

## TENDENCY IN RESOLVING COMMERCIAL BUSINESS DISPUTES IN THE INTERNATIONAL LAW AND THE IMPROVEMENT FOR VIETNAM'S LAW

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<https://doi.org/10.37602/IJREHC.2025.6508>

### ABSTRACT

In a market economy, trade disputes are inevitable due to fierce and diverse competition among economic sectors. When the prices of goods and services depend on supply and demand, businesses are forced to compete not only domestically but also in the international market. Therefore, resolving trade disputes becomes an urgent requirement to maintain stability, minimize economic losses and ensure a sustainable business environment. In the world, most countries focus on building a legal corridor and diversifying dispute resolution methods, from state jurisdiction channels such as the Court to non-state mechanisms such as negotiation, conciliation and commercial arbitration. In Vietnam, since the market economy was formed at the end of the 20th century, the legal system on competition in commercial business has been increasingly improved, creating conditions for businesses to choose appropriate settlement mechanisms for both domestic and foreign disputes. The article presents trends in resolving trade disputes in the world and solutions to help developing countries like Vietnam improve their commercial business laws, enhance competitiveness and strengthen the confidence of the domestic and foreign business community.

**Keywords:** Trade disputes, developing countries, international trade law.

### 1.0 INTRODUCTION

Commercial disputes are an inevitable objective phenomenon of the market economy - a market with diverse economic components and prices of goods and services determined by the balance of supply and demand. It is the competitive factor formed from the market economy that has created excitement in commercial activities for business entities, creating many benefits and choices for consumers. In particular, the market economy helps facilitate economic exchange and integration, businesses need to compete not only at the national level but also in the global market, so it is inevitable that conflicts and disagreements will occur in the business process. Therefore, the market economy is the reason why commercial business disputes are becoming more and more common and complicated.

To stabilize trade relations, it is urgent that the parties in the dispute quickly find appropriate solutions and methods to help the parties eliminate disagreements and conflicts, and also minimize economic losses. Therefore, countries are very interested in building institutions on resolving trade disputes and diversifying dispute resolution methods, giving the parties many options suitable to the general situation. In Vietnam, the market economy began to take shape at the end of the 20th century and the State promptly issued many legal documents recognizing

forms of dispute resolution, including methods with the participation of the State (Court) and non-State methods (negotiation, mediation, commercial arbitration). After more than 40 years of economic development and international integration, we have completed diverse legal corridor for business entities to choose appropriate dispute resolution methods not only for domestic disputes but also foreign elements disputes . In addition, continuing to study the trend of resolving commercial business disputes in the world during the integration period is an important task so that we can continue to improve regulations on resolving commercial business disputes in Vietnam in the coming time.

## **2.0 THE TENDENCY IN RESOLVING COMMERCIAL BUSINESS DISPUTES IN THE WORLD**

Most countries in the world have recognized the diversification of methods of resolving commercial business disputes such as negotiation, mediation, arbitration and Court.

As for the negotiation method, this is considered the first choice between the parties when a dispute occurs because of its speed, goodwill and absolute confidentiality. However, because of its confidentiality and only taking place between the parties in the dispute, there are no complete and accurate statistics on the priority level and application of this method. The negotiation method can be implemented at any time when the parties have a conflict, whether or not there is economic damage, and can be applied even during the process of the parties resolving the dispute through other methods. Therefore, although the purpose of negotiation is that the parties themselves agree with each other on the issues in conflict - similar to a civil agreement, countries still recognize this as an independent method of resolving commercial disputes and encourage business entities to apply this method before seeking other methods.

Regarding the Court method, this is considered the most effective and rigorous method, so it is suitable for complex and high-value disputes. Sometimes, resolving commercial disputes in Court is considered a form of " punishment " by one party to the other party because the trial in Court is public and has a significant impact on the business reputation of the parties, especially the defendant. However, the limitations of the Court method such as long settlement time, not small litigation costs and complicated procedures, make the parties in commercial relations more hesitant to choose this method, especially for international commercial disputes.

In the context of increasingly deep international economic integration, the need to resolve commercial disputes quickly, confidentially and effectively is also the requirement that the parties set when choosing a suitable resolution method. It is for this reason that Mediation and Commercial Arbitration have gradually become popular and become the current trend in resolving commercial disputes in the world.

**2.1 First of all, discussing the method of conciliation, this is a flexible method for the parties in terms of both time and procedure, while still ensuring confidentiality, leading to the parties being able to maintain their business reputation.**

Goodwill in commercial conciliation is also considered the most prominent factor, thereby the parties can completely maintain a peaceful trade relationship. According to research by the World Bank, commercial dispute conciliation is an important solution to support the promotion of the business environment and enhance economic development. In commercial disputes with

foreign elements, conciliation is considered a solution to overcome cultural and jurisdictional barriers<sup>1</sup>. Conciliation is also considered a component index of the Contract Enforcement Index of the World Bank's annual Doing Business Report<sup>2</sup>. With the above advantages of conciliation, up to 176 economies with different legal systems accept voluntary conciliation<sup>3</sup>.

Resolving commercial disputes by mediation has also developed for a long time in Europe. The European Union has a view to promote alternative dispute resolution (ADR) methods, including mediation. In 2008, the European Parliament issued a Directive on the application of mediation in civil and commercial matters in member states and set out the basic principles for mediation to exist and develop in the European Union. Countries wishing to join the European Union must accept the application of voluntary mediation. With that in mind, the Vietnam-EU Free Trade Agreement (EVFTA) has established an investment mediation regime. This regime is considered an innovation in resolving investment disputes<sup>4</sup>.

Recently, on August 7, 2019 in Singapore, the " United Nations Convention on Settlement Agreements Resulting from Conciliation " (referred to as the Singapore Convention) was adopted by the United Nations Commission on International Trade Law (UNCITRAL) with 46 countries signing and coming into effect. The Singapore Convention has solved the biggest drawback of the conciliation method, which is the lack of a mechanism to ensure the enforcement of conciliation results, thereby becoming a support for creating a mechanism to enforce conciliation agreements as simple as the enforcement of arbitration awards or court judgments<sup>5</sup>.

The Ministry of Justice's 2021 report on Vietnam's ability to join the United Nations Convention on International Dispute Settlement Agreements through Mediation also shows that most of the surveyed countries have recognized commercial mediation for a long time (Singapore since the 1990s, Korea since 1990; the United States since 1998, China since 2010...) and all encourage and facilitate business entities to choose Mediation as an alternative to complex litigation methods such as the Court. As of June 2023, 56 countries have signed the Convention and 11 of them have ratified this Convention<sup>6</sup> Currently, Vietnam is also in the process of joining the Singapore Convention.

**2.2 Regarding the method of Commercial Arbitration, this is considered a modern and superior method of resolving commercial disputes and has become a strong trend in the 21st century.**

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<sup>1</sup> World Bank (2017), Mediator's Handbook, page 9

<sup>2</sup> Simeon Djankov et la, Courts, Research papers supporting the methodology (Doing Business) of World Bank

<sup>3</sup> Word Bank, Doing Business – Enforcing contract, Good Practices, Using Alternative means to resolve disputes, <http://www.doingbusiness.org/data/exploretopics/enforcingcontracts/good-practices#Computerization%20and%20court%20effective>

<sup>4</sup> Nguyen Hung Quang, Mediation - Trends in resolving commercial disputes in the integration period, International law and practical issues in Vietnam, Thanh Nien Publishing House (2019), pp. 237-253

<sup>5</sup> Ministry of Justice (April 2019), Draft report on Research Results of the United Nations Convention on Settlement Agreements for Settlement of International Disputes Reached Through Mediation, p. 2

<sup>6</sup> Ngo Trong Quan, Do Thu Huong, Singapore Convention on Conciliation and Recommendations for Vietnam's Accession

Resolving commercial disputes by Commercial Arbitration is a method of resolution through the activities of an Arbitrator as an independent third party to end conflicts by issuing an arbitration award that the parties must respect and implement. The parties can choose between resolving the case by arbitration (the parties themselves choose the Arbitrator to establish the Arbitration Council and the Arbitration Council will dissolve after the end of the case) or through a legally established Arbitration Center. The method of Commercial Arbitration has an advantage over the method of Mediation because the resolution of disputes is guaranteed by the combination of two factors: agreement (the main factor of Negotiation and Mediation) and judgment. The disputing parties in a dispute can agree and agree to choose an arbitration center, arbitrators, a place of settlement or applicable procedures... At the same time, the arbitration award (the decision of the Arbitration Council to resolve the entire content of the dispute and terminate the arbitration proceedings) on behalf of and for the benefit of the disputing parties (not having the nature of state power), has final value (effective from the date of issuance), is not subject to appeal or protest and is guaranteed to be enforced by a competent state agency. In other words, the arbitration method has combined the advantages of the mediation method (private in nature) and the Court (organized, professional and enforceable). Another feature that makes Commercial Arbitration a widely popular dispute resolution method in the world is because of its " non-governmental " nature, always ensuring " neutrality " and most importantly, it is suitable for disputes with international elements. The establishment of arbitration centers depends on the dispute resolution needs of investors and not on the will of the State.

Regarding international cooperation in the field of commercial dispute resolution by arbitration, it is impossible not to mention the New York Convention of 1958. **The New York Convention of 1958** on the recognition and enforcement of foreign arbitral awards is considered an important step forward in the field of commercial arbitration globally. The New York Convention was born out of the shortcomings of the Geneva Protocol on Arbitration Clauses of 1923 ("Geneva Protocol 1923") and the Geneva Convention on the Enforcement of Foreign Arbitral Awards of 1927 ("Geneva Convention 1927"). In 1953, the ICC proposed the development of a new treaty governing international arbitration. The draft text was submitted by the ICC with the aim of resolving obstacles to the recognition and enforcement of international arbitral awards. The ICC initiative was taken up by the United Nations Economic and Social Council ("ECOSOC"), which drafted a revised convention in 1955. The draft was discussed at a conference at the United Nations Headquarters from May to June 1958, and the New York Convention was born, marking an important milestone in the development of arbitration worldwide. To date, 157 countries have ratified the 1958 New York Convention. Vietnam joined the New York Convention in 1995 and on September 14, 1995, the National Assembly Standing Committee issued the Ordinance on procedures for recognition and enforcement of foreign arbitral awards in Vietnam.

It can be said that in Vietnam, the Commercial Arbitration method was only officially applied in the early 21st century when the State issued the Commercial Arbitration Ordinance in 2003. However, in many countries around the world such as Japan, Korea, UK, USA... this method has been applied for a long time and is now considered the first choice when resolving commercial disputes. According to statistics in Japan, each year hundreds of commercial

dispute cases are received, and there are up to two arbitration centers in Asia ranked in the Top 3 most chosen arbitration centers in the world<sup>7</sup>.

In addition, the development of international trade activities has also made the application of commercial dispute resolution methods more and more flexible and superior. The two methods of commercial mediation and arbitration are gradually being linked together, helping the parties in the dispute to be truly flexible in choosing the appropriate resolution method. Even the Arbitration Centers themselves are tending to expand the application of mediation procedures before officially establishing the Arbitration Council, thereby shortening the time and saving costs for the parties while still ensuring the effectiveness of the resolution. This trend is also gradually being applied in Vietnam, as shown by the provisions of Decree 22/2017/ND-CP on commercial mediation. It can be said that Vietnam is in a period of actively promoting economic and international integration, so approaching the general trend of the world and perfecting domestic legal regulations is the top priority today.

### **3.0 OVERVIEW OF COMMERCIAL DISPUTE RESOLUTION IN VIETNAM AND SOME DIRECTIONS FOR IMPROVEMENT**

#### **3.1 Overview of methods of resolving commercial disputes in Vietnam**

In Vietnam, there are also full recognition of methods of resolving commercial disputes including negotiation, mediation, commercial arbitration and Court<sup>8</sup>.

Negotiation is understood as a method of dispute resolution through the parties voluntarily discussing, agreeing, self-settling, and resolving arising disagreements to eliminate disputes without the assistance or judgment of any third party. The negotiation process between the parties is not bound by legal regulations on procedures and settlement procedures, so the parties are completely proactive in settling conflicts (through direct or indirect negotiation or a flexible combination of direct and indirect negotiation), while saving time, costs, and preserving the reputation and business secrets of the parties. Therefore, this method is considered the " first " and " priority " choice for the parties when a dispute occurs, especially for disputes where the parties have a close relationship, understand each other, or the level of damage to the parties is not too great or there has been no economic damage. However, this method also has limitations when the negotiation results depend entirely on the voluntariness of each disputing party without any legal mechanism to ensure the enforcement of the parties' agreements during the negotiation process. Therefore, this method is less effective for commercial disputes of large value, complex content or parties with not really close commercial relationships. It can be said that this limitation not only exists in the practice of enforcement in Vietnam but is also a common problem of the negotiation method for countries around the world.

Commercial mediation is a method of dispute resolution with a third party as an intermediary (Mediator) to help the parties settle, resolve disagreements, eliminate conflicts and end disputes. The parties can choose simple mediation - where the parties themselves choose a reputable individual to act as a mediator, or choose mediation at commercial mediation centers. Pursuant to Clause 1, Article 3 of Decree 22/2017/ND-CP of the Government on Commercial

<sup>7</sup> <https://hanoionline.vn/video/xu-huong-giai-quyet-tranh-chap-thuong-mai-quoc-te-213798.htm-213798.htm>

<sup>8</sup> Article 317 of the Vietnamese Commercial Law 2005

Mediation, Commercial mediation is a method of resolving commercial disputes agreed upon by the parties and supported by a commercial mediator as an intermediary to resolve the dispute according to the provisions of Decree 22/2017/ND-CP. Also, according to the provisions of Article 6 of Decree 22/2017/ND-CP, disputes are resolved by commercial mediation if the parties have a mediation agreement and the agreement can be established before, after or at any time during the dispute resolution process. The method of mediation in commercial disputes has many similarities with negotiation such as saving time and costs; the parties are flexible in terms of procedures and processes during the resolution process. In addition, although there is the participation of a third party, the Mediator, the resolution also ensures confidentiality (not public) when the parties have an agreement and especially the participation of a third party helps the parties to find consensus and respect the common agreement reached more easily. However, in Vietnam, the biggest limitation of the mediation method is that there is no legal mechanism to ensure the implementation of successful mediation results.

Commercial arbitration is a method of dispute resolution involving the participation of a third party, the Arbitrators, by issuing a judgment that is enforceable against the parties. According to Clause 1, Article 3 of the Law on Commercial Arbitration 2010, commercial arbitration is a method of dispute resolution agreed upon by the parties and conducted in accordance with the provisions of the Law on Commercial Arbitration 2010. In Vietnam, commercial arbitration has the authority to resolve disputes between parties arising from commercial activities; disputes arising between parties in which at least one party has commercial activities and other disputes between parties that the law stipulates must be resolved by arbitration. The authority of the arbitrator will arise when the parties have an arbitration agreement and the arbitration agreement can be made before or after the dispute occurs<sup>9</sup>. The resolution of commercial disputes must ensure the following principles: The arbitrator must respect the agreement of the parties if that agreement does not violate prohibitions and is not contrary to social ethics; Arbitrators must be independent, objective, impartial and comply with the provisions of law; Disputing parties are equal in rights and obligations. The Arbitration Council is responsible for creating conditions for them to exercise their rights and obligations; Dispute resolution by Arbitration is conducted privately, unless otherwise agreed by the parties and the Arbitration Award is final. The biggest advantage of the Commercial Arbitration method is that the resolution is through flexible procedures developed by the parties themselves or issued by arbitration centers but supported by State litigation agencies such as the Court and civil enforcement agencies. However, this method also has certain limitations. Firstly, the cost of litigation in commercial arbitration is still quite high, so many investors are hesitant to choose this method. Secondly, the 2010 Commercial Arbitration Law has shown many limitations when it has not updated the general trend of the world as well as the practice of dispute resolution in Vietnam in some contents such as not recording settlement according to the simplified procedure, not recognizing the method of online dispute resolution (although in practice during the Covid-19 pandemic, there was an Arbitration Center in Vietnam applying this method<sup>10</sup>). Thirdly, in recent times in Vietnam, the resolution of commercial disputes has been increasingly interested and chosen, demonstrated by the fact that many new arbitration centers have been established, spread across many provinces and cities across the country. However, the number of 22 Arbitration Centers is still a very limited number compared to the

<sup>9</sup> Article 5 of the Law on Commercial Arbitration 2010

<sup>10</sup> <https://hiac.vn/tin-tuc/dieu-khoan-su-dung-he-thong-tranh-chap-13470#>

potential and needs of investors, as well as not meeting the goal of encouraging the resolution of commercial disputes by arbitration set by the Party and the State.

The Court method is a method of resolving commercial disputes through the activities of the state judicial agency, the People's Court, by issuing a judgment or decision that is effective for the parties by the coercive power of the State. The Court's authority to resolve disputes/trials is recognized in Clause 2, Article 2 of the Law on Organization of People's Courts 2014 , according to which The Court, on behalf of the Socialist Republic of Vietnam, adjudicates criminal, civil, marriage and family, business, commercial, labor, administrative cases and resolves other matters in accordance with the provisions of law; fully, objectively and comprehensively considers documents and evidence collected during the proceedings; based on the results of the litigation, issues a judgment, decides on guilt or innocence, applies or does not apply penalties, judicial measures, decides on rights and obligations regarding property and personal rights . More specifically, Article 30 of the 2015 Civil Procedure Code also stipulates that the People's Court has the authority to resolve disputes related to business and commerce, including: (1) Disputes arising in business and commercial activities between individuals and organizations with business registration and all with profit purposes; (2) Disputes over intellectual property rights, technology transfer between individuals and organizations with each other and all with the purpose of profit; (3) Disputes between people who are not members of the company but have transactions on capital contribution transfer with the company, company members; (4) Disputes between the company and its members; disputes between the company and managers in limited liability companies or members of the Board of Directors, directors, general directors in joint stock companies, between members of the company with each other related to the establishment, operation, dissolution, merger, consolidation, division, separation, transfer of company assets, conversion of the company's organizational form and (5) Other disputes on business and trade, except for cases under the jurisdiction of other agencies and organizations as prescribed by law. It can be said that in Vietnam, resolving commercial disputes by the Court is the optimal method for the parties, when the resolution results are guaranteed by the coercive power of the State. Also according to the provisions of the 2015 Civil Procedure Code, the Court has the authority to resolve civil disputes (in a broad sense) with foreign elements, thus completely consistent with the current context of international economic integration in Vietnam. However, this method requires the parties to spend a lot of time, effort and money, so resolving commercial disputes in Court is also considered the last choice for the parties when more flexible methods such as negotiation and mediation do not achieve results.

Among the above methods, the Court is still the popular method or also known as the traditional method because it is carried out at the People's Court - the State power agency. However, in recent years, along with the recognition of many legal documents, as well as following the general integration flow of the world, business entities in Vietnam also tend to choose alternative methods to the Court such as mediation and commercial arbitration. Faced with this change, legal regulations on commercial dispute resolution also need to be adjusted and improved accordingly.

### **3.2 Some directions for improving Vietnamese law related to resolving commercial disputes**

### 3.2.1 General orientation

It can be said that the outcome of dispute resolution depends largely on the goodwill of the parties in the dispute, especially in private dispute resolution methods. The State needs to have orientations and policies to encourage and facilitate business entities to choose alternative methods to the Court to conform to the general trend of the world as well as reduce the burden on the judicial system. Along with that, it is necessary to continue to update, amend and perfect the legal system regulating dispute resolution activities by Commercial Mediation and Commercial Arbitration, remove procedural barriers for investors and absorb progressive regulations of countries in the region and the world. Vietnam also needs to research and join international conventions, bilateral and multilateral agreements related to commercial dispute resolution to facilitate business entities in Vietnam to have more investment opportunities as well as when participating in international commercial dispute resolution.

### 3.2.2 Some specific recommendations

Firstly, for the negotiation and conciliation methods, the State should still encourage the parties to choose when a dispute arises because these are methods that directly give the decision-making power to the parties themselves in the dispute relationship. In addition, the State can set some binding regulations or sanctions for the parties when they do not implement the achieved results such as: limiting the parties to file a lawsuit within a certain period of time or paying higher fees/charges when filing a lawsuit at an arbitration center or court if an agreement has been reached or a successful conciliation result has been achieved. In addition, Vietnam needs to soon complete research and assessment to join the Singapore Convention, and at the same time, internalize international law appropriately so that the Commercial Conciliation method in Vietnam achieves the highest efficiency, in line with the current integration process.

Second, for the method of Commercial Arbitration, the law on commercial arbitration in Vietnam needs to be completed, updated, and revised soon to be consistent with the reality of economic life and legal trends in the world. Currently, the Law on Commercial Arbitration 2010 is in the process of being revised and is approaching the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL). However, in addition to the revision towards approaching the Model Law, the law needs to acknowledge some new trends in dispute resolution in Commercial Arbitration such as recognizing the simplified arbitration procedure (shortening the resolution process, thereby saving time and costs for the parties); allowing dispute resolution by online arbitration. In addition, the State needs to have policies to encourage the establishment of new commercial arbitration centers in many provinces and cities that do not have arbitration centers, thereby creating favorable conditions for parties in commercial disputes to access commercial arbitration without wasting time and travel expenses.

Third, the improvement of the law on resolving commercial disputes at the Court is considered one of the important tasks of judicial reform activities in Vietnam in the coming time because the role of the Court as well as the effectiveness of resolving disputes at the Court are always recognized and trusted by business entities. In the context of the 4.0 industrial revolution developing strongly around the world, as well as the increasingly urgent international economic integration, Vietnam not only has many favorable opportunities for socio-economic development, promoting industrialization and modernization of the country, but also faces

great challenges in ensuring national defense, security, political and social stability, maintaining a peaceful environment, sustainable development and especially challenges in judicial reform. Resolution No. 27-NQ/TW, dated November 9, 2022, of the Central Executive Committee " On continuing to build and perfect the Socialist Rule of Law State of Vietnam in the new period " has set out 5 groups of viewpoints, determined general goals, specific goals by 2030 and 3 focuses. For the judiciary, the Resolution sets the goal to be achieved by 2030, which is: " Basically completing the construction of a professional, modern, fair, strict, honest judiciary, serving the countr, serving the people, protecting justice, protecting human rights, civil rights, protecting the socialist regime, protecting the interests of the State, the legitimate and legal rights and interests of organizations and individuals ". At the same time, the Resolution identifies one of the three focuses of building and perfecting the socialist rule of law state as: "Promoting judicial reform, ensuring the independence of the court according to its jurisdiction, judges and jurors adjudicating independently and only following the law". Thus, perfecting the law on dispute resolution at the Court in general and resolving commercial business disputes by the Court in particular is a major priority of the Party and State in the current context of integration.

To help resolve commercial disputes at the Court effectively, the State needs to improve relevant policies and laws, ensure respect for and protection of the legitimate rights and interests of business entities; improve the mechanism for preventing, stopping and handling all acts of illegal interference in judicial activities; ensure the independence of the court according to its jurisdiction, judges and jurors are independent and only comply with the law. In addition, it is necessary to build a judicial procedure system with trial as the center, litigation as a breakthrough; ensure democratic, fair, civilized, rule of law, modern, strict, accessible judicial procedures, ensure and protect human rights and civil rights; effectively apply abbreviated judicial procedures; combine non-judicial procedural methods with judicial procedural methods; improve the effectiveness of judgment enforcement work...

Finally, it is necessary to expand the support of the judiciary to agencies and organizations that are performing the function of resolving commercial disputes in order to increase the efficiency and credibility of the People's Court and other dispute resolution agencies. All institutions such as Commercial Mediators, Commercial Arbitrators or Courts need to continue to strengthen their capacity, promote their functions and tasks in perfecting the law, improving the effectiveness of law enforcement on resolving commercial disputes, contributing to improving national competitiveness in the context of deep international integration as at present.

#### **4.0 CONCLUSION**

In today's market economy, conflicts between business entities are inevitable and methods of resolving trade disputes are effective tools to minimize economic and trade relations losses, helping the business environment to always be healthy, stable and effective. Therefore, the improvement of laws on trade dispute resolution in the world in general and in Vietnam in particular needs to be paid attention to in order to promptly meet the current strong demand for economic and social integration.

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