



ADR & ARBITRATION GUIDE 2022

CHAPTER 4

HYBRID PROCEDURE

Nowadays, it is reckon that international as well as national disputes have increasingly evolved in terms of quantity and complexity. Along with filing petitions at competent courts, parties have shifted towards Alternative Dispute Resolution (ADR) (e.g. arbitration, mediation and negotiation) for effective dispute settlement. However, the aforesaid dispute resolution mechanisms still have their own pros and cons requiring a great deal of contemplation from users.

Emerging from such circumstances, hybrid procedure offers users a more flexible and productive means of resolving conflicts in the contemporary business landscape. Hybrid procedure, or known as hybrid mechanisms, is a process involving more than one standalone ADRs. Such method holds great promising for dispute settlement, as it is often dubbed as “the best of both world” – lessening the disadvantages originated from separate ADR while utilizing the benefits thereof. According to the latest survey carried out by SIDRA, efficiency as well as costs are the driven factors impacting clients’ choice in hybrid dispute resolution instead of arbitration, negotiation and/or mediation.

Hybrid procedure may take a variety of forms depending on the sequence of process, such as Negotiation – Arbitration, Arbitration – Mediation (Arb – Med), Mediation – Arbitration (Med – Arb).

1. Negotiation - Arbitration

Pursuant to Article 9 and Article 38 Law No. 54/2010/QH12 dated June 17th 2010 on Commercial Arbitration (“Law on Commercial Arbitration 2010” – LOCA 2010), participants shall have the freedom, during the process of arbitration proceedings, to negotiate and reach agreement with each other to resolve their dispute.

Up to now, Rules Of Arbitration Of The Vietnam International Arbitration Centre (“VIAC Rules”) and applicable laws have not provided in detail the role of the Arbitral Tribunal in the negotiation process between the disputing parties. Specifically, the laws only recognizes negotiation as one of the methods allowed to be used for commercial dispute resolution . Thus, in general, the parties are allowed to proceed with the negotiation process without being subject to any procedural legal constraints.

On the other hand, due to the absence of relevant provisions stated in arbitration rules and applicable laws, the negotiation process is carried out under the self-settlement mechanism between the parties. Therefore, in contrast to mediation, all parties during the negotiation may discuss and resolve the dispute at their own discretion without the presence of a neutral third party to assist or make a final judgment.

A negotiation for dispute settlement is deemed as successful if involved parties decide to terminate the dispute resolution and a settlement agreement is reached. At that time, the Arbitral Tribunal shall stay the settlement of the dispute on grounds of Article 30.1.d VIAC Rules and Article 38 LOCA 2010.



2. Mediation – Arbitration (Med – Arb)

It should be noted that this is a two-tier procedure. At the first stage, all Parties shall endeavor to resolve their conflicts with the help of a Mediator. Where the mediation ends in impasse, they may resort to arbitration – the second and final stage in this procedure. The use of Med – Arb in VIAC is basically indistinguishable from the general understanding thereof. Moreover, the initial (Mediation) as well as later (Arbitration) stages shall follow VMC’s Rules of Mediation and VIAC’s Rules of Arbitration, successively:

“Firstly, Parties commence mediation and pay mediation costs in compliance with the Vietnam Mediation Centre (VMC)’s Rules of Mediation and Schedule of Mediation costs. If the mediation proves to be unsuccessful, one party initiates arbitral proceedings at VIAC in accordance with VIAC’s Rules of Arbitration.”

Where the case proceeds to the arbitral stage, the same Mediator managing the mediation at the first place will also play the role of the Arbitrator. Such a person is often called by the phrase “same neutral Med-Arb”, or simply “Med-Arbiter”. However, such name does not appear in practice in Vietnam, thus depending on each stage in the Med-Arb proceedings, Med-Arbiter is considered as a Mediator and/or Arbitrator.

It is worth noting that pursuant to Article 9.2.đ Decree No. 22/2017/NĐ-CP dated February 24th 2017 of the Government on commercial mediation (“Decree No. 22/2017/NĐ-CP”), the Mediator is refrained from concurrently acting as an Arbitrator for the same dispute of which he/she is mediating or has mediated the resolution, unless otherwise agreed upon by the parties. Therefore, it is advisable that both parties expressly state in Med-Arb agreements that the Mediator navigating their own disputes shall play the role of an Arbitrator.

2.1. Advantages to Mediation – Arbitration

Among the current hybrid procedures, Med - Arb is the most popular choice among clients for effective conflict resolution. Not only does its benefits outweigh those of other standalone dispute resolution methods, but also keep up for long-term outcomes.

Med-Arb offers a speedy and cost-effective method for dispute settlement

Med-Arb can be efficient in terms of saving money and time for the disputants.

Regarding the former aspect, both parties have no need to appoint another unfamiliar face and prepare for other lengthy and time-consuming pretrial processes should the mediation process go downhill, as the Mediator has the ability to play the role of an Arbitrator continuing the dispute settlement. Besides, when the parties initiate the Med-Arb process at VMC, the parties will be refunded 15% of the mediation cost by VMC. Thus, the parties benefit from 15% of the mediation fees compared to sole mediation or arbitration, because the VMC’s Schedule of Mediation Costs does not stipulate the refund of mediation costs if the mediation session has been organized, (regardless of whether the mediation is successful).

As for the latter, the disputed issues may be cut down in terms of quantity due to the agreements of the parties since the mediation. Therefore, the agreed points would be resolved in an initial shorter tiers (mediation), and only the remaining issues are to be carried on to the later stage (arbitration).

Enforceability

While providing a chance to mediate between the involved parties, Med-Arb approach also offers the assurance of a finality.

As mentioned above, the parties' initiation of arbitration and mediation of Med-Arb procedure is subject to the VIAC Rules, the VMC Rules (and other legal documents in the fields of arbitration and conciliation).

In case the parties agree to settle any or all issues arising out of the dispute right from the beginning, the parties are obliged to make a record of successful mediation in line with Article 15.1 Decree No. 22/2017/NĐ-CP. The written record of successful mediation will be enforceable for the parties in accordance with Civil Procedure Code 2015 . It should be noted that the obligor shall attach the written record of successful mediation when submitting an application for recognition of the successful mediation to the Court .

In case the parties switch to arbitration proceedings, the arbitral award is final and binding on all parties based on Article 4.5 LOCA 2010 and Article 32.5 VIAC Rules.

To sum up, regardless of the fact that such a decision is reached through mutual agreements (the mediation stage) or under the arbitral proceeding, it becomes a binding and enforceable settlement to all disputants.

The disputants are more inclined to mediate in good faith and cooperative manner

During the early Med-Arb procedure, the disputants may come into the realization that the outcome will lay in the hand of Mediator should they fail to reach a unanimous decision. Therefore, all parties will endeavor to avoid negative outbursts and display an amenable attitude to each other for a more satisfying and successful result.

2.2. Disadvantages to Mediation – Arbitration

Coercive Behavior from the Mediator/Arbitrator

Med-Arb and other hybrid procedures are known for expressly authorizing a third neutral party to render a final decision. However, such feature may lead to a scenario where the Mediator pushes the parties to comply with the his/her wishes (this is often the case with Mediators who use a "strong arm tactics" against the disputants), stemming the following outcomes:

- (i) firstly, the disputants' agreement may reflect the will of the Mediator rather than their own;
- (ii) secondly, either or all of the disputants may feel ignored, disrespected, or unfairly treated, thereby creating a negative impact on the involved parties' relationship.

Concerns over confidential information

Pursuant to Article 4.2 and Article 9.2.c Decree No. 22/2017/NĐ-CP, information relating to a

mediation case shall be kept confidential, and a commercial Mediator is obliged to protect confidential information about the disputes mediated by them (unless otherwise agreed by the parties or prescribed by law). Even though the law has prohibited the act of disclosing confidential information by the Mediator, it has done nothing to govern the Mediator/ Arbitrator's usage of such information for the arbitral proceeding. So far, the above issue has remained as one of the major obstacles preventing clients from choosing the Med-Arb process.

Particularly, all disputants will be given an opportunity to express their opinions and demands to Mediator either in a private caucus or in a joint session during the mediation phase. For the former case, the Mediator is able to retrieve confidential information and/or facts from the presenting participants. The criticism centered on the fact that such knowledge may affect the principle of independence, objectivity and impartiality of the Mediator/ Arbitrator if the parties decide to go to the arbitration stage (e.g. Mediator/ Arbitrator is biased and/or prejudiced against one or more parties, thereby improperly influencing the final rulings).

Another ominous scenario is that all disputants may hold back information during mediation for fear of the fact that Mediator may lose its neutrality if assuming the role of the Arbitrator. Not only such disadvantage burdens the Mediator's duties, but also makes disputants overlook opportunities to resolve their conflict in a far shorter time.

2.3. Mediation - Arbitration Agreements

In recent years, as the parties gradually switch to use hybrid procedures such as Med-Arb for dispute settlement, the Med-Arb agreement since then has had a tendency to increase in number. Normally, the Med-Arb agreement will prioritize the principle of good faith settlement of the parties through negotiation. In the event that an unanimous decision cannot be reached, the parties will conduct mediation (the Mediation stage in Med-Arb). The Med-Arb Agreement further recognizes that once the mediation is unsuccessful, the parties will go to the final stage in the Med-Arb mechanisms, which is arbitration proceedings.

However, such statements are merely some of the issues drawn from the practice of drafting agreements, as the applicable law does not directly govern Med-Arb agreement in particular and the hybrid procedure agreements in general. However, arbitration and mediation stages in the Med-Arb procedure are subject to legal documents or other principles in the field of arbitration and mediation (as mentioned above). Therefore, some topics surrounding the Med-Arb agreement (such as legal validity, binding of the agreement, etc.) will be considered through the relevant legislation.

It should be emphasized that the existence of an Med-Arb Agreement is one of the prerequisites for the parties to resolve disputes under the Med-Arb mechanism . However, the parties should ensure that the Med-Arb Agreement is in compliance with the conditions for validity to successfully initiate the Med-Arb procedure.

Regarding conditions about formality, the Med-Arb agreement must be established in writing in accordance with Article 16.2 LOCA 2010 and Article 11.2 Decree No. 22/2017/NĐ-CP. The Med-Arb Agreement may be established as a clause in a contract or as a separate agreement .

Regarding the content conditions, the Med-Arb Agreement generally must not contain content breaching the prohibition as specified by the law, going against social ethics, intending to evade obligations, and infringing the rights of third party .

Besides, due to the fact that the Med-Arb Agreement still has the nature of an arbitration agreement (in parallel with the characteristics of the mediation agreement), relevant parties should avoid the following cases in the process of negotiating, drafting and concluding the Med-Arb agreement:

- (i) *invalid agreement under Article 18 LOCA 2010 and Article 3 Resolution No. 01/2014/NQ-HĐTP;*



It is also important to note that an unrealizable Med-Arb agreement does not invalidate the agreement itself. In other words, such Med-Arb Agreement still exists between the parties, and the parties can renegotiate and revise so that the Med-Arb Agreement is enforceable between the parties.

In case the Med-Arb Agreement is invalid or unrealizable and one of the parties institutes court proceedings, the Court will proceed to accept such civil case .

3. Arbitration – Mediation

Similar to Med-Arb, Arbitration – Mediation (Arb-Med) is a two tier procedure consisting of mediation and arbitration phases. However, the main difference spotted from those hybrid mechanisms revolves around the step sequence of said ADRs. Unlike its counterpart, Arb-Med lays the first stone with an arbitration proceeding with a non-binding award. After that, the involved parties will make an attempt to resolve conflict with the help of a Mediator. VIAC provides the same guidance about Arb-Med procedure as follows: *“First and foremost, Parties commence and participate in arbitral proceedings at VIAC. After the arbitral tribunal is constituted, parties agree to suspend arbitral proceedings to mediate.”*

At the mediation stage, the parties may fall into either of the following outcomes:

- (i) in case of successful mediation: the parties make a record of successful mediation, terminating the dispute settlement phase; and
- (ii) in case of unsuccessful mediation: the parties resume the arbitration proceedings until the Arbitral Tribunal passes a valid award between the parties.

It is worth noting that the parties may switch to mediation at any time before the issuance of a final ruling provided that the Mediator gives consent to such change. There are a number of reasons for initiating the mediation including but without limiting to:

- (i) the parties wish to settle the dispute early by cutting down the later procedure in arbitration; and
- (ii) every participant is given a chance to consider the possible outcomes stemming from the arbitral proceeding itself.

Arbitrator and Mediator are played by the same neutral third party, thus such person is deemed as “Arb-Mediator” to distinguish from Med-Arbiter in Arb-Med process. However, such name does not appear in practice in Vietnam, thus depending on each stage in the Arb-Med proceedings, Arb-Mediator is considered as an Arbitrator and/or Mediator.

The parties should pay attention to the issue of allowing the same Arbitrator to assume the position of Mediator in Arb-Med Agreement to avoid breaching Article 9.2.đ Decree 22/2017/NĐ-CP.

3.1. Advantages to Arbitration – Mediation

Efficiency and Enforceability

Similar to Med-Arb, Arb-Med also obtains the same advantages in terms of efficiency as well as enforceability. For example, such a hybrid procedure uses the same neutral party to navigate the entire procedure, thus decreasing the time limit as well as fees spent on initiating other standalone ADR for both relevant participants.

In addition, the approval of an arbitration award or record of successful mediation will have the same binding effect on the parties as with the Med-Arb method. Specifically, in case the dispute is resolved at the arbitration stage (before or after the conciliation stage), the award of the arbitral tribunal will be binding on the parties. If the parties reach a common decision immediately upon mediation and declare the termination of the dispute settlement process, the record of successful mediation made by the parties will be enforceable according to the civil law of Vietnam (as analysis in Section 2.c).

Participants' willingness to the Mediator's suggestions

One of Arb-Med's strengths is that the parties to a dispute can perceive the risk of losing the case or the unfavorable outcome when resolving disputes at the arbitration stage. Such "aversion" shall motivate the parties to push the dispute resolution process into the mediation stage, and the Mediator's proposals/solutions thereby have a tendency to be accepted more easily.

3.2. Disadvantages to Arbitration – Mediation

Confidentiality

Similar to the Med-Arb method, the fact that the parties choose to disclose confidential information during the mediation stage raises concerns about the neutrality of the Arbitrator in the dispute resolution process (stated in Section 2.b). For this reason, the participants of the mediation process in line with Med-Arb procedure are often cautious while disclosing confidential details and information to the Mediator because of the risks that the Mediator is unable to be neutral and objective when assuming the role of an Arbitrator.

However, when the parties keep silent or do not provide sufficient necessary information to the

Mediator, the success rate of the Mediator is not guaranteed and the resolution of the dispute is highly likely to progress to the subsequent arbitration stage to make a final award that is binding on the parties.