

INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) UNDER NEW-GENERATION FREE TRADE AGREEMENTS

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Vietnam's becoming a party to a series of agreements to encourage and protect investment (bilateral investment treaty - BIT) and Free Trade Agreements (FTAs) such as the Strategic Trans-Pacific Partnership Agreement (TPP) or the European Union - Vietnam Free Trade Agreement (EVFTA) and other multilateral investment agreements (e.g. ASEAN FTA or the Agreement to establish ASEAN - Australia - New Zealand, etc. Free Trade Zones) has helped to attract foreign investment capital into Vietnam. However, there is an inevitable consequence that disputes between foreign investors and Vietnam's Government might arise out of this investment growth. These disputes will be resolved according to the provisions in the Foreign Investment Protection and Promotion Agreements (FIPAs), FTAs or other multilateral treaties. In fact, investors often choose an arbitration tribunal to resolve conflicts because this method has many advantages (one of which includes its greater neutrality as compared to a national court) Dispute settlement through negotiation and conciliation is not preferred because conciliation results depend on the willingness of the parties and there is no legal mechanism to ensure the implementation of the conciliation agreements. However, with the current development trend, conciliation is increasingly being shown as an effective method for dispute settlement besides arbitration and court, and suitable for international investment disputes. To keep up with the trend, Vietnam needs to approach and understand this dispute settlement's procedures, especially in the context of the Investment Law 2014 stipulating that negotiations and conciliation are "prerequisites" before a dispute is referred to arbitration or court. This article will focus on analyzing academic aspects as well as practical aspects of resolving investment disputes by conciliation, then analyze a number of difficulties in Vietnam's context and propose solutions for the application of this new method.

1. Vietnam's legal documents on dispute settlement by means of conciliation

Dispute settlement by conciliation is recognized in many legal documents of Vietnam.

1.1. Law on Commercial Arbitration 2010

Under Article 9 of the Law on Commercial Arbitration 2010, during arbitral proceedings, the parties may freely negotiate and agree with each other on the settlement

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of their dispute or request an Arbitration Council to conduct conciliation for the parties to reach agreement on the settlement of their dispute. Furthermore, if the parties reach an agreement on dispute settlement through conciliation conducted by the Arbitration Council, the Arbitration Council will accept the agreement of the parties as final arbitration decision.² These regulations shall apply to all disputes settled by arbitration in the territory of Vietnam, including investment disputes .

1.2. Law on Investment 2014

Law No. 67/2014/ QH13 dated November 26, 2014, coming into effect from 01 July 2015 (“Law on Investment 2014“) is a specialized legislation governing fields related to domestic and foreign investment on the territory of Vietnam. In particular, dispute settlement between foreign investors and Vietnam Government is stipulated in Article 14 as follows:

Article 14, Settlement of disputes over business and investment

1 Disputes over business investments in Vietnam shall be settled through negotiation and conciliation. If the dispute settlement cannot be reached through negotiation and conciliation, the dispute shall be resolved by arbitration or by the court in accordance with Clauses 2, 3, and 4 of this Article.

This is an inheritance provision of Article 12 of Law No. 59/2005/QH11 dated November 29, 2005 (“Law on Investment 2005“), but as compared to the Law on Investment 2005, the provision of the Law on Investment 2014 poses a fundamental difference on disputes settlement of investment activities by negotiation and conciliation. Clause 1 of Article 12 of Law on Investment 2005 only indicates that negotiation and conciliation is one of the options to resolve any dispute relating to investment activities in Vietnam.³ However, in the Clause 1 of Article 14 of Law on Investment 2014, negotiation and conciliation is the “prerequisite“ before dispute is referred to other methods such as Vietnam’s court and arbitration, foreign or international arbitration, ad-hoc arbitration or other choices of the parties in dispute. Accordingly, only when the dispute settlement cannot be reached through negotiation and conciliation, the dispute shall be resolved by other methods as stipulated in Clauses 2, 3, and 4 of Article 14 of Law on Investment 2014. In other words, under the provisions of the Law on Investment 2014, negotiations and conciliation can be seen as “prerequisite” of the dispute settlement of investment activities by arbitration and by court.

² Article 48 of Law on Commercial Arbitration 2010

³ **Article 12. Dispute settlement**

1. Disputes related to investment activities in Vietnam are resolved through negotiation, conciliation, arbitration or court proceedings in accordance with law.

This showed the government's acceptance of alternative dispute resolution (ADR) methods in settling trade disputes in general and investment disputes in particular. However, this regulation was not really compatible with a number of BITs and investment dispute settlement provisions in FTAs to which Vietnam is a signatory. This aspect will be analyzed in more detail in the next sections of this paper.

1.3. Civil Code 2015

Civil Code No. 92/2015/QH13 dated November 25, 2015 ("**Civil Code 2015**") replacing Civil Code 2004 and amending Civil Code 2011 also recognizes the court's jurisdiction in resolving investment disputes (other disputes in business and trade).⁴

In addition, Civil Code 2015 supplements a whole new chapter related to the recognition of out-of-court mediation results.⁵ Accordingly, conciliation results of the disputes between agencies, organizations and individuals settled by competent agencies and persons in accordance with the law on reconciliation will be recognized under Article 419 of Civil Code 2015. Under this regulation, conciliation results of investment disputes can also be recognized in court. Such recognition will take effect immediately and be enforced in accordance with the Civil Code.⁶

1.4. Decree on Trade Conciliation

Although numerous legal documents regulates dispute settlement via conciliation, to date, Vietnam has yet to promulgate any document which specifies procedures for trade and investment dispute conciliation. Therefore, upcoming Decree on Trade Conciliation which inherits UNCITRAL Model Law on Commercial Conciliation and is localized to suit the situation of Vietnam will serve as the first legal document to govern this issue and promises to lay the foundation for commercial conciliation legal framework in Vietnam.

According to Article 2 of the Draft Decree on Commercial Conciliation dated July 19, 2016 ("**Draft Decree on Conciliation**"), disputes subject to commercial conciliation include:

"1. Disputes arising from commercial activities.

2 Disputes arising among parties, at least one of whom practices commercial activities.

3 Other disputes among parties which can be resolved by commercial conciliation."

⁴ Article 30 of Civil Code 2015

⁵ Chapter XXXIII of Civil Code 2015

⁶ Article 419, Clause 9 of Civil Code 2015

Accordingly, disputes arising from investing activities in accordance with Article 14 of the Investment Law 2014, including disputes between foreign investors and Vietnamese public sector can also be resolved via conciliation.

2. Investment dispute settlement via conciliation under the international agreements which already came in force

Vietnam has signed BITs with 64 countries and regions, entered in 11 FTAs and is in the process of negotiating other 5⁷ FTAs.⁸ Most of these agreements contain provisions on settlement of disputes between foreign investors and Vietnam's public sector recipients. This section will analyze some typical dispute settlement provisions between investors and the public sector recipients via conciliation.

2.1 Bilateral Investment Treaties - BIT

As reported by the Ministry of Planning and Investment (MPI), as of June 2014, Vietnam has been involved in 8 investment disputes with foreign investors relating to BITs.⁹ Documented provisions on dispute settlement in the relevant agreements are as follows:

a. Vietnam - Netherlands BIT

Vietnam - Netherlands BIT was signed on March 10, 1994 and came into force as of February 01, 1995. Article 9 of the Treaty stipulates:

1 Disputes between one Contracting Party and a national of the other Contracting Party concerning an investment of the latter in the territory of the former Contracting Party shall, if possible, be settled amicably.

2 If such disputes cannot be settled according to the provisions of paragraph 1 of this Article within a period of three months from the date either party to the dispute requested amicable settlement, the dispute shall, at the request of the national concerned, be submitted to an ad hoc arbitration tribunal to be appointed by a special agreement or one established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)¹⁰.

b. Vietnam - France BIT

⁷ <http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/229#iiaInnerMenu>

⁸ <https://aric.adb.org/fta-country>

⁹ MPI, Review of Vietnam's international commitments on investments in attachment to Correspondence No. 617/BKHDT-PC (December 29, 2014)

¹⁰ **Article 9 – Vietnam – Netherlands BIT**

1) Disputes between one Contracting Party and a national of the other Contracting Party concerning an investment of the latter in the territory of the former Contracting Party shall, if possible, be settled amicably.

2) If such disputes cannot be settled according to the provisions of paragraph 1 of his Article within a period of three months from the date either party to the dispute requested amicable settlement, the dispute shall, at the request of the national concerned, be submitted to an ad hoc arbitration tribunal to be appointed by a special agreement or one established under the Arbitration Rules of the United Nations Commission on International Trade Law.

Vietnam - France BIT was signed on May 26, 1992 and came into force as of August 10, 1994. Similar to the BIT with the Netherlands, Article 8 of Vietnam - France BIT stipulates:

1 Disputes between one Contracting Party and a national of the other Contracting Party concerning an investment of the latter in the territory of the former Contracting Party shall, wherever possible, be settled amicably.

2 If such disputes cannot be settled within a period of six months from the date either party to the dispute requested amicable settlement, the dispute shall, at the request of either Party, be submitted to an ad hoc arbitration tribunal. [...]

c. *Vietnam - the U.S BTA*

Vietnam - the U.S Bilateral Trade Agreement (BTA) which came into force as of July 13, 2000 stipulates that:

2 In the event of an investment dispute, the parties to the dispute should attempt to resolve the dispute through consultation and negotiation, which may include the use of non-binding third-party procedures. Subject to paragraph 3 of this Article, if the dispute has not been resolved through consultation and negotiations, a national or company of one Party that is a party to an investment dispute may submit the dispute for resolution under one of the following alternatives:

A. to the competent courts or administrative tribunals of the Party in the territory of which the covered investment has been made; or

B. in accordance with any applicable, previously agreed dispute-settlement procedures; or

C. in accordance with the terms of paragraph 3.

Under these provisions, settlement through negotiation and conciliation is raised as an optional alternative rather than a binding regulation and is not a prerequisite for determining the competence of the Arbitration Council in later proceedings.

It is noted that because conciliation is a relatively new method in investment dispute settlement, most BITs only provide for negotiations without referring to conciliation. Moreover, it should also be noted that, the term “amicable settlement” used in the English version of some BITs only means “resolution of disputes in a friendly and polite manner”, rather than “conciliation” as being translated into Vietnamese of some BITs (such as those with the Netherlands and France cited above). Only when the Agreement refers to “Mediation”, “Conciliation” or other goodwill dispute resolution procedures with the participation of a third party (such as the BTA with the US cited above), it can be truly deemed settlement through conciliation with the participation of conciliator.

As analyzed above, in accordance with Article 14, Paragraph 1 of Investment Law 2014, all investment disputes must be resolved through negotiation and conciliation before being submitted to other legal proceedings. Having that said, there is a discrepancy between Vietnamese laws and international investment commitments, leading to difficulties during application, e.g., in determining whether mediation and conciliation is a prerequisite for the Arbitration Council to apply arbitral dispute resolution.

2.2 Free Trade Agreements (FTAs)

To date, no disputes between investors and the government of Vietnam has arisen relating to bilateral or multilateral FTA to which Vietnam is a signatory. However, all FTAs on investment contain provision on dispute resolution between foreign investors and the government, with specifying conciliation as an option for the parties in resolving investment disputes.

For example, Vietnam - South Korea FTA signed on May 05, 2015 and effective as of December 20, 2015, stipulates that:

Article 9.16: Consultation and Negotiation

In the event of an investment dispute, the disputing investor and the disputing Party shall initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding third-party procedures. Consultations shall be held within 30 days of the submission of the notice of intent to submit a claim to arbitration, unless the disputing parties agree otherwise.

Similarly, ASEAN, Australia and New Zealand Free Trade Area (AANZFTA) signed on February 27, 2009 and effective as of January 01, 2010 also stipulates that:

Article 19: Consultations

*1 In the event of an investment dispute referred to in Article 18.1, the disputing parties shall as far as possible resolve the dispute through consultation, with a view towards reaching an amicable settlement. Such consultations, which may include the use of **non-binding, third party procedures**, shall be initiated by a written request for consultations delivered by the disputing investor to the disputing Party.*

[...]¹¹

In particular, these Agreements **do not require** mediation and conciliation as a prerequisite of submitting the dispute to arbitration.

3. Investor-State dispute settlement by means of conciliation within the framework of new generation international investment commitments

¹¹ Article 19, Part B, Chapter 11 of AANZFTA

3.1. *Trans-Pacific Partnership (TPP)*

TPP was signed on February 04, 2016. Chapter 9, Article 9.18 of the Agreement provides for an amicable settlement of disputes between foreign investors and state agencies as follows:

Article 9.18: Consultation and Negotiation

*1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures through conciliation or mediation.*¹²

[...]

This provision encourages the parties to resolve disputes through consultation and negotiation, including intermediation and conciliation. However, under this provision, the use of goodwill, amicable and non-judicial method is encouraged rather than mandated. Moreover, although the settlement of disputes by negotiation and conciliation is encouraged, TPP has no specific regulations on the order and procedures for conciliation.

3.2. *EU – Vietnam Free Trade Agreement (EVFTA)*

The EU – Vietnam Free Trade Agreement (EVFTA) officially ended negotiations on December 2, 2015. This Agreement shall be considered as the most comprehensive and ambitious Free Trade Agreement ever negotiated by the EU with a developing country. The Investment Chapter of the Agreement is viewed to be more innovative compared to other Free Trade Agreements, particularly with regard to the settlement of disputes between investors and investment-receiving countries¹³.

3.2.1. Overview of mechanism for settlement of investment disputes in EVFTA

EVFTA stipulates four (04) methods for settlement of disputes between investors and the government, including: negotiation, conciliation, consultation and investment tribunal. Of these methods, negotiation and conciliation are encouraged but not mandated, serving as the premise for dispute resolution through proceeding methods later on.

Disputes between investors and the government, if cannot be resolved through negotiation and conciliation, the claimant shall send to the respondent request for

¹² **Article 9.18: Consultation and Negotiation**

1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.

[...]

¹³ See also: Nguyen Manh Dung & Nguyen Thi Thu Trang, *International Investment Dispute Resolution in Vietnam: Opportunities and Challenges*, paper at the “*International Investment Arbitration and Dispute Resolution in Southeast Asia*” Conference in Bangkok (7/2016) and Nguyen Manh Dung & Dang Vu Minh Ha, *Investor-State Dispute Resolution Mechanism under the EU – Vietnam Free Trade Agreement*, paper at the “*Regulation & Investment Disputes Conference: Asian Perspectives*” in Singapore (8/2016).

consultation, etc. Within 6 months from the date of sending the request for consultation, if the dispute remains unresolved, the claimant may submit the dispute to the investment tribunal for resolution. Unlike the familiar investment arbitration method, the investment tribunal provided for in EVFTA is a completely new model with basic features including (i) two-level trial of first instance and appeal; (ii) settlement conducted by a tribunal consisting of three members, appointed from the Board of First Instance Tribunal or Board of Appellate Tribunal which are pre-selected by the Agreement authority; (iii) the final judgment shall be enforced as that issued by the courts of the Member States of the Agreement (however, within the first 5 years of the Agreement' effective date, judgments in which Vietnam is the respondent will be executed through the procedures for recognition and enforcement under the 1958 New York Convention on the recognition and enforcement of foreign arbitration's judgments).

3.2.2. Mechanism for resolving investment disputes by conciliation in EVFTA

In any stage of the dispute resolution process, the parties may request the settlement of disputes by conciliation. EVFTA conciliation procedure is provided for in Article 5 and Annex 1, Part 3, Chapter II of Section 8 of the EVFTA on Conciliation Mechanism for Investment Disputes.

When both parties have agreed to conciliation, the parties may agree on the appointment of a conciliator¹⁴. If the parties cannot agree on the choice of a conciliator, a member of the Tribunal Board of the Investment Tribunal will be appointed the conciliator by the Chairman of the Board¹⁵. The appointed conciliator shall have a neutral nationality, being citizen of neither the EU nor Vietnam. It should be noted that members of the Board of First Instant Tribunal and the Board of Appellate Tribunal shall possess professional qualifications to be able to undertake work placements in the judiciary or are qualified jurists recognized in their countries. These members must demonstrate that they meet the professional knowledge and competency in the field of international law. In the most ideal case, the members should have expertise in specific areas of the law such as international investment law, international trade law and the settlement of disputes arising in connection to compliance with international investment and trade agreements¹⁶.

During the conciliation process, time lines of all other proceedings (such as deadlines for consultation request or petition submission, etc.) shall be suspended until the process comes to an end. The conciliator shall follow the Code of Conduct applicable to the members of the Board of First Instance and the Board of Appellate Tribunal of the Investment Tribunal.

¹⁴ Article 2, Clause 1, Section 2 of Annex I on Conciliation Mechanism for Investment Disputes

¹⁵ As above (paragraph 2)

¹⁶ Article 13, paragraph 3

Conciliation results will be enforced voluntarily by the parties¹⁷ without enforcement mechanism. Documents used in the process of conciliation will not be public, unless the parties agree otherwise.

4. Procedures for settling investment disputes by conciliation and a number of practical issues

Although regulation on investment dispute settlement by conciliation has been longstanding, not until the Decree on Trade Conciliation was formally introduced, Vietnam has never had a specific guiding document on order and procedures for conciliation. Besides, prior to EVFTA, the international investment commitments to which Vietnam is a member also do not provide detailed regulations on this issue. With the advent of the Decree on Trade Conciliation and the specific guidance in Annex I, Part 3, Chapter II, Section 8 of EVFTA ("Annex I"), steps taken to resolve investment disputes by conciliation have been put into a legal framework with specific instructions to create more favorable conditions for the disputing parties to make use of. In addition, legal issues relating to conciliation can also be obtained from the UNCITRAL Model Law on International Trade Conciliation¹⁸, UNCITRAL Conciliation Rules¹⁹, usually applied for ad-hoc mediation and the International Bar Association (IBA) Rules for Investor-State Mediation²⁰.

In general, the conciliation procedure can be summarized in the following steps:

4.1. Initiation of the conciliation procedure

Under Article 6, the Draft Decree on Trade Conciliation dated July 19, 2016, disputes may be resolved by conciliation if the parties reach a settlement agreement in writing, which can be composed before or after a dispute arises.²¹ EVFTA does not have this requirement. However, according to Article 2 of Annex I on the Procedure for resolving investment disputes by conciliation, at any stage of the dispute resolution process, a party may submit a request for conciliation in writing to the other party, and if the other party consents in writing, the conciliation procedure will be conducted²². The exchange of

¹⁷ Article 5 Section 2 of Annex I on Conciliation Mechanism for Investment Disputes

¹⁸ The English version is available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf

¹⁹ The English version is available at: <https://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>

²⁰ The English version is available at: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=8120ED11-F3C8-4A66-BE81-77CB3FDB9E9F>

²¹ **Article 6. Conditions for dispute settlement by trade conciliation**

Disputes shall be resolved by conciliation given the parties' mutual agreement. The parties may agree to settle disputes by conciliation before or after disputes occur, or at any time during the dispute.

²² **Article 2 Initiation of the Procedure**

1. Either disputing party may request, at any time, the commencement of a mediation procedure. Such request shall be addressed to the other party in writing.

[...]

requests for and acceptance of conciliation can also be considered a settlement agreement in writing set forth after the dispute occurs and thus, still in line with the law of Vietnam.

Settlement agreement serves to express the parties' will in settling disputes by conciliation. However, unlike arbitration agreements, conciliation agreements have no binding responsibility to the disputing parties. This means that regardless of the existence of a settlement agreement, one party can still refuse request for conciliation from the other side.

It should be noted that, for Bilateral and Multilateral Agreements requiring conciliation to be mandated prior to proceeding with arbitration, request for conciliation serves as the legal basis for determining whether conciliation has taken place, and thereby to determine whether the Arbitration Council has jurisdiction to resolve the dispute. In that case, even when requests for conciliation are denied, conciliation is considered to be taken place but failed, and thus providing the basis to initiate the next proceedings.

4.2. Conciliation procedure:

According to the Draft Decree on Conciliation, disputing parties have the freedom to agree on how to proceed with the conciliation procedure: the parties may choose to apply the rules of a conciliation center or self-unify method for conciliation.²³

For disputes arising from EVFTA, the conciliation procedure shall be carried out in accordance with Annex I of this Agreement. However, for disputes arising from other Agreements (such as TPP), the parties may freely choose the conciliation procedure conducted by an organization that provides conciliation services [such as the Singapore International Mediation Center (SIMC) or the International Chamber of Commerce (ICC)] or to conduct ad hoc mediation under procedures agreed by the parties themselves or to apply the UNCITRAL Conciliation Rules or the IBA Rules for Mediation.

The selection of conciliation procedure is extremely important because it determines all other matters of the conciliation proceeding such as procedure for conciliator appointment, competent authority for conciliator appointment, conciliation process, conciliation costs, implementation of the settlement agreement and other related issues.

3. The party to which such request is addressed shall give sympathetic consideration to the request and accept or reject it in writing within 45 days, or where such request is submitted after a request for consultation has been submitted pursuant to Article 4 of Section 3 (Resolution of Investment Disputes), within 30 working days of its receipt.

²³ **Article 14. Conciliation procedure:**

1. The parties may choose Conciliation Rules of organizations providing commercial conciliation services as the method of conducting the conciliation or self-negotiate the mode of such conducting. In cases where the parties have not agreed on how to conduct the conciliation, the commercial conciliator shall conduct the procedure in a manner that the commercial conciliator sees fit with the cases and aspirations of the parties, and that has been approved by the parties.

4.3. Conciliator Appointment

Under Article 3, clause 1 under Annex I, the parties may agree to select a conciliator.²⁴ In cases the parties cannot agree on Conciliator selection, either party may request that the Tribunal Board to draw by lot and appoint a Conciliator from among the member of the Tribunal Board of Investment Tribunal²⁵. EVFTA does not define standard for conciliator selected by the Parties but does stipulate strict requirement for conciliator being appointed by the Tribunal Board (who actually is a member of the Tribunal Board and must meet the requirement to be a member of the Tribunal as being analyzed in section 3.2.2 above)

According to Vietnam Law, disputing parties may agree to appoint a conciliator, however there is a strict requirement of conciliator standard. Particularly, under Article 7 clause 1 of the Draft Decree on Trade Conciliation, conciliator must meet the following requirements:

A) Having full capacity of civil conduct in accordance with the Civil Law; possessing good morality, high reputation, being independent, impartial and objective;

b) Having university level of competence and working experience in the trained field from 2 years or more;

C) Having conciliation skill, knowledge of law, trade and commercial custom and related fields.

Furthermore, the Decree also requires conciliator to be registered in the conciliator list of conciliation center or in the established list of conciliators of the Department of Justice²⁶. This makes it difficult for disputing parties to select foreign conciliators to conciliate the dispute. On the other hand, if the parties cannot agree to conciliator selection, the parties may request a conciliation center to be the appointing authority and such appointment shall follow the rules of this center²⁷.

²⁴ **Article 3 Selection of the Mediator**

1. If both disputing parties agree to a mediation procedure, the disputing parties shall endeavor to agree on a mediator within 15 working days from the receipt of the reply to the request.

²⁵ 2. If the disputing parties cannot agree on the mediator within the established time frame, either disputing party may request the President of the Tribunal to draw by lot and appoint a mediator from among the Members of the Tribunal which are neither nationals of the European Union, nor of Vietnam.

²⁶ **Article 12 - Decree on Trade Conciliation. Selection and appointment of trade conciliators**

1. Trade conciliators being agreed by the parties to be selected from the established list of trade conciliators of the trade conciliation services provider or from the list of ad-hoc trade conciliators that is established by the Department of Justice in provinces or cities directly under the central government.

²⁷ **Article 12 - Decree on Trade Conciliation. Selection and appointment of trade conciliators**

2. Trade conciliator appointments by trade conciliation service provider shall be in accordance with Conciliation Rules of trade conciliation service provider.

UNCITRAL and IBA rules also allow that disputing parties may agree on conciliator selection or appointing authority. If the parties choose to follow these sets of rules, selection and appointment of conciliators shall follow the stipulation of these Rules accordingly.

From May 2016, the Singapore International Mediation Center (SIMC) officially provides the service of conciliator appointment for ad-hoc mediation procedure in accordance with Practice Node 01/2016²⁸. Accordingly, SIMC shall appoint conciliator as agreed upon and in compliance with the requirement of the parties, considering nationalities, specialty, experience, etc. and other special requirement set forth by disputing parties.

It is the same as arbitration procedure that lawyers play an important role in the selection stage of conciliators or competence authorities to appoint conciliators because selection of an appropriate conciliator may decide the success of a conciliation procedure. Before selecting a conciliator or an appointing authority, a lawyer needs to consider many factors such as legal regulations of conciliator standard, conciliator appointment procedure, cost, etc.

4.4. Conciliation proceedings

According to Decree on Trade Conciliation, conciliator may recommend solutions to resolve the dispute at any stages of the conciliation proceedings.

As being stipulated in EVFTA, conciliator shall decide the most appropriate way to conciliate based on consultation and discussion between the parties²⁹. The conciliator, in addition, may offer advice and propose a solution for the consideration of the disputing Parties which may accept or reject the proposed solution or may agree on a different solution. However, the conciliator shall not be allowed to advise or comment on the adequacy of the measures at hands of the disputing parties under the Agreement. Moreover, it is necessary to note that according to this Annex, conciliation settlement agreement shall be made within 60 days from the date of appointment of the conciliator while the limitation of conciliation time is not defined in Vietnam Law.

According to UNCITRAL and IBA rules, conciliation settlement, with the support of a conciliator shall be conducted upon mutual agreement between the parties. Additionally, SIMC or ICC conciliation rules also stipulate the support of SIMC and ICC in case of necessities (such as decision of language to be used, place of conciliation or meeting organization prior to conciliation for mutual agreement on necessary issues...)

²⁸ Access to English version available at <http://simc.com.sg/practice-note/>

²⁹ 2. The mediator may decide on the most appropriate way of bringing clarity to the measure concerned. In particular, the mediator may organize meetings between the disputing parties, consult the disputing parties jointly or individually, seek the assistance of or consult with relevant experts and stakeholders and provide any additional support requested by the disputing parties. However, before seeking the assistance of or consulting with relevant experts and stakeholders, the mediator shall consult with the disputing parties.

4.5. Termination of conciliation proceedings

In general, Vietnam law, EVFTA and sets of conciliation rules all acknowledge termination of conciliation proceedings in the following 3 cases:

- (i) When the parties reach a conciliated settlement agreement.
- (ii) When the conciliator, after consultation with the parties concludes that further efforts at conciliation are no longer needed
- (iii) Upon request of conciliation termination from one disputing party³⁰

Upon termination of the conciliation proceedings, if the dispute has not been settled, the parties can submit the dispute to arbitration or court in accordance with Vietnam law or regulations under the international commitments of Vietnam.

4.6. Implementation of a conciliated settlement agreement

EVFTA does not stipulate mechanism for enforcement of a conciliated settlement agreement, thus implementation shall depend on the willingness of the parties. In contrast, the Decree on Trade Conciliation stipulates that a conciliated settlement agreement shall be implemented in accordance with the code of civil procedure, which means the conciliated settlement agreement shall be enforced as the decision of the tribunal after being acknowledged in accordance with recognition procedure of conciliation result under Chapter XXXIII, the Code of Civil Procedure 2015³¹.

According to Trade Arbitration Law, if the parties reach a conciliation agreement during dispute settlement proceedings, such agreement shall be acknowledged by Arbitration Committee and valued as arbitration award³². This award shall be enforced in member countries of New York Convention 1958.

Specially, a mutually agreed solution to the dispute conciliated by the Singapore International Mediation Center with the option of applying Arb-Med-Arb Protocol³³

³⁰ Article 17 - Draft Decree of Trade Conciliation

³¹ **Article 419-Code of Civil Procedure 2015. Recognition procedure of a conciliated settlement agreement outside of Tribunal**

9. Decision to recognize a conciliated settlement agreement outside of Tribunal shall be enforced under the law of civil judgment execution.

³² **Article 58 - Trade Arbitration Law Conciliation and recognition of a conciliation settlement**

Upon request of the parties, Arbitration Committee shall conduct conciliation for the parties to reach mutual agreement on dispute settlement. Once the parties reach an agreement on dispute settlement, Arbitration Committee shall make a report of conciliation settlement signed by both parties and confirmed by arbitrators. Arbitration committee shall make the decision of recognition of the mutual agreement. This decision shall be final and valuable as arbitration award.

³³ Dispute shall be firstly brought to the Singapore International Arbitration Center and be at the option to apply Arb-Med-Arb Protocol. After that, the dispute shall be brought to conciliation proceedings under the Singapore

shall be recognized as arbitration award of the Singapore International Arbitration Center (SIAC) and be enforceable to member countries of the New York Convention 1958.

5. Challenges in settlement of investment disputes by conciliation in Vietnam and recommendations

Although investment disputes settlement by conciliation are becoming a popular preferential trend in the new-generation Free Trade Agreements, there are still difficulties and obstacles for application of this method to investment disputes in Vietnam. The section will analyze the issues to give recommendations to complete the Vietnam legal system in order to face the difficulties, capturing and maximizing the benefits from the new Free Trade Agreements.

5.1. Legislation on trade conciliation remains incomplete and inconsistent to international commitments

Conciliation is clearly relatively a new dispute settlement method in Vietnam towards not only investment disputes but also other common trade disputes. Although it is encouraged by law to settle dispute by alternative dispute resolution (ADR) such as arbitration, conciliation and negotiation; no related documents stipulating details and particular instructions is available. Lawmakers, on the other hand, have not understood the nature and distinction of basic differences between negotiation and conciliation. This is very clear in the translation version into Vietnamese of BIT where “*amicable settlement*” was translated into conciliation instead of negotiation.

Additionally, there are some inconsistencies in current Law of Vietnam to international commitments of Vietnam as well as international law of conciliation. For example, it is stipulated under Article 14 subsection 1 of Investment Law 2014 that only when negotiation and conciliation is unsuccessful, shall the parties refer to other dispute resolution methods. However, some BITs only encourage the usage of negotiation, conciliation but do not enforce the application of this method as a prerequisite for submitting the dispute to arbitration or tribunal.

Although the Decree on Conciliation which is going to be promulgated, promises to create a legal framework to facilitate the development of conciliation, there are still inconsistencies to international law. Firstly, requirement of conciliators must be registered with the Department of Justice, which is a technical barrier prohibiting the selection of foreign conciliators in dispute conciliation in Vietnam. This is a limitation, especially to investment disputes as there is a shortage of competent resources of conciliation and investment in Vietnam. Secondly, there are shortcomings in Vietnam law to stipulate the suspension of the statute of limitations during conciliation proceedings or the usage of conciliation evidences for other proceedings. These shortcomings make disputing parties hesitate to use conciliation to resolve disputes.

Due to the above shortcomings, disputing parties find conciliation unattractive, especially for investment disputes. Vietnam, therefore, needs to review the legal system to adjust for consistency with international law before the new Free Trade Agreements come into force. Besides, Vietnam can choose to apply international rules of conciliation which consist of provisions complementing for the shortcomings in the Decree on Conciliation, enhancing the success probability of conciliation.

5.2. Shortage of competent resource for consultation and representatives in conciliation proceedings.

Conciliation method is relatively new in Vietnam, thus there is a limitation of competent lawyers for consultation and as representatives of the state in conciliation proceedings. This is the same as the investment arbitration procedure under UNCITRAL rules. Whilst the success of conciliation proceedings very much depends on consultation of selection of applicable rules, conciliation procedure and selection of conciliator. Therefore coaching and training courses on investment dispute settlement in general as well as investment dispute settlement by conciliation in particular are necessary to build up competent resource being ready to handle conciliation request from foreign investors when there is a dispute.

5.3. Obstacles during implementation of a conciliated settlement agreement

Even though the Code of Civil Procedure 2015 facilitates the implementation of a conciliated settlement agreement by recognizing it as final binding award of the tribunal, this regulation is only applicable for trade conciliation in Vietnam. The conciliated settlement agreement being achieved from conciliation proceedings in SIMC or ICC, as a result, shall not be recognized and enforced in Vietnam under the mechanism of the Code of Civil Procedure 2015.

The working group II of UNCITRAL on arbitration and conciliation are under researching and developing a Convention on Enforcement of Conciliated Settlement Agreement, which becomes effective same as New York Convention 1958 on recognition and enforcement of arbitration award of foreign arbitrator. The experts, in many conference for draft of the convention, mutually agree that the Convention shall be applied for conciliated settlement agreement of which one party is the government or state agencies³⁴. This Convention promises to be the basic for conciliation settlement development, especially conciliation settlement of investment disputes. Vietnam should study, consult and consider for adoption when the convention is promulgated and come into force.

³⁴ Ema Vidak-Gojkovic, The UNCITRAL Convention on Enforcement of Conciliated Settlement Agreements – An Idea Whose Time Has Come? < <http://kluwermediationblog.com/2015/10/21/the-uncitral-convention-on-enforcement-of-conciliated-settlement-agreements-an-idea-whose-time-has-come/>>

Using conciliation to resolve trade disputes in general and investment disputes in particular is becoming a popular trend globally. In Vietnam, conciliation settlement is encouraged to be used to minimize time and cost of the parties, as well as to limit tension between foreign investor and state agencies, which exerts positive impact on the development of an attractive investment environment in Vietnam. Therefore Vietnam needs to quickly complete the legal system on conciliation as well as to concentrate on training and coaching to improve the skills of the resource specializing in investment disputes and conciliation settlement. This will help Vietnam to integrate in accordance with the common trend, avoiding the risks of investment dispute and taking the advantage of all the opportunities brought about from the new-generation Free Trade Agreements.

ANNEX

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