

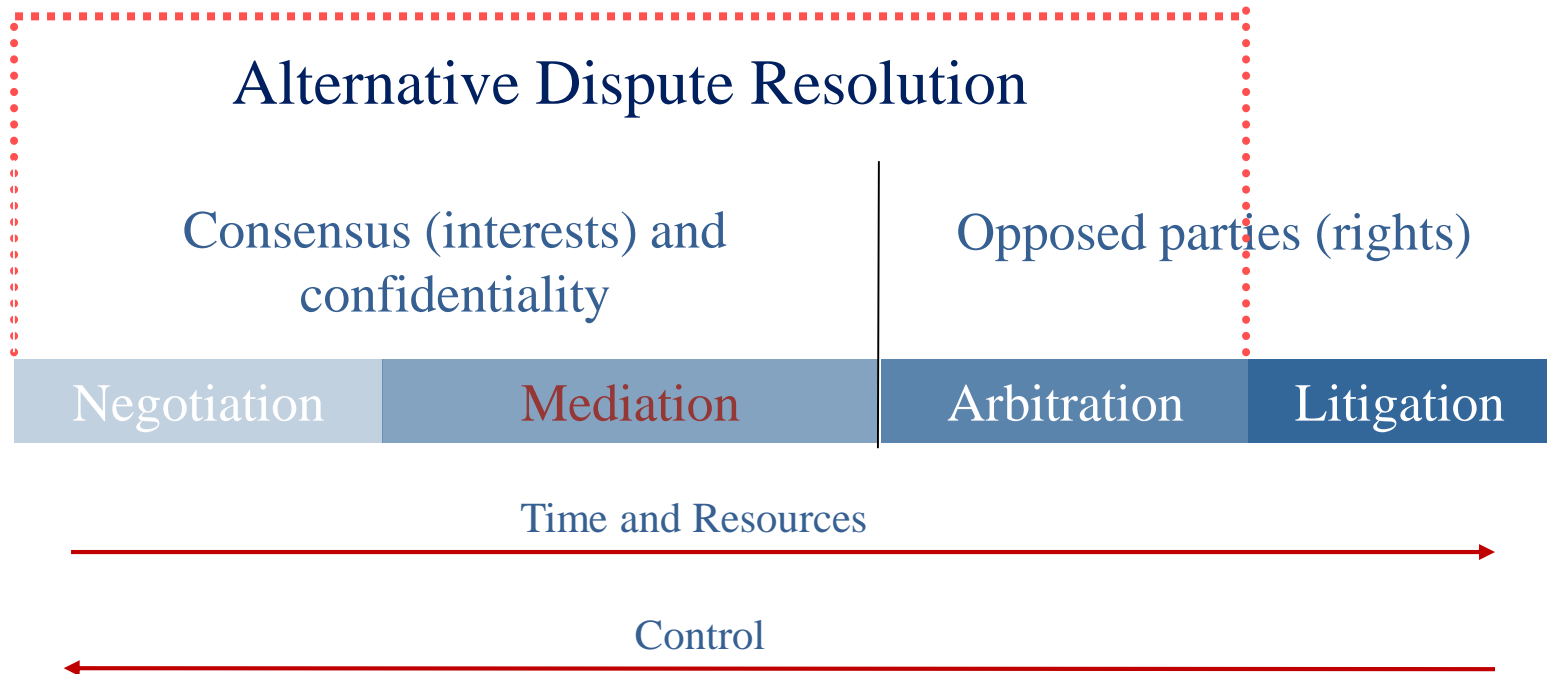
COMMERCIAL MEDIATION INTERNATIONAL BEST PRACTICE AND CONSIDERATIONS FOR VIETNAM



WORLD BANK GROUP

Nina Mocheva
Senior Financial Sector Specialist - Dispute
Resolution
Vietnam
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Mediation in Dispute Resolution Continuum



Regulatory Design for Mediation: Key Considerations

Triggers/incentives

Managing the internal process

Certification and practice standards

Legal rights and obligations of participants



How...

Regulatory model?

- Public/private
- Hard/soft
- Top-down/industry-based
- Combination (**recommended**)

Regulatory source?

Legislation, court directions, rules and decisions, industry codes of conduct, institutional rules, standard forms of mediation agreements, etc.

Key Regulatory Requirements

- ✓ Allow for enforcement of settlements reached in mediation processes
- ✓ Allow confidentiality and admissibility of evidence without prejudice
- ✓ Ensure a degree of party autonomy (in determining the procedure and final-decision making)
- ✓ Provide for legal limitation periods

Regulatory Best Practice

- National legislation on mediation is often guided by the **UNCITRAL Model Law** on International Commercial Conciliation
- Consider **regional or major trading partners' models** to ensure a level of compatibility of mediation systems
- In addition to the key regulatory requirements, **a good regulatory framework embodies:**
 - The principle of equality in the mediator's relation towards the parties;
 - The principle of neutrality in the mediator's relation towards the subject matter;
 - Definition of the procedural effect of mediation referrals on court proceedings;
 - Definition of the role of the judge in mediation referral process;
 - Description of the duties of the mediator in the mediation process;
 - Mediation referral criteria;
 - Explanation of fee allocation for mediation services;
 - Explanation of the mediator appointment and selection procedure;
 - Definitions of commencement and termination of mediation procedure.

Overview: how does the current Vietnamese mediation law compare to international best practice?

- + Allows enforcement of settlements reached in mediation, but the procedure of recognition is still to be tested in practice (CPC)
- + - Allows confidentiality (Mediation Decree), but no guarantee of inadmissibility of confidential mediation information in subsequent proceedings
- + Ensures a degree of party autonomy (in determining the procedure and final decision-making) (Mediation Decree)
- No tolling of statutes of limitation

Hybrid procedure “med-arb”: can a mediator act as an arbitrator in the same dispute?

Mediation Decree (2017)

Art 9.2 (dd) “[Commercial mediators shall have the following obligations]:<...> to refrain from acting as an arbitrator for the same dispute which is or was under mediation, unless otherwise agreed by the parties.”

Law on Commercial Arbitration (2010)

Article 42. Replacement of arbitrators: “An arbitrator must refuse to resolve a dispute, and the parties shall have the right to request replacement of an arbitrator resolving the dispute in the following circumstances: <...> (d) The arbitrator was a mediator, representative or lawyer for either of the parties prior to the dispute being brought to arbitration for resolution, unless the parties provide written consent.”

Hybrid procedure “med-arb”: should a mediator act as an arbitrator in the same dispute? (cont’d)

- **Guiding principles** - party autonomy (need express consent from both parties) and duty to be independent, impartial, and objective
- **Risks - the arbitrator or the award can be challenged**

VIAC Mediation Rules (December 21, 2017 Draft)

Article 12.3: “The parties agree that they will not call the Mediator as a witness, representative, adjudicator or arbitrator in any subsequent proceedings, whether arising out of the mediation or any other dispute in connection with the same contract.”

NB: parties can modify or exclude this rule by written agreement (see Art 1.3)

Hybrid procedure “arb-med” and consent awards

- **Law on Commercial Arbitration 2010:**

Article 9. “Parties shall have the freedom, during the process of arbitration proceedings, to <...> request the arbitration tribunal to mediate in order for the parties to reach agreement and resolve their dispute.”

Article 58. “The arbitration tribunal [may], at the request of the parties, conduct a mediation in order for the parties to reach an agreement on resolution of their dispute. If the mediation is successful, the arbitration tribunal shall prepare minutes of successful mediation to be signed by the parties and certified by the arbitrators. The arbitration tribunal shall issue a decision recognizing the agreement of the parties. Such decision shall be final and shall have the same validity as an arbitral award.”

- **International practice – e.g. China, Germany, revised ICC Arbitration Rules**

“Hybrid procedure “arb-med” and consent awards (cont’d)

- **Enforcement of mediated settlement agreements (“successful out-of-court results”) under CPC regime**
 - Settlement agreement is contractually binding on the parties; AND
 - Can be recognized and enforced as a judgment if so requested at court

- **Enforcement of “consent awards”**
 - Domestic “consent awards” (art. 58 LCA) - LCA regime (Ch 10-11)
 - Foreign consent awards (note that an award issued in Vietnam may still be considered “foreign”) - CPC and New York Convention Regime

Statutes of limitation and mediation proceedings

- **International practice:** mediation suspends statutes of limitations to file actions in court or arbitration (e.g. UNCITRAL Model Law Art. 13)
 - **Rationale:** to encourage parties to try mediation without fear that the time to file a case in court will run out.
- **Vietnamese framework:** not provided

Mediator's professional responsibility and “making proposals”

- **Mediators do not determine questions of law and fact!**
- **Mediators do not give advice or determine solutions!**
- **Facilitative role** of the mediator, with limited advisory elements

Mediation Decree (2017)

Art 14.3 “At any point in time during the mediation process, the commercial mediator may make proposals to help the parties settle the dispute”

- This is not common practice internationally (due to potential liability issues – e.g. Australian case of *Tapoohi v Lewenberg 2003 VSC*)
- The right provided in the Mediation Decree should be used with caution

Private caucusing – practice unique to mediation, not appropriate in arbitration

- Private caucusing – common practice in mediation (not allowed in arbitration)
- Must remain impartial
- Must be careful about preserving confidentiality where parties do not give permission for disclosure

VIAC Mediation Rules (December 21, 2017 Draft)

Article 10. Confidentiality and Disclosure of Information

The Mediator shall treat any information exchanged between him/her and a party and/or his or her representatives during a private session confidential and shall not disclose the same to any other party unless given prior express approval by the information provider.

Use of mediation information in subsequent proceedings

International practice

- **Art. 10 of the UNCITRAL Model Law on International Commercial Conciliation**
- **Institutional rules** - e.g. ICC, Singapore, HKIAC

Use of mediation information in subsequent proceedings

Mediation Decree (2017)

Art. 4 “Information related to mediation case must be kept confidential, unless agreed in writing between the parties or otherwise provided for by the law.”

Art. 9.2. c) “[among mediators’ duties is] to keep confidential the information of the dispute that he/she participated in the mediation, unless agreed in writing between the parties or in compliance with the law.”

VIAC Mediation Rules (December 21, 2017 Draft)

Art. 12 - “[Unless mandatory law requires disclosure] any written documents or any other information that was obtained during Mediation and that would otherwise not have been obtained shall not be used in subsequent judicial, arbitral or other proceedings. The parties agree that they will not call the Mediator as a witness, representative, adjudicator or arbitrator in any subsequent proceedings, whether arising out of the mediation or any other dispute in connection with the same contract.”

Use of lawyers in mediation

- Often an active participant in mediation: before, during and after

Mediation Decree (2017) Art. 15.3 – “settlement agreement must have signature of the parties and the mediator”

- If parties are not present, the legal representative must be properly authorized to settle (Chapter IX, Part I of the CC (on Representation))
- Authorisation/representation matters will be dealt with under the Civil Code (CC) and the CPC.

VIAC Rules Art. 6 - “The parties will confer upon their representatives the necessary authority and mandate to settle the dispute”

Mediation in OCWs and the role of the mediator

- Mediation has been a valuable tool in out-of-court restructuring cases: OCWs (e.g. Japan, Thailand, Korea) and pre-packs (e.g. US Ch 11 cases)
- Promoted as a matter of policy in corporate restructurings: UNCITRAL, WB-ICR Principles, EU
- **Restructuring/insolvency expertise + mediation competence needed**

➤ E.g. Japan Turnaround ADR Scheme

Mediators skilled in business turnaround and mediation techniques (usually lawyers, public accountants and consultants).

Role: Examine the debtor's rehabilitation plan, draft an investigative report to creditors, propose modifications to the rehabilitation plan if needed and assist with negotiations between the creditors and debtor.

Questions?

- nmocheva@ifc.org
- www.worldbank.org/insolvency