



MULTI-TIERED DISPUTE RESOLUTION CLAUSE

LEGAL NATURE AND ENFORCEMENT IN ARBITRATION UNDER VIETNAMESE LAW

Abstract



Multi-tiered dispute resolution clauses (MTDRCs), which require parties to engage in one or more preliminary dispute resolution steps (such as negotiation or mediation) before initiating arbitration, have become a prevalent feature in commercial contracts. Despite their widespread use, Vietnamese law lacks a comprehensive legal framework addressing the procedural and substantive issues surrounding MTDRCs. This paper analyzes the legal nature of MTDRCs under Vietnamese law, explores divergent judicial interpretations regarding their enforceability in arbitration. The paper concludes with recommendations for legislative clarification and for contracting parties in the exercise of MTDRCs.

1. Introduction



In practice, a large number of arbitration clauses in commercial contracts in Vietnam adopt a multi-tiered structure. These clauses, also known as escalation clauses or step clauses, typically require parties to first attempt to resolve their disputes amicably, through methods such as negotiation, mediation, or expert determination, before commencing arbitration. This structure reflects a good faith effort by the parties to resolve disputes efficiently and cost-effectively before engaging in formal adjudicative mechanisms. Internationally, such clauses are recognized and widely used, including in the model clauses recommended by the International Chamber of Commerce (ICC), the World Intellectual Property Organization (WIPO), etc., all of which combine mediation and arbitration in a tiered sequence. However, under Vietnamese law, there are no detailed regulations specifically addressing MTDRCs. While the Law on Commercial Arbitration (LCA) and other relevant instruments recognize alternative dispute resolutions such as negotiation and mediation, these are often merely characterized as optional components of the dispute resolution process.

2. Party autonomy

Vietnamese contract law recognizes party autonomy as a fundamental principle. Article 3.2 of the Civil Code 2015 and Article 11.1 of the Commercial Law 2005 affirm the right of parties to freely agree upon terms and conditions, provided such agreements do not contravene legal prohibitions, social ethics, or public interest. Article 4.1 of the LCA reinforces this autonomy by stating that arbitral procedures should respect the parties' agreement.

However, the lack of specific legislative provisions regarding the legal status and enforceability of pre-arbitral steps leads to inconsistent interpretations of MTDRCs in practice.





3. Divergent judicial approaches to MTDRCS

Vietnamese courts have taken two opposing approaches regarding the legal consequences of failing to comply with pre-arbitral steps in MTDRCS.

3.1. First approach: mandatory pre-arbitral procedure

This view considers that pre-arbitral steps constitute binding conditions precedent to arbitration. Non-compliance renders the subsequent arbitration procedurally defective, potentially leading to the annulment of the arbitral award.

This perspective is grounded in the principle of pacta sunt servanda and the statutory provisions that uphold party autonomy. Failure to comply with mandatory steps in an MTDRC may be construed as a breach of contract and a violation of procedural fairness under the LCA. Consequently, an arbitral award may be set aside pursuant to Article 68.2(b) of the LCA, where the arbitral procedure was not conducted in accordance with the agreement of the parties, and Article 68.2(dd) LCA, where the award is deemed contrary to the fundamental principles of Vietnamese law.

This is reflected in practice by Decision No. 10/2014/QĐ-PQTT issued by the Hanoi People's Court, where the court annulled the arbitral award on the ground that the parties had not conducted prior negotiation as stipulated in their MTDRC. The court held this to be a serious procedural violation under the LCA.





3.2. Second approach: pre-arbitral steps not mandatory

Conversely, the second approach views MTDRCs as binding in nature but not as establishing a mandatory pre-arbitral procedural condition for the commencement of arbitration. This perspective is grounded in the interpretation of the conditions, sequence, and procedures for arbitration under the LCA and the arbitration rules of arbitral institutions – particularly, in this research, the VIAC Rules. Neither the LCA nor the VIAC Rules contains any provision that imposes a mandatory requirement for compliance with pre-arbitral procedures such as negotiation or mediation. As long as there exists a valid arbitration agreement and the dispute falls within the scope of arbitration, the parties are entitled to submit their dispute directly to arbitration.

Moreover, even after arbitral proceedings have been initiated, the parties do not forfeit their right to pursue alternative dispute resolution methods such as negotiation or mediation. Article 9 of the LCA expressly provides that during the arbitral process, the parties retain the freedom to negotiate, settle the dispute by mutual agreement, or request the arbitral tribunal to facilitate mediation. This legal framework underscores that the parties' right to pursue other dispute resolution mechanisms remains intact throughout the arbitral process. Consequently, the parties' lawful rights and interests concerning the resolution of disputes through negotiation or mediation are preserved, and it is not compulsory for them to undertake such pre-arbitral steps as a precondition to arbitration.





This second approach has been recognized in various court decisions. For instance, in Decision No. 526/2013/QD-PQTT, the Ho Chi Minh City People's Court upheld the arbitral tribunal's jurisdiction and the validity of the arbitration agreement, despite the claimant's failure to comply with the agreed-upon negotiation step. The court stated that although the claimant did not strictly follow the negotiation procedure as agreed, such non-compliance did not render the arbitration clause invalid. It further emphasized that even if the parties bypassed the negotiation phase, the LCA contains no provision obligating arbitral tribunals to consider pre-arbitral steps, but only to assess the validity of the arbitration agreement pursuant to Article 43.1 LCA. Should the parties genuinely wish to negotiate or mediate, they may still do so within the arbitration process.

Similarly, Decision No. 02/2020/QD-PQTT of the Hanoi People's Court affirmed the validity of the arbitral tribunal's jurisdiction, notwithstanding the fact that the parties had not resolved the dispute through the pre-agreed dispute resolution and mediation board (following their EPC contract). The respondent challenged the tribunal's competence, arguing that arbitration was premature since the parties had not first engaged the agreed body. The court rejected this argument, holding that, under Articles 43 and 44 of the LCA, the court would only intervene in cases where there was no arbitration agreement, where the agreement was invalid, or where it cannot be performed. In this case, the parties had a valid and enforceable arbitration agreement. The court noted that multiple attempts to negotiate had been made but failed, and thus mediation was practically infeasible. On that basis, the court recognized the arbitral tribunal's jurisdiction regardless of the parties' non-compliance with the agreed pre-arbitral procedures.





These cases demonstrate that both interpretative approaches to the legal consequences of MTDRCs have been acknowledged by Vietnamese courts. However, the co-existence of these opposing viewpoints reveals a lack of consistency in judicial interpretation. This divergence in precedent cases creates significant uncertainty for parties relying on MTDRCs, thereby undermining the predictability and effectiveness of such agreements in commercial practice.

4. Recommendations

Based on doctrinal analysis and practical experience, this paper supports the second approach, which respects party autonomy but does not elevate pre-arbitral steps to the level of mandatory conditions precedent unless expressly and clearly agreed upon by the parties. To enhance legal certainty and support Vietnam's development as an arbitration-friendly jurisdiction, the following recommendations are proposed:

4.1. Legislative clarification

The LCA should be supplemented to expressly address the legal nature and procedural role of MTDRCs. The revised law should clarify the relationship between pre-arbitral procedures and arbitration proceedings. In particular, it is recommended that:

(i) Arbitral tribunals be empowered to assess the content of MTDRCs to determine whether such provisions express a binding intention and whether they are sufficiently specific (e.g., with clear timeframes, procedures, and consequences for non-compliance);





(ii) Tribunals be allowed to stay the arbitral proceedings for a reasonable period to permit parties to comply with agreed negotiation or mediation steps, without prejudicing the claimant's right to initiate arbitration;

(iii) Such a stay should not affect the limitation period applicable to arbitration claims, thereby safeguarding the claimant's procedural rights.

With clear statutory guidance, there will be no legal basis to annul arbitral awards due to alleged procedural violations stemming from ambiguous pre-arbitral steps. This reform would both uphold party autonomy and ensure the predictability and integrity of the arbitral process and dispute resolution process in Vietnam.

4.2. Practical recommendations for contracting parties

Given the current legal ambiguity, contracting parties should adopt best practices when drafting MTDRCs. In particular:

(i) Parties intending to include MTDRCs should expressly specify the nature of each pre-arbitral step, including the method (e.g., written negotiation, structured mediation), the duration (e.g., "within 30 days of notice of dispute"), and the format (e.g., meetings between designated representatives, virtual sessions);

(ii) If the parties intend such procedures to be mandatory conditions precedent to arbitration, this intention must be clearly and unequivocally stated in the contract;





(iii) In situations where a dispute has already arisen and a party/parties refuse(s) to participate in the agreed pre-arbitral process, the other party/parties should send a formal written notice documenting its/their attempt to comply and providing a reasonable timeframe for response. Such notice should make clear that failure to cooperate will be treated as a refusal to engage in pre-arbitral resolution, and that the negotiation or mediation process shall be deemed unsuccessful. The claimant(s) may then initiate arbitration, accompanied by written evidence of its/their good-faith efforts to perform the agreed pre-arbitral procedures and the respondent's/respondents' non-cooperation. These records will support the argument that the pre-arbitral step has failed due to the respondent's/respondents' conduct.

Adopting these drafting and procedural practices will help minimize disputes over procedural compliance and preserve the enforceability of arbitral awards.

5. Conclusion

MTDRCs play a vital role in promoting amicable settlements and minimizing costs in commercial disputes. However, the enforceability of such clauses under Vietnamese law remains controversial due to inconsistent judicial approaches and the absence of statutory provisions. Therefore, a balanced and coherent legal framework and contract drafting are necessary to ensure the effective functioning of MTDRCs while safeguarding the procedural rights of the parties.



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