

Kluwer Mediation Blog

Qualifications Of A Commercial Mediator Under Vietnamese Law

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1. Introduction

Although private commercial mediation has been offered in Vietnam for around ten years,^[1] the Vietnamese Government's enactment of Decree 22/2017/NĐ-CP on 24 February 2017 on Commercial Mediation (hereinafter Decree 22) has been significantly meaningful. Firstly, the Decree 22 has steadily established a clear legal framework for commercial mediation in Vietnam. Further, based on the content of the Decree 22, it could be stated that this Decree has provided for fundamental features of the commercial mediation process. The strong encouragement of the Vietnamese Government for commercial mediation as well as regulating appropriate provisions in the Decree 22 can lead to benefits for enterprises. Instead of being unstructured and unorganised as previously, commercial mediation processes have definitely followed the provisions in the Decree 22 to amend their operations, then to eliminate unnecessary legal risks. In the process of composing the Decree 22, one of the most controversial matters was whether or not this legal instrument should strictly impose limited qualifications which a commercial mediator will have to achieve.

2. Qualifications of a commercial mediator

From draft stage on, qualifications for commercial mediators were the subject of debate, there were two opposing viewpoints relating to this matter. The first tended to briefly design several elements which are simple and flexible, accordingly a commercial mediator only need have some criteria such as good morals, accreditations, legal understanding, commercial ethics and other related areas. On the contrary, the second favoured strictly limited conditions that a mediator must satisfy, including having achieved a bachelor's degree and being employed in the relevant area for at least two years. Even though the first viewpoint is more simple and easier for the mediator while the second is more elaborate and difficult, the second one finally prevailed and was prescribed in provisions of the Decree 22.^[2]

The second point of view on the qualifications of mediators seems to be persuasive. Although many countries' laws as well as the Model Law 2002 of UNCITRAL have not

clearly prescribed the qualifications for commercial mediators, the Decree 22's provisions on qualifications for commercial mediators appear to be congruent with and necessary for the current situation of Vietnam, for the following reasons:

(i) The Model Law of UNCITRAL has made recommendations but not compelled an approach, using the experience of foreign countries for the purposes of consultation. The law of every country is essentially enacted in harmonisation with its social-economic circumstances.

(ii) In the case of Vietnam, as the Decree 22 has been the first legal instrument on private mediation in general and specifically in relation to commercial mediation, a set of conditions that a commercial mediator will have to fulfil is really significant for the Government to manage the quality of the commercial mediation sphere overall. Transparent, basic qualifications could significantly contribute to the success of commercial mediation.

Article 7(1) of the Decree 22 stipulates two core types of conditions that a commercial mediator must satisfy, including "basic conditions" and "abandoned conditions". Basic conditions consist of (i) full civil capacity pursuant to the Civil Code 2015; (ii) having good morals, charisma and being independent, unbiased and impartial; (iii) having mediation skills and understanding of the law, commercial conduct and other related areas. In addition to basic conditions, a commercial mediator must not fall within any of the abandoned circumstances, including: (i) being a suspect, convict, a person serving a criminal sentence or finished serving a criminal sentence but the criminal record is not expunged; (ii) being administratively supervised by governmental organisations. Examining the minimum requirements listed in the Decree 22, there are some features which could be commented on.

3. Some comments and assessments

First, pursuant to the spirit of Decree 22, a commercial mediator must be registered at a private mediation organisation or Justice Department of provinces or cities under central authorities (Justice Department). It is impossible for a commercial mediator to conduct his business without registration in one of two forms. In case of registering at the Justice Department, a commercial mediator only needs to fulfil minimum qualifications mentioned at Article 7(1) of the Decree 22. Contrarily, if the person registers as a commercial mediator of a mediation organisation, he can be listed as having additional criteria to recommend him, as Decree 22 has allowed mediation organisations to establish their own qualifications, provided that such are not less than the features described at Article 7(1).

Second, in addition to basic conditions and abandoned conditions, there are some other conditions which relate to the diversified practice of commercial mediation called "additional conditions". Such conditions often relate to certain features such as age, gender, professional experience or even the current career of a commercial mediator. Those conditions relate to the specific character of commercial mediation, which includes the autonomy of parties to the dispute. For instance, parties to a particular dispute consent that their dispute will be heard before a mediation committee including two mediators of Mediation Centre A, who have master's degrees

in laws and possess at least ten years of experience in dispute resolution. Obviously, the qualifications of commercial mediators, in this event, subject to parties' consent are above the basic conditions listed in Decree 22. Therefore, if Mediation Centre A does not have any mediators who can satisfy the parties' agreement, the mediation agreement in this case seems to be invalid as it cannot be performed.

Third, commercial arbitrators and commercial mediators are both independent and impartial third parties. Nevertheless, the relative qualifications of those third parties have several differences. Under Article 20 of Commercial Arbitration Act 2010, a person can become a commercial arbitrator if he fulfils the following criteria: (i) full civil liability; possessing a bachelor degree with at least five-year experience^[3]; (ii) not serving as judges, prosecutor, inspector, conductor, or official of people's court, people's procuracy, civil enforcement agency, and not being suspect, convict, a person serving criminal sentence or having served a criminal sentence but the criminal record is not expunged. In comparison to qualifications for commercial mediators, a commercial arbitrator's qualifications have both stricter and easier points. A commercial arbitrator has to have professional experience of at least five years while the condition for commercial mediators has been only two years. As for a highly qualified expert, he can be appointed as a commercial arbitrator although the term for professional service is lower than five years. However, the same "reduction" does not exist in Decree 22.

Moreover, a person serving as judge, prosecutor, inspector, conductor, or official of people's court, people's procuracy, civil enforcement agency cannot become commercial arbitrator as the same time, but the Decree 22 does not exclude those circumstances from the ability to work as a commercial mediator. This omission could give rise to two practical considerations: (i) whether or not a person serving as judge, prosecutor, inspector, conductor, or official of people's court, people's procuracy, civil enforcement agency can act as a commercial mediator; (ii) if so, whether or not he will register with the Justice Department or a commercial mediation centre. It would be helpful for these questions to be interpreted clearly in other legal instrument such as an Ordinance of Ministry of Justice or a Resolution of People's Supreme Court.

Fourth, the nationality of commercial mediator is also a considerable feature. A commercial mediator of Vietnamese nationality will have to fulfil basic conditions and abandoned conditions, however whether or not those conditions will also apply to a foreign person who would like to conduct commercial mediation in Vietnam, and whether they can register at a certain Justice Department or a commercial mediation centre remains unclear. The same question arose when legislators drafted the Commercial Arbitration Act 2010. Practitioners of Vietnamese arbitration pointed out that several Vietnamese arbitration centres have included foreign arbitrators' names in recommended lists and the Ministry of Justice has ever never refused these registrations. It is notable that a foreign expert who would like to work as a commercial mediator in Vietnam must meet the requirements for Vietnamese mediators as mentioned above.

Finally, if parties choose a person to serve as a commercial mediator without registration to support them in the mediation process, there is a question as to whether or not the dispute settlement that is the outcome of mediation process could

be valid and enforceable. Article 27(7) of the Civil Procedure Code 2015 provides that only the court has jurisdiction to recognise and enforce the dispute settlement of a commercial mediation process, and only a dispute settlement made pursuant to law on commercial mediation (the Decree 22) could be recognised and enforced.^[4] The parties' appointment of a commercial mediator who has not registered with the Justice Department or a commercial mediation centre, will therefore breach the provisions of Decree 22. As a consequence, the dispute settlement in this case cannot be recognised and enforced by a Vietnamese court.

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