Conciliation in resolving collective labor dispute resolution: legal practices and limitations in Vietnam

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Abstract

Labor Conciliation is a recommended measure to settle collective labor disputes by the International Labor Organization (ILO) after the failure of collective bargaining. Based on the ILO's principles, each country develops its own legal regulations on conciliation process in line with the country situation and conditions. This paper discusses the Vietnam's legal regulations on labor conciliation as a method of collective labor dispute resolution, their limitations and some recommendations for the improvement of conciliation activities.
keywords: Collective labor disputes, conciliation, labor conciliator.

1. Context and objectives

The terms "Conciliation" and "Mediation" are defined, interpreted and practiced differently in some countries, whereas in other cases no distinction is made between those two concepts. The International Labor Organization (ILO), Vietnam and some other countries use "*conciliation*" and "*mediation*" interchangeably.

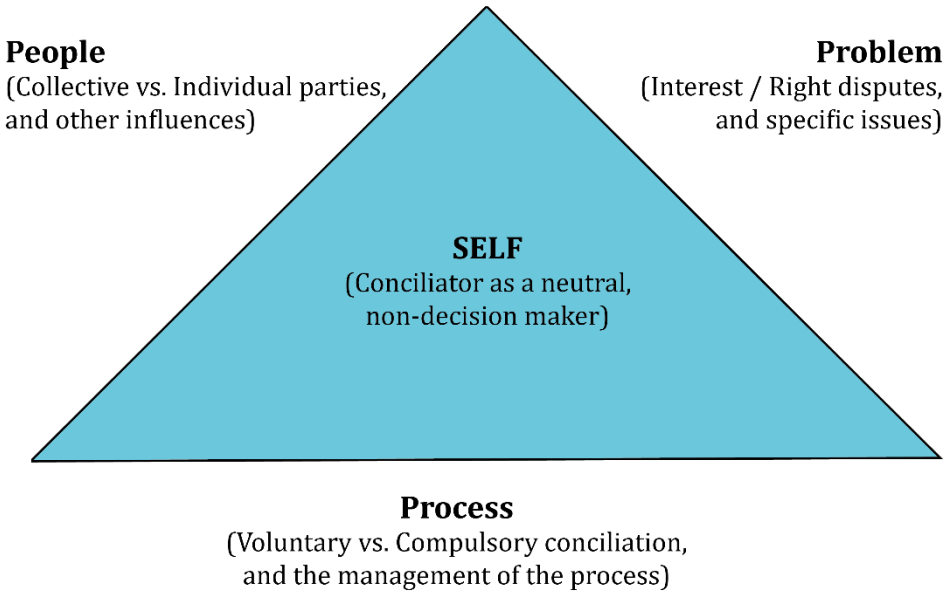
According to the ILO, conciliation is "*a process in which an independent and impartial third party assists the disputing parties to reach a mutually acceptable agreement to resolve their dispute*" [1].

Conciliation is a flexible and effective measure to help disputing parties find unified solutions to remove conflicts and disagreements, which can be considered a "disputing party-centered" process because it mainly focuses on the needs, rights and interests of employers and labor collective. Conciliation has the presence of an intermediary, whereby the conciliator will intervene to facilitate and support employer and labor collective in reaching an acceptable agreement for both parties. A labor conciliator is not a judge, an arbitrator or a person imposing a decision or agreement between the parties. When conciliating a labor dispute, the most important task of the conciliator is to help the parties understand and come together to negotiate for a solution. He/she provides support to the parties in reaching consensus, being fully aware that the final

[1] International Labor Organization (2013), p. 223.

decision should be made by the parties themselves. A labor conciliator must be someone who does not have related interests to the dispute and must be completely neutral. His/her neutrality creates the trust for disputing parties when requesting for help. The result of a successful conciliation process is an agreement reached by both parties and its execution entirely depends on the willingness of the parties without any legally guaranteed decision. The ILO has adapted the following model of Conciliation:

Figure 1: ILO's adapted model of Conciliation.



Source: The Conciliator's Handbook, J.E. Beer and E. Stief, © 1997 Friends Conflict Resolution Program.

The model shows three main components involved in the dispute resolution including PEOPLE, PROBLEM and PROCESS. "PEOPLE" here refers to the disputing parties and other influences; "PROBLEM" contains the disputed issues and things that either party is not satisfied with, while "PROCESS" describes conciliation activities in both voluntary and mandatory manner. The fourth component stated in the model is the conciliator who facilitates the whole conciliation process with the neutral role of a non-decision maker. The conciliator uses a variety of techniques to guide, build and help parties communicate openly, create favorable conditions for finding optimal solutions to resolve Collective Labor Disputes (CLDs). Based on the ILO's classification and depending on national policies on

industrial relations and sizes of the dispute, conciliation may be voluntary or compulsory.

- *Voluntary conciliation* under the ILO's definition is a situation in which conciliation is set in motion only with the agreement of the disputing parties[2].

Voluntary conciliation is often applied in countries where the goal of national labor relations policy is to promote the development of collective bargaining. This conciliation mechanism includes countries such as Italy, Japan, Austria, Belgium, the United States, Kenya, Sri Lanka, Philippines, Ireland, Egypt, India, England, Ghana and Colombia.

- *Compulsory conciliation*: Collective labor disputes must be resolved by conciliation before the parties can use other methods. As defined by the ILO, this is a situation where the conciliation service is requested by law to be used by disputing parties. Their attendance at a mediation meeting is mandatory but reaching a resolution is not[3].

Compulsory conciliation is usually applied in countries with a less developed collective bargaining system that may lead to a deadlock and recourse to strikes. Under this method, the competent subject will accept to settle a collective labor dispute when receiving request from either disputing party. Conciliation is defined as a mandatory method to resolve collective labor disputes when countries want to create opportunities for resolving the dispute peacefully before either party applies industrial actions. Many countries such as Denmark, Canada, Finland, New Zealand, France, Australia and Sweden stipulate conciliation as a compulsory procedure before the disputing parties can resort to industrial actions. Under the Finnish law, mediation is mandatory though disputing parties have no obligation to firmly reach a solution. Elsewhere, such as in the case of Malta, conciliation is mandatory but only when the parties' negotiations have failed. A similar approach is adopted in Lithuania and Estonia, where unsolved disputes must be sent to relevant public authorities and handled by a public mediator or committee[4]. Most countries in Southeast Asia, including Vietnam, stipulate the resolution of CLDs by conciliation as compulsory[5]. This paper discusses the Vietnamese legal regulations on labor conciliation as a measure for collective labor dispute resolution, their limitations and some recommendations for the improvement of the conciliation effectiveness.

[2] Ibidem, p235.
[3] Ibidem, p222.
[4] International Labor Organization (2007); E. Daya (1995*), Conciliation and Arbitration Procedures in Labor Disputes: A Comparative study*, International Labor Office.
[5] Campuchia (1997), Art. 304; Laws of Malaysia (1967), Art. 18-19; Laws of Singapore (1960), Artt. 21 & 22; Laws of Thailand (1975), Art. 21.

2. Vietnamese legal regulations on labor conciliation

2.1. General procedures

According to Vietnam Labor Code 2012 and Revised Labor Code 2019, conciliation is a mandatory procedure applied for both right and interest CLDs[6]. To enable the conciliation process, one of the disputing parties needs to submit the request to district-level Department of Labor Invalids and Social Affairs (DOLISA) in the area where the dispute occurs. The requester has the right to select a labor conciliator and require the district-level DOLISA to appoint that conciliator to handle the dispute[7]. Within one working day from the date of receiving the report of district DOLISA, the chairperson of District People's Committees (DPC) will issue the decision appointing the conciliator for the dispute settlement. This regulation respects the self-determination rights of parties during the dispute settlement. However, it may create the other party's distrust in the conciliation work done by the only labor conciliator selected by the requester, and consequently affect the conciliation results. In addition, though the vacancy announcement is publicly posted, labor conciliators are mainly appointed among the staff of district DOLISA and Trade Union; thus, the local labor conciliators are not diversified and the representatives of employers are not included.

According to the existing legal regulations, before taking the conciliation measure, the labor conciliator needs to guide disputing parties to negotiate themselves with the aim of achieving a common agreement. If they themselves can find solutions for the dispute, the conciliator will record it as successful mediation. Where the solutions are not reached by the two parties, the conciliator will suggest an option for their consideration. If they both accept, the conciliator will record it as successful mediation. If they are both not satisfied with the suggested solution or one of the parties is not present for the second summoning without an adequate reason, the conciliator will record it as unsuccessful mediation. The mediation minutes will be recorded with the signatures of the present party and mediator, copied and sent to both parties within one working day from issuance date. The law does not establish sanctions in cases where either party does not comply with the conciliated results, which may make the mediation attempt totally meaningless. In cases where the conciliation has failed, or one of the parties refuses to comply with the results of the successful conciliation, as described in the written record, or does it after the deadline, the appointed conciliator shall not pursue the mediation meeting further; the disputing parties have the right to

[6] Quốc hội (2012), Artt. 201 & 204; Quốc hội (2019), Art. 191 &195.
[7] Bộ Lao động, Thương binh và Xã hội (2013), Art.7.

either request the Labor Arbitration Council or appeal the People's Court for solutions if it is a right-related CLD[8]. If it is an interest-related CLD, the parties can either choose to appeal the Labor Arbitration Council for the dispute settlement or go on a strike under the leadership of the workers' representative organization[9], as regulated in the Articles 200, 201 &202 of the Revised Labor Code 2019.

2.2. Competent subject for labor conciliation

Under the provisions of Article 184, Labor Code 2019 and Clause 1, Article 3 of the Government Decree No. 46/2013/ND-CP dated May 10, 2013 detailing the enforcement of several articles of the Labor Code 2012 concerning labor disputes, labor conciliator is stipulated as one of the competent subjects to settle labor disputes. The conciliator is appointed for a five-year term by, and subject to the management of, the chairperson of Provincial People's Committee (PPC), who may exempt or remove him/her from office in accordance with the law. Under the Labor Code 2012, the authority to appoint and manage labor conciliators belonged to the DPC's chairperson. In fact, the revised provision, which stipulates that conciliators should be appointed and managed by PPC chairpersons, provides them a higher social status, thereby encouraging qualified candidates for the position. In addition, the management of labor conciliators at the provincial level enables them to coordinate with relevant provincial agencies during their work, and facilitates the mobilization of labor conciliators among districts, as and when required. In the past, when labor conciliators were managed by the chairpersons of DPCs, they were allowed to resolve only the labor disputes which occurred within their district areas. This led to the situation that some conciliators were overloaded, while those serving in other districts were idle and were not given the opportunity to improve their professional knowledge and skills through practice.

Circular No. 08/2013/TT-BLDTBXH stipulates the procedures for appointing and dismissing labor conciliators. It includes the following steps:

i) determine the number of labor conciliators;
ii) publicize the vacancy announcement;
iii) appoint the labor conciliator.

The number of labor conciliators in each district will be determined by the chairperson of DPC based on the number of enterprises and status of labor disputes in the area. This number can be increased annually depending on the

[8] Quốc hội (2012), Art.192.
[9] Ibidem, Art.196.

capacity of labor dispute resolution, number of enterprises located in the areas and existing number of conciliators[10]. Usually, three conciliators are appointed in districts with a limited number of labor disputes and ten in those with a high quantity of disputes. A few districts have only one or two conciliators, which is not really optimal in cases where disputing parties request for a replacement of conciliators because they have reason not to trust the appointed one. Concerning the procedure for dismissing a conciliator, the chairperson of PPC will consider and sign the decision on dismissal of the labor conciliator upon receipt of the relevant request from the DPC's chairperson. In general, the procedures for appointment and dismissal of labor conciliators are fairly clear, quick and suitable to the functions and tasks of the competent authority and the relevant parties have sufficient time to handle the necessary work.

Concerning the competence, conciliator is the only subject with authorization to conduct the resolution of CLDs at the conciliation stage. This is the main new point of the Labor code 2012, which remained unchanged in the revised Labor Code 2019 in terms of competent individual/organizations to settle labor disputes. From the issuance of the Labor code in 1994 till 2013, there existed two competent entities for CLD resolution, including the grassroots labor conciliation council and the conciliator. The grassroots labor conciliation council was established in the enterprises with the existence of trade union and would be responsible for solving all CLDs arisen within such enterprises[11]. Conciliator had authorization to resolve disputes in the enterprises where the grassroots labor conciliation council did not exist, or where a council did actually exist but the disputing parties chose to invite a conciliator for their dispute settlement[12].

According to the prevailing laws, the conciliator's competence to conciliate CLDs is limited to disputes that arise in the enterprises where strikes are allowed. For the enterprises where strikes are prohibited or those operating in essential branches and domains of the national economy, the competence to conciliate labor disputes shall belong to the labor arbitration council[13]. In the first case, labor conciliators can only resolve the disputes when there is a request for conciliation from either disputing party and, before that, the dispute has been managed through collective bargaining but failed to reach a result, as one party refused to negotiate, or collective bargaining happened but failed, or it was successful but one party didn't comply with the results.

[10] Bộ Lao động, Thương binh và Xã hội (2013), Art.4.
[11] Chính phủ (2007), Art.4.
[12] Chính phủ (2007), Art.7.
[13] Chính phủ (2013), Art.4.

2.3. Duration of conciliation

The maximum duration to settle a collective labor dispute by conciliation as regulated is five working days counting from the date of receiving the request for conciliation. After this period, if the labor conciliator does not conduct the mediation, the disputing parties have rights to bring the case to the Labor Arbitration Council or appeal the People's Court (for the right-related CLDs) and go on a strike (for interest-related CLDs) for solutions. Although the law regulates five working days as the duration for the labor conciliator to finish a dispute mediation work, the conciliator in fact does not have full five days to do it. As stipulated, within one working day after receiving the letter of request from disputing party, district DOLISA must report to the chairperson of DPC for appointing a conciliator to resolve the dispute; within one working day after receiving the report from district DOLISA, the decision of conciliator appointment can be issued by the chairperson of DPC[14]. Thus, the actual time available to the conciliator for all the work required to resolve the dispute is reduced to three days only, which is a too short timeframe for him/her to identify and collect relevant data and evidences, develop a plan of action and complete the mediation process at the same time.

3. Legal limitations and recommendations for the improvement of conciliation effectiveness

3.1. Legal limitations

3.1.1. Low compliance with the conciliation international standards

According to the ILO, the resolution of labor disputes by conciliation is common and particularly important because it can better ensure the will of disputing parties than a trial in the Court. Specifically, this issue was noted by the ILO in its Recommendation No.92 of 1951 on voluntary mediation and arbitration, whereby the ILO recommends that States establish voluntary mediation agencies in accordance with their own conditions, set up free and quick procedures for

[14] Bộ Lao động, Thương binh và Xã hội (2013), Art.4.

resolving disputes either on initiative of any of the disputing parties or by the voluntary mediation agency, as regulated[15]. Thus, the mandatory mediation procedures regulated in the Labor Code of Vietnam need to be considered for revision, since they are contrary to the ILO labor standards.

3.1.2. Tight duration and lack of regulations on the conciliator's authority and obligations in requesting for data provision and technical assistance during the conciliation process

Despite the large amount of preparatory work needed prior to the mediation meeting, the conciliator is required to inform the disputing parties of the date, venue and agenda of the meeting within one working day from the date of receipt of the notification of his/her assignment to resolve the dispute, as regulated at the Article 7, Circular No. 08/2013/TT – BLĐTBXH. This means that the labor conciliator should inform the disputing parties of the schedule of the conciliation meeting even when the substance of dispute has not been clearly understood, or the availability of the necessary information is uncertain, which may substantially affect the effectiveness of the session. Moreover, the existing law does not regulate the responsibilities of the labor conciliator, such as his/her duty to keep secret the confidential data got during the settlement process, as well as the sanctions if the conciliator violates such terms. This may affect the positive outcome of the mediation, as the disputing parties, and especially the employers, may hesitate to provide to the labor conciliator sensitive information related to their business know-how.

In addition, prior to the conciliation meeting, the appointed conciliator has to do an extensive preparatory work to promote the quality and effectiveness of the conciliation, which may include: review of legal document, collective agreements and internal statute of enterprise; identification and collection of relevant data and evidences to acquire a comprehensive knowledge of the disputed contents and the actual status of the industrial relations between the two parties; collection of information concerning their business situation, effectiveness, obstacles, advantages and priorities among the recommendations put forward by each party, as well as the development direction of the enterprise, the income of employees and other data to be compared with those of other enterprises working in the same industry in the same region. This would enable the conciliator to gather sufficient information to develop an appropriate method and maximize the effectiveness of the conciliation work. In order to get those data and information,

[15] International Labor Organization (*1951)*, Para. 3.

apart from the documents provided by the disputing parties, the labor conciliator should have the right to conduct activities to identify and collect data and information related to the enterprise and employees; he/she should also have the right to require technical assistance from other agencies or experts such as finance, accounting and auditing. However, the existing law does not specifically regulate these rights of the labor conciliator during the fact-finding phase but generally regulate the rights for all subjects that have competence to resolve labor disputes instead.

Although it is regulated at the point a, clause 2, Article 182, Revised Labor Code 2019 that the disputing parties have obligations to "*sufficiently and timely provide the documents and evidences as proof for their request*", the law does not regulate the sanctions, should these parties or the relevant agencies refuse to provide the required documentation or evidence to the labor conciliator.

Hence, when one of the two parties or relevant agencies doesn't want to cooperate, the labor conciliator will not be able to access important data to resolve the dispute.

3.1.3. Lack of regulations on the enforcement of conciliation results

In Section 5, Part I, Recommendation No. 92, 1951 on voluntary mediation and arbitration, the ILO encourages countries to ensure that: "*All agreements which the parties may reach during conciliation procedure or as a result thereof should be drawn up in writing and be regarded as equivalent to agreements concluded in the usual manner*"[16]. Thus, the record of successful mediation should be recognized as a written agreement between employees and employers. In other words, it has the same legal value as a collective agreement. However, in practice, the minutes of mediation conducted by labor conciliator only record the successful or unsuccessful mediation results, while the implementation of the agreements reached depends on the will of disputing parties. The record of successful mediation has no binding legal value on disputing parties, as the law only generally stipulates that disputing parties must "*abide by the agreement reached, the arbitrator's judgment or decision*"[17]. Apart from this sentence, no sanctions shall be imposed when the obliged party fails to abide by the agreement recorded in the minutes of a successful mediation, as established by the conciliator, while the other party has neither the right to request the Court to recognize the mediation results[18] nor to have it executed by the civilian enforcement team, as stipulated in

[16] Ibidem, Part I.
[17] Vietnam Revised Labor Code 2019, Point b, Clause 2, Article 182.
[18] Vietnam Civil Code 2015, Article 33.

the Law on civil enforcement, because this matter is not governed by such law[19]. The implementation of conciliation results depends on the voluntary execution of the disputing parties, but it is not guaranteed by the coercive power of the government. This can be regarded as a weakness of the conciliation process, as the unwilling disputing party may take advantage of the conciliation procedure to delay the fulfilment of its obligations, leading to the case where the infringed party loses the right to initiate a lawsuit at the court due to expiration of the time limits and resort to an illegal strike.

In addition, for the practice of the conciliation meeting, Clause 3, article 188, Revised Labor Code 2019 regulates that the meeting can be held only with the presence of either the disputing parties or the persons authorized. The law does not regulate the solution for the cases where the disputing parties or their representatives are not present at the first conciliation meeting. It only regulates the case where one disputing party is summoned for the second time but is still not present without providing an adequate reason; this would be the basis for the labor conciliator to record it as an "*unsuccessful mediation*". Therefore, should one of the disputing parties not be present at the first meeting, regardless of having provided an adequate or inadequate reason, the labor conciliator will postpone the meeting and call for the second one. If one of the disputing parties is summoned for the second time but is still absent without an adequate reason, the labor conciliator will record it as an unsuccessful mediation. Then, if an adequate reason for the second absence is put forward by any of the disputing parties, the labor conciliator has to postpone the meeting again and call for a third one. However, as the existing law does not regulate what should be considered as an "*adequate reason*" for absence of either party, the employers may take advantage of this gap to delay their presence at the mediation meeting.

3.1.4. Lack of regulations on evaluating the efficiency of conciliation process

No instrument for the evaluation of the conciliation system's efficiency has been developed so far. No guidance does exist either to measure the success rate of mediation or to evaluate the level of satisfaction of the service users. In addition, as of today the effectiveness of the conciliation procedure is mainly depending on the field of experience and the personal ability of the conciliators to communicate with the disputing parties, but is not relying on professionally trained staff.

[19] Vietnam Civil enforcement Law 2008 (revised in 2014), Article 2.

3.2. Recommendations for the improvement of conciliation effectiveness

3.2.1. Enhance the application of voluntary conciliation procedures to meet the international labor standards

Vietnam needs to study and apply voluntary conciliation instead of the mandatory procedures in the resolution of collective labor disputes, as well as promote dialogues and collective bargaining activities at enterprises and industry levels to meet the international labor standards.

3.2.2. Develop the cooperative mechanism between labor conciliators and relevant agencies/individuals during the mediation process

There should be specific regulations which clarify the rights of conciliators to access the data/information and request for technical assistance (accounting/finance/auditing, etc.) from relevant organizations and individuals. Those regulations should at the same time include the applicable sanctions for those who supposedly refuse to provide the related information and/or constrain the mediation work.

3.2.3. Supplement the regulations to ensure the enforcement of mediation results and amend the related regulations for consistency

Those additional rules should allow one disputing party to appeal the Court to recognize the record of a successful conciliation, in compliance with the Civil Procedure Code, if the other party does not implement the agreement reached in the mediation meeting. Accordingly, in order to ensure the consistency of the legal system, it is necessary to amend the provisions of Vietnam revised Civil Enforcement Law 2014 with a view to incorporating the provisions on enforcement of mediation results and labor arbitrator's awards into Article 2 (in addition to those on commercial arbitrator's awards). Furthermore, penalties

should be applied to the party that refuses to implement the conciliation results to improve the enforceability and the effectiveness of mediation, which will encourage the disputing parties to choose these solutions instead of resorting to unlawful wildcat strikes. Apart from that, it is also necessary to amend the current mechanism for handling unlawful spontaneous strikes by the inter-sectorial Task Force through its State administrative intervention, whereby labor relation institutions should be more often used instead to harmonize the interests of parties, minimize the number of disputes and strikes.

3.2.4. Develop a measurement and evaluation system of conciliation activities

An effective assessment and measurement system of conciliation activities should be developed, which can provide detailed forms and indicators showing the quality, the satisfaction level of mediation results and the achievement rate of conciliation agreements, so as to know where and how the conciliation activities should be improved for identification of adequate solutions. In addition, it's also necessary to provide labor conciliators with professional training on mediation to build their capacity and improve the quality of mediation process.

4. Conclusion

Conciliation is mandatory in resolving CLDs in Vietnam, the labor conciliator can be full-time or concurrently appointed by the chairperson of the PPC with specific functions, duties and position allowance. However, in most of the cases, workers do not choose conciliation or collective bargaining but go on spontaneous strikes as the first solution to the disputes. Therefore, it is necessary to review the appropriateness, the current practice and the effectiveness of Vietnam's mediation regulations, as well as the representative role of trade unions and labor representative organizations in CLD resolution to improve the efficiency of conciliation activities and promote the country compliance with the international labor standards.

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