**SETTLING DISPUTES THROUGH ARBITRATION AND THINGS TO KEEP IN MIND**

As an alternative dispute resolution outside of the courtroom, commercial arbitration has long become the preferred dispute settlement mechanism and has been used everywhere around the world, especially within the sphere of international commercial activities.

Although having been introduced into Vietnam relatively early (since the end of the nineteenth century), arbitration has only been duly paid attention to and recognized as an adjudicative institution after the passage of the Ordinance on commercial arbitration in 2003. Despite having many inadequacies content-wise, the Ordinance on commercial arbitration 2003 bears an essential meaning in regulating the law, laying a legal foundation for Vietnamese arbitration to access and integrate with the common trends in international arbitration. When the Law on Commercial arbitration 2010 was passed, former weaknesses relating to the jurisdiction of arbitration centers and void arbitration agreements, etc. were rectified, making the option of settling disputes through arbitration legally clearer, easier to access, and arbitration has been more commonly applied in Vietnam ever since.

Although both are mechanisms for settling disputes, resolving disputes in Courts versus in Arbitration Centres have a few differences, and this article will identify some noteworthy points for the readers to take into consideration when opting for dispute resolution by arbitration:

1. **Reviewing the validity of the Arbitration Agreement**

* *The dispute falls within a sector over which Arbitration has jurisdiction to adjudicate*:

Not every dispute can be settled by arbitration. The jurisdiction of arbitration is limited to certain types of disputes enumerated in Article 2 of the Law on Commercial Arbitration, including:

1. Disputes among parties arising from commercial activities.

2. Disputes among parties in which at least one party conducts commercial activities.

3. Other disputes among parties that are permitted by law to be adjudicated by arbitration.

* *There is an agreement to resolve the dispute through arbitration:*

Unlike the jurisdiction of Courts which is provided for by law and activated automatically, the jurisdiction of arbitration only arises if the parties agree. Agreements to resolve disputes through arbitration can be entered into before or after disputes have arisen.

* *Not belonging to cases of void arbitration agreements:*

Regarding the form of the agreement: According to Article 16 of the Law on Commercial Arbitration 2010, arbitration agreements can be made in the form of arbitration clauses within a contract or in a separate agreement. These agreements shall be made in writing.

The following forms of agreement can also be regarded as written form:

* Agreements made through communication between the parties by telegram, fax, telex, email or other means as prescribed by law;
* Agreements made through the exchange of written information between the parties;
* Agreements recorded in writing by lawyers, notaries public or competent institutions at the request of the parties;
* In their transaction, the parties refer to a document that contains an arbitration agreement such as a contract, an invoice, a company charter and other similar documents;
* Agreements made through the exchange of petitions and self-defense statements reflect the existence of an agreement proposed by one party and undenied by the other.

As regards other matters: In general, from the moment an arbitration clause is drafted until the start of an arbitration procedure, the issue of an arbitration agreement’s validity should be considered the first. The parties should refer to cases where arbitration agreements are voided as set out in Article 18 of the Law on Commercial Arbitration which was further elaborated by Article 3 of Resolution No. 01/2014/NQ-HĐTP to ensure proper compliance with the law.

1. **Re-negotiating in case the arbitration agreement is unclear**

Although regulations on arbitration have been renovated and reformed a lot after the passage of the Law on Commercial Arbitration 2010, in reality, dispute resolution by arbitration has only started to take off in the past 2-3 years. However, disputes settled by arbitration often result from contracts drafted and entered into many years ago, making it hard to avoid errors in arbitration agreements such as failure to specify the form of arbitration (institutional or ad hoc) or failure to determine the specific arbitration center.

If the form of arbitration is not specified, or the specific arbitration center is not appointed as above, the parties should consider Article 43.5 of the Law on Commercial Arbitration about re-negotiating the form of arbitration or the specific arbitration center settle the dispute. If the parties fail to re-negotiate, the selection of arbitration form and specific arbitration center for dispute settlement will be executed in accordance with the plaintiff’s request.

Although whether the application of the aforementioned regulation on re-negotiation must be satisfied before the plaintiff can appoint an arbitration center or not is still debated in reality, the parties taking a case to arbitration should nevertheless keep in mind the issue of re-negotiation to better protect their right to choose the arbitration center.

1. **Selecting and interviewing the arbitrator.**

One of the basic differences between settling disputes in courts and by arbitration is that the parties will be able to choose the arbitration centre as well as the arbitrator to resolve their disputes. This regulation allows the parties having a dispute to choose arbitrators who have the most appropriate specialties and skills for their disputes. Considering the finality of the arbitral award, the parties should be very cautious when choosing which arbitrators will adjudicate their disputes.

However, an arbitral tribunal can only be good if it is composed of good arbitrators, whether the arbitral tribunal is capable of resolving the dispute between the parties or not depends greatly on the arbitrators selected by the parties. In fact, when opting for arbitrators, the parties are likely to choose well-known or familiar arbitrators, which at first glance seems to be beneficial but isn’t always suitable in all circumstances. According to the author, the chosen arbitrators should be “appropriate” arbitrators who don’t have to be too famous but instead should be knowledgeable and appropriately skilled. In addition, assessing the chosen persons’ viewpoint is also a legal issue worth paying attention to.

Moreover, prior to officially submitting the application for arbitrator appointments, the appointing party should allow time for preliminary interviews with the arbitrators they intend to appoint about such arbitrators’ time, expertise and experience working on similar cases before making the final decision. This exchange shall focus only on viewpoints and general issues to ensure the appointed arbitrator have enough time to study and adjudicate the dispute in the best possible way, the parties should not go too deep to avoid revealing too much information about the case because this person has yet to be officially appointed as an arbitrator for the case.

1. **Noticing the right to object in arbitration proceedings**

When litigating a case in Court, if a party notices that the Court commits errors during the dispute settlement process and the case is being adjudicated against their interests, the disadvantaged party usually keeps those judicial errors secret to later appeal in appellate procedures or request for review under reopening/cassation proceedings. However, this trick will not be applied when disputes are resolved by arbitration because there is no reviewing procedures within arbitration proceedings.

Moreover, pursuant to Article 13 of the Law on Commercial Arbitration, in case one party is aware of a violation of a provision of this Law or the arbitration agreement but still carries on with the arbitration procedures and does not object to such violation within a period of time prescribed by this Law, that party will lose their right to object in Arbitration or in Courts. Therefore, whether the parties disagree with the arbitration’s jurisdiction or violations about the content, procedures in the arbitration’s dispute settlement process, they should nevertheless immediately exercise their right to object to avoid losing this right.

Conducting proceedings in arbitration is a long process that requires the conductors to possess certain experience and knowledge, this “settling disputes through arbitration and things to keep in mind” series can’t cover all aspects that may arise, however, we hope that this series of articles has brought you with some helpful knowledge about the process of dispute settlement in arbitration for your own use in the future.