PERFECTING THE MECHANISM OF SUCCESSFUL MEDIATION AGREEMENT UNDER THE LAWS OF VIETNAM AND THE EXPERIENCE OF GERMANY, USA, AUSTRALIA, AND SINGAPORE

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ABSTRACT

Objective: Improve the legal provisions on the mechanism for implementing successful mediation agreements according to Vietnam Commercial Mediation law.

Method: Methods used in this article include: writing law analysis, comparative method, and data collected from documentation... to compare and analyze The successful mediation enforcement mechanism under Vietnamese law and some countries such as Germany, the United States, Australia, and Singapore.

Result: Resolved inadequacies in recognizing a “Successful mediation agreement”; Proposed to develop regulations on the mechanism of implementing a successful mediation agreement within the scope of the law on commercial mediation, the law on handling administrative violations, and the law on enforcement of civil judgments.

Conclusion: This study contributes to orienting, perfecting, and resolving shortcomings related to the key role of the commercial mediator, improving security principles, and simplifying processes to recognize a “Successful settlement agreement”. This important legal foundation helps the Commercial Mediation method operate effectively.

Keywords: mediation, commercial mediation, commercial mediator, enforcement mechanism of the successful mediation agreement.

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APERFEIÇOANDO O MECANISMO DE UM ACORDO DE MEDIAÇÃO BEM SUCEDIDO SOB AS LEIS DO VIETNÂ E A EXPERIÊNCIA DA ALEMANHA, EUA, AUSTRAÍLIA E CINGAPURA

RESUMO

Objectivo: Melhorar as disposições legais sobre o mecanismo de implementação de acordos de mediação bem-sucedidos, de acordo com a lei de mediação comercial do Vietname.

Método: Os métodos usados neste artigo incluem: redação de análise jurídica, método comparativo e dados coletados da documentação ... para comparar e analisar O mecanismo de aplicação da mediação bem-sucedido sob a lei vietnamita e alguns países como Alemanha, Estados Unidos, Austrália e Cingapura.

Resultado: Inadequações resolvidas no reconhecimento de um “acordo de mediação bem-sucedido”; Proposta para desenvolver regulamentos sobre o mecanismo de implementação de um acordo de mediação bem-sucedido no âmbito da lei sobre mediação comercial, da lei sobre o tratamento de infrações administrativas e da lei sobre a execução de sentenças civis.

Conclusão: Este estudo contribui para orientar, aperfeiçoar e resolver deficiências relacionadas ao papel fundamental do mediador comercial, melhorando os princípios de segurança e simplificando os processos para reconhecer um “acordo de liquidação bem-sucedido”. Este importante fundamento jurídico ajuda o método de Mediação Comercial a funcionar de forma eficaz.

Palavras-chave: mediação, mediação comercial, mediador comercial, mecanismo de execução do acordo de mediação bem-sucedido.

1 INTRODUCTION

Based on understanding the context and inevitable needs of social reality, Decree No. 22/2017/ND-CP of the Vietnamese Government dated February 24, 2017 (hereinafter referred to as Decree 22/2017) promulgates the Commercial mediation, an essential step in internalizing the commitment to open mediation services as signed with World Trade Organization. Thanks to fast, flexible, confidential, and cost-effective procedures, commercial mediation helps the parties show good faith in maintaining and developing their business partnerships while reaching compromises to avoid litigation in Court (Christy Bieber, J. D., 2023). In addition, mediation allows the parties to focus on the underlying circumstances contributing to the dispute rather than on restricted legal issues (Lark Lewis, J. D., 2023). From the perspective of state governance, mediation also reduces the workload of Courts, saving human resources and time, which may be used for other societal activities 14 (Duy, N.B., 2023). In the future, accelerating the progress of setting a legal framework for commercial mediation activities in Vietnam in line with international laws is crucial. Thus, it is vital to perfect and intensively exploit a
mechanism in Vietnam to enforce a successful mediation agreement (hereinafter referred to as SMA). It is the main foundation for the litigants’ SMA to be enforced.

Following the prevailing laws of Vietnam, two documents directly regulate commercial mediation activities. The first is Decree 22/2017, which creates a legal framework for commercial dispute mediation relations in Vietnam. Based on an overall assessment, most of the provisions therein are not as strictly binding by the state governance as Arbitration or Court; this document is the foundation for the set-up of legal mechanisms to create trust and support for the parties involved in dispute settlement by commercial mediation. However, Decree 22/2017 does not contain the provisions to specify the most important principles of mediation, especially provisions on the SMA. The second is the Civil Procedure Code 2015 (hereinafter referred to as 2015 CPC), recognizing the Procedure for recognizing the results of successful out-of-court mediation from Article 416 to Article 419. Specifically, that document mentions the issues concerning Recognition Conditions (Article 417 of the 2015 CPC), Application Forms (Article 418 of the 2015 CPC), and Recognition Procedures (Article 419 of the 2015 CPC). The Procedure will be applied to SMA established outside the Court, including commercial mediation. Through the above procedure, the Court will consider and decide whether to recognize or not the written results of successful mediation occurring among agencies, organizations, or individuals authorized by competent agencies, organizations, or persons in charge of mediation under the law on mediation (Article 416 of the 2015 CPC). Following this stage, the involved parties will continue Civil judgment enforcement procedures according to Chapter III of the 2008 Law on Civil Judgment Enforcement (amended and supplemented in 2014, 2018, 2020, and 2022). However, this process will take much time and significantly affect the security mechanism, which will not guarantee commercial mediation activities’ fast, flexible, and voluntary nature and self-determination. We conducted this study to propose the most appropriate solutions for a flexible enforcement mechanism of SMA in practice.

The article uses the following primary research methods: writing law analysis, comparative method, data collected from documentation, etc., aiming to comprehensively assess the theoretical basis system of commercial mediation to resolve commercial disputes in Vietnam and, at the same time, study the laws of some countries such as Singapore, USA, Germany, and Australia on mediation and enforcement mechanism of SMA in practice. With the most significant task of perfecting legal provisions, the article
will become a reference source for general law research and those interested in commercial mediation. We have pointed out the disadvantages of legal provisions and proposed perfect solutions to improve the efficiency of implementing the SMA enforcement mechanism according to the law on commercial mediation in Vietnam.

2 SITUATION OF LAWS OF VIETNAM ON SUCCESSFUL MEDIATION AGREEMENT ENFORCEMENT

Under the current laws of Vietnam, there are two documents regulating the regulation of commercial mediation: First, Decree 22/2017 stipulates the “scope, principles, order and procedures for resolving disputes through commercial mediation, commercial mediators, commercial mediation organizations, foreign commercial mediation organizations in Vietnam and state governance of commercial mediation activities” (clause 1, Article 1 of Decree 22/2017). Second, the CPC 2015 details the “Procedures for recognizing the results of successful out-of-court mediation” mentioned in Articles 416 to 419 of Chapter XXXIII.

2.1 INCOMPATIBILITY BETWEEN THE 2015 CIVIL PROCEDURE CODE AND DECREE 22/2017/ND-CP ON COMMERCIAL MEDIATION

Referring to the promulgation context, the provisions of Chapter XXXIII of the 2015 CPC on “Procedures for recognizing the results of successful out-of-court mediation” are general ones for the dispute resolution model through mediation; as long as mediation occurs outside the Court, these provisions shall apply. It can be seen that commercial mediation is only a part of the entire contents of out-of-court mediation. Besides, there are other mediations, such as local mediation (mediation in villages, hamlets, neighborhoods, groups, residential communities, etc.); land mediation (mediating disputes related to land use rights such as transactions, inheritance of land use rights, division of spouses’ community properties as land use rights, etc.); labor mediation (mediating individual or collective labor disputes over rights or interests) and other specialties. Meanwhile, Decree 22/2017 is a document enacted in 2017, adhering to the 2015 CPC, an acceptable and satisfactory solution that aims to initially implement and shape the development of commercial mediation regulations in Vietnam. Nevertheless, the Vietnamese courts’ conditions for SMA to be recognized, as acknowledged in Article 417 of the 2015 CPC, will not be much associated with Decree 22/2017 provisions as this
document promulgated in the previous period. The advantage of this issue is that the State will rely on the procedures designed in CPC 2015 to implement the management and enforcement of successful mediation results in commercial disputes without establishing a separate mechanism or agency to control this issue. However, in practice, this issue causes a lot of disadvantages and limitations, from violating security principles to violating other core properties of commercial mediation. The following are some details to be analyzed regarding the enforcement mechanism of SMA under the law of commercial mediation in Vietnam.

2.2 PROVISIONS IN THE FORM OF THE SUCCESSFUL MEDIATION AGREEMENT

*In practice,* to ensure the free development of commercial mediation activities, the prevailing laws of Vietnam do not require a specific document binding the parties to correctly and fully establish the contents of the contract for such a document to take legal effect.

*In essence,* it is the parties’ voluntary will and self-determination to enter a civil contract. As a civil contract, it must prioritize respecting all parties’ decisions, providing that it does not violate the prohibitions defined by law and social ethics or aim to evade the obligations to the Government or a third person (clause 4, Article 417 of the 2015 CPC).

2.3 PROVISIONS ON THE ORDER AND PROCEDURES FOR RECOGNITION OF SUCCESSFUL MEDIATION RESULTS

*Regarding the nature,* the prevailing laws of Vietnam have not specifically regulated an “Enforcement mechanism of successful mediation agreement”, especially in settling commercial disputes. However, the 2015 CPC also has provisions on a preceding stage called “Procedure for recognition of successful out-of-court mediation results” from Article 416 to Article 419 of the 2015 CPC, as we have just mentioned.

*Regarding the object,* Chapter XXXIII of the 2015 CPC shall apply to most SMAs - in other words, the general provisions for the dispute resolution model through mediation, as long as it occurs outside the Court. Thus, applying such an object of dispute in the commercial field is only a tiny part of all fields considered for settlement.
Regarding the recognition process, Decree 22/2017 does not directly refer to the procedures for recognizing SMA, but refers to the 2015 CPC. Expressly, this issue is stipulated in Articles 416 to 419, Chapter XXXIII, in the 2015 CPC, as follows: First, the conditions for recognition of successful out-of-court mediation results (Article 417 of the 2015 CPC) include the requirements for civil act capacity, terms of rights and obligations, applications of involved parties and other legal requirements as prescribed by law; Second, the application for recognition of successful mediation results (Article 418 of the 2015 CPC); Third, the order and procedures for recognition of successful out-of-court mediation results (Article 419 of the 2015 CPC): receiving and handling applications, considering applications, opening meetings, etc., to giving a decision on recognition or non-recognition of such results.

2.4 PROVISIONS ON THE ENFORCEMENT OF SUCCESSFUL MEDIATION AGREEMENT

This content, except the provisions mentioned in Clause 1, Article 15 of Decree 22/2017⁴, should be mentioned herein. Based on the perspective of enforcement of SMA in Vietnam, there will be two following cases:

First, SMA is like a contract. Accordingly, the enforcement will be fully subject to the parties’ discretion in the mediation, which means the parties may voluntarily enforce such results without performing further procedures (LawPlus, 2023). Once the parties agree to the results, they have committed to enforce and comply with them without asking the Court or other agencies or organizations to confirm or control the enforcement. The document will be valued as a bilateral contract in such a case. It helps to save time and costs and ensure accuracy and respect of parties’ interests.

Second, SMA is like a Court ruling. Accordingly, when the parties apply to Article 418 of the 2015 CPC, the Court of Vietnam will consider and decide on the recognition or non-recognition of SMA. Thus, when one of the parties or two parties, likely for personal gain, delay, or any other reason, does not have enough trust in, or desires, the agreement to be enforceable in practice, the parties can take the two following steps:

Firstly, one party or the parties should file an Application for civil dispute resolution according to Form No. 01-VDS (attached to Resolution No. 04/2018/NQ-

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⁴ Clause 1, Article 15, of Decree 22/2017 “When achieving the mediation results, the parties shall make a written record of such results. That record is effective and binding on the parties following the civil law.”
HDTP dated August 9, 2018, of the Council of Judges of Supreme People’s Court) to ask the Court to recognize the successful mediation results under the process specified in Articles 416 to 419, Chapter XXXIII, in the 2015 CPC. Thus, the successful mediation results through dispute settlement procedures of commercial mediation will be recognized by the Court in a Court ruling (clause 5, Article 419 of the 2015 CPC).

Secondly, for SMA to be enforced by the Civil judgment enforcement agency, the applicant should file an Application for judgment enforcement according to Article 31 of the law on civil judgment enforcement - [2008 Law on Civil Judgment Enforcement (amended and supplemented in 2014, 2018, 2020, and 2022)] (hereinafter referred to as LCJE) and perform several other things according to Chapter III of the Procedures for civil judgment enforcement - the LCJE. In this case, the Civil judgment enforcement agency will consider and perform its duties.

Another important note is that the decision on recognition or non-recognition of successful out-of-court mediation results will take effect immediately and not be appealed or protested according to appellate procedures (clause 8, Article 418 of the 2015 CPC). Therefore, the results will be considered for recognition and enforcement in line with the law on civil procedures and civil judgment enforcement.

2.5 PROVISIONS ON COMMERCIAL MEDIATORS ASSOCIATED WITH THE ENFORCEMENT OF SUCCESSFUL MEDIATION AGREEMENTS

For Commercial Mediator, there are two contents to be clarified as follows:

Firstly, the conditions for recognizing successful out-of-court mediation results, as recorded in the 2015 CPC, cause many disadvantages to the commercial mediator. In general, most applicable regulations on the Conditions for recognizing successful out-of-court mediation results in Article 417 of the 2015 CPC, focus on the subjects participating in the dispute settlement or parties involved only, not the conditions for the subject conducting the mediation session, commercial mediator. It will be a significant limitation when the position and role of this subject are not respected and promoted.

Secondly, the standards outlined in Decree 22/2017 do not require the authentication of the “signature” of a commercial mediator. Article 11, Mediation Rules of Vietnam International Commercial Mediation Center (VICMC), states, “When the parties reach an agreement on dispute settlement, and if required by the parties, the mediator assists the parties in making the Record of successful mediation results”. Hence,
based on the provisions of applicable laws and VICMC Rules, SMA will not automatically contain such authentication, which is not mandatory in the case of SMA establishment.

3 COMPARISON OF ENFORCEMENT MECHANISM OF SUCCESSFUL MEDIATION AGREEMENT IN VIETNAM AND LESSONS FROM GERMANY, USA, AUSTRALIA, AND SINGAPORE

Based on objective assessment, each country will have a distinctly legislative approach and thinking appropriate to its own economic, political, cultural, and social situation. Therefore, any legislative point of view will have a specific reason to exist, and what legislators should do is have a correct orientation to consider which content is most suitable to learn and improve the feasibility of law application. By correlative comparison with the legal system of mediation in several countries such as Germany, Australia, the USA, and Singapore, there are two primary contents to be considered by Vietnam to perfect the law on commercial mediation.

3.1 SUCCESSFUL MEDIATION AGREEMENT MADE IN VIETNAM NOT REQUIRING THE RECOGNITION PROCESS AT THE COURT

Vietnam tends to concretize the legal provisions as recognizing “Procedures for recognizing successful out-of-court mediation results” in Chapter XXXIII, the 2015 CPC. This content is recognized by law for the parties’ SMA to be enforced in practice. Nonetheless, this also causes many disadvantages when this process takes more time for involved parties and cannot ensure flexibility, adaptability, and security for them in case of participating in commercial mediation. First of all, as compared with the laws of the Federal Republic of Germany (Bundesrepublik Deutschland), in most cases, SMA will be voluntarily enforced by the parties. An agreement concluded through the mediation process constitutes a mediation agreement under Section 779 of the German Civil Code (Bürgerliches Gesetzbuch), which is enforceable as a contract. Furthermore, the agreement may be documented in a notarized deed (notarized deed), which is an enforceable deed, or if the parties’ attorneys-at-law signs the agreement (agreement of attorney-at-law), the agreement may be declared immediately effective under a particular procedure provided that the payer agrees (Linklaters, 2022). On the other hand, by reference to the United States of America (USA) regulations, any SMA reached through
mediation must be made in writing and performed by the parties. Neither the mediator nor any organization such as The private alternative dispute resolution (ADR) provider - JAMS or the American Arbitration Association - AAA has the authority to enforce mediation; a mediation agreement may be enforceable in the same way as any other contractual agreement through Arbitration (if the agreement contains an Arbitration clause) or at Court (Linklaters, 2022). For the enforcement, Section 13 of the USA Uniform Mediation Act only notes that “In applying and construing this [Act], consideration should be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it” between states. There is no specific process to coordinate the enforcement of such activity, which will be done voluntarily; if either party wants to bind the other party, it will be carried out through arbitration or court to apply as an agreement on ordinary contract law. Thus, with a comprehensive reference to the laws of this country, no provision in civil procedure legislation requires the recognition of the Court for a successful out-of-court mediation result as prescribed in Articles 416 to 419 of Vietnam CPC (Cratsley, J., 2018). From the perspective of an Asian country and considering the legal background in the Commonwealth of Australia, the mediation agreement in Australia is a legally binding and enforceable agreement in compliance with the usual rules of contract law. Some jurisdictions, however, will formally require specific types of mediation agreements. For example, in Victoria, mediation agreements in civil matters must be formalized [Legal Profession Act 2004 (Vic), section 4.3.12(1)]. Courts may also express settlement agreements through consent orders; this option can provide an effective enforcement tool, as failing to comply with such orders could result in contempt for courts (Linklaters, 2022). In particular, in some territories, mediation agreements in civil matters must be formalized – in other words, setting standards to define and shape the structure of specific tasks so it will be easier to handle and control all things better. Therefore, based on the experience learned from those countries, Vietnam can consider simplifying the Procedures for recognizing successful out-of-court mediation results and replacing it with another more flexible and adaptive mechanism to make this dispute resolution model developed commensurate with its advantages.
3.2 VIETNAM IS REQUIRED TO PERFECT THE CONFIDENTIALITY MECHANISM FOR THE EFFECTIVE ENFORCEMENT OF A SUCCESSFUL MEDIATION AGREEMENT

Firstly, in comparison of the confidentiality principles of Vietnam, Singapore, and Australia (in the Asia-Pacific region), it can be seen that, in Vietnam, the confidentiality factor stated in Clause 2, Article 4 of Decree 22/2017 is recognized in a highly simplified and primitive manner: “The information related to the mediation must be kept confidential unless agreed in writing by the parties or otherwise prescribed by law”. In addition, the rest thereof hardly mentions the provisions on confidentiality principles. Referring to the Singaporean Mediation Act 2017, this document has clarified many legal aspects of confidentiality (Khanh, N., 2019). Specifically, the confidentiality regulation therein is considered quite comprehensive because the information in the mediation process will be kept confidential and not used in further proceedings unless authorized by the Court or Arbitral Tribunal for some particular circumstances. According to Article 10 Singapore Mediation ACT 2017: “The mediation communication shall not be acknowledged as evidence in any arbitration or disciplinary proceeding unless authorized by the court or arbitral tribunal according to section 11”. On the contrary, compared with the prevailing laws of Australia, the confidentiality regulations in this country are pretty similar to the laws of Singapore. Accordingly, the information used in the dispute resolution model through mediation will be kept confidential. This information will not be accepted in court proceedings (Federal Court of Australia, 2023). At the same time, the mediator may disclose information in certain specific circumstances: agreed by the parties, reasonable grounds available for believing that disclosure is necessary to prevent or reduce the risk of personal injury or property damage, or required by law. The willful delay, failure to conduct mediation, or failure to conduct the mediation in good faith may result in adverse costs afterward (Linklaters, 2022). It is shown in practice in Vietnam that the Vietnam Mediation Center - VMC and Vietnam International Commercial Mediation Center - VICMC have also recognized the principle of not using mediation information for proceedings, which is mentioned in Clause 5, Article 11 Mediation Rules (VMC, 2019) and Article 15 Mediation Rules (VICMC, 2019).

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respectively. However, the legal regulations in Decree 22/2017 have not met and recognized such content, which needs noting if Vietnam wishes to perfect its confidentiality regulations. Through the above analysis, Vietnam can consider learning from the legislative points of view of Singapore and Australia, limiting the leakage of mediation information, which can become evidence against the parties if the parties file the dispute to the Court.

Secondly, in comparison of confidentiality principles of Vietnam and the USA, it can be seen that mediation information must be kept confidential unless it violates the legal prohibitions or social ethics aims to evade obligations or infringes on the third party’s rights (clauses 2 and 3, Article 4 of Decree 22/2017). The exceptions to the confidentiality principle in this document are established based on a general perspective. Compared with the United States Uniform Mediation Act 2003 (hereinafter referred to as UMA), this document establishes a highly detailed confidentiality mechanism compared to the Vietnamese legislative point of view; of course, UMA also specifies exceptions to confidentiality privileges (Thao, N. B., 2009, p.38). It means that not all information relating to the mediation or mediation communications is subject to confidentiality requirements. For the information to be kept confidential, it must also meet the corresponding content conditions (Khoi, H. M. &amp Ngoc, H. B. 2016). Specifically, UMA has listed the exceptions to confidentiality in paragraph (a) Section 6 of UMA, including agreement recorded and signed by all parties; information in a mediation held publicly or as required by law; information implying threats, use of force or injury; information on the criminal plan, conduct, and concealment of crimes; information relating to the mediator’s professional activities or the purpose of protecting people (children, disabled people, etc.). On the other hand, paragraph (b) Section 6 of UMA prohibits using information in the mediation process as evidence in court. However, a difference is that exceptions to disclosure are allowed, provided that: First, the benefits from using such evidence must be more significant than the ones from confidentiality rights. Second, the person conducting the proceedings will carefully consider listening to the parties’ separate opinions and decide whether such content is important enough to become evidence. These are exceptions prescribed by law but also include exceptions created by the Judicial authorities to consider the integrity and protection of the mediation process with more significant needs and benefits (Widman, S., 2020). Based on the analysis mentioned above and the assessment, Vietnam can consider learning the
following two factors: *First, the information in the mediation process shall not be used as evidence in courts; Second, confidentiality principles shall be intensively presented* because this will help to avoid unfortunate risks likely arising in reality.

4 DISADVANTAGES AND COMPLETE SOLUTIONS ON THE ENFORCEMENT MECHANISM OF SUCCESSFUL MEDIATION AGREEMENT UNDER COMMERCIAL MEDIATION LAW

4.1 DISADVANTAGES

4.1.1 Prevailing recognition process of a “Successful mediation agreement” is complicated, very time-consuming, and not suitable for the nature of commercial mediation activities

For the involved parties based on quickness, flexibility, and self-determination, the parties wishing to realize the recognition of SMA shall take the following: considering the conditions for recognition (Article 417 the 2015 CPC), preparing the application for recognition (Article 418 the 2015 CPC), and carrying out the recognition procedures in conformity with the procedures and order at courts (Article 419 the 2015 CPC). This process is complicated and takes time, which is a disadvantage in exercising the parties’ agreement in their commercial relationship. In the beginning, one of the advantages for the disputing parties to choose the resolution through a commercial mediation model is quickness and convenience. If the implementation of steps in the previous mediation process were quick and flexible, but recognizing that SMA took much time, the mediation would have lost its inherent superiority. It is a disadvantage for Vietnam to develop an enforcement mechanism of SMA in line with the law on commercial mediation. It should be noted that the provisions on the order and procedures specified in Chapter XXXIII, the 2015 CPC of Vietnam, will automatically apply to mediation regulations of other specialties. A required adjustment is to introduce separate and independent regulations on the agreements of SMA in the commercial field for the suitability of the orientation and nature of this activity. Therefore, performing procedures for recognizing the successful out-of-court mediation results wastes both parties’ time and effort. Again, this does not show the inherent advantages of dispute resolution through commercial mediation.
4.1.2 Process of recognizing successful mediation results not complying with the confidentiality principle, a unique principle of commercial mediation

In essence, SMA is the information internally agreed upon by the parties to resolve the dispute. Thus, is the confidentiality principle guaranteed if this agreement is transferred to the Court for recognition under Articles 416 to 419 of the 2015 CPC? For example, or a process stated in CPC 2015, the procedures for receiving and processing a request for recognition of SMA shall be transferred from Article 419 to Article 363 of the 2015 CPC. However, these are regulations on the Procedures for resolving civil matters (Section 6 Procedures for settling civil matters in the 2015 CPC). On the other hand, when Article 363 above is analyzed in detail, most of the processes from receiving to amending the application are referred to Articles 191 and 193 of the 2015 CPC on the procedures for initiating and accepting cases (Chapter XII, Section 2 in the 2015 CPC). The current problem is that these provisions are referred from the “Procedures for recognizing the successful out-of-court mediation results” (Chapter XXXIII in the 2015 CPC) to “General provisions on procedures for resolving civil matters” (Chapter XXIII in the 2015 CPC) and this process is leading to “Initiating and accepting cases” (Chapter XII in the 2015 CPC). The confidentiality requirement in case of such a complicated process is almost an impossible request. From a legislative perspective, although Decree 22/2017 has defined this principle with the detail of “Information related to mediation case must be kept confidential” (clause 2, Article 4 in Decree 22/2017), this is still quite preliminary and does not cover the entire nature of the problem. Thus, it is required to complete the confidentiality factors directly related to this issue so that the enforcement mechanism of SMA takes smoothly. In other words, the legal foundation of confidentiality will be the basis for the enforcement mechanism of SMA to be fully preserved. It is a long-term roadmap and solid foundation for the information confidentiality of the involved parties to be promoted in compliance with its true meaning.

4.1.3 Applicable law regulations need to adequately ensure the crucial role of the commercial mediator in establishing a successful mediation agreement

Currently, the conditions for the Court to recognize the SMA in the 2015 CPC only include issues related to the parties involved in resolving disputes without addressing conditions for the commercial mediator. The absence of specific provisions regarding conditions related to this entity constitutes a significant limitation, as the position and role
of the commercial mediator are not emphasized and valued. This provision has a reasonable aspect in that the nature of a mediation outcome is an agreement between disputing parties. Hence, the conditions for recognizing this result should only focus on the disputing parties. Conversely, this will indirectly limit the role of the commercial mediator; precisely, the provisions of Decree 22/2017 on commercial mediator standards are rendered less meaningful, as the role of the mediator is not seen as a mandatory condition in this case. It is also a point that needs careful consideration when constructing and establishing enforcement mechanisms of SMA, not only to ensure both the enforceability of the parties’ agreements but also to ensure the essential role of the mediator in commercial mediation.

4.2 PROPOSED SOLUTIONS

In our proposal, the SMA will be effective when it satisfies all the conditions stipulated by the law in Decree No. 22/2017/ND-CP without requiring litigation procedures for recognition. If successfully implemented, this process will develop the inherent advantages of flexibility, speed, and confidentiality in mediation while enhancing the effectiveness of promoting this dispute resolution current model in Vietnam. Furthermore, in establishing the enforcement mechanism, the contents revolving in this provision will be developed and completed based on essential legal relationships, including Laws on commercial mediation, laws on Administrative violations handling, and laws on Civil execution. Fundamentally, to address these issues, we propose three critical solutions as follows:

4.2.1 Establishing legal regulations for the enforcement mechanism of successful mediation agreements within the scope of the Law on commercial mediation

The proposed solutions within the framework of Decree 22/2017/ND-CP (on commercial mediation) include:

Firstly, the recommendation to establish regulations on the Effective conditions of the successful mediation agreement as stipulated in Decree No. 22/2017/ND-CP. Based on the foundations of Effective conditions of successful mediation agreement outside the Court in the 2015 CPC, Vietnamese law needs to adjust and establish regulations that suit the specifics of the commercial mediation field. Notably, under this heading, Vietnamese law needs to provide “solid” content to establish the “specific”
conditions that, when satisfied, will give the SMA legal effect. As Effective Conditions serve as the prerequisite foundation for the effective operation of all other standards, the following content will be inherited, supplemented, or constructed based on the 2015 CPC, Decree 22/2017, and other legal documents.

**“Effective conditions of the successful mediation agreement:**

1. The parties participating in mediation have total legal capacity: voluntary, independent, and objective.

2. The parties establishing the mediation agreement are individuals with rights and obligations regarding the content of the mediation agreement. In cases where the content of the mediation agreement is related to the rights and obligations of third parties, the third party’s consent must be obtained.

3. The content of the successful mediation agreement is legally effective when it has the signatures of the parties participating in mediation.

4. The content of the successful mediation agreement is entirely voluntary, does not violate the law, is not against social ethics, and does not evade obligations to the State or third parties.

5. The document on the Successful mediation outcome, when meeting the provisions of clauses 1, 2, 3, and 4 of this Article, will take effect for the parties according to the provisions of contract law.

6. In cases where the Successful mediation agreement has the additional authentication of the signature of the commercial mediator, it will be considered as a Memorandum of Successful mediation outcome according to commercial mediation law. This document will be executed according to the law on civil enforcement.”

These are general provisions on the practical conditions of a SMA that need to be directly recognized in Decree No. 22/2017/ND-CP. Each proposed provision has a reason for its existence; the contents are built based on the following aspects:

- *From the aspect of inherited legal regulations*. Accordingly, the provisions mentioned in clauses 2 and 4 about adequate conditions of the successful

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6 Two provisions are inherited based on Article 417 in the 2015 CPC including:

“2. The parties participating in establishing a mediation agreement have rights and obligations regarding the content of the mediation agreement. In case the content of the mediation agreement is related to the rights and obligations of a third party, the third party’s consent must be obtained.

4. The content of the parties’ successful mediation agreement is completely voluntary, does not violate prohibitions of the law, is not contrary to social ethics, and is not intended to shirk obligations to the State or third parties.”
mediation agreement we have proposed are inherited based on the existing provisions in Article 417 of the 2015 CPC.

- **From the aspect of supplementary regulations.** Accordingly, the provisions mentioned in clause 1 about adequate conditions of the successful mediation agreement we have proposed are supplemented and improved with the spirit of “entirely voluntary, independent, and objective”. The parties can generally agree on the most suitable process, time, place, and establishment of the SMA according to their needs. They are also entirely independent of any influence or pressure from external factors.

- **From the aspects of the newly established provisions.** These are the regulations we propose and develop based on a SMA’s principles, nature, and characteristics. Building these conditions will contribute to ensuring obligations related to rights, interests, and obligations while also creating a flexible and adaptable legal framework, allowing this document to be applicable in practice:

  First, “The content of the mediation agreement becomes legally effective when it bears the sufficient signatures of the participating parties”. In nature, a SMA is a contract between the parties involved in mediation, meaning that each party has obligations towards the other party (clause 1, Article 406 in the 2015 Civil Code), and the rights of one party correspond to the obligations of the other party and vice versa (Minh, N. H., 2021). When the parties reach a mediation agreement, the agreement’s content becomes legally effective when it bears the sufficient signatures of the participating parties.

  Second, “The document regarding the outcome of the successful mediation agreement becomes effective for the parties following the provisions of contract law when it meets the conditions stated in clauses 1, 2, 3, 4 of this Article”. Considering the wording, Clause 1 Article 15 in Decree 22/2017 has already stipulated: “The document regarding the outcome of the successful mediation agreement becomes effective for the parties following the provisions of civil law”. Therefore, regarding the scope, “civil law” here include various legal regulations such as regulations on property rights, inheritance, copyright, contracts, etc. Therefore, using the term “contract law” would be more accurate.

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7 The original content is mentioned in clause 1, Article 417 in the 2015 CPC: “1. The parties to the mediation have full civil act capacity.”

The official content that we propose to record in Decree 22/2017/ND-CP on Conditions for validity of mediation agreements: “1. The parties to the mediation have full civil act capacity; completely voluntary, self-determined and objective.”
and transparent in terms of wording when constructing the *Effective conditions of the successful mediation agreement*.

Third, “*In cases where the commercial mediator’s signature additionally authenticates the successful mediation agreement, it takes on the nature of a Memorandum of successful mediation outcome under the Law on commercial mediation.* This document will be executed following the law on civil enforcement”. In this context, granting additional authority to the commercial mediator is the most feasible and appropriate approach. The process from Article 416 to Article 419 of the 2015 CPC is unnecessary as it would consume a significant amount of time for the parties. Moreover, the standards for information security also become less secure when this litigation phase involves so many steps.

Based on the analyses and evaluations above, we have proposed the development of provisions regarding the *Effective conditions of the successful mediation agreement*. This proposal demonstrates superiority and flexibility as it includes the positions and roles of the entities involved: the parties participating in mediation and the commercial mediator. As in any situation, the provisions concerning these conditions contribute to establishing legal effectiveness for a SMA. If the parties have sufficient signatures, the SMA will have legal effect as a bilateral contract. If the signature of the commercial mediator is also present, it will be enforceable according to the LCJE. This foundation will serve as a solid basis for initially enhancing the enforcement of the SMA.

Secondly, we propose the creation of a document called the “*Memorandum of successful mediation outcome under the law on commercial mediation*” (hereinafter referred to as the Memorandum). This document holds legal effect as a regular contract and is established with sufficient signatures from the participating parties. If the signature of the commercial mediator is also present, it will be processed according to the LCJE. Naturally, if the parties do not adhere to the formalities of this document, it will still hold legal effect as a contract. This provision ensures flexibility and optimization by providing all necessary conditions for effective enforcement.

Thirdly, we will develop relevant provisions regarding the legal effectiveness of the “*Memorandum of successful mediation outcome under the Law on commercial mediation*”. To protect the memorandum’s principles and unique characteristics, we will focus on navigating – and proposing the legal effectiveness aspects of this document as follows:
First, the essence of the memorandum is the intent of the participating entities in mediation. Transforming it from a regular Contract into a Decision will not affect the content and legal value of the successful mediation outcome. This amendment is purely based on the Enforcement agency’s authority to ensure the document’s enforcement.

Second, the Memorandum will be sent to parties with relevant rights and obligations. It could include the parties directly involved in the dispute, parties related to the disputed issue, or third parties with rights and obligations related to the dispute, given their close connection to the document’s content.

Third, the memorandum will have immediate enforceability from when the parties sign and establish the document. It means that once the document is signed between the parties and the commercial mediator, the parties can promptly enforce it. For the document to be enforced, one of the parties must follow the Procedure for submitting enforcement (Article 32 in the LCJE), prepare the Enforcement request application (Article 31 in the LCJE), etc., following the procedure in the LCJE. Implementing this procedure allows the document to be swiftly enforced, ensuring self-determination and timeliness and enabling the parties to implement their agreement according to the established plan.

Fourth, they establish provisions regarding the Authority to authenticate the signature of commercial mediators to ensure the enforcement of a successful mediation settlement. Currently, referring to the provisions of the 2015 Civil Procedure Code concerning the Conditions for court recognition of successful mediation outcome (Chapter XXXIII in the 2015 CPC), a disadvantage exists that indirectly affects the role of the commercial mediator. Specifically, the provisions of Decree No. 22/2017 concerning the standards of commercial mediator are no longer of significant relevance, as the status of the mediator is not considered a mandatory condition in this case. Generally, Vietnamese law can consider the following factors:

First, granting authority to authenticate the signature of the commercial mediator (sign, clearly state their name, and affix a seal). This regulation will enhance the authority and ensure these entities’ crucial role within the dispute resolution framework through commercial mediation.

Second, ensure that the signature is a “direct signature” of the authorized person - the commercial mediator. It is to ensure the legal value of the documents used, especially since this document will have the power of compulsory execution according to the law.
on civil enforcement. Therefore, it is necessary to ensure that the signature is a “direct signature” of the authorized person – the commercial mediator.

Third, establishing the signature will alter the legal application for the mediated settlement but will not change the essence of the document. As analyzed in the previous section, in cases where the commercial mediator’s signature additionally authenticates the SMA, it takes on the nature of a Memorandum of successful mediation outcome. This document will be executed under the LCJE. On the contrary, if the SMA only bears the signatures of the two parties, it will apply according to the civil contract law. This amendment is primarily based on the Enforcement agency’s authority to ensure the execution of that document.

Fifthly, supplementing prohibited actions for commercial mediators. Accordingly, establishing the regulations regarding the authority to authenticate the signature of commercial mediators also leads to the emergence of actions that these entities are not allowed to perform. Rising from this issue, these are the factors that the law needs to clarify:

First, the law has not excluded special situations in which mediators must disclose information. In cases where the parties involved bring this matter for direct resolution to the Court if it deems necessary, the court can issue a decision requiring the managing organizations, agencies, or individuals to provide documents and evidence to the court as stipulated in clause 3 of Article 106 of the 2015 CPC. Therefore, the court has the full authority to demand that commercial mediators provide information related to the mediation process for the court to settle the dispute. Faced with the authority of an official agency, a mediator still has the responsibility to disclose information they become aware of during the mediation session. Therefore, the following content should be added to “Prohibited Actions for commercial mediators” in Article 10 of Decree No. 22/2017:

- “Using any documents, information as evidence or proof, in any form, in lawsuits before any competent financial institution or court or other forms of dispute resolution, where the content of the lawsuit relates to the dispute, is subject to the mediation procedure:
  a) Information, documents, viewpoints, proposals, opinions, business secrets, and other rights put forward by the parties during the dispute resolution process;
  b) Suggestions and proposals of the commercial mediator during the mediation process.”
As analyzed in the section on disadvantages, establishing standards for the overall issues mentioned above ensures the safety of the participating entities in disputes. Also, it builds confidence and trust for the parties participating in the mediation session. This action is a safe and effective step in enforcing the SMA. It prevents mediators or parties from exploiting the mediation session information and then utilizing such content to disclose it for purposes other than the intended one or personal gain, applied in subsequent litigation processes.

Second, there should be regulations on prohibited acts in case of misuse of signatures. Based on the issues analyzed and learned from Australia’s legislative point of view, Vietnamese law makes additional proposals to overcome this problem in Article 10 of Decree 22/2017 on Prohibited acts for commercial mediators with the following contents:

- “Using the signature authentication authority to profit, evade obligations or harm the parties to the mediation, third parties or other relevant parties.”

The addition of regulations on behaviors that commercial mediators are not allowed to do contributes to showing synchronization with the Privacy Principle – the core principle of this model. This is our separate solution, the law has not yet provided this, this problem is set out to overcome the consequences of the issue of Authorization to certify signatures for the commercial mediators that we proposed earlier. Therefore, adding this provision to Article 10 of Decree 22/2017 is an appropriate and feasible job. On the other hand, depending on the nature and severity of the violation, commercial mediators must be subject to sanctions following the provisions of the civil law, the criminal law, or the law on handling administrative violations.

4.2.2 Develop legal provisions on the enforcement mechanism of mediation agreements within the scope of the law on handling administrative violations

It is necessary to add sanctions for commercial mediators. Currently, prohibited acts for commercial mediator subjects are mentioned by law in Article 10 of Decree 22/2017. Similar to the above regulations, when commercial mediators violate the law’s prohibition, it will be handled according to the standards in Article 30 of Decree 82/2020/ND-CP on Regulations on sanctioning administrative violations in the field of supplementary legal aid; judicial administration; Marriage and family; civil enforcement; bankruptcy of enterprises and cooperatives (hereinafter referred to as Decree 82/2020 for
Accordingly, these contents revolve around the provisions: If commercial mediators perform prohibited acts, how will administrative violations be sanctioned? Under Decree 82/2020, setting monetary milestones from VND 5,000,000 to VND 30,000,000 is appropriate if this subject performs actions prohibited by law. However, the issue of dealing with such violations will not work if the mediator performs these prohibited acts repeatedly, which can be beneficial in the short or long term. Therefore, the solutions proposed in the framework of Decree 82/2020, include:

Firstly, supplement the regulation “Deprivation of the right to use the commercial mediators’ practice certificate from 01 to 03 months for the violations specified at Points a, b and d in Clause 2, Article 30 of Decree No. 82/2020” in the case of repeated administrative violations. Considering that the breach discloses information about the case (point a, clause 2, Article 30 in Decree 82/2020); Receiving, demanding money, or other benefits (point b, clause 2, Article 30 in Decree 82/2020); Simultaneously acting as a representative or consultant for one of the parties or concurrently an Arbitrator for the same dispute which is being or has been conciliated (point c, clause 2, Article 30 in Decree 82/2020). These regulations belong to professional, ethical standards; the implementation of the above actions both shows contempt for the law and does not respect the general rules of ethical conduct of commercial mediators.

Second, supplement the regulation “deprivation of the right to use the commercial mediators’ practice certificate from 06 months to 09 months for violations specified at points a, b and d in Clause 2, Article 30 of Decree 82/2020” in the case of recidivism. In this case, the mediator subject was previously sanctioned but continues to commit such an act. Considering the deprivation of the right to use the commercial mediator practice certificate from 6 months to 9 months, it is reasonable to warn this subject at a higher and stricter level than repeated administrative violations. The regulation of each handling level frame will correspond to each level the violator has performed.

As mentioned above, the legal frameworks we have just proposed are built based on reference to the “Additional sanctions” of the regulations on Violations of regulations for administrative activities. lawyer profession (Article 6 in Decree 82/2020), Violations of regulations on legal consulting activities (Article 10 in Decree 82/2020). Accordingly, we have based on the nature and extent of violations. violations, consequences of violations; and legal conditions that supplement and complete the regulations on Violations of regulations on the activities of commercial mediators (Article 30 in Decree
82/2020) so that it is possible to examine but still agree with the general spirit of Decree 82/2020.

4.2.3 Develop legal provisions on the enforcement mechanism of mediation agreements completed within the scope of civil judgment enforcement legislation – 2008 Law on Civil Judgment Execution (amended and supplemented in 2014, 2018, 2020, and 2022)

The solutions proposed in the framework of the 2008 Law on Civil Judgment Execution (amended and supplemented in 2014, 2018, 2020, and 2022) include:

First, the Law on Civil Judgment Execution needs to provide for ensuring the enforcement of successful mediation results. Specifically as follows: First, based on the duties and powers of civil judgment enforcement agencies. Accordingly, the civil judgment enforcement agency is responsible for bringing the decisions and judgments of the Court or an equivalent agency into reality, ensuring such decisions protect the people’s interests. This solid legal foundation enables commercial mediators to fully fulfill their rights and obligations, from promoting the mediation process to implementing those results. Second, based on economic benefits and human resources. Although the SMA is essentially a civil contract based on the parties’ agreement, if we want to ensure the implementation, there must be a separate solution rather than relying on a state authority for enforcement. However, solving this problem is a challenging job. If setting up a separate body to deal with the above process, how should it be set up? How does the process work? Will the state budget and human resources meet? Therefore, the most possible solution right now is not to go through a complicated process at the Court but will lead directly to the jurisdiction of the Civil Judgment Authority. This public agency will efficiently operate and ensure its enforcement based on the existing platforms.

Second, the Law on Civil Judgment Execution needs to add the document: “Memorandum of results of mediation completed according to the law on commercial mediation” into the scope of regulation of the civil judgment enforcement law. This document will be under the handling competence of commercial mediators. The precise delineation of the legal nature of the SMA is an indispensable job. The legislator will quickly orient, propose, and add to the LCJE’s regulation scope. The SMA will become a “new” subject recognized and protected by civil judgment enforcement law. With the above analysis and evaluation, the LCJE needs to stipulate more Memorandum subjects
to be added to the *Scope of the regulation section* specified in Article 1 of the LCJE. It is the basis and solid foundation, helping the enforcement mechanism of the SMA according to the law on commercial mediation to be synchronized and perfected. One thing to note: *Memorandum does not have the nature of state power, does not represent the will of the State, but represents the will of the disputing parties.* This problem has posed many difficulties for the commercial mediation model if there is no consensus and goodwill cooperation between both parties in implementing the SMA. Therefore, if one of the parties wishes to request coercion, the support of the civil judgment enforcement agency will be critical in ensuring the implementation so that the parties can exercise their rights and obligations and service as promised.

*Third, add the subject “Commercial mediator” and the document “Memorandum of results of mediation completed according to the law on commercial mediation” to the civil law judgment enforcement.* Editing the *Scope of the regulation section* of the LCJE also means that the inner content of this document needs to be changed. Therefore, it is necessary to supplement and improve the following issues to ensure the implementation of the Memorandum. Accordingly, *the subject “commercial mediator” is added to the regulations on *Issuing judgments and decisions* in Article 27 of the LCJE and *Guiding the right to request civil judgment enforcement* in Article 26 of the LCJE. The decentralization of authority to the subject of commercial mediators will contribute to ensuring the uniformity and consistency of the law and, at the same time, make the application of regulations more convenient and more accessible. In addition, *the Memorandum document is added to the regulations on executable judgments and decisions* in Article 2 of the LCJE, *Judgment execution competence* in Article 35 of the LCJE, *and Judgment enforcement mandate* in Article 56 of the LCJE. Accordingly, establishing content on the *Memorandum* into the above contents contributes to helping the Civil Judgment Enforcement Agency quickly determine the correct scope and authority in solving SMA issues. Thus, the issue of adding two objects of commercial mediators and a *memorandum* is a suitable job if we want this document to be directly enforced without having to go through the recognition procedure at the Court.

*Fourthly, the principles applied to the “Memorandum of Understanding on the results of successful mediation under the law of commercial mediation” are also applied similarly to other subjects.* With the enforcement of civil judgment enforcement law, the involved parties can themselves or authorize others to request judgment enforcement
through petition (Article 31 in the LCJE), and instructions on the right to request enforcement of civil judgments (Article 26 in the LCJE), procedures for submitting petitions (Article 32 in the LCJE), etc. In addition, issues of legal consequences of requesting the Memorandum enforcement will also be based on implementing the civil judgment enforcement law. Therefore, if the regulatory issue has an additional subject that is memorandum within the scope of this law, then the entire process (request - receipt - processing - enforcement) will also be complied with, similar to other regulations—decisions and judgments of other agencies and subjects.

Fifthly, the statute of limitations for requesting the implementation of the “Memorandum of Understanding on the results of mediation completed under the commercial mediation law” will be applied similarly to the civil judgment enforcement law provisions. With the application of the provisions of the civil judgment enforcement law, the statute of limitations for requesting enforcement for the Memorandum will also be calculated according to Article 30 in the LCJE: “05 years, from the date the judgment or decision takes legal effect, the judgment debtor or the judgment debtor has the right to request the competent civil judgment enforcement agency to issue a judgment enforcement decision”.

5 CONCLUSION

Commercial mediation is a highly potential dispute resolution method because of its flexibility, efficiency, security, conflict resolution, and relationship healing. The evaluation, analysis, and recommendations are essential for getting the most comprehensive view of the current state of Vietnam’s law on the enforcement mechanism for SMA under the law of commercial mediation. If the legal system governing this issue establishes a flexible legal framework, the social impact of this issue is manageable. Overall, the legal system will be challenging to perfect if the commercial mediation dispute resolution model develops in a direction opposite to its core nature. Therefore, it is necessary to make proposals to improve the regulation of commercial mediation in general and the enforcement mechanism of SMA following the Law on commercial mediation in particular because this is the main foundation contributing to creating a clear and solid legal framework for the mediation model to be developed without infringing - destroying other the principles - nature, and advantages of this method. Based on the
problems analyzed, we have solved the inadequacies in the provisions of the law based on three main aspects.

First, within the scope of Decree 22/2017/ND-CP, we have directly proposed to develop the contents of the practical conditions, develop the memorandum, document, perfect the security regulations, and grant the authority right to certify signatures for commercial mediators. These regulations create the basic legal foundation and are directly related to the enforcement of the SMA.

Second, within the law’s scope on handling administrative violations - Decree 82/2020. In this section, we proposed adding Sanctions for commercial mediator subjects. It is our separate solution; the law must still provide for it. This problem is posed to remedy the consequences of the signature attestation authority content for commercial mediators we proposed earlier.

Third, within the scope of civil judgment enforcement - LCJE. Accordingly, the contents proposed to be improved include adding the document “A Memorandum of successful mediation results under the law of commercial mediation” and the subject “Commercial mediator” to the overall content related to civil judgment enforcement law. This action contributes to showing the synchronization and compatibility with the standards we proposed in the previous contents.

The combination of the factors mentioned above has established a flexible and flexible mechanism but still ensures the principle of confidentiality and strengthens the commercial mediator subjects’ role in enforcing SMA. If successfully considered and built, this will be a solid foundation to ensure the implementation of the SMA document and, at the same time, help the dispute resolution model by commercial mediation to be developed corresponding to the values of the dispute settlement method. This recipe has brought.
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