

COMPARATIVE STUDY OF ALTERNATIVE DISPUTE RESOLUTION IN INDONESIA AND VIETNAM”.

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Abstract

Alternative Dispute Resolution (ADR) is a legal mechanism that facilitates case resolution outside the courtroom, offering a more informal and efficient alternative to litigation. With its simplicity, affordability, and speed, ADR is often regarded as a superior method for resolving disputes. This paper explores the application of ADR in Indonesia and Vietnam, highlighting their respective legal frameworks. Indonesia has established ADR within its formal legal system earlier than Vietnam, providing a structured foundation for its use. Meanwhile, Vietnam is showing promising developments in ADR, with expectations of significant advancements, such as updates to its Law on Commercial Arbitration. These changes could position Vietnam as a key player in arbitration within the region. As Vietnam continues to refine its ADR practices, it is likely to become an increasingly attractive destination for businesses in need of reliable and globally recognized dispute resolution solutions. By comparing the progress of ADR in both countries, this study underscores Indonesia's established framework and Vietnam's potential as an emerging hub for arbitration. These findings contribute to understanding how ADR evolves in Southeast Asia, reflecting its importance in fostering effective and accessible dispute resolution

Keywords: *Alternative Distribution Board Resolution; Indonesia; Vietnam*

INTRODUCTION

Contract between two parties often end with the conflicts, no matter how hard the parties deal with the conflicts. When the disputes or conflict arise, the resolution may become an issue to be resolved due to every party has its own legal system.

This issue will have several difficulties to determine which legal system to be applied. For example, when the state own company of Indonesia has contract agreement and relationship with a French company for the construction of railway system LRT Jabodebek. In the middle of the Contract, the disputes between two parties arise. The parties shall resolve the issue, yet there are additional legal issues to be decided, such as what the best the method of dispute resolution shall be applied, where the place to resolve the dispute. Conventionally, company disputes are resolved through general justice schemes, also known as litigation channels. This settlement is not recommended because of the lengthy process and the bureaucracy that is convoluted, especially the high costs

incurred due to the lengthy process of the proceedings. Therefore, the business world is also familiar with Alternative Dispute Resolution (ADR) (Taufik Siregar, et, al., 2022).

Alternative Dispute Resolution is a legal institutions offer the the disputing parties to make a settlement without using a trial. This method is to provide a win-to-win solution in which the needs of all parties are met (Md. Nazmul Haq, et. al., 2021).

The fact that ADR is more in demand than litigation measures cannot be separated from its simplicity and process which does not require time and bureaucracy. ADR is also preferred because it can provide a win-win solution where there are efforts to facilitate the needs of all the disputing parties. ADR must provide fast, effective, and efficient service in resolving business disputes.

There are various types of ADR. Some of the most well-known of these are negotiation, mediation and arbitration. These three methods are most widely used throughout the world because of their good capacity in resolving business disputes. There are many forms of ADR that disputants can take. Most of these are steps to find a win-to-win solution so that all parties involved are expected to profit. The ADR broke through the formal walls of the trial, where the decisions produced by the proceedings were always win-to-lose so that one of the parties would be forced to carry out the resulting demands. For this reason, ADR is the right solution and is preferred by business actors in disputes, before thinking about using litigation or trial channels (Salsabila Fakhriyah Arradiyah, 2021).

ADR nowadays becomes more popular to be applied in the world of law. The globalization of the world communities open up exchange opportunities across the various circle between countries. The question mark then appears as follows :

- a. Is there any standards to be implemented in the ADR implementation? Do the countries has same concept on the implementation?
- b. What is the basis that makes the difference of ADR implementation in each country?

Many papers or legal writings have been provided to study those implementations among the countries. In this paper, the author will make an example to compare the application of ADR in Indonesia and application of ADR in vietnam.

METHOD

The research uses a literature study of existing legal materials.

RESULT AND DISCUSSION

Alternative Dispute Resolution implementation in Indonesia.

ADR has become a buzz word in recent years. This existence of ADR in Indonesia answers a solution of the problem domestic judicial procedures of the court system which have been deemed ineffective. The ADR itself exists to resolve several shortcomings of the judicial procedures such as a) court fees incurred are expensive; b) slow dispute resolution; c) generally unresponsive judicial practices.

There are several laws and regulations that provide a legal basis for the practice of ADR in Indonesia. The first legal basis for implementing ADR in Indonesia is Law Number 48 of 2009 concerning Judicial Power (Law on Justice). This regulation, which is actually intended to regulate judicial and judicial practices in Indonesia, also has the substance of ADR, in which Article 5 states that judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice in life in society. With this provision, it opens up the opportunity for case resolution by other means outside the court, as long as the parties choose it and believe that the process for settling the case they choose is fair. In Article 3 paragraph (1), it can also serve as a guide for the parties to be able to resolve dispute cases without going through a judicial process, and the parties are free to choose what form / instrument of ADR to use as long as both parties mutually agree. (Andi Ardillah Akbar, 2019).

The second legal basis is The Civil Code (KUHPERDATA) Article 1851-1864. Dispute resolution through Alternative Dispute Resolution (ADR) is also addressed. According to Article 1851, "peace" refers to an agreement in which both parties, through the act of handing over, promising, or retaining an object, bring an end to an ongoing case or prevent a future one from arising. The term "peace" in this context signifies the resolution of disputes, where both parties willingly terminate the dispute between them, leaving no room for further legal actions. This concept is further emphasized in Article 1858 paragraph (1), which states, "any peace agreement between the parties holds the same authority as a final-level court ruling. (Andi Ardillah Akbar, 2019).

The third legal basis of the law that concerning ADR and Arbitration itself is Law Number 30 of 1999. In Article 1 point 10 it is stated that, "Alternative Dispute Resolution is a dispute resolution institution or difference of opinion through a procedure agreed upon by the parties, namely settlement outside the court by means of consultation, negotiation, mediation, conciliation, or expert judgment" (Andi Ardillah Akbar, 2019).

Arbitration in Vietnam

Arbitration serves as a private and effective mechanism for resolving disputes, offering several well-recognized benefits such as cost efficiency, time savings, procedural flexibility, confidentiality, and ease of enforcement. In Vietnam, arbitration has witnessed remarkable development since the enactment of the Law on Commercial Arbitration (LCA), which became effective on January 1, 2011. This legal framework has significantly boosted the popularity and utilization of arbitration as an alternative to court proceedings for both domestic and international disputes.

The growth of arbitration in Vietnam can be observed through the increasing number of users and cases resolved through this method. For example, data from the Vietnam International Arbitration Centre (VIAC)—the country's oldest and most established arbitration institution—illustrates this trend. From 2010 to 2020, the number of arbitration cases administered by VIAC surged by 336% compared to the period between 2003 and 2010. This significant increase reflects a rising preference for arbitration among businesses, driven by its ability to handle disputes efficiently and fairly. (Phan Trong Dat, et. al., 2022)

Moreover, awareness of arbitration has grown substantially over the past decade, especially in the last five years. Thousands of enterprises in Vietnam now actively reference arbitration clauses in their contracts, not only for international transactions but also for domestic agreements. This shift highlights arbitration's growing acceptance as a preferred dispute resolution method in various sectors of the economy.

The legal profession in Vietnam has also adapted to the increased demand for arbitration. Many law firms and practitioners now specialize in providing arbitration-related services, offering professional representation for parties involved in disputes. Some of these firms and lawyers have achieved international recognition for their expertise, further solidifying Vietnam's position as a hub for arbitration in the region.

Mediation in Vietnam

Mediation is a widely acknowledged method for resolving disputes, particularly in business settings, due to its ability to provide mutually satisfactory solutions. In the best cases, it can offer a win-win resolution for all parties involved. The appeal of mediation lies in its efficiency—both in terms of time and cost. It is also a process that can help preserve valuable business relationships, even after a dispute has been resolved. Mediation’s ability to keep the parties’ interactions positive in the post-dispute phase is one of its key advantages, especially in industries where ongoing collaboration is important.

In Vietnam, mediation has been in practice for quite a long time, albeit not always formally recognized or acknowledged by the parties involved. Historically, mediation was conducted by judges during court proceedings or by arbitrators during arbitration, but these processes were not necessarily seen as professional commercial mediation. It wasn’t until 2017 that Vietnam’s commercial mediation landscape saw significant legal reform with the issuance of the Decree No. 22/2017/ND-CP on Commercial Mediation. This legislation marked a turning point, officially recognizing mediation as a distinct, standalone method of dispute resolution, independent from the judicial or arbitration processes. The introduction of this Decree set the stage for the rapid development and formalization of professional commercial mediation practices in Vietnam. (Phan Trong Dat, et. al, 2022)

Following the enactment of the Decree, Vietnam saw the establishment of several new mediation centers, alongside the qualification of many commercial mediators who were authorized to practice under the new regulations. One such institution is the Vietnam Mediation Centre (VMC), a division of the Vietnam International Arbitration Centre (VIAC). The VMC is notable for being the first mediation institution created specifically under the Decree. The Centre reported that shortly after it launched its Rules of Mediation in July 2018, it received over ten high-profile cases, with a total dispute value of USD 44 million. Remarkably, 70% of these cases resulted in successful final mediated settlement agreements (MSAs), and all MSAs were voluntarily enforced by the parties involved.

In response to the rapid growth of the digital landscape and the increasing demand for more accessible dispute resolution processes, the VMC introduced its online mediation platform. This platform is among the first online mediation tools in Vietnam and has been

designed to meet the needs of a growing number of businesses seeking efficient, remote dispute resolution. By offering a more flexible, digital approach, it aims to further enhance the efficiency of the mediation process and attract even more businesses to adopt mediation as a preferred method for resolving disputes.

However, while mediation is growing in popularity, it must be acknowledged that there is still a long way to go before it becomes a widely accepted practice in Vietnam’s business community. Despite the obvious advantages, such as time and cost savings, businesses are still slow to adopt professional commercial mediation. Raising awareness among companies about the benefits of using mediation requires significant effort. One of the major concerns that businesses express when it comes to mediation is the enforceability of the mediated settlement agreement (MSA).

On a national scale, the MSA can be recognized and enforced by Vietnamese courts, but this process is often viewed as more complex compared to arbitration, where the parties participate in a single proceeding that results in a directly enforceable award. Arbitration is widely seen as more straightforward in this respect, which is why some businesses continue to prefer it over mediation, especially when enforceability is a primary concern. On the international stage, the MSA can be enforced under the 2019 Singapore Mediation Convention (SMC), which was established to provide cross-border enforcement for mediated agreements. The SMC is designed to work in a similar way to the New York Convention for arbitration, offering a global standard for the recognition and enforcement of mediation settlements. However, Vietnam is not yet a signatory to the SMC, which could make mediation in the country less attractive for international disputes, as the global enforceability of MSAs may be limited in the absence of this international agreement. (Phan Trong Dat, et. al, 2022).

In conclusion, while mediation in Vietnam has made great strides since the passage of the Decree on Commercial Mediation, and is increasingly being embraced by businesses, there remain significant challenges to widespread adoption. The ongoing efforts to raise awareness about its benefits, improve the enforceability of mediated settlements, and expand online mediation platforms will likely help to further integrate mediation into Vietnam’s dispute resolution landscape. The future of commercial mediation in Vietnam hinges on overcoming these hurdles and encouraging businesses to embrace this effective and flexible alternative to litigation and arbitration.

Mediation & Arbitration Combination in Vietnam

As Vietnam is expected to join the Singapore Mediation Convention (SMC) soon, there has been a growing trend of using both mediation and arbitration together to address concerns about enforceability. Various combinations of these two methods, designed to increase efficiency, have been developed and implemented. The most widely used approaches include mediation followed by arbitration (med-arb), arbitration followed by mediation (arb-med), and a combination of both, where arbitration is paused for mediation (arb-med-arb). (Phan Trong Dat, et. al., 2022).

In the med-arb process, parties first attempt mediation. If mediation is unsuccessful, arbitration follows. On the other hand, in arb-med, arbitration begins first, and if the parties wish to mediate, the arbitration is paused while mediation takes place. If mediation leads to an agreement, the arbitration process is typically suspended. The arb-med-arb procedure is similar, but if mediation results in a settlement, it is recorded in a consent award by the arbitration panel, giving it the same legal effect as an arbitral decision.

These combined processes, whether med-arb, arb-med, or arb-med-arb, are beneficial for resolving disputes quickly and efficiently. They allow parties to explore mediation at any point during the dispute resolution process while ensuring that arbitration serves as a backup plan if mediation fails. This dynamic encourages the parties to cooperate and seek a solution in good faith, with the assurance that arbitration will fully resolve the dispute if necessary. (Phan Trong Dat, et. al., 2022).

Among these methods, arb-med-arb stands out due to its complexity, purpose, and procedural structure. The main purpose of this process is to address the limitations of mediation, such as issues with enforceability and statute of limitations. The process allows arbitration to start first, preserving the statute of limitations in case mediation is delayed or fails. Additionally, even if mediation is successful, the resulting settlement is enforceable either voluntarily by the parties or through enforcement mechanisms under applicable legal frameworks.

The arb-med-arb process is typically designed to streamline the initial arbitration steps to maintain the parties' commitment to mediation. Once mediation concludes, the arbitration process resumes, either to recognize the mediation outcome or to address unresolved issues. The end result of this process can either be an arbitral award that

resolves all outstanding matters or a consent award confirming the mediated settlement. Both types of outcomes are enforceable internationally under the New York Convention, which is a significant advantage over the arb-med process in jurisdictions that recognize and enforce mediated agreements, like the New York Convention.

However, a point of controversy arises when a neutral party serves both as mediator and arbitrator in the same dispute. Some practitioners argue that this is acceptable, especially if the parties agree, as it saves time and costs by having the same neutral familiar with the case. However, others raise concerns that this violates confidentiality rules in mediation and arbitration. The mediator’s role is to help the parties find a solution, whereas the arbitrator’s role is to make a decision based on the arguments and evidence presented. This distinction makes it difficult for the same person to act impartially in both roles, leading to concerns about maintaining fairness and independence. The issue remains a subject of debate in the ADR community.

In practice, hybrid mediation-arbitration procedures can be complicated for businesses due to their complexity. Therefore, companies often seek the assistance of legal experts experienced in ADR to help navigate these processes efficiently.

The combination of mediation and arbitration is not new to the international ADR landscape. Institutions like the ICDR, ICC, and HKIAC have long provided hybrid solutions like med-arb. In fact, SIAC was the first to introduce the arb-med-arb protocol in 2011, in collaboration with SIMC. In Vietnam, however, the adoption of such hybrid ADR procedures is a recent development. In 2020, VIAC and VMC launched their first-ever combined ADR services, including the Med-Arb/Arb-Med Combo and the Arb-Med-Arb Protocol, marking a significant step in the country's ADR landscape. By offering both mediation and arbitration services, VIAC and VMC have tailored these procedures to fit local customs and maximize the benefits for users, encouraging further use of ADR and fostering its growth in Vietnam. (Phan Trong Dat, et. al., 2022)

Over the past decade, the Vietnamese government, along with its legal institutions and practitioners, has worked tirelessly to promote alternative dispute resolution, particularly arbitration. As a result, significant developments are expected in the near future, including possible amendments to the Law on Commercial Arbitration. This could position Vietnam as a Model Law country and a preferred arbitration seat. Such advancements would further establish Vietnam as a leading hub for international dispute resolution.

CONCLUSION

Indonesia and Vietnam have made notable strides in the practice of Alternative Dispute Resolution (ADR), each with unique legal frameworks and challenges. Indonesia has a well-established ADR system supported by Law No. 48 of 2009 on Judicial Power, Law No. 30 of 1999 on Arbitration and ADR, and relevant sections of the Civil Code. These laws provide various options like mediation, negotiation, and arbitration, allowing parties to resolve disputes outside of court. In contrast, Vietnam's ADR adoption gained momentum with the 2011 Law on Commercial Arbitration (LCA), formalizing arbitration as a reliable dispute resolution method, especially for commercial and cross-border matters.

Arbitration is a preferred method in both countries, addressing the inefficiencies of litigation. Indonesia's arbitration system is governed by Law No. 30 of 1999, while Vietnam's growth in arbitration is demonstrated by a 336% increase in cases between 2010 and 2020, according to the Vietnam International Arbitration Centre (VIAC). Mediation also plays a key role in both nations, with Indonesia integrating it into the judicial process, while Vietnam formalized mediation through Decree No. 22/2017 and established institutions like the Vietnam Mediation Centre (VMC).

Vietnam has innovated with hybrid ADR methods like med-arb, which combine mediation and arbitration for greater efficiency. While not yet prevalent in Indonesia, these methods offer a promising future for ADR in the region. Both countries face challenges in awareness and access to ADR, but Vietnam's continued development positions it as a potential regional arbitration hub, while Indonesia has the foundation to expand ADR's use across more sectors.

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