

CHAPTER 7

DISPUTE RESOLUTION AND ENFORCEMENT

1. Resolving Disputes

In Vietnam jurisdiction, there are three main dispute resolution forums available for investment and commercial agreements as follows: courts, arbitration, and mediation.

Firstly, regarding resolving disputes in courts: Recourse to the domestic courts is often suggested by Vietnamese partners and counterparties. Foreign investors, however, may be reluctant to agree to this choice, due to their unfamiliarity with the Vietnamese courts and potential concerns about the impartiality, independence and efficiencies of the court system. Besides that, the process to resolve disputes in courts is at least 6 months.

Secondly, to resolve disputes in arbitration center: over the course of time, the appointment to resolve disputes by arbitration in Vietnam has been popular. The use of arbitration is convenient due to the brief of procedure which helps the parties save their time, money and also reputation. To make sure that resolving disputes by arbitration shall be applied, the parties should agree before in the contract. For international arbitration, there is requirement that at least one foreign investor or foreign invested company involving in the agreement.

Finally, regarding mediation: mediation and commercial arbitration has many similarities. The jurisdiction comes from agreement between contracting parties. Moreover, the agreement reflects the will of parties to use these methods to resolve disputes and can be set up before or after disputes arise. By using mediation, there is confidentiality for the parties to protect their reputation. One of the features to use mediation in dispute resolution is that the result will be decided by parties through reaching the balanced benefit between parties. From there, they can maintain business relationship after mediation hearings.

2. Litigation

In the process of implementing business activities in Vietnam, if a dispute arises, the foreign investors can resolve it at many different competent authorities, one of these is the court of Vietnam.

Dispute resolution in court is a form of dispute resolution through the activities of court's tribunals, on behalf of the State to issue decisions or judgments. The decisions or judgments of the Court are legally enforceable. During the enforcement, interim measures could be used to protect the disputing parties and subject to courts' discretion.

3. Arbitration

From 1st January 2011, the Law on Commercial Arbitration replaced the former 2003 Ordinance, leading to the attraction and create a dispute resolution forum for foreign investors. Arbitration is a more formal and binding process where the disputes are resolved by the arbitrators nominated by both parties.

There are many advantages to using arbitration over court litigation, such as simple procedure, right to choose the arbitrator as well as an arbitral tribunal, high confidentiality. Furthermore, the jurisdiction base on the agreement of both disputing parties and the referees' decision (e.g. an award for damages) is final and binding, the permission of using non-Vietnamese languages, applying applicable foreign laws, and arbitral awards are recognized and enforceable in many countries.

While arbitration offers many benefits, the enforcement of arbitral awards in Vietnam remains challenging. The grounds for setting aside awards can be interpreted broadly when compared to the arbitration enforcement laws and practices of other countries.

4. Commercial Mediation

Mediation outside of court proceedings, especially in commercial areas is quite new in Vietnam. However, since the Decree 22/2017/ND-CP on Commercial Mediation (Decree 22) took effect from April 15, 2017. This legislation leads mediation practice in Vietnam to being more popular and familiar with domestic and foreign investors. Besides that, the establishment of the first prominent commercial mediation center in Vietnam including the Vietnam Mediation Centre (VMC) and the Vietnam International Commercial Mediation Centre (VICMC) also create a forum of choice for alternative dispute resolutions.

The mediation, a win-win process, will be conducted by the authorized mediators, selected by the disputing parties. Mediators conduct in such a manner as he or she considers appropriate, taking into account the circumstances of the case, the wishes of the parties, and the need for a speedy settlement of the dispute, and may make proposals at any stage for the settlement of the dispute. The mediator may hold joint mediation sessions with the parties or private mediation sessions with each party.

A party to the mediated settlement agreement may request the court to issue a decision acknowledging the agreement of the concerned parties. For certain disputes, mediation is a compulsory step before the concerned party can file a petition with the courts such as labor and real estate cases.

For confidentiality, information relating to mediation proceedings is confidential unless relevant parties in writing, and disclosure is necessary for enforcement. Besides that, the parties must agree not to use any documents or information obtained through mediation for use as evidence in subsequent judicial, arbitral, or other proceedings.

However, there is no formal system of accreditation for mediators in Vietnam. Each mediation center must submit a list of mediators to the department of justice in the city or province where it has registered for operation. Any change to the list of mediators must be notified to the department of justice. Ad-hoc mediators must also be registered at the Department of Justice in the city or province where the mediator resides.

5. Negotiated Resolutions

Negotiation is a method of dispute resolution in business in Vietnam without third party, where the parties present their opinions, discuss and find the most appropriate methods, and reach a consensus agreement to resolve the dispute. Negotiation is the common process through written correspondence or a meeting between the parties. Both sides seeking to settle the dispute cannot submit to court or used any statements against another party. This resolution is convenient, fast, simple, flexible, efficient, and inexpensive than court proceedings. Besides that, it resolves the dispute in peace ways so that protect the reputation and business secrets of the parties.

Otherwise, the negotiation's result depends on understanding, good faith attitude, and cooperation of both parties and the enforceability depends on the willingness of the parties to implement. Meaning, when one or both parties have uncooperative attitude in negotiation process, the possibility of success is very fragile. Negotiation results are not ensured by compulsory legal systems. Therefore, even if the parties reach an agreement to resolve the dispute, the implementation of the negotiating result is still dependent on the willingness of the party to do so.

Negotiation is susceptible to abuse in practices because of the lack of goodwill, one party has tried

to delay the process to linger the dispute, especially when the prescriptive period for initiating legal action no longer available. Therefore, the disputing parties often have to pay attention to this factor before or during the negotiation to have a reasonably selected resolution in the commercial dispute resolution process.

6. International Tribunals

International tribunals choice is permitted under the Vietnamese Law for contracts involving foreign investors. Vietnam is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. However, the enforcement of foreign arbitral awards may be difficult to implement and Vietnamese courts may refuse enforcement because of the fundamental principles. For instance, it will depend on where a potential defendant's assets (property) are located, and whether any award could be enforced outside of Vietnam.

ICSID-International Centre for Settlement of Investment Disputes is the leading body devoted to international investment dispute settlements with extensive experience and resolve the majority of all international investment cases. Even though Vietnam is not a member of ICSID, Vietnam have increasingly considered joining ICSID as it helps to promote international investment by providing confidence in the dispute resolution process.

7. Enforcement

The result of dispute resolution will be enforced by the parties, court or even arbitration tribunal. The enforcement of each dispute resolution method is quite different.

As the judgements/decisions of Vietnamese court are legally binding, which means that all agencies, organizations and individuals shall be strictly observed. For the foreign court's judgements/decisions, it can be enforced in Vietnam in very limited circumstances and needs to be recognized by the Vietnamese court before being enforced.

For the arbitration tribunal awards: the awards are enforceable in the same way as court judgements are. In contrast, the enforcement of foreign arbitral awards is more difficult and Vietnamese courts may refuse enforcement on the grounds of failure to comply with "*principles of Vietnamese law*".

The enforcement of mediation agreement in Vietnam will be valid and have legal effect on the disputing parties in accordance with the Civil Code Proceedings and Law on the Enforcement of Civil Judgments. However, the mediation agreement conducted by foreign mediation centers are presently not enforced in Vietnam.

