



NOTES FOR A VALID AND ENFORCEABLE ARBITRATION AGREEMENT

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The below Legal Summary prepared by BLG contains a brief discussion with tailored practical information for investment and business activities in Vietnam.

The article concentrates on notes for a valid and enforcement arbitration agreement.

According to a survey in 2017, 92% of FDI enterprises in Vietnam refused to settle a dispute at court^[1]. Vietnam International Arbitration Center (“VIAC”), a popular arbitration institution in Vietnam revealed that in the period of 2011-2019, VIAC resolved 1,259 disputes, an increase of 336% compared to the period of 2003-2010^[2]. It seems that using arbitration is more familiar in Vietnam. This is accounted for many advantages of arbitration compared to court such as transparency, shorter and simpler procedures, freedom in selection of arbitrators, confidentiality...

A compulsory condition for a party to commence the arbitration procedure is an arbitration agreement. The below shall address some matters regarding the validity of an arbitration agreement and some notes on drafting process under Laws of Vietnam, in particular, Laws on Commercial Arbitration No. 54/2010/QH12 (“LCA”) and Resolution No. 01/2014/NQ-HDTP of Council of Judges of the People’s Supreme Court regarding to Guidelines for the Law on Commercial Arbitration (“*Resolution 01*”).

There are two basic types of arbitration agreement: **(i)** an arbitration clause as a part of an agreement and **(ii)** a separate arbitration agreement. Whatever the type is, an arbitration agreement has to satisfy three below fundamental requirements:

Firstly, as per Article 16 of LCA, the arbitration agreement must be in writing or equivalent, such as^[3]:

- Agreement concluded by the communication between the parties by telegram, fax, telex, email or other forms provided for by law;
- Agreement concluded by the exchange of information in writing between the parties;
- Agreement recorded in writing by a lawyer, notary public or competent institution as per request of the parties;
- A document such as a contract, document, company’s charter or other similar documents consists of an arbitration agreement referred to by the parties;

^[1] Tap chi Tai chinh Online, <https://tapchitaichinh.vn/ty-le-doanh-nghiep-su-dung-trong-tai-thuong-mai-de-giai-quyet-tranh-chap-thap.html>, last accessed on 25 January 2024.

^[2] Vietnam International Arbitration Center, <https://www.viac.vn/thu-tuc-trong-tai/thuc-tien-thi-hanh-luat-trong-tai-tai-trung-tam-trong-tai-quoc-te-viet-nam-viac-a124.html>, last accessed on 25 January 2024.

^[3] Article 16 of LCA.

- The existence of an arbitration agreement proposed by a party and not denied by the other is reflected through the exchange of petitions and self-defense statements.

Secondly, the arbitration agreement does not fall under the invalid cases as stipulated in Article 18 of LCA. In other words, the arbitration agreement shall only be effective if it does not violate any prohibitions of laws and is freely and voluntarily executed by those having the legal capacity and the authority to do so.

However, arbitration is not applicable for all kinds of disputes but only those arising from commercial activities or among at least one party conducting commercial activities or those stipulated by laws may be resolved by the arbitration.

It is also worth paying attention to the competence of the person executing the arbitration agreement, especially when he is the authorized representative.

Thirdly, the arbitration agreement must be enforceable. Under Article 4 of Resolution 01, the arbitration agreement should clearly express the form of arbitration or the arbitration institution/the arbitrator that is “available” at the time when the dispute arises. The chosen arbitration institution should be operating or there is an heir if it is closed whilst the chosen arbitrator should be able to settle the dispute. Otherwise, it is required that the involving parties agree once again on all of the above matters. If no agreement can be reached, the form of arbitration or an arbitration institution/arbitrator shall be selected by the plaintiff.

One common error when drafting an arbitration agreement is misnaming the chosen arbitration institution. This mistake may lengthen the whole process. Clause 5 of Article 43 LCA requires the parties in such case to agree again on a specific arbitration institution to settle the dispute, if no agreement can be reached, the arbitration institution to settle the dispute shall be selected at the plaintiff’s request. To avoid that, please kindly refer to list of arbitration institutions in operation in Vietnam via Electrical Portal of the Ministry of Justice at <https://bttp.moj.gov.vn/qt/Pages/trong-tai-tm.aspx?Keyword=&Field=&&Page=1> for your selection.

Besides strictly following the pre-conditions of a valid arbitration agreement as discussed above, for an enforceable one, parties may refer to the model arbitration clause recommended by some trusted arbitration institutions which can be found on their websites. Based on that, parties may consider adding more details with the help of a law firm such as the place of arbitration, the language, the costs and expenses....

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Head office:
P7-43.08 Park 7, Vinhomes Central Park,
720A Dien Bien Phu, Ward 22, Binh Thanh
District, Ho Chi Minh City.



info@bizlegalgroup.com



www.bizlegalgroup.com

