

Recent ADRs Developments in Vietnam

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Vietnam is still on its way to gain international recognition of its developments in alternative dispute resolution (ADR), with the focus on mediation and arbitration. While arbitration has definitely been on the rise in Vietnam, more time is required for mediation to gain the same. This article shall provide a brief of recent developments of ADR in Vietnam, taking special account to the trend towards the use of different ADR conjunctions.

Arbitration

Arbitration provides users with a private channel to resolve their dispute, with several well-known advantages including cost and time efficiency, flexibility, confidential and easy enforceability. Arbitration in Vietnam has experienced an impressive growth since the enactment of the Law on Commercial Arbitration in 2010 (in force as from 1 January 2011 – LCA). This is indicated by, firstly, the increasing number of arbitration users in general and actual disputes resolved by arbitration in particular. According to the statistics provided by Vietnam International Arbitration Centre (VIAC), which is the oldest and one of the most prominent arbitration institutions in Vietnam, the number of arbitrations administered by VIAC alone from 2010 to 2020 surges by 336 percent in comparison to the period between 2003 and 2010.³ Besides, greater awareness of arbitration and arbitration-related issues is also recorded since the introduction of the LCA, especially during the last five years. This can be seen in the active reference to arbitration by thousands of enterprises in not only cross-border transactions but also domestic ones. Furthermore, legal profession has also expanded towards the use of arbitration, with more law firms and lawyers providing professional arbitral representation services, some of whom are internationally recognised as best arbitration firms and lawyers.

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³ Vu Anh Duong, Seminar on “The Ten Year Journey of The 2010 Law on Commercial Arbitration” within the framework of the 2020 Vietnam ADR Week (June 2020). It was further discussed at the Seminar that the fact that the court is overload in handling commercial lawsuits indicates that arbitration can and will develop to share this burden.

One of the features, and also an advantage, of arbitration is its enforceability, which is the main concern of users.⁴ An arbitral award is final and binding. Domestically, it is treated similarly to a Vietnamese court's judgement, which means that it can be directly enforced by the competent Vietnamese enforcement authority without going through recognition process.⁵ Internationally, a Vietnamese arbitral award can be recognised and enforced in all countries who are signatories to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Award (New York Convention). One recent example that is worth mentioning is the Thailand court's Judgement on Recognition and Enforcement of a VIAC-rendered arbitral award in July 2017.⁶ As the result, the award was then enforced against the Thailand respondent company. Cases like this help gain trust among the business community in the use of arbitration.

Mediation

Undeniably, mediation is acknowledged as a method that provides the parties with a satisfactory, or in the best scenario, a win-win solution to their dispute. Mediation is fast, cost-effective, and helps remain the parties' standing business relationship in the post-dispute stage. In Vietnam, mediation has been widely used for a long time, albeit without the acknowledgement of the users, for example mediations conducted by judges during court proceedings or by arbitrators during arbitral proceedings. However, it was not until 2017 when professional commercial mediation marked a milestone in its development with the issuance of the Decree No. 22/2017/ND-CP on Commercial Mediation. The introduction of this legislation officially recognises mediation as a separate means of dispute resolution and facilitates advanced development of mediation. Consequently, several mediation centres have been established and a considerable number of commercial mediators have been qualified to practice under the Decree.

It is reported by the Vietnam Mediation Centre (VMC), a division of VIAC which is the first mediation institution established under the Decree, that immediately upon the launch of its Rules of Mediation in July 2018, VMC received over ten high profile cases with the total value in dispute of USD 44 mil, 70 percent of which indeed reached the final mediated settlement agreement (MSA) and 100 percent of the MSA was voluntarily enforced by the parties involved.⁷ More recently, in response to the increasing demand for online dispute resolution in line with the technological revolution, VMC has launched its online mediation platform – MedUp⁸ which is among the very first online platforms for mediation in Vietnam. The introduction of these new online channels hopes to raise the efficiency of mediation and therefore, attracts more mediation users.

⁴ Queen Mary University of London and White & Cases LLP, **International Arbitration Survey: The Revolution of International Arbitration** (2018).

⁵ Vietnamese 2014 Law on Enforcement of Civil Judgement, Article 2.

⁶ Local court case No. 243/2016; Judgement No. 152/2017 dated 26 July 2017.

⁷ VIAC, Annual Reports.

⁸ See more at www.medup.vmc.org.vn

However, it must be frankly stated that mediation indeed requires further efforts in order to gain popularity among the Vietnamese business community. It would take more time to raise the awareness of enterprises in using professional commercial mediation, despite the perceived benefits. The most popular concern of mediation users is the enforceability of the MSA. On national scale, although the MSA may be recognised and enforced by the Vietnamese court following a court proceeding, it is still considered more complicated in comparison with arbitration where parties participate in one single proceeding to obtain a directly enforceable award. On international scale, internationally made MSA may be enforced in accordance with the 2019 Singapore Mediation Convention (SMC) which has similar effect as the New York Convention for arbitration. However, Vietnam has not yet been a signatory to the SMC, which may make mediation in Vietnam less attractive.

The combination of arbitration and mediation

In the expectation that Vietnam will soon join the SMC, another trend towards the use of mediation and arbitration in conjunction has arisen, which aims, *inter alia*, to address the concern about enforceability. Various modified versions of arbitration-mediation combination have been developed and brought to use. The most popular ones are mediation followed by arbitration (med-arb), arbitration followed by mediation (arb-med) and arbitration with a break in arbitral proceedings for mediation (arb-med-arb). In a med-arb process, parties first attempt to mediate, failing which an arbitration shall then be commenced. By contrast in an arb-med process, where arbitral proceedings are being conducted and the parties wish to mediate, a mediation will then start until the parties reach an agreement. The pending arbitration is usually stayed upon successful mediation. The third process – arb-med-arb has similar procedure compared to the second one, except that after reaching a settlement agreement in mediation, such result is recorded in a consent award by the arbitral tribunal in the pending arbitration. The consent award bears an equal legal effect to that of an arbitral award rendered by an arbitral tribunal.

It is obvious that the aforementioned processes, either med-arb, arb-med or arb-med-arb, help settle the parties' disputes in a timely and cost-effective manner. On the one hand, these combined processes leave an opportunity open for the parties to mediate at any point of time during the dispute settlement. On the other hand, in all circumstances, arbitration stands as a backup plan, which imposes a certain degree of pressure on the parties to cooperate at their best effort to resolve the dispute in good faith and in an amicable manner, and otherwise completely resolves dispute when mediation fails.

Among the aforementioned hybrid procedures, arb-med-arb is considered of particular interest that is worth highlighting due to its complexity in terms of purpose, procedure and outcome. With respect to the purpose, arb-med-arb process aims to encourage parties to mediate their disputes by addressing the drawbacks of mediation, including statute of limitation and enforceability. Firstly, this process allows parties to commence arbitral proceeding to reserve the statute of limitation in case mediation is prolonged but such

an attempt fails. Secondly, even in the event of successful mediation, the settlement agreement is enforceable, either voluntarily by the parties or by enforcement authorities pursuant to legal instruments. In accordance with this aim, arb-med-arb procedure is usually designed to simplify the initiating arbitral steps, keeping submissions at the most minimum level to retain the parties' good faith and appropriate attitude towards mediation. Upon termination of mediation, parties resume arbitral proceedings to either recognise mediation result or resolve the unmediated dispute.

Therefore, in terms of result, arb-med-arb process may end with an arbitral award finally resolving all matters in dispute or a consent award recording the mediated settlement. Both of these results can be recognised and enforced in foreign countries pursuant to the New York Convention. In general, this is a huge 'plus' in comparison with arb-med, except in some minority of jurisdictions such as England where there are regulations on recognition and enforcement of mediated settlement agreement.

A concern arises out of these combinations is whether a neutral can act as both mediator and arbitrator in two parts of the process with respect to the same dispute. Some scholars and practitioners opine that this is permitted upon the involved parties' agreement, considering it is both time and cost saving because the neutral is already familiar with the facts of the case from the previous proceedings. Nevertheless, others argue that submitting dispute to the same neutral breach the confidentiality rules of mediation/arbitration. Furthermore, due to the different roles of a mediator (support parties in analysing matters in dispute and suggesting solutions) and an arbitrator (judge/adjudicate upon parties' argument and evidence), an arbitrator is considered to no longer remain independent from and impartial of the parties. Therefore, mediator and arbitrator of the same dispute cannot be the same. This matter remains controversial.

In practice, participating in a procedure combining both arbitration and mediation might be somewhat complicated to enterprises because of the complexity of procedures and regulations. Therefore, counsels who are familiar with ADRs and relevant legal issues are usually engaged to fasten the dispute resolution process.

Indeed, mediation and arbitration conjunctions as mentioned above are not new in the international ADR market. 'Big names' such as ICDR⁹, ICC¹⁰ or HKIAC¹¹ provides for at least the basic med-arb solution. Especially, SIAC was the first institution to introduce, together with SIMC, their arb-med-arb protocol in 2014.¹² In Vietnam, however, the situation is as new as mediation, which results in later development in hybrid ADR procedures. In 2020, in the effort to provide the business community with even more efficient dispute

⁹ See ICDR Med-Arb Model Clause at <https://www.icdr.org/clauses>.

¹⁰ See ICC Med-Arb Model Clause at <https://iccwbo.org/publication/suggested-icc-mediation-clause-english-version/>.

¹¹ See KHIAC Suggested Mediation Clause at <https://www.hkiac.org/mediation/rules/hkiac-mediation-rules>, in which arbitration is suggested to follow mediation.

¹² See more at <https://simc.com.sg/dispute-resolution/arb-med-arb/>.

resolution, VIAC and VMC have launched their newly designed combined processes, namely the Med-Arb /Arb-Med Combo and the Arb-Med-Arb Protocol, being the first ADR combination services introduced in Vietnam.¹³ Taking the advantage of being an institution providing both mediation and arbitration services, VIAC, and its division VMC, have designed their procedures in a unique form that best matches local ADRs usage customs and maximises users' benefits. These new resolutions are expected to encourage the use of ADRs and promote their development in Vietnam.

Undeniably, continuous efforts by the Vietnamese government, institutions and practitioners have been made over the last decade with the single aim to promote alternative dispute resolutions, especially arbitration. It is therefore expected that in the next few years, more advanced developments will be seen in arbitration practice, for instance amendments to the current Law on Commercial Arbitration, so that Vietnam will be a Model Law country and soon will be a favourite seat of arbitration. Such developments in arbitration may pave the way for the same in mediation, and hopefully, spring will soon come for mediation.

¹³ See more at <https://www.vmc.org.vn/en/med-arb-combo> and <https://www.vmc.org.vn/en/arb-med-arb-protocol>