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Enforcement of Mediated Settlement Agreements in Vietnam: A Step Forward the International Trend?

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On 24 February 2017, the Government of Vietnam promulgated Decree No.22/2017/ND-CP on Commercial Mediation (the “Decree”). It is the first legislation specifically governing commercial mediation in Vietnam. The Decree is inspired by the UNCITRAL Model Law on International Commercial Conciliation (the “UNCITRAL Model Law”), but includes several local modifications. From the drafting process, the Decree has attracted the attention and comments of experts and practitioners not only from Vietnam but also from the international community.

Furthermore, Vietnam also recently introduced an effective regime for the enforcement of mediated settlement agreements, one of the most critical issues of mediation. It is secured by the regulations on recognition of results of out-of-court mediation (mediated settlement agreements) in Chapter 33 of the 2015 Vietnamese Civil Procedure Code (the “CPC”).

Beyond the national level, the EU-Vietnam Free Trade Agreement (the “EVFTA”), which is regarded as the most comprehensive and ambitious FTA that the EU has ever concluded with a developing country, also dedicates a considerable role to the mediation of both state-state and investor-state disputes.

Considered altogether, will these legal frameworks create firm ground for the rise of mediation in Vietnam?

Disputes allowed to be settled by commercial mediation

Mediation is a brand-new issue for the legislators in Vietnam. In lack of a pre-existing mediation law, the Decree is therefore instead significantly influenced by the 2010 Vietnamese Law on Commercial Arbitration (the “LCA”). In particular, similar to the scope of application of the LCA, the Decree stipulates that mediation shall only be applicable for disputes of a commercial nature, disputes in which at least one party is engaged in commercial activity or disputes specifically designated by other laws to be settled by commercial mediation. Under Vietnamese law, “commercial activities” means activities for the purpose of generating profits, including the sale and purchase of goods, provision of services, investment, and commercial promotion. Presently, only disputes falling within this scope can be settled by commercial mediation. Though the scope of application of the Decree is narrower than foreseen in the UNCITRAL Model Law, it can cover almost all current common commercial disputes. Additionally, it is expected that the sphere of

application will be expanded in the near future with the amendment of the Vietnamese Law on Commerce as well as other substantive laws. These will most likely specifically designate further kinds of disputes for resolution through mediation.

Qualifications of mediators, practice of foreign mediators and presence of foreign mediation institutions in Vietnam

The Decree set out quite strict qualifications for mediators. Specifically, apart from general moral standards, mediators must have a university or higher qualification and at least two years of working experience in their educated discipline. Furthermore, mediators are required to have mediation skills as well as legal understanding, knowledge of business and commercial practice. These requirements are similar to those applicable to arbitrators under the LCA. Despite these strict requirements, the Decree lacks an accreditation system for mediators.

The Decree on Commercial Mediation promotes both institutional and ad-hoc mediation. Accordingly, mediators can choose to be listed on the panel of a mediation centre or practise independently as ad-hoc mediator or both.

Though there is no explicit restriction on the nationality of mediators, the Decree imposes a technical barrier requiring ad-hoc mediators to register with the Department of Justice where they reside. As a result, the opportunity for foreign mediators to personally practise in Vietnam may be restricted. Presently, it therefore appears that the selection of an adequate mediator may be a hard task for disputing parties as well as their counsel since the persons meeting the requirements of the law may not be as skilful and experienced as internationally accredited mediators. However, influenced by the LCA and in compliance with the commitment of Vietnam in accession to the WTO, the Decree also encourages foreign mediation institutions to open branch or representative offices in Vietnam. Furthermore, the branch offices of international mediation centres can establish their own panels of mediators provided that the mediators meet the general qualifications specified by the Decree. We expect that these regulations will facilitate international mediation centres to explore the Vietnamese mediation market.

Recognition of mediated settlement agreements

The enforceability of mediated settlement agreements is maybe the most important factor contributing to the success of mediation. Accordingly, in order to safeguard the enforceability of mediated settlements, Vietnamese law provides a mechanism for the recognition of mediated settlement agreements, which converts the agreements into court judgments.

The written mediated settlement agreement, on the one hand, will be valid and have binding effect on the disputing parties in accordance with the provisions of civil law. On the other hand, pursuant to the Decree and Chapter 33 of the CPC one or both parties to the mediated settlement agreement can apply to the courts for the recognition of their agreement. After being recognized, the mediated settlement agreement is enforceable as a full and final court judgment in compliance with the Vietnamese Law on the Enforcement of Civil Judgments. However, this recognition mechanism only applies for settlement agreements resulting from mediations conducted under the provisions of the Decree. Hence, the results of mediations conducted by foreign mediation centres such as the Singapore International Mediation Center (SIMC), the Center for Effective Dispute Resolution (CEDR), etc. are presently not covered by these regulations.

The Vietnamese regulations mirror Directive 2008/52/EC of the European Parliament and Council

of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, especially its Article 6 on the enforceability of agreements resulting from mediation.

With these regulations, Vietnam is at the forefront of a new international trend on the enforcement of mediated settlement agreements. In future, this trend may well lead to an instrument, most favourably in form of an international convention, on the enforcement of international commercial settlement agreements resulting from mediation, which could have a similar effect as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The draft of such a Convention is currently the main topic of discussion in Working Group II of the UNCITRAL (Agenda of Working Group II of the UNCITRAL https://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html accessed on 15 May 2017).

Investment Mediation

Apart from building the framework for commercial mediation, with the EVFTA Vietnam also entered into one of the very first new generation free trade agreements promoting and detailing the settlement of investment dispute through mediation. Under the EVFTA, at any time during the settlement of an investor-state dispute, any disputing party can invite the other party to conduct mediation in accordance with the procedure stipulated therein.

The specific regulations on mediation included in the EVFTA demonstrate the special attention given by the legislators in Europe and Vietnam to dispute resolution through mediation, which is apparently gradually becoming a favourable new trend in the world. Consequently, we believe that this trend will also positively affect and further help the development of commercial mediation in Vietnam.

Conclusion

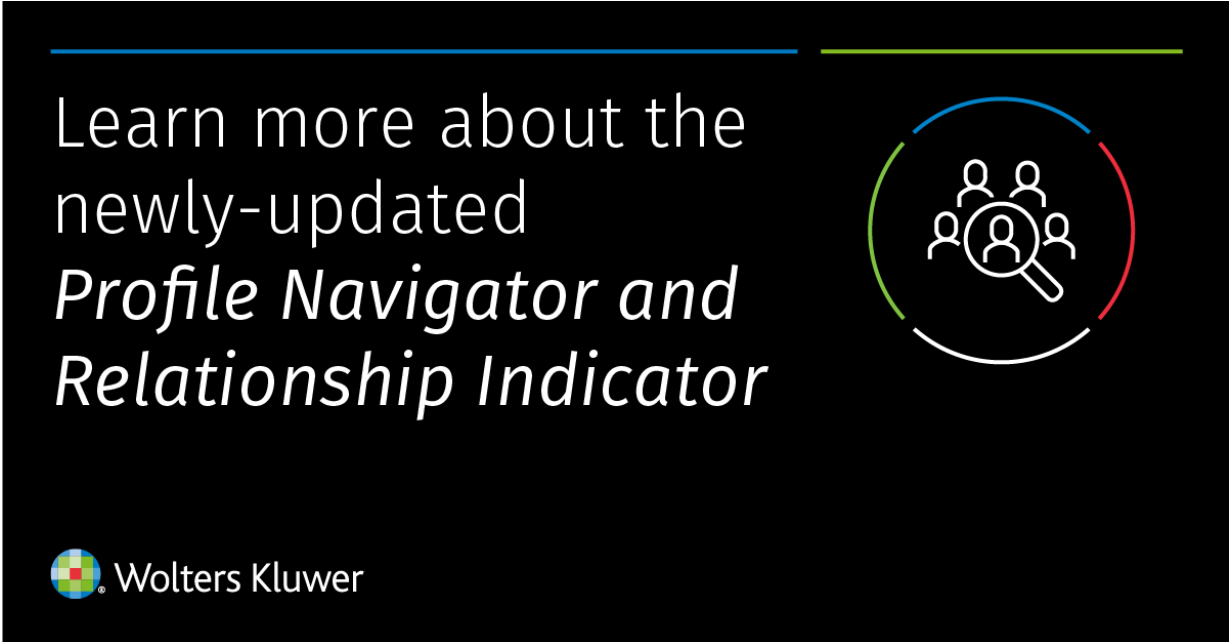
It is apparent from the above that both commercial mediation and investment mediation in Vietnam have received due attention from legislators and are now provided with a sound legal framework, which will be the cornerstone for its future development. Despite certain drawbacks, it can be expected that the new legislation will bring mediation in Vietnam closer to the standards of international practice and will help it to become an effective method of dispute resolution for the business community. In addition, we expect that the new legislation on mediation will actually support rather than pose competition to arbitration, as it will enhance the usage of multi-tiered dispute resolution and strengthen the pro-ADR policy of the Vietnamese government. Accordingly, we have the strong belief that mediation will flourish in Vietnam in the near future due to its facilitation by the new legal framework as well as the support from the Vietnamese courts and government.

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