

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DISPUTE SETTLEMENT

INTERNATIONAL
COMMERCIAL ARBITRATION

5.2 The Arbitration Agreement



UNITED NATIONS
New York and Geneva, 2005

NOTE

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

This module has been prepared by Mr. R. Caivano 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.

The designations employed and the presentation of the material do not imply an expression of any opinion whatsoever on the part of the United Nations concerning the legal status of any country, territory, city or areas or of its authorities, or concerning the delimitations of its frontiers or boundaries. In quotations from the official documents and the jurisprudence of international organizations and tribunals countries are designated as reported.

The United Nations holds copyright to this document. The course is also available in electronic format on the UNCTAD website (www.unctad.org). Copies may be downloaded free of charge on the understanding that they will be used for teaching or study and not for a commercial purpose. Appropriate acknowledgement of the source is requested.

UNCTAD/EDM/Misc.232/Add.39

Copyright © United Nations, 2005
All rights reserved

TABLE OF CONTENTS

Note	ii
What You Will Learn	1
1. Concept and Enforcement of Arbitration Agreement	3
<i>Objectives</i>	3
1.1 <i>Definition. Arbitration agreement, arbitration clause and Submission Agreement</i>	3
1.2 <i>Enforcement of an arbitration agreement</i>	3
1.2.1 <i>Negative enforcement: Lack of jurisdiction of courts</i>	4
1.2.2 <i>Positive enforcement: the “submission agreement”</i>	4
1.3 <i>Enforcement of an arbitration agreement under the UNCITRAL Model Law and the New York Convention</i>	5
1.3.1 <i>Competence of the arbitral tribunal to rule on its own Jurisdiction</i>	7
1.4 <i>Summary</i>	9
1.5 <i>Test your understanding</i>	9
2. The Law Applicable to the Arbitration Agreement	11
<i>Objectives</i>	11
2.1 <i>Criteria for determining the law applicable to the arbitration Agreement</i>	11
2.2 <i>The Model Law</i>	12
2.3 <i>The New York Convention</i>	12
2.4 <i>Summary</i>	14
2.5 <i>Test your understanding</i>	14
3. Requirements for the Arbitration Agreement	15
<i>Objectives</i>	15
3.1 <i>It must arise out of mutual consent</i>	15
3.2 <i>The parties must have legal capacity</i>	16
3.2.1 <i>Consequences of the lack of capacity</i>	16
3.2.2 <i>Law applicable to the legal capacity</i>	17
3.2.3 <i>The legal capacity to enter into an arbitration agreement</i>	17
3.3 <i>The agreement must be made in writing</i>	18
3.3.1 <i>Must the agreement be contained in the same document?</i>	18
3.3.2 <i>Are signatures necessary for the validity of an arbitration agreement?</i>	18
3.3.3 <i>Is a tacit consent to arbitration valid?</i>	20
3.3.4 <i>Can arbitration be agreed upon “by reference”?</i>	21
3.3.5 <i>Summary</i>	21
3.4 <i>It must arise out of a defined legal relationship</i>	22
3.5 <i>The subject matter must be arbitrable?</i>	22
3.6 <i>Summary</i>	26
3.7 <i>Test your understanding</i>	27

4. Termination of the Arbitration Agreement	29
<i>Objectives</i>	29
4.1 Termination of the arbitration agreement by mutual consent	29
4.2 Other possible grounds for termination	29
4.2.1 Grounds related to the parties	29
4.2.2 Grounds related to the arbitrator	30
4.3 Summary	30
4.4 Test your understanding	31
5. Separability or Autonomy of the Arbitration Agreement	33
<i>Objectives</i>	33
5.1 The problem and its solution	33
5.2 The UNCITRAL Model Law	34
5.3 Summary	36
5.4 Test your understanding	37
6. Guidelines to Draft an Arbitration Agreement	39
<i>Objectives</i>	39
6.1 When to resort to arbitration	39
6.2 General considerations: written form of the arbitration clause and words to use	40
6.3 How to define the subject-matter to be submitted to arbitration	40
6.4 Specific questions to take into account	42
6.4.1 Institutional or ad hoc arbitration?	42
6.4.2 Selection of institutional arbitration	43
6.4.3 Appointment of arbitrators	45
6.4.4 Number and qualifications of arbitrators	46
6.4.5 Rules of procedure	47
6.4.6 Confidentiality	48
6.4.7 The seat or place of arbitration	49
6.4.8 The procedural law	51
6.4.9 Determination of the language	52
6.4.10 Determination of the applicable substantive law or equity	53
Arbitration	53
6.4.11 Recourse against award	55
6.5 Summary	56
6.6 Test your understanding	58
7. Case studies	61
7.1 Cases to be studied in groups	61
7.2 Mastery test - Yes or No test	63
8. Further reading	65

WHAT YOU WILL LEARN

Arbitration is private justice born out of the parties' will. By including an arbitration clause in a contract, the parties choose to settle their disputes—in the event any arise—out of court. Those disputes will be submitted to arbitrators.

This module provides an overview of the agreement by which the parties decide to submit their disputes to arbitration. More specifically, the following sections will focus on the conditions and the content of such an agreement and issues related with its enforcement. This module also discusses the issue known as “separability of the arbitration agreement” and the related principle known as “*Kompetenz-Kompetenz*”. We will also provide some guidelines about how to draft an arbitration clause in order to make arbitration a final and binding resolution of the disputes.

Many legal systems are involved in international arbitration. That is why many of the issues addressed here will not have a unanimous answer, but will rather depend on the different solutions provided under the applicable legislation. Even though this module will contain some references to domestic legal rules, we shall mainly focus on the provisions of the UNCITRAL Model Law (hereinafter, the “Model Law”) and on the rules of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (hereinafter, the “New York Convention”).

1. CONCEPT AND ENFORCEMENT OF ARBITRATION AGREEMENT

Objectives

On the completion of this section, you will be able to:

- Compare the meaning of the terms: “arbitration agreement”, “arbitration clause” and “submission agreement”;
- Recognize the consequences of including an arbitration clause in a contract;
- Describe the meaning and enforcement of the term “arbitration agreement” under the Model Law.

1.1 Definition. Arbitration agreement, arbitration clause and submission agreement

In general, the arbitration agreement provides the basis for arbitration. It is defined as an agreement to submit present or future disputes to arbitration.

This generic concept comprises two basic types:

- a) A clause in a contract, by which the parties to a contract undertake to submit to arbitration the *disputes that may arise* in relation to that contract (arbitration clause); or
- b) An agreement by which the parties to a dispute that has already arisen submit the dispute to arbitration (submission agreement).

The arbitration clause therefore refers to disputes not existing when the agreement is executed. Such disputes, it must be noted, might never arise. That is why the parties may define the subject matter of the arbitration by reference to the relationship out of which it derives.

The submission agreement refers to conflicts that have already arisen. Hence, it can include an accurate description of the subject matters to be arbitrated. As we shall discuss later, some national laws require the execution of a submission agreement regardless of the existence of a previous arbitration clause. In such cases, one of the purposes of the submission agreement is to complement the generic reference to disputes by a detailed description of the issues to be resolved.

1.2 Enforcement of an arbitration agreement

By entering into an arbitration agreement, the parties commit to submit certain matters to the arbitrators’ decision rather than have them resolved by law courts.

Thus, the parties:

- a) Waive their right to have those matters resolved by a court; and
- b) Grant jurisdictional powers to private individuals (the arbitrators).

We shall call these two main effects of the agreement “negative” and “positive”, respectively.

1.2.1 Negative enforcement: Lack of jurisdiction of courts

An arbitration agreement precludes judges from resolving the conflicts that the parties have agreed to submit to arbitration. If one of the parties files a lawsuit in relation to those matters, the other may challenge the court’s jurisdiction on the grounds that the jurisdiction of the courts has been waived.

The judge’s lack of jurisdiction is not automatic, nor can it be declared *ex officio*. Instead, it must be raised by the defendant no later than when filing the answer to the complaint. That is so because arbitral jurisdiction is waivable, and the waiver would be presumed if the plaintiff filed a complaint and the defendant failed to challenge the court’s jurisdiction.

To sum up, once a conflict has arisen over any of the subjects included in the arbitration agreement, the courts will have no jurisdiction to resolve it unless both parties expressly or tacitly agree to waive the arbitration agreement.

1.2.2 Positive enforcement: the “submission agreement”

The arbitration agreement grants jurisdiction to arbitrators. By “jurisdiction” we mean the powers conferred on arbitrators to enable them to resolve the matters submitted to them by rendering a binding decision.

The negative enforcement of the arbitration agreement is universally accepted and does not depend on the kind of agreement. Conversely, the positive enforcement is inextricably linked to the applicable law. That is so because some local arbitration laws still do not grant the arbitration clause an

预览已结束，完整报告链接和二维码如下：

https://www.yunbaogao.cn/report/index/report?reportId=5_10272

