

Original Article

ADR And ODR for Dispute Settlement Arising from the Securities Market in Vietnam

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Received Date: 05 February 2024

Revised Date: 16 February 2024

Accepted Date: 24 February 2024

Published Date: 07 March 2024

Abstract: In recent years, Alternative Dispute Resolution (ADR) has become a new trend of dispute settlement around the world. Especially due to the impact of the COVID-19 pandemic, the application of information technology to resolve disputes between parties using Online Dispute Resolution (ODR) has initially been formed and is being used by the parties. In this article, the author will analyze the current situation of using ADR and ODR to solve disputes arising from the security market. From there, propose solutions to further improve this dispute resolution method in the future.

Keywords: Disputes, Securities, ADR, ODR, Facts, Solutions.

I. INTRODUCTION

Since being regulated by a competent state agency and allowed to operate, many disputes have arisen in the securities market between investors, securities companies and corporates. Accelerating the process of resolving disputes between parties to develop the economy is an urgent task of the judicial sector today. In addition to traditional dispute resolution methods in court, the use of alternative dispute resolution methods (ADR) such as mediation and arbitration is also encouraged. Furthermore, in the era of development of the fourth industrial revolution (4th IR), information technology is also widely applied in all aspects of life. Online dispute resolution (ODR) is also widely used by disputing parties and dispute resolution agencies. This is even more meaningful for investors in the securities market, when the need for quick and cost-effective resolution is needed to promote more investment due to quick and efficient settlement solutions.

A) Overview of Disputes in the Securities Market

Disputes often arise in the derivatives market when one or several subjects believe that the subject participating in the securities relationship has violated their interests. Disputes arising in the securities sector may stem from violations of law in the securities sector, violations of state management orders on securities, or may not originate from administrative violations or criminal, but only disagreements about rights and obligations between the parties when one or more parties believe that the other party has not fulfilled its obligations to ensure the rights of the other party in the business relationship. Based on the subject, disputes arising in the securities sector can include the following types:

- i. Disputes between investors: with a large number in the market and frequently carrying out transactions to buy and sell securities with each other as well as other related transactions, disputes between investors are clear. This type of dispute is inevitable in the derivatives market.
- ii. Disputes between investors and service providers: Due to the diverse nature of relationships established between investors and related organizations, many types of disputes arise, such as disputes on account opening contracts between derivative securities companies and clients, disputes over portfolio management contracts, Disputes over derivatives investment consulting contracts; Disputes over the mortgage of derivative securities purchase and sale contracts; Dispute over the transfer of derivative securities purchase and sale contracts.
- iii. Disputes between issuing organizations and other organizations: disputes over the implementation of underwriting commitments; Disputes related to securities issuance consulting.
- iv. Other types of disputes include contract disputes between the bond issuer and the representative of the bond owner, as well as disputes over account opening contracts between depository members, banks, and clients. Disputes over contracts in which one party is a foreign organization or individual; Disputes between issuers and investors, disputes between service providers, disputes between trading members and market organizers, etc.

B) Using the ADR Method for Settlement of Disputes on the Derivatives Market

Dispute resolution in the derivatives market is specifically stipulated in Article 131 of the Securities Law. Following that, disputes arising in securities activities and the securities market in Vietnam can be resolved through negotiation, conciliation/mediation, arbitration or court settlement according to the provisions of law. Thus, in this provision of the securities law, it is mentioned that resolving disputes between parties in the derivatives market can be done through alternative dispute resolution – ADR methods such as negotiation, mediation or arbitration.



a. Resolve Disputes by Negotiation

Negotiation is when disputing parties discuss, exchange, fight, compromise and agree to reach a consensus on conflict resolution. This is an informal form of dispute resolution voluntarily applied by the parties. By choosing to negotiate, the parties save time and costs - extremely important factors for any entity participating in the stock market. Resolution by negotiation is often applied to simple disputes, the value of which is not large.

b. Resolve Disputes by Mediation

Mediation is a form of dispute resolution in which the parties agree to choose a solution to end the conflict with the support of a third person acting as a mediator.

For resolving disputes in the stock market between members, the stock trading center or stock exchange often acts as a mediator. Article 37.8 of the Securities Law stipulates that the Stock Exchange can act as a mediator if requested by the disputing Parties for disputes arising from securities transactions. This regulation shows that other conciliators can conciliate many other disputes arising in the stock market. For example, disputes arise during the process of investment consulting, underwriting, investment fund management or securities portfolio management, and disputes arise during the process of securities depository. Like other countries, the stock exchange markets in Vietnam established a conciliation committee. They issued documents regulating the order and procedures for conciliation to create favorable conditions for the dispute resolution process.

The conciliation board includes the head of the conciliation board, who is the director or deputy director of the securities trading center, representatives of the market surveillance department, related functional departments and representatives of the same member securities companies, and a number of other members at the request of the head of the conciliation committee.

The conciliation process includes the following four basic steps:

- Step 1: Receive the request for conciliation. The party requesting conciliation sends the conciliation request and necessary documents to the center. Within 07 working days from the date of receipt, the center must send a copy of the application to the defendant.
- Step 2: Prepare for mediation. Within 15 days, the defendant must send a written response accepting or not accepting the settlement. In case the defendant accepts mediation, the center director signs a decision to establish a mediation committee. The conciliation board shall convene directly or request the parties to explain in writing, provide evidence and other documents, issue a decision to suspend conciliation in certain cases, and set a time and location where a conciliation session takes place, send conciliation summons to the parties at least 15 days before the conciliation date.
- Step 3: Conduct mediation under the chairmanship of the head of the mediation committee.
- Step 4: The conciliation ends with the conciliation committee preparing a record of successful conciliation or unsuccessful conciliation record based on the results of the conciliation session. The implementation of conciliation results depends entirely on the voluntary will of the parties.

c. Resolve Disputes by Arbitration

Dispute resolution by arbitration is a form of dispute resolution through the activities of an arbitrator (as an independent third party) to end conflicts between disputing parties through making an award of a decision that has a binding effect on the parties. Arbitration is commonly used to resolve disputes on the stock market, and business disputes are always resolved at the root by a final award, binding decision. At the same time, time and cost are not high; procedures are simple and not rigid. However, when choosing arbitration, the parties naturally lose the right to sue the dispute in court.

As a general rule, the arbitrator has the authority to resolve a dispute when that dispute arises in commercial activities. That dispute arises between business organizations and individuals in the course of performing one or more commercial acts, and before or after a dispute arises, the parties have an arbitration agreement. Resolving disputes in the securities market at commercial arbitration must follow legal procedures.

Because specialized laws do not have separate regulations, according to the general provisions of arbitration law, the statute of limitations for initiating lawsuits for disputes on the stock market in particular and disputes arising in commercial activities, in general, is two (02) years from the date of the dispute. The law allows parties to choose one of two forms of arbitration to resolve disputes at arbitration centers or arbitration councils established by the parties.

In case the parties choose an arbitration center, the plaintiff must file a lawsuit with the center clearly stating the name of the selected arbitrator. The arbitration center will send a copy of the complaint along with a list of the center's arbitrators to the defendant within 30 days. If so, the defendant must send the arbitration center a written statement of self-defense and respect for the chosen arbitrator. The two selected arbitrators agreed to choose the third arbitrator as the chairman of the arbitration panel. The president of the arbitration center may appoint an arbitrator if, at the end of

the time limit, the defendant does not choose an arbitrator or the two arbitrators cannot agree on the choice of a third arbitrator.

In the case of an arbitration council established by the parties, instead of sending an application to the arbitration center, the plaintiff must send the application to the defendant and the right to appoint an arbitrator to help the parties belongs to the provincial court where the defendant is located application for domicile or residence. The total time from the day the complaint is submitted to the day the arbitration council is established is no more than 59 days.

After being appointed, the arbitrators must study the records and verify the facts if necessary. The arbitrators have the right to meet the parties to hear their opinions and request the parties to provide relevant evidence or collect evidence. Arbitrators can still be replaced during the dispute resolution process if there are factors that affect the objectivity of their arbitration work. Actual activities of stock markets in other countries show that the majority of arbitrators who arbitrate disputes in the stock market belong to arbitration centers established by stock exchanges. Currently, in Vietnam, there is no arbitration center specializing in arbitrating disputes in the securities sector.

The chairman of the arbitration council decides the opening time of the meeting unless the parties have otherwise agreed. The meeting is not public, and the parties can attend directly or authorize representatives and have the right to invite witnesses and lawyers to protect their legitimate rights and interests. At the same time, during the process of the arbitration council resolving the dispute, the parties have the right to apply to the provincial court, where the arbitration council accepts to apply a number of temporary emergency measures when they see that their rights and interests are infringed or are at direct risk of being infringed.

The arbitration council makes its decision based on the majority principle, and this decision is as enforceable as a judgment issued by a court. Arbitration law specifically encourages parties to conciliate during arbitration proceedings, but there is a clear distinction between the legal value of conciliation results in two cases.

In the first case, the parties reconcile with each other. This conciliation process can be conducted in parallel and independently of the arbitration process. If conciliation is successful at the request of the parties, the arbitral tribunal will suspend the arbitration proceedings. This is an out-of-litigation conciliation, so whether the conciliation results will be implemented or not depends entirely on the willingness of the parties.

In the second case, the parties request the arbitration council to conduct conciliation. If conciliation is successful, the parties request the arbitration council to prepare a record of successful conciliation and issue a decision recognizing successful conciliation. This decision is final and binding on all parties.

C) Resolve Disputes Related to the Securities Market by Using ODR

On September 27, 2019, the Politburo issued Resolution No. 52-NQ/TW on a number of guidelines and policies to proactively participate in the Fourth Industrial Revolution on the basis of promoting national digital transformation based on the basis of digital technology, the Internet and cyberspace. It can be seen that Vietnam's Communist Party and State recognize the power of the digital era in the country's socio-economic development strategy. As Vietnam participates more and more deeply in new-generation free trade agreements, the growth rate of e-commerce activities is exploding rapidly, and a non-traditional solution is needed.

a. Overview of the Online Dispute Resolution (ODR) Method

According to the Technical Note on ODR, the ODR procedure includes 03 stages (negotiation, facilitated settlement, and final stage) as following details:

- i. Negotiation phase: When the plaintiff (claimant) submits a request on the ODR system, the ODR system administrator notifies the defendant (respondent) about the plaintiff's request and responds to the plaintiff. The initial negotiation can be supported by a technology (possibly AI), and the parties can negotiate directly on the ODR system platform.
- ii. Resolution support phase: If negotiations are unsuccessful, the ODR system administrator appoints a mediator to assist the parties in negotiating to reach an agreement.
- iii. Final stage: If Stage 2 is unsuccessful, the next step in the process is for the ODR system administrator or mediator to notify the parties of the next step, which can be resolved by arbitration or court.

b. Evaluating the Resolution of Securities Market Disputes using the ODR

i) Advantages of the ODR Method

The rapid development of e-trading in Vietnam's securities market is the reason for the promotion of the development of the Online Dispute Resolution (ODR). Currently, most transactions of buying and selling securities contracts take place online on electronic stock exchanges.

It can be seen that the increase in electronic transactions will increase disputes, and the trend of resolving disputes by ODR method will increase for the following reasons:

First, the ODR method shortens the time to resolve disputes. Compared to traditional dispute resolution methods, the ODR method is quick, effective, flexible, and inexpensive, and it can handle electronic securities transaction disputes without being limited by borders, country, or territory. The ODR system is supported by technology, especially with the support of AI technology, to help process data quickly from the stage of checking, reviewing and evaluating evidence of the parties. In addition, the ODR system also allows disputing parties to meet online to negotiate, conciliate, and arbitrate in the form of exchanging messages, chatting (text communication) or meeting online (video conference) is very convenient, helping to speed up dispute resolution for the parties.

Second, the ODR method minimizes the cost of dispute resolution. The ODR method is resolved via the Internet, and the parties can negotiate and mediate anytime, anywhere, and are not bound by space and time. The service fee of the ODR method is low compared to the traditional dispute resolution method because all dispute resolution procedures can be carried out via the Internet.

Third, the ODR method protects the interests of disputing parties (especially individual investors). In disputes, especially small disputes, if the party whose interests have been violated wants to sue in court, the procedures are complicated. Sometimes, the cost of resolving the dispute is much greater than the cost. Their interests are being violated, so the ODR method will bring benefits to those who are violated, especially individual investors in the securities market.

Fourth, the ODR method helps strengthen and build a healthy and developed securities trading environment in the electronic trading market.

ODR at electronic securities exchange websites also provide a communication portal to help buyers complain and denounce derivatives fraud, fraud or other dishonest acts. In Vietnam, electronic derivatives exchanges VN-Index and websites of securities companies are increasingly paying attention to the ODR mechanism.

ii) Disadvantages of the ODR Method

Information technology infrastructure in Vietnam is increasingly focused on development. The deployment of 5G network technology to develop the digital economy is one of the important breakthroughs in developing the Vietnamese economy at the conference. It will support the development of dispute resolution by the ODR method. However, the first ODR system in Vietnam was only officially launched in June 2020 at the Hanoi International Arbitration Center (HIAC), showing that the ODR method has not really developed in Vietnam.

The delay in applying the ODR method in Vietnam comes from the following reasons:

Firstly, resolving disputes using the ODR method may be ineffective when the results of negotiation and conciliation do not have legal value binding on the parties; even the arbitration award may be invalid. Besides, resolving disputes using the ODR method will not be simple if one of the parties is not in good faith and commits fraud in providing documents and evidence. Although the 2015 Civil Procedure Code recognizes the value of electronic evidence, due to a lack of specific instructions, it is difficult to authenticate these evidence documents.

Second, the use of AI technology in dispute resolution cannot be absolutely optimal (AI is created by humans). Because they can be manipulated for bad purposes and are currently not common in Vietnam, disputing parties do not really trust them. Besides, the ODR method requires the parties to be knowledgeable about technology and be able to use applications on the Internet. This is also a challenge for many individuals and organizations.

Third is the issue of personal information security. When resolved by ODR, the personal information of the parties can be stolen in the cyber environment. If the ODR system is not guaranteed, it will easily be hacked by hackers and steal personal information. Moreover, it can be the business secrets of the enterprise.

c. Solutions to Promote Online Dispute Resolution Methods in Vietnam

In the conditions of the Fourth Industrial Revolution, the ODR method will be a useful solution, facilitating the parties to resolve disputes quickly, effectively, and transparently while promoting the development of trade. E-commerce in Vietnam is increasingly reaching out.

To develop dispute resolution methods using ODR in Vietnam, the state needs to have policies to support ODR organizations and create a favorable legal corridor for them. The application of the ODR method, specifically as follows:

Firstly, it is necessary to build a mechanism to support the development of ODR organizations in Vietnam and encourage dispute resolution using the ODR method to be consistent with world economic integration. When Vietnam joined the World Trade Organization (WTO) and signed new-generation free trade agreements (EVFTA, CPTPP), trading with foreign partners became popular when there was a dispute. If a dispute occurs, a cross-border resolution method needs to be used. Therefore, the ODR method will solve this problem and promote the development of cross-border e-trading, helping buyers and sellers easily interact without territorial limits achieving results. The agreement is based on resolving disputes through negotiation and dialogue rather than confrontation.

Second, perfect the procedural law system and relevant legal documents to create a legal basis for ODR. According to the Report of the Supreme People's Court, in the period 2016 - 2020, the People's Court system resolved 1,842,684 out of a total of 1,894,472 civil, marriage and family cases, business, trade and labor. Cases tend to increase with increasing complexity, while the staff and judges of the entire court sector in general, and local courts in particular, are lacking in number. Not yet strong in quality. This puts great pressure on the Court sector. In that condition, applying the ODR method will help reduce the large number of cases for the Courts, contributing to improving the quality of the court's trials. To accomplish this, it is necessary to perfect the system of legal documents on proceedings (civil, administrative, marriage and family, commercial, criminal) to create a legal basis for applying legal documents. Applying the ODR method, at the same time, it is necessary to complete regulations related to ODR in a number of relevant legal documents, such as the 2006 Law on Information Technology, the 2015 Law on Cyber Information Security, and the 2018 Law on Cyber Security year.

Third, the information technology infrastructure, equipment, and techniques for dispute resolution should be invested in using the ODR method. Information technology infrastructure, equipment, and techniques are prerequisites for the ODR model, but they cost a lot. Therefore, the state needs to have a policy to support costs for ODR organizations in Vietnam; Complete national data on population, tax codes, phone codes... to easily authenticate identities and personal and business information between disputing parties.

Fourth, soon issue guiding documents for Clause 1, Article 94 of the 2015 Civil Procedure Code on verification and collection of electronic evidence identity authentication so that e-trading activities are transparent, ensure the validity of contracts, avoid fraud, and limit contract cancellation or delivery not in accordance with the agreement.

II. CONCLUSION

From the above synthesis and analysis, it can be seen that disputes between parties in the securities market are increasingly occurring. The pressing issue is that the disputing parties need to quickly resolve those disputes to continue the investment and business process in the derivatives market. The use of out-of-court and online dispute resolution methods (ADR combined with ODR) to resolve disputes in the securities market is the most civilized and effective today. It is becoming increasingly popular not only in Vietnam but also around the world. Competent state agencies need to have appropriate support mechanisms to encourage and motivate disputing parties to use more of these dispute resolution methods in the future so that Vietnam's economy can develop sustainably in the context of ever-deepening international economic integration.

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