

The Mediation In Resolving Labor Dispute: Assessment Of The Mediation In Resolving Labor Dispute In Viet Nam Legal System

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Abstract

Regard to legal culture, there are some main following approaches to process labor disputes up to now: Discussion and negotiation, mediation, arbitration (Voluntary or Compulsory) and court action. In the countries steeped in the common law or civil law, mediation of labor disputes get more common and plays a far bigger role. In Viet Nam, however, this one is infant. Grievances and disputes have been handled through strikes or court action.

The modern Viet Nam legal system restrains development and acceptance of mediation. The article aims to explain the advantages of mediation, assess the practice use of mediation in handle the labor disputes and recommend policies for development of mediation for labor disputes in Viet Nam.

Keywords: *Mediation, labor disputes, Viet Nam legal system.*

I. INTRODUCTION

1.The main approaches to handle labor dispute

Minimizing labor disputes involves procedures and problems that arise in the negotiating of contracts, handling of grievances and establishing effective labor – management relations, and can include anything from an economic issue to a pretty grievance (F.White, 1949).

Processing labor disputes involves procedures and problems in order to handle of grievances in labor relations and establish effective labor - management relations. It is believed, however, that the following list includes all of the usual approaches to settlement of a labor dispute:

- Discussion and negotiation
- Mediation
- Voluntary arbitraion
- Compulsory arbitration
- Cout action. (Arbitration, 2004)

It may be noted that labor disputes are at times accompanied by strikes, picketing, slowdowns, boycotts, lockouts, black- listing, strike breaking and etc. It is clear that each country's approach to resolving labor disputes is different. Mediation, arbitration and litigation are used by all.

However, no industry nowadays is excluded from the application of mediation. Mediation takes on more roles in many industries from business to family, labor relationship and other civil relations. (Spurin, 2002).

In the last decades of the 20th century mediation was not only used in collective disputes, but also more and more in individual disputes and conflicts within the companies (Union, 27).

2. Definition of mediation and mediation in solving labor disputes

If there was a universal understanding of what mediation is, we can partly fulfill the aims and objectives of the paper. Generally, researchers consider mediation a form of third party “assisted negotiation process”. Mediation is the process whereby an independent third party acts as a facilitator to bring about an agreement between the disputing parties as to the terms of a settlement of the dispute. The parties negotiate the terms of a settlement agreement between themselves, with the assistance and guidance of the mediator (Spurin, 2002).

Adopted legislative definition of mediation by some countries and institutions as “a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute” (Bergin, 2012)

In term of labor disputes, the mediation process is voluntary, begins within the enterprise, and involves the union, the employer and employee with the limited access to the court (C.Brown, 2009). Usually, in this case, mediation is defined as process where the parties to a dispute – in labor relations: the employer and the labor union – invite a neutral third party, the mediator, to help them resolve their differences. (F.White, 1949)

3. The distinguish of mediation, arbitration and judicial process

Table 1: The distinguish of mediation, arbitration and judicial process

| | Judicial process | Arbitration | Mediation |
|---|---|---|---|
| 1 | Judicial process is an adjudicatory process where a third party (Judge) decides the outcome | Arbitration is a quasi-judicial adjudicatory process where arbitrator(s) decide the dispute between the parties | Mediation is a negotiation process and not an adjudicatory process |
| 2 | The decision is binding on the parties | The award in an arbitration is binding on the parties | A binding settlement is reached only if parties arrive at a mutually acceptable agreement |
| 3 | Procedure and decision are governed, restricted | Procedure and decision are governed, restricted | Procedure and decision are not governed, restricted |
| 4 | Decision is appealable | Award is subject to challenge on specified ground | Decree in terms of the settlement is final and is not appealable |

4. The feature and the advantages of mediation in resolving labor disputes

4.1. The feature of mediation in resolving labor disputes

The article proposes that employees, employers and unions consider the advantages of use of mediated settlement procedures in terms of time, cost and finality. They may use mediation to settle both individual and/or collective labor disputes (C.Brown, 2009).

Understanding its functionalities may present an opportunity for countries to choose mediation as the best process. (C.Brown, 2009)

- Mediation is a voluntary, party –centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques.

Mediation is voluntary, the parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute.

- Mediation is a party – centered negotiation process. The parties, and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute.

- The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interest of the parties. Mediation addresses both the factual/legal issues and the underlying causes of a dispute.

- Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.

- Mediation is conducted by a neutral third party –the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation. In mediation, the mediator assists the parties in resolving their dispute.

In mediation the mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. Third party - this mediator has no power of decision concerning the conflict between the parties, but helps to find and reach a mutually acceptable and voluntarily reached solution. The mediator supports both parties by special negotiation skills and techniques and does not solve the dispute by authoritarian means. (F.White, 1949).

The usual institutions in court settlements and jurisdiction (labor courts or arbitration etc.) are more determined by external force such as authority force. (F.White, 1949). Mediation is not a kind of law –enforcement, but is a supplement to free collective bargaining.

4.2. The advantages of mediation in resolving labor disputes

- Mediation is as part of alternative dispute resolution instruments. Its definitions in legal literature focus on “fast”, “flexible” and “efficient” procedures (Arbitration, 2004). Mediation is a cost- effective and efficient mechanism for resolving disputes. (Bergin, 2012)

- + The procedure is speedy, efficient and economical.

- + The procedure is simple and flexible. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day to day activities. In addition, the process is conducted in an informal, cordial and conducive environment.

In the United States mediation in labor law has a resolution quota of 85%; it is often marked as “high yield –low risk” procedure. The reasons in the US are – which would have to be confirmed in continental Europe by relevant legal fact research: Cheaper procedure, faster procedure, more flexible than court procedures. (Union, 27)

- The process facilitates better and effective communication between the parties which is crucial for a creative and meaningful negotiation. Mediation helps to maintain relationships between the parties.

- Litigation and arbitration produce winners and losers whereas the “win/win” outcomes is available to the mediation. (Spurin, 2002). The risk of a win/loss outcome when a

case in litigated in court can be avoided by mediation. It also is said to work in favour of “cooperation instead of confrontation” (Arbitration, 2004)

- Mediation is a fair process. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.

- Mediation is also confidential in nature, which means that statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties. Any statement made of information furnished by either of the parties, and any document produced or prepared for/during mediation is inadmissible and non-discoverable in any proceeding.

4.3. The disadvantages of mediation in resolving labor disputes

The willingness of parties to voluntarily settle their differences through mediation depends in large part on the confidentiality of the process. If parties fear that their disclosures to mediators or other parties during a mediation may be used against them or published outside the mediation session, it is likely that the use of the process will decline or the process will be weakened by parties manipulating their presentation to ensure that the mediator and/or the other parties are not provided with certain information that might otherwise be pivotal to a settlement being reached at the mediation. (Bergin, 2012)

II. ASSESSING MEDIATION IN RESOLVING LABOR DISPUTE IN VIET NAM LEGAL SYSTEM

This article consider the legal and political forces behind the modern mediation movements in Viet Nam.

1. The prevalence of mediation in the dispute management in Viet Nam

One indicator of prevalence of mediation in the dispute management practice of a country is the amount of legislations relating to mediations. Specific legislations on mediation in this industry is very limited in Viet Nam. Up to now, there are Labor Law in 2012 and The decree No 46 in 2013 enforced by the government about terms relating to settling labor disputes.

Mediation services in the private sector not regulated by legislation.

Mediation in Viet Nam is travelling a more difficult and winding path to recognition as a valuable alternative to litigation.

This article consider the reasons behind this recent mediation movement in Viet Nam. Australia and Germany: two countries that represent the common law and the civil law traditions respectively.

Germany is a country that represent the civil law traditions. Tradition law of Viet Nam and Germany have some the same. The mediation of labor disputes in Germany also don't develop very much.

Four reasons for the current development of mediation practice in Germany:

1. The German legal culture, steeped in the civil law tradition, restrains the development and acceptance of mediation (the civil law cultural tradition).

2. The regulation of the legal profession has discouraged lawyer from embracing mediation as an alternative to litigation.

3. The language of mediation: the absence of uniform terminology had led to confusion about the meaning of mediation in Germany.

4. The nature of legal education: The highly theoretical and rigid nature of civil law education in Germany has hindered the intergration of mediation skills into law curricula. (ALEXANDER, 2001).

It should be noted that we can easily find these same reason why the Viet Nam legal system did not make very much use of mediation in labor law.

- Mediation is palying an increasingly important role in culture of dispute management in Austrialia. The growth of mediation has been supported by a number of factors (Bergin, 2012):

First, long court waiting list. The development of mediation allowing courts to refer matters to mediation.

Second, the concept of mediation has been pro-actively promoted in the wider community.

Third, The role of State. Government in Australia provide valuable support for many mediation initiatives such as passing the bill in order to empowering mediation, subsidies mediation programs and project. (ALEXANDER, 2001)

2. Mediation standards, accreditation, training and education of mediation in Viet Nam (Compared to in Germany and Australia)

The success of mediation is in part dependent upon the abilities of the mediator. The mediator should be aware that there is a higher standard placed upon him or her. (Spurin, 2002). The skills of a mediation will limited to dealing with disputes (Spurin, 2002)

Standards for conduct and accreditation in mediation continue to be a controversial issue worldwide.

2.1. Mediation standards, accreditation, training and education in Viet Nam

- In Viet Nam, mediation is not always recognised in legal studies as part of the curriculum.

- Mediator in labor dispute is appointed by the chairman of the People Committee for a 5 –year term to settle labor disputes.

- Standards for accreditation of labor mediator in Viet Nam:

+ Viet Nam citizen, enough healthy and capacityof acting.

+ Not accused for a crime and executing penalties.

+ It is not necessary for to graduating from a law school, but they are good at knowledge about labor law.

+ Have at least 3 experienced years in managing labor disputes.

2.2. Mediation standards, accreditation, training and education in Australia and Germany

Australia and Germany: two countries that represent the common law and the civil law traditions respectively.

- In Australia, private mediation is generally conducted by former judicial officers, lawyers and other professionals with particular expertise in the nature of the revelant dispute. (Bergin, 2012). In general, in Australia the vast majority of accreditation programs comprise a four day intensive course, in which participants are required to complete a number of mediation role plays and play a mediator at least one of them. Numerous university and private institution offer mediation accreditation programs. (ALEXANDER, 2001)

In Germany, current trends in Germany indicate the likely development of mediation accreditation and practice standards according to industry. Interestingly, many accreditation programs are being designed and offered on an inter-disciplinary basis and often at postgraduate level. These programs offer both lawyers and non lawyers a postgraduate degree in mediation (ALEXANDER, 2001).

Usually, those programs consist of a year foundation course in which mediator is taught in an interdisciplinary context drawing from legal, communication and psychological theories. The second year allows students to specialise in particular areas of mediation such as family mediation or commercial mediation.

In addition, a number of other universities and private institutions offer mediation training. Although the format of the programs varies to a large extent, there appears to be a trend towards one to two year programs consisting of intensive training modules of about 200 contact hours in total and opportunities for clinical practice.

- Mediation in legal education: Australia law schools were among the first to respond to the mediation movement by offering studies in mediation as part of the law curriculum at both undergraduate and postgraduate levels. The majority of Australia Law Schools have integrated mediation into their law studies program. (ALEXANDER, 2001)

In the context of legal education mediation plays a minor role in Germany. Specialised courses in mediation within the legal education curriculum are not offered on a regular basis.

In contrast to the situation in Germany, Australia university education plays a major role in the development of knowledge, understanding and skills of future lawyers in the area of mediation (ALEXANDER, 2001).

3. The process of mediation to resolving labor disputes in Viet Nam

Figure 1: The process of mediation to resolving individual labor disputes in Viet Nam

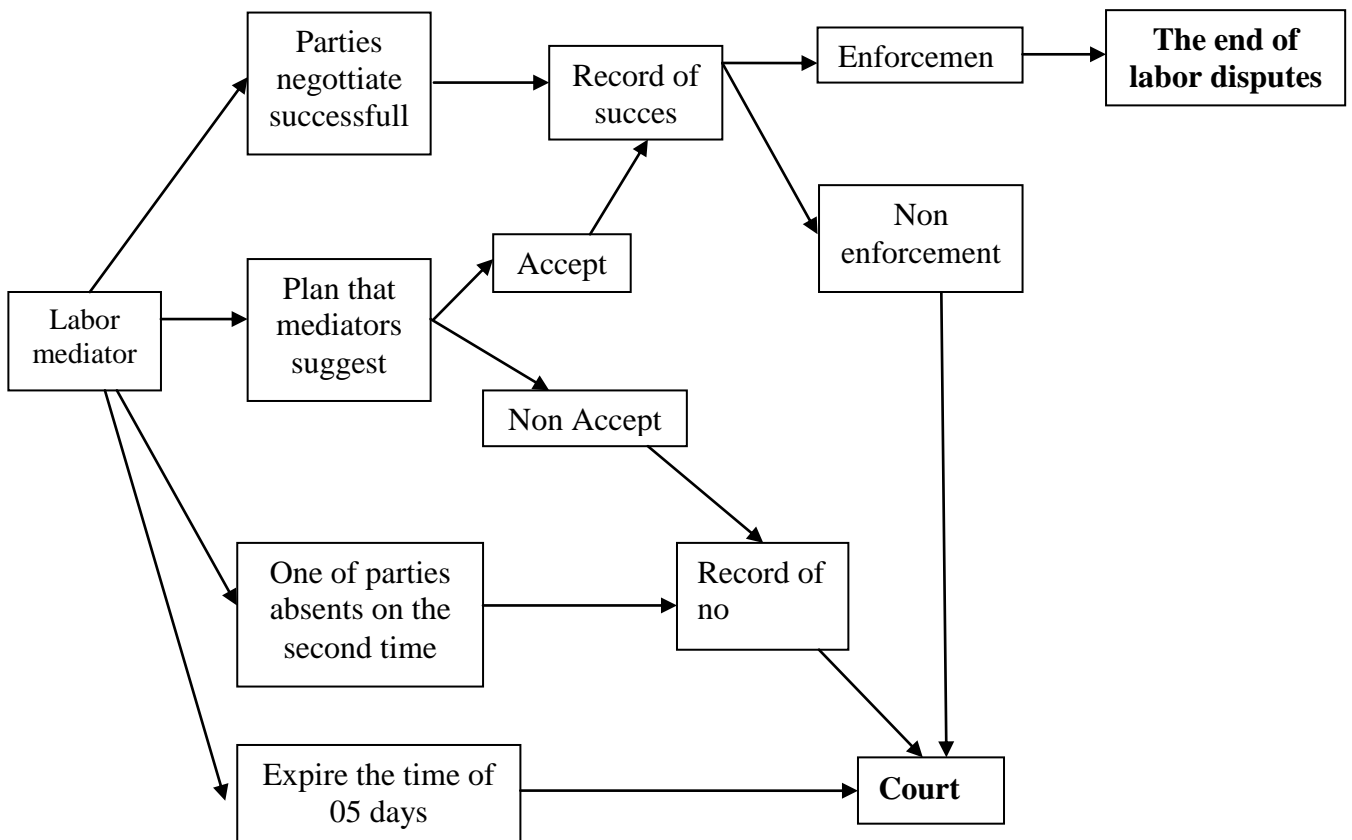
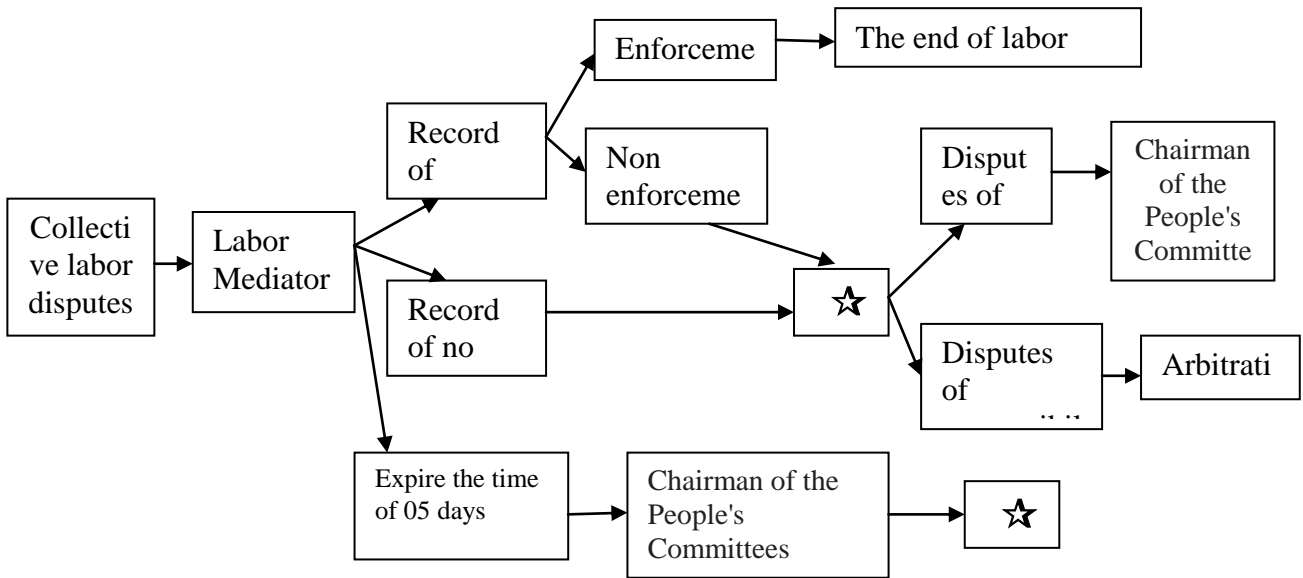


Figure 2: The process of mediation to resolving collective labor disputes in Viet Nam



III. DISCUSSION AND CONCLUSION

This article will assess the practice use of mediation in handle the labor disputes Viet Nam. In fact, labor mediation is very common and plays a far bigger role in the world. In Viet Nam legal system, generally mediation in considered as part of alternative dispute resolution instrument in labor disputes. However, it is infancy and not popular. Most disputes in general and labour disputes in particular reach the courts.

It is clear from the above, mediation is playing a significantly greater role in the Viet Nam legal system in the future. But, in my opinion, some recomedation should be done to go further by attempting to foster a culture of pre –litigation mediation for labor disputes:

- The goverment shoul give education programs helping employees, employers and unions change their minds of mediation. When they understand advantages of mediation, they will accept mediation for managing labor disputes.

- The goverment provide valuable supports for many mediation initiatives such as subsidies mediation programs and projects for development of private mediation.

- Upgrade the standards for accreditation of mediators who is responsibility for resolving labor disputes.

- The law school shoud offer training program for lawyers and non lawyers a postgraduate degree in labor mediation. Those programs consist of foundation course in which mediator is taught in an interdisciplinary context drawing from legal, communication and psychological theories. The other part allows students to have praticed opportunities att labor mediation centers.

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