

MED-ARB IN COMMERCIAL AND CONSTRUCTION DISPUTES

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Abstract:

The construction industry is regarded as one of the most conflict and dispute ridden industries. Due to its distinctive nature of it being highly technical, the parties often choose alternative dispute resolution processes where they retain more control of the process over lengthy and ineffective litigation.

In Vietnam, arbitration was introduced nearly a decade earlier than mediation and became a favoured Alternative Dispute Resolution (ADR) approach given its final and binding nature. Recently, Decree 22/2017-ND-CP was passed to regulate the commercial mediation in Vietnam.

It is predicted that mediation will be used more widely in construction industry in Vietnam for a number of reasons:

- 1. Not all claims will develop into disputes and parties are most likely preferred to maintain their relationship for future business. In contrast to arbitration, where the parties present their case to the arbitral tribunal for the final judgment, mediation is a process where the parties, with the facilitation of the mediator, work toward a mutual settlement agreement. Thus, mediation is seen as an appropriate effective forum for resolving construction claims and contractual disagreements while preserving relationships.*
- 2. Under a multi-tiered dispute resolution clause the parties are required to conduct mediation before the matter can be referred to arbitration.*
- 3. A valid mediated settlement agreement would be recognised and enforced by a competent court of Vietnam under Article 419 of the 2015 Civil Code.*

There is, however, confusion about the concept of mediation under Vietnamese law and the word “mediation” could be interpreted differently and refer to “mediation” in its legal meaning under Decree 22, or as “conciliation”, or as a purely amicable settlement in a broad sense. Under Decree 22/2017/ND-CP mediation is applicable when the parties mutually agree on mediation to settle their dispute. On the other hand, the term “mediation” is used in Article 45.2 of the Decree 37/2015/ND-CP when referring to the function of the Dispute Adjudication Board (DAB), which states that the parties may agree to “mediate” using the Dispute Adjudication Board. This causes confusion about the role of the DAB and that of a mediator. In fact, the DAB is an adjudication instrument designed by the FIDIC, failing which the parties may continue with

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other methods (such as mediation and/or arbitration) to settle their differences or disputes. This confusion gives rise to several problems in initiating arbitration proceedings and/or the enforcement of an arbitration award in case a multi-tiered dispute resolution clause is triggered.

This paper will analyse these problems in the context of construction dispute resolution under Vietnamese laws and offer some suggestions, including how to apply mediation, in the context of Vietnam, in conjunction with the other ADR processes in the order required under a multi-tiered dispute resolution system, or in the innovative format of Arb-Med-Arb introduced in Singapore, in order to enhance the effectiveness and enforceability of the dispute resolution methods in construction disputes.

Introduction

With the strong development of the real estate and construction market, the disputes arising in construction field are also growing each year. Vietnam's International Arbitrator Centre (VIAC) reported that the resolution of disputes in Vietnam construction field had increased rapidly, from 10% in 2014³ to 15% in 2016⁴. For various reasons, construction relationships between contractors and employers provoke arguments and conflicts that lead to disputes during the implementation of contracts. Therefore, it is necessary to have a fast, cost-effective resolution to help resolve contentious issues while maintaining a business relationship between contracting parties. Mediation could help to achieve such goal because, with interested base approach, mediation allows the parties to focus on the business and controlling the process and through mediation process experienced mediators may help the parties to identify common ground and to make cost benefit assessment of the issues which will in turn help the decision makers make right decision to avoid the escalation of the costly disputes. For the above reasons, mediation becomes more and more popular, especially in disputes in the field construction.

I. Definition of Mediation

The most comprehensive and modern definition of mediation is offered by the International Mediation Institution as follows:

“Mediation is negotiation facilitated by a trusted neutral person.

The role of the neutral - the mediator – is to help those involved sort out their issues and arrive at a consensus. That might involve helping parties to finalize an agreement, resolve a dispute, develop effective communications, build or improve relationships, or all of these things.”

Two other important features of mediation are described below:

- i. Confidentiality: mediation is a confidential process where what was discussed or agreed in private is not disclosed to others without everyone’s agreement. In addition, what is discussed in private session with each party shall not be disclosed to the other party without its prior agreement. However, in such private session, the mediator, through

³ VIAC, *2014 Statistics of disputes in each field*, available at <http://viac.vn/thong-ke/loai-hinh-tranh-chap-a168.html>, accessed on 30/10/2017

⁴ VIAC, *2016 Statistics of dispute resolution*, available at <http://viac.vn/thong-ke/thong-ke-tinh-hinh-giai-quyet-tranh-chap-tai-viac-nam-2016-a749.html>, accessed on 30/10/2017

his/her neutral questions may assist a party in assessing its situation based on which the party may come up with more realistic proposal that will bring the parties closer to the agreed settlement.

- ii. Voluntary: prior to the mediation process, the parties must reach a mediation agreement in writing which shall be used as the legal basis for mediation process. During the process, the mediator does not have the authority to impose upon the parties a solution to the dispute. And if the mediation does not result in an agreement, either party can still submit the dispute to the court or arbitration (whichever applicable). In such case, details of the mediation will not be disclosed or used at the court/arbitration hearing.

II. Mediation in construction under Vietnamese laws and FIDIC forms

1. Mediation in construction dispute under FIDIC forms of contract

Today, many construction projects are using the FIDIC (International Federation of Consulting Engineers) international standard conditions of contracts (usually known as FIDIC Books) because of their comprehensiveness and balance risk allocation. Vietnamese Government also encourages the parties involving in construction projects to use the FIDIC forms⁵. Mediation is not clearly stipulated in FIDIC forms but indirectly mentioned in amicable settlement Sub-Clause titled "*Amicable Settlement*"⁶ of Sub-Clause 20 [Claims, Disputes and Arbitration], because the disputing parties can entrust a mediator to facilitate their negotiation in this amicable settlement stage. Additionally, mediation plays its role after the disputes are settled by dispute adjudication board, the process of which is stated below.

The FIDIC Books all provide that disputes, in the first place, are to be adjudicated by a dispute board⁷ which is called the Dispute Adjudication Board ("**DAB**").⁸ In the Red, Yellow and Silver Books, the DAB is defined as "*the person or three persons so named in the Contract, or other person(s) appointed under Sub-Clause 20.2 [Appointment of Dispute Adjudication Board] or Sub-Clause 20.3 [Failure to Agree Dispute Adjudication Board]*".

There are two different models of DAB found in FIDIC books. The Red Book provides for a standing DAB, while the Yellow and Silver Books provide for an ad hoc DAB:

- The parties appoint Standing DAB **at the beginning** and such DAB operates throughout its term⁹.
- The parties appoint an ad hoc DAB **when a dispute arises**. Such ad hoc DAB has a sole purpose of adjudicate the dispute referred to it¹⁰.

⁵ Article 54.3 of Decree 37: "*Use of model FIDIC conditions of contract, model construction contracts for the formulation and implementation of construction contract is encouraged. Adjustments to the contract on the basis of model construction contract employed must be made to suit Vietnamese laws.*"

⁶ Sub-Clause 20.5 in the FIDIC Red, Yellow, and Silver Books

⁷ Sub-Clause 20.2 of FIDIC Silver Book

⁸ However, the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer – Multilateral Development Bank Harmonised Edition (March 2006) uses the term "Dispute Board".

⁹ Ellis Baker et al, *FIDIC Contracts: Law and Practice 5th edition* (Informa Law, 2009), p. 509

¹⁰ Ibid, p. 511

As stated in Sub-Clause titled [*Obtaining Dispute Adjudication Board's Decision*] of Clause 20 of the Red, Yellow and Silver Books, if a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Work, either Party may refer the dispute in writing to the DAB for its decision, with a copy to the other Party. The process of obtaining the DAB's decision and use other method of dispute settlement is generalized as below:

- Within 84 days or another period of time as may be proposed by the DAB and approved by the parties, after receiving the other party's reference, the DAB shall give its decision to both Parties. The decision is binding on both Parties, unless and until it is revised in an amicable settlement or arbitration.
- If either Party is dissatisfied with the DAB's decision, then either Party may give Notice to the other Party of dissatisfaction within 28 days after receiving the decision. Neither Party shall be entitled to commence arbitration of a Dispute unless a Notice of dissatisfaction with respect to that Dispute has been given.
- If no Notice of dissatisfaction is issued within 28 days after the parties receive the DAB's decision, the decision shall be final and binding upon the parties.
- Where this Notice of dissatisfaction has been given, both parties shall attempt to settle the dispute amicably before starting arbitration.

To be more specific, FIDIC Books, Silver Book for instance, provide in the Amicable Settlement Sub-Clause that: "*Where notice of dissatisfaction has been given under Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] above, both parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.*" In this stage of amicable settlement, mediation, a method has been increasingly successful in achieving settlements in construction related disputes,¹¹ can be applied by the parties and they would gain considerable benefit from using mediation. It is inferred from the above FIDIC clause that amicable settlement shall be attempted after the Notice of dissatisfaction given by either party upon the DAB decision. Therefore, the role of a DAB should not be mistaken with that of a mediator. Moreover, DAB will issue a decision while mediators will not produce any decision but assist the parties to reach solutions of their own which shall be reflected in a settlement agreement.

Sub-Clause Amicable Settlement has an intrinsic conflict between the first and the second sentence.¹² The first sentence sets out a mandatory rule, but the second sentence expressly provides that arbitration may be initiated "*even if no attempt at amicable settlement has been made.*" The FIDIC Guides maintains that "*this apparent contradiction is unavoidable, because of the impossibility of providing any meaningful method of imposing a requirement for the Parties to reach a consensual agreement of their differences.*"¹³ However, subject to

¹¹ Op cit, n 9, p. 542

¹² Op cit, n 9, p. 542

¹³ FIDIC, *The FIDIC Contract Guide (1st Edn, 2000, International Federation of Consulting Engineers)*, p. 314

the governing law, in some cases the requirement of the first sentence must be observed, i.e. the parties have a legal obligation to attempt to achieve a settlement before refer the dispute to arbitration.¹⁴

2. Mediation in construction disputes in Vietnamese laws context

a) Commercial mediation under Vietnamese laws

On 24 February 2017, the Government issued Decree No. 22/2017/ND-CP (“**Decree 22**”) on commercial mediation, which came into effect on 15 April 2017. Decree 22 stipulates in detail the principles, conditions, and procedures of commercial mediation as an alternative dispute resolution method, as well as the conditions for establishment of mediation centers in Vietnam. Prior to the introduction of Decree 22, mediation was already an integrated part of the dispute resolution process at both courts and arbitration centers in Vietnam. The main points of Decree 22 are as follows:

- With regards to fundamental principles, Decree 22 provides that commercial mediation is only applied as a dispute resolution mechanism for disputes arising from commercial activities, disputes where at least one party is engaged in commercial activities, or disputes otherwise regulated in other legislations to be resolved by commercial mediation.¹⁵ Dispute resolution through commercial mediation must ensure that the parties voluntarily participate in the mediation process and on equal grounds regarding their rights and obligations.¹⁶ The information regarding the mediation must be kept confidential, unless otherwise agreed by the parties or specified under the relevant legislation.¹⁷
- Similar to arbitration, commercial mediation may commence only if the parties have a mediation agreement. Parties may enter into a mediation agreement before or after the dispute has arisen, or at any point during the dispute resolution process.¹⁸ Decree 22 states that a mediation agreement must be in writing, either as a mediation clause in a contract or as a separate agreement.
- Commercial mediation services can be provided by mediation centers established under Decree 22 or by existing arbitration centers in Vietnam. Foreign mediation centers can also operate in Vietnam by setting up their branch and/or representative office.
- In terms of process, the parties to commercial mediation may agree to follow the mediation rules of a commercial mediation center or apply the mediation procedure agreed between them. In the absence of an agreement on the commercial mediation procedure, the mediator(s) may apply the procedure that is most appropriate to the nature of the dispute, as long as the procedure is approved by the parties.¹⁹

¹⁴ Op cit, n 9, p. 542

¹⁵ Article 2 of Decree No.22/2017/ ND-CP on Commercial mediation

¹⁶ Article 4.1 of Decree No.22/2017/ ND-CP on Commercial Mediation

¹⁷ Article 4.2 of Decree No.22/2017/ ND-CP on Commercial Mediation

¹⁸ Article 6 of Decree No.22/2017/ ND-CP on Commercial Mediation

¹⁹ Article 14 of Decree No.22/2017/ ND-CP on Commercial Mediation

- Commercial mediation may be conducted by one or more mediators, as agreed by the parties. The mediator(s) is enabled to offer proposals on the resolution of the dispute at any time during the dispute resolution process.
- In regard to enforcement, when the parties achieve a resolution as a result of a successful mediation, the parties are required to prepare a written document in terms of the successful mediation, for instance settlement agreement, to be signed by the parties and the mediator. This settlement agreement shall be binding on the parties. In addition to this, either party shall be allowed to request a competent Vietnamese court to recognize the settlement agreement.²⁰ The procedure for such recognition is stipulated under Chapter XXXIII of the Civil Procedure Code 2015. Once recognised by the Vietnamese court, the settlement agreement achieved through a successful mediation shall be enforceable under the Law on Enforcement of Civil Judgment.

b) Mediation in construction disputes under Vietnamese laws

The requirement of the first sentence of Article 20.5 of FIDIC forms as mentioned above is true in the case of Vietnam. Laws on construction oblige the parties to enter into amicable settlement before going to mediation, litigation or arbitration. Particularly, Article 45.1 of Decree 37 states that:

“When settling disputes arising during contract performance, the parties must comply with principles and procedures as prescribed in Clause 8, Article 146²¹ of the Law on Construction No. 50/2014/QH13.”

and Article 45.2 of Decree 37 stipulates that:

“If the two parties agree that dispute settlement through mediation conducted by an agency, organization or one or some expert individuals (commonly referred to as the dispute board), the settlement via this committee shall be prescribed as follows:

a) The dispute adjudication board can be specified in the contract at the time of signing or can be formed after the dispute arises. Number of members of the dispute board shall be negotiated by the parties. Members of the dispute board are required to be highly qualified and experienced in dispute settlement and have good knowledge of the law provisions on construction contract.

b) Within 28 days since the two parties receive conclusion of dispute settlement from the dispute board, if such conclusion is not accepted by either party, the dispute shall then be brought to arbitrator or court as regulated; after this period, if no party opposes the conclusion, the conclusion shall be deemed as agreed by the parties. Hence, the two parties must comply with such conclusion...”

From the above provisions, it can be seen that there is a similarity between Vietnamese dispute board provision and FIDIC clauses on DAB, namely:

²⁰ Article 16 of Decree No.22/2017/ ND-CP on Commercial Mediation

²¹ Clause 8.b, Article 146 of the Law on Construction provides that: *“Contractual parties shall themselves negotiate on the settlement of disputes. If their negotiation is unsuccessful, their disputes shall be settled through mediation or commercial arbitration or litigation in accordance with relevant laws.”*

- the member(s) of the board is appointed by the parties
- he can make decision on the dispute;
- the decision is binding to both parties; and
- the decision can be opposed by the parties, only after such event has occurred, the parties may refer the dispute to arbitration or litigation.

This process, called adjudication, should be distinguished with mediation. The differences between those two methods of dispute resolution are brief below²²:

- While mediation is a negotiation with assistance of a third party, adjudication is the process of settling a dispute by referring it to a third party (the adjudicator) for a decision which is binding upon both parties, unless the parties oppose it.
- Valid Mediated Settlement Agreement once recognised by a competent court shall have binding effect upon the parties. Adjudication decision, however, has binding effect unless either party expresses its dissatisfaction.
- The involvement of the third party is considerably different in the two methods. The mediator only facilitates the process and the parties are the one who make decision. In contrast, the adjudication decides on the content and outcome of proceedings.
- In terms of privacy, mediator must keep the information disclosed by the parties' confidential save for the application to the court for recognition and enforcement, but in case of compulsory adjudication, the adjudicator may publicize such information as the decision has to be enforced by courts.
- The degree of parties's satisfaction with the outcome is higher in mediation, because in the latter process, it is the parties who reach a solution with the assistance/facilitation of the mediator. The parties in adjudication may be less satisfied, for the decision is imposed by a third party.
- Mediation can maintain the relationship between the parties, while the relationship among the parties may go sour in case of dissatisfaction of the adjudicated decision by the DAB.

However, under Vietnamese laws, the concerning parties may settle their disputes through mediation [hòa giải=amicable settlement] conducted by dispute board. Hence, in respect of construction contract using FIDIC form or incorporating dispute board clause, the provisions of Article 45.2 is likely to create confusion on the role of the dispute board and cause potential conflicts over both the timeline and the role of mediators.

III. Med-arb and arb-med-arb situation in Vietnam

Under Vietnam legal system, the “hòa giải” process, which term could be interpreted either as amicable settlement or mediation, is also regulated by the Law on Commercial Arbitration.

²² Belden, *Brief Comparison between Mediation, Adjudication, Arbitration and Litigation*, available at <http://beldenlex.com/training/publications/Brief%20Comparison%20Between%20Mediation,%20Adjudication,%20Arbitration%20and%20Litigation%20-%20ADR.pdf>, access on 30/10/2017

Pursuant to this Law, contending parties are encouraged and allowed to negotiate and mediate in arbitration proceedings at the arbitration centers. Accordingly, upon request by both parties, the **arbitrators shall allow the parties to conduct the negotiation where she/he would perform the mediator role** to settle the dispute amicably²³. In case the mediation results in settlement by the parties, a “**decision recognizing successful mediation settlement**” will be made and signed by the parties and the arbitrators (assumably acting in the role of a mediator), and this decision is enforceable by recognition from the arbitration panel with equivalent value as an arbitration award.²⁴ This is somehow very confusing, because arbitrators do not have the same function as the court to make decisions on recognizing successful mediation settlement agreement. Instead, the arbitral tribunal normally will issue a consent award specifying the content of the parties’ agreement.

The biggest problem with this structure, however, is that the mediation at arbitration centers shall be performed by arbitrators who will consider merits of the case and make decision on the award. This will give rise to a major conflict of interest, where the arbitrator (in the role of arbitrator) is barred by the confidentiality requirement from having access to what the parties discussed jointly or privately with the mediator during mediation process, and if he himself is the mediator the party(ies) might not wish to disclose any information or intention and the whole purpose of mediation is defeated. This is also divergent from the spirits of both Decree 22²⁵ and various international practices. UNCITRAL Model Law on International commercial conciliation (2002) states that:

“Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.”

Under the SIAC-SIMC Arb-Med-Arb Protocol²⁶, the arbitrator(s) and the mediator(s) will be separately and independently appointed by SIAC and SIMC, respectively, under the applicable arbitration rules and mediation rules of each Centre. Unless the parties otherwise agree, the arbitrator(s) and the mediator(s) will generally be different persons.

Similarly, under the European Mediation Code, a person shall not be allowed to perform two functions. Under Article 10.3 of the ICC Mediation Rules, a mediator may not be an arbitrator unless the parties agree in writing. In the case of *Glencot vs Ben Barrett*²⁷, the High Court ruled in favor of the arbitrator who had previously reconciled the case to the fact that a

²³ Article 9, Article 58 of Law No.54/2010/QH12 on Commercial arbitration.

²⁴ Article 58 of Law No.54/2010/QH12 on Commercial arbitration.

²⁵ Article 9.2d of Decree No.22/2017/ND-CP on commercial mediation

²⁶ Arb-Med-Arb is a process where a dispute is first referred to arbitration before mediation is attempted. If parties are able to settle their dispute through mediation, their mediated settlement may be recorded as a consent award. The consent award is generally accepted as an arbitral award, and, subject to any local legislation and/or requirements, is generally enforceable in approximately 150 countries under the New York Convention. If parties are unable to settle their dispute through mediation, they may continue with the arbitration proceedings.

²⁷ http://simc.com.sg/wp-content/uploads/2015/12/2015-Asian-JM-35-48_Arb-med-arb-Constance-Castres-St-Martin.pdf accessed 2 November 2017.

lieutenant could not be the same conciliator because it would affect fairness in the judgment process.

"A caucus" is a private meeting between a disputing party and the mediator(s), which is useful for mediators to obtain information that the disputing party will not disclose in the presence of the other party. Conducting a "caucus" is exclusive feature of mediation while it shall NEITHER possible NOR permissible in arbitration proceedings, for an arbitrator to arrange any (private) ex-parte meeting with the either party, for example, in *Bowden v Weickert*, the arbitral award was dismissed because the arbitrator had used the confidential information obtained in mediation. Moreover, once the mediation fails, no one wants what they have disclosed from mediation to become evidence against themselves. The fact that the arbitrator also takes the role of a mediator for the same case would discourage the parties from making any effort to mediate during the process of arbitration.

The arb-med-arb structure in construction disputes would arguably face the same problem. In theory mediation may be agreed by the parties at any time before, during or even after the arbitration process. In case of a standard construction dispute, usually mediation would be initiated after a dissatisfactory DAB's decision and the dissatisfied party gave a Notice of dissatisfaction, followed by a period of 56 days of amicable settlement efforts before arbitration may commence. This is usually referred to as "med-arb" and should be in line with international practice. But if mediation is initiated during the process of arbitration, the parties may wish to utilize the arbitration system to recognize and enforce their agreement under the "consent award" mechanism and not as a regular mediated settlement agreement. The law should therefore (i) make a clear distinction between the consent award system and the mediation process outside the arbitration system; and (ii) provide regulations for mediation process which is independent from the arbitration process and, in particular, should enable the parties to appoint independent mediators to assist reaching settlement agreement and then seek enforcement of this agreement via arbitral consent award system.

IV. Conclusion

Different laws and guidances in Vietnam have been inconsistent and confusing with regard to the mediation process in construction disputes. This causes uncertainty for mediation to work in practice. Given the above, there is an urgent need for the law to be reformed to enable the mediation process to work properly. Also, the benefits of the med-arb and Arb-Med-Arb system would not be realized without specific amendments to the Commercial Arbitration Law and Decree 22 to be in line with international practices.