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## UNCITRAL - with a Special Glance Model Law and Arbitration

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### **Abstract:**

*Development and intensification of trade relations in the world has raised the need for adequate regulation and the establishment of international legal standards in this area. This reason send to the establishment of the United Nations Commission on International Trade Law - UNCITRAL. This committee has a mandate to reduce legal barriers in international trade, and the modernization and harmonization of laws in this area. In this paper we addressed the role of UNCITRAL, namely Model Law on International Commercial Arbitration issued in 1985, a law that has affected the legal unification in the field of arbitration, and facilitation of trade disputes through arbitration, as one of the forms alternative commercial dispute resolution. In this paper we also handle arbitration, where we have included the history and the notion of arbitration in the international context, the legal resources of this institution and the agreement for arbitration.*

**Key words:** UNCITRAL, Arbitration, Commission, Model Law, Agreement, etc.

## **What is UNCITRAL?**

With the fast development and expansion of world trade in the 1960s, state governments began to realize the need to establish global standards and harmonization and modernization of the diversity of rules across the world. Naturally, countries turned to the United Nations, which in 1966 recognized the need to play an active role in removing legal obstacles to the flow of international trade by establishing the United Nations Commission on International Trade Law - UNCITRAL. Much of the complex network of rules and agreements affecting international trade agreements legal today is achieved through consultation and detailed and lengthy negotiations organized by UNCITRAL. The purpose of the UNCITRAL is to remove or reduce legal obstacles to the flow of international trade and progressively modernize and harmonize trade laws. UNCITRAL also seeks to coordinate the work of organizations active in this type of work to promote acceptance and wider use regulations and legal texts that she develops.

UNCITRAL finds its origins in the 1960s when it began expansion of world trade and the need for a global uniformity of legislation. United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly of United Nations resolution 2205 (XXI) of 17 December 1966, and plays an important role in the development of the framework of the implementation of the mandate its to further the progressive harmonization and modernization of international trade law and preparing promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law<sup>1</sup>. Since its establishment, UNCITRAL has been recognized as the principal judicial organ of the United Nations in the field of international trade law. UNCITRAL in its mandate, coordinating the work of

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<sup>1</sup> A Guide to UNCITRAL Basic facts about the United Nations Commission on International Trade Law, UNITED NATIONS, Vienna, 2013, fq. 1

organizations active in this field and promote cooperation between them, encouraging wider participation in existing international conventions and wider acceptance of existing laws and uniform models, preparing and promoting the adoption of conventions new international model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in cooperation, where appropriate, with organizations operating in this field, promoting and roads means of ensuring a uniform interpretation and implementation of international conventions and uniform laws in the field of international trade law<sup>2</sup> etc.

UNCITRAL members are elected from among the member states of the United Nations and representing traditions and levels of economic development in various legal levels. Of the 29 countries it was expanded by the General Assembly of the United Nations in 1973 to 36 states and again in 2002 in 60 countries<sup>3</sup>.

The work of UNCITRAL is organized and developed in three levels. The first level is self UNCITRALI, often referred to as the Commission, which works through an annual plenary session. The second level is the work of intergovernmental groups, which greatly undertake the development of themes for the work program of UNCITRAL, while the third is the secretariat, which assists the Commission and its working groups in the preparation and development their work<sup>4</sup>.

## **UNCITRAL Model Law**

UNCITRAL on his way towards reducing legal barriers in international trade in 1985 has issued the model law on international commercial arbitration. "Model Law is designed to assist states in reforming and modernizing their laws on

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<sup>2</sup> Ibid pp. 1, 2

<sup>3</sup> Ibid p. 2

<sup>4</sup> Ibid p. 5

arbitral proceedings in order to take into account the special characteristics and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of judicial intervention through the recognition and enforcement of arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by states, regions and different legal systems or economic world"<sup>5</sup>. Since the approval model law on arbitration is amended and supplemented, and today almost all countries of the world have also adapted their laws to arbitration, in this case Kosovo when issuing the arbitration law in 2007, whole has adopted the model law UNCITRAL.

Model Law regulates basic issues ranging from the arbitration agreement, where includes the definition and form of arbitration agreement, the composition of the arbitral tribunal, including the number of arbitrators, the appointment of arbitrators, etc.; jurisdiction of the arbitral tribunal, administration of arbitration proceedings , including equal treatment of the parties, the determination of rules of procedure, the place of arbitration, the arbitration language etc. the decision and the outcome of the procedure, recognition and enforcement of decisions and other issues.

According to Article 1, this law applies to international commercial arbitration, subject to any agreement in force between the state and any other state or states<sup>6</sup>. The term "trade" (commercial) used in the law is not explained directly in its provisions, but only noted in footnote stating "the term *trade*, should be given a wide interpretation so as to cover matters arising from reports commercial nature, whether contractual or not. The term "commercial" should be given a

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<sup>5</sup> See website UNCITRAL <http://www.uncitral.org/>, the link: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html)

<sup>6</sup> See: Article 1 of and UNCITRAL Model Law on International Commercial Arbitration

wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road”<sup>7</sup>. From this it follows that the term trade in this case is required to be interpreted in a broader context that includes various commercial transactions in the international economy and not be limited only in terms of trade. It also tells us that arbitration is an institution that solves various economic disputes, depending on the agreement of the parties.

## **Arbitration - General Reviews**

It's hard to say the exact origin of arbitration, but documented that they have started to be used very early, since the slave states. Both the Quran and the Bible divine books provide references for the resolution of disputes through arbitration and mediation<sup>8</sup>, in addition, arbitration is also mentioned in Greek mythology<sup>9</sup>.

The development of arbitration as an alternative means of resolving commercial disputes, both in terms of internal (state) and externally (international), went on to achieve a high level of use by different businessmen to settle disputes their

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<sup>7</sup> See, footnote 2, on the UNCITRAL Model Law on International Commercial Arbitration

<sup>8</sup> Nicola White, LLB, LLM (DUB) attorney-at-Law (NY). 2008. *Alternative Dispute Resolution*, 23.

<sup>9</sup>Steven C. Bennett. 2002. *ESQ-Arbitration-essential concepts*. NLP IP Company, American Lawyer Media, 9.

trade by without arbitration as a more efficient way of resolving commercial disputes. Parties usually opt for arbitration because the arbitration have some advantages in comparison with the courts, for example, they make a faster resolution of disputes, arbitrators are chosen by the parties themselves and have different professional fields which guarantee a better survey of the issue, lower costs, arbitration proceedings are generally private, flexible rules, etc. This method of resolving trade disputes has continually evolved and today the international commercial arbitration has become the method of resolving disputes which international trade is done efficiently and faster taking decisions binding on the parties<sup>10</sup>. Various authors such as Bennett, Born, Redfern, Hunter, Bales etc. in their works depict various occasions of dispute settlement through arbitration, not only in business but also in various disputes. These authors cite King Solomon as a famous arbitrator in resolving different disputes, as Philip the second of Macedonia who use arbitration in disputes in the field of peace treaties with the city-states of southern Greece<sup>11</sup>etc.

Arbitration as an alternative method of resolving disputes, paving the way easier and more convenient to find a solution that goes in favor of the parties. As Kalia highlight "arbitration appears more and more as a means of rapid less costly for the trial of an issue than the ordinary courts, and also as a tool for achieving true justice, while eliminating, or abnormalities occurring inadequacies during the trial by a judge of the ordinary"<sup>12</sup>. Therefore, the importance of arbitration in social life will be of general interest to businesses. This is evidenced in the way that scientific interest for the study of this legal institute has especially increased during the last decades of the last century, and which continues today.

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<sup>10</sup>Alan Redfern and Martin Hunter. 2004. *Law and Practice of International Commercial Arbitration*. Sweet & Maxwell London NU3 3PF, 1.

<sup>11</sup> See more extensively: Richard A. Bales. 1997. *Compulsory Arbitration-the grand experiment in employment*. Cornell University Press, 5.

<sup>12</sup> Ardian Kalia. 2010. *International Private Law*. Tirane, 336.

International trade disputes arbitration not resolving on behalf of the state. Key element on which based the arbitration in its work to resolve disputes, is the agreement of the parties which is the fundamental law of arbitration work.

The term international commercial arbitration means an arbitrator or arbitrators body (which must always be to) elect to resolve the dispute or trade disputes in international trade, as this term is also used to distinguish domestic commercial arbitration<sup>13</sup>. Officially, the term International Commercial Arbitration could be worth it just to arbitration that is organized in accordance with the Convention on International Commercial Arbitration of Europe which was signed in Geneva on 21 April 1961, but in practice the notion International Commercial Arbitration means any arbitration for the resolution of international commercial disputes which does not belong to an internal legal system. In legal doctrine of international commercial arbitration separated four important features: the agreement for arbitration, choice of arbitrators, the arbitral tribunal's decision and execution of the decision<sup>14</sup>.

Intensification of economic relations between states, as well as the rapid development of science and technology, and more and more specialization and complexity of different economic branches, see arbitration as an institution more efficient and convenient in trade dispute<sup>15</sup>. The foundation for the expansion of arbitration is located exactly in the intensification of international trade exchange trade then in the development of global proportions, recently the world has become practically "neighbors" because modern communication tools have offered a state with another state when not in direct

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<sup>13</sup> Vilim Gorenc. 2006. *Fundamentals of business law statutory and contractual*. Pristine: University College Victory, 305

<sup>14</sup> Alan Redfern and Martin Hunter. 2004. *Law and Practice of International Commercial Arbitration*. Sweet & Maxwell London NU3 3PF, 5

<sup>15</sup> Mehdi Hetemi. 2007. *International Trade - Commercial Law*. Pristine, 417,418.

neighborhood<sup>16</sup>. Entities that enter into agreement for arbitration may be physical persons and legal persons belonging to different countries. Different nationality or domicile of entities in commercial disputes, who determined that their dispute or disputes resolve through arbitration, and arbitration also give the international character<sup>17</sup>.

## **The notion of Arbitration**

In legal science there are different opinions about the notion of arbitration. A group of authors, without excluding the distinguished authors such as Born, Bennett, etc. Gorenci consider arbitration as an alternative form of trade disputes, a way of resolving disputes outside the regular court system. According to their arbitration is a classic form of alternative dispute resolution involving a sequence of actions for private solutions to trade disputes, characterized by agreement of the parties, independence, and non-governmental decision-making.

Other authors Miller, Macneil etc. consider arbitration as a private institution for resolving trade disputes between two or more persons. These authors interpret international commercial arbitration exclusively and intentionally or unintentionally not distinguish between international commercial arbitration and arbitration in domestic law, as well as the distinction between international commercial arbitration and arbitration in public international law. Several other authors also make a distinction between international commercial arbitration of private law and arbitration in public international law, for example, the famous author Jezdiq makes such a distinction noting that arbitration in the review of internal disputes on the basis of rules of civil law, arbitration and public international law resolve disputes under relevant

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<sup>16</sup> Alexander J. Belohlavek. 2011. "The Legal Nature of International Commercial Arbitration and the Effects of Conflicts between Legal Cultures." *Law of Ukraine* 2: 18-26.

<sup>17</sup> Riza Smaka. 2007. *Business Law*. Pristine, 491.

principles of public international law, foreign trade arbitration rule as foreign trade disputes are reviewed based on the principles of private international law<sup>18</sup>.

The legal literature attempts for the appointment of elements that contained in the notion of international commercial arbitration. As such elements are: the need for functioning of arbitration agreement (contract) in writing of the parties, which is entrusted with dispute resolution arbitration, that resolve international disputes, they are institutions of international law<sup>19</sup> etc. According to the European Convention on International Commercial Arbitration with the phrase "arbitration" means not only the resolution of disputes by arbitrators appointed for certain cases (ad hoc arbitration) is the resolution of disputes by arbitration permanent<sup>20</sup>. International commercial arbitration is an institution that resolves international commercial disputes where the subject in dispute can be physical and legal persons of different countries, based on the agreement of the parties on the basis of which is established by applying the right set of people parties in their agreement.

### **Legal sources of arbitration**

International commercial arbitration is usually treated under private international law (which belongs to the subject) which regulates private juridical relations with international element, therefore, also its resources in formal legal terms are both diverse: national resources and international<sup>21</sup>, therefore, the sources of international commercial arbitration are both diverse national and international sources.

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<sup>18</sup> Mihail Jezdiq. 1979. *International Private Law II*, Rilindja, Pristine, 137.

<sup>19</sup> Gary B. Born, 2001. *International Commercial Arbitration, Commentary and Materials*. Kluwer Law International, 1.

<sup>20</sup> European Convention on International Commercial Arbitration, Geneva, 21 April 1961, Article 1.2 point B.

### ***National resources***

The parties have complete freedom in determining which law will apply to resolve their dispute through arbitration. In the arbitration agreement the parties may stipulate arbitration law of any particular State. From this, it follows that national arbitration laws pose a direct source of the right to arbitration. It should be mentioned that the issue of arbitration is regulated by a special law in most states of the world, but in some countries the issue of arbitration provided under the code of civil procedure as example case in France where the arbitration proceedings governed by civil procedure codes, or Italian civil procedure code of arbitration procedure is governed by Article 806 to 840 etc. In the U.S., arbitration is regulated by federal and state laws. The main federal Act, the Federal Arbitration Act, was enacted in 1925 and since then has been amended several times<sup>22</sup>.

### ***International sources***

International sources of international commercial arbitration are multilateral conventions such as: the Convention of New York in 1958 on the recognition and enforcement of foreign arbitral awards, the Convention on International Commercial Arbitration of Europe signed in Geneva on April 21, 1961 The law also UNCITRAL model rules of UNCITRAL arbitration rules of the international Chamber of Commerce which was established in Paris in 1923 and has played an important role in promoting international laws etc. and bilateral conventions which are the most frequent among related countries.

### **Arbitration Agreement**

When talk for arbitration regardless of the type of arbitration

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<sup>21</sup> Hajredin Kuçi and Asllan Bilalli. 2008. *International Private Law*, Pristine, 69

<sup>22</sup> Edward Brunet, Richard E. Speidel, Jean E. Sternlight, Stephen J. Ware. 2006. *Arbitration Law in America. A critical assessment*. Cambridge University Press, 25.

(institutional or ad hoc arbitration), and talk about whether domestic or international arbitration, important place has the arbitration agreement. First of all, arbitration established under the agreement, in reality, without the consent of the two parties can not exist nor arbitration. This means that the parties agree is a fundamental condition for arbitration. Whatever the attitude of states for domestic and international arbitration, again all legal systems recognize of the parties consent expressed in the agreement. Kosovo law for arbitration, by adjusting the rules of UNCITRAL Model law, defines arbitration agreement as "an agreement reached between two or more persons, that some or all legal disputes which have arisen or which may arise among them, shall be subject to arbitration" (see: Article 2).

In the arbitration agreement the parties express their consent to the dispute which has arisen or will arise in the future to be resolved through arbitration rather than state court. In addition, the importance of the agreement for arbitration is also in agreement that sets out the rules of procedure in relation to choice of substantive law that will enforce arbitration, the place or seat of arbitration, the language they will use arbitration etc. The arbitration agreement has another importance, it is also a formal source of law of arbitration because it is an act that obliges arbitration.

### ***Form of arbitration agreement***

Universally, is accepted that the arbitration agreement be in writing. The New York convention to the recognition and enforcement of foreign arbitration decisions, 1958, in Section 2 provides: "every one of the contracting states accept the agreement in writing" under this Convention, each State Party is required to arbitration agreement to recognize the written agreement. In the same way, has foreseen the UNCITRAL Model law, which says: "an agreement is in writing if it is contained in a document signed by the parties or in an

exchange of letters, fax, telegrams or other means of telecommunication which provide a registration of the agreement<sup>23</sup>. The most significant effect of the arbitration agreement is the birth of obligations between the parties to be bound by the decision of the arbitrators, and meanwhile, to prevent parties to set in motion a national judge<sup>24</sup>.

### ***Validity of arbitration agreement***

Two issues that pose a particular importance is the existence or not of an arbitration agreement and the validity of the arbitration agreement, especially when we are dealing with competent authority to decide on this matter: arbitration or court.

Convention of New York does not specify who should decide on the validity and existence of the arbitration agreement. The UNCITRAL Model Law, highlights that the arbitral tribunal may decide for its own jurisdiction in the case and that a court before which presented a case dealing with an arbitration agreement must refer the parties to arbitration<sup>25</sup>. Kosovo law on arbitration in Article 7 highlights: "the court before which an action is brought on a matter, which is subject to arbitration shall dismiss the claim, if the defendant in his statement of defense invoked the arbitration agreement unless the court finds that the arbitration agreement is invalid or that the disputed issue is not covered by the arbitration agreement", while Article 14.1 highlights that it is a matter of the arbitral tribunal to decide on the validity of the arbitration agreement and whether it is competent for resolution of the dispute which is submitted. From these two provisions clearly shows that the issue of the existence (if an agreement is void and unenforceable) is under the jurisdiction of the court, while issues relating to the validity of the arbitration clause shall be

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<sup>23</sup> Ligji Model i UNCITRAL-it, neni 7.2

<sup>24</sup> Ardian Kalia. 2010. *E Drejta ndërkombëtare private*. Tiranë, fq.355.

<sup>25</sup> UNCITRAL Model Law, article 16 and article 8.

determined by the arbitral tribunal. Therefore, the law is quite clear that asking the court to reject any request as invalid if there is a valid arbitration agreement. However, if the court finds that the agreement is void and unenforceable, it is not obliged to refer the matter to arbitration.

## **Conclusions**

United Nations Commission on International Trade Law - UNCITRAL was established in 1966 by the General Assembly of United Nations resolution 2205 (XXI). Since from this time UNCITRAL has played a major role in the modernization and harmonization of international trade law. In this regard UNCITRAL has encouraged acceptance and wider use regulations and legal texts that it develops. With the approval of the Model Law on International Commercial Arbitration 1985, has urged states to enact their own laws to arbitration in accordance with the law and in this way has helped to ease the resolution of international commercial disputes through arbitration as an alternative form of resolution disputes. Nowadays arbitration plays a major role in international trade resolution dispute, being considered as a more efficient, faster and cheaper cost than the courts. International commercial arbitration is an institution that resolves international commercial disputes where the subject in dispute can be physical and legal persons of different countries, based on the agreement of the parties on the basis of which is established by applying the right set of people parties in their agreement. The development of arbitration as an alternative means of resolving commercial disputes, both in terms of internal (state) and externally (international), went on to achieve a high level of use by different businessmen to settle disputes their trade saw arbitration as a more efficient way of resolving commercial disputes. Parties usually opt for arbitration because the arbitration have some advantages in comparison with the

courts, eg they make a faster resolution of disputes, arbitrators are chosen by the parties themselves and have different professional fields which guarantee a better survey of the issue, lower costs, arbitration proceedings are generally private, flexible rules, etc..

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