**ARBITRATION AGREEMENT – CONDITIONS TO BE EFFECTIVE AND SOME NOTES**

Pursuant to Article 3.2 of Law on Commercial Arbitration 2010 (“**Law on Commercial Arbitration**”), Arbitration Agreement is understood as an agreement between the parties on the settlement of disputes that may arise or have arisen through the arbitration method. This agreement can be made before or after a dispute occurs and shall satisfy certain conditions as prescribed by laws.

# **Conditions for an effective Arbitration Agreement**

## **General conditions**

With the nature of an agreement to record the parties’ consistence of will on the method of dispute resolution by the Arbitration, such agreement must first meet the general conditions for an effective civil transaction as follows[[1]](#footnote-1):

*- Regarding the subject:* the subject entering the arbitration agreement must have appropriate civil legal capacity and civil act capacity. Accordingly, the subject capacity of an individual can be determined through personal legal documents such as citizen identification card, identity card, passport, etc. Subject capacity of a legal entity can be determined via the enterprise registration certificate, investment registration certificate, etc. At the same time, the person who enters into the arbitration agreement on behalf of the legal entity shall be the legal representative or the authorized representative entitled to conclude such agreement upon the company's charter.

- *Regarding the will:* the parties to the Arbitration Agreement are completely voluntary, not deceived, threatened or coerced.

- *Regarding the content and purpose:* the content and purpose of the Arbitration Agreement must not violate the prohibition of the laws, and be not contrary to social ethics.

## **Conditions for formality**

Arbitration Agreement may be made in the form of an arbitral clause in the contract or in the form of another stand-alone agreement, but must be made in writing[[2]](#footnote-2). Consequently, Arbitration Agreements established verbally or through specific acts will have no legal validity and be not legally binding between the parties.

It should be noted that the concept of "writing" in Law on Commercial Arbitration has been expanded and listed in details. Accordingly, the following cases are considered to be made in the written form[[3]](#footnote-3):

1. Agreement made through communication between the parties by telegram, fax, telex, email or other forms as prescribed by laws;
2. Agreement made through exchange of written information between the parties;
3. Agreement recorded in writing by a lawyer, notary public or competent institution at the parties’ request;
4. In their transactions, the parties make reference to a document such as a contract, document, company charter or other similar documents which contains an Arbitration Agreement;
5. Agreement made through exchange of petitions and self-defense statements which reflect the existence of an agreement proposed by a party and not denied by the other party.

## **Beyond the cases that the arbitration agreements are invalid**

An invalid Arbitration Agreement will not give rise to, change or terminate the rights and obligations of the parties as from the time such agreement is entered into; therefore, unless otherwise agreed, the Court shall be the competent authority to resolve the dispute in this circumstance. Consequently, for the Arbitration Agreement to be valid, in addition to the conditions analyzed above, the arbitration agreement must not fall into the following invalid cases[[4]](#footnote-4):

1. Disputes arise in the fields falling beyond the arbitration's jurisdiction;
2. Arbitration Agreement maker has no competence as defined by the laws;
3. Arbitration Agreement maker has no civil act capacity under Civil Code;
4. Form of the Arbitration Agreement is incompliant with regulations of Law on Commercial Arbitration;
5. A party is deceived, threatened or coerced in the course of making the Arbitration Agreement and requests a declaration that such Arbitration Agreement is invalid;
6. Arbitration Agreement breaches prohibitions specified by the laws.

## **Beyond the cases that the arbitration agreements are unrealizable**

Similar to the invalid Arbitration Agreements, in case the Arbitration Agreements fall into unrealizable circumstances, the Court shall also have jurisdiction to resolve the disputes (if the parties do not otherwise agree). Cases where the Arbitration Agreements are unrealizable, including[[5]](#footnote-5):

1. The parties reached an agreement to resolve their disputes at a specific Arbitration Center, but such Center has now shut down without any Arbitration Center that inherits, and the parties fail to agree another Arbitration Center;
2. The parties reached an agreement on appointment of a specific Arbitrator, but when the dispute arises, due to force majeure events or objective difficulties, such Arbitrator cannot resolve the dispute, or the Arbitration Center or Court cannot find a substitute Arbitrator as agreed by the parties, and the parties also fail to reach an agreement to select a substitute arbitrator.
3. The parties reached an agreement on appointment of a specific Arbitrator, but when the dispute arises, such Arbitrator refuses the appointment or the Arbitration Center refuses the Arbitrator appointment, and the parties also fail to reach an agreement to select a substitute Arbitrator.
4. The parties reached an agreement to resolve their disputes at a specific Arbitration Center but agreed to apply the Arbitration Rules of another Arbitration Center and the charter of the Arbitration Center selected by the parties does not allow the application of Arbitration Rules of other Arbitration Centers, and the parties fail to reach an agreement to select a substitute Arbitration Rules.
5. The goods/service suppliers and consumers have a provision of the Arbitration Agreement drafted by the suppliers, but when the disputes arise, the consumers refuse to have such disputes settled by the Arbitration.

# **Some notes on the content of the Arbitration Agreement**

## **The Arbitration Agreements are ambiguous**

It is the fact that there are many Arbitration Agreements that are ambiguous on the form of arbitration and/or the arbitration center to resolve the disputes. For example, the parties agree that *“Any dispute arising out of or in connection with this contract shall be resolved in accordance with the Arbitration Rules of the Vietnam International Arbitration Center (VIAC)”*. In this case, the parties agree to settle the disputes by the Arbitration, but they have not identified expressly whether the form of arbitration is the institutional arbitration or the ad hoc arbitration, as well as such agreement has not specified a specific arbitration center to resolve the disputes in the event that the parties accept the institutional arbitration.

Or there are cases where the parties agree that *“…in case the disputes cannot be resolved by negotiation, the parties have the right to bring such disputes to the Southern Vietnam Trade Arbitration Center”*. Meanwhile, there is only the Southern Trade Arbitration Center (STAC), so this agreement is also considered as an unclear agreement about the Arbitration Center.

In the face of ambiguous Arbitration Agreements as mentioned above, the laws tend to facilitate the Arbitration mechanism. Pursuant to Article 43.5 of Law on Commercial Arbitration, where the parties reached an Arbitration Agreement but failed to specify the form of arbitration or cannot identify a specific arbitration center, if a dispute arises, the parties must re-agree on the form of arbitration or a specific arbitration center. If no agreement can be reached, the plaintiff is entitled to select the arbitration form or the arbitration center to settle such dispute.

## **The Arbitration Agreements have the dispute resolved both by the Arbitration Center and the Court**

In many cases, the parties agree on a dispute settlement clause that *"when a dispute arises, both parties are entitled to initiate a lawsuit at the Arbitration Center or the Court"*. For the above "two-way" agreements, the Resolution No. 01/2014/NQ-HDTP sets out the specific direction as follows[[6]](#footnote-6):

1. First of all, the parties have the right to re-negotiate or reach a new agreement on the competent authority to settle the disputes. In this case, the competent authority to settle the disputes shall be determined upon the re-negotiation or new agreement between the parties.
2. If the parties fail to re-agree or reach a new agreement on the competent authority to settle the disputes and do not fall under the case where the Court has jurisdiction to settle the disputes under Article 2.3 of this Resolution, then:
* In the event that the disputes are initiated at the Arbitration Center before they are initiated at the Court/or when the Court has not yet accepted the case: The Court must refuse to accept and settle or suspend to settle the case (from time to time).
* In the event that the disputes have not been initiated at the Arbitration Center before they are initiated at the Court: The Court will consider accepting and handling them under common procedures.
1. Article 117.1 of the Civil Code 2015 [↑](#footnote-ref-1)
2. Article 16.1 of the Law on Commercial Arbitration [↑](#footnote-ref-2)
3. Article 16.2 of the Law on Commercial Arbitration [↑](#footnote-ref-3)
4. Article 18 of Law on Commercial Arbitration [↑](#footnote-ref-4)
5. Article 4 of the Resolution No. 01/2014/NQ-HDTP [↑](#footnote-ref-5)
6. Article 2.4 of the Resolution No. 01/2014/NQ-HDTP [↑](#footnote-ref-6)