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Perfection Of Court Online Mediation System From The Perspective Of Functional Orientation

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Abstract

As an important application of Internet information technology in the judicial field, online dispute resolution has played an increasingly important role in recent years. In addition to online litigation, online mediation, as an auxiliary online dispute resolution method, has the comparative advantages of flexibility, low cost, convenience, and other non-litigation dispute resolution methods. The online mediation of the people's court in China is litigation mediation in nature and judgmental mediation in function. It will find a correct solution in law as the primary goal and take reducing costs as the inherent value of mediation. There is a risk of damaging the voluntary and procedural protection rights of the parties. China's current online mediation system has many drawbacks in realizing the function of judgmental mediation, such as the lack of restrictions on the scope of application, the difficulty in ensuring the voluntary nature of the parties, and the lack of connection with online litigation. Therefore, for the design of the online mediation system of the People's Court of China, the scope of its application should be limited in legislation. Secondly, we should make specific procedural regulations on online mediation, restrict the mandatory mediation of judges, avoid sacrificing the voluntariness of the parties, and endanger the legitimacy of mediation and the interests of the parties. Thirdly, in the application, attention should be paid to clarifying the auxiliary status of online mediation, strengthening the connection with online litigation, and resolving disputes more appropriately and efficiently.

Keywords

Court mediation; online mediation; function positioning; dispute resolution

Introduction

At present, with the rapid development of Internet technology, we have entered the era of comprehensive information. On the one hand, online mediation inherits the comparative advantages of a non-litigation dispute resolution mechanism and has the advantages of reducing the cost of dispute resolution and improving the efficiency of dispute resolution. On the other hand, the online form breaks through space and time constraints and can give the parties more convenience.

However, when we shift our attention from the theoretical level to the practical level, we will find that the application effect of online mediation is not ideal. For example, from the pilot work to December 12, 2018, the People's Court of Guandu District of Kunming City entered 2738 online mediation cases on the cloud dispute

resolution platform, of which only 46 cases were successfully mediated online. This is not an exception. It can be seen that the current online mediation mode in China is still not mature, and the operation effect is not completely ideal. Some universal theories, systems, and specific rules in the construction of online mediation mechanisms have been discussed from different perspectives in academic circles. From the existing research, some scholars believe that the main reason for the poor effect of online mediation is that there is a functional imbalance between the requirements of in-depth communication on which the mediation mechanism can be effectively implemented and the flat structure of online media. Some scholars use the theory of technology-organization interaction as an analytical tool to summarize the existing problems in the development of online mediation and put forward suggestions, and some scholars start from the linkage and integration of systems, exploring how online mediation can play a better role in the system. The author believes that the construction of the system must be compatible with its functional purpose. This paper intends to explore how to build and improve the online mediation system of the people's court in China from the functional orientation of online mediation.

Function orientation of online mediation

The concept and nature of online mediation

Online mediation refers to the judicial activities in which the parties communicate, exchange, and reach a mediation agreement through electronic chat software, e-mail, electronic bulletin board, and other network information channels without meeting. Compared with the traditional mediation mode, online mediation requires more "technical".

As far as the nature of online mediation is concerned, on the one hand, from the perspective of the subject of mediation, the online mediation of the People's Court of China has the nature of court litigation mediation. Litigation mediation, also known as litigation mediation, is a process in which the case has entered litigation proceedings, and the parties reach a settlement and sign a mediation agreement under the mediation of the judge. The main feature of litigation mediation is that the mediator is a judge. According to the People's Court Online Mediation Rules, the current court online mediation in China includes all or part of the mediation activities carried out by the people's court, parties, mediation organizations, or mediators through the people's court mediation platform, such as online application, delegation, audio and video mediation, production of the mediation agreement, application for legal confirmation of mediation agreement, production of mediation statement, etc. Therefore, the current online mediation activities of the people's courts in China are essentially litigation mediation, so the scope of online mediation of the people's courts discussed in this article is also limited to mediation in litigation.

On the other hand, from the perspective of operation mode, online mediation needs online media technology and has a certain virtual nature. Generally speaking, justice should be a kind of on-site activity, with the characteristics of physical space presence, openness, and personal experience of the parties. With the wide application of information network technology in the judicial field, the online dispute resolution model has risen and flourished. Under the online dispute resolution mode, the above basic features of justice have been subverted. The core difference between online dispute resolution and offline dispute resolution is the change

of the dialogue field between the participants in dispute resolution, that is, from the real interaction between offline people to online dialogue and communication mediated by electronic devices. Therefore, the second basic nature of online mediation is off-site. In terms of the concept of communication, the media of information interaction between the communication subjects has changed, and the impact of this dialogue on the dispute-resolution process will be profound and significant. Mediation, as a dispute settlement activity with the assistance of a third party and mainly based on the independent negotiation of the parties, is more affected in the process of transferring from offline mode to online mode than other types of dispute resolution.

The difference between online mediation and offline mediation

At present, there is a view that there is no essential difference between online mediation and traditional mediation. Online mediation is simply to move traditional mediation from offline to online. This view ignores the impact of the information media itself on the mediation process. In fact, in the process of transferring from offline to online, the mediation subject, procedure, and effect have fundamentally changed.

Technical media exists as the main body of mediation

Some scholars believe that from offline mediation to online mediation, a dispute resolution participant with substantive significance has been added to the process of dispute resolution, that is, the technical media itself. This change has changed the traditional "mediator - party A - party B" ternary structure into a four-element structure, that is, "mediator - party A - party B - technical media". The author agrees with this view. In the process of offline mediation, the communication between the three parties is real-time and interactive, and the senses of the parties can be fully mobilized. However, in the process of online mediation, due to the addition of technical media, the transmission chain of information is forced to be extended, and its transmission has hysteresis and distortion. The substantive significance of technical media as a participant in dispute resolution lies in its negative blocking effect on dispute resolution. The size of the screen reduces the efficiency of information transmission between the parties to the dispute and the mediator, and some non-verbal information cannot be transmitted, or the transmission effect is not as ideal as offline mediation in the same time and space, and this non-verbal information often plays an important role in the resolution of the dispute.

More flexible mediation procedures

Mediation emphasizes taking flexible, diverse, and effective ways to resolve disputes according to the needs of specific cases, so there are generally no strict procedural restrictions. However, as a more formal way of mediation, court mediation should apply more formal procedures to ensure the voluntariness of the parties in the litigation process, otherwise, it will violate the essential requirements of the mediation system and damage the interests of the parties. However, in the process of transferring from offline mediation to online mediation, it is more difficult to achieve the procedural guarantee requirements. On the one hand, China's people's court mediation originally lacked strict procedural restrictions, and the specific procedures of court mediation were not specified in the relevant documents. On the other hand, separated from the constraints of the offline solemn environment, the inherently flexible procedures are more likely to be omitted, omitted, or deleted at will, thus damaging the substantive rights of the parties.

The effect of mediation is poor.

It is undeniable that online mediation does have the advantages of strong flexibility, low cost, convenient participation, and so on. Especially after the outbreak of COVID-19 in 2020, as an important part of online alternative dispute resolution, online mediation has played an important role in resolving social conflicts and reducing the burden of the courts. However, as pointed out in the first part of this article, the application of online mediation is more of a forced choice based on the objective epidemic background, and its dispute-resolution effect is not ideal. In traditional offline mediation, the mediator and the parties to the dispute mediate face-to-face. The mediator can judge the attitude of both parties according to the language, body movements, facial expressions, eye contact, and other information of both parties, tap the needs, and timely change the mediation strategy to promote the progress of dispute resolution. However, in the online mediation process, the communication between the mediator and the parties to the dispute can only be completed through the computer screen. The mediator only observed the facial expressions of both parties, and the lack of a variety of nonverbal information hindered the implementation of the mediation work. The patience and concentration of the mediator and both parties will be more easily consumed, which is the inevitable result of the lack of face-to-face communication. Second, in the face of the cold screen, the attitude of all parties is not easy to ease, and it is difficult to form a friendly atmosphere of reconciliation, which is not conducive to the smooth conclusion of the mediation agreement.

Function orientation of online mediation

Japanese scholar Hiroshi Ogase once made a rigorous analysis of the functional orientation of mediation and divided mediation into four types according to its different functions, namely, judgmental mediation, edification mediation, negotiation mediation, and therapeutic mediation.

In the coordinates shown in the above figure, first of all, we can distinguish two mediation modes with opposite value orientations: one is to actively respond to the expectations of trial-style treatment and strive to keep consistent with this requirement (in the same direction as the law), and the other is to seek the inherent treatment of mediation itself that is different from the trial (in the opposite direction from the law). Mediation in the same direction is mainly used as an auxiliary system to remedy the lack of judicial capacity, while mediation in the opposite direction exists as a unique way in the dispute resolution mechanism of the whole society.

Secondly, according to the different emphasis on the function of mediation, it can be expressed by two differentiation axes: one axis indicates that the basic function of mediation is to reduce costs or restore the order of the community. Another differentiation axis indicates that the basic goal of mediation is to find a legally correct solution (legitimacy) or the parties choose their preferred solution (autonomy). According to the nature of mediation and trial-type mediation, we can get four types of mediation: judgment type, negotiation type, edification type, and treatment type.

Judgmental mediation takes finding a legally correct solution as the primary goal and takes reducing costs as the inherent value of mediation. The ideal state is to achieve a solution close to the trial as far as possible under the premise of saving costs and improving efficiency, based on taking mediation as an important means to popularize the law to society and realize rights more widely and at a lower cost. Negotiating mediation also puts the focus of its function on the reduction of costs. However, contrary to judgmental mediation, its pur-

pose is not to find the correct legal solution but to put cost savings first, and not hesitate to reduce the legal correctness. In the civilization-type mediation model, the so-called standard of correct settlement is completely different from the model of strict law. It does not seek the reappearance of the trial, but takes the discovery of the unique justice or reasonable settlement of the mediation itself as its responsibility, takes the realization of a certain social joint relationship as its goal, and pursues the "complete settlement", the maintenance of human relations and the stabilization of order. Therapeutic mediation regards dispute as a pathological phenomenon of interpersonal relationships and tries to treat the disease and restore it to normal using generalized interpersonal relationship adjustment.

Based on the above essential characteristics of online mediation, the author believes that the function of online mediation should be located in the judgment mediation, and compared with traditional court mediation, it is more inclined to the left and upper side of the differentiation axis, that is, it focuses on the reduction of costs, and it is also more likely to fall into the misunderstanding of pursuing legality too much, which is detrimental to the voluntariness of the parties.

The biggest advantage of online mediation is that it saves time and money costs. The parties involved in mediation can complete the mediation process without meeting. Compared with traditional face-to-face mediation, it further reduces the cost of dispute resolution. In contrast, online mediation is also more likely to fall into the error of authoritarianism. Some scholars pointed out that for a long time, China's litigation mediation has formed a "mediation type" trial mode in the procedural structure. This mode mainly takes mediation as the litigation goal, and the judge's authority investigation and mediation activities as the center to launch the trial process. In the design of the specific system, the strictness of the procedure is not emphasized, and the litigant's litigation rights cannot restrict the jurisdiction. In the process of transferring mediation activities from offline to online, this disadvantage will be more obvious. The online mediation mechanism will consume the mediation subject's patience to a certain extent. Mediators naturally prefer to guide the parties to reach a predetermined mediation plan rather than patiently explore the real needs of the parties, which will lead to a higher degree of discovery of legal correctness, but this will inevitably be at the expense of the parties' voluntary and procedural protection rights.

Defects of the current online mediation system

From the perspective of legislative evolution, China's current online mediation system has the following problems in realizing the function of judgmental mediation:

Lack of restrictions on the scope of online mediation

According to the provisions of Article 3 of the current Online Mediation Rules of the People's Court, almost all cases suitable for mediation or settlement can be moved online, and the scope of application of online mediation has not been clearly defined in legislation. This vague regulation will make it difficult to properly resolve disputes efficiently and will run counter to the original intention of the judgmental mediation to pursue low cost and high efficiency.

It is easy to sacrifice the voluntariness of the parties

As we all know, the most important mediation prerequisite is both parties' voluntariness. In the process of court mediation moving from offline to online, the opportunity of face-to-face communication to confirm the real intention was lost, and the voluntariness of the parties was difficult to guarantee. In China's current Civil Procedure Law and its judicial interpretation, as well as the newly released People's Court Online Mediation Rules, although the principles of legality and voluntariness, clear facts, and clear right and wrong are set for court mediation, there is still a lack of specific procedural regulations on how to effectively guarantee the voluntariness of the parties in the online mediation process.

Lack of connection with online litigation

Online mediation is a typical application of a non-litigation dispute resolution mechanism migrating online. Accordingly, the litigation mechanism has also been reformed in line with the trend of judicial informatization and implemented online litigation. An important issue that follows is how to properly handle the relationship between online mediation and online litigation mechanism. Online mediation belongs to judgmental mediation, which focuses on finding legally correct solutions, reducing costs, and improving efficiency. The pursuit of efficiency requires the formation of a complete litigation and mediation connection mechanism in the system design, and the comprehensive use of various dispute resolution methods to properly resolve disputes. Although China's current People's Court Online Litigation Rules also mentions the issue of online mediation, it regards online mediation and evidence exchange, court trial, service, and other matters as litigation links, and does not make specific provisions on the connection between online mediation and litigation.

Scheme for improving the online mediation system

Limit the scope of online mediation

Regarding the scope of the application of online mediation, China's relevant judicial practice has explored some preliminary standards for separating online disputes from offline disputes. For example, Anhui and Beijing stipulated the scope of accepting cases of civil disputes through online platforms in the form of a "positive list+negative list".

Throughout the judicial practice in these regions, we can see that for cases with relatively clear facts and legal relations, the communication cost of dispute resolution is low, and the needs of the parties are simple and clear. Such cases can be handled online. However, for cases with relatively complex factual evidence and numerous parties, if mediation is carried out blindly in pursuit of low cost, ignoring the independent will of the parties and the difficulty of mediation itself, it is easy to enter the situation of long-term mediation, which increases the cost of dispute resolution. Therefore, for relatively complex disputes, the application of online mediation should be ruled out if objective conditions allow, and it is still necessary to restore to the offline environment for more proper treatment. Therefore, the author believes that the opinions of the parties, the complexity of the facts of the case, the antagonistic feelings of the parties, and the objective conditions that restrict online mediation should be taken into consideration when deciding whether to use online mediation.

Adhere to the mode of separation of investigation and review

When mediation and trial are placed in the same procedure, and the same collegial panel or the same judge mediates first and then adjudicates, the judge can't help but use his jurisdiction to request the parties to accept the mediation plan proposed by him to succeed in mediation. The parties are worried that refusing mediation or refusing the mediation plan proposed by the judge will offend the judge, and thus suffer retaliation from the adverse judgment. Therefore, from the perspective of ensuring the voluntariness of the parties in the mediation process, the mode of "separation of mediation and trial" has its necessity.

The author believes that under the online mediation mode, more attention should be paid to the "separation of mediation and trial". On the one hand, the drawbacks of "integration of mediation and review" still exist in the online mode. Because the mediation work under the online mediation mode will be subject to many limitations of time and space, the online mediation mechanism itself will cause a certain degree of wear on the patience of the mediation subject. The mediator naturally prefers to guide the parties to reach a predetermined mediation plan, rather than patiently explore the real needs of the parties, thus damaging the procedural rights of the parties. In addition, at present, judges or court-specially invited mediators generally lack professional mediation knowledge and skills. In the online mediation mode, due to the lack of face-to-face situations and nonverbal behaviors, the importance of this knowledge and skills is even more prominent. Therefore, the author advocates that judges should be replaced by people with professional knowledge as online mediators, to carry out "mediation separation" and resolve disputes reasonably and legally.

Strengthen the connection with online litigation

On the connection between online mediation and online litigation, foreign research and practice have made good progress. Take the UK's ODR (Online Dispute Resolution) experimental project as an example. The project divides the process of dispute resolution into three stages: online evaluation, online assistance, and online judgment. The online evaluation stage mainly involves dispute diagnosis, case characterization, and helping the parties to understand alternative solutions. If the dispute cannot be resolved at this stage, it will enter the online assistance stage. At this stage, the case commissioner will organize the parties to provide mediation, consultation, and other services. If the parties are still unable to settle at this stage, they will enter the final online adjudication link, and the judge will make a decision.

It is found that only a small number of cases can enter the online adjudication stage. The system has formed a funnel filtering system. Through online evaluation and online assistance, cases with complex cases or involving major interests are screened out, and these cases are finally settled by litigation. The author believes that the system convergence of online mediation and online litigation in China can also refer to this case diversion mechanism. The online dispute resolution process can be divided into online assessment, online consultation, online mediation, online trial, and other links to form a systematic case handling mechanism, clarify the rights and obligations of the parties at all stages, give full play to the role of online pre-litigation mediation to resolve disputes, and reduce the workload of the court, however, it should be noted that the case commissioner in charge of online mediation and the judge in charge of the online trial should be held by different people, and the "separation of mediation and trial" mode should be strictly implemented.

Conclusion

Nature determines functional orientation, and functional orientation determines the institutional structure. On the one hand, online court mediation has the characteristics of traditional court mediation, and on the other hand, it relies on modern media technology, which is virtual. The online mediation of the people's court is a judgmental mediation in its functional orientation, which focuses on finding the correct legal solution and reducing the cost, but it may damage the voluntariness of the parties. The current online mediation system has deficiencies in giving full play to the function of judgmental mediation. The root cause is that the lack of various non-verbal information has created difficulties for the implementation of mediation work and posed new challenges to the design of the online mediation system. This paper puts forward corresponding suggestions to improve the current online mediation system to enrich the research content in this field.

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