

GES Scholarship Training Program

ADR

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Questions


1. Thủ tục hòa giải tiền tố tụng đến nay đã có chưa?
2. Làm sao có thể tách bạch yếu tố thương mại để kết luận tranh chấp có thuộc thẩm quyền giải quyết của trọng tài hay không?
3. Tính khả thi của việc áp dụng hòa giải để giải quyết tranh chấp? (trong tương lai gần hay xa?)
4. Như thế nào là một điều khoản trọng tài có hiệu lực? cần những yếu tố nào để điều khoản trọng tài có hiệu lực?
5. Khái niệm "the seat of arbitration" có trong quy định pháp luật VN về trọng tài không?
6. "Thực tiễn hỗ trợ thi hành của tòa án Việt Nam và/hoặc nước ngoài đối với quyết định của trọng tài Việt Nam?"
7. Việc thi hành án phán quyết trọng tài trên thực tế như thế nào, có những rủi ro và trở ngại gì?



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Outline

1. What is ADR?
2. Negotiation
3. Mediation/Conciliation
4. Arbitration
5. Recognition and Enforcement



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1. What is ADR?

Who are they?

- Negotiator
- Litigator
- Arbitrator
- Mediator



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1. What is ADR? (cont)

Specialised fields of law?

- Contract Law
- Civil Procedure Law
- Arbitration Law
- Mediation Law



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2. Negotiation

Westminster's Perspectives on Conflicts and Disputes (cont):

- The importance of negotiation
- A starting point: the problem of distributing 'goods'
- Bargaining: negotiating styles and strategies
- The importance of interests *and* positions
- People and problems



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2. Negotiation (cont)

Westminster's Perspectives on Conflicts and Disputes:

- What about power?
- The roles of trust and ethics in negotiation
- Cultural and other concerns in negotiation
- Negotiation and conflicts/disputes
- Negotiation and the law/the legal system
- Negotiation and other processes

3. Mediation/ Conciliation

QMUL's Program:

- Characteristics of mediation
- Role of mediator
- Power-imbalances in mediation
- Stages of mediation
- Evaluative and Facilitative Mediation

3. Mediation/ Conciliation (cont)

QMUL's Program (cont):

- Transformative Mediation
- Narrative Mediation and Therapeutic Jurisprudence
- Recent innovations
- ADR providers; ADR regulation; Qualifications of mediators

3. Mediation/ Conciliation (cont)

Pros:

- Time, cost saving; win-win solution; confidential, ...

Cons:

- “qualified” mediators, confidentiality, “time bar” issue...

Legal framework:

- Mediation Degree
- CPC on the recognition of mediated Settlement Agreement



4. Arbitration

- Subjective Arbitrability:

- Who may submit to arbitration?
- Distinction from questions of power of acting persons to enter into an arbitration agreement
- International and national rules dealing with subjective arbitrability
- Rules providing for exclusive jurisdiction of the courts



4. Arbitration (cont)


- Criteria of Arbitrability: Article 2 of LCA 2010;

- Claims capable of party settlement
- Which law determines whether capable of settlement?
- Claims involving a monetary interest/involving property



4. Arbitration (cont)

- **Criteria of Arbitrability:** Article 2 of LCA 2010 (cont);
- Public policy
- Balancing of interest
- Rules providing for exclusive jurisdiction of the courts




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4. Arbitration (cont)

Arbitration agreement?

- *Các bên liên quan sẽ cố gắng giải quyết tranh chấp do thông qua thương lượng và hòa giải. Trừ trường hợp tranh chấp liên quan tới Hội đồng quản trị hay Chủ tịch Hội đồng quản trị, Chủ tịch Hội đồng quản trị sẽ chủ trì việc giải quyết tranh chấp và sẽ yêu cầu mỗi bên trình bày các yếu tố thực tiễn liên quan đến tranh chấp trong vòng 10 (mười) ngày làm việc kể từ ngày phát sinh tranh chấp. Nếu tranh chấp liên quan tới Hội đồng quản trị hay Chủ tịch Hội đồng quản trị, bất cứ bên nào cũng có thể yêu cầu chỉ định một chuyên gia độc lập để hành động với tư cách là trọng tài cho quá trình giải quyết tranh chấp.*



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4. Arbitration (cont)

Arbitration agreement (cont)?

- 2. *Trong trường hợp không đạt được quyết định hòa giải trong vòng 06 (sáu) tuần từ khi bắt đầu qua trình hòa giải hoặc nếu quyết định của trung gian hòa giải không được các bên chấp nhận, bất cứ bên nào cũng có thể đưa tranh chấp do ra cơ quan trọng tài hoặc tòa án có thẩm quyền.*
- 3. *Các bên sẽ tự chịu chi phí của mình có liên quan tới thủ tục thương lượng và hòa giải. Các chi phí của tòa án hay trọng tài sẽ do các cơ quan này quyết định bên nào phải chịu.*



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4. Arbitration (cont)

Validity and Effectiveness of an Arbitration Agreement?

- Validity: an arbitration agreement is valid when it meets all the *formal and substantive legal requirements*



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4. Arbitration (cont)

Validity and Effectiveness of an Arbitration Agreement (cont)?

- Effectiveness: an arbitration agreement is effective when
- It produces mandatory consequences for the parties
- Excludes jurisdiction/intervention of the national courts
- It puts in place an efficient, fair and rapid procedure for the resolution of the dispute



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4. Arbitration (cont)

Seat of Arbitration

- Suggested definition

“a body of rules which sets standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (...), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (...) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (...).”



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4. Arbitration (cont)

Definition of lex arbitri

- The *lex arbitri* is the body of law and rules which governs and regulates the structure and procedure of arbitration. It differs and is specific for each arbitration. It comprises:
- the specific agreement of the parties;
- the arbitration rules expressly or impliedly incorporated by the parties; and
- national and international procedural rules adopted by the parties and by the arbitrators to govern the arbitration.



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4. Arbitration (cont)

Definition of lex arbitri (cont)

- The *lex arbitri* is always subject to the mandatory law of the place of arbitration, the international standards of due process and the requirements of the New York Convention at the place of enforcement.

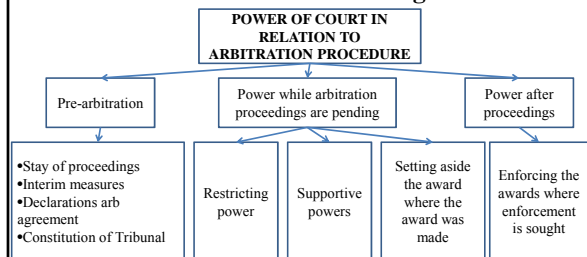


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4. Arbitration (cont)

Power of Court – Stages



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5. Recognition and Enforcement

1. The Courts shall not recognize Foreign arbitral awards when the evidence provided by the award debtors to object the request of recognition and enforcement of foreign arbitral awards are rational, legitimate, and arbitral awards fall into one the following cases:

a) Parties to the arbitral agreement have **no capacity to sign** such agreement under the law applicable to each party;



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5. Recognition and Enforcement (cont)

b) The arbitral agreement is legally **invalid** under the law of the country, which has been selected by the parties as governing law, or the law of the country where the awards were declared if the parties had not chosen the governing law for such agreement;

c) The award debtors being individuals, agencies or organizations **were not promptly and properly notified** of the appointment of Arbitrators and of procedures for resolution of disputes at foreign arbitration organization, or could not exercise their procedural rights for plausible reasons;



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5. Recognition and Enforcement (cont)

d) Foreign arbitral awards are declared on a dispute which was not requested by the parties for resolution or went beyond the request of the parties to the arbitral agreement.

dd) The Foreign arbitration personnel or the procedures for dispute resolution by Foreign arbitration do not comply with the arbitral agreement or with the law of the country where the foreign arbitral award was declared if the arbitral agreement does not prescribe such matters.



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5. Recognition and Enforcement (cont)

e) *The Foreign arbitral awards have not yet been legally binding on the parties;*

g) *The Foreign arbitral awards have been set aside or suspended from enforcement by competent bodies of the countries where the awards were declared or the countries whose laws have been chosen as governing law.*



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5. Recognition and Enforcement (cont)

2. Foreign arbitral awards shall also not be recognized, if the Vietnamese courts deem that:


- a) *The disputes must not be resolved by arbitration under Vietnamese law;*
- b) *The recognition and enforcement in Vietnam of Foreign arbitral awards **are against fundamental principles of the law** of the Socialist Republic of Vietnam.*



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Reading list

1. Alan Redfern, Martin Hunter, Nigel Blackaby, and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (4th edition, Sweet & Maxwell, 2004);
2. Albert Jan Van Den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981);
3. ICCA's *Guide to The Interpretation of The 1958 New York Convention: a Handbook For Judges.*



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*Thank you for
your kind attention!*

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