ADR & ARBITRATION GUIDE 2022

CHAPTER 2

MEDIATION

1. Advantages to Mediation

Mediation is a conception that has become familiar to traders as well as businesses. In the process of the commerce, disputes are unavoidable. In our life, when we refer to the disputes, we immediately refer to the Court, but in the field of commercial business, mediation is a method which an effective measure and is used in many cases.

The conception of Mediation is mentioned officially in the UNCITRAL Model Law on International Commercial Mediation in 2002, in Article 1 of this Model Law defining *"Conciliation" as a procedure referred to by the phrase conciliation, intermediary, or the orther phrase of similar meaning. In which, the parties in the dispute relationship require a third party to assist in the settlement of disputes arise out of a legal relationship in accordance with the agreement contractual or non-contractual or disputes of this legal relationship.*

1.1. Direct Communication

Hence, Mediation is a measure of resolving disputes through a Mediator – the requested third party. At that time, the Mediator will be the bridge to create the best opportunities and coordinates so that the parties in the disputing relationship can solve their problems by direct negotiation. In the case, the mediator has an independent position and doesn't receive any benefits from the parties to the disputes, nor does it make any judgment on that dispute.

Therefore, the Mediator has only the duty of an intermediary to arrange a negotiation which helps the parties to compromise and solve the problem voluntarily by making their own decisions during the conciliation process.

Accordingly, with the connection of the mediator, the parties will to deal directly with the problems that arise during the implementation of commercial commitments. The parties to the dispute can exchange, talk, negotiate, through which the parties have the opportunity to express their opinions on the dispute. Moreover, mediation gives the parties the opportunity to explain, express their apologies and goodwill in order to dealing the interests of the parties after the dispute. Direct participation of the parties represents the responsibility of the parties for their choices. This direct approach also demonstrates appreciation and respect for the parties right to self-determination, so that they are not pressured into making decisions to resolve problems. Expressing your viewpoints and attitudes directly to the other party is the best method to solve problems specially in the commercial field.

1.2. Control over Result

Mediation is a measure that enhances the voluntary of the parties in dispute resolution.

Since, when participating in this process, the parties will face-to-face and give their opinions and requirements on the settlement of that dispute, expressing their desire for the effect of the mediation process.

In other words, when deciding to proceed with the Mediation measure, the parties must clearly understand and determine for themselves the purposes and results they want. So that in the process of conciliation, the parties can reach an agreement towards a result that can reconcile each other's interests and still achieve the original purposes. Therefore, they have completely control over the outcome of the mediation process.

1.3. Impartiality of Mediator

The mediator is someone who has the role of a third party. As an independent party, it is not binding about the interests to any party to the disputing relationship. “Independence” and “Objectivity” are two basic principles throughout the Mediator in the mediation process. This requires the mediator to always maintain the intermediary - bridge point of view, not to show favoritism to any party when performing the mission of controlling the mediation process. In fact, the mediator selected must be someone with knowledge and experience in the field in which the parties are in dispute. Therefore, in the process of leading the negotiation, the mediator can provide his or her neutral judgment and opinion. However, this is for reference, not binding and imposing on the parties. Therefore, the core role of the Mediator is to lead the mediation, build and maintain fairness throughout the mediation process.

1.4. Credibility of Settlement Proposals

A mediator would bring credibility to settlement proposals that would otherwise be declined by the parties out of suspicion related to the motives of the proposing party. As an experienced and trusted mediator, the mediator’s proposal will not be overlooked by the parties, compared to the proposal offered by either party.

1.5. Avoidance of Conflicts of Interest

The occurrence of a commercial dispute means that one party to such a disputing relationship suffers economic harm. Therefore, when choosing the method of conciliation, the parties in that dispute

want a solution that not only compensate for the loss of one party but also ensure that the other party does not suffer other losses.

The essence of Mediation is an act of compromise between the parties after a dispute, each party making a small concession . Therefore, when they have chosen this method to resolve the dispute, it means that they have accepted their mistake and want a compromise to towards an outcome which the best interests of the parties are guaranteed by the commitment voluntarily as well as in good faith about the cooperation of both parties at the moment and in the future. The element "Law" is not an important thing in the Mediation, the judgement is not essential, the victory or the worse is not the final result that the Mediation is aiming for. Through the process of discussion and negotiation, the parties find reasonable solutions to solve outstanding problems and overcome past mistakes. The fact that each party voluntarily accepts to concede some of its own interests to compromise together, towards the common interests of both sides. It's indicative of the existence of a conflict of interest in the process. In addition, the parties can control the outcome, so if there is a conflict of interests, they have the right not to continue the mediation and not be bound by the outcome of the mediation.

1.6. Nonbinding Nature

The Mediation method is selected based on the voluntariness of the parties in the dispute. During the mediation process, the parties will not be governed by any legal system or set a template for mediation. In addition, the third party - Mediator is also not allowed to give any opinion imposed to bind the disputing parties to a specific orientation. The whole process basis on the self-settlement, the self-determination and the voluntariness of the parties.

Hence, the agreements and commitments from the mediation process are not enforceable and do not have any legal mechanism for ensuring the implementation of this commitments. It all depends entirely on the goodwill and willingness of the parties to strictly comply. Therefore, the Mediation process takes place based on the respect and the capacity implementation of the parties without any binding on interests, procedures as well as legal aspects between the parties.

1.7. Reduction of Subsequent Litigation Costs

Except for Mediation, the parties can use other methods to resolve disputes such as: Commercial arbitration or Court. These are two quite common methods of dispute resolution, however, when the parties choose these two methods, they must pay a fee for the agency responsible for settlement, the cost of lawyer services. and other paperwork costs, etc.

Therefore, the Mediation method is still preferred because of the simplicity of the procedure as well as the cost savings for that dispute. In fact, a dispute can be resolved in just a few days, and the cost of the mediator is hourly. Meanwhile, a dispute to be resolved by Arbitration or Court can take up to months or years, meaning that the cost of Lawyers for the whole process can be multiplied. Therefore, using Mediation can help the parties not only save a lot of costs for other litigation steps, but also preserve other benefits.

2. Selecting Mediator

2.1. Style

Commercial mediators include ad hoc commercial mediators and commercial mediators of a commercial mediation organization selected by the parties or appointed by the commercial mediation organization at the request of the parties .

2.2. Background

(i) Having full capacity for civil acts in accordance with the provisions of the Civil Code; and

(ii) Have good moral character, prestige, independence, impartiality, objectivity.

2.3. Skills

The mediator must meet the requirements of mediation skills, understanding of law, commercial business practices and related fields .

The requirements for legal knowledge or in-depth understanding of commercial issues help ensure the expertise of the Mediator when participating in the Mediation process. In addition, in the process of leading the negotiation, the mediator also needs to have experience and skills in mediation to conduct mediation procedures professionally, towards the best outcome for all parties.

Although, Mediation is a popular dispute resolution method in the world. In fact, Vietnam has only built a basic legal framework to regulate Mediation, so intensive training for certification is very difficult, especially in the field of commercial mediation, which has not yet received much attention to organise the training programs in higher education.

3. Preparation for Mediation

3.1. Selection of Negotiating Representative

Negotiation is a long and difficult process, reconciling the interests of both parties is always a

difficult journey. Therefore, skills in communication, presentation, and quick analysis are needed in the whole process. Therefore, the negotiating representative is very important, determining most of the outcome of the mediation. Accordingly, in order to conduct conciliation, the representatives of the parties must have a thorough understanding of the dispute as well as a deep and broad knowledge of that field, which is sufficient to propose reasonable solutions, and the negotiator's experience in mediation as well as in the resolution of related commercial disputes is also necessary.

3.2. Confidentiality

During the preparation of the Mediation, the parties must keep confidential the records of evidence and documents for the Mediation. This work will benefit the parties in the negotiation process, holding specific and valuable evidence help the parties gain advantage in the negotiation process. In addition, such documents may contain business secrets or commercial agreements between the two parties, so the confidentiality of these documents is very important.

Not only that, the issue of the confidentiality of the lawsuit also needs to be kept private to ensure that the business activities of the parties are not affected. In particular, it can cause huge economic losses to the parties.

When the issues of the lawsuit are known to many people, the parties will be influenced by many outside influences, many opinions influence, making their opinions likely to change. This will make the Mediation process more difficult and also cannot guarantee the best Mediation results for the parties.

3.3. Evaluating Case

Of course, before entering into dispute mediation, the parties need to generally evaluate the case. That gives a foundation estimate of the dispute, identifies the issue, and determines the strengths and weaknesses of each party. Evaluating the case in this stage helps the parties to well prepare documents, procedures and evidence to defend themselves against the evidence and arguments of the other party.

In addition, identifying correctly the problem is a very important step for the researching records and finding suitable legal bases for Mediation. Accordingly, they can prepare in advance for possible situations that may arise during negotiations with the other party. An important goal in preparation should be to enter the mediation process confident enough in one's own understanding of the situation to be open to other participants' points of view and to options that may arise in the course of the mediation process.

This preparation helps the parties save time and costs for mediation as well as the mediation process will go smoothly and achieve the goals set by the parties.

3.4. Assessment of Opponent's Position

Identifying the opponent is always a wise move of the negotiator. Assessing the potential of the opponent, the parties will have a basic comparison to minimize the difference in force as well as a balance of capacity to ensure fairness in the reconciliation process. Moreover, knowing about the opponent helps the parties to anticipate the situation and take careful preparation steps in choosing their negotiators as well as being proactive with their actions on the negotiating table.

This shows that assessing the position of the opponent is necessary and is a decisive factor to the outcome of the conciliation.

4. Process

4.1. Issue Identification

The mediator give an introduction with his qualification and neutrality in this mediation process. The parties will introduce themselves at the request of the Mediator, trying to develop the rapport with them.

The mediator establishes control over the mediation process.

The mediator explains the mediation concepts and processes to ensure that the parties have a clear understanding and to allow their questions to be clarified.

The mediator formally restates the dispute for the parties to hear and give feedback on whether it is right or wrong, consistent with their original proposal.

4.2. Party Statements

The Claimant are allowed an explanation of their case, followed by a presentation by their Lawyer and a presentation of legal issues. The same is done for the Respondent. This is a step to facilitate the disputing parties to point out their opinions and attitudes as well as to present their thoughts on the case that has happened, along with the legal grounds that their side has prepared to clarify the dispute.

The mediator attempts to understand the facts, issues, obstacles, possibilities and ensures that each participant feels heard. Mediators encourage communication, asks questions to elicit information.

This step also helps the Mediator to identify the specific situation and the two sides also confirm once again their position in this dispute and the desired resolution.

4.3. Exploration of Resolution Options

The mediator may hold separate sessions with each party to understand the underlying interests and confidential information that they do not wish to share with the other parties. After listening to both sides, the Mediator must research to find solutions that both parties can accept.

The mediator must also try to understand and make comments on the matter of dispute to expand awareness and conclusions in order to expand the possibility of accepting the proposed resolution options.

Of course, the proposals that the Mediator makes must be based on the opinions and results of the discussion and negotiation process of the parties.

4.4. Memorialization of Resolution

Through the discussion process, with the guidance of the Mediator, the parties listen to each other's presentation and absorb each other's ideas. In addition, the comments of the mediator are for reference only, the parties will gather the agreed terms of the agreement. The mediator will conduct oral reconfirmation of those terms.

The parties, with the help of the Mediator, will proceed to make a record of the successful mediation with all the terms of the settlement that the parties have confirmed.

4.5. Closing Evaluations

When a successful mediation is reached, the parties will have to make it in writing. The mediation document takes effect for the parties in accordance with the civil law.

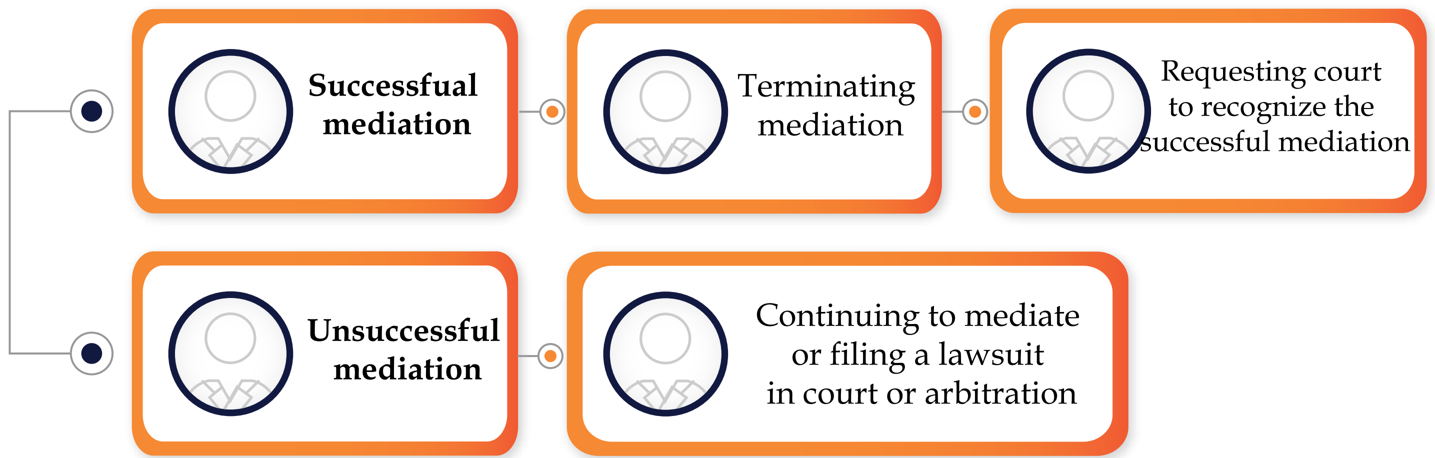
In case of unsuccessful mediation, the parties have the right to continue mediation or request other dispute resolution methods such as arbitration or court in accordance with the law .

The mediation procedure shall terminate in the following cases:

(i) when the parties have reached a successful mediation; or

(ii) when consulting the parties, the Mediator finds that it is no longer necessary to conduct mediation; or

(iii) at the request of one or more of the parties to the dispute.



5. Enforcement of Agreement

Decree No. 22/2017/ND-CP does not provide a mechanism to ensure the enforcement of the mediation agreement as well as the legal consequences in case one party violates the mediation agreement. And Clause 9, Article 419 of the 2015 Civil Code, only stipulates that the successful conciliation results are enforced according to the civil judgment enforcement law.

To be clearer, when considering other provisions of the law, we find that:

Firstly, the mediation agreement does not affect the admissibility of the case. As follows:

(i) According to Clause 1, Article 192 of the 2015 Civil Code and Article 3 of Resolution 04/2017/NQ-HDTP, commercial mediation is not required to return the petition.

(ii) Similarly, according to Articles 124 and 127 of the 2015 Civil Code, whereby even if one party violates the conciliation agreement, the Court will not use these as a basis to temporarily suspend or stop the settlement of civil cases. NS.

Secondly, a breach of the mediation agreement by one party may also be considered a breach of contract . At that time, the aggrieved party may apply the sanctions specified in Article 292 of the Commercial Law 2005:

(i) forced performance of the contract;

(ii) fines for violations;

(iii) compel compensation for damage;

(iv) suspension of contract performance;

(v) suspension of contract performance; and

(vi) cancel the contract;

(vii) other measures agreed by the parties that are not contrary to basic principles of Vietnamese law, treaties to which the Socialist Republic of Vietnam is a contracting party and international trade practices.