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The Current Status of Law on Commercial Arbitration Agreements: A Qualitative Study from Vietnam

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Abstract: In Vietnam, arbitration is a method of resolving disputes in commercial business, established on the principle of voluntariness and agreement of the parties, to anticipate conflicts that may arise or have arisen. Creating a solid legal corridor to protect the legitimate rights and interests of the parties based on equality and voluntariness between subjects participating in transactions and contracts related to commercial business to agree to resolve disputes by commercial arbitration is necessary to contribute to the effective implementation of foreign investment capital collection policies in Vietnam. Through qualitative research methods, the authors will focus on clarifying the legal situation and pointing out inadequacies in legal regulations in Vietnam related to issues such as (i) the effectiveness of arbitration agreements and (ii) the form of arbitration agreements. From there, we propose recommendations to improve the law in Vietnam related to commercial arbitration agreements.

Keywords: agreement; effect; form; commercial arbitration

商业仲裁协议法律现状：来自越南的定性研究

摘要：在越南，仲裁是解决商业纠纷的一种方式，建立在自愿和当事人同意的原则上，以预防可能发生或已经发生的冲突。在参与商业交易和合同的主体之间，在平等和自愿的基础上，建立一条坚实的法律走廊来保护当事人的合法权益，同意通过商业仲裁解决纠纷，对于有效实施越南外商投资资本征收政策是必要的。通过定性研究方法，作者将重点阐明法律状况，并指出越南在（i）仲裁协议的有效性和（ii）仲裁协议的形式等问题上法律规定的不足之处。在此基础上，我们提出了改进越南商业仲裁协议相关法律的建议。

关键词：协议、效力、形式、商业仲裁

1. Introduction

In the context of market economic development in Vietnam, the method of dispute resolution through commercial arbitration in the fields of business and commerce, if chosen to be used, will have superior characteristics such as: (i) the arbitrator's award is final and must be enforced by the parties; (ii) arbitration procedures are quick, and the parties can proactively choose the time and place to resolve the dispute; and (iii) highly confidential dispute resolution sessions can ensure secrets in business.

During the process of concluding and implementing transactions, contracts related to commercial businesses are resolved by arbitration [1]. However, disputes resolved through Commercial Arbitration in Vietnam are still quite limited, and according to statistics from October 2016 to the end of September 2017 in Vietnam, there were up to 10,000 disputes. Commercial disputes were resolved by the Grassroots Court. Of these, 35.75% of disputes at the Court are related to investment and finance and 20% are related to goods and services [2].

In contrast, according to the Annual Report of the Vietnam International Arbitration Center (VIAC) in 2022, VIAC has handled 270 cases, of which domestic disputes accounted for 42.7% of cases and disputes involving one party being the other. FDI accounted for 39.2% and disputes involving foreign elements accounted for 18.1%. Of the total number of cases handled by VIAC, the banking and finance sector accounts for a relatively small proportion and is not mentioned in VIAC's Annual Report, with the highest proportion being the trading sector at 44.4 %, service provision at 27.8%, construction at 18.9%, insurance at 3.3%, real estate at 1.5%, and logistics at 2% [3].

This shows that dispute resolution through arbitration in the banking and finance sectors is not the optimal method. The explanation for this may be that the legal regulations on Commercial Arbitration have certain limitations and are not yet complete compared to the dispute resolution mechanism at the Court, leading to fear among the parties. When choosing this form of dispute resolution, arbitrators will encounter difficulties in the process of investigation, verification, and collection of evidence; in general, the law has recognized the rights of Arbitrators in Articles 45, 46, and 47 of Vietnam's 2010 Commercial Arbitration Law. However, these rights are limited to the scope of the "request exchange", verification from a third party, summoning witnesses, whether the desired issue can be achieved or not depends on the cooperation and goodwill of the parties. The Commercial Arbitration Center is not part of the apparatus of state agencies, which makes the process of collecting information and data to serve the resolution of disputes in the banking sector still difficult. The application of temporary emergency measures to borrowers in credit contracts is sometimes not really timely. In addition, the scope of resolution of Commercial Arbitration does not include cases related to individuals, in which case, many contracts are signed in the form of individuals [4]. This leads to many dispute cases that will not be within the scope of the resolution of Commercial Arbitration in Vietnam. Through qualitative measures, combining written law analysis and comparison methods, the research will point out shortcomings related to the legal regulations on arbitration agreements in Vietnam in terms of effective content and form of arbitration agreement.

2. Current Status of Regulations on Arbitration Agreements under Vietnamese Law

2.1. Validity of Arbitration Agreement

Pursuant to Clause 2, Article 3 of the Law on Commercial Arbitration 2010: "Arbitration agreement means an agreement between the parties to settle by arbitration a dispute which may arise or has arisen." Therefore, the arbitration agreement is based on the equal voluntary will of the parties to resolve disputes that may arise or have arisen within the scope specified in Clause 2, Article 2 of the LCA 2010. In addition, according to the provisions of Clause 1, Article 5 of Commercial Law 2010, the agreement of the parties is a prerequisite for settlement by

commercial arbitration. Accordingly, it can be seen that the establishment of a commercial arbitration agreement must be based on voluntary equality between the parties in establishing the obligation to comply with the terms of dispute resolution by arbitration in the form of a clause in a contract or separate written agreement. For arbitration agreements, the law does not specifically stipulate the conditions for validity, but there are provisions for cases in which the arbitration agreement is invalid in Article 18 of the LCA 2010.

Compared to the provisions of the 2015 Civil Code, the conditions for a subject participating in establishing a civil transaction must include civil legal capacity, behavioral capacity appropriate to the established civil transaction [5], and voluntary civil transactions [6]. Compared with the provisions in Clauses 2 and 3, Article 18 of the LAC 2010, we see that the person establishing the commercial arbitration agreement, in addition to meeting the requirements for civil act capacity under Civil Code 2015, must also have the authority to establish a commercial arbitration agreement according to Civil Code 2015. specified: "The person who establishes the arbitration agreement does not have authority according to the provisions of law," according to the provisions of Clause 2, Article 18 of the LCA 2010, the person who establishes the arbitration agreement is not a legal representative or is not a legally authorized person or is a legally authorized person but does not exceed the scope of authorization. In principle, if an arbitration agreement is established by a person without authority, it is invalid. In case the arbitration agreement is established by a person without authority, but in the process of establishing and implementing the arbitration agreement or in the arbitration proceedings, the person with the authority to establish the arbitration agreement has accepted or has already accepted it [7]. If you know and do not object, the arbitration agreement is not invalid. From the above regulations, the authors found that there are still some legal inadequacies regarding commercial arbitration agreements, specifically.

First, the issue of objections to arbitration agreements established by unauthorized persons currently does not have specific regulations on the form of objections by the parties. Objection is considered an important legal event; the right and obligation of the parties to express their will to object in order to invalidate an arbitration agreement established without proper authority to protect their legitimate rights and interests. However, because the law does not specify the form of objection, when determining the fact that the parties' objection to the arbitration agreement being established by an unauthorized person is unfounded, it causes difficulties [8]. It is difficult for parties to use legal provisions in arbitration agreements to protect their legitimate interests.

On the other hand, if the arbitration agreement is established by an arbitration clause in a commercial contract, the issue is the ability of the parties to apply contractual remedies governed by the Commercial Law to express their opposition to the arbitration agreement established by a subject without rights, specifically such as temporarily suspending contract performance, suspension of contract performance, and cancellation of contracts. Accordingly, the provisions of Articles 308, 310, and 312 of Commercial Law 2005 regulate issues related to temporary suspension of contract performance and suspension of performance contract and contract cancellation, respectively. In general, there are two cases where the parties can apply these sanctions during contract performance: i) the violation that the parties have agreed upon is a condition for temporarily suspending the performance of the contract, suspending the contract, or canceling the contract; and ii) one party fundamentally violates its contractual obligations. Therefore, if there is no agreement, it means that when one of the parties fundamentally violates the obligations in the contract, there is a breach of contract by one party causing damage to the other party to the extent that it causes the other party to violate the contract. According to Article 3 of the Commercial Law 2005, if the remaining parties fail to achieve the purpose of enter into a contract [9], they will be allowed to apply the above sanctions. However, in Article 19 of the LCA 2010 stipulates: "An arbitration agreement is entirely independent from the contract. Any modification, extension, cancellation, invalidation, or nonperformance of the contract will not invalidate the arbitration agreement", which aims to separate the content of the commercial contract from the dispute resolution agreement, ensuring fairness in the legitimate rights and interests of the parties. In other words, an arbitration agreement, as an agreement on a method of dispute resolution, is not related to the parties' ability to perform their obligations and enjoy their rights during contract performance. From the above analysis, the provisions in Article 19 of the LCA 2010 partly limit the parties' rights to object to arbitration agreements established by entities without authority.

Second, based on Clause 2, Article 3 of Resolution 01/2014/NQ-HDTP, there are two cases in which a commercial arbitration agreement established by an unauthorized person will not be invalid: i) the person has authority to establish the accepted arbitration agreement; ii) if the person with the authority to establish the arbitration agreement knows and does not object, the arbitration agreement is not invalid. Accordingly, the basis for determining whether the parties have accepted or known that a person without the authority to establish an agreement on commercial

arbitration faces many difficulties because there is no specific written guidance on how to establish a commercial arbitration agreement determined in the above cases.

Cases where the person with the authority to establish the arbitration agreement accepted it. In general, the law does not have specific provisions for cases in which a person with authority to establish an arbitration agreement is considered to accept an arbitration agreement established without proper authority. According to Article 16 of the LCA 2010, the arbitration agreement must be established in written form according to the forms specified in Clause 2. However, if the acceptance of a commercial arbitration agreement is established without the right authority, the law does not have binding regulations on its form, thereby leading to the problem of inconsistency with the provisions of Article 16 of LCA 2010. At the same time, there is a lack of basis in determining the validity of the arbitration agreement and the rights and obligations of the parties from the time the person with the authority to establish the arbitration agreement has accepted the agreement in the wrong authority.

In cases where the law stipulates that the person with the authority to establish the arbitration agreement knows, but does not object. Accordingly, the law still leaves open the provisions in determining the signs and times to assume that the person with the authority to establish the arbitration agreement knew that the arbitration agreement was established incorrectly in order to determine the legal liability of the parties in the transaction with respect to the arbitration agreement in the above case. In addition, in Article 278 of the Civil Code 2015, the contract performance time is the number of days from the effective date of the contract to the date the parties complete their obligations as prescribed in the contract, excluding the time for performing warranty obligations (if any) [10]. Accordingly, contract performance is implemented by the parties of the contents established around the rights and obligations of each party, aiming to achieve the purpose of the contract. Compared to the terms of the arbitration agreement, the time of implementation of the agreement is the time when an actual dispute occurs; therefore, the implementation of the contract by the parties is relatively separate from the terms of the arbitration agreement. Therefore, during the performance of the contract, determining that the competent person knew about the issue of establishing an arbitration agreement in the wrong authority would be very difficult to prove, because there is no solid legal basis.

Third, according to Clause 2, Article 3 of Resolution 01/2014/NQ-HDTP only stipulates that the person with the authority to establish the arbitration agreement knows and does not object; thus, the arbitration agreement is not invalid. However, there is no mention of the time limit within which the person with the authority to establish the arbitration agreement must make an objection from the time of knowing that the arbitration agreement was established with improper authority. Therefore, in some specific cases, determining the value of objections to arbitration agreements established by unauthorized persons faces many difficulties. In addition, because there are no provisions in the law, the parties have the right to express their will to object within the limits allowed by law, specifically during the entire stage of establishing and implementing an important agreement. arbitration or arbitration proceedings [11] to express its objection to the arbitration agreement was not under proper authority. The authors believe that this is an important basis for determining the time within which the parties are responsible for expressing their objections from the moment they learn about an arbitration agreement being established by an entity without authority. rights, the failure to specifically set a time limit for the parties to object to an improperly established arbitration agreement does not highlight the initiative of the parties in protecting their legitimate rights and interests in the legal system, and at the same time fails to ensure the rights and interests of the remaining parties in the transaction.

Fourth, pursuant to the provisions of Article 139 of the Civil Code 2015: Civil transaction entered into and performed with a third person by a representative in accordance with his/her scope of authorization shall give rise to rights and obligations of the principal". Compared with the provisions of Clause 2, Article 3 of Resolution 01/2014/NQ-HDTP, if the person with authority to establish the arbitration agreement has accepted or is known without objecting, it will be considered that the arbitration agreement was established by a person without authority to be valid. However, the law does not specifically mention the subjects considered competent to establish arbitration agreements in this case, so according to the provisions of Article 139 of the 2015 Civil Code, it is possible to determine: persons with authority to establish arbitration agreements." The right to establish an arbitration agreement includes: i) the person authorizing the establishment of the arbitration agreement; ii) the authorized person has the ability to establish an arbitration agreement within the scope of his or her authorization. However, in the author's opinion, this issue is unreasonable because there is no document stipulating whether the right to establish an arbitration agreement is consistent with the right to accept an established arbitration agreement. correct authority. Therefore, within the scope of authorization, an authorized person has the ability to establish an arbitration agreement, but this does not mean that this

person has the right to accept an arbitration agreement established without proper authority on behalf of the principal if it is not clearly stated in the authorization document.

2.2. Form of Arbitration Agreement

Pursuant to the provisions of Clause 1, Article 16 of the LCA 2010, it is stipulated that an arbitration agreement may be made in the form of an arbitral clause in a contract or in the form of a separate agreement, and an arbitration agreement must be established. made in writing or in other forms, as prescribed in Clause 2, Article 16 of the 2010 Commercial Law. However, in the opinion of the authors, there are some unreasonable points regarding the forms of arbitration agreements, specifically as follows:

First, for agreements established through exchanges between the parties by Telegram, fax, email, and other forms as prescribed by Clause 2, Article 3, Resolution 01/2014/NQ-HDTP, or for cases where agreements are established through information exchanges, written communication between the parties by Point a Clause 2, Article 16 of the Law on Commercial Arbitration 2010 [13]. Thus, the exchange of information by telegram, fax, email, or text between parties is considered a form of arbitration agreement. However, the above regulations do not clearly define the time when an arbitration agreement is established on a case-by-case basis:

On the basis of the 2015 Civil Code, in the case of a contract concluded in writing, the time a contract is concluded and the time the last party signs the document or by another form of acceptance is shown in the document [14] and in Article 393 of the Civil Code 2015 has a case where an offer to enter into a contract is considered to be accepted: i) acceptance of an offer to enter into a contract means a reply by the offeree to the offeror accepting the entire content of the offer; ii) the silence of the offeree shall not mean an acceptance of the offer to enter into the contract, unless it is agreed upon or habit established by the parties. This provision shows that the law is still open about determining the time when an arbitration agreement is officially established between the parties during the exchange of written information. From there, the question arises whether the time when the arbitration agreement is officially established will be based on the time the last party signs the document or the time when the parties agree by the receiving party responding by written consent to the arbitration agreement under Civil Code 2015 during the process in which the parties exchange information. On the other hand, according to the provisions of Article 393 of the 2015 Civil Code, silence is considered a case of accepting an arbitration agreement when the conditions prescribed by law are met. This is an important basis for determining whether an arbitration agreement is established. The fact that the law has not set time for establishing the arbitration agreement in the above case may lead to disputes on the settlement agency when commercial contract disputes arise.

Second, regarding the issue of agreement, it is recorded in writing by a lawyer, notary public, or competent organization at the request of the parties [15]. According to regulations, a written arbitration agreement drawn up by a lawyer or notary at the request of the parties is one of the recognized forms to establish that when a dispute occurs, it will be resolved by commercial arbitration. However, according to the above regulations, preparation of documents by lawyers and notaries is required by the parties. Thus, it can be understood that the above request is made based on the consensus of all parties in the transaction. However, in cases where the arbitration agreement is recorded by a lawyer or notary at the request of one party, the validity of the document depends on the agreement of the remaining parties to request the recording of the agreement. Arbitration agreement in writing or not, it is recognized that there are still no specific regulations. Thus, it can be understood that the above request is made based on the consensus of all parties in the transaction. However, in cases where the arbitration agreement is recorded by a lawyer or notary at the request of one party, the validity of the document depends on the agreement of the remaining parties to request the recording of the agreement. Arbitration agreement in writing or not, it is recognized that there are still no specific regulations. Third, through the exchange of complaints and self-defense statements, the existence of an agreement by one party is demonstrated and is not denied by the other party. According to the above provisions, parties are obliged to refuse or reject the other party's request for an arbitration agreement. If it was not rejected, it was automatically admitted. The author believes that the above regulations do not ensure objectivity in the process of resolving civil disputes; specifically, compared with the provisions of the Civil Procedure Code 2015, litigants, including the plaintiff, defendant, and people with related rights and obligations, are not obliged to deny the information given by the remaining parties. On the other hand, according to the provisions of Clauses 4 and 5, Article 70 of the Civil Procedure Code 2015 on the rights and obligations of the litigant, the litigant can maintain, change, supplement, or withdraw the request. Moreover, documents and evidence can be provided: proof to protect legitimate rights and interests. The above provisions show that the litigant is only responsible for issues related to the scope and level of his or her own request and is not responsible for authenticating the contents of the

remaining parties involved in dispute resolution. In addition, with the requirements of the litigant, this subject is required to be responsible for providing documents and evidence and to protect legitimate rights and interests. Therefore, when the parties provide information that an arbitration agreement exists, they must present evidence and prove it and cannot rely on the other party's denial to determine.

Fourth, when there is a transfer of rights and obligations arising from a transaction or contract in which the parties have established a legal arbitration agreement, the arbitration agreement in the transaction or contract remains valid for the transferee and transferee, unless the parties agree otherwise [16]. Accordingly, the authors found that the following shortcomings still exist:

To begin with, pursuant to the provisions of Article 370 of the Civil Code 2015, there are provisions: "i) An obligor may transfer a civil obligation to a subrogatee of the obligor with the consent of the obligee, except where the obligation is personal to the obligor or where the law provides that the obligation may not be transferred; ii) Upon a transfer of the obligation, the subrogatee of the obligor shall become the obligor." Thus, the condition for transferring obligations requires the consent of the obligee because the obligee itself will have to pay attention to its own interests by assessing the ability to perform the obligation of the party by substituting the obligation [7]. According to the provisions of Clause 3, Article 7 of Resolution No. 01/2014/NQ-HDTP, if there is an arbitration agreement in the transaction, it will still be valid for the party to substitute the obligations after being transferred. However, the transfer of responsibility for an arbitration agreement is independent of the content of the contract. Therefore, in certain cases, the subrogator may not understand the arbitration agreement, which may lead to disputes over jurisdiction. On this basis, the authors propose that it is necessary to stipulate the responsibility of the person transferring the obligation to provide information and evidence related to the agreement to the person replacing the obligation to know about the arbitration agreement.

In addition, the law stipulates that when there is a transfer of rights and obligations arising from a transaction or contract in which the parties have established a legal arbitration agreement, the arbitration agreement in the transaction shall be valid the contract remains valid for the transferee and the transferee [17]. However, according to Clause 1, Article 6 of the LCA 2010: "The arbitration agreement may be established in the form of an arbitration clause in the contract or in the form of a separate agreement." The question is, in case the parties establish an arbitration agreement by a separate agreement, will the agreement be automatically transferred according to regulations? This is currently not clarified by law. We think that this issue requires specific guidance from lawmakers.

Commercial activities always have potential conflicts in the process of buying and selling goods and providing services [17]. To ensure the stability and healthy development of the business environment, it is necessary to create an appropriate out-of-court dispute-resolution method, which is commercial arbitration. However, the construction and development of arbitration activities depend largely on the level of economic development, legislative techniques, and especially the legal regulations of a country to regulate arbitration activities.

In Vietnam, the process of international economic integration is an important driving force for reforms in the legal corridor, including the internationalization of arbitration law. The development and improvement of the law creates a solid legal corridor on arbitration, including regulations on arbitration agreements, which is one of the prerequisites for promoting rapid development of the arbitration process. including attracting foreign investment capital [18]. Facing the trend of integration, arbitration activities in Vietnam have gradually become more professional and popular, becoming a popular method of choice for agreeing to resolve disputes on commercial contracts. In fact, in Vietnam, there is a business community that has gradually become accustomed to the habit of using arbitration to integrate into international transactions [19]. Therefore, the research and development of regulations related to arbitration agreements need to be paid attention to and amended in accordance with the actual development of commercial transaction activities, aiming to create a solid legal basis to protect the rights and interests of the parties based on the mechanism that respects the agreement and the ability to choose parties in commercial transactions [20]. Through the analyzed shortcomings in the legal regulations on arbitration agreements in Vietnam, this article will be a reliable document, with full scientific and legal basis, and recommendations in research work will contribute to valuable document sources serving research and reference for students, law majors, agencies, departments, and branches. In addition, the project is a necessary reference document for individuals and agencies competent to promulgate legal documents, amend and supplement current regulations, and perfect the legal system related to commercial arbitration in Vietnam in the future [21].

3. Conclusion

Internationally, commercial arbitration is one of the most popular out-of-court conflict settlement techniques. In Vietnam, arbitration is becoming a more significant method of dispute resolution than

negotiation, mediation, and litigation when it comes to business issues, particularly those involving banking and finance. Nevertheless, there are a number of shortcomings and restrictions with the Law on Commercial Arbitration 2010 as it is put into reality. This has had a major impact on how well commercial arbitration resolves disputes in the banking industry. As can be observed from the above analysis, there are still a lot of restrictions on the legal requirements surrounding commercial arbitration. They must be changed for arbitration to actually be used in banking disputes and for the parties to select it as their first option.

Declarations

Author Contributions

Conceptualization, T.T.K. and T.T.T.V.; methodology, T.T.K.; software, N.T.P.; validation, T.T.K., T.T.T.V. and N.T.P.; formal analysis, T.T.K.; investigation, T.T.K. and T.T.T.V.; resources, N.T.P.; data curation, T.T.K.; writing—original draft preparation, N.T.P.; writing—review and editing, T.T.K.; visualization, T.T.T.V.; supervision, T.T.K.; project administration, T.T.K. All authors have read and agreed to the published version of the manuscript.

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The data presented in this study are available on request from the corresponding author.

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The authors declare that there is no conflict of interests regarding the publication of this manuscript. In addition, the ethical issues, including plagiarism, informed consent, misconduct, data fabrication and/or falsification, double publication and/or submission, and redundancies have been completely observed by the authors.

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