



Mechanisms for Resolving Commercial Disputes Outside of Courts

An Inevitable Trend in the Current Context

Mechanisms for Resolving Commercial Disputes Outside of Courts: An Inevitable Trend in the Current Context of December 2024

The methods for resolving disputes in commercial business outside of courts, historically speaking, such as negotiation, mediation, and arbitration, have existed long before the establishment of courts. These dispute resolution mechanisms in commercial business originated centuries ago but only began to develop robustly after the 20th century.

In recent years, especially in the post-Covid-19 context, the use of alternative dispute resolution methods in commercial business to settle commercial disputes has become increasingly popular in Vietnam. This trend is evident not only in the number of disputes being resolved but also in the diversity of dispute areas. Since the enactment of the 2010 Commercial Arbitration Law, the total number of disputes resolved at arbitration centers in Vietnam has been steadily increasing.

Notably, the Singapore International Arbitration Centre (SIAC), a regional arbitration organization in Asia-Pacific, recorded a record-breaking 1,080 new dispute cases, with a total dispute value of USD 8.49 billion (SGD 11.25 billion). This milestone marked a dual achievement for SIAC: it surpassed the 1,000-dispute threshold for the first time and recorded the highest number of cases since the organization was established. With these outstanding advantages, the trend of choosing alternative dispute resolution methods in commercial business outside of courts is becoming increasingly prevalent for resolving current commercial disputes.

Following this vigorous development, more than 30 commercial arbitration centers have been established across Vietnam and have gained the trust of many businesses. These centers are striving to become the "golden addresses" for resolving commercial disputes in the near future.

According to the 2005 Commercial Law, alternative dispute resolution methods outside of courts include the following:

- Negotiation between the parties.
- Mediation between the parties conducted by an agency, organization, or individual mutually agreed upon by the parties as a mediator.
- Arbitration.

Thus, under the current Vietnamese law, when a commercial dispute arises, the parties can resolve the dispute by directly negotiating with each other. In cases where negotiation fails, the resolution of the commercial dispute can be carried out with the assistance of a third party through mediation or arbitration.

The issue of selecting an appropriate dispute resolution method requires the parties to consider and choose based on various factors such as the objectives to be achieved, the nature of the dispute, the business relationship between the parties, the time and cost allocated for dispute resolution, etc. Therefore, when choosing a dispute resolution method, the parties need to clearly understand the nature of the dispute and weigh the advantages and disadvantages of each method to make a reasonable decision.

Negotiation – Advantages and Disadvantages

Definition of Negotiation

Negotiation involves the disputing parties themselves agreeing to choose a solution to end the conflict that has arisen between them. Negotiation is an informal dispute resolution method without the intervention of any state agency or third party. It reflects the parties' freedom to agree and decide independently. Most contractual disputes are resolved through negotiation. Negotiation in dispute resolution has become a long-standing commercial custom recognized by merchants and seems to have become a traditional practice in business life.

Legal Indicators of Negotiation:

- The parties voluntarily agree to seek a solution on a voluntary basis.
- There is no assistance from a third party outside the dispute.
- The parties must voluntarily implement the agreed-upon mediation plan.

The method of resolving contractual disputes in business through negotiation has the following advantages. Firstly, it allows for quick resolution and low costs. Moreover, it maintains the cooperative relationship, preserves business secrets, and does not affect the reputation of the parties. Additionally, it is not bound by rigid legal procedures.

However, negotiation also has disadvantages. The agreed-upon solution lacks enforceability. Moreover, a party acting in bad faith may exploit negotiation to delay or evade fulfilling obligations. This method requires both parties to act in good faith, honestly, and cooperatively, with each party needing to share benefits to hope for successful negotiation.



Conditions for Applying Negotiation:

- Typically applied in the early stages of the dispute resolution process.
- Suitable for disputes of small value, low complexity, and relatively clear related events.
- Parties must act in good faith.
- Parties must clearly understand their positions in the dispute.

Negotiation Procedure:

- Clarify the objectives the client aims to achieve.
- Analyze the advantages and disadvantages of each disputing party.
- Anticipate scenarios and develop mediation plans.
- Exchange information and propose solutions.
- Organize direct negotiations (if necessary).
- Draft a mediation memorandum upon reaching an agreement.
- Monitor the implementation of the mediation plan.

Mediation – Advantages and Disadvantages

Mediation is understood as the parties conducting negotiations to resolve disputes with the assistance of a third party, known as a mediator, through procedures and solutions proposed by the mediator. The mediation procedure has the following advantages:

Firstly

The parties have the autonomy to decide on mediation. They can choose any mediator or mediation venue that best suits their needs, allowing business owners to arrange their time reasonably to better manage their business operations without being constrained by time as in court proceedings.

Secondly

The mediation procedure is amicable. Mediation truly involves dialogue and negotiation to reconcile interests between the parties with the help of the mediator. It is an excellent method for resolving disputes amicably, maintaining and developing long-term business relationships for the mutual benefit of both parties. Mediation reflects the parties' desire to arrange the matter so that neither side is seen as losing, avoiding confrontational attitudes and win-lose outcomes typically seen in court litigation.

Thirdly

Mediation is conducted not only based on law but also incorporates business culture and the business relationship between the parties. The mediator facilitates free dialogue between the disputing parties, transferring information, helping them recognize their own and each other's strengths and weaknesses, and understanding their desires and needs. This allows them to prioritize the primary benefits each party seeks through dispute resolution and adjust their negotiation positions accordingly. During mediation, legal provisions are considered when clarifying facts or analyzing correctness but do not bind the process as strictly as arbitration or court proceedings. Therefore, mediation is conducted flexibly, free from rigid procedures and regulations.



Fourth

Mediation enhances the direct participation and control of business owners over the resolution process and outcome. Many business and commercial disputes are technical in nature (construction, finance, etc.), requiring participants to have sufficient knowledge in related business and commercial fields. However, in actual court litigation, many judges and lawyers may not meet these requirements. Most business disputes do not involve principles or ethics but are fundamentally about money and compensation for damages – issues that business owners have the right and ability to control and decide with the help of a third party facilitating their negotiation. Additionally, an important aspect of mediation that business owners are concerned about is their ability to control the use of relevant documents and evidence to resolve the dispute while maintaining business secrecy – a sensitive factor for them.

Fifthly

Mediation is conducted swiftly and cost-effectively. Respecting the maximum autonomy of the parties, the mediation outcome truly depends on the will and interests that the parties wish to achieve. Time is "gold" for business owners, so dispute resolution must be quick to ensure continuous and regular business operations. Mediation allows the parties to focus on the main issues of the dispute, minimizing time and money wasted on procedural formalities. At any point, if the parties agree to the mediator's proposed solution, the mediation can conclude without being compelled to continue. The cost of mediation, including mediator fees, depends on the parties' decisions, except when mediation is conducted at a mediation center.

Arbitration – Advantages and Disadvantages

Resolving disputes through arbitration is an indispensable form of dispute resolution in the market economy and is increasingly favored by business owners. Arbitration involves resolving disputes through the activities of an arbitration council/arbitrators, acting as independent third parties to settle conflicts by issuing binding rulings that the parties must comply with.

Commercial arbitration is not established by the state but is formed based on the parties' autonomy to agree. In other words, arbitration is a judicial body originating from arbitration agreements. Through arbitration agreements, commercial arbitration is trusted by the disputing parties and entrusted with the authority to examine the dispute's content and issue rulings.

Therefore, to bring a dispute to arbitration, the parties must have an arbitration agreement either before or after the dispute arises. This means that arbitration bodies can only resolve commercial disputes based on the parties' agreement and only when the disputing parties request a specific arbitration body to handle the case. This is a fundamental principle of arbitration proceedings, ensuring maximum autonomy for the disputing parties and clarifying the judicial nature of this dispute resolution method.

Arbitration offers the following advantages:

Firstly, arbitration is flexible, granting the parties proactive control. Disputing parties can choose to resolve disputes at an arbitration council they establish or any arbitration center they trust. This means the parties can select the arbitration form (institutional or ad hoc) to resolve disputes. If parties choose institutional arbitration, they typically follow the procedural rules of the selected arbitration center. Additionally, disputing parties agree on the time and place for arbitration, the selection of arbitrators, and the language and law applicable to the dispute resolution.

Arbitrators are chosen by the parties, allowing them to select individuals with expertise in specific fields relevant to the dispute. If the parties do not trust the selected arbitrator, they have the right to replace them. The law only intervenes if the parties cannot agree on the selection process for arbitrators. Arbitration also allows parties to proactively manage the timing and location of dispute resolution.

Secondly, arbitration is swift. The arbitration process can be expedited by shortening procedural steps, unlike court proceedings where parties may have to argue at hearings. Instead, parties can present their views and evidence through written submissions. This streamlines the dispute resolution process and saves time, allowing parties to focus on their business operations.

Thirdly, arbitration maintains confidentiality. Arbitration proceedings are conducted privately, and arbitration decisions are not publicly disclosed. This feature is highly attractive to businesses as it allows them to protect trade secrets and maintain their reputation without having to appear in court. This aligns well with the general mindset of business owners, as disputes with business partners are undesirable, and a business involved in numerous disputes can develop a negative public image, affecting future business relationships.

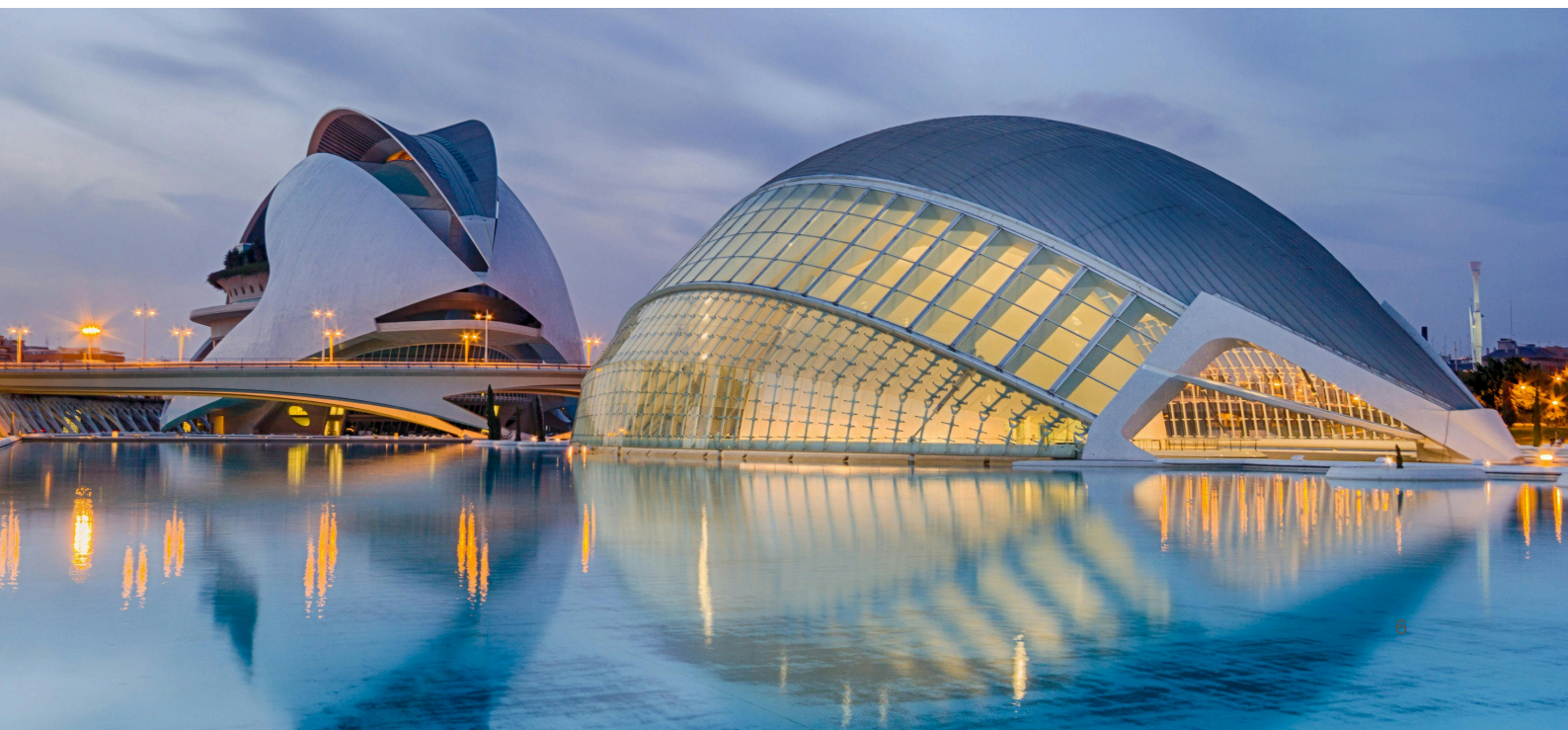
Fourthly, arbitration is more amicable. Arbitrators are attentive to the parties, which is a unique feature of arbitration. This does not violate the principle of the "independence of arbitrators" during dispute resolution. During arbitration, arbitrators work more gently, can communicate with lawyers, gather testimonies, and closely follow the case's progression. This genuine dialogue helps the parties understand each other better to find the best dispute resolution solution. Therefore, after resolving a dispute through arbitration, the disputing parties can continue their business relationship.



Fifthly, arbitration is not territorially limited. In arbitration proceedings, there are no jurisdictional issues. This means that disputing parties can choose any arbitrator from any economic arbitration center within the country or internationally to resolve their dispute. This is an advantage of commercial arbitration that courts cannot offer.

Sixthly, arbitration rulings have a general authoritative nature. This is an advantage over negotiation and mediation methods. Once arbitration issues a ruling, the parties cannot appeal to any organization or court (except in cases of serious procedural violations). This advantage stems from the nature of arbitration, where the arbitration decision is based on the parties' agreement. Therefore, when an arbitration ruling is issued, the parties are obligated to comply. Consequently, business owners are not dragged into lengthy and costly litigation processes as in courts. In arbitration, an independent third party decides the dispute by issuing their ruling, which is final and binding on the parties.

However, arbitration also has certain disadvantages. Resolving disputes through arbitration can be relatively expensive, and the longer the arbitration process, the higher the arbitration fees. Additionally, enforcing arbitration decisions is not always as smooth and straightforward as enforcing court judgments. Nevertheless, arbitration remains an increasingly favored method of resolving commercial disputes, combining the advantages of other dispute resolution methods harmoniously.



Proposals and Recommendations for Applying Commercial Arbitration Law

After 12 years of applying the 2010 Commercial Arbitration Law (TTTM), it is evident that the law has contributed to the development of arbitration activities, which have garnered increasing attention and acceptance from the community. The number of disputes resolved through arbitration has also significantly risen. However, the practical application of this law has revealed some limitations that need further improvement, specifically:

- The jurisdiction issues of arbitration and the specific jurisdiction provisions of Vietnamese courts.
- The provision in Article 2, Clause 2 of the TTTM regarding "Disputes arising between parties where at least one party is engaged in commercial activities" has not been uniformly understood.
- Besides granting the Arbitration Council certain authorities, especially the power to apply emergency measures, the TTTM's provisions on compensating damages for disputing parties do not align with international arbitration practices.

Globally, many countries prioritize policies to promote arbitration activities. Some nations aspire to become global dispute resolution centers, such as Singapore and South Korea.

With government support, several arbitration centers in the Asia region, including Singapore, Hong Kong, and South Korea, are expanding their influence. Courts in many countries have policies supporting arbitration, respecting the independence of arbitration proceedings by only intervening when arbitration requires assistance and minimizing negative interventions, particularly regarding the annulment of arbitration awards.

The TTTM is considered a positive step toward building an arbitration mechanism aligned with international standards. The TTTM has incorporated fundamental principles regarding international commercial arbitration and the UNCITRAL Model Law. However, alongside the achievements, in the context of Vietnam's vigorous socio-economic and market-oriented service sector development, there remain some unresolved issues in applying arbitration to resolve commercial disputes, such as:

- In international arbitration cases, choosing the arbitration venue implies selecting the law of the country where arbitration is conducted. The TTTM has not clearly defined this.
- The reasons for annulling arbitration decisions are often "abstract," increasing the risk that a party may request court intervention to delay the enforcement of arbitration decisions because, while reviewing the annulment, the arbitration decision cannot be enforced.





It is necessary to promptly amend the 2010 Commercial Arbitration Law to align with the UNCITRAL Model Law on International Commercial Arbitration. The UNCITRAL Model Law is considered the gold standard for commercial arbitration, with UNCITRAL listing 83 countries worldwide that adopt the UNCITRAL Model Law. Vietnam is not listed. Being listed among UNCITRAL Model Law countries enhances the attractiveness of a nation's arbitration activities, creates a more favorable legal and business investment environment, and promotes the development of arbitration and related services.

There is a need for specific guidelines on the grounds for simultaneously annulling arbitration decisions and developing a mechanism to review court decisions on annulling commercial arbitration decisions. Lawyer Dang Thanh Chung also believes that restrictions on the choice of applicable law for Vietnamese citizen disputing parties should be removed, as such restrictions contradict the principle that the determination of applicable law depends on the selection of the arbitration venue.

Moreover, the application of laws inevitably involves conflicts within the law's content and between formal legal provisions and rules chosen or agreed upon by the parties. Interpreting and selecting conflict resolution provisions are crucial, determining the case's content and influencing foreign investors' decisions to choose domestic or international arbitration, potentially leading to unfavorable outcomes for Vietnam. Therefore, it is essential to promptly establish principled regulations to resolve legal conflicts between systems within the commercial arbitration framework.

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