

PRESENTATION

**MEDIATION AND MEDIATION LAW OF
VIETNAM IN CONTEXT OF ASEAN
INTEGRATION**

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MEDIATION AND MEDIATION LAW OF VIETNAM IN CONTEXT OF ASEAN INTEGRATION

I. OVERVIEW ON MEDIATION IN VIETNAM

1. Brief on history of mediation activities in Vietnam

Like other countries, dispute resolution methods in Vietnam have been based on economic-social background and deeply affected by the political, cultural, social and historical factors from time to time¹. Vietnam has been under the considerable influence of Confucianism and Buddhism theories, which appreciate peace, morality and harmony between people. When Vietnamese people have to face conflicts, their behavior and response are influenced by the opinion of “*litigation in court is a misfortune*”². From the historical aspect, we can see that mediation is the method that Vietnamese people have been using to solve their disputes for ages³.

• *Feudal period*

The most important rules relating to mediation were provided for in different village conventions of certain communities, mostly in village conventions and were used to solve minor civil disputes amongst the members within a community. Mediation practice took its roots from ancient written and unwritten rules of conduct. The Feudal Dynasties in Vietnam did rarely institutionalize village customs and mediation rules to make formal laws of the State. However, the customs and traditions of villages were often referred to by the laws of the Feudal State in handling violations. During the French colonial period in Vietnam, private-mediation was provided for in the commercial associations’ charters and was used by the merchants as a method to solve arisen disputes.

• *From 1945 to 1986*

Having become an independent country since 1945, Vietnam followed the Soviet model of development to build a socialist state. The centrally planned economy

¹ Duong Thi Thanh Mai, *An Approach from Tradition Culture Aspect about Alternative Dispute Resolution in Vietnam*, on file with the author (Presentation at International Conference “Alternative Dispute Resolution – International experience and ability to manipulate in Vietnam” which was organized by the Ministry of Justice of Vietnam in Hanoi in April 2008)

² Tran Van Quang, *Alternative Dispute Resolution Methods in Vietnam*, on file with the author (Presentation at International Conference “Alternative Dispute Resolution – International experience and ability to manipulate in Vietnam” which was organized by the Ministry of Justice of Vietnam in Hanoi in April 2008).

³ Le Hong Hanh, *Mediation in Vietnam- the Actual State and the Tendency for future development* (Presentation at Round Table Conference on Mediation in Asia, which was organized by Graduate School of Law, Kyushu University in Fukuoka-Japan, August 30 and 31, 2010).

mechanism was applied to govern the socio-economic issues. In this period, commercial disputes and important social issues were arranged by the State and the Communist Party's bodies. There was not any real ADR mechanism, except for the mediation mechanism at the grassroots. This exceptional mediation would be able to exist thanks to its close link to the traditions and customs of different communities in Vietnam. Thus, it is easy to understand why the mediation mechanism at the grassroots was widely accepted in the centrally planned economy.

• ***From 1986 until now***

In the last years of the preceding period, the Vietnamese Government realized that the planned economy mechanism was no longer suitable with the practice and needed to be changed. In 1986, the Renovation Policy (Doi Moi) was enacted. In order to implement this policy, Vietnam has been actively developing an open market economy which considers the development of commercial activities as a key factor in the national strategy. The practice has witnessed a diversity of economic activities and participation of various economic sectors with different ownership types. So many important legal documents were enacted, including regulations on dispute resolution mechanism such as the 1989 Ordinance on Procedures for Settlement of Economic Cases, the Ordinance on Procedures for Settlement of Civil Cases, the 1990 Ordinance on Economic Contracts, the 1992 Law on Organization of People's Courts (as amended and supplemented in 1993 and 1995), Decree 116/CP dated 5 September 1994 on organization and operations of economic arbitration centers at the provincial level, the 1996 Civil Code, the 1997 Commercial Law and the 1998 Ordinance on Grassroots Mediation. Thus, civil and arbitration procedures and mediation mechanism have been gradually improved. The forms of disputes resolution have been considerably changed thanks to the reform policy.

In the early years of the 21st century, the development of judicial reform and law completion has spread in many Asian countries, including Vietnam. In 2002, the Politburo of Vietnam issued Resolution No. 08-NQ/TW on 2 January 2002 on judicial reform. Then, on 24 May 2005, the Politburo of Vietnam approved two important resolutions, i.e., Resolution No. 49-NQ/TW on the Judicial Reform Strategy to 2020 and Resolution No. 48-NQ/TW on the Strategy for the Development and Improvement of Vietnam's Legal System to the year 2010 with Visions to 2020. Resolution No. 49-NQ/TW continued to reaffirm the determination in building Vietnam's socialist rule-

of-law State of the people, by the people, and for the people. Simultaneously, it also set for the main policies to reach the goals during period 2005-2020 such as: *“Encouraging the settlement of conflicts by using alternative dispute resolution, such as bargaining, conciliation, mediation, or arbitration, through court support for legal recognition of such settlements”*; *“Realizing socialization by developing forms of alternative dispute resolution, making a pilot in assigning private organs to conduct some court’s tasks”*. In addition, Resolution No. 48-NQ/TW also defined the task of *“improving the laws on the resolution of economic disputes (e.g., arbitration and mediation) in accordance with international trade custom”*.

The growth of the legal system in terms of dispute resolution (see Subsection 2 below) from 2002 to present is the result of the said policies. ADR practice, including mediation method, also has seen active changes. However, in general, the mediation mechanism in Vietnam still has many shortcomings and inadequacies (see Section II below). In comparison with the dispute resolution mechanism in other nations and the practical demand of Vietnam, the mediation mechanism needs to be comprehensively improved.

2. Legal basis

Vietnam is a civil-law country so the main principles and rules are provided for in legal documents. A great number of normative documents, including codes, laws, decrees, decisions, indicators, circulars and resolutions, have been enacted to govern the society. The regulations related to resolving disputes via mediation have been stated in several normative documents.

Mediation, an alternative dispute resolution mechanism, has just been introduced into the legal system of Vietnam and in primary provisions. There are many legal documents that have referred to mediation in the basic principle section such as the 2005 Civil Code (Article 12), the 2005 Commercial Law (Article 11 & Article 317.2), the 2005 Law on Enterprises, the 2005 Law on Investment (Article 12.1), the 2005 Law on Environmental Protection, the 2005 Law on Intellectual Property, the 2000 Maritime Code, the 1993 Petroleum Law (as amended in 2000 and 2008, Article 27), the Law/Ordinance on Consumer Protection, the 2000 Marriage and Family Law, etc. The said legal documents state that mediation is one of the ways of resolving conflicts and encourage parties to use such method. For example, it is provided in Article 317 of the Commercial Law that *“Mediation between the parties shall be*

settled by an agency, organization or individual selected by the parties". Similarly, Article 12 of the 2005 Law on Investment also provides that *"Any dispute relating to investment activities in Vietnam shall be resolved through negotiation and mediation, or shall be referred to arbitration or to a court in accordance with law"*.

More specifically, the mediation activities have been governed by the following legal documents:

(1) Court-annexed mediation has been prescribed in the 2004 Civil Procedure Code⁴ (Article 10 and Article 180 to Article 188).

(2) Arbitration-mediation has been stipulated in the 2010 Law on Commercial Arbitration⁵.

(3) Administrative-mediation is applicable to land disputes and labor disputes as mandatory mediation. Mediation on labor disputes has regulated by the 1994 Labor Code⁶ and its guiding decrees of the Government. Mediation on land disputes has regulated by the 2003 Law on Land and its guiding instruments.

(4) Grassroots mediation⁷ is officially recognized in the 1992 Constitution: *"Appropriate people's organizations shall be formed at the grass-roots level to deal with minor breaches of law and disputes among the people in accordance with the law"*⁸. The most concrete and comprehensive legal document on grassroots mediation is the 1998 Ordinance on grassroots mediation. This Ordinance stipulates the scope of grassroots mediation, the criteria and competence of the individuals and organizations to act as grassroots mediators. Furthermore, the Government has issued Decree No. 160/1999/ND-CP dated 6 June 2003 guiding the implementation of this Ordinance. In addition, the 1999 Law on Vietnam Fatherland Front⁹ also contains several articles on grassroots mediation. Several basic provisions on grassroots mediation are stipulated in family and civil laws such as the 2000 Marriage and Family Law and the 2005 Civil Code. It is worthy noting that in comparison with other forms of ADR, grassroots mediation has comparatively comprehensive legal grounds for its development.

⁴ This Code has been amended in the 2011 Law amending and supplementing a number of articles of the Civil Procedure Code, which shall take its effects from 1 Jan. 2012.

⁵ This Law was promulgated on 17 June 2010, taking its effect from 1 Jan. 2011 and replacing the 2003 Ordinance on Commercial Arbitration.

⁶ This Code was amended in 2002 and 2007.

⁷ This type of mediation is also namely community mediation.

⁸ Article 127 of the 1992 Constitution of Vietnam

⁹ See Article 7.3

(5) Private-mediation is stipulated in principle in the 2005 Law on Investment, the 2005 Commercial Law and some other legal documents. Thanks to that, businesses and merchants have opportunities to solve their disputes through mediation. However, specific legal provisions on private-mediation process have not been formed yet. In reality, mediation services are only provided by some organizations, law firms and associations. Such units have their own principles to perform their mediation role or to settle disputes brought by their members or clients during the mediation process

II. ORGANIZATION AND OPERATION OF MEDIATION IN VIETNAM

The purpose of this section is to describe an overview picture of mediation activities in Vietnam through analyzing legal framework, elementary features, organization and operation of mediation forms, including court-annexed mediation, private-mediation, arbitration-mediation, grassroots-mediation and administrative-mediation. It also points out the shortcomings of mediation activities in Vietnam and proposes the orientation to improve such activities.

It is noted that the concepts of mediation and conciliation are interchangeable in legal system and practice of Vietnam.

1. Court-annexed mediation

1.1. Legal framework

Court-annexed mediation is provided for in the Civil Procedure Code of Vietnam (in Article 10, Article 41, Article 180-188 and other articles). The main characteristics of court-annexed mediation are stated below:

- Pursuant to the regulations of the Civil Procedure Code, court-annexed mediation must be conducted by judges in every civil and family case¹⁰. It means that mediation is a mandatory process in resolving every civil case at court. It is the duty of judges to handle given case¹¹ on the basis of the principle mentioned in Article 10 of the Civil Procedure Code, i.e., *“the courts have the responsibility to conduct*

¹⁰ except cases which must not be conciliated or cannot be conciliated as stipulated in Article 181 and Article 182

- Civil cases which must not be conciliated include:

+ Claims for compensation for damage caused to State assets.

+ Civil cases arising from transactions which are contrary to law or social ethics.

- Civil cases which cannot be conciliated include:

+ The defendants are intentionally absent though having been duly summoned twice by courts.

+ The involved parties can not take part in the conciliation for plausible reasons.

+ The involved parties being wives or husbands in divorce cases, who have lost their civil act capacity.

¹¹ Thus, some Vietnamese scholars argue that court-annexed mediation in Vietnam cannot be regarded as an alternative dispute resolution mechanism.

conciliation and create favorable conditions for the involved parties to reach agreement with one another on the resolution of civil cases or matters under the provisions of this Code". Additionally, Article 41 (4) also emphasizes that one of the tasks of judges is to conduct conciliation for the involved parties in order to reach mutual agreement on the resolution of the cases.

- Court-annexed mediation process is known as the Combination of Litigation with Mediation¹². This is an important characteristic of Vietnamese litigation procedures. Mediation activities are conducted not only at trial preparation process but also during trial procedure¹³. According to the Civil Procedure Code of Vietnam, the court, when hearing a civil case, shall lay emphasis on mediation and whenever mediation is possible, the court shall mediate the case with willingness on the part of parties and in accordance with law. This characteristic is shown in the following provisions:

It is prescribed in Article 180 of Civil Procedure Code that "*the courts must, during the period of preparation for the first-instance trial of cases, carry out conciliations for the involved parties to reach agreement on the resolution of the cases*". Only in cases where the conciliation fails, the judges continue hearing the case.

It is also the task of judges to encourage the parties reach an agreement during the first-instance court and appeal court sessions: At the first-instance court sessions, the presiding judge shall ask whether the involved parties can reach mutual agreement on the resolution of the cases or not. In cases where they reach agreements on the resolution of the cases and their agreements are voluntary, not contrary to law or social ethics, the trial panels shall issue decisions to recognize their agreements on the resolution of the cases. The court decisions recognizing the involved parties' agreements on the resolution of the cases shall take legal effect¹⁴. In many cases, the dispute continues to be resolved according to the appeal court procedures. At appeal court sessions, if the involved parties can reach mutual agreement on the resolution of their cases and their agreements are voluntary and not contrary to law or social ethics,

¹² This feature is similar with court-mediation in China. *See: Cai Renrong, Mediation in China* (Presentation at Round Table Conference on Mediation in Asia, which was organized by Graduate School of Law, Kyushu University in Fukuoka- Japan, 30 and 31 August 2010).

¹³ To its scope, thesis shall focus on mediation in trial preparation process.

¹⁴ Article 220 of the Civil Procedure Code of Vietnam

the appellate trial panels shall render appellate judgments to revise the first-instance court judgments and recognize the agreement of the involved parties¹⁵.

- Enforcement of mediation settlement agreement is ensured by the State: In cases where the parties reach an agreement on the resolution of the whole case, the judge shall issue a “*decision to recognize the agreement of the involved parties*”. Such decision shall have the same legal effect as a court judgment. As a result, its validity shall be ensured by the State. The decisions to recognize the involved parties’ agreements shall take effect immediately after they are issued and neither appealed nor protested against according to the appellate procedures. If there are grounds to believe that such agreements were reached as a result of mistakes, deceptions, intimidation or they contravene law or social ethics, these decisions may be protested against according to the cassation procedures¹⁶.

- Mediation session is conducted with the presence of both parties¹⁷.

- Mediator in court-annexed mediation is judge: In principle, after receiving a case file, the chief judge shall assign a judge to handle it. It means that the judge shall be responsible for conducting steps of proceedings, including mediation sessions. In mediation sessions, the judge shall act as a mediator in accordance with Article 184 of the Civil Procedure Code. In cases where the parties cannot reach an agreement, the judge shall issue the decision to bring the cases to trial. Then, he/she shall be the judge presiding the first-instance court sessions.

1.2. Practice

- The table below shows that in the 2006-2010 period, the Vietnamese judiciary received total 881966 cases (include civil, business-commercial and labor cases), the number of disputes has been on the increase year by year and the cases which were successfully settled through the mediation process at courts usually above 40%.

Table: Number of cases and result of court-annexed mediation

(Source: Summarizing the data in Annual Report of Supreme Court year 2006, 2007, 2008, 2009, 2010)

¹⁵ Article 270 of the Civil Procedure Code of Vietnam

¹⁶ Articles 187 & 188 of the Civil Procedure Code of Vietnam

¹⁷ Article 185, 185a of the Civil Procedure Code of Vietnam

Year	Total number of cases (civil, business-commercial and labor cases) which the courts resolved	Mediation successful	
		Number	Percentage
2006	146823	60931	41,5%
2007	171681	82816	48,2%
2008	174732	76882	44%.
2009	194358	87461	45%
2010	194372	99712	51,3%

• Mediation process is a part of pre-trial process; it is the task of the judges to conduct steps in resolving civil cases. Naturally, it requires the judges to have good skills and deep knowledge of this field. However, in reality, a large number of Vietnamese judges admitted that they still have lacked mediation skills because they haven't been well-trained in terms of laws and mediation skills. There are nearly 50% of Judges said they have not been trained in resolving dispute skills¹⁸. Thus, they can only act as mediators mainly thanks to their experience and sensibility.

1.3. Shortcomings

Firstly, Court-connected mediation type hasn't been formed in Vietnam. The courts undertake all the work without any connection with or support of other organizations or professionals or experts. While the socialization policy is considered as an effective tool to reform the judicial system, the courts haven't really paid enough attention to necessary measures in order to enhance socializing mediation activities. The growth of court-connected mediation programs has catalyzed a symbiosis between court mediation and mediation in the private sector¹⁹. In developing countries, the tendency for successful in developing mediation activities is a strong level of cooperation with the court system, while maintaining it outside the court environment²⁰.

Secondly, in principle of the civil procedures, the courts do not separate the mediation activities and the tasks of the judges (as mentioned above). It has caused the following issues:

¹⁸ Ministry of Justice of Vietnam, Report of Research Survey on Status of International Commercial Disputes and Dispute Resolution of Vietnam Enterprises, the Role of Judicial Institution (conducted from 2007-2009, hard-copy in the Library of Ministry of Justice of Vietnam)

¹⁹ Forrest S. Mosten, *Institutionalization of mediation*, Family Court Review Vol. 42 No. 2. April 2004

(1) The judges are overloaded because they have to conduct so many tasks and work during the proceedings. Under standard of Supreme Court of Vietnam, the average of workload that each judge can undertake is 5 cases/per month. However, in fact, in some cities such as Hanoi, Ho Chi Minh, Danang, average each resolve 7 civil cases/per months. Additionally, they have responsibility with all of procedure, including conducting mediation sessions. Therefore, many judges said that they feel overload with their work²¹.

(2) It is difficult in guarantee the objectivity in resolving disputes, especially, in cases where the parties don't reach an agreement. It is disturbing that the judge is easy to has prejudice in the trial with the party/parties because they had meet each other, contacting, show information, sense, etc at the mediation sessions.

Thirdly, pursuant to the Civil Procedure Code and the Law on Organization of the People's Courts, there is no mechanism in using collaborators or experts in specialized field to assist judges in conduct court-annexed mediation. The courts haven't cooperated with other agencies which have expertise in providing dispute resolution services. In many cases, the judge must resolve disputes beyond his or her understanding and capacity.

Fourthly, Annual Activities' Programs of the Supreme Court often set out a lot of requirements to enhance the effectiveness of the judiciary's mediation activities. However, the policy on training mediation skills and improving knowledge for judges has not been satisfactory. This situation has caused the weakness of judges in conducting mediation activities.

Fifth, the provision that requires the attendance of both parties in mediation sessions is considered as inflexible. The reason is that in many cases, the parties don't want to meet each other. They feel uncomfortable and they don't want to disclose their own information with the other side.

Sixth, In addition, some argue that civil procedure provisions shouldn't require judges to conduct mediation activities in every civil case as a mandatory process. Instead, legal provisions should divide mandatory mediation cases and voluntary

²⁰ Kendel Rust & Vesna Dasovic-Markovic, *Alternative Dispute Resolution Platform*, (Pilot Project Management Manual for Court-Referred Mediation of International Finance Corporation, SEED-Southeast Europe Enterprise Development,2005).

²¹ Ibid.

mediation cases. With voluntary mediation cases, depend on each case and the specific dispute, the judge has the right to refer parties conduct mediation process.

2. Private-Mediation

2.1. Legal framework

As mentioned above, there has not been any law that governs private mediation activity in details in Vietnam. The Law on Investment and the Law on Commercial have general provisions on mediation. Thus, businesses and merchants have opportunities to settle their disputes through mediation.

Notably, Vietnam International Arbitration Centre (VIAC) has made its best efforts to promote other forms of ADR together with arbitration. In 2007, the Mediation Rules²² was adopted by VIAC. The Rules are independent from the mediation provisions of the Arbitration Rules of the Centre. Subject to the Mediation Rules, VIAC has provided mediation services with respect to disputes arising out of or relating to legal relationship in commercial activities. The VIAC's Mediation Rules comprise 20 articles and are considered as modern and flexible regulations. It sets forth the procedures for mediation, including commencement of mediation proceedings, number of mediators, appointment of mediator, submission written statements to the mediator, roles of mediators, administrative assistance, communication between the mediator and the parties, cooperation of the parties with the mediator; settlement agreement, termination of mediation proceedings, mediation costs, etc²³. The contents of the Rules have the following notable features:

- The parties may appoint a mediator from the list of mediators suggested by VIAC or outside such list or request the VIAC President to recommend an individual to act as a mediator.

- Role of mediator: the mediation must make all his efforts to be independent, impartial and objective to assist the parties to reach an amicable settlement of their dispute. The mediator may conduct the mediation proceedings in any manner appropriate to the nature and substance of the dispute and the parties' expectation. The mediator, at any stage of the mediation proceedings, may make proposals for settlement of disputes. Such proposals should not necessarily be in writing or be

²² The Rules are applicable to mediation activity conducted by VIAC.

²³ From Article 2 to Article 17 of the Mediation Rules

accompanied by a statement of reasons for the proposals²⁴. In cases where the mediation is unsuccessful, the mediator shall not be appointed by either of the parties as arbitrators in the subsequent arbitration proceedings for the same dispute, unless it is otherwise agreed by the concerned parties.

- The method for the conduct of mediation proceedings is flexible²⁵: the parties can request VIAC to arrange the time schedule and venue to conduct mediation. In addition, VIAC shall designate person(s) to provide assistance for the mediator and the parties during the mediation proceedings. The parties can propose that the communication during the mediation sessions be in Vietnamese or a foreign language²⁶. Depending on specific disputes, the mediator may meet in person with each party separately or hold a meeting with presence of both parties.

- Confidentiality is very important during the mediation proceedings: In principle, every written communication exchanged between the mediator and a party and every other information received by the mediator from a party shall be forwarded (if in writing) or informed by the mediator to the other party. If the information is provided by a party to the mediator under the condition of confidentiality, the mediator shall not disclose such information to the other party²⁷. Additionally, the mediator, VIAC and the parties shall have to keep confidential all matters relating to the mediation proceedings, including settlement agreement²⁸. The parties are not allowed to use any information in respect to the mediation proceedings as a ground or evidence in arbitral or judicial proceedings²⁹.

- Legal validity of the mediation settlement agreement: Article 13 of the Mediation Rules stated that in cases where the parties reach an agreement, they shall be bound by the agreement in accordance with the general legal rules on civil relations. Although the Mediation Rules have referred to the civil provisions, there isn't any article of the Civil Code of Vietnam mentioning this issue directly. The mediation settlement agreement can be considered as a contract. Thus, if a party doesn't implement such agreement, the other side can initiate a lawsuit at court.

²⁴ Article 7

²⁵ Article 8 & Article 9

²⁶ In this case, the parties can arrange translation and bear the costs.

²⁷ Article 10

²⁸ Article 14

²⁹ Article 20

2.2. Practice

In Vietnam, mediation services may be provided by any expert, law firm, association and other organization without any prevention from the State. In reality, there are some law firms³⁰ and associations³¹ have provided mediation services to their clients or members. However, these organizations have not yet focused on provision and development of mediation services. They didn't make any statistics on the number of cases resolved by them through the mediation method³². There are some other organizations and individuals wishing to provide mediation services. However, they are embarrassed and don't know how to start. They don't want their work develop spontaneously.

In contrast to the indifference of such organizations, VIAC have hoped to lay down the grounds for the growth of private-mediation activities in Vietnam by adopting the Mediation Rules. However, from 2007 to 2010, VIAC only received and settled 05 cases by the mediation method³³. From this fact, we can see that the private mediation activity in Vietnam at the present time has not been popular and widely used. Mediation, as a separate ADR mechanism, never has been used by businesses to solve their commercial disputes. On the other hand, the businesses in Vietnam still do not trust in ADR in general and commercial mediation in particular. There may be a concern from such businesses over the results achieved during the commercial mediation and arbitration proceedings.

2.3. Shortcomings

Firstly, there is no concrete legal basis for private-mediation in Vietnam. While the Government has paid a lot of attention to commercial arbitration, there is not concrete legal basis for private mediation to develop. In the opinion of almost Vietnamese lawmakers, private-mediation is a voluntary social activity so it is not necessary to be governed by the legal regulations. In fact, private-mediation is still considered as an outsider to the legal system of Vietnam. Meanwhile, almost aspects of the social life have been regulated by laws. In other words, private-mediation is not considered as an independent dispute settlement method. The legal system is silent to

³⁰ such as Vilaf Hong Duc, an investment consultancy law firm, etc.

³¹ such as Vietnam Associations of Seafood Exporters and Producers, Vietnam Wood and Forest Products Association and Vietnam Real Estate Association.

³² Ministry of Justice of Vietnam, *Report on Research Survey on Status of International Commercial Disputes and Dispute Resolution of Vietnamese Enterprises, the Role of Judicial Institution* (conducted from 2007-2009)

important issues relating to the organization and operations of private mediation type such as criteria and conditions to be mediators, establishment of mediation service providers, mediation fee, mediation proceedings, validity of mediation agreement, confidentiality of mediation proceedings and enforcement of mediation settlement agreement, etc. Private-mediation still lacks basic legal grounds to be formed and develop.

Facing this situation, some scholars argue that private mediation should be promoted to develop. Furthermore, disputes are legal issues. As a result, private-mediation is legal activities and should be governed by the laws. Specific provisions on private mediation should be clearly provided for in the legal system.

Secondly, although mediation settlement is considered as a contract or a contract clause, it does not have legal enforcement. That is why the parties are reluctant to use private mediation through mediation institutions to settle their disputes. The parties are worry about the enforceability of the mediation settlement agreement because if one party refuses to comply the obligations, the other party can only initiate arbitration or court proceedings against the party for their breach of the agreement. This has reduced the attention of the parties to commercial mediation conducted by mediation institutions. On the whole, this has affected the development of commercial mediation in Vietnam.

3. Grassroots - mediation

In Vietnam, the most popular outside-court mediation mechanism is mediation at the grassroots. The State always creates conditions for and encourages mediation activities and various forms of mediation at the population communities³⁴. Grassroots mediation covers minor disputes among the people mostly arising from family and civil relationships³⁵. Below are some specific features of mediation at the grassroots:

First, grassroots mediation is an outside-court and voluntary mediation form. Nobody can force the parties to solve their disputes through grassroots mediation. In this aspect, grassroots mediation is totally different from the in-court mediation as provided for in the Civil Procedure Law and practice of Vietnam where the judges in

³³ Ibid.

³⁴ Article 2 of the Ordinance on Grassroots Mediation

³⁵ Some minor violations of law that do not constitute crimes or are not subject to administrative sanctions can also be solved via grassroots mediation. The current law on grassroots mediation forbids conducting mediation in respect to crimes and violations that are subject to administrative sanctions.

charge of the cases are required to assist the involved parties to conciliate before proceeding with hearing such cases.

Secondly, grassroots mediation is carried out by voluntary social organizations. As a result, there is no control over mediators or mediation groups by the State.

Thirdly, this kind of mediation, to the larger extent, is widely acceptable due to the traditions, customs and moral values of different communities of Vietnam.

1.3. Legal framework

- ***Principles***: Article 4 of the Ordinance on the organization and activities of reconciliation at the grassroots (the “Ordinance on Grassroots Mediation”) sets forth the following 04 basic principles for mediation at the grassroots: “(1) *Conformity with the line and policies of the Party, the law of the State, the social ethics and the fine customs and practices of the people*; (2) *Respect for the voluntaries of the parties; not to oblige or coerce the disputing parties to accept reconciliation*; (3) *Objectiveness, transparency, conforming to reason and sentiments, keeping secrecy of information on private life of the disputing parties, respect for the legitimate rights and interests of others, non-infringement upon the interests of the State and public interests*; (4) *Acting promptly, with initiative and consistence aimed at preventing law violations, limiting possible bad consequences and achieving the aim of reconciliation*”.

- ***Organization***: Mediation at the grassroots shall be achieved through the activities the mediation group or other appropriate organizations of the population at hamlets, villages, street dwellers groups and other population groups. The grassroots mediation group is the self-managing and voluntary organization. A mediation group has its head and members selected jointly by the Committee of the Fatherland Front and Communist Youth League in the commune, ward or township and recognized by the People’s Committee of the same level. The Ministry of Justice is answerable to the Government in exercising State management over reconciliation at the grassroots; guiding and directing the People’s Committees of various levels to conduct State management over reconciliation work in the localities.

- ***Mediator’s qualifications***: Article 9 of the Ordinance on Grassroots Mediation sets forth criteria to the member of mediation group:

The operation scope of mediation at the grassroots does not cover commercial disputes. Thus, this thesis shall not focus on this type of mediation.

“1. Having good ethical qualities, seriously abiding by the commitments and policies of the Party, the laws of the State and enjoying prestige among the population; 2. Having the capability to persuade and mobilize the population to implement policies and law;

3. Voluntarily taking part in the reconciliation organization, having the sense of responsibility and ardor in reconciliation work”.

The legal provisions don't require that members of the mediation group must be professional judicial officers and don't make any restriction on age of these members.

• **Procedures:** There is no concrete formal procedure stipulated by the law for mediation at the grassroots. The mediators and parties may agree on the procedures to follow during the mediation proceedings subject to the nature of the case to be mediated. Regarding the enforceability of mediation settlement, unlike court-annexed mediation, agreements which are made as results of the mediation proceedings at the grassroots are only implemented if the involved parties are voluntary.

3.2. Practice

In Vietnam, there are 128,425 villages and wards. Correspondingly, 120,462 mediation groups with 623,157 mediators are formed. The rate of mediation groups over total villages and wards reached 93.8%. In the 1999 - 2008 period, mediation groups have settled 3,899,745 cases. In which, the percentage of successful cases are 80.3% (equivalent to 3,131,575 cases)³⁶. Such figures evidence the popularity, role and importance of mediation at the grassroots in the daily life of Vietnamese people.

3.3. Shortcomings:

In addition to the said achievements, mediation activities at the grassroots also have some following issues:

- The members of mediation groups are often chosen from the community. They are familiar with and have experience in the community life. However, in terms of other aspects, several mediators lack of legal knowledge, mediation skills and basic understandings of mediation activities. The capability to conduct mediation proceedings are not even amongst mediators, mediation groups and localities. Additionally, some mediators even misunderstand the role of mediator. It has caused

³⁶ According to the statistics of the Department of Law Education and Dissemination - the Ministry of Justice.

the fact that the mediator may impose their own opinion on settlement of disputes instead of helping the parties to voluntarily reach an agreement.

- The operations of mediation groups in some localities are still formal, perfunctory or administrative. Some mediation groups only focus on achieving the goals in terms of quantity, not the quality of operations.

4. Administrative-mediation

In Vietnam, administrative-mediation is used to settle labor and land disputes as a mandatory process before the parties initiate lawsuits at court. Within the scope of thesis, this subsection shall not focus on analyzing this type of mediation form, just describing it in general.

4.1. Mediation of labor disputes

According to the current labor law, labor mediation is conducted by the competent bodies in charge of solving labor disputes. They are grassroots labor mediation councils and labor mediators of district-level labor departments. Labor mediation procedures are provided for in Article 164 of the 1994 Labor Code as follow: the labor mediation councils at the grassroots shall be required to proceed with mediation within 07 days from the date of receipt of the application for mediation. The parties or their representatives must attend the mediation meeting. The council shall set forth conciliatory proposals for consideration by the disputing parties. If the solution is accepted by the parties, the council shall record it in the minutes, which must be signed by the parties and the mediator. In the mediation fails, each party to the dispute shall have the right to request the People's Court at the district level to settle the dispute. Similar procedures are applicable to the mediation of collective labor disputes. The difference in the way to solve two kinds of labor disputes is that in cases where the collective labor dispute cannot be settled by mediation, each party or both parties to the dispute shall have the right to request the labor arbitration council at the provincial level to settle the dispute. Labor arbitration is a very specific labor dispute resolution mechanism in Vietnam.

There are some shortcomings arisen from the mediation of labor disputes in terms of the legal system:

- The members of the mediation council include employer-related persons (representatives of the enterprises). Thus, the true meaning of mediation sessions is not

ensured. The mediation council is not a third neutral party because of the presence of only one party to the dispute.

- The enforceability of mediation settlement agreement is not clearly provided for in the legal regulations. In cases where the parties reach an agreement at the mediation process but either of the party is not voluntary to implement such agreement, the courts often find it embarrassing to handle and settle the dispute.

4.1. Mediation of land disputes

Pursuant to Article 135 of the Law on Land of Vietnam, the mediation process is mandatory in respect to land disputes. The State encourages land-disputing parties to reconcile themselves or settle their land disputes through mediation at the grassroots. For land disputes which cannot be reconciled, the disputing parties shall file their written applications to the People's Committees of communes, wards or townships where the land in dispute is located. The commune/ward/township People's Committees have the responsibility to coordinate with Vietnam Fatherland Front and its member organizations as well as other mass organizations in mediating land disputes. The mediation time limit shall be thirty working days as from the date on which the commune/ward/township People's Committees receive the written applications. The land dispute reconciliation results must be recorded in writing with the signatures of the disputing parties and the certification of the People's Committees of communes, wards or townships where the land is located.

5. Arbitration mediation

In accordance with Article 58 of the 2010 Law on Commercial Arbitration, *"follow the requirement of the parties, the Arbitration Councils conduct the mediation process to assist the parties reach agreement on dispute resolution. When the parties reached agreement on dispute resolution, the Arbitration Councils make mediation agreement which must be signed by the involved parties as well as arbitrators. The Arbitration Councils issue the decision recognizing the successful of mediation. These decisions shall be final ones and valuable as arbitration decision"*

III. THE TENDENCY AND CONTEXT TO IMPROVE MEDIATION MECHANISM IN VIETNAM

1. The international tendency and context of mediation development

- The growth of mediation in recent decades has shown the trend to use this method in resolving disputes. It is predicted that this trend shall continue to expand

and mediation shall become a popular alternative to litigation in the future. There is a great rise in using of mediation worldwide due to the higher and higher demand of societies for this type of dispute settlement. The scope of mediation is also expanded in many areas and many countries. The legislative basis for mediation is noted to improve; diverse countries are pursuing mediation reforms as a response to contemporary demands. In many of these jurisdictions, mediation is seen as useful not only for small claims, family disputes but also as an alternative dispute resolution device for the most complex matters, including dispute involving business, environmental, intellectual property, international trade, etc which were previously considered to be irreconcilable.

- Judicial Reform Strategy in many countries has recognized mediation measure as a part with the hopeful in reducing the overload of the courts. There are various initiatives have been taken to developing mediation, including the passage of new laws for its facilitation.

- The mediation activities have revealed the diversification of legislative and institutional frameworks in most of countries. Economic, legal, institutional and cultural heterogeneity of each region has affected the development of mediation activities. Each country would govern and promote ADR in the way that it considers the most appropriate one subject to the practical conditions of that country.

- There are many factors that can affect the success of mediation mechanism. These factors can be modified subject to each country's specific features³⁷, more specifically are legal regulations; policy and support of the State, stakeholders; practical demand, etc.

- With the aim in improvement legal framework on mediation of several countries, some international organizations and NGOs have made model mediation laws which are very good examples of mediation procedures and indicate how the mediation should be conducted. There are some uniforms of laws or rules on mediation that have already been introduced and can be referred to such as Model in Law on International Commercial Conciliation (the "Model Law on Conciliation") Of the United Nations Commission on International Trade Law (UNCITRAL)³⁸; the

³⁷ Lukasz Rozdeiczer and Alejandro Alvarez de la Campa, *Alternative dispute resolution manual: implementing commercial mediation*" (International Finance Corporation – World Bank Group, 2006).

³⁸ UN recommended that all states should consider enacting national legislation on this basis in view of the perceived desirability of creating a uniform legislative framework for the application of conciliatory settlement

Uniform Mediation Act of New York Bar Association³⁹; the Arbitration and Mediation Rules⁴⁰ of London Court of International Arbitration; Model Mediation Procedure & Agreement of Center for Effective Dispute Resolution (CEDR)⁴¹ and Model Rule for the Lawyer as Third Neutral Party of International Institute for Conflict Prevention & Resolution (CPR)⁴²; the 2002 Green Paper on Alternative Dispute Resolution in Civil and Commercial Law (the “Green Paper”), the 2004 European Code for Mediation (the “Code of Conduct”) and Proposal for a Directive on Certain Aspects of Mediation in Civil and Commercial Matters (the “Proposed Directive”) of European Commission

- Additionally, there are several international mediation institutes that have been formed such as International Mediation Institute (IMI)⁴³, Asian Mediation Association (AMA)⁴⁴, the United States-China Business Mediation Centre, etc. This tendency is seemed strongly over the world.

2. The context of Vietnam and requirement to improvement mediation mechanism

- In Vietnam, there are critical prerequisites for the development of the mediation activities⁴⁵, however, mediation activities in Vietnam has not been developed to the expectation and satisfaction of practice demand. This fact seems opposite to the development of ADR system, the overload of courts and the demand to resolve conflicts through non-trial procedure. The analysis above has shown some main issues as follows: (1) Mediation has not been considered as an independent alternative dispute resolution method in both legal system and practice; (2) It lacks an effective mechanism to resolve disputes through private-mediation, court-connected mediation; (3) Mediation service providers haven't been formed and

procedures in international commercial disputes

(http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html)

³⁹ <http://www.nysba.org/>

⁴⁰ <http://www.jurisint.org/en/ctr/63.html>

⁴¹ http://www.cedr.co.uk/index.php?location=/library/model_documents.htm

⁴² <http://www.cpradr.org/>

⁴³ IMI's website is addressed at <http://www.imimmediation.org/>

⁴⁴ It is currently made up of 5 member as mediation organizations in Asia, namely the Hong Kong Mediation Centre, the Indonesian Mediation Centre, the Malaysian Mediation Centre, the Philippine Mediation Center and the Singapore Mediation Centre. Two new member organizations which will join the AMA are from India and China.

⁴⁵ In Vietnam, the disputes have increased day by day. In line with the general trend, Vietnamese enterprises and individuals always try to avoid litigation and settling the disputes quickly. However, court procedures are often time-resuming, complex and costly. Therefore, settling disputes at the courts is a solution which is not expected. ADR is considered as an effective measure that creates more opportunities to resolve their disputes quickly. However, the parties do not have many choices to resolve their conflicts.

operated in a professional manner; (4) Mediators are not professional and their skills need to be comprehensively improved. Besides, there is no answer to many legal issues regarding the commercial mediation such as enforceability of mediation agreement, confidential principle of mediation process, enforcement of mediation settlement agreement and establishment and operation of mediation service providers, etc. The cause of this situation can be founded in the shortage of the legal frame work on mediation in Vietnam. This method has not been formed clearly and needs to be improved.

- To improve mediation mechanism in Vietnam, the lawmakers and policy-makers need to reach the tendency of mediation development in the world, learn experiences from other countries which are successful in development mediation activities, refer model mediation laws and consider to join in international mediation institutes .

IV. RECOMMENDATION TO IMPROVE THE MEDIATION MECHANISM IN VIETNAM

1. Improving the legislation on mediation

1.1. Forming and enacting the Law on Mediation

The Law on Mediation should be enacted to form a clear framework for mediation. Subject to the current legal basis of Vietnam, the birth of the Law on Mediation is a better solution than other suggestions⁴⁶. The scope that the Law on Mediation shall govern should be wide enough to govern all the mediation activities such as mediation at the grassroots, private mediation and some other related issues. The wide scope of the Law on Mediation shall contribute to improve the mediation regime fundamentally.

- *The Law on Mediation should satisfy the following requirements:*

- Recognizing basic characteristics of the mediation method such as respect for the autonomy of the parties, flexibility of the mediation process and confidential requirements, etc.

⁴⁶ In consideration of the conditions of the current Vietnamese legal system, there are some suggestions to improve legal institutions on mediation such as forming and enacting the Law on ADR Promotion and the Law on Arbitration and Mediation, etc. However, the plan for building the Law on Mediation is more feasible because the Project for Drafting the Law on Mediation for the Working Schedule of the National Assembly of Vietnam in 2012 has been accepted. The challenge is that there are different opinions and arguments of the scope and contents of the Law on Mediation. *The first* opinion is that the Law on Mediation should elevate the 1998 Ordinance on Grassroots Mediation. *The second* opinion is that the Law on Mediation should cover

- Establishing legal basis on mediation activities as an independent ADR method.
- Being consistent and compatible with the general rules and uniform laws on mediation which are recognized internationally; Simultaneously, learning experiences on development of mediation from other countries.
- Determining important tasks of mediation activities such as contributing to reduce the workload of the courts, socializing activities of the judicial and gradually implementing the Judicial Reform Strategy.

• ***The Law on Mediation should cover the following main contents:***

(1) General provisions:

This section of the Law should provide for the scope of law, the applicable subjects, the concept of mediation, the fundamental principles of mediation activities and the policies to support the formulation and development of mediation types, etc. In particular, this section should refer to a several issues in order to ensure the feasibility and effectiveness of mediation activities as follows:

- The regulations to ensure the confidentiality of the mediation process;
- The regulations on the legal validity of mediation clause: in cases where parties have agreement in selecting the mediation method (before or after the dispute happens), they shall have responsibility to conduct the mediation process before filing a suit in court or arbitration centre.
- The regulations to ensure the enforceability of settlement agreement: Law on Mediation should to regulate that in case where parties reach settlement agreement during the mediation process, the agreement can be enforced by the state power. Upon the mediation process is conducted, the settlement agreement should be recognized by the court. The recognition procedures should be conducted in a similar to that in resolving civil matters governed by the Civil Procedure Code of Vietnam⁴⁷.
- Establishing the link between mediation activities and courts.

(2) Mediation at the grassroots: this section should be built subject to the additions and amendment of the 1998 Ordinance on Grassroots Mediation.

mediation activities. In my opinion, if the lawmakers follow the first opinion, there will be no significant progress in finalizing mediation forms in Vietnam.

⁴⁷ The international experiences show that the models of an informal agreement will not work well in areas where legal consciousness is still limit and the parties easy to change mind and not to feel obliged by what has been signed. Therefore, the “legalization” of mediation and mediated agreements are very important – See: Kendel Rust & Vesna Dasovic-Markovic, *Alternative Dispute Resolution Platform*, (Pilot Project Management Manual for Court-Referred Mediation of International Finance Corporation, SEED-Southeast Europe Enterprise Development,2005).

(3) *Private mediation:*

- Rights and duties of mediators;
- General provision on qualifications of mediator and mediator training (based on general standard, each mediation service provider can enact more detail requirements);
- The subjects can provide private mediation services, including: individuals who have enough conditions to be mediators, associations, law firms and centers of academics, etc;
- Procedures for registration of establishment of mediation organizations;
- General provisions on procedure of mediation sessions;
- Mediation service providers have rights to cooperate with courts, receive cases from court to conduct the mediation process.

1.2. Amendment of and addition to some provisions of the Civil Procedure Code of Vietnam

(1) The Civil Procedure Code should be amended in the manner that mediation is converted from a step for preparation trial into a pre-proceeding activity - an independent process.

(2) The court-annexed regime should be comprehensively innovated.

There are two options. *Firstly*, courts should establish the Mediation Centre directly under courts to conduct the mediation process before the court hearing. *Secondly*, the mediation process should be conducted by the Mediation Council which has members including a judge and some mediators.

In addition, Articles from 180 to 188 of the Civil Procedure Code should be supplemented in order to overcome the shortcomings of the current court-annexed regime in Vietnam:

- The mediation process should not be mandatory to all civil cases. Instead, the Civil Procedure Code should determine and divide disputes into 3 types: (1) Disputes need to be mediated as mandatory process; (2) Disputes need to be mediated subject to the judge' order; (3) Disputes can be mediated subject to the judge's recommendation.

- The judge has the task to preside mediation sessions. However, in cases where the parties don't reach an agreement, this judge should not continue to trial that case. Such amendment is aimed to ensure the impartiality in resolving cases.

- Mediation procedure should be conducted in a more flexible manner. For example, depending on particular situation, one party or all parties is/are required to attend the mediation session.

- Mediators may be court officials and collaborators such as lawyers and experts, etc.

(iii) The Civil Procedure Code should be supplemented in order to lay the grounds for the court-connected mediation type. The court can cooperate with other organizations which have ability to provide mediation services. In some cases such as simple matters or disputes for minor values, etc, the judge can assign any mediation provider which has cooperated with the court to resolving such cases.

The formation of the court-connected mediation can be considered as a measure in socializing the judicial's tasks, contributing to reduce the workload of courts.

2. Promoting the roles of stakeholders

- The Government should adopt policies and particular measures to develop mediation.

- Academic institutions can be the sponsors for establishment and operations of the mediation centers

- The competent authorities, including the Ministry of Justice and the Supreme Court, should amend and conduct mediation training schedules which are consistent with each type of mediation and dispute.

3. Implementing measures to increase the awareness of community, businesses of mediation

In order to improve the efficiency of mediation activities, stakeholders should propagate advantages and benefits of using the mediation methods for dispute settlement, thereby creating confidence in the community.

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To conclude this presentation, we recognize that the development of mediation in Vietnam is not an easy work which can be done and completed in short-term. It is also not the task of only an individual or organization. The success of mediation in Vietnam in the future requires the perception and efforts of the stakeholders. It is not a simple journey, but the end of the journey is a tremendous performance, a step towards the civil society with the harmony in interests.
