ADR & ARBITRATION GUIDE 2022

LIKON LAW - Vietnam Int’l Practice

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LIKON LAW, established in May 2017, is based in Ho Chi Minh City (Saigon), Vietnam's commer cial metropolis, and has experiences in providing legal services for local, national, and internation al clientele.

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CHAPTER 1

ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION

1. ADR in general

When engaging in business and entering into commercial relations, both parties wish for the smoothness in the transaction, best interests from the affairs, and look forward to long-term cooperation. Nevertheless, in the process of commencing or performing such practices, the occurrence of conflicts is inevitable. In the event of a dispute, it is of the utmost importance to opt for the most legitimate dispute resolution method in order to best ensure the rights and interests as well as the relationship between both parties. Conventionally, as in a traditional legal context, parties refer to bringing the dispute to the courts of competent jurisdiction. Even so, burgeoning court dockets, traditional confrontational processes, and spiraling litigation costs have caused dissatisfaction in this mode.

To meet the urgent need for optimal dispute resolution methods, new types of proceedings have been developed for the rescue known as Alternative Dispute Resolution mechanisms ("ADR"). ADR is used to describe an array of resolution mechanisms on legal disputes as alternatives to full-scale court processes or judicial processes, namely mediation, arbitration, and additional kinds of ADR designed for specific cases and subject matters. They provide procedures overcoming the inadequacies of the judicial system and quickly gain traction in dispute resolution for offering great help to the parties in leading to a settlement without going to court, or without litigation on the said matter. These methods involve the engagement of a neutral third party in resolving conflicts. In addition, it minimizes the interference of the third party in the results of dispute settlement, the parties have full discretion in such cases. To this end, prior to that, parties involved in the dispute may agree on the preferred method of resolution through the conclusion of a binding clause in their agreement. However, the parties may also agree on an alternative method after a dispute has arisen.

The next section will demonstrate how ADR mechanisms show a whole range of advantages on the parties over the conventional method of dispute resolution by courts, ensure to work wonders for the parties involved and spur the proliferation of interest in and use of these mechanisms.

2. Advantages

2.1. Speedy Resolution

In general, litigation often includes many complicated procedures, the litigants are often drawn into tactical games to delay proceedings, force opponents to pay unnecessary expenses, or gain benefits unrelated to the case. Judges can impose fines on the party who abuses the proceedings, however,

court backlogs and staff shortages make it difficult to keep shady practices under control. In other words, this method has traditionally emphasized procedure and process, the requirement for strict adherence to rules of evidence, the opportunity to appeal against unfavorable judgments, and other features that often make lawsuits prolonged and more complicated.

According to the Civil Procedure Code 2015, litigation includes procedures for settling a case at the first instance and procedures for appellate trial if there is an appeal. The first instance procedure consists of various processes, namely initiating a lawsuit, accepting the case, conciliation and trial preparation, and opening a court hearing. Likewise, the appellate procedure begins with the acceptance of an appeal, preparation for appellate trial, appellate court session, and pronouncement of appellate judgment. On the basis of the two-level adjudication principle, the parties can only request first-instance and appellate trial by the Court. However, in order to ensure the legitimate rights and interests of both parties, and to ensure the fairness and strictness of the laws, disputes can be resolved according to special procedures such as cassation and retrial.

In contrast, ADR provides streamlined procedures to accelerate case disposition, more time-efficient than taking a matter to court. Most of its processes are agreed upon in accordance with the timetable of both parties. Moreover, the delays are rare and can occur only if the parties agree to postpone or do not prepare submissions on time.

Regarding the arbitration process, as prescribed in VIAC Rules of Procedure, on a case-by-case basis, the procedure is as follows:

(i) in case the parties have reached an arbitration agreement that includes the selection of the Sole Arbitrator and stipulations on the procedures for conducting arbitration, the arbitration will be conducted according to the agreement of the parties;

(ii) in case the parties do not agree, arbitration proceedings include one (01) procedure with six (06) processes as follows:

- petition submitted to the Arbitration Cente by the Claimant;
- statement of Defence submitted by the Respondent;
- Constitution of an Arbitral Tribunal comprising a Sole Arbitrator *(The Plaintiff and the Claimant agree to appoint the Sole Arbitrator or request the President of the Arbitration Center to appoint one)*;
- pre-trial investigation;

- selection of the trial date;

- end of the trial.

(iii) if the parties do not agree that the dispute should be resolved by the Sole Arbitrator, the dispute will be resolved by the Arbitral Tribunal consisting of three Arbitrators. The procedure is similar as mentioned above except that the constitution of an Arbitral Tribunal will now consist of three Arbitrators. *(The Plaintiff and Claimant each appoint one Arbitrator or request the President of the Arbitration Center to appoint one Arbitrator. Two appointed Arbitrators will elect the third Arbitrator to act as the Chairman of the Arbitration Council. In case two Arbitrators fail to elect the Chairman of the Arbitration Council within the prescribed time limit, the President will appoint another Arbitrator to act as the Chairman of the Arbitration Council).*

The mediation process in accordance with Decree No. 22/2017/ND-CP include the following:

(i) the mediation agreement established in the form of a mediation clause in the contract or in the form of a separate agreement, made in writing;

(ii) selection and appointment of commercial mediators;

(iii selection of the Mediation Rule;

(iv) select the date of mediation; and

(v) reception of results.

2.2. Reduced Expense

There are obvious advantages for parties to elect ADR in comparison to litigation in terms of costs.

Firstly, in terms of the economic interests of the parties, court proceedings take a lot of time to settle, many cases need years to be resolved, causing delays in business activities, directly affecting profits not only from the time the dispute occurs but also into the future with no estimated end time. On the contrary, the decreased amount of time that it takes to resolve a dispute using ADR has a big impact on the lower costs for factors such as consultation fees, costs of witnesses, and days booked away from proceeding work like the aforementioned method. Also, investigations and appeals are limited, which means possible future cost savings.

Secondly, in the long run, the costs associated with ADR tend to be significantly lower than those of court proceedings when compared with the cost sequence from first-instance court to appellate court. In some special-nature cases, there will be additional court procedures such as cassation and

retrial, adding up to the total cost of the whole dispute settlement, eating up enormous sums of money, time, and talent whilst in the beginning, the cost of each separate litigation proceeding is actually lower than that of ADR.

2.3. Flexible Solutions

The flexibility of ADR procedures allow parties to focus on issues which matter to them, as opposed to their strict legal rights and obligations. The parties often have the choice of the ADR method to be used. The process is also very flexible, according to what best suits the parties.

Regarding how the ADR process is to be conducted and it is possible to agree that an arbitration proceeding is 'ad hoc', that is the rules are designed by the parties with the appointed arbitral tribunal unless an agreement or contract specifies otherwise, and there is normally no institutional supervision of the process. This may include procedural and discovery rules, any relevant industry standards, applicable law, language of proceedings, time limitations, and so forth. Parties may specify their own terms in the arbitration agreement Parties may also choose an arbitrator who is an expert on the relevant subject matter at hand, which can be beneficial in circumstances that require expertise and specific knowledge.

In the mediation process, although the mediation involves the mediator playing an important role in guiding, persuading, helping, and facilitating in the whole process, in essence, the parties still resolve disputes through negotiation based on the parties' wills and wishes. The result of this process is a mutual agreement voluntarily reached by the parties. As long as it does not violate the prohibitions of the law, does not infringe upon the national interests, public interests of society, does not infringe on the legitimate rights and interests of third parties, there will be no problems on the legitimacy of the content of the mediation agreement.

2.4. Privacy

ADR mechanisms can be advantageous for commercial parties due to the privacy and confidentiality that arbitration and mediation can offer in comparison to the public nature of court litigation. The need to preserve confidentiality, in practice, is a critical factor in any kind of disputes, as it allows parties to focus on the merits of the dispute without concern over its public impact. In ADR, parties have significant choice at the onset in deciding what information they wish to make public. Parties can agree that any or all of the ADR procedure, such as the hearing, evidence and any disclosures, be kept confidential.

2.5. Preservation of Business Relationships

When it comes to the purpose of preserving the business relationship, mediation is indeed the optimal ADR method. Mediation does not limit its focus to the discrete legal claims asserted by the parties. This mode looks beyond the legal issues to explore the relationship between the parties in an attempt to find a true resolution to the problem between them. Furthermore, the potential outcomes of the mediation process are not limited to pre-existing legal remedies, or by the requirement that one or the other party be found in the wrong. Thus, a wide range of creative resolutions of the problems is possible to create win-win situations.

2.6. Minimizing Harm to Business

Release of Information

The parties are free to differ in their opinion and can discuss their opinions with each other, without any fear of disclosure of this fact.

Regarding Law on Commercial Arbitration 2010, arbitrators must keep secret the content of the dispute they settle, except for cases where they must provide information to competent state agencies as prescribed by law. Likewise, according to Law on Grassroots Mediation 2013, the mediator must keep the information of the parties confidential, except in the case of serious disputes or conflicts that may lead to violent acts affecting the health and life of the parties or cause public disorder; in case of detecting a conflict or dispute showing signs of violation of the law on handling of administrative violations of the criminal law, it must promptly notify the leader of the mediation group to report to the competent individual or agency the right to timely settlement. Meanwhile, the legitimacy of the judgment should be ensured through publicity, publicity being the general case, non-publicity being the exception.

Protecting Public Image

Publicized disputes can tarnish a company's reputation, contract disputes and accusations of fraud can force a company to put the business on hold, ultimately decline a company's value, drive down sales, or even cause a business to fold. Therefore, ADR has established a strict and absolutely secret settlement mode in order to protect the public image of the parties involved. Both arbitration and mediation proceedings provide the ultimate confidentiality of information exchanged related to the dispute settlement process.

2.7. Controlling Damages

Generally, parties engaged in ADR processes should have greater satisfaction in the outcome as opposed to bringing the matter through the court system. This may be attributable to the fact that in ADR, parties exercise greater control over the outcome and directly participate in constructing the terms of their settlement.

3. Role of Counsel

A significant part of a lawyer's work involves advising and assisting clients to settle disputes. Lawyers can advise clients on and represent them in ADR processes. The various forms of ADR involve different consulting work for lawyers as follows:

3.1. Lawyers and arbitration

In reality, the duties of lawyers in the process of assisting clients in resolving disputes by arbitration includes the following steps:

Performing situation assessment

Lawyers will determine whether an arbitration against an opposing party is worthwhile from the laws, as well as the financial state and point of view of the client, and to develop an appropriate case strategy. In detail, such practices involving numerous tasks to be mentioned below:

Firstly, lawyers have to assess the strengths and weaknesses of the client's legal case, including the claims and defenses that may be validly made.

Secondly, the assessment of legal issues as well as the enforcement of such matters that may arise should also be carried out by lawyers.

Thirdly, it is necessary for lawyers to make predictions about the possible or actual position of the other party's strengths and weaknesses.

Lastly, it is to advise clients on whether to initiate arbitration, as well as the potential risks of carrying out such practice.

The act of performing a pre-arbitration review from lawyers ensures that the client will be able to avoid unfavorable situations or at least make the client more aware of the risks they are going to deal with, especially in terms of arbitration costs, and provides a strategy that best maximizes the interests of customers when participating in dispute resolution.

Securing third-party funding

In the event that a client does not have sufficient funds, or does not wish to use the necessary funds, to participate in the arbitration, lawyers can assist the client in securing third-party funding for all or part of the client's legal costs. Having the support of lawyers for the client, in this case, is an essential factor for the third party to consider in deciding whether to undertake the sponsorship or not. Besides, the role of lawyers in this activity also contributes to bringing fairness and ensuring that there is no case of financial imbalance between two parties involved in dispute settlement leading to risks for the weaker party.

Assisting in arbitration proceedings

Lawyers assist clients in every step of the arbitration process, which can involve thousands of hours of work and often includes both written and oral duties as follows:

(i) preparing and filing a request for arbitration, or submitting an initial response to a request for arbitration;

(ii) assisting in the establishment of the Arbitral Tribunal including the selection of the appropriate arbitrator;

(iii) assisting in the collection of relevant and authentic evidence, including the drafting and selection of documents to be translated;

(iv) preparing written submissions including factual evidence, governing law, witness statements, and expert reports;

(v) performing analysis of submissions and evidence submitted by the opposing party;

(vi) preparing necessary correspondence and responding to procedural incidents;

(vii) preparation for hearings includes core arguments, opening statements, and cross-examination;

(viii) preparation of submissions on expenses; and

(ix) assisting the recognition and enforcement of an arbitrator's award in favor of the client, especially if such award is not voluntarily complied with.

3.2 Lawyers and mediation

Mediation can be conducted by either the parties performing such practice by themselves or by mediators. In both of these matters, the involvement of lawyers is essential. In addition, lawyers can participate in the mediation process directly or in authorized cases. Whichever the case, the duties will be as follows:

Preparing documents and evidence

Before participating in the mediation, the lawyer will collect and analyze documents and evidence of the client so that during the mediation process, the client can present appropriate evidence to illustrate their explanation. In the mediation stage, the use of evidence will help persuade the other party to make concessions in order to quickly and definitively resolve the dispute without going to trial. Such practice also helps the client understand the reason why they have to give in and what will they gain or lose on the basis of their actual rights and interests.

Discussing the requirements and issues to be achieved and conceded

Before mediation, the lawyer will discuss with the client numerous requirements to be achieved during the mediation phase. On that basis, the client will decide to give in to the opponent or not. At what point, to what extent, and what are the requirements to be achieved after the concession is made. Lawyers will further analyze the provisions of the law, the time of the procedure, and issues

related to the enforcement process. The lawyer must show the litigants the benefits of making concessions over upholding their initial intentions or wishes. The final decision rests with the parties. During the discussion, the lawyer will inform the client about their legal status, analyze the advantages and disadvantages of the client as well as the opponent, thereby planning the mediation and choosing the best solution.

Agreement on court fees

In many cases, the parties can reach an agreement on the content of dispute settlement but cannot agree on the legal fees, especially in high-value cases. Depending on the case, the lawyer advises the client to accept how much of the court fee is appropriate and necessary to create favorable conditions for the other party. If the client have benefited from the mediation, then they should accept a little more loss in the court fee agreement. If only because both parties cannot agree on the legal fees, all efforts and goodwill of the involved parties will become meaningless.

Participating in mediation

As defenders of the client's legitimate rights and interests, lawyers have the right to participate in mediation. In this case, the lawyer must have an agreement between the client and the lawyer, the recommendation letter of the bar association, or the lawyer card. While participating in mediation, lawyers can at any time consult with their clients so that they can make legal demands or concessions, especially making requests in accordance with the legal requirements agreed before. The client should not be allowed to decide all issues but should discuss them with a lawyer. In cases where there are disagreements on the same issue, the right to decide is still the client's, but before that, the lawyer should still carefully present the arguments, views, and options of the client together with the analysis of the advantages and disadvantages of the options that the lawyer proposes for the client to consider.

In case authorized by the client to participate in the mediation on their behalf, the lawyer will present the authorization contract between the client and the lawyer. Lawyers are entitled to perform rights and obligations within the scope of authorization to protect the legitimate rights and interests of clients. However, for new incidents arising in the mediation process that has not yet reached an agreement between the lawyer and the client, the lawyer will discuss with the client before making the final decision. Even if being authorized to participate in the whole mediation process, it does not mean that the lawyer has the right to make all the decisions that are contrary to the interests of the client. This is not only professional ethics but also the principle of a professional lawyer.

CHAPTER 2

MEDIATION

1. Advantages to Mediation

Mediation is a conception that has become familiar to traders as well as businesses. In the process of the commerce, disputes are unavoidable. In our life, when we refer to the disputes, we immediately refer to the Court, but in the field of commercial business, mediation is a method which an effective measure and is used in many cases.

The conception of Mediation is mentioned officially in the UNCITRAL Model Law on International Commercial Mediation in 2002, in Article 1 of this Model Law defining *"Conciliation" as a procedure referred to by the phrase conciliation, intermediary, or the orther phrase of similar meaning. In which, the parties in the dispute relationship require a third party to assist in the settlement of disputes arise out of a legal relationship in accordance with the agreement contractual or non-contractual or disputes of this legal relationship.*

1.1. Direct Communication

Hence, Mediation is a measure of resolving disputes through a Mediator – the requested third party. At that time, the Mediator will be the bridge to create the best opportunities and coordinates so that the parties in the disputing relationship can solve their problems by direct negotiation. In the case, the mediator has an independent position and doesn't receive any benefits from the parties to the disputes, nor does it make any judgment on that dispute.

Therefore, the Mediator has only the duty of an intermediary to arrange a negotiation which helps the parties to compromise and solve the problem voluntarily by making their own decisions during the conciliation process.

Accordingly, with the connection of the mediator, the parties will to deal directly with the problems that arise during the implementation of commercial commitments. The parties to the dispute can exchange, talk, negotiate, through which the parties have the opportunity to express their opinions on the dispute. Moreover, mediation gives the parties the opportunity to explain, express their apologies and goodwill in order to dealing the interests of the parties after the dispute. Direct participation of the parties represents the responsibility of the parties for their choices. This direct approach also demonstrates appreciation and respect for the parties right to self-determination, so that they are not pressured into making decisions to resolve problems. Expressing your viewpoints and attitudes directly to the other party is the best method to solve problems specially in the commercial field.

1.2. Control over Result

Mediation is a measure that enhances the voluntary of the parties in dispute resolution.

Since, when participating in this process, the parties will face-to-face and give their opinions and requirements on the settlement of that dispute, expressing their desire for the effect of the mediation process.

In other words, when deciding to proceed with the Mediation measure, the parties must clearly understand and determine for themselves the purposes and results they want. So that in the process of conciliation, the parties can reach an agreement towards a result that can reconcile each other's interests and still achieve the original purposes. Therefore, they have completely control over the outcome of the mediation process.

1.3. Impartiality of Mediator

The mediator is someone who has the role of a third party. As an independent party, it is not binding about the interests to any party to the disputing relationship. “Independence” and “Objectivity” are two basic principles throughout the Mediator in the mediation process. This requires the mediator to always maintain the intermediary - bridge point of view, not to show favoritism to any party when performing the mission of controlling the mediation process. In fact, the mediator selected must be someone with knowledge and experience in the field in which the parties are in dispute. Therefore, in the process of leading the negotiation, the mediator can provide his or her neutral judgment and opinion. However, this is for reference, not binding and imposing on the parties. Therefore, the core role of the Mediator is to lead the mediation, build and maintain fairness throughout the mediation process.

1.4. Credibility of Settlement Proposals

A mediator would bring credibility to settlement proposals that would otherwise be declined by the parties out of suspicion related to the motives of the proposing party. As an experienced and trusted mediator, the mediator’s proposal will not be overlooked by the parties, compared to the proposal offered by either party.

1.5. Avoidance of Conflicts of Interest

The occurrence of a commercial dispute means that one party to such a disputing relationship suffers economic harm. Therefore, when choosing the method of conciliation, the parties in that dispute

want a solution that not only compensate for the loss of one party but also ensure that the other party does not suffer other losses.

The essence of Mediation is an act of compromise between the parties after a dispute, each party making a small concession . Therefore, when they have chosen this method to resolve the dispute, it means that they have accepted their mistake and want a compromise to towards an outcome which the best interests of the parties are guaranteed by the commitment voluntarily as well as in good faith about the cooperation of both parties at the moment and in the future. The element "Law" is not an important thing in the Mediation, the judgement is not essential, the victory or the worse is not the final result that the Mediation is aiming for. Through the process of discussion and negotiation, the parties find reasonable solutions to solve outstanding problems and overcome past mistakes. The fact that each party voluntarily accepts to concede some of its own interests to compromise together, towards the common interests of both sides. It's indicative of the existence of a conflict of interest in the process. In addition, the parties can control the outcome, so if there is a conflict of interests, they have the right not to continue the mediation and not be bound by the outcome of the mediation.

1.6. Nonbinding Nature

The Mediation method is selected based on the voluntariness of the parties in the dispute. During the mediation process, the parties will not be governed by any legal system or set a template for mediation. In addition, the third party - Mediator is also not allowed to give any opinion imposed to bind the disputing parties to a specific orientation. The whole process basis on the self-settlement, the self-determination and the voluntariness of the parties.

Hence, the agreements and commitments from the mediation process are not enforceable and do not have any legal mechanism for ensuring the implementation of this commitments. It all depends entirely on the goodwill and willingness of the parties to strictly comply. Therefore, the Mediation process takes place based on the respect and the capacity implementation of the parties without any binding on interests, procedures as well as legal aspects between the parties.

1.7. Reduction of Subsequent Litigation Costs

Except for Mediation, the parties can use other methods to resolve disputes such as: Commercial arbitration or Court. These are two quite common methods of dispute resolution, however, when the parties choose these two methods, they must pay a fee for the agency responsible for settlement, the cost of lawyer services. and other paperwork costs, etc.

Therefore, the Mediation method is still preferred because of the simplicity of the procedure as well as the cost savings for that dispute. In fact, a dispute can be resolved in just a few days, and the cost of the mediator is hourly. Meanwhile, a dispute to be resolved by Arbitration or Court can take up to months or years, meaning that the cost of Lawyers for the whole process can be multiplied. Therefore, using Mediation can help the parties not only save a lot of costs for other litigation steps, but also preserve other benefits.

2. Selecting Mediator

2.1. Style

Commercial mediators include ad hoc commercial mediators and commercial mediators of a commercial mediation organization selected by the parties or appointed by the commercial mediation organization at the request of the parties .

2.2. Background

(i) Having full capacity for civil acts in accordance with the provisions of the Civil Code; and

(ii) Have good moral character, prestige, independence, impartiality, objectivity.

2.3. Skills

The mediator must meet the requirements of mediation skills, understanding of law, commercial business practices and related fields .

The requirements for legal knowledge or in-depth understanding of commercial issues help ensure the expertise of the Mediator when participating in the Mediation process. In addition, in the process of leading the negotiation, the mediator also needs to have experience and skills in mediation to conduct mediation procedures professionally, towards the best outcome for all parties.

Although, Mediation is a popular dispute resolution method in the world. In fact, Vietnam has only built a basic legal framework to regulate Mediation, so intensive training for certification is very difficult, especially in the field of commercial mediation, which has not yet received much attention to organise the training programs in higher education.

3. Preparation for Mediation

3.1. Selection of Negotiating Representative

Negotiation is a long and difficult process, reconciling the interests of both parties is always a

difficult journey. Therefore, skills in communication, presentation, and quick analysis are needed in the whole process. Therefore, the negotiating representative is very important, determining most of the outcome of the mediation. Accordingly, in order to conduct conciliation, the representatives of the parties must have a thorough understanding of the dispute as well as a deep and broad knowledge of that field, which is sufficient to propose reasonable solutions, and the negotiator's experience in mediation as well as in the resolution of related commercial disputes is also necessary.

3.2. Confidentiality

During the preparation of the Mediation, the parties must keep confidential the records of evidence and documents for the Mediation. This work will benefit the parties in the negotiation process, holding specific and valuable evidence help the parties gain advantage in the negotiation process. In addition, such documents may contain business secrets or commercial agreements between the two parties, so the confidentiality of these documents is very important.

Not only that, the issue of the confidentiality of the lawsuit also needs to be kept private to ensure that the business activities of the parties are not affected. In particular, it can cause huge economic losses to the parties.

When the issues of the lawsuit are known to many people, the parties will be influenced by many outside influences, many opinions influence, making their opinions likely to change. This will make the Mediation process more difficult and also cannot guarantee the best Mediation results for the parties.

3.3. Evaluating Case

Of course, before entering into dispute mediation, the parties need to generally evaluate the case. That gives a foundation estimate of the dispute, identifies the issue, and determines the strengths and weaknesses of each party. Evaluating the case in this stage helps the parties to well prepare documents, procedures and evidence to defend themselves against the evidence and arguments of the other party.

In addition, identifying correctly the problem is a very important step for the researching records and finding suitable legal bases for Mediation. Accordingly, they can prepare in advance for possible situations that may arise during negotiations with the other party. An important goal in preparation should be to enter the mediation process confident enough in one's own understanding of the situation to be open to other participants' points of view and to options that may arise in the course of the mediation process.

This preparation helps the parties save time and costs for mediation as well as the mediation process will go smoothly and achieve the goals set by the parties.

3.4. Assessment of Opponent's Position

Identifying the opponent is always a wise move of the negotiator. Assessing the potential of the opponent, the parties will have a basic comparison to minimize the difference in force as well as a balance of capacity to ensure fairness in the reconciliation process. Moreover, knowing about the opponent helps the parties to anticipate the situation and take careful preparation steps in choosing their negotiators as well as being proactive with their actions on the negotiating table.

This shows that assessing the position of the opponent is necessary and is a decisive factor to the outcome of the conciliation.

4. Process

4.1. Issue Identification

The mediator give an introduction with his qualification and neutrality in this mediation process. The parties will introduce themselves at the request of the Mediator, trying to develop the rapport with them.

The mediator establishes control over the mediation process.

The mediator explains the mediation concepts and processes to ensure that the parties have a clear understanding and to allow their questions to be clarified.

The mediator formally restates the dispute for the parties to hear and give feedback on whether it is right or wrong, consistent with their original proposal.

4.2. Party Statements

The Claimant are allowed an explanation of their case, followed by a presentation by their Lawyer and a presentation of legal issues. The same is done for the Respondent. This is a step to facilitate the disputing parties to point out their opinions and attitudes as well as to present their thoughts on the case that has happened, along with the legal grounds that their side has prepared to clarify the dispute.

The mediator attempts to understand the facts, issues, obstacles, possibilities and ensures that each participant feels heard. Mediators encourage communication, asks questions to elicit information.

This step also helps the Mediator to identify the specific situation and the two sides also confirm once again their position in this dispute and the desired resolution.

4.3. Exploration of Resolution Options

The mediator may hold separate sessions with each party to understand the underlying interests and confidential information that they do not wish to share with the other parties. After listening to both sides, the Mediator must research to find solutions that both parties can accept.

The mediator must also try to understand and make comments on the matter of dispute to expand awareness and conclusions in order to expand the possibility of accepting the proposed resolution options.

Of course, the proposals that the Mediator makes must be based on the opinions and results of the discussion and negotiation process of the parties.

4.4. Memorialization of Resolution

Through the discussion process, with the guidance of the Mediator, the parties listen to each other's presentation and absorb each other's ideas. In addition, the comments of the mediator are for reference only, the parties will gather the agreed terms of the agreement. The mediator will conduct oral reconfirmation of those terms.

The parties, with the help of the Mediator, will proceed to make a record of the successful mediation with all the terms of the settlement that the parties have confirmed.

4.5. Closing Evaluations

When a successful mediation is reached, the parties will have to make it in writing. The mediation document takes effect for the parties in accordance with the civil law.

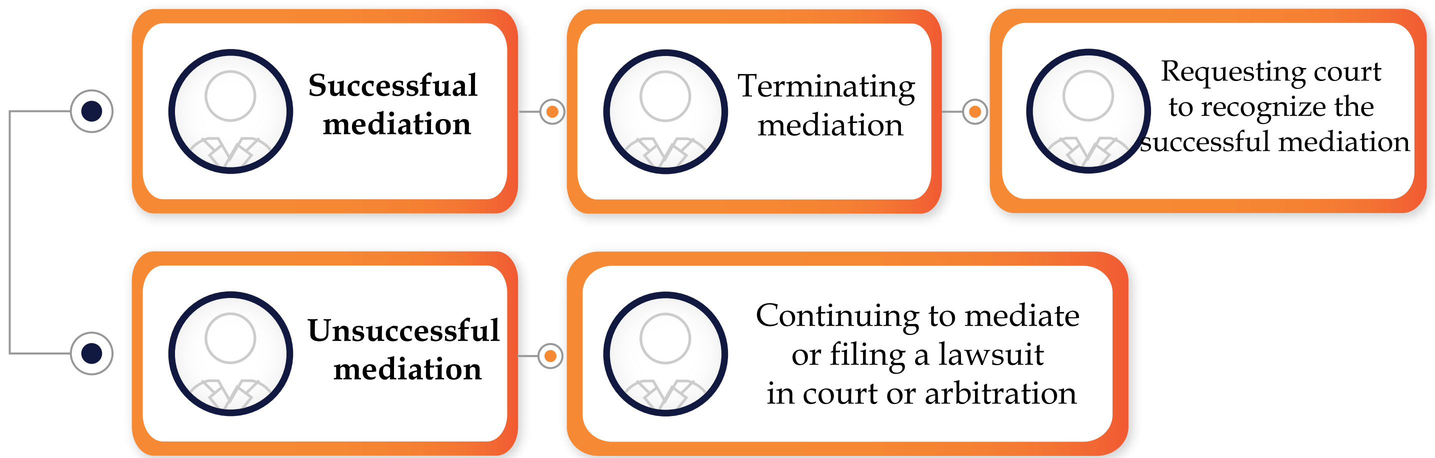
In case of unsuccessful mediation, the parties have the right to continue mediation or request other dispute resolution methods such as arbitration or court in accordance with the law .

The mediation procedure shall terminate in the following cases:

(i) when the parties have reached a successful mediation; or

(ii) when consulting the parties, the Mediator finds that it is no longer necessary to conduct mediation; or

(iii) at the request of one or more of the parties to the dispute.



5. Enforcement of Agreement

Decree No. 22/2017/ND-CP does not provide a mechanism to ensure the enforcement of the mediation agreement as well as the legal consequences in case one party violates the mediation agreement. And Clause 9, Article 419 of the 2015 Civil Code, only stipulates that the successful conciliation results are enforced according to the civil judgment enforcement law.

To be clearer, when considering other provisions of the law, we find that:

Firstly, the mediation agreement does not affect the admissibility of the case. As follows:

> (i) According to Clause 1, Article 192 of the 2015 Civil Code and Article 3 of Resolution 04/2017/NQ-HDTP, commercial mediation is not required to return the petition.
>
> (ii) Similarly, according to Articles 124 and 127 of the 2015 Civil Code, whereby even if one party violates the conciliation agreement, the Court will not use these as a basis to temporarily suspend or stop the settlement of civil cases. NS.

Secondly, a breach of the mediation agreement by one party may also be considered a breach of contract . At that time, the aggrieved party may apply the sanctions specified in Article 292 of the Commercial Law 2005:

> (i) forced performance of the contract;
>
> (ii) fines for violations;
>
> (iii) compel compensation for damage;
>
> (iv) suspension of contract performance;
>
> (v) suspension of contract performance; and

(vi) cancel the contract;

(vii) other measures agreed by the parties that are not contrary to basic principles of Vietnamese law, treaties to which the Socialist Republic of Vietnam is a contracting party and international trade practices.

CHAPTER 3

ARBITRATION

1. Arbitration Clauses and Agreements

According to Law on commercial arbitration, the condition for a dispute to be resolved by arbitration is a mutual arbitration agreement. On the other words, parties' arbitration agreement is as the basis for the Arbitrators' Jurisdiction.

1.1. Determining the existence of the arbitration agreement

The Vietnamese law is not binding on the time of concluding the arbitration agreement, the parties can agree before a dispute arises, that is, at the time of entering into the initial contract, or after the dispute arises. In case there is a transfer related to a transaction contract including the lawful arbitration agreement, the arbitration agreement shall also be transferred to the transferee unless otherwise agreed by the parties.

1.2. Principle of separability (Severability Doctrine)

The party subject to the arbitration award often invokes the Court that the main contract or the contract including an arbitration agreement is void, thus the arbitration agreement is no longer valid. However, it is important to note the principle of separability of the arbitration agreement for the transaction contract. Specifically, if the content of the transaction agreement and the validity of the main contract is changed or invalidated, the arbitration agreement will still be valid, even if the arbitration clause is established in the transaction contract.

1.3. Form of agreement

The arbitration agreement must be in writing that may be agreed upon as a contractual clause or in a separate document. When the parties have more than one arbitration agreement for a content of dispute, the agreement established last will be effective.

Particularly for the investment sector, the consent to arbitration agreements is also recognized in the investment treaty and the law on foreign investment. Thereby, foreign investors have the right to request international arbitration to resolve disputes even if there is no agreement between the investor and the Government on arbitration as well as the arbitration clause in the signed contract. The case is called "arbitration agreements without privity".

The practice of arbitration in some other countries, even if the parties have not concluded an arbitration agreement prior to the arbitration, the procedure is admissible if the existence of an arbitration agreement is alleged by one party and not denied by the other. In this case the parties are

deemed to have implicitly agreed to dispute settlement by arbitration. It is for this reason that any objections as to the competence of the Arbitral Tribunal have to be raised by the respondent before he argues on the merits of the case. This case is considered as a waiver of rights (described in detail in section 3.6), moreover, although Vietnam still accepts the arbitration agreement that has not been made before and in which one party does not deny the other party's request for arbitration, the form of the agreement must be expressed in writing still attached as the mandatory condition.

1.4. Invalid and unrealizable arbitration agreement

The parties when establishing an agreement should pay attention to the circumstances leading to the agreement being invalid or unenforceable in order to avoid disputes arising during the proceedings.

Invalid arbitration agreement

The following specific cases lead to the arbitration agreement between the parties being considered invalid:

(i) disputes arise in the domains falling beyond the arbitration’s jurisdiction; or

(ii) the person who signed the arbitration agreement does not have the competence to sign, such as not being the legal representative or legally authorized person, or despite having the right to sign but signing beyond the authority. However, according to civil law, in case the competent person knows that the signing is incorrect or exceeds his/her competence but does not object, the arbitration agreement will still be considered valid; or

(iii) the person who entered into the arbitration agreement has no civil act capacity under the Civil Code, such as a minor, a person who has lost his or her civil act capacity or has a restricted civil act capacity. Note that for a dispute involving a foreign element, the capacity to sign is subject to the law applicable to each party, not of course Vietnamese law;

(iv) the form of an arbitration agreement is not consistent with the provisions as mentioned. In case the initial arbitration agreement is oral or in other forms, but the parties make amendments in written form in accordance with the provisions, it will be accepted; the establishment of an arbitration agreement occurs when one of the parties is deceived, intimidated or compelled or declaration that the such arbitration agreement is invalid;

(v) the arbitration agreement breaches prohibitions specified by law.

Unrealizable arbitration agreement

The arbitration agreement will be incapable of being performed if the such agreement falls into one of the following cases:

(i) when the parties have reached an agreement to settle disputes at specific Arbitration Institution, which has ceased to operate without any succeeding arbitration organization, and the parties fails to agree on any another agreement; or

(ii) the parties have reached a specific agreement on the choice of an ad hoc arbitrators, but at the time a dispute arises, the arbitrator refused or could not participate in the resolution of the dispute and the parties did not agree on an alternative one; or

(iii) the parties have reached an agreement to resolve the dispute at a specific arbitration centre but have also agreed to apply the Rules of Arbitration of another arbitration centre, and the charter of the arbitration centre chosen for dispute resolution does not allow the application of the Rules of Arbitration of another arbitration centre; and the parties fail to agree on the replacement of Rules of Arbitration.

1.5. Binding and Non-bonding

The binding nature of the arbitration agreement between the signatories is the same as that of other civil agreements. However, in case the supplier of goods and services has included a provision on dispute settlement at arbitration in general conditions on goods and service provision drafted, the consumer still has the right to freely choose to initiate a lawsuit at an Arbitration Institution or a court to settle these disputes. In other words, suppliers of goods and services can only initiate arbitration proceedings with the consent of the consumer.

2. Arbitration Proceedings

2.1. Initiation of lawsuits

Petitions and enclosed documents

The plaintiff shall file a petition with the Arbitration Center or send it to the defendant when a dispute is settled by ad hoc arbitration. A petition contains:

(i) information on the place and time of establishment of the lawsuit petition;

(ii) information of the parties and witnesses;

(iii) summary of the circumstances of the dispute;

(iv) state the basis and evidence for initiating the lawsuit;

(v) specific requirements of the plaintiff and the value of the dispute; and

(vi) information on the arbitrator selected or requested by the plaintiff.

The arbitration agreement and relevant documents should be enclosed with the petition. In addition, in the event that the defendant's counter-claim goes beyond the scope of the arbitration agreement, the plaintiff has the right to object and clearly indicate such it in the self-defense statement.

As to the defendant, after receiving the petition and enclosed documents from the Arbitration Center or the claimant, within 30 days unless otherwise agreed by the parties or prescribed by the Arbitration Center's of proceeding, the respondent must submit a self-defense statement containing the following contents:

(i) information on the place and time of establishment of the self-defense statement;

(ii) information of the defendant;

(iii) grounds and evidence for self-defense; and

(iv) information on the arbitrator selected or requested by the defendant.

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 shall clearly indicate such in the self-defense statement. If the defendant fails to submit the self-defense statement, the dispute settlement will still proceed.

Time limit for arbitration proceedings and the prescription for initiating the lawsuit

The time factor is an important aspect of the conduct of an arbitration. The Vietnam's law does not stipulate the time limit for arbitration proceedings, but only stipulates the time of commencement and termination of arbitration activities. The time of commencing of arbitral proceedings is the time when the Arbitration Center or the defendant receives the plaintiff's petition. The parties are allowed to agree otherwise on the date of commencement of the arbitration or to accept the Arbitration Center's rules if relevant. The time of termination is when an arbitral award decides to settle the entire content of the dispute.

As for the prescription for initiating the lawsuit, according to the general rule of the Law on Commercial Arbitration, it is two (02) years from the date when the legitimate rights and interests of organizations and individuals are infringed unless otherwise provided by discrete laws. The parties should draw attention to the time when they knew or were forced to know that their legitimate rights and interests were infringed in order to proceed with the proceedings.

2.2. Competence of Arbitration

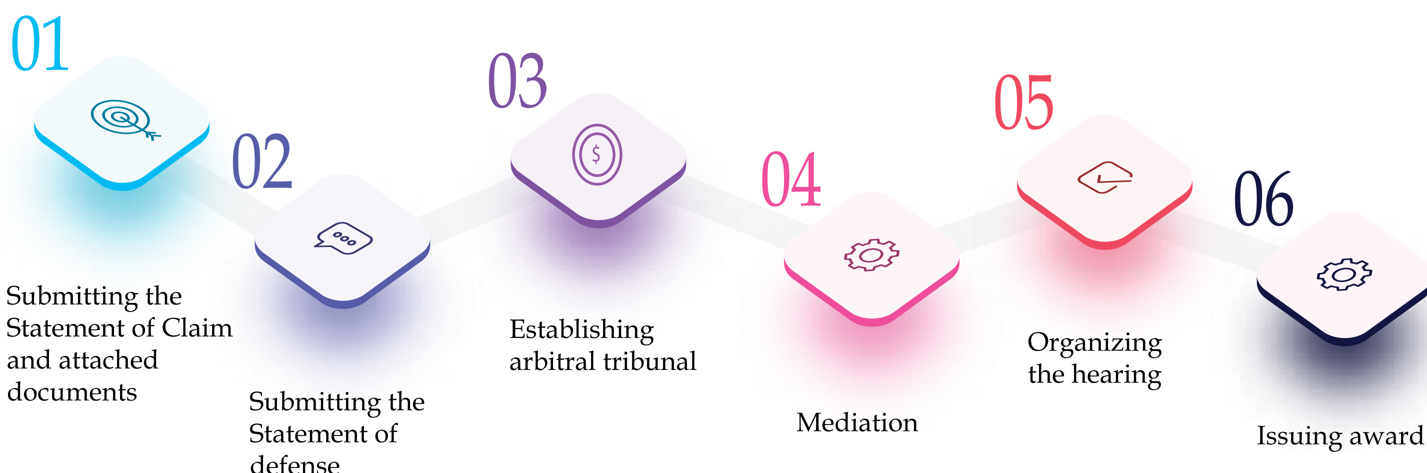
Scope

Disputes within the jurisdiction of arbitration are recorded in the law, specifically:

(i) disputes among parties which arise from commercial activities.

(ii) disputes among parties at least one of whom conducts commercial activities; and

(iii) other disputes among parties which are stipulated by law to be settled by arbitration, such as Investment Law, Maritime Code, etc.



Arbitration law does not have a detailed explanation of commercial activities, so the understanding and application of this term is based on the commercial law and civil law in general.

Delimitation the jurisdiction with the Court

The parties need to clearly understand the delimitation the jurisdiction between the Court and the arbitrator in order to initiate appropriate proceedings and avoid unnecessary time and expense. According to the New York Convention and Vietnamese arbitration law, the Court shall refuse to accept the case and return the petition with enclosed documents if:

(i) the disputing parties have reached a valid arbitration agreement;

(ii) one of the parties has submitted the dispute to arbitration and Arbitral Tribunal has already been constituted;

(iii) the parties have a mutual agreement to settle disputes at court as well as arbitration, and then one of the parties has initiated at arbitration.

In case the Court has enrolled the case, if the dispute settlement falls into the priority cases that must be resolved at arbitration, the Court shall suspend the settlement of the case and return the request for Arbitration and accompanying documents under Point g, Clause 1, Article 217 of the Civil Procedure Code 2015. In case the Court has finished settling the first-instance level, but only at the appellate level finds that the dispute is not within the Court's jurisdiction, the Appellate Court shall cancel the first-instance judgment and suspend the settlement of the case and return the petition with relevant documents.

It should be noted that if the initial arbitration agreement is not clear on the specific form of arbitration and the institution of arbitration, the case will still fall under the jurisdiction of the arbitrator if the parties have re-agreed on the mentioned issues. If the parties cannot reach an agreement, the dispute shall be settled at the request of the plaintiff.

The parties reaching the provisions on the competent Court over arbitral activities, such as the application of provisional urgent measures, summoning witnesses, collecting evidences, changing arbitrators, etc., must clearly state the name of the Court and satisfy the conditions that its competence is the People's Court of provinces or centrally run cities.

2.3. Provisional Remedies

Law on Commercial Arbitration stipulates the competence of the arbitration to apply provisional urgent measures that are amendment from the previous Ordinance on Commercial Arbitration. Accordingly, one of the parties may request the Court or the arbitrator to apply provisional urgent measures, and the request to the Court is not the rejection of the arbitration agreement to settle the dispute.

The Arbitral Tribunal's application of provisional urgent measures depends on the requirements of the disputing parties. The parties cannot request arbitration to apply such measure against a third party who is not in a disputing relationship, and the third party also does not have the right to request it applied to the disputing parties. The provisional urgent measures under the jurisdiction of

the Arbitral Tribunal following Clause 2, Article 49 of the Law on Commercial Arbitration 2010 include:

"a) Prohibiting any change in the status of assets under dispute;

b) Prohibiting or forcing any disputing party to commit one or more certain acts to prevent acts which adversely affect the process of arbitral proceedings;

c) Distraining assets under dispute;

d) Requesting preservation, storage, sale or disposal of any asset of one disputing party or all disputing parties;

e) Requesting temporary money payment between the parties; and

f) Prohibiting transfer of the rights to assets under dispute."

The requester for application of provisional urgent measures shall send a written requirement to the Arbitral Tribunal. Concurrently, the requester also must fulfil financial obligations via deposit a sum of money, precious metal, gemstone or valuable papers of a value set by the Arbitral Tribunal which equivalent to the amount of the loss caused by improper application of such measures in order to protect the requester's interests.

2.4. Arbitrator

As for the agreement on the choice of arbitrators, Vietnamese law is derived from the UNCITRAL Model Arbitration Law as well as the rules of commercial arbitration associations of other countries. Specifically, Law on Commercial Arbitration stipulates that the parties have the right to agree on the formation of an Arbitral Tribunal consisting of one or more arbitrators. However, regulations provide for a three-member tribunal unless the parties conclude otherwise or the arbitration institution provide different rules of proceeding. Each party appoints one arbitrator, while the chairman is usually appointed by the two party appointed arbitrators.

Vietnamese regulations respect the freedom of agreement between the parties on the selection of competent arbitrators. The process and duration for selecting arbitrators will have different flexibility depending on the mutual agreement or Rules of the Arbitration Center that the parties have chosen. The Law on Commercial Arbitration also provides general principles for cases that the parties do not agree otherwise or the Rules of the Arbitration Center do not provide otherwise. Specifically:

Regarding formation of an Arbitral Tribunal at an Arbitration Center, within 30 days after receiving a petition, the defendant shall announce the claimant a selected arbitrator or request the Arbitration Center's Chairman to designate an arbitrator. Within 07 days after the expiration of the time limit, if the defendant cannot select an arbitrator, the Arbitration Center's Chairman shall designate an arbitrator for the defendant.

As for the sole arbitrator dispute settlement, the sole arbitrator is selected and appointed by mutual agreement of the parties. If the appointment process fails within 30 days after the defendant receives a petition, the arbitrator is appointed by the Chairman of arbitral institution, at the request of one party or all parties and within 15 days after receiving such request.

In case of ad hoc Arbitral Tribunal, similar to point (a), within 30 days, if the defendant fails to notify the plaintiff of the selected arbitrator, the plaintiff has the right to request a competent court to appoint an arbitrator for the defendant.

As for the sole arbitrator dispute settlement, if the parties fail to mutually choose an arbitrator within 30 days from the time the defendant receives the lawsuit petition, one party or the parties shall request the President of the Arbitration Center or a competent court to appoint a sole arbitrator.

2.5. Application of law

The principle of party autonomy is characteristic of the arbitral process which is recognized in most countries around the world, including Vietnam. For foreign-involved disputes, the choice of applicable law is not necessarily to exist before the occurrence of the dispute, as long as the parties finally subject the agreement on the applicable law to govern the dispute. Conversely, failing that, the Arbitral Tribunal shall apply the law which is considered most appropriate to the dispute. Thus, there are no binding provisions that the Arbitral Tribunal shall choose the legal system of either disputing party.

In the case of Vietnam's law but there are no provisions related to the content of the dispute, the Arbitral Tribunal shall apply international practices to settle the dispute if the application is not contrary to the basic principles of Vietnamese law, such as Incoterms.

2.6. Waiver of rights

Law on Commercial Arbitration Law, absorbed from the UNCITRAL Model Arbitration Law, provides for waiver of rights to protect the legitimate rights and interests of the parties in the arbitration proceedings. In addition, another purpose of such provision is to remind the parties to

proactively detect violations in arbitration proceedings and then request the Arbitral Tribunal to handle them.

Accordingly, the provisions on waiver of rights are guided in Article 6 of Resolution No. 01/2014/NQ-HDTP guiding the implementation of a number of provisions of the Law on Commercial Arbitration (LCA). Specifically, the interpretation in Resolution 01/2014/NQ-HDTP is consistent with UNCITRAL, when a party detects a violation of the LCA or arbitration agreement but continues with the arbitral procedure and does not object to the Arbitral Tribunal within the prescribed time limit, such party shall lose its right to object at the Arbitration or the Court to such violations. Therefore, when one of the parties requests the Court for the mentioned-above violation, the Court must collect and examine relevant documents and evidence to determine whether one or the parties waive the rights. Thus, the Court has the right to decide even if one or the parties have lost the right to object in case the Court considers that there are sufficient grounds to accept or not accept the request.

3. Arbitral award

3.1. Finality of the arbitral award

Under the New York Convention, arbitral awards are decisions made by an arbitrator to resolve part or all of the subject of the dispute, the award is final and binding. Accordingly, in relation to each issue in the arising dispute, the New York Convention recognizes the value of a partial award, the preliminary award in the "final" understanding.

As for Vietnamese law, an arbitration award is necessary to satisfy two factors: (i) the decision to resolve the entire content of the dispute requested to be resolved and (ii) terminate the arbitration proceedings. In addition, the Arbitral Tribunal may amend and issue additional awards at the request of the parties or proactively correct them following the law.

The parties should distinguish between the registration of the award and the recognition and enforcement of the award. Many arbitral awards are performed voluntarily, however, there are still have cases that one party fails to execute the award. Registration of arbitration awards apply to disputes resolved by ad hoc arbitration, domestic ad hoc awards must be registered at the competent court to be enforced by the enforcement agency. Meanwhile, the recognition and enforcement of awards applicable to foreign arbitral awards will be discussed in the following section.

Judicial review

In order to ensure the fast and flexible nature of dispute arbitration settlement as well as to expect the carefulness of the Court when considering the grounds to set aside an arbitral award, there is no cassation procedure for the arbitral award at the Court. The law ensures the finality of the award, so when the parties have related complaints, they only request the Court to consider based on the annulment of the arbitral award.

3.2. Foreign Award

There are the two following criteria that a foreign arbitral award can only be enforced in Vietnam: (i) requested to be enforced in Vietnam and (ii) recognized and enforced by a Vietnamese court. The statute of limitations for filing a request for recognition and enforcement of a foreign arbitral award is 3 years from the effective date of the award.

Under the New York Convention, a foreign arbitral award is an award issued in the territory of a country other than the one requested for recognition and enforcement. Notwithstanding the conflict with Clause 3, Article 8 of the LCA, the dispute settlement is conducted in the Vietnamese territory, so the award must be deemed to be made in Vietnam regardless of where the Arbitral Tribunal held a meeting to issue the award. In case Arbitral Tribunal established under Vietnamese law issues an award outside the territory of Vietnam, at this time, if according to the LCA, this is a Vietnamese arbitration award, contrary if under the New Convention York, this is a foreign arbitration award. However, this case must apply under the Convention because Vietnam is a member of the New York Convention, which is a foreign arbitral award. This foreign award may be recognized and enforceable in Vietnam by the Vietnamese Court and the Court also has the authority to refuse this award.

Regarding the burden of proof, Vietnam's Civil Procedure Code recognizes that this obligation belongs to the party subjecting to the enforcement following the spirit of the New York Convention. But in fact, the Court still requires the creditor to provide more documents and evidence in addition to the evidence prescribed by law to prove that the award is not in the cases where it is refused.

Regarding the general procedure for requesting recognition and enforcement of foreign arbitral awards in Vietnamese jurisdiction are outlined as follows:

Step 1: Filing

The person or entity seeking recognition and enforcement of a foreign arbitral award in Vietnam must, either directly or via his or her representative, file a petition with the Ministry of Justice of Vietnam.

Step 4: Consideration of the application dossier

Within two months from the date of acceptance, unless the petition examination process is suspended pursuant to the law, the court will issue a decision to hold a court hearing to examine the petition, which shall be held within 20 days from the date of such a decision.

Step 5: Court hearing

The court meeting to examine the petition will be conducted by a panel of three judges under the supervision of a prosecutor from the procuracy of the same level. Unless the court rejects the petition, the court will make a decision on recognition and enforcement of the foreign arbitral award of the court (the "Recognition Decision").

Step 6: Sending the decision on recognition and enforcement of the foreign arbitral award of the court (the "Decision")

Within 15 days from the date of the decision on recognition and enforcement, or on non-recognition in Vietnam of a foreign arbitral award, the court must send the Decision to the parties concerned or their legal representatives, the Ministry of Justice and the procuracy at the same level.

Step 7: Appeal against the court decision

The concerned parties have the right to make an appeal against the Decision within 15 days from the receipt of such a decision.

The chief prosecutor of the provincial procuracy or the chief prosecutor of the supreme procuracy also has the right to appeal the Decision. The time limit for an appeal is seven days for a provincial procuracy and 10 days for the supreme procuracy from the date of receipt of such a decision.

Step 8: Review of the appeal/the protest

The recognition and enforcement of the award will finally be decided by the supreme court within one month from the date of receipt of the appeal or the protest (the "Supreme Court Decision").

Step 9: Request for enforcement of the award

The Supreme Court Decision takes effect from its date and may be appealed according to cassation or retrial procedures in accordance with the law.

CHAPTER 4

HYBRID PROCEDURE

Nowadays, it is reckon that international as well as national disputes have increasingly evolved in terms of quantity and complexity. Along with filing petitions at competent courts, parties have shifted towards Alternative Dispute Resolution (ADR) (e.g. arbitration, mediation and negotiation) for effective dispute settlement. However, the aforesaid dispute resolution mechanisms still have their own pros and cons requiring a great deal of contemplation from users.

Emerging from such circumstances, hybrid procedure offers users a more flexible and productive means of resolving conflicts in the contemporary business landscape. Hybrid procedure, or known as hybrid mechanisms, is a process involving more than one standalone ADRs. Such method holds great promising for dispute settlement, as it is often dubbed as "the best of both world" – lessening the disadvantages originated from separate ADR while utilizing the benefits thereof. According to the latest survey carried out by SIDRA, efficiency as well as costs are the driven factors impacting clients' choice in hybrid dispute resolution instead of arbitration, negotiation and/or mediation.

Hybrid procedure may take a variety of forms depending on the sequence of process, such as Negotiation – Arbitration, Arbitration – Mediation (Arb – Med), Mediation – Arbitration (Med – Arb).

1. Negotiation - Arbitration

Pursuant to Article 9 and Article 38 Law No. 54/2010/QH12 dated June 17th 2010 on Commercial Arbitration ("Law on Commercial Arbitration 2010" – LOCA 2010), participants shall have the freedom, during the process of arbitration proceedings, to negotiate and reach agreement with each other to resolve their dispute.

Up to now, Rules Of Arbitration Of The Vietnam International Arbitration Centre ("VIAC Rules") and applicable laws have not provided in detail the role of the Arbitral Tribunal in the negotiation process between the disputing parties. Specifically, the laws only recognizes negotiation as one of the methods allowed to be used for commercial dispute resolution . Thus, in general, the parties are allowed to proceed with the negotiation process without being subject to any procedural legal constraints.

On the other hand, due to the absence of relevant provisions stated in arbitration rules and applicable laws, the negotiation process is carried out under the self-settlement mechanism between the parties. Therefore, in contrast to mediation, all parties during the negotiation may discuss and resolve the dispute at their own discretion without the presence of a neutral third party to assist or make a final judgment.

A negotiation for dispute settlement is deemed as successful if involved parties decide to terminate the dispute resolution and a settlement agreement is reached. At that time, the Arbitral Tribunal shall stay the settlement of the dispute on grounds of Article 30.1.d VIAC Rules and Article 38 LOCA 2010.

2. Mediation – Arbitration (Med – Arb)

It should be noted that this is a two-tier procedure. At the first stage, all Parties shall endeavor to resolve their conflicts with the help of a Mediator. Where the mediation ends in impasse, they may resort to arbitration – the second and final stage in this procedure. The use of Med – Arb in VIAC is basically indistinguishable from the general understanding thereof. Moreover, the initial (Mediation) as well as later (Arbitration) stages shall follow VMC's Rules of Mediation and VIAC's Rules of Arbitration, successively:

> *"Firstly, Parties commence mediation and pay mediation costs in compliance with the Vietnam Mediation Centre (VMC)'s Rules of Mediation and Schedule of Mediation costs. If the mediation proves to be unsuccessful, one party initiates arbitral proceedings at VIAC in accordance with VIAC's Rules of Arbitration."*

Where the case proceeds to the arbitral stage, the same Mediator managing the mediation at the first place will also play the role of the Arbitrator. Such a person is often called by the phrase "same neutral Med-Arb", or simply "Med-Arbiter". However, such name does not appear in practice in Vietnam, thus depending on each stage in the Med-Arb proceedings, Med-Arbiter is considered as a Mediator and/or Arbitrator.

It is worth noting that pursuant to Article 9.2.đ Decree No. 22/2017/NĐ-CP dated February 24th 2017 of the Government on commercial mediation ("Decree No. 22/2017/NĐ-CP"), the Mediator is refrained from concurrently acting as an Arbitrator for the same dispute of which he/she is mediating or has mediated the resolution, unless otherwise agreed upon by the parties. Therefore, it is advisable that both parties expressly state in Med-Arb agreements that the Mediator navigating their own disputes shall play the role of an Arbitrator.

2.1. Advantages to Mediation – Arbitration

Among the current hybrid procedures, Med - Arb is the most popular choice among clients for effective conflict resolution. Not only does its benefits outweigh those of other standalone dispute resolution methods, but also keep up for long-term outcomes.

Med-Arb offers a speedy and cost-effective method for dispute settlement

Med-Arb can be efficient in terms of saving money and time for the disputants.

Regarding the former aspect, both parties have no need to appoint another unfamiliar face and prepare for other lengthy and time-consuming pretrial processes should the mediation process go downhill, as the Mediator has the ability to play the role of an Arbitrator continuing the dispute settlement. Besides, when the parties initiate the Med-Arb process at VMC, the parties will be refunded 15% of the mediation cost by VMC. Thus, the parties benefit from 15% of the mediation fees compared to sole mediation or arbitration, because the VMC's Schedule of Mediation Costs does not stipulate the refund of mediation costs if the mediation session has been organized, (regardless of whether the mediation is successful).

As for the latter, the disputed issues may be cut down in terms of quantity due to the agreements of the parties since the mediation. Therefore, the agreed points would be resolved in an initial shorter tiers (mediation), and only the remaining issues are to be carried on to the later stage (arbitration).

Enforceability

While providing a chance to mediate between the involved parties, Med-Arb approach also offers the assurance of a finality.

As mentioned above, the parties' initiation of arbitration and mediation of Med-Arb procedure is subject to the VIAC Rules, the VMC Rules (and other legal documents in the fields of arbitration and conciliation).

In case the parties agree to settle any or all issues arising out of the dispute right from the beginning, the parties are obliged to make a record of successful mediation in line with Article 15.1 Decree No. 22/2017/NĐ-CP. The written record of successful mediation will be enforceable for the parties in accordance with Civil Procedure Code 2015 . It should be noted that the obligor shall attach the written record of successful mediation when submitting an application for recognition of the successful mediation to the Court .

In case the parties switch to arbitration proceedings, the arbitral award is final and binding on all parties based on Article 4.5 LOCA 2010 and Article 32.5 VIAC Rules.

To sum up, regardless of the fact that such a decision is reached through mutual agreements (the mediation stage) or under the arbitral proceeding, it becomes a binding and enforceable settlement to all disputants.

The disputants are more inclined to mediate in good faith and cooperative manner

During the early Med-Arb procedure, the disputants may come into the realization that the outcome will lay in the hand of Mediator should they fail to reach a unanimous decision. Therefore, all parties will endeavor to avoid negative outbursts and display an amenable attitude to each other for a more satisfying and successful result.

2.2. Disadvantages to Mediation – Arbitration

Coercive Behavior from the Mediator/Arbitrator

Med-Arb and other hybrid procedures are known for expressly authorizing a third neutral party to render a final decision. However, such feature may lead to a scenario where the Mediator pushes the parties to comply with the his/her wishes (this is often the case with Mediators who use a "strong arm tactics" against the disputants), stemming the following outcomes:

(i) firstly, the disputants' agreement may reflect the will of the Mediator rather than their own;

(ii) secondly, either or all of the disputants may feel ignored, disrespected, or unfairly treated, thereby creating a negative impact on the involved parties' relationship.

Concerns over confidential information

Pursuant to Article 4.2 and Article 9.2.c Decree No. 22/2017/NĐ-CP, information relating to a

mediation case shall be kept confidential, and a commercial Mediator is obliged to protect confidential information about the disputes mediated by them (unless otherwise agreed by the parties or prescribed by law). Even though the law has prohibited the act of disclosing confidential information by the Mediator, it has done nothing to govern the Mediator/Arbitrator's usage of such information for the arbitral proceeding. So far, the above issue has remained as one of the major obstacles preventing clients from choosing the Med-Arb process.

Particularly, all disputants will be given an opportunity to express their opinions and demands to Mediator either in a private caucus or in a joint session during the mediation phase. For the former case, the Mediator is able to retrieve confidential information and/or facts from the presenting participants. The criticism centered on the fact that such knowledge may affect the principle of independence, objectivity and impartiality of the Mediator/Arbitrator if the parties decide to go to the arbitration stage (e.g. Mediator/Arbitrator is biased and/or prejudiced against one or more parties, thereby improperly influencing the final rulings).

Another ominous scenario is that all disputants may hold back information during mediation for fear of the fact that Mediator may lose its neutrality if assuming the role of the Arbitrator. Not only such disadvantage burdens the Mediator's duties, but also makes disputants overlook opportunities to resolve their conflict in a far shorter time.

2.3. Mediation - Arbitration Agreements

In recent years, as the parties gradually switch to use hybrid procedures such as Med-Arb for dispute settlement, the Med-Arb agreement since then has had a tendency to increase in number. Normally, the Med-Arb agreement will prioritize the principle of good faith settlement of the parties through negotiation. In the event that an unanimous decision cannot be reached, the parties will conduct mediation (the Mediation stage in Med-Arb). The Med-Arb Agreement further recognizes that once the mediation is unsuccessful, the parties will go to the final stage in the Med-Arb mechanisms, which is arbitration proceedings.

However, such statements are merely some of the issues drawn from the practice of drafting agreements, as the applicable law does not directly govern Med-Arb agreement in particular and the hybrid procedure agreements in general. However, arbitration and mediation stages in the Med-Arb procedure are subject to legal documents or other principles in the field of arbitration and mediation (as mentioned above). Therefore, some topics surrounding the Med-Arb agreement (such as legal validity, binding of the agreement, etc.) will be considered through the relevant legislation.

Conditions for Med - Arb Agreements' validity

It should be emphasized that the existence of an Med-Arb Agreement is one of the prerequisites for the parties to resolve disputes under the Med-Arb mechanism . However, the parties should ensure that the Med-Arb Agreement is in compliance with the conditions for validity to successfully initiate the Med-Arb procedure.

Regarding conditions about formality, the Med-Arb agreement must be established in writing in accordance with Article 16.2 LOCA 2010 and Article 11.2 Decree No. 22/2017/NĐ-CP. The Med-Arb Agreement may be established as a clause in a contract or as a separate agreement .

Regarding the content conditions, the Med-Arb Agreement generally must not contain content breaching the prohibition as specified by the law, going against social ethics, intending to evade obligations, and infringing the rights of third party .

Besides, due to the fact that the Med-Arb Agreement still has the nature of an arbitration agreement (in parallel with the characteristics of the mediation agreement), relevant parties should avoid the following cases in the process of negotiating, drafting and concluding the Med-Arb agreement:

> *(i) invalid agreement under Article 18 LOCA 2010 and Article 3 Resolution No. 01/2014/NQ-HĐTP;*

It is also important to note that an unrealizable Med-Arb agreement does not invalidate the agreement itself. In other words, such Med-Arb Agreement still exists between the parties, and the parties can renegotiate and revise so that the Med-Arb Agreement is enforceable between the parties.

In case the Med-Arb Agreement is invalid or unrealizable and one of the parties institutes court proceedings, the Court will proceed to accept such civil case .

3. Arbitration – Mediation

Similar to Med-Arb, Arbitration – Mediation (Arb-Med) is a two tier procedure consisting of mediation and arbitration phases. However, the main difference spotted from those hybrid mechanisms revolves around the step sequence of said ADRs. Unlike its counterpart, Arb-Med lays the first stone with an arbitration proceeding with a non-binding award. After that, the involved parties will make an attempt to resolve conflict with the help of a Mediator. VIAC provides the same guidance about Arb-Med procedure as follows: *"First and foremost, Parties commence and participate in arbitral proceedings at VIAC. After the arbitral tribunal is constituted, parties agree to suspend arbitral proceedings to mediate."*

At the mediation stage, the parties may fall into either of the following outcomes:

(i) in case of successful mediation: the parties make a record of successful mediation, terminating the dispute settlement phase; and

(ii) in case of unsuccessful mediation: the parties resume the arbitration proceedings until the Arbitral Tribunal passes a valid award between the parties.

It is worth noting that the parties may switch to mediation at any time before the issuance of a final ruling provided that the Mediator gives consent to such change. There are a number of reasons for initiating the mediation including but without limiting to:

(i) the parties wish to settle the dispute early by cutting down the later procedure in arbitration; and

(ii) every participant is given a chance to consider the possible outcomes stemming from the arbitral proceeding itself.

Arbitrator and Mediator are played by the same neutral third party, thus such person is deemed as "Arb-Mediator" to distinguish from Med-Arbiter in Arb-Med process. However, such name does not appear in practice in Vietnam, thus depending on each stage in the Arb-Med proceedings, Arb-Mediator is considered as an Arbitrator and/or Mediator.

The parties should pay attention to the issue of allowing the same Arbitrator to assume the position of Mediator in Arb-Med Agreement to avoid breaching Article 9.2.đ Decree 22/2017/NĐ-CP.

3.1. Advantages to Arbitration – Mediation

Efficiency and Enforceability

Similar to Med-Arb, Arb-Med also obtains the same advantages in terms of efficiency as well as enforceability. For example, such a hybrid procedure uses the same neutral party to navigate the entire procedure, thus decreasing the time limit as well as fees spent on initiating other standalone ADR for both relevant participants.

In addition, the approval of an arbitration award or record of successful mediation will have the same binding effect on the parties as with the Med-Arb method. Specifically, in case the dispute is resolved at the arbitration stage (before or after the conciliation stage), the award of the arbitral tribunal will be binding on the parties. If the parties reach a common decision immediately upon mediation and declare the termination of the dispute settlement process, the record of successful mediation made by the parties will be enforceable according to the civil law of Vietnam (as analysis in Section 2.c).

Participants' willingness to the Mediator's suggestions

One of Arb-Med's strengths is that the parties to a dispute can perceive the risk of losing the case or the unfavorable outcome when resolving disputes at the arbitration stage. Such "aversion" shall motivate the parties to push the dispute resolution process into the mediation stage, and the Mediator's proposals/solutions thereby have a tendency to be accepted more easily.

3.2. Disadvantages to Arbitration – Mediation

Confidentiality

Similar to the Med-Arb method, the fact that the parties choose to disclose confidential information during the mediation stage raises concerns about the neutrality of the Arbitrator in the dispute resolution process (stated in Section 2.b). For this reason, the participants of the mediation process in line with Med-Arb procedure are often cautious while disclosing confidential details and information to the Mediator because of the risks that the Mediator is unable to be neutral and objective when assuming the role of an Arbitrator.

However, when the parties keep silent or do not provide sufficient necessary information to the

Mediator, the success rate of the Mediator is not guaranteed and the resolution of the dispute is highly likely to progress to the subsequent arbitration stage to make a final award that is binding on the parties.

CHAPTER 5

COMPROMISES AND SETTLEMENTS

1. Methods of Reaching Settlement

A settlement is an agreement between the parties. It generally involves one party agreeing to pay compensation to the other party or meet the other party's demands, and the other party agreeing to take no further legal action on their claim . In a dispute, each party rarely knows with certainty the outcome of their case if their dispute is resolved by a court judgment or an arbitral award which often motivates them to reach a settlement. A settlement may take place in advance or parallel to the litigation process and is usually reached after direct negotiations between parties or negotiations between their attorneys. Accordingly, the parties can reach a settlement through (1) an in-person meeting or (2) correspondence .

1.1. Reaching a Settlement through an In-person Meeting

A settlement does not have to happen face-to-face, but an in-person meeting often leads to better coordination, greater information exchange and more positive outcomes such as satisfaction and trust than negotiations occurring via email. A settlement meeting often involves both parties and their attorneys working together to seek solutions for their dispute. Usually, each party and his attorney will meet in a third conference room where the attorney has secured instructions from their respective clients to advance negotiations and pursue settlement. The meeting is a useful way of achieving agreement in a set time frame. Also, the parties often prefer in-person meetings for complex disputes with great value. However, it is necessary for both parties to attend the meeting with the understanding that they will need to negotiate and compromise.

1.2. Reaching a Settlement through Correspondence

A settlement also can be reached by an exchange of written letters. A settlement agreement is a form of contract which parties can reach through the settlement offer and acceptance of the offer.

A settlement offer is an offer by one party to settle a dispute amicably to avoid or end a lawsuit or other legal actions . A settlement offer should include detailed essential information to determine the benefit of settling a case such as the statement of facts, the client's history, damages and evaluation. Remarkably, the terms of the offer of settlement must be clear and must show the intention to compromise and assume some obligations.

An acceptance of the offer of settlement often must be made within a reasonable time, and on the terms offered . In other words, the acceptance has to "mirror" the offer and does not modify the original terms of the offer.

Nonetheless, settlement is rarely a discussion of one issue. In most cases, the parties will have to compromise on many issues, each with its range of possible resolutions. The settlement, therefore, does not usually consist of exchanging offer and acceptance but is broken down into many offers, counter-offers and acceptances.

2. Attorney's Ethical Considerations

2.1. Good Faith

Attorneys should be fair in their conduct and their counseling of their clients concerning the settlement. Accordingly, in the course of compromising or settling, the attorney must not make a false statement of material fact (or law) to the opposing party. Unethical false statements of fact or law may occur in some ways: the attorney knowingly and affirmatively states a falsehood or makes a partially true but misleading statement that is equivalent to an affirmative false statement; the attorney incorporates or affirms the statement of another that the attorney knows to be false; the attorney remains silent or fails to disclose a material fact to the other party .

2.2. Acting within the Scope of Provided Authority and Abide by the Client's Decisions

The client has the right to decide what scope of authority to give the attorney, and the attorney should operate exclusively within the scope of the authority the client has provided.

Early discussion with the attorney of the option of pursuing settlement may help the client to develop reasonable expectations and to make better-informed decisions about the course of the dispute. However, the decision of whether to pursue settlement discussions belongs to the client . The attorney should not initiate settlement discussions without authorization from the client. Similarly, when the opposing party first raises the possibility of settlement, the better practice is to offer no immediate response until the attorney consults the client. On the other hand, the attorney has to provide the client with information, relevant facts that help the client decide whether to make a decision regarding a settlement offer or acceptance of the offer from the other party.

2.3. Adhere to Ethical and Legal Rules

Attorneys must comply with applicable codes of professional conduct and law during settlement negotiations and may not knowingly assist or advise clients to violate the law or other legal obligations. If an attorney discovers that a client will use the attorney's services or work product to further a course of criminal or fraudulent conduct, he must withdraw from representing the client. Especially, the attorney's obligation of allegiance to the client will not justify him in breaching, or

knowingly assisting the client in breaching. A settlement agreement is a contract and once entered into is binding and conclusive. Therefore, when compromise produces a settlement agreement, it is subject to challenge in the same manner as other contracts. For instance, a settlement agreement may be void and unenforceable because the attorney fails to comply with the codes of professional conduct.

2.4. Protect the Interests of Client

During settlement, attorneys often forget that they are representing the interests of a client, not to engage in a battle of wits with another attorney. Therefore, the attorney must reasonably consult with the client respecting the means of negotiation of settlement, including whether and how to present or request specific terms. This helps the attorney pursue settlement discussions with a measure of diligence corresponding with the client's goals. In other words, the degree of independence with which the attorney pursues the negotiation process should reflect the client's wishes, as expressed after the attorney's discussion with the client.

2.5. Confidentiality

Attorneys have a duty to keep the affairs of their clients confidential and the circumstances in which they are able to disclose client information is strictly limited. As one party's agent, the attorney will ordinarily be bound by the confidential agreement, since settlement terms and other matters concerning a lawsuit will ordinarily be confidential information that may not be disclosed without the client's consent after consultation. Therefore, in connection with a settlement, the general rule is that the attorney may agree not to reveal the settlement terms and other specified information that is subject to the attorney's confidentiality duty.

3. Matters to Consider Before Entering Settlement

3.1. Merits of the case

There are a number of factors to decide whether to compromise a dispute. They include, most obviously, the merits of the case that the client is in a strong or weak position in terms of the facts and evidence to support the case . Most disputes are settled for many reasons, including that it's often better to finalize a settlement than for either party to go through a long trial. But not all settlement offers are better than going to trial, especially where filing a lawsuit is likely to yield a higher amount of compensation. Therefore, the attorney can offer advice based on years of experience and careful evaluation as to whether initiating a settlement offer is a better idea than going to court or vice versa.

3.2. Commercial Relationship

It is necessary to consider the relationship between the parties. If the parties remain on good terms and want to maintain an existing relationship, compromise and settlement is the appropriate way to settle business disputes .

3.3. Resources and Time

Another main concern parties must deal with when considering before entering settlement is their own and their opponent's resources. If the respondent has limited financial resources, it may be better for the claimant to settle soon after the dispute arises instead of later, especially if the claimant anticipates incurring significant costs litigating the dispute. Similarly, it may not be worthwhile litigating a case against a respondent with extensive resources who can afford the high costs of litigation if the claimant can not. In this case, the claimant can create an incentive for speedy resolution by offering to settle for less than the full value of the claim (if the settlement value is reasonable) .

In addition, the parties should consider the burden, expense and opportunity costs if they must devote substantial time and other resources to support the litigation. This is because involving in litigation can typically lose a significant amount of work time to locating, collecting, reviewing and producing records requested for discovery, as well as the additional time spent preparing to submit a petition and trial.

3.4. Timing of Settlement

Settling the dispute as soon as it arises can be advantageous to both sides, mostly because of the cost savings involved in avoiding discovery and related attorney costs. This is particularly appropriate where maintaining the commercial relationship between parties is a priority, before the situation becomes irreversibly adversarial. However, if the respondent needs the time to assess the scope, nature of the dispute as well as strength of the claimant and the parties do not settle the dispute before proceedings begin, it is entirely possible for the parties to consider whether a settlement is possible during the litigation process. Furthermore, the parties also should consider all issues including the court's opinion, new evidence and information when deciding whether to engage in further settlement discussions during the course of the trial. In general, a settlement agreement should be reached before the litigation process although the prospect of settlement may be evaluated throughout the life of a dispute.

4. Matters to Consider in Negotiating and Drafting Settlement Agreements

4.1. Matters to Consider in Negotiating

Attorney Possess Authority to Settle

In many jurisdictions, an attorney can not settle a client's action without authorization from the client. An attorney's authority to settle is not incidental, rather it is essential that an attorney have express, special authority from his client to do so. If the compromise is arranged by an agent acting outside the scope of his authority, no settlement can exist regardless of whether the parties had a final settlement agreement . And the safer course (or a requirement in some jurisdictions, including Vietnam) is for the client and the lawyer to enter into a contract for legal services.

Negotiating Procedures

Under Vietnamese law, the negotiation between parties is not bound by legal regulations on the order and procedures for settlement. Therefore, the parties have the right to decide whether to compromise in a meeting or by correspondence, directly between the opposing parties or between their attorneys. This consideration may be based on the value of the dispute, geographical distance or the current commercial relationship between the parties.

Remarkably, Vietnamese law has no protection over communications made during settlement negotiations as 'without prejudice' principle in some common law nations. This means that any statements or documents parties make during settlement negotiations can be later used against them.

Therefore, each party should consider this element before choosing ways and procedures of settlement.

Set Bargaining Range

The parties should set the bargaining range during planning the negotiation. They first need to estimate the range of likely results if the case goes to settlement. Accordingly, the parties will set their bargaining range and establish the upper and lower limits. Compromising toward a specific goal will give the parties settlement structure, direction and focus.

Basic Principles - Cooperation and Flexibility

Cooperation is the road to a successful settlement. Distrust, stubbornness and attempts to gain unjustified advantages beget non-cooperation rather than concessions and tend to cause a breakdown in the communication necessary to reach a settlement. Therefore, the key to a successful

settlement is mutual cooperation. Moreover, there is a possibility that one party fails to evaluate the issue and sets the wrong bargaining range because there is some evidence that they were not aware of before. Therefore, during the settlement process, each party should be flexible to modify their original expectations. Many attorneys have flexible language negotiation but they never reconsider initial goals even after new information changes the merits of the case. This will lead to an ineffective compromise and settlement process and it will be difficult for parties to reach a settlement.

Gather and Prepare Supporting Documents

During negotiation, parties should gather the necessary documents, including not only the primary contract but also any subcontracts and relevant documents. Information is at the heart of negotiation. Adequate attention to gathering information and documents during the negotiation can significantly enhance the likelihood of a mutually satisfactory agreement. In addition, if one party has more information about the case, the opposing party's financial situation, needs and costs, it will be easier to develop negotiating proposals and have a stronger negotiating position.

4.2. Matters to Consider in Drafting Settlement Agreements

A settlement agreement, like any contract, should be about the performance of mutually agreed-up-on terms. Therefore, before drafting the settlement agreement, the parties should consider some crucial elements to ensure the performance of the terms and protect one party if the other party fails to perform the agreement.

Form of Settlement Agreement

Settlement agreements are contracts subject to the same rules of formation, validity, and interpretation as other contracts. Because of this, many jurisdictions require settlement agreements to be in writing to be enforceable. In cases where the law does not require settlement agreements to be made in writing, the parties also should record any terms of the agreement in writing so that rights and obligations are clear and enforceable. Verbal settlement agreements should be avoided as they may open to dispute at a later date. If the settlement involves a stay or dismissal of court proceedings, the parties will need to prepare a court order so that the case can be brought to an end and the settlement terms enforced within the existing proceedings if necessary.

Parties

It is important to ensure that the correct parties are identified as parties to the settlement agreement. Normally, the parties to a settlement agreement would be the parties to the contracts at issue or the

parties to the pending litigation or arbitration.

In certain trading relationships, however, the party with whom dealings are made may not be the contractual counterparty against whom rights or obligations are held. In addition, where a group of companies is involved, it is important to ensure the correct entity or entities are bound by the agreement. Therefore, it is necessary to check the list of all individuals and entities - both for the claimant and respondent - that the agreement will cover .

Scope of Settlement Agreement

It is necessary to identify the scope of the agreement. Accordingly, parties should carefully consider which claims they want to release as part of a settlement agreement and whether the language in the settlement agreement captures those precise claims. Furthermore, it is also important to clarify in the settlement agreement whether the release of claims is mutual. The settlement agreement should explicitly release all known and unknown claims because the general release of claims is not always sufficient to release claims that were unknown at the time of settlement.

Recitals

A settlement agreement should have recitals explaining the facts involving the dispute and state that the parties have reached a settlement. Recitals appear at the start of the agreement and provide a background of the settlement and underlying dispute, such as the settlement's date of execution, the parties to the settlement, a description of the claims that are subject to the settlement, a statement that the parties have voluntarily entered into the settlement to fully resolve the dispute. Although the recitals are not an enforceable part of the settlement agreement, they provide guidance for parties on how and why the settlement agreement was entered into. Moreover, recitals may prove useful in informing the parties' intent if disputes arise over specific terms or their performance.

Consideration

Like any contract, a valid settlement agreement must be supported by valid consideration. For example, under the settlement agreement, the respondent agrees to pay the claimant an amount in exchange for the claimant having to withdraw the claim. The obligation for payment of any money or other obligations should be clear and a time limit for performance should be expressed in the settlement agreement. There is little value in a settlement agreement if it was made unclear around payment terms. This is especially the case if the payment is made in installments or by a third party.

Confidentiality

One benefit to settling out of court is that the details are not part of the public record. Therefore, many settlement agreements incorporate a confidentiality clause that strictly prohibits the parties from disclosing certain details of the case. When considering the need for confidentiality in the agreement, the parties should give the confidentiality explicitly level and state the penalty for violation of the confidential terms.

Nevertheless, disclosure is usually necessary for some situations. A party will need or want to disclose the settlement to its accountant, financial/tax advisor, attorneys, and others with a need to know to render professional services. Therefore, the agreement also should provide that confidentiality is not required if a party must disclose to enforce the agreement.

Legal Costs & Tax consequences

Where compensation is paid, the tax implications should be considered. The parties must discuss the tax implications of financial payment to settle a claim, as well as the timing of a settlement payout and the jurisdiction in which the payment is made.

The parties also should consider how the legal costs of the dispute will be treated. Usually, each party bears its own costs.

CHAPTER 6

TAX ISSUES

1. General principles

In the process of settling disputes by arbitration, taxability of the money received depends on the nature of the claim. The receipts which are corporate income from manufacture, trade of goods and service provision or other one from deposit interests, loan interests and sale of foreign currencies,... are referred to taxable income, unless the taxpayers can demonstrate an exemption specified in Article 4 of Law on the amendments to the Law on Enterprise income tax 2008. The taxpayers are obliged to declare tax though it is a tax-exempt income.

Except for the non - deductible expenses mentioned in Clause 2 Article 9 Law on the amendments to the Law on Enterprise income tax 2008, actual expenses of enforcing a claim are deducted if incurred in performing business operation; career education; and national security. To be entitled to tax exemption, enterprises shall sufficiently provide invoices, evidencing documents as prescribed by law.

2. Injuries to business

2.1. Attorney's fee, arbitration charge

Attorney's fee is a charge paid by parties for lawyer's legal services. Arbitration charge is the legal cost that the parties pay for dispute settlement by arbitration. The arbitration charge includes:

(i) remuneration and travel and other expenses for arbitrators;

(ii) charge for expert consultation and other assistance at the request of the arbitration council;

(iii) administrative charge;

(iv) charge for designation of the arbitration centers ad hoc arbitrators at the request of the disputing parties; and

(v) charge for use of other services provided by the arbitration center.

It is recognised that the attorney's fee as well as arbitration charge are expenses that be deducted from taxable income due to these reasons below:

Firstly, they are contained in the group of non - deductible expenses as prescribed in Clause 2 Article 9 Law on the amendments to the Law on Enterprise income tax 2008.

Secondly, they are actual expenses incurred in carrying on an enterprise's trade or business. To ensure that the operation of the business always comply with the law and the rights' enterprise are effectively defended, the enterprise could hire lawyers and request arbitration to settle disputes arising in commercial business. Therefore, the attorney's fee as well as arbitration charge are considered to be necessary expenses deducted from taxable income.

2.2. Payment for goods and services

When the enterprise receives income from the purchase of provision goods and services or transfer of real estate, transfer of real estate invest- ment projects following the arbitration award, these incomes are referred to taxable income unless it is tax - exempt income as prescribed in Article 4 Law on the amendments to the Law on Enterprise income tax 2008.

3. Fine for breach, damages and interest on overdue payment

Fine for breaches is one of effective measures to restrict the partner's access to violation. According to Article 300 of Law on Commerce 2005, if the parties agree to a fine for breaches of the contract, the breaching party is obliged to pay an amount of fine for its breach of their contract, except for cases of liability exemption specified in Article 294 of this Law.

Forcing payment for damages is also one of the commercial remedies that is stipulated in Law Commerce 2005. Under provisions of this Law, damages is an amount of money that the breaching party pays for the loss caused by a contract-breaching act to the aggrieved party, including: the actual and direct loss due to the breach of the breaching party and the direct profit which the aggrieved party would have earned if such breach had not been committed. Unlike fine for breach, payment for damage could not be agreed in the contract, except for cases of liability exemption specified in Article 294 Law on Commerce 2005.

Interest on overdue payment is interest on the amount of money that the breaching party has not paid goods, services and other necessary expenses to the aggrieved party. According to Article 306 of Law on Commerce 2005, the aggrieved party has the right to claim an interest on such delayed payment at the average interest rate applicable to overdue debts in the market at the time of payment for the delayed period, unless otherwise agreed or provided for by law.

It is identified that all of these payments mentioned above are not contained in the group of non - deducted expenses as prescribed in Clause 2 Article 6 Circular No. 78/2014/TT-BTC issued on June 18, 2014 which has been amended by Article 4 Circular 96/2015/TT-BTC. Moreover, they are actual

and relatable to the business operation. Due to the fact that, damages, fine for breaches and interest on overdue payment shall be deducted from revenues to calculate taxable income.

In addition, Clause 1 Article 5 Circular No. 219/2013/TT-BTC issued on December 31, 2013 which has been revised and amended, provides that monetary compensation (including compensation for land and property on land that is expropriated by a competent authority), bonus, allowance, or payment for transfer of emission permit, or other revenues are not required to declare and pay value added tax ("VAT"). Therefore, damages, fine for breaches and interest on overdue payment mentioned above are charges that the parties shall not declare and pay VAT. In this case, parties only shall make out receipt/payment voucher without invoicing.

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