ONLINE MEDIATION IN THE FIELD OF TRADE: QUALITATIVE ANALYSIS FROM THE EXPERIENCE OF SOME COUNTRIES AROUND THE WORLD AND LESSONS LEARNED IN VIETNAM

Nguyen Thanh Phuong, Tran Thanh Khoe

ABSTRACT

Background: The Industrial Revolution has promoted the development of the digital economy and e-commerce. This also leads to an increase in disputes related to online transactions. From the above issue, the legal corridor regulating issues related to online mediation activities has initially formed and developed strongly in a number of countries such as India, Japan, and European Union countries. However, from the perspective of Vietnamese law, this form of mediation is still quite new, and it will take time to develop regulatory policies related to this issue.

Research Methods: Within this article, to clarify the research issues, the authors used the following specific research methods: (i) Qualitative Research methods, (ii) Exploratory research method; (ii) Inductive and deductive methods; Statistical and synthetic methods; (iii) Comparative method.

Results: Through reasearch, the authors show some results achieved when applying online dispute resolution methods in the European Union, India and Japan. From there, we summarise some experiences when applying online mediation in Vietnam in the current context of digital transformation.

Conclusion: In the context that Vietnam is implementing judicial reform, the use of technology to serve in trial work is necessary. However, current legal regulations related to online trial and mediation in Vietnam have not been specified and guaranteed legality yet. From those, with the implementation of technology applied in trials, conducting online mediation in some countries will be one of the useful experiences, helping Vietnam perfect its legal mechanism in the future.

Keywords: arbitration, commercial mediation, online mediation, legal regulations, world experience.

Received: 09/10/2023
Accepted: 08/01/2024
DOI: https://doi.org/10.55908/sdgs.v12i1.2483

---

a Master of Laws, Nam Can Tho University, Can Tho City, Vietnam, E-mail: Nguyenthanhphuong099@gmail.com, Orcid: https://orcid.org/000-002-8206-5301

b Master of Laws, Nam Can Tho University, Can Tho City, Vietnam, E-mail: Khoett96@gmail.com, Orcid: https://orcid.org/0009-0000-6065-694X
MEDIAÇÃO ONLINE NO CAMPO DO COMÉRCIO: ANÁLISE QUALITATIVA DA EXPERIÊNCIA DE ALGUNS PAÍSES AO REDOR DO MUNDO E LIÇÕES APRENDIDAS NO VIETNÁ

RESUMO

Antecedentes: A Revolução Industrial promoveu o desenvolvimento da economia digital e do comércio eletrónico. Isto também leva a um aumento nos litígios relacionados com transações on-line. A partir da questão acima, o corredor jurídico que regula questões relacionadas com atividades de mediação online começou a se formar e a se desenvolver fortemente em vários países, como Índia, Japão e países da União Europeia. No entanto, do ponto de vista do direito vietnamita, esta forma de mediação ainda é bastante recente e levará tempo a desenvolver políticas de regulamentação relacionadas com esta questão.

Métodos de Pesquisa: Neste artigo, para esclarecer as questões de pesquisa, os autores utilizaram os seguintes métodos específicos de pesquisa: (i) Métodos de Pesquisa Qualitativa, (ii) Método de Pesquisa Exploratória; (ii) Métodos indutivos e deductivos; Métodos estatísticos e sintéticos; (iii) Método comparativo.

Resultados: Através de pesquisa, os autores mostram alguns resultados alcançados ao aplicar métodos de resolução de disputas online na União Europeia, Índia e Japão. A partir dai, podemos resumir algumas experiências durante a aplicação de mediação online no Vietnã, no atual contexto de transformação digital.

Conclusão: No contexto em que o Vietnã está implementando uma reforma judicial, o uso da tecnologia para servir no trabalho de julgamento é necessário. No entanto, os regulamentos legais atuais relacionados ao julgamento e mediação online no Vietnã ainda não foram especificados e garantidos a legalidade. Destes, com a implementação da tecnologia aplicada em julgamentos, a realização de mediação online em alguns países será uma das experiências úteis, ajudando o Vietnã a aperfeiçoar seu mecanismo legal no futuro.

Palavras-chave: arbitragem, mediação comercial, mediação online, regulamentos legais, experiência mundial.

1 CONCEPT OF ONLINE MEDIATION

According to the Southeast Asia E-Commerce Report 2020 by Google, Temasek and Bain & Company, Vietnam's e-commerce in 2020 increased by 16% and reached a scale of over 14 billion USD. In the Vietnamese e-commerce market, the online goods retail sector increased by 46%, ride-hailing and online food delivery increased by 34%, marketing, entertainment, and online games increased by 18%, and the online tourism sector alone decreased by 28%. This report also predicts that the average growth rate for the period 2020 - 2025 is 29%, and by 2025, the scale of e-commerce in Vietnam will reach 52 billion USD (Vecom 2021, 14). It can be seen that the development of online transactions will increase disputes. However, e-commerce transactions often have small value. So, when a dispute occurs, consumers will not proceed with dispute resolution procedures because it will take a lot of time and cost more than the value of the
transaction. Therefore, Online Dispute Resolution (ODR) in online transactions is considered a solution to resolve disputes between parties in the current context of digital transformation (Nguyen Thanh Minh Chanh, 2021).

From the point of view of Ethan Katsh and Janet Rifkin, online mediation is understood as “a dispute resolution method in which the dispute between the parties is resolved partly or completely online by a third party called mediators to reach a common agreement.” (Ethan Katsh & Janet Rifkin, 2001). Thus, online mediation still has the core characteristics of the mediation method, which is the resolution of disputes between parties through a third party. However, unlike traditional mediation, part or all of the mediation processes will be conducted online. Therefore, the growth of online mediation is closely linked to the development and modernisation of technological solutions. From platforms that allow email exchange during the conciliation processes, technology helps online conciliation to be conducted effectively and smoothly, but the essence of this dispute resolution method is not lost.

The usage of technology in the mediation process will make online mediation suitable for disputes between parties who cannot attend hearing sessions due to limited capabilities or conflicts (Nguyen Ngoc Ha, 2021). Besides, online mediation is also suitable for disputes in which the differences in the position of the disputing parties are not too large. Currently, online mediation is used in many types of disputes, such as disputes over goods purchase and sale, insurance, construction, space leasing, etc. In particular, online mediation is popular in e-commerce (including e-commerce in the forms of B2C, C2C, B2B...) because merchants operate e-commerce mainly in the case of small and medium enterprises (Nguyen Huong, 2020).

2 EXPERIENCE IN RESOLVING DISPUTES BY ONLINE MEDIATION FROM SOME COUNTRIES AROUND THE WORLD AND LESSONS FOR VIETNAM IN THE CONTEXT OF DIGITAL TRANSFORMATION

2.1 EXPERIENCE IN CONDUCTING ONLINE MEDIATION FROM THE EUROPEAN UNION

As a result of the diverse development of commercial activities, more and more disputes in this field will arise, while the current traditional dispute resolution methods are still not comprehensive and effective to thoroughly resolve all disputes arising. In certain cases, force majeure events, such as natural disasters, enemy sabotage, etc., have made
dispute resolution activities even more difficult. Since then, Online Dispute Resolution (ODR) has become a useful method, saving costs and time for the parties in dispute settlement. Among ODR methods, online mediation is a method widely studied and used in resolving commercial disputes, including disputes with foreign elements. Grasping this trend, the European Union has issued many regulatory regulations related to this issue, such as Directive 2013/11/EU of the European Parliament and the European Council on alternative dispute resolution methods for customers, or Regulation No. 524/2013 of the European Parliament and the Council on online dispute resolution for customers (this is a directive supplementing Directive 2013/11/ The EU regulating issues related to online mediation, known as the ODR Rules). Overall, these rules were issued based on the vision to create an online dispute resolution platform across EU countries for both domestic and cross-border transactions. This rule was issued to have a basis for resolving trade disputes through electronic methods and means. This mechanism will connect parties in the dispute process with online arbitration centres.

On the basis of Article 2 of the ODR 524/2013 rule, this convention will cover disputes related to contractual obligations originating from online sales or service contracts between resident consumers within the European Union and a trader established within the European Union. In addition, this rule also clarifies the definition of electronic sales contracts or electronic service provision contracts, which are understood as "sales contracts or service provision contracts in which the trader or its agent has provided goods or services through a website or by other electronic means. Accordingly, the consumer has purchased goods and services on that website or by other related means. Hereby, it is recognised that contracts concluded through traditional written forms will not fall within the scope of ODR Rule 524/2013.

Regarding the operation of the ODR platform, consumers will fill in the information in the online complaint form, which is integrated into the EU ODR platform website. Once the required information is completed, the form will be forwarded to the complained merchant through the ODR platform. After receiving the complaint form related to them, traders or e-commerce businesses will have the right to choose the following forms to solve their disputes: (i) Self-negotiate, actively contacting the complainant to resolve the dispute; (ii) choosing to settle disputes on the ODR platform; (iii) Choosing not to participate in dispute resolution. If both parties agree to resolve their disputes through the ODR platform (30-day period), the dispute will be forwarded to online arbitration, conciliation or other
ODR centres as decided by consumers and merchants based on the available list. In general, it can be seen that the ODR online dispute resolution model in the European Union is considered one of the first models applying technology to resolve disputes. Compared to other online dispute resolution models in the world, online dispute resolution in the European Union still has some issues, such as:

Firstly, the ODR platform is used in most member countries of the European Union. Notably, member countries of the European Union established centres to settle disputes besides courts and online arbitration and mediation centres - ODR for consumers. These centres are inspected and certified by that state. To meet the need to resolve commercial disputes, European Union countries have established 415 ADR/ODR organisations and centres equipped with tools to resolve consumer online disputes. All these organisations and centres have been licensed and certified by the state members. Objectively, the number of disputes resolved through the ODR platform is relatively large. According to statistics, since ODR was established in the European Union, about 120,000 disputes have been resolved through online mediation. About 56% of disputes are domestic disputes, while 44% are cross-border disputes, and only about 2% are conducted by arbitration.

Second, European Union countries always encourage settling disputes through mediation instead of court proceedings. Besides they also point out the advantages of mediation, such as saving time and simplifying procedures. As required by the rules, traders established within the European Union engaged in online sales or services and online market platforms should provide an electronic link to the ODR platform on their website (Dao Ba Minh, 2021, 71). In addition, the European Union's ODR platform is operated flexibly, combining traditional alternative dispute resolution (ADR) and online dispute resolution (ODR) methods. This helps arbitration and mediation centres to reach different disputes easily. It is worth noting that the ODR platform has great value, as it creates great pressure on traders, forcing them to resolve consumer complaints submitted to this platform when informed by the European Commission. Based on its nature, the online mediation platform is not simply an online dispute resolution method, but this method also brings value to traditional mediation and arbitration centres when traders and customers can also agree to choose these centres to resolve their disputes related to goods submitted to the ODR platform by the European Union (Tran Le Dang Phuong & Nguyen Thanh Phuong 2023, 67).
2.2. ONLINE MEDIATION DISPUTE SETTLEMENT IN INDIA

According to statistics from Bain & Co., India's online shopping market will reach 50 billion USD by 2022. With 180-190 million online shoppers, India is the third largest in the world after China and America (Nguyen Dang, 2020). As a result, disputes over e-commerce will arise in this country. To deploy mediation activities in general and online mediation, India gradually established a stable legal system to support the commercial mediation dispute settlement in correspondence to practice. Accordingly, many codes and acts have been issued to regulate issues related to commerce, electronic transactions, and commercial arbitration.... In 1872 in India, the Contract Law was enacted. This is the first step in which India recognised electronic contracts. However, this law has not yet been detailed. As a result, it is difficult to apply in practice. Responding to the needs of society in 2000, the Information Technology Law was promulgated. The content of this law detailed the specific characteristics of electronic contracts. Specifically, Chapter 4 detailed written available documents or information to express electronic forms and accept electronic contracts (Anil Xavier, 2016).

Along with this issue, in India, electronic signatures are legalised to help e-commerce contracts be implemented legally. In Chapter 5 of the Information Technology Law 2000, there are 02 types of electronic signatures, including an electronic signature combined with the Aadhaar system and eKYC (Electronics Know Your Customer). This has invisibly promoted the recognition of electronic signatures in online transactions, which is the basis for developing online mediation in India (Dv. Prashant Mali, 2015).

To enhance the development of mediation to help disputes be solved in a peaceful manner, during the period from 1996 to 2012, the government issued many different policies. However, although development was encouraged, in general, the laws did not fully cover the problems that occurred in the practice of electronic transactions. Since then, in 2013, India carried out judicial reforms to promote the development of online mediation activities. As a result, regulations on mediation have been incorporated in the Company Law 2013, Bankruptcy Law 2016, Commercial Court Law 2015, and other related laws. One of the highlights in section 12A of the Commercial Court Law 2015, amended in 2018, requires conciliation to be held before filing a lawsuit to the courts. Besides, India also regularly persuades parties, as well as lawyers, to go for mediation to settle their disputes (Laila Ollapally, 2018).
To make the mediation process become a popular method to resolve disputes in India, the Indian government has established online mediation platforms to encourage and facilitate mechanisms and policies to promote mediation. An online mediation and arbitration centre was established, which will reduce the Court's workload. The statistics show that in India in 2020, there are still nearly 30 million unresolved cases. Based on the above issue, the Indian Ministry of Justice has encouraged disputes to use new dispute resolution methods known as online mediation. At the same time, the Ministry of Justice also published a list of arbitration and conciliation centres on the portal to encourage disputers to strongly choose this form of dispute resolution to reduce pressure on the Court and save litigation costs and dispute resolution time (M. Govindarajan, 2016). In addition, India also established private and public online mediation centres. During the period 2015-2018, the Ministry of Home Affairs and the Government established an online consumer mediation centre at the National Law University of India and, at the same time, established mediation centres at institutions with legal training. These centres also provide an online mediation platform with easy access, high security, and neutrality (H. Plecher, 2020).

2.3 ONLINE MEDIATION DISPUTE SETTLEMENT IN JAPAN

In Japan, online mediation appeared quite early in 2001, with the name ECOM (Electronic Commerce Promotion Council). However, during this period, Japanese law still lacked provisions regulating issues related to online mediation activities. So, these centres are not operating effectively. With the ambition to promote the development of mediation, Japan focuses on developing non-profit organisations that provide online mediation services. In 2013, an organization called Jaconet was established, bringing together individuals with the will to protect the rights of consumers and resolve disputes in the most peaceful way. In a remarkable step forward in 2015, the Jaconet organisation investigated the development of an online commercial mediation system and proposed a number of solutions to strengthen the legal system and correct shortcomings in the resolution mechanism to resolve cross-border disputes online. Based on Japan's proposal, cross-border e-commerce dispute resolution agencies, known as the Cross-border Consumer Center Japan (CCJ), were established with 11 agencies abroad (C. Rule & A. Schmitz, 2017).
In 2018, the scale of the e-commerce market in Japan grew strongly, with an estimated value equivalent to 166 billion USD. In 2017, there were 82.59 million users for e-commerce transactions, which was forecasted to increase by 6.33 million people by 2022. Along with economic development, there is an increase in disputes related to e-commerce. In 2017, the National Consumer Affairs Center (NCAC) received 77,318 disputes related to e-commerce purchases, while in 2012, there were only 31,934 cases. During this period, there were changes in laws, but dispute resolution methods still do not meet the needs of consumers. Japan has established a number of Small Claims Trial (SCT) bodies in which disputes, including electronic transactions that have a value of fewer than 600,000 Yen, will be resolved by these bodies. The time to resolve these disputes at the Center is about 2 months, with a service cost of about 4,000 Yen per dispute. One of the difficulties is that this method cannot resolve cross-border disputes, meanwhile, these disputes cannot be resolved through the courts (Tran Le Dang Phuong & Nguyen Thanh Phuong, 2923, 79).

To solve these problems, Japan has established the main legal basis to deploy online dispute resolution methods such as:

*First,* the government issued the Law on Promotion of Non-Profit Activities, which is the basis for organisations providing non-profit online mediation services to be established. This law allows organisations and individuals to participate in activities to protect consumer rights. On the basis of this law, many organisations have been established and provided information and services on dispute resolution by online mediation. In addition, the Law on Information Technology was promulgated in 2000, which is the foundation for developing e-commerce in general and online mediation in particular. Accordingly, Article 19 of this law creates conditions for the development of e-commerce transactions, as well as resolving these disputes, such as introducing new rules to settle disputes. The contract Law also recognises the validity of electronic transactions and creates conditions for developing online transactions. Law on electronic signature identification and commercial law created barriers to the development of online transactions due to the issue of confirming the identity of the parties. This can be difficult because there is a possibility that others can provide false identities by changing the information through the network. Since then, Japan has allowed the development of business activities and electronic signature recognition. In terms of nature, an electronic signature will have the same legal effect as a signature or seal under certain conditions.
This will facilitate electronic transactions and online settlement (Ha Cong Bao Anh, 2020)

Second, Japan also promulgated the Arbitration Law in 2003 to develop online mediation. In 2004, Japan issued an act to encourage the use of online mediation (Act on Promotion of Use of Alternative Dispute Resolution) to provide basic concepts and responsibilities of governments and stakeholders in establishing a certification system for online commercial mediation services, as well as establishing regulations on standards for participating in providing online mediation services, based on Lawyers’ standards to evaluate the standards of those participating in providing online mediation services. These standards will be determined by evaluators selected by the Ministry of Justice.

3 CONCLUSION AND RECOMMENDATIONS TO COMPLETE THE DISPUTE RESOLUTION MECHANISM THROUGH ONLINE MEDIATION IN VIETNAM

With the industrial revolution, every aspect of life is considered from the perspective of digital transformation, which will bring new opportunities as well as challenges, especially foreign element trade disputes. With this fact, it is necessary to use online dispute resolution methods. This raises the question of how Vietnam needs to improve to accommodate this new method of dispute resolution.

First, Vietnam needs to amend the Commercial Arbitration Law 2010. Although the Commercial Arbitration Law 2010 does not regulate online mediation activities. However, when evaluating the issue objectively, the Commercial Arbitration Law is inconsistent with the nature of online mediation activities, such as the form of the petition and attached documents. On the basis of Article 30, when the parties have a dispute that wishes to resolve their disputes through arbitration, the plaintiff must complete the petition and send it to the arbitration centre or send it to the defendant. The question is, in what form will the petition be presented? Practical application shows that lawsuit petitions are often made in a written form. The law does not allow lawsuit petitions to be made in the form of email or other forms. On the contrary, by the nature of ODR, all arbitration processes and procedures must be carried out electronically. Therefore, Article 30 of the Commercial Arbitration Law needs to be amended by adopting different forms of the lawsuit petition. This will help to avoid conflicts hindering the dispute resolution process through online arbitration when the defendant does not accept emails in written form.
Second, from India's experience, Vietnam needs to build a systematic legal corridor. Accordingly, India has created conditions for online mediation activities to develop through synchronising customs laws. This requires Vietnam to issue uniform regulations on issues related to electronic evidence, electronic signatures, and electronic contracts. Although Vietnam has established a legal corridor related to electronic transactions, recognising the validity of electronic data and electronic signatures, gaps exist in electronic evidence and digital signatures. This requires the legal corridor to be synchronized with online mediation forms. In addition, it is necessary to pay attention to security and privacy issues when using online mediation. At that time, with experience from India in establishing and using the personal identification system through the biometric form Aadhaar, it facilitated online transactions and dispute resolution. Therefore, Vietnam should take into account this system performed in India when it develops systems to facilitate the development of online mediation (Ha Cong Bao Anh, 2021).

Third, Vietnam needs to focus on the standards of mediators and service providers and develop laws to encourage the development of commercial mediation. Vietnam should establish a cross-border online mediation agency. Accordingly, with experience from Japan, the establishment of a dispute resolution system for cross-border transactions, specifically CCJ, has promoted trust with consumers. From this, Vietnam also needs to quickly establish an agency in charge of online mediation to enhance the trust of foreign partners in e-commerce disputes in Vietnam.

In summary, the law requires amendments in correspondence to practice to develop online mediation methods. With experience in implementing online commercial mediation activities in a number of countries around the world, these experiences help Vietnam have grounds to amend relevant legal regulations and provisions. This will contribute to resolving commercial disputes thoroughly, saving costs and time for disputers who wish to resolve commercial disputes, and minimising pressure on courts to resolve disputes.
REFERENCES


Dao Ba Minh (2021), Thúc đẩy giải quyết tranh chấp bằng trọn gian và hòa giải trực tuyến ở EU (Current status of applying dispute resolution methods by online arbitration and mediation in the EU), Nghe Luat journal, no. 7.


Ha Cong Anh Bao, Hòa giải trực tuyến ở Nhật Bản và một số đề xuất cho Việt Nam (Online mediation in Japan and some proposals for Vietnam), Journal of Northeast Asian Studies, No. 12 (238).

Ha Cong Bao Anh, Hòa giải trực tuyến ở Ấn Độ và một số đề xuất cho Việt Nam (Online mediation in India and some suggestions for Vietnam), Journal of India and Asian Studies, No. 1/2021.


Nguyen Ngoc Ha (2021), Nghiên cứu tổng quan về phương thức hòa giải trực tuyến trong giải quyết tranh chấp thương mại có yếu tố nước ngoài (Overview research on online
mediation methods in resolving commercial disputes with foreign elements). Presentation at the Conference "The current state of law and practical application of settlement Resolving commercial disputes by online arbitration and mediation", 2021


Phan Trung Hien (2022), Đề hoàn thành luận văn ngành luật (To successfully complete the law thesis), Su That National Political publisher.

Tran Le Dang Phuong & Nguyen Thanh Phuong (2023), Hoạt động hòa giải trực tuyến từ kinh nghiệm một số quốc gia trên thế giới và bài học với Việt Nam trong bối cảnh chuyển đổi số (Online mediation activities from the experience of some countries around the world and lessons for Vietnam in the context of digital transformation). Scientific conference proceedings: "Award Friendly resolution of investment disputes: Mediation and other methods, Vietnam Foreign Trade University, August 11, 2023."