

SHOULD YOU CHOOSE TO RESOLVE DISPUTES THROUGH COMMERCIAL ARBITRATION?

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Multiple businesses are prone to choose to resolve disputes through commercial arbitration as the procedures are quick and not as time-consuming as through a court. But reality, in fact, is at times not that simple.

Arbitration is a method of resolving disputes without recourse to the court. Commercial arbitration is a method of resolving commercial disputes¹. Upon commenting on this method of dispute resolution, there is an opinion that "the procedures are simpler (only through one arbitration hearing rather than many levels: first instance, appeal, cassation, retrial); the arbitral award takes immediate² effect."

Nonetheless, any method has its advantages and disadvantages. To optimize efficiency, it is necessary to learn about both aspects.

Does the arbitral award really take immediate effect?

Article 69 of the Law on Commercial Arbitration 2010 provides for within 30 days of receiving the arbitral award, either party has the right to apply to a competent court to request cancellation of this award if such party secures sufficient grounds to prove that the award falls into the cases of cancellation under the Law on Commercial Arbitration.

In fact, there are many cases where either party requests the court to cancel an arbitral award and the court accepts the request. A canceled arbitral award amounts to the fact that the dispute resolution process must kick off from the beginning: that is, the parties can agree to bring the dispute to arbitration or either party may sue in court and the dispute will go through the first instance trial process, then potentially an appeal.

Arbitration fees

To initiate an arbitration case, the parties need to submit a petition to an arbitration center (if choosing to resolve the dispute at the arbitration center), then pay arbitration fees there. After receiving arbitration fees, the arbitration center notifies the respondent and conducts the procedures for establishing an Arbitral Tribunal.

Return to the situation where the arbitral award is canceled as aforesaid. There are many reasons for the arbitral award to be canceled³, but among them is the reason that "the composition of the Arbitral Tribunal and the arbitration procedures are inconsistent with the agreement of the parties or contrary to the Law on Commercial Arbitration 2010)" – this reason partly stems from the Arbitral Tribunal.

¹ According to the definition in the Law on Commercial Arbitration 2010, a commercial dispute is the one between parties arising (i) from commercial activities; and (ii) in which at least one party has commercial activities.

² <https://tuoitre.vn/khi-co-tranh-chap-doanh-nghiep-nen-chon-trong-tai-hay-toa-an-de-giai-quyet-20210424153327492.htm>

³ There are 5 cases where the arbitral award is canceled according to Article 68.2 of the Law on Commercial Arbitration 2010.

So in case the arbitral award is canceled, might the paid arbitration fees be refunded? The answer shows that such refund depends on the regulations of each arbitration center, but mostly no. That is, if the arbitral award is canceled, it is likely that the claimant will not receive back the arbitration fees paid.

This is different from a dispute resolution in court. As a court decision is annulled, upon retrial, the court will reconsider the obligation to pay legal fees; that is, the claimant still has the opportunity to receive back the court fee advance if it is declared the winning party.

Whether commercial arbitration should be chosen to resolve disputes needs to be considered carefully, depending on the subject matter of the signed contract and the roles of the parties involved therein. And in addition, drafting arbitration articles also requires an anticipation of the developments that might occur in the future.

When the dispute involves multiple parties

It should be noted that a precondition for dispute resolution by commercial arbitration is that the parties must have an arbitration agreement. That is, in case of reaching no arbitration agreement, even if you file an arbitral petition pay arbitration fees, the result you will receive will be merely a decision of the arbitration tribunal stating that it does not have the authority to resolve the dispute and decide to suspend dispute resolution. In this case, the claiming party and the counter-claiming party (if any) will be refunded a portion of the arbitration fees paid, according to the specific regulations of the arbitration center.

But in some cases, determining what constitutes an arbitration agreement is not easy. For example, Company A signs two separate contracts with Company B and Company C, whereby Company B and Company C will perform two different tasks, although within the framework of a common project. In each contract, Company A has an arbitration agreement with Company B, and Company A also has an arbitration agreement with Company C. The project then generates damages against A, and Company A states that both Company B and Company C are at fault. So it might be considered an arbitration agreement reached among all three parties A, B, C, and on that basis, does Company A have the right to claim both Company B and Company C in the same dispute to be resolved by arbitration? Or must Company A claim each party in a separate dispute?

The answer is difficult to fully analyze within the framework of an article. The example is given only to expressly state that as there are more than two parties involved in a dispute, the option to resolve the dispute by arbitration must be seriously considered and fully agreed upon.

But there is an opinion that we simply cannot resolve the dispute by arbitration anymore, Company A can claim both Company B and Company C in the same court case and that's it. So please see below.

“The court refuses to accept the case in case of an arbitration agreement reached”

This is the principle set forth in Article 6 of the Law on Commercial Arbitration Law, specifically: "In case the disputing parties have an arbitration agreement and one party initiates a lawsuit in court, the court must refuse to accept the case." except where the arbitration agreement is invalid or unenforceable.

Thus, if you have an arbitration agreement and still want to claim in court, you must fall into "a case where the arbitration agreement is invalid or unenforceable".

But to know whether you are in a "case of invalid or unenforceable arbitration agreement arbitration agreement", sometimes you will have to pay the price in terms of time consumption and arbitration fees to seek an arbitral award that recognizes such a reality.

It can be seen that just one dispute resolution article might greatly affect the protection of the rights and interests of the parties in case of a dispute. Whether commercial arbitration should be chosen to resolve disputes needs to be considered carefully, depending on the subject matter of the signed contract and the roles of the parties involved in the contract. And besides, preparing arbitration articles also requires an anticipation of the developments that might be on the horizon.