

LEGAL REGULATIONS ON ONLINE MEDIATION AND SEVERAL RECOMMENDATIONS FOR VIETNAM

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ABSTRACT:

The legal regulation on online mediation is rooted in the framework of mediation law combined with its online characteristics, thereby creating distinct features of online mediation compared to traditional mediation. Therefore, when formulating regulations governing online mediation, legislators need to pay attention to these characteristics. In addition to the existing legal provisions on mediation, the issues of online mediation agreement, confidentiality, privacy, standards and skills of mediators when resolving disputes online need to be addressed.

Keywords: commercial mediation, online mediation, legal regulations.

1. Introduction

Commercial activities are increasingly developing with various new and complex forms. This leads to trade disputes that are constantly increasing in both quantity and value. The types of commercial disputes are also increasingly diverse, requiring non-traditional dispute resolution methods. With the rapid rise of the Internet emerging as a borderless market, commercial activities have been and still are trending toward the online environment. Thus, commercial dispute settlement must also gradually follow this trend with the emergence of Online Dispute Resolution, that is, dispute resolution based on the Internet environment with the development of electronic engineering, intangible technology and information technology.

In Vietnam, mediation has been established based on cultural factors in business activities of traders and has been regulated under Article 312 of the Commercial Law 2005. However, until 2017, the Government promulgated Decree No. 22/2017/ND-CP on commercial mediation. This is an important legal basis to promote the development of mediation activities in Vietnam, in line with the development trend of the world. Besides, along with Law on E-transactions, the Civil Procedure Code 2015 has numerous provisions to support the online dispute resolution, implying that the application of online mediation will be a new tendency in Vietnam in the near future.

Nevertheless, in Vietnam, the issue of commercial dispute resolution by means of online mediation is still quite new in terms of theory,

practice and legal regulations. This article studies the law on online mediation; on that basis, some recommendations will be proposed for the development of the law on mediation in Vietnam.

2. The concept of online mediation and the legal regulations on online mediation

The concept of mediation is defined in many national and international legal documents but there has not been any legal document stipulating the definition of online mediation. The concept of online mediation is mainly introduced from the point of view of researchers.

According to Lawson, “online mediation” is a form of mediation in which two mediators use electronic means such as emails, online messages, online calls or video conference calls instead of using common methods of communication such as face-to-face meetings or telephones¹. Meanwhile, Ethan Katsh and Janet Rifkin identify online mediation as part of online dispute resolution, a voluntary process in which disputes between parties are facilitated to be resolved by a third party called a mediator in order to reach a mutual agreement². According to Gergely L. Szozke, online mediation can be understood as a mediation process where information technology and remote dialogue are applied in part or in whole. Therefore, online mediation is a special type of mediation method as well as a form of online dispute resolution³.

To sum up, online mediation can be understood as the use of online formats as mentioned above in part or in whole of the mediation process. Besides, information technology elements integrated into the online mediation process do not compromise the nature of the mediation. Perhaps, the issue at stake is the method of communication between disputing parties, between intermediaries and related parties.

The development of mediation in general and online mediation in particular in the world as well as in Vietnam in order to meet the needs of dispute resolution in commercial activities is the basis for the state to issue regulations governing this social relationship. Based on the concepts of law and online mediation, it can be understood that the law on online mediation is “a system of legal norms

promulgated or recognized by the State to govern mediation relationships of arising disputes through online means”.

3. Features of the legal regulations on online mediation

The legal regulations on mediation will have the combined characteristics of the law on mediation and the law on electronic transactions, therefore it will have the following characteristics:

First, the process of forming the legal norms on online mediation originates from the development of information technology and the Internet: Mediation has existed in the world for a long time and been applied in many fields such as marriage and family, labor, commerce. Legal norms on mediation have also evolved in line with this development, with adjustments for each area. However, online mediation was solely applied when the Internet emerged⁴, helping people to communicate through the online environment; thus, it created a way of mediation implemented on online platforms and in order to develop and implement this method, the legal regulations governing electronic transactions in general and legal relationships in online mediation in particular have been established.

Second, the regulations on online mediation must be based on the choice of the parties: Mediation is the voluntary dispute resolution method; therefore, when mediation is implemented in the online environment, this feature remains unchanged. This option belongs to the parties before a dispute occurs until a final result is reached.

Third, the disputes are resolved by online mediation, including both online and offline: Although online mediation originates from the need to resolve e-commerce disputes⁵, with the development of technology, online mediation applies not only to online disputes but also to offline disputes. Hence, the regulations on online mediation will be adjusted to be applicable to online as well as offline dispute settlement.

Fourth, the legal regulations on the subjects of online mediation will be more diverse: Mediation is the dispute resolution method with the participation of a third party, but in an online environment, there

are the fourth party and the fifth party which are the network service provider and the technology provider respectively⁶. The legal regulations governing the subject of online mediation will cover all parties involved in this dispute settlement process.

Fifth, regulations on online mediation have to create amiability and flexibility among the parties: The basis of mediation is to create a friendly and comfortable space so that the disputing parties can continue to find one common voice together; therefore, the regulations on online mediation will not be binding, creating flexibility to involved parties.

Sixth, there must be strict regulations on cyber security, safety and confidentiality: The principle of security has been stipulated under the mediation law; however, when being implemented in the online environment, this principle might be violated by hackers. Meanwhile, the information can be converted into data messages or information transmitted by analog technology, which cause potential risks such as system crash, technical malfunction, data loss or data theft for other purposes. Therefore, regulations on cyber security, safety and confidentiality should be focused on under the legal regulations on online mediation.

Seventh, regulations on online mediation should aim to harmonize international law: Due to the practical importance of online mediation in the settlement of commercial disputes in general and cross-border e-commerce dispute activities in particular, the legal system governing online mediation will have to create harmonization of international law in order to facilitate the implementation of successful mediation decisions.

4. Contents of the legal regulations on online mediation

Based on the characteristics of the legal regulations on online mediation, the content of the legal regulations on online mediation will include the following issues:

- *Method of signing, storage, form and content of online mediation agreements:* The mediation agreement is an important legal basis for the parties

and competent mediators to participate in the dispute settlement process. As for the online mediation, the agreement can be made in writing or by electronic means; thus, regulations on the online mediation agreement must stipulate the method of signing, storage and electronic forms of this agreement. The usual content of online mediation agreement should incorporate issues related to the online environment, which may include the fee for video conferencing or teleconference and accepted and binding methods of signing documents⁷.

- *Regulation on privacy of online mediation:* As for mediation, it is important to clearly distinguish between information security, data security, system security and user privacy. Therefore, it is necessary to have regulations on the responsibility of information security and privacy for the parties participating in the online mediation. Especially, the focus on online system security is the most crucial aspect since it determines the trust of customers for the online mediation service that they are using, even if it is the system operated by the machine that performs the task of mediation or human beings behind it⁸.

- *Mediators and related parties in mediation:* The mediators expertise, skills and ethics in the online mediation process are decisive in each dispute. It is because of this importance that the law on online mediation needs to stipulate the necessary criteria and conditions for mediators, in which it is needed to focus on training mediators when participating in mediation. Regulations on the rights and obligations of other subjects including disputing parties, network service providers and technology providers are also specifically regulated to ensure the ability to carry out this process.

- *Online mediation process:* As a dispute resolution mechanism based on the choice of the parties, the mediation process is very flexible, depending on the established mediation centers, so the provisions of the law only should be oriented, creating a basis to help these centers build an appropriate information communication process.

- *Management organization and duties of online mediation centers:* In order to provide online

mediation services, service providers must meet the requirements of management organization, human resources and technology. Therefore, the law on online mediation needs to have specific regulations and standards for online mediation centers.

- *Evidence in online mediation:* In online mediation, in order to achieve a successful outcome, the parties need to exchange and provide mediators with a variety of documents, digital photos, emails or opinions, etc. This information will be subsequently checked, verified and stored by the online mediation centers as evidence for commercial mediation. However, this exchange of information may face various barriers due to the involuntary consent of the parties. For example, the parties are concerned that the documents provided or their business secrets, may be exposed. To alleviate this concern, it is necessary to have specific regulations regarding the confidentiality as well as the possibility of not being accepted as evidence of information, and documents provided in the online mediation procedure will need to be specified.

- *Recognition and enforcement of decisions of online mediation:* The online mediation decisions can be made in writing or by a data message signed by the mediators and the parties. If the successful mediation decision is made in writing, there are specific regulations guiding its recognition and enforcement; nevertheless, if the successful mediation decision is presented in electronic form, these decisions will face some difficulties or require specific regulations to be recognized as legally enforceable⁹. In addition, in the case of decisions with foreign elements, the requirement for the harmonization of the law on recognition and enforcement of online mediation decisions in the form of messages is necessary to be supplemented.

5. Several proposals for building legal regulations on online mediation in Vietnam

Hitherto, Vietnamese legal system has not had any specific regulations on online mediation; yet, based on regulations on commercial mediation and e-transactions, online mediation activities are still being implemented in Vietnam, although there are

also legal loopholes. Therefore, in order to develop the online mediation system in Vietnam, it is necessary to promulgate and improve the following legal regulations:

- *Improving the law on commercial mediation:* In order to develop online mediation, first, there is a need for improving the legal regulations on commercial mediation, in which it is necessary to raise the importance of commercial mediation by establishing an independent statute to broaden the scope of mediation. Second, it is vital to suspend the calculation of the statute of limitations for initiation of a lawsuit as recommended by the UNCITRAL Model Law on International Commercial Mediation as well as to develop the regulation on confidentiality obligations when participating in mediation. In addition, regulations on training mediators and mediation centers must be supplemented; and summary procedures in the procedure for recognizing the results of successful mediation outside the court must also be regulated.

- *Perfecting the law on electronic transactions:* It is necessary to issue specific regulations guiding the entry into electronic contracts, which is a legal framework for the prevention of possible disputes in e-commerce transactions. Supplement regulations on the collection and storage of electronic evidence to protect the legitimate rights and interests of parties participating in e-commerce activities.

- *Improving regulations on online mediation:* Although mediation is still being implemented in Vietnam, the absence of specific regulations on online mediation will make the parties hesitant in choosing this method as well as increase the online participation confirmation procedures and processes of the parties. Therefore, there should be specific regulations on this method to create trust for the parties as well as the legal basis for online mediation to develop.

- *Providing standards for mediators participating in online mediation:* As skills for online dispute resolution will be different from skills in face-to-face mediation, it is necessary to supplement regulations on requirements for mediators participating in online mediation. Mediators must

have information technology skills and online mediation skills. These requirements can be fulfilled by specifying the number of training hours and training content for the mediator.

- *Providing standards of online mediation centers:* In Vietnam, some mediation centers have implemented online mediation such as Vietnam International Commercial Mediation Center (VICMC), Mediation Center Vietnam (VMC), Hanoi International Arbitration Center (HIAC); however, there is an absence of standards related to information security procedures when applying online mediation, especially specifying concrete responsibilities of the centers to keep information confidential during the online mediation process.

- *Improving regulations for certifying websites providing online mediation services:* With the development trend of mediation, different mediation centers have been established, as well as the websites of companies and electronic marketplaces. E-commerce also has online mediation functions. Nonetheless, it is demanded to have a mechanism to supervise and evaluate the

activities of websites providing online mediation services to protect consumers.

- *Building an online system for recognition and enforcement of successful mediation decisions:* Although online mediation is applied, the process of recognition and enforcement of mediation decisions will be difficult due to the absence of regulations on the online system on recognition and enforcement of successful mediation decisions; for example, the procedure for online submission of minutes of successful mediation, confirmation of electronic signatures of the parties, payment of court fees via the Internet. Therefore, in order for online mediation to truly become a closed online process, regulations on recognition and enforcement of online mediation decisions need to be promulgated such as building an electronic court system. In addition, Vietnam also needs to actively promote the process of joining international treaties on commercial mediation, such as the Singapore Convention on Mediation, in order to progress towards the recognition and enforcement of cross-border online mediation decisions ■

ENDNOTE:

¹Lawson, P. (2002). *Disputes in cyberspace: online dispute resolution for consumers in cross-border disputes - an international survey*. Canada: Consumers International.

²Ethan Katsh & Janet Rifkin. (2001). *Online Dispute Resolution: Resolving Conflicts In Cyberspace*, San Francisco: Jossey-Bass, pp. 56

³Gergely L. Snzoke. (2008). How (not) to Regulate mediation the Effects of the Strict Hungarian Provisions on Online Mediation. *Masaryk U. J.L. & Tech.*, 147, 149-150.

⁴E. Katsh (1996). *Dispute Resolution in Cyberspace*, [Online] Available at <https://www.umass.edu/legal/articles/uconn.html>

E.C. Lide (1996). ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation. *Ohio State Journal On Dispute Resolution*, 12(1), 193-221.

⁵Pablo Cortés. (2010). *Online Dispute Resolution for Consumers in the European Union*. Oxfordshire, United Kingdom: Taylor & Francis.

⁶Faye Fangfei Wang. (2009). *Online Dispute Resolution: Technology Management and Legal Practice from an International Perspective*. Oxford: Chandos, pp.29

⁷For more on preparing for e-mediation, see S. Jani & C. Getz, (2010). *Mediating from a Distance: Suggested Practice Guidelines for Family*. [Online] Available at https://www.mediatebc.com/sites/default/files/Guidelines_Mediating-from-a-Distance-%28Second-edition%29_0.pdf

⁸Ebner & Zeleznikow. (2015). Fairness, Trust, and Security in Online Dispute Resolution. *Hamline Journal of Public Law and Policy*, 36(2), 142-160.

⁹Tran Phuong Anh. (2021). *The issue of recognition and enforcement of online arbitral awards - provisions of international and Vietnamese law*, presentation at the seminar on current legal status, practical application on resolving commercial disputes by arbitration, online mediation organized by the Institute of Legal Sciences in 2021.

REFERENCES:

1. S. Jani & C. Getz. (2010). *Mediating from a Distance: Suggested Practice Guidelines for Family*. Victoria, BC, Canada: Mediator Roster Society.

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**QUY ĐỊNH PHÁP LUẬT VỀ HÒA GIẢI TRỰC TUYẾN
VÀ MỘT SỐ KHUYẾN NGHỊ ĐỐI VỚI VIỆT NAM**

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TÓM TẮT:

Quy định pháp luật về hòa giải trực tuyến bắt nguồn từ khuôn khổ của pháp luật về hòa giải kết hợp với các đặc điểm trực tuyến trong việc hòa giải, từ đó tạo ra những nét khác biệt của hòa giải trực tuyến so với hòa giải truyền thống. Vì vậy, khi xây dựng các quy định pháp luật điều chỉnh hoạt động hòa giải trực tuyến, các nhà lập pháp cần lưu ý những đặc điểm này. Bên cạnh các quy định pháp luật hiện hành về hòa giải, Việt Nam cần giải quyết các vấn đề về thỏa thuận hòa giải trực tuyến, bí mật, quyền riêng tư, tiêu chuẩn và kỹ năng của hòa giải viên khi giải quyết tranh chấp trực tuyến.

Từ khóa: hòa giải thương mại, hòa giải trực tuyến, quy định pháp luật.