UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DISPUTE SETTLEMENT

INTERNATIONAL COMMERCIAL ARBITRATION

5.1 International Commercial Arbitration

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NOTE

The **Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty-one modules.

This module has been prepared by Mr. Eric E. Bergsten at the request of the United Nations Conference on Trade and Development (UNCTAD). The views and opinions expressed are those of the author and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL or the Advisory Centre on WTO Law.

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TABLE OF CONTENTS

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WHAT YOU WILL LEARN

Section 1 of this module raises the question as to what is international commercial arbitration. You will see that it is one of many possible procedures for the settlement of disputes in regard to economic transactions. You will learn about the essential features of arbitration; that it is for the settlement of a dispute, consensual based on the agreement of the parties, private and not part of the State system of justice and leads to a final and binding decision that will be given execution by the courts. You will also learn that there are other dispute settlement procedures that generically are called ADR, Alternative Dispute Resolution or, as some would have it, Amicable Dispute Resolution.

International commercial arbitration is defined not only by whether arbitration is involved, but also whether the arbitration is "commercial". Therefore, Part 1 continues by discussing the development of "commerce" in the context of international commercial arbitration and why the concept of commerce is important in investment arbitrations. You will then learn what makes arbitration international, particularly in the context of the UNCITRAL Model Law on International Commercial Arbitration.

Section 1 closes with a discussion of why parties choose international commercial arbitration to settle their disputes. You will learn that some of the reasons are common to domestic and international arbitration and that some are especially relevant to international commercial disputes.

In Section 2 you will learn about the history of international commercial arbitration from its modern beginnings in the early 1920s to the present time. You will learn that there are current efforts to improve the legal regime by amendments to the Model Law. You will also learn that the recent rapid growth in investment arbitration is having an impact on ordinary commercial arbitration, but that the nature of that impact is not yet clear.

In Section 3 you will learn about the legal structure of international commercial arbitration. You will learn that it consists of four levels,

1) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

2) the national law of arbitration (which may consist of one statute governing all arbitrations or one statute for domestic arbitrations and a second statute for international arbitrations),

3) the procedural rules adopted by the parties (usually by agreeing to have the arbitration conducted by a particular arbitration institution or by adopting the UNCITRAL Arbitration Rules and

4) arbitral practice.

1. WHAT IS "INTERNATIONAL COMMERCIAL ARBITRATION"?

1.1 Dispute Settlement

Chapter 5 in the Course on Dispute Settlement is entitled "International Commercial Arbitration". It discusses a particular means of settling disputes, i.e. by "arbitration" that is "commercial" in nature and has some international element to it. Such an explanation explains very little. This introduction to Chapter 5 is intended to give background and history so as to set the term "international commercial arbitration" and its significance into context.

Chapters 1, 2, 3, 4 and 6 of the Course on Dispute Settlement discuss specific institutions that have as their purpose, or at least one of their purposes, the conduct of procedures for the settlement of specific types of disputes of an economic nature. That is not true of this chapter. To be sure, there are specific institutions that organize such procedures, and a number of them will be mentioned in the various modules that comprise this chapter. However, this chapter is not about the conduct of arbitration in any particular one of them. Nor is it about the settlement of specific types of disputes. It is about a process for the settlement of a wide range of disputes of an economic ("commercial") nature that is carried out by many institutions, and sometimes in the absence of any institution.

The following eight modules in this Chapter will go into more detail about the legal rules governing international commercial arbitration. Module 5.2 discusses the arbitration agreement and the consequences of entering into one. Module 5.3 considers the mechanism by which the arbitral tribunal comes into existence and the requirements to be an arbitrator. Module 5.4 is concerned with the procedure by which the arbitration is conducted and how agreement is reached as to that procedure. Module 5.5 deals with one of the more difficult and important questions in international commercial arbitration – what law governs the arbitration. As will become clear, the law of different countries may govern the conclusion of the arbitration agreement, the arbitration procedure and the substance of the dispute. The requirements for the making of the award are described in Module 5.6, while Module 5.7 discusses the recognition and enforcement of the award under the New York Convention. Although arbitration is a means to settle a dispute without resort to the courts, the courts have certain responsibilities in regard to arbitration. Those responsibilities are discussed in Module 5.8. Finally, one of the new developments in arbitration is the ability to conduct the procedures completely by electronic means. That development is considered in Module 5.9.

1.1.1 *Third party involvement in dispute settlement*

Why third party involvement

Whenever two or more parties have a dispute, it would be preferable if they were able to discuss it between themselves and to arrive at a peaceful solution. That is true whether the parties are members of a family, States or commercial entities. Only the parties themselves can achieve a solution that will not only resolve the dispute, but will facilitate a useful future relationship. However, sometimes the parties are not interested in any future relationship and only want the dispute to be settled, preferably on their own terms. That may lead to war or its private equivalents. Even when they are interested in a peaceful settlement of the dispute, it is not infrequent that the parties are not able to discuss – or negotiate – a mutually agreeable solution. In such a situation the aid of a third party must be sought.

Litigation

The State offers one form of third party settlement of private disputes by maintaining a court system in which they can be litigated. Most private disputes that require the services of a third party are settled by litigation, though many of them are settled directly between the parties once the litigation has begun.

Private third parties

It is also possible for the parties to involve third persons in a private capacity to solve, or to help them solve, the dispute. Arbitration is the most prominent of the private dispute settlement mechanisms, both domestically and for international commercial relations, though it is not the only one. Others will be briefly mentioned below after the basic characteristics of international commercial arbitration have been discussed.

1.2 Arbitration as a dispute settlement mechanism

1.2.1 *Definition of "arbitration"*

No official definition

As will be seen throughout this chapter, it is often of great importance to know whether a given procedure amounts to "arbitration". For example, Article II, paragraph 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, generally known as the New York Convention,