

IMPLEMENTING MULTI-TIERED DISPUTE RESOLUTION CLAUSES: RECOMMENDATIONS FOR VIETNAM

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Abstract

In most commercial contracts, the parties often prioritize the application of measures to resolve conflicts in good faith such as dispute resolution board or mediation prior to arbitration (also known as alternative dispute resolution, ADR). Problems occur when one of the parties does not comply with the pre-arbitration proceedings designed in the contract. Currently, the 2010 Law on Commercial Arbitration does not clearly stipulate the validity and enforceability of the multi-tiered clause, leading to different courts making different decisions on the consequences of violating the pre-arbitration agreement. This paper analyzes the practice of the arbitral tribunals and the courts concerning the issue of application of multi-tiered clauses leading to arbitration in order to propose recommendations for amendments to the 2010 Law on Commercial Arbitration.

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1. Navigating multi-tiered dispute resolution: A path to amicable settlements

Multi-tiered dispute resolution (MDR) clause provides for a two-or-more mechanisms for the resolution of a dispute, typically requiring parties to attempt to conduct alternative dispute resolution before engaging in arbitration or court litigation, such as negotiation, mediation, expert determination, and arbitration.¹ It means that when a dispute arises, parties must or should follow specified steps as agreed before proceeding to arbitration in an attempt to resolve the problem amicably. MDR clause is also known as “escalation”, “multi-step” or “ADR-first” clauses.² Similarly, in the realm of international investment, this provision is also regularly included in bilateral, multilateral and regional investment agreements between countries called the “cooling-off” clause.³ In this research, the author concentrates on the MDR process leading up to arbitration, which facilitates parties in reaching a good-faith dispute resolution before resorting to arbitration for resolution.⁴ All of these mechanisms have a “filtering effect”⁵ by screening the disputes that proceed

1 Bom, G. B. (2014). *International commercial arbitration* (Vol. 1) (2n ed.). Kluwer Law International, p. 241.

2 Kayali, D. (2010). Enforceability of multi-tiered dispute resolution clauses. *Journal of International Arbitration*, 27(6), 489–512. <https://doi.org/10.54648/joia2010033>, p. 552.

3 Baltag, C. (2017). Not hot enough: Cooling-off periods and the recent developments under The Energy Charter Treaty. *Indian Journal of Arbitration Law*, 6(1), 25–42. <http://hdl.handle.net/10547/622271>

4 Berger, K. P. (2006). Law and practice of escalation clauses. *Arbitration International*, 22(1), 1–18. <https://doi.org/10.1093/arbitration/22.1.1>, p. 1.

5 Piñeiro, A. L. D. (2010). *Multi-step dispute resolution clauses*. Wolters España, p. 733.

to arbitration. Senior manager meetings (negotiation) often constitute the first step, mediation serves as the second, and arbitration proceedings serve as the third. Each tier or level in the MDR incurs higher costs than the preceding one.⁶ For example, The American Arbitration Associate (AAA) introduces the MDR model clause in its Drafting Guide as follows:⁷

In the event of any controversy or claim arising out of or relating to this contract, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach a settlement within 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the International Mediation Procedures of the International Centre for Dispute Resolution. If the settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.

This type of agreement raises the question of whether the agreement on pre-arbitration proceedings is procedural or substantive in nature. The determination of the procedural or substantive approach will directly affect their enforceability in practice.⁸ As for the procedural approach, MDR clause will constitute a prerequisite for initiating arbitration, affecting the arbitral tribunal's decision-making authority or the admissibility of a claim. The substantive approach, wherein the pre-arbitration agreement is considered substantive similar to other contractual terms, and the breach of the pre-proceeding obligation does not impair the arbitrator's jurisdiction, is often criticized by scholars for its perceived lack of practicality. In particular, the Claimant shall be held liable to the Respondent for damages resulting from the early submission of the matter to the arbitral tribunal. It will typically be exceedingly challenging for the Respondent to demonstrate that it experienced any real harm, nevertheless. Accepting the substantive approach would therefore prevent the Claimant from being penalized for violating the multi-tier arbitration clause in cases when the Respondent is unable to demonstrate any actual losses resulting from a premature submission.⁹

The author advocates for a procedural interpretation of the MDR

6 Willan, H. F. (2020). *Arbitration insights: Australia: Multi-tiered dispute resolution clauses*. HFW Insights. <https://www.hfw.com/downloads/002495-HFW-Arbitration-Insights-Australia-Part-3-Multi-tiered-Dispute-Resolution-Clauses-October-2020.pdf>

7 Kayali (2010), *supra* note 2, pp. 551 – 577.

8 Born, G. B. (2009). *International commercial arbitration*. Kluwer Law International, p. 847.

9 Mécar, M. (2015). *Enforceability of multi-tiered clauses leading to arbitration* (Master's thesis, Central European University). Central European University, p. 39.

clause, as this facilitates addressing the legal consequences of non-compliance with this provision more effectively. It is necessary to respect the will of the parties when they want to establish a procedural dispute settlement process, especially arbitration proceedings that always uphold the agreement of the parties. At the same time, this will provide the arbitral tribunal jurisdiction in two directions:¹⁰ (i) order a stay of the arbitration proceedings until the Claimant has complied with the pre-arbitration procedure, or (ii) dismiss the claims. However, when one party ignores or neglects these pre-arbitration procedures despite the existence of an MDR clause, a legal dilemma emerges regarding the arbitral tribunal's jurisdiction and the enforceability of resulting arbitral awards, potentially leading to grounds for annulment under law.

To address this issue, the article delves into the legal framework governing multi-tiered dispute resolution clauses in Vietnam. It analyzes legal provisions and case law to explore potential approaches, comparing them with other domestic laws and international legal instruments.

2. Analyzing challenges in applying multi-tiered dispute resolution clauses in commercial arbitration for dispute resolution in Vietnam

The 2010 Law on Commercial Arbitration (LCA) is currently open to provide for the terms of arbitration pre-proceeding agreements. Article 9, Article 38, and Article 58 of the 2010 LCA provide for mediation and negotiation, but only identify these methods as an integral part of arbitral proceedings.¹¹ Therefore, it is not simple to judge the legal relationship between the method of dispute resolution at the pre-arbitration stage and the arbitral proceedings themselves agreed upon by the parties in the MDR clause.

According to Article 5 of the 2010 LCA, the main condition under which a dispute can be resolved by arbitration is the existence of an arbitration agreement. This provision is strict because there is no provision open to the parties entitled to other agreements. Thus, explicitly, in this case, there is no provision stating that pre-arbitration proceedings are a prerequisite for the settlement of the dispute and that the arbitral proceedings shall commence from the time the claimant submits the petition.¹² If there is an arbitration agreement between the two parties, the conditions for bringing the dispute to arbitration are typically considered satisfied, irrespective of whether the parties have a separate conciliation agreement or pre-arbitration procedures in place.¹³ The absence of

10 Jollies, A. (2006). Consequences of multi-tier arbitration clauses: Issues of enforcement. *Arbitration*, 72(4), 329 – 338, p. 331.

11 Dung, T. V., & Chien, N. Q. (2023). *Trọng tài Thương mại Quốc tế - Những vấn đề đương đại và thực tiễn Việt Nam* [International Arbitration, Contemporary and practical issues in Vietnam]. Vietnam National University Ho Chi Minh City, p. 41.

12 Article 31.1 of the 2010 LCA.

13 An, N., & Vy, N. N. T. V. (2020). Hiệu lực thi hành của điều khoản trọng tài đa tầng trong trọng tài quốc tế và kiến nghị cho Việt Nam [Enforceability of multi-tiered arbitration clauses in international arbitration and recommendations for Vietnam]. *Vietnamese Journal of Legal Sciences*, 8(138), 93-107.

adequate legal basis has led to numerous legal issues, which is analyzed below.

While MDR clauses are prevalent in commercial contracts, their primary function is to facilitate good-faith dispute resolution before resorting to arbitration,¹⁴ this clause causes several legal problems and many controversial problems in trial practice when one of the parties fails to follow the pre-proceedings as outlined in the MDR clause.

2.1. Enforceability of the multi-tiered dispute resolution

The existence of the MDR clause manifests in various forms, reflecting the parties' preferences for the dispute resolution process. Hence, the application of the MDR clause has given rise to numerous legal considerations. Are all tiers of arbitral pre-proceedings mandatory? What are the legal repercussions if the parties fail to adhere properly and entirely to the steps outlined in the MDR clause? Can the arbitral award be annulled in such instances? Vietnamese and international practice shows that judicial authorities now have two completely opposite approaches to MDR agreements as well as other ways to handle issues arising from violations of MDR provisions, which is analyzed in the next sections.

2.1.1. Arbitral pre-proceeding is mandatory for the parties

For this approach, the parties must respect and fully enforce the commitments agreed upon in the MDR clause and arbitration is the final “tier” in the order of dispute resolution methods to be implemented by the parties to resolve the dispute. Therefore, violation of any content of the pre-proceedings will directly affect the arbitral proceedings and arbitral award. This approach is based on the principle of freedom of agreement, and respect for the will of the parties.¹⁵ Article 4.1 of the 2010 LCA also provides that the arbitrator must respect the agreement of the parties if it does not violate prohibition and is contrary to public order. Thus, if the MDR clause is a voluntary agreement between the parties, it must be respected and strictly complied with.¹⁶ Violation of the dispute settlement steps outlined in the multi-tiered dispute settlement clause constitutes a breach of the parties' agreement and contravenes fundamental principles of Vietnamese law. Consequently, the arbitral award in such cases may be subject to annulment under the provisions specified in point b, d of Article 68.2 of the 2010 LCA.

This solution has been applied by the People's Court of Hanoi when settling the request to annul the arbitration award in the dispute between Hoang Long Company and Vietmindo Company.¹⁷ Accordingly, Article

14 Berger (2006), *supra* note 4, p. 1.

15 Article 11.1 of the 2005 Commercial Law.

16 Dung, T. V. (2021). Giải quyết trường hợp vi phạm thỏa thuận tiền tố tụng trọng tài: Kinh nghiệm quốc tế và một số đề xuất hoàn thiện pháp luật trọng tài Việt Nam [Settlement of violations of pre-arbitration agreements: International experience and some proposals to improve Vietnamese arbitration law]. *Vietnamese Journal of Legal Sciences*, 140(1), 45-58, p. 52.

17 Decision No. 10/2014/QĐ-PQTT dated 28/10/2014 of Hanoi People's Court.

4 of the Contract delineates the dispute settlement procedure as follows: (i) both parties are obligated to engage in discussions in a spirit of goodwill and cooperation, aiming to reach a mutually beneficial solution; subsequently, (ii) if mutual agreement remains elusive following discussions, the parties consent to refer the dispute to the Vietnam International Arbitration Center (VIAC) for resolution. The Court found that Vietmindo Company initiated proceedings with VIAC without completing the required initial negotiation step, violating due process under Article 68.2.b of the 2010 LCA. The agreement lacked clear terms mandating negotiations as compulsory, nor did it define the criteria for successful negotiations or set a specific timeframe for this stage. In addition, the Court did not evaluate the enforceability of this agreement or consider if negotiations were a prerequisite for filing the lawsuit, but concluding that the procedural conditions for admissibility were not met.

Different from such decision by the Vietnamese Court, the courts in Switzerland since 1999 seem to have supported the view that MDR agreements are enforceable, especially since the Swiss Supreme Court also focuses on the legal consequences of a violation of the MDR clause, under which violations of the MDR will be considered under Article 190 of the Swiss International Private Law Act.¹⁸ Under the 2017 Organisation for the Harmonization of Business Law in Africa (OHADA) Uniform Arbitration Act, if an agreement mandates a pre-arbitration dispute resolution procedure, the arbitral tribunal must respect this requirement upon request. The tribunal can direct parties to start pre-proceedings, and if these are not initiated, it may adjourn the arbitration to allow the necessary party to comply. Furthermore, the tribunal has the authority to assess the outcome of these proceedings if needed. However, the principle of freedom of agreement can be waived if the parties agree before arbitration that good faith negotiation or mediation is not possible, as seen in ICC dispute No. 8445, where the tribunal allowed skipping conciliation proceedings before initiating arbitration.¹⁹ In addition, if during the arbitration proceedings in the respondent's self-defense, there is no objection to the jurisdiction of the arbitral tribunal regarding the violation of due process, it is considered implicitly that the respondent also does not want to participate in the pre-proceedings and agrees to immediately participate in the arbitration proceedings.²⁰ Therefore, this approach can be still affected by the will of both parties.

18 Westerlund, J. (2021). The enforceability of multi-tier dispute resolution clauses: A comparative analysis of enforcement in selected jurisdictions. *Research Paper*, University of Helsinki Faculty of Law. <https://ssrn.com/abstract=3810435>, pp. 35 - 38.

19 Mécar (2015), *supra* note, p. 35.

20 Davydenko, D. (2010). *Does noncompliance with pre-arbitration dispute settlement procedures affect awards enforceability in Russia?* Kluwer Arbitration Blog. <https://arbitrationblog.kluwerarbitration.com/2010/04/09/does-noncompliance-with-pre-arbitration-dispute-settlement-procedures-affect-awards-enforceability-in-russia/>

2.1.2. *Arbitral pre-proceeding is not a prerequisite for initiating arbitration proceedings*

The MDR clause, being a result of a voluntary agreement, does not require pre-arbitration proceedings as a condition for arbitration. Therefore, any non-compliance with such procedures does not affect the arbitral process or the outcome. The current LCA does not mandate pre-arbitration proceedings; thus, as long as a valid arbitration agreement exists, parties can proceed directly to arbitration, regardless of any prior negotiation or conciliation efforts.²¹ Moreover, after initiating the lawsuit and during the arbitration proceedings, the parties still do not lose the right to implement other dispute resolution methods such as negotiation or conciliation.²² Therefore, the parties' freedom to negotiate, conciliate, or take other dispute settlement steps is not affected or lost in the arbitration proceedings; the legitimate rights and interests of the parties in taking dispute settlement steps are still guaranteed, so they are not required to conduct pre-arbitration proceedings according to the established multi-tiered dispute settlement provision.

It may be seen that the duration of the bargaining obligation at the pre-arbitration stage should be interpreted as procedural and guiding rather than and mandatory. Their primary purpose is to promote opportunities for the resolution of disputes in good faith, the purpose of which is not to obstruct or undermine arbitration proceedings whether resolution in good faith is not feasible or non-compliant in terms of deadlines. It can therefore be concluded that the implementation of the required MDR clause does not preclude the arbitral tribunal from proceeding.

In the spirit of considering that pre-proceedings are not a prerequisite for initiating a lawsuit to arbitration, the Hanoi People's Court resolved the application for annulment of the arbitral award²³ in the direction that: "According to the provisions of Article 5 of the Law on Commercial Arbitration 2010, conciliation is not a prerequisite of initiating a lawsuit to arbitration" and

21 Vu, K. A. (2023). *Điều khoản giải quyết trọng tài đa tầng trong trọng tài thương mại Việt Nam* [Multi-tiered dispute resolution clauses in commercial arbitration in Vietnam]. MCAC Website. <https://mcac.vn/dieu-khoan-giai-quyet-tranh-chap-da-tang-trong-trong-tai-thuong-mai-tai-viet-nam>.

22 Article 9 of the 2010 LCA states that parties may negotiate a settlement or request mediation from the arbitral tribunal during arbitration proceedings. Details on negotiation and conciliation are further outlined in Articles 38 and 58 of the LCA, respectively.

23 Decision No. 04/2022/QĐ-PQTT dated 21 March 2022 of the Ha Noi People' Court. Article 25 of the Contract in dispute stipulates: "Any dispute or matter between the parties arising out of or in connection with this Contract shall be immediately resolved by conciliation by the parties. Within 15 days from the date on which mediation efforts fail, any of the parties shall have the right to refer the dispute to the Vietnam International Arbitration Center next to the Vietnam Chamber of Commerce and Industry in Hanoi for adjudication of the dispute in accordance with its procedural rules...". In fact, the Claimant ignored the arbitration pre-proceedings and asked the Arbitrator to resolve the dispute. Claimant argue that "Mediation is not a prerequisite for initiating arbitration" while mediation in proceedings is an encouragement, not an obligation. See more: Do, V. D. (2023). *Pháp luật trọng tài thương mại Việt Nam - Bản án và Bình luận bản án (Tập 1)* [Vietnamese commercial arbitration law – Verdict and judgment commentary (Volume 1)]. Hong Duc Publishing, p. 378.

determined that “there are no grounds for accepting the Respondent’s request to annul the arbitral award”. The Court, referencing the 2010 LCA, has chosen not to mandate mediation, noting that the law allows for the enforceability of pre-arbitration agreements. It interprets that the parties intended for arbitration to proceed if mediation fails within a set timeframe, in line with the 2015 Civil Code. However, this approach reflects a general inflexibility and lack of visibility concerning the legal status of pre-arbitration agreements.

Looking at the experiences of other countries, in the *NVF, RWK and KLB v. NWA and FSY*, a party failed to comply with the MDR clause and referred the dispute to arbitration without mediation and held that the arbitrators had no jurisdiction under Article 67 of the England Arbitration Act.²⁴ The England Court held that failure to comply with the MDR agreement related to mediation did not make the arbitration agreement void. In addition, the England Court has clarified that depriving one party of the right to refer a dispute to arbitration due to the other’s failure to comply with prerequisites deprives the arbitration agreement of common sense in business.²⁵ In an important decision handed down on 8 October 2021, the Commercial Court (Calver J) has confirmed that the failure of a party to comply with a contractual term requiring mediation before a dispute is referred to arbitration is not a matter that affects the jurisdiction of an arbitral tribunal and, instead, is only relevant to the admissibility of the dispute.²⁶ A study also indicates that courts in Germany and France are inclined to adopt this view if the interpretation of the dispute settlement agreement shows that the parties expect to be bound by pre-arbitration procedures.²⁷

In sum, arbitral awards should not be annulled for not following the steps in a multi-tiered dispute resolution process. According to Article 31 of the 2010 LCA, arbitral proceedings start when the arbitration center receives the petition,

24 Clause 10.2 of the Agreement provided, in particular, as follows:
“10.2 Disputes:

(a) In the event of a dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, termination, interpretation or effect, the relevant parties to the dispute shall first seek settlement of that dispute by mediation in accordance with the London Court of International Arbitration (“LCIA”) Mediation Procedure, which Procedure is deemed to be incorporated by reference into this clause insofar as they do not conflict with its express provisions. Any mediation shall take place in London.

(b) If the dispute is not settled by mediation within 30 days of the commencement of the mediation or such further period as the relevant parties to the dispute shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules from time to time in force, which Rules are deemed to be incorporated by reference into this Agreement insofar as they do not conflict with its express provisions.”

25 Chance, C. (2022). *Multi-tier dispute resolution clauses and the distinction between jurisdiction and admissibility – Hong Kong Court of Appeal confirms approach*. Clifford Chance Briefing. <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/07/multi-tier-dispute-resolution-clauses.pdf>

26 Chamber, S. (2021). *NWA v. NVF [2021] EWHC 2666 (Comm): Breach of an ADR condition precedent to arbitration does not affect an arbitral tribunal’s jurisdiction*. Selborne Chambers. <https://selbornechambers.co.uk/nwa-v-nvf-2021-ewhc-2666-comm-breach-of-an-adr-condition-precedent-to-arbitration-does-not-affect-an-arbitral-tribunals-jurisdiction/>

27 Mécar (2015), *supra* note 15, p. 43.

not counting any pre-arbitration steps. Therefore, skipping prior negotiation or conciliation does not affect the proceedings, and awards cannot be annulled for these procedural omissions.²⁸ However, if there are sufficient grounds to determine that the will of the parties wishing to compel the pre-proceedings (which will be analyzed below) but the arbitral tribunal has not considered it (where the respondent has objections) it shall be considered a breach of the fundamental principle and there are grounds to annul the arbitral award.

2.1.3. Interpreting parties' intentions regarding pre-arbitration procedures through the wording of multi-tiered dispute resolution clauses

The enforceability of pre-arbitration clauses largely depends on their wording, which must clearly express the parties' intentions. If a clause mandates specific pre-arbitration steps with language like "must," "shall," or "only if", judges and arbitrators typically enforce these requirements, obliging the claimant to complete these steps before initiating arbitration.²⁹ However, if the word "may" is used, it would imply that the pre-arbitration mechanisms in the clause are optional. The claimant has the option to submit the dispute to arbitration directly without utilizing all of the pre-arbitration mechanisms specified in the multi-tiered clause leading to arbitration. For example, "Disputes between related parties [...] will first be resolved through negotiation and mediation. In case the disputing parties still do not reach an agreement, the dispute will be referred to the Vietnam International Arbitration Center [...]"³⁰ From the wording of the clause, it is evident that the parties stipulate the requirement for the negotiation and conciliation process to precede the initiation of arbitration proceedings. In general, common law countries consider the validity of the MDR as a consent agreement or an agreement to agree.³¹ The Court will not substantially recognize the enforceability of the MDR clause if the parties do not set forth the interrelation of dispute resolution methods clearly and in detail.

The ICC tribunals considered the use of the word "shall" as an indication that the parties wanted mandatory and enforceable pre-arbitration mechanisms. For instance, in the ICC case No.9977, the clause reads as follows:

Any controversy that may arise among the parties with respect to the legal relation arising out of this Agreement shall be submitted to senior management representatives of the parties who will attempt to reach an amicable settlement [...] If an amicable solution cannot be reached by

28 Hoa, N. T. (2021). Hoàn thiện pháp luật trọng tài ở Việt Nam hiện nay [Improving arbitration law in Vietnam today]. *Legislative research*, 12, 34 - 44. http://thuvienlamdong.org.vn:81/bitstream/DL_134679/46733/1/CVv213S122021034.pdf

29 Varady, T., et al. (2012). *International Commercial Arbitration: A Transnational Perspective*. Thomson/West, p. 14.

30 Decision No. 38/2009/QĐKDTM-PT dated 27 March 2013 of the Court of Appeals of the Supreme People's Court in Ho Chi Minh City.

31 Kajkowska, E. (2017). *Enforceability of multi-tiered dispute resolution clauses*. Bloomsbury Publishing, p. 28.

negotiation, the dispute shall be finally settled by arbitration by a panel of one (01) arbitrator.

In this case, the arbitrator held that the use of the word “shall” clearly meant that the pre-arbitration negotiations were contracted as “a prior mandatory process of communication between the parties in conflict”.³² The wording of a multi-tiered clause is crucial in determining its enforceability and whether pre-arbitration steps are mandatory. Despite their informal nature, negotiations can be deemed mandatory if the clause indicates this intent. Similarly, pre-arbitration mechanisms like expert or mediator appointments may also be binding if intended. The VIAC adopts this approach when handling petitions, using the MDR clause’s wording to assess mandatory procedural requirements. If unmet, the VIAC may request evidence of compliance and, with the VMC, facilitate mediation to avoid the annulment of arbitral awards.

2.2. Jurisdiction related to the validity of multi-tiered dispute resolution clauses

Most arbitral tribunals have decided that the issue of determining jurisdiction over the validity and enforceability of the MDR clause lies in the application under the Kompetenz-Kompetenz principle, which is one of the fundamental principles of international commercial arbitration.³³ According to this principle, the arbitral tribunal possesses the authority to determine its own jurisdiction, allowing it to not only decide upon its jurisdiction but also to compel the claimant to adhere to the clause and ascertain that initiating legal proceedings is premature. Therefore, the claimant’s failure to attempt to resolve the dispute in good faith under the conditions set forth in the multi-tiered clause does not affect the jurisdiction of the arbitral tribunal, but only the condition of adjudication in considering the claim.³⁴

Regarding the Vietnamese law, the 2010 LCA is currently open to this matter. According to judicial practice in Vietnam, most arbitral tribunals follow the Kompetenz – Kompetenz principle pursuant to Article 43.1 of the 2010 LCA. However, the matters of the arbitral tribunal’s jurisdiction and the admissibility of a case are distinct, and there is no clear legal foundation for assigning the tribunal the authority to assess the enforceability of pre-arbitration procedures. Allowing arbitration to be dismissed because pre-arbitration steps were not taken could let the other party misuse these rules to avoid arbitration. That is not the way we are looking for.

2.3. Suspension of arbitral proceedings in case pre-proceedings must be carried out

If the parties have agreed that the pre-proceedings of arbitration are

32 Figueres, D. J. (2003). Multi-Tiered Dispute resolution clauses in ICC arbitration. *ICC Bulletins*, 14 (1), 71-88, pp. 84-85.

33 Fouchard, P., & Goldman, B. (1999). *Fouchard Gaillard Goldman on International Commercial Arbitration*. Kluwer Law International, p. 213.

34 Jollies (2006), *supra* note 9, p. 335.

mandatory but have not yet done so, the arbitral tribunal shall proceed to suspend the settlement of the dispute to facilitate the parties to carry out such pre-proceedings, as OHADA stipulated. Suspension of arbitration proceedings is considered one of the remedies for non-compliance with the MDR clause, which both helps some parties to continue to resolve the dispute amicably and ensures the will of the parties. In the Australian case *Hooper Bailie Associated Ltd. v. Natcon Group Pty Ltd.*,³⁵ when the arbitration proceeding had begun, Hooper Bailie and Natcon decided to conciliate to settle some of the differences. Nevertheless, Natcon chose a liquidator who desired to carry on with the arbitration process. Hooper Bailie filed a motion asking the New South Wales Supreme Court to stop Natcon from carrying out the arbitration. The conciliation agreement was deemed obligatory and enforceable by the court. As a result, the arbitral process was put on hold by the court until the specified conciliation procedures were completed.

The decision to declare termination dispute settlement or postponement for the parties to conduct pre-arbitration such as negotiation and mediation will be decided by the arbitral tribunal.³⁶ The 2010 LCA only stipulates the postponement of the hearing, not proceeding. The procedural approach favors maintaining the proceedings instead of dismissing the claim outright, among the available options. This strategy, of course, is only applicable in cases where the parties have not made any other agreements, such as one stipulating that the prematurely filed arbitration claim would not be allowed. The respondent's interests are protected by maintaining proceedings until the claimant attempts peaceful resolution as required by the multi-tiered clause. This approach also prevents the claimant from facing statute of limitations issues or bearing double arbitration costs. Both parties benefit from faster resolution and avoid the time and expense of appointing a new tribunal.³⁷

3. International experience and recommendations for Viet Nam

3.1. International framework governing multi-tiered dispute resolution clause

3.1.1. UNCITRAL Model Law

The Article 14 of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (2018 UNCITRAL)³⁸ provides that in cases the parties

35 *Hooper Bailie Associated Ltd v. Natcon Group Pty Ltd.* (1992, April 13). *New South Wales Law Reports*, 28 NSWLR, p. 194.

36 Article 57, Article 59 of the 2010 LCA.

37 Jollies (2006), *supra* note 9, pp. 336-337.

38 Article 14. Resort to arbitral or judicial proceedings: "Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights."

have agreed to conduct mediation and have expressly committed that they will not resort to a court or arbitration to resolve a dispute that has or will arise within a certain period of time or until a certain event occurs. The court or arbitrator must respect this commitment until it is fulfilled, unless a party believes it necessary to protect its rights. Recourse to a court or arbitrator in itself shall not be considered a rejection of the mediation agreement or the termination of the mediation. Thus, 2018 UNCITRAL has taken into account the will of the parties in establishing the pre-arbitral proceeding agreement.

During the drafting process, lawmakers realized that if one party has initiated a lawsuit in court or arbitration, the likelihood of successful mediation is greatly reduced. However, they cannot reach a consensus on limiting the parties' right to sue during the mediation process because this may make the parties afraid to include the mediation agreement in the contract. Furthermore, restricting the right to sue may conflict with the right to access justice enshrined in the Constitutions of some countries. Therefore, Article 14 of 2018 UNCITRAL is limited to cases where the parties have expressly pledged not to resort to Court or arbitration for a certain period of time or until a certain event occurs. At that time, the Court or arbitrator must refuse to examine the case according to the conciliation agreement and commitment between the parties. Nevertheless, if required, a party retains the option to disregard the commitment and seek recourse from the Court or arbitrator. This may occur, for instance, when a party requests the Tribunal or arbitrator to enforce injunctive relief or initiates legal proceedings to prevent the statute of limitations from lapsing.

Thus, it can be seen that the general trend of many countries is to build and complete their own legal framework for commercial mediation. However, countries' laws on commercial mediation, including mechanisms to ensure the implementation of mediation agreements, still have many differences, depending on the socio-cultural and economic characteristics as well as the development views and policies of each country.

3.1.2. 2017 OHADA Uniform Arbitration Act

Although the provision of UNICITRAL mentioned the agreement of the parties on pre-proceedings, it has not specified the enforceability of the MDR clause or the competence of the arbitral tribunal when encountering this case. OHADA has legislated this matter. Article 8-1 of OHADA is one of the first provisions in modern arbitration law in the world to clearly and explicitly provide for the MDR clause, and to allow enforcement of the pre-arbitration proceeding agreement. Accordingly, OHADA stipulated that if the parties have an agreement requiring them to settle their disputes through a preliminary phase before commencing arbitration, the tribunal will, at the request of any party,

verify to see if this requirement has been fulfilled and, if not, will order the completion of the preliminary phase. In the event that no parties has started this preliminary phase, the arbitral tribunal will suspend the process for as long as it considers appropriate, allowing the most conscientious party to start this phase.

Under OHADA rules, the arbitral tribunal can postpone proceedings and mandate that parties complete pre-proceedings within a set timeframe if they haven't been carried out this step upon a party's request. The tribunal also determines the success of these pre-proceedings. If not adhered to, the issues can be resolved without suspending the arbitration. The tribunal sets an appropriate adjournment period for parties to attempt dispute resolution, after which arbitration resumes if unresolved.³⁹ According to the expert, OHADA addresses cost-effectively in the context of an increasing number of objections (regarding the jurisdiction of the arbitral tribunal and/or the admissibility) related to compliance with pre-arbitration proceedings.⁴⁰

3.2. Proposed amendments to the 2010 Vietnam's Law on Commercial Arbitration

First, the 2010 LCA should clearly define the validity and enforceability of MDR clauses, mirroring OHADA's effective regulations. Although the 2010 LCA does not define MDR clauses, as they are detailed in the parties' dispute resolution agreements, it should guarantee enforceability in line with OHADA's model. If an agreement mandates pre-proceedings, it must specify the sequence and timeline of dispute resolution steps, which parties are obliged to follow before arbitration. The arbitral tribunal will determine the enforceability of MDR clauses in case of disagreement. If an MDR clause does not mandate pre-proceedings, the steps become optional, and parties may choose to proceed directly to arbitration. Effective drafting of MDR clauses in contracts is crucial for clarifying parties' intentions.

Second, Article 43.1 of the 2010 LCA should be amended so that the arbitral tribunal may consider and decide on the enforceability of the pre-arbitration proceedings. It is appropriate to empower the arbitral tribunal to assess the enforceability of the pre-arbitral proceedings because the arbitral tribunal has the authority to resolve the dispute and assess the legal issues of the dispute, including the issue of pre-arbitral proceedings.⁴¹ This approach has also been confirmed by the Hong Kong Court of Appeal (in case *C v D*)⁴² that the admissibility of a claim is a matter for the arbitral tribunal to decide. In the

39 Douajni, G. K. (2019). OHADA and improving the business climate in Africa: Impact of the Uniform Act on Arbitration and on Mediation. *International Business Law Journal*, 2019(6), 577-590, p. 580.

40 Gidoïn, A. S. (2018). L'étape préalable dans le nouveau droit de l'arbitrage et de la médiation OHADA. *ASA Bulletin*, 36(3), 578 – 596. <https://doi.org/10.54648/asab2018055>

41 Vu (2023), *supra* note 21.

42 Chance (2022), *supra* note 25.

case *Republic of Sierra Leone v SL Mining Ltd.*,⁴³ the High Court of England made it clear that whether a dispute should be arbitrated too soon (pre-mature submission) would be decided by the arbitral tribunal, not the Court. As such, the English Court has left open the recourse to the consequences of non-compliance with the pre-arbitration proceedings for the arbitral tribunal. The 2010 LCA ought to include provisions similar to those in OHADA, according to which parties have agreed to mandatory pre-arbitration proceedings but have not yet completed them, the arbitral tribunal must suspend the proceedings for a duration it considers suitable. However, there is no provision in the 2010 LCA on the mechanism for temporary suspension of arbitral proceedings, so it will be necessary to provide provisions in this regard to supplement the enforcement of MDR clause. This amendment will ensure that violating pre-arbitration proceedings does not impact the jurisdiction of the arbitral tribunal or constitute grounds for annulment of the award. Currently, under Article 68 of the 2010 LCA, there is no clear basis for a court to annul an award due to non-compliance with pre-arbitral procedures. Therefore, the LCA should adopt the aforementioned approach to solidify the enforcement mechanism of arbitration pre-proceedings agreements. With this adjustment, courts reviewing requests to annul arbitral awards will not reconsider issues related to non-compliance with pre-arbitration proceedings.

Third, the 2010 LCA should be amended to allow appeals to the Supreme People's Court for decisions that annul an arbitral award, establishing a supervisory mechanism over the annulment process. Appeals should be limited to annulment decisions to preserve the integrity of arbitral awards. If an award is issued without completing mandated pre-arbitration procedures specified in the MDR clause, it can be annulled. Introducing this appeal mechanism aligns with practices in France and the UK, where appeals on arbitration decisions, both annulments and non-annulments, are permitted to ensure the legality and enforceability of MDR clauses. ●

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Author Contribution

The author solely contributed to the study conception and design. The author read and approved the final manuscript.

Declarations

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