

PREFERRED OPTION

Lawyer Luong Van Trung, Founding Partner of Lexcomm Vietnam LLC and an arbitrator at the Vietnam International Arbitration Center (VIAC), tells VET / VnEconomy's Xuan Thai about the trend of resolving disputes through commercial arbitration in the context of an increasingly integrated market economy and deeper international economic integration.



Some argue that being a lawyer, whether in an advisory or litigation role, is easier than working as an arbitrator. What is your perspective?

I don't think so. Each role presents its own set of challenges.

For example, when a legal advisor helps a client negotiate and finalize a construction contract, they must deeply understand the specifics of that contract type, along with the client's position, capabilities, goals, and potential risks. They also need a comprehensive grasp of the law to craft terms that are advantageous for the client while remaining reasonable enough for the other party to accept.

If a dispute arises from this construction contract, a litigation lawyer must have a similar depth of understanding but also needs the ability to identify and develop a compelling narrative or "theory" for the case. They must build and present a legal argument strong enough to persuade the adjudicator.

An arbitrator, in resolving such disputes, requires comparable knowledge to evaluate and decide whether to accept or reject the arguments of each party. In cases where no lawyer is present, or the lawyers are underprepared, the arbitrator must independently assess the facts and laws to

determine a fair resolution. Additionally, an arbitrator must clearly and persuasively articulate, in their ruling, the reasons behind their acceptance or rejection of each party's arguments. In practice, arbitrators are often (and ideally should be) highly skilled and experienced lawyers.

Can an arbitrator also act as a lawyer? What are the key differences in their roles, and what qualities are essential for an arbitrator?

In both Vietnam and other countries, a high percentage of arbitrators are also practicing lawyers. However, even when one individual performs both roles, their approach to each is distinct. The primary difference lies in their responsibilities: lawyers are advocates for their clients, seeking every legal and factual argument to protect their clients' interests while maintaining respect for and belief in justice. Arbitrators, on the other hand, must be entirely independent, impartial, and neutral when assessing the case and evaluating the arguments presented by each party.

Regarding the qualities needed for an arbitrator, I believe they include the ability to assess issues from diverse perspectives, in-depth knowledge of the law,

particularly in the specific area of the dispute (such as construction, commerce, or real estate), and, most importantly, independence, impartiality, integrity, and objectivity. Additionally, arbitrators must be able to clearly and convincingly explain their decisions, providing sound reasoning for accepting or rejecting the arguments of each party. Proficiency in foreign languages is also essential when arbitration proceedings are conducted in a non-native language.

It's also important to note that arbitrators are not required to hold a law degree. They can be experts in the relevant field of dispute. In cases involving highly specialized disputes, it may be beneficial if one member of the arbitration panel is an expert in that field, for example insurance, oil and gas, aviation, or construction.

What are some of the joys or challenges you have encountered in commercial arbitration?

Having served as an arbitrator in around 80 dispute cases, I have experienced a variety of both positive and negative moments. However, for the purpose of this conversation, it might be more fitting to share some of the more challenging experiences.

In some disputes, I've come close to feeling deeply distressed (though I never showed it) when one party lacked legal representation or accepted contract terms that were clearly detrimental to their interests. The arbitration panel always aims to find a just resolution, but the unfavorable contract terms, coupled with poor contract execution and evidence management by one party, often make that goal unachievable.

I have also felt saddened when a lawyer advised their client to reject mediation, leading to a ruling far worse than what could have been achieved through settlement, resulting in the loss of a significant and valuable business partner.

Another disappointing experience has been witnessing lawyers who were inadequately prepared for the case, failing to effectively protect their client's interests. Whether due to insufficient skills or a lack of responsibility, they often fail to create a solid strategy or defense. In such cases, the arbitration panel had to "find its own way" to reach a fair and balanced decision, with little useful input from the lawyer's arguments.

Lastly, the conduct or "culture" of the parties involved in some disputes has been a matter of concern and reflection.

In the context of Vietnam's increasing integration into the global economy, do you think Vietnamese businesses should choose commercial arbitration for resolving disputes?

I believe that commercial arbitration is a preferred option for resolving disputes in economic and commercial matters, espe-

cially when there are foreign elements involved, such as foreign laws, non-Vietnamese languages used in arbitration, complex cases, or disputes in specialized fields like oil and gas, aviation, finance, and construction. However, it is important to note that commercial arbitration must be agreed upon by both parties in the contract or through a separate written agreement.

One of the key benefits of commercial arbitration is its neutrality. The parties can choose an arbitration center in a neutral country or region, and select an arbitrator they trust to be impartial, objective, and honest. Another advantage is the flexibility it offers. The autonomy of the parties is central to arbitration, allowing them to agree on the location of hearings or the qualifications of the arbitrators, and even to adjust certain procedural rules as necessary.

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Arbitration also allows for flexibility in representation, as lawyers or authorized representatives can come from any country. Confidentiality is another important benefit in commercial arbitration, which is essential in business relationships. Additionally, arbitration provides access to a high level of expertise, as arbitrators can be legal professionals or specialists from any field relevant to the dispute.

The enforceability of arbitration awards is another advantage, as they are final and immediately enforceable, just like court judgments. Finally, while arbitration costs can be high, there is a good chance that the winning party can recover these costs, as the arbitration panel has significant authority to determine who will bear the expenses. In general, disputes resolved through commercial arbitration are often settled more quickly than those handled by the courts.

Do you have any advice for businesses involved in commercial arbitration disputes?

Preparation is key. Businesses must develop a solid strategy and focus on how to win the case, or at least minimize the losses, based on the facts and the law.

It is essential for businesses to hire qualified lawyers with experience in commercial arbitration. For instance, I know of a case where a Vietnamese defendant hired highly-regarded local lawyers, known for handling criminal cases, to represent them in a commercial arbitration dispute with a Japanese corporation. The proceedings were conducted in English, and the opposing party had a top international law firm from Japan.

The Vietnamese lawyers had limited proficiency in English and lacked experience in large-scale arbitration cases involving international teams of lawyers. When the defendant realized the risk of losing, they replaced their lawyers just seven days before the second hearing. This change significantly improved their position and was likely one of the key factors in their victory.

One of the most important rights in a dispute is choosing an appropriate commercial arbitration tribunal. A "golden rule" in arbitration is "know your tribunal". It is crucial to select arbitrators who are the best fit for the case, based on experience, knowledge, and even cultural background.

Businesses should also be open to the possibility of a settlement and be prepared to pursue it. It's not always necessary to follow a lawyer's advice to "fight to the end". ■

