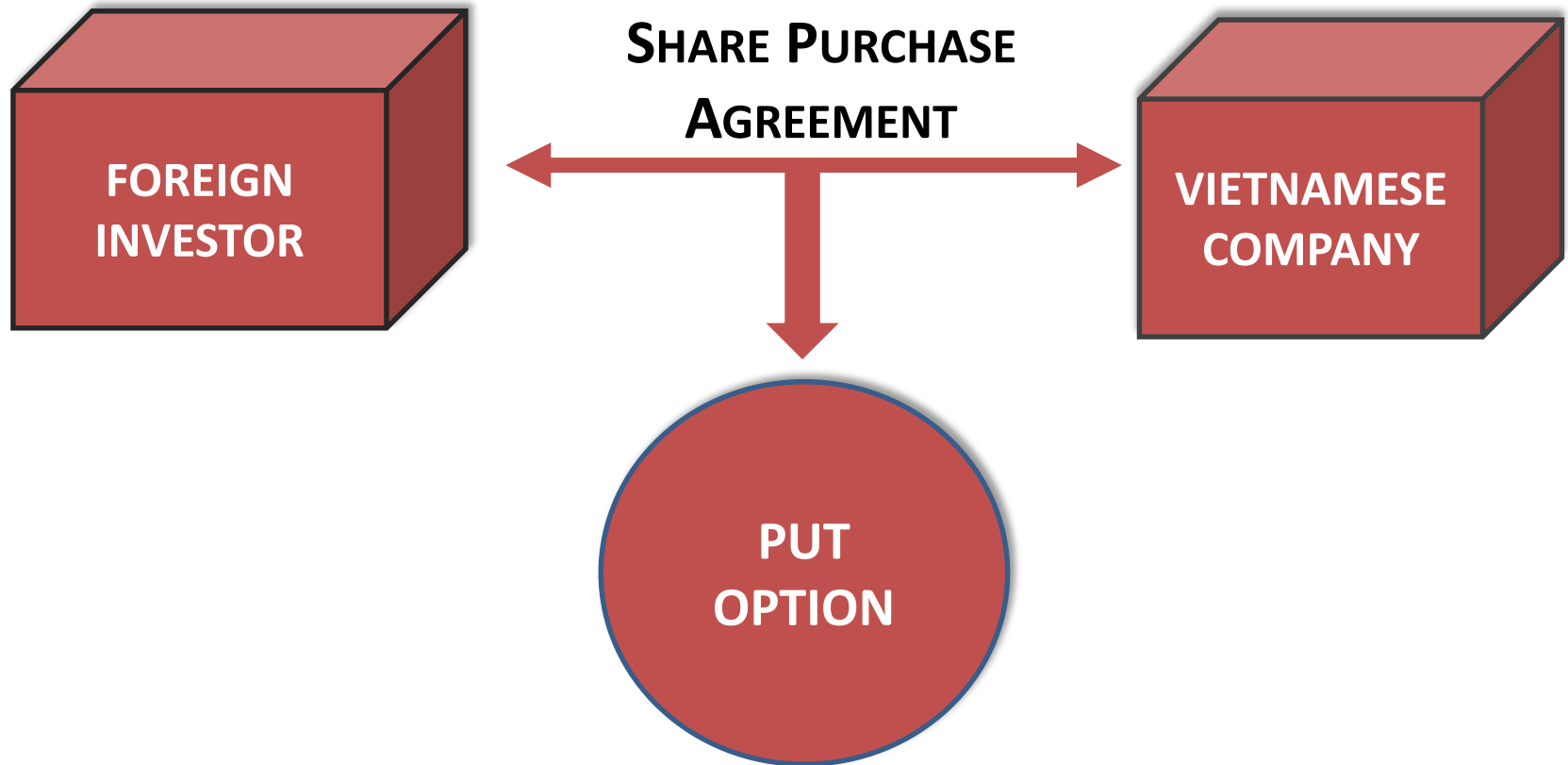
ICC Court *prima facie* determine (Art. 6.4 ICC Rules)

The arbitral tribunal shall decide (Art. 6.5 ICC Rules)

VIAC Rules

The arbitral tribunal shall decide (Art. 28 VIAC Rules)

SPA DISPUTE



FACT AND EXPERT WITNESS

	Fact Witness	Legal Expert Witness
Why	Complicated facts, long period of disputes	Complicated or vague legal issues under Vietnamese laws
How	ICC Rules (Art. 25 and Art. 3 of Appendix VI) ; Model Terms of Reference of ICC, VIAC Rules (Art. 19. 2 19.4 and 38.5)	
Assessment	The tribunal have full authority to determine the admissibility, relevance, materiality and weight of Evidence (Art. 9 IBA Rules)	

ESCALATION FROM CONTRACTUAL CLAIMS TO TREATY CLAIMS

Disappointment with the judiciary of host state and licensing state authorities;
Refusal of recognition and enforcement of arbitral awards



Alleged breach: Denial of justice, Expropriation; Fair and equitable treatment; Full protection and security, etc

* Trinh Vinh Binh (the Netherlands) vs. Vietnam [2003]

* DialAsie (French) [2011]

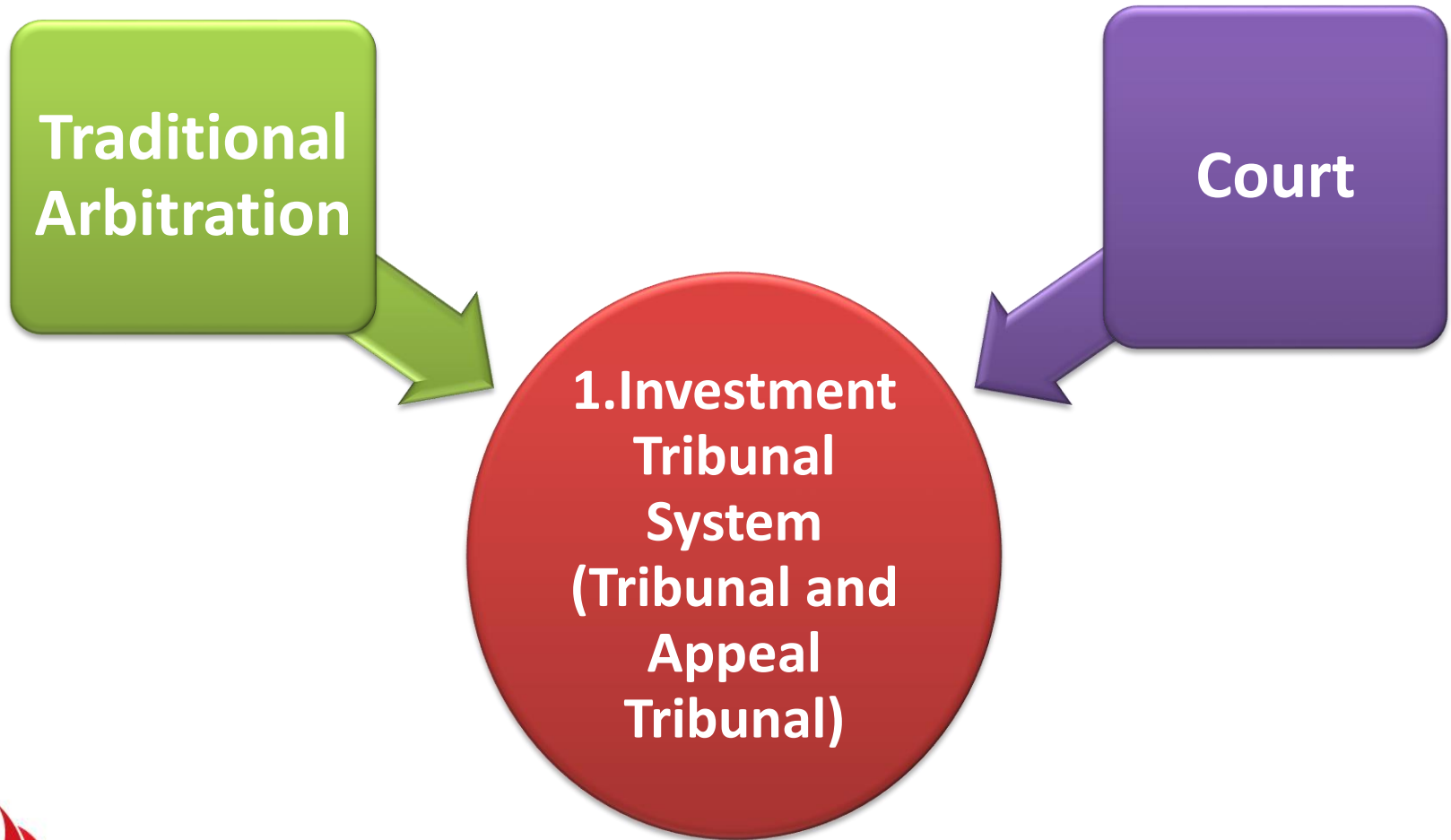
* SK E&C (Korea) [settled]

* Metropolitan (The US)

JURISDICTIONAL OBJECTION

- **“Foreign Investor” requirement**
(McKenzie (USA) vs. Vietnam [2010])
- **“Investment” requirement** (Recofi SA vs Vietnam [2015])

REFORM OF ISDS?



THANK YOU FOR YOUR KIND ATTENTION!

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