Kluwer Mediation Blog

Vietnam Series: Mediator's Settlement Proposals – A View From Vietnam

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In recent years, Vietnam has boosted its legal framework for commercial mediation. The story began with the promulgation of the new Civil Procedure Code 2015 whose Chapter 33 serves as the legal basis for the recognition of out-of-court mediated settlement agreements. Then, the Government issued Decree no. 22/2017/ND-CP on Commercial Mediation ("Decree 22") detailing and guiding the implementation of Article 317(2) of the Law on Commerce 2005. Being the first legislation specifically governing commercial mediation in Vietnam, Decree 22 prescribes, inter alia, the range of disputes which can be referred to commercial mediation; the principles and the process of commercial mediation; the qualifications of commercial mediators and their rights and obligations; and the establishment and the operation of commercial mediation institutions. In fact, Decree 22 relies heavily on the UNCITRAL Model Law on International Commercial Conciliation with a number of modifications to suit the local requirements of Vietnam.

In addition to a growing number of ad hoc commercial mediations, in late May 2018, the Vietnam International Arbitration Centre ("VIAC") established the Vietnam Mediation Centre ("VMC"), which is among the first commercial mediation institutions in Vietnam. Immediately after its establishment, the VMC introduced its Rules of Mediation ("VMC Rules of Mediation"), which shall be applicable to the process of commercial mediation conducted within the VMC from 1 July 2018.

In accordance with the principle of party autonomy, both Decree 22 and the VMC Rules of Mediation do not lay down in detail how the commercial mediator should conduct the process of commercial mediation. The only general requirement is that the process should be appropriate, taking into account the circumstances of the case and wishes of the parties, and that such process must be accepted by the parties (Article 14(1) of the Decree 22 and Article 7(2) of the VMC Rules of Mediation). However, both instruments clearly set out the right of commercial mediators to make settlement proposals. Article 14(3) of the Decree 22 reads that: "At any stage of the process of commercial mediation, the mediator may make proposals for a settlement of the dispute." Such provision is essentially a near verbatim adoption of Article 6(4) of the UNCITRAL Model Law on International Commercial Conciliation. Similarly, but more detailed, Article 7(3) of the VMC Rules of Mediation stipulates that: "The mediator may, at any stage of the mediation, make proposals for solutions to settle the dispute but must not impose a settlement on parties. Such proposals need not to be accompanied by a statement of the reasons thereof."

At a glance, such provisions may raise a number of concerns:

First, some may believe that settlement proposals are directive (rather than merely evaluative) which is contrary to the principle of party autonomy. For the avoidance of doubt, Article 7(3) of the VMC Rules of Mediation explicitly states that the mediator has no power to force the parties to accept his proposals. In fact, in accordance with Article 9(2)(b) of the Decree 22, the mediator has to respect the agreement of the parties, provided that such agreement is not contrary to the laws and the social morality. Therefore, when making settlement proposals, the mediator is not restricting or impeding the right of the parties to make their own independent decisions.

Second, in some cases, settlement proposals may seem to be more favourable to a party than the other, thus creating the appearance that the mediator is not impartial. Consequently, even though Article 7(3) of the VMC Rules of Mediation does not require the mediator to state the reasons for his proposals, the mediator should make clear with the parties that his proposals serve as his independent and objective evaluation of the case. Additionally, stating the reasons for settlement proposals also makes them more convincing and increases their chance to be accepted by the parties.

Despite these concerns, settlement proposals have significant advantages. First, they can overcome the posturing that often goes on in negotiations. Second, settlement proposals come with the guarantee of objectivity and legitimacy, taking into account the fact that the parties have confidence in the competence and integrity of the commercial mediator. Therefore, the authors predict that commercial mediators in Vietnam will make settlement proposals frequently, and they have high likelihood to be accepted by the parties.

Our prediction comes as no surprise if we know that the right of mediators (and judges) to make settlement proposals is well-established in Vietnamese law. A quick look at other forms of mediation demonstrates such a point of view.

First, in the context of labour mediation, Article 201 of the Labour Code 2012 provides that the labour mediator shall help the disputing parties to negotiate with each other. In case the parties in dispute cannot reach an agreement themselves, the labour mediator shall make settlement proposals for the parties to consider. If they accept the settlement proposal, the labour mediator shall memorialise the mediated settlement agreement in writing.

Second, in the context of court-annexed mediation, Article 210(4) of the Civil Procedure Code 2015 (guided by Directive no. 04/2017/CT-CA) on the process of court-annexed mediation provides that:

– the judge shall inform the parties about relevant legal provisions as well as analyse the legal effect of successful mediation;
– ? when the parties have expressed their opinions, the judge shall determine settled issues and unsettled issues, and request the parties to clarify their positions on unsettled issues;
-? when the parties have clarified their opinions but unsettled issues remain, the judge shall make settlement proposals for the parties to consider;
– ? the judge shall make conclusions on settled issues and unsettled issues (if any).

Although settlement proposals may be common in other forms of mediation, and both Decree 22 and the VMC Rules of Mediation state that settlement proposals may be made at any stage of the process of commercial mediation, we are not saying that commercial mediators should always

make settlement proposals. On the contrary, commercial mediators should only use settlement proposals as a last resort to save what would otherwise be a failed mediation, i.e., after all other attempts to avoid impasse have failed. Like the “five rights” of medication use (the right patient, the right drug, the right time, the right dose, and the right route), settlement proposals which are rightly made should work as an effective intervention to help the parties resolve their disputes.

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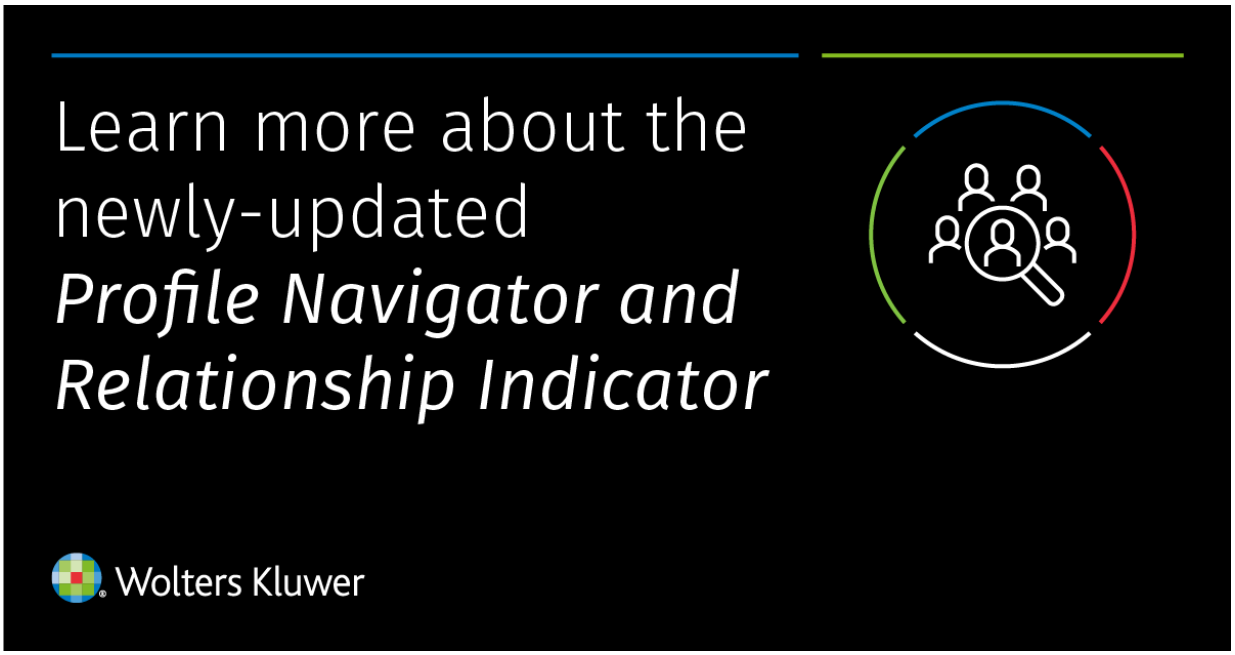

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