Litigation ADR Arbitration

European Union

Comparative Study

Question	European Court of Justice	UNCITRAL Model Law of Arbitration	Rules of the European Court of Arbitration
1. Are mediation clauses in commercial contracts binding and enforceable?	Mediation clauses are not included on the ECJ procedural provisions.	Mediation clauses are not included on the UNCITRAL Model Law of Arbitration procedural provisions.	Mediation clauses are binding and enforceable. Where all of the parties to a valid mediation agreement do not engage in a mediation, the mediation may be carried out between the parties which have agreed to proceed even though other parties have refused to be involved.

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2. What is the procedure for mediation? Is it a popular method for resolving commercial disputes?	Mediation clauses are not included on the ECJ procedural provisions.	Mediation clauses are not included on the UNCITRAL Model Law of Arbitration procedural provisions.	Within the framework of the European Court of Arbitration, it is recommended to the parties to select the standard agreement of this institution to mediate and, if unsuccessful, to arbitrate the dispute (Two-step clause). The parties are offered a short mediation and arbitration clause while a longer one which deals with several important and delicate other issues is also available to more sophisticated users.

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3. Are arbitration clauses in commercial contracts binding and enforceable?	Article 272 TFEU provides that the ECJ has jurisdiction in staff cases concerning aspects of employment relationship and commercial cases. A precondition for the court's jurisdiction is the conclusion of a contract "by or on behalf of the Union (European Union)". Although the court's jurisdiction is based upon an "arbitration clause", the court's decision will take the form of a judgment rather than an award. Enforcement of those judgments will take place according to the same procedure that applies in the case of other judgments of the court.	Arbitration clauses in commercial contracts are binding and enforceable. Moreover, a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.	Arbitration clauses are binding and enforceable. If one party submits that the contract containing the arbitration agreement is null and void or has not come into existence or that the arbitration agreement itself is null and void or non existent, while the Court had found the agreement to be prima facie in existence and valid, the Arbitral Tribunal shall remain seized and have power to determine at any time in the proceedings as to the non-existence or nullity of the contract and or the arbitration agreement. The Arbitral Tribunal may make such a determination in its final award.

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4. What type of arbitration is commonly used for resolving commercial disputes: ad hoc arbitration or institutional arbitration?	Arbitration can be organised directly by the parties setting up their own arbitration rules or selecting already existing rules. These arbitrations are generally defined as "ad hoc". Otherwise the parties refer the dispute to an administrating body like the European Court of Justice. The most commonly used type of arbitration is the institutional arbitration.	Arbitration can be organised directly by the parties setting up their own arbitration rules or selecting already existing rules. These arbitrations are generally defined "ad hoc". Otherwise the parties refer the dispute to an administrating body. The most commonly used type of arbitration is the institutional arbitration.	Arbitration can be organised directly by the parties setting up their own arbitration rules or selecting already existing rules. These arbitrations are generally defined "ad hoc". Otherwise the parties refer the dispute to an administrating body like the European Court of Arbitration. The most commonly used type of arbitration is the institutional arbitration.

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<tr><td>5. Which arbitration institutes are most popular?</td><td colspan="3">There are many Arbitration bodies or institutions that carry out arbitral proceedings. The European Court of Arbitration is one of the most popular; besides de fact that there are a lot of Chambers of Commerce on the different Member States as well as other arbitral institutions that could be chosen by the parties. Arbitration proceedings carried out in front of the ECJ are, on the contrary, not very common, taking into account the number of cases they have per year. (Just five arbitration proceedings in front of the ECJ in 2011) Statistics concerning the judicial activity of the General Court, p. 195 (Read more)</td></tr>
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6. What influence can the parties have on the identity of the arbitrator(s)?	Parties are not able to decide or influence on the identity of the arbitrators.	The parties are free to agree on a procedure of appointing the arbitrator or arbitrators. The parties are also free to determine the number of arbitrators, however, failing such determination, the number of arbitrators shall be three.	If the parties have agreed to appoint three arbitrators, each party will nominate one arbitrator. The parties will jointly nominate the third arbitrator, who shall act as the Chairman of the Arbitral Tribunal, by consent. In the absence of an agreement by the parties as to the Chairman, his nomination will be made by the two party- appointed arbitrators or, in event of disagreement between them continuing for 10 days after the preliminary meeting, the Chairman will be appointed by the Court. By agreement of the parties, if the number of arbitrators is to be three the arbitrators could be appointed by the Court.

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7. In what language is an arbitration proceedings conducted?	The language of a case must be either Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish or Swedish. The language of a case shall be chosen by the applicant, except where (a) the defendant is a Member State or a natural or legal person having the nationality of a Member State, the language of the case shall be the official language of that State; where that State has more than one official language, the applicant may choose between them; (b) at the joint request of the parties, the use of another of	The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.	If the parties cannot agree on the procedural language (s), it/they will be determined by the Arbitral Tribunal, having regard also to the language predominantly used by the parties in their contractual relationships. The Arbitral Tribunal shall avoid a language that would cause a manifest disadvantage to one of the parties. The Arbitral Tribunal may, in exceptional circumstances, decide upon the use of two languages, but it shall ordinarily favour the choice of only one procedural language. Oral argument will be in the language (s) which has / have been selected.

	the languages mentioned for all or part of the proceedings may be authorised; (c) at the request of one of the parties, and after the opposite party and the Advocate General have been heard, the use of another of the languages mentioned in paragraph 1 as the language of the case for all or part of the proceedings may be authorised by way of derogation from subparagraphs (a) and (b); such a request may not be submitted by an institution of the European Communities		

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8. What types of pre-arbitration measures are available and what are their limitations?	Applicants may request for interim measures seeking suspension of a particular action by a Member State or institution where there is a fear that continued operation of measures could cause harm to the party involved	It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.	The Pre-Arbitral Referee proceedings consist in appointing a person entrusted and empowered with the authority to apply on behalf of the parties a solution of urgent matters or preliminary conservatory or interlocutory measures. The intervention of the Pre-Arbitral Referee may be requested only before an arbitral tribunal is appointed or, in the absence of an arbitration agreement, before a state court is seized with the matter.

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9. What are the costs of arbitration proceedings and who bears these costs?	Proceedings before the Court shall be free of charge, except where: (a) a party has caused the Court to incur avoidable costs, the Court may, after hearing the Advocate General, order that party to refund them; (b) where copying or translation work is carried out at the request of a party, the cost shall, in so far as the Registrar considers it excessive, be paid for by that party on the scale of charges referred in the Rules.	The costs of arbitration proceedings under the UNCITRAL Model Law vary depending on the institution that carries out the proceedings.	The procedural costs are made up of the administrative costs of the Court, arbitrators' fees and any other expenses related to the arbitral proceedings. It shall be fixed by applying the schedule of such fees in effect on the day of filing of the request for arbitration and in accordance with the relevant scale in Appendix No 4 of those Rules. The Arbitral Tribunal shall determine in its findings the party bearing the costs of the proceedings. The arbitrators shall have the power to award the costs against a party or parties in such proportion, as the Arbitral Tribunal deems appropriate.

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<tr><td>10. What are the basic rules of document disclosure in arbitration? Which documents do not require disclosure?</td><td>The powers of the Court are expressed in terms of production to the court and those provisions do not confer a direct right upon a party to obtain documents directly from another party. The court has however established that parties in general must be given access to all documents and information supplied to the court. There are two exceptions to this rule; the first one is that Confidential documents can be withheld from interveners. The second is that confidential material supplied by one applicant is not disclosed to other applicants, who are competitors, where a number of cases are joined.</td><td colspan="2">There are no disclosure duties for the parties and each can submit any document they may have to support their claims and request the arbitrators an order for their counterparty to produce a document.</td></tr>
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11. What is the procedure for witness evidence in arbitration (namely, is it deposition based or witness examination or cross-examination)?	The Court may, either of its own motion or on application by a party, and after hearing the Advocate General, order certain facts to be proved by witnesses. The order of the Court shall set out the facts to be established. The Court may summon a witness of its own motion or on application by a party or at the instance of the Advocate General. An application by a party for the examination of a witness shall state precisely about what facts and for what reasons the witness should be examined.	The arbitral tribunal may consider it appropriate to clarify, in advance of the hearings, the order in which questions will be asked and the manner in which the hearing of witnesses will be conducted.	The parties may examine witnesses and the parties directly before the Arbitral Tribunal. The Arbitral Tribunal shall ensure the proper order of such examination at the hearing. A cross-examination of the witnesses and of the parties shall be permitted.

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12. How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties and/or counsel privileged (i.e., may not be disclosed to the Arbitrator)?	The procedure shall consist of two parts: written and oral. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter–memorials and, if necessary, replies; also all papers and documents in support. These communications shall be made through the Registrar, in the order and within the time fixed by the Court. A certified copy of every document produced by one party shall be communicated to the other party. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.	Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.	Settlement discussions starts with the written part of the procedure, namely the Request for Arbitration and the Statement of Defense. After that it take place the Hearings, which are the oral part of the proceedings.

Question	European Court of Justice	UNCITRAL Model Law of Arbitration	Rules of the European Court of Arbitration
13. Under what circumstances can an Arbitration Award be enforced, challenged or annulled?	Article 280 TFEU provides that the decisions of ECJ are enforceable along of the order of enforcement, which is appended to the decision, without any further formality. Enforcement is governed by the rules of civil procedure in force in the State in the territory of which it must be carried out. The order for its enforcement is appended to the decision (without other formality than verification of the authenticity of the decision, as it must be issued by the ECJ). When the party concerned has completed these formalities on application, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent	An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced. However, recognition or enforcement may be refused only at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: a party was under some incapacity, the agreement is not valid under the law of the country where the award was made; the party has no proper notice of the appointment of an arbitrator or of the arbitral proceedings; or the award deals with a	By acceptance of those Rules, the parties expressly waive their right to any redress against the award, except where the right of appeal, by rehearing, by an Appellate Arbitral Tribunal has not been excluded and is instituted by application to the Court, which finds that the requirements for the admissibility provided for by article 28 of the Rules are satisfied, and, or certain attacks against the arbitral award or the appellate award may not be validly waived by the parties pursuant to mandatory provisions of the applicable procedural law.

	authority.	dispute not contemplated on the submission to arbitration. It may also be refused if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or the recognition or enforcement of the award would be contrary to the public policy of this State.	

ANNEX I

Legislation based on the UNCITRAL Model Law on International Commercial Arbitration as adopted in 1985 has been enacted in:

Country	Year	Comments
Austria	2006	
Bulgaria	2002	The legislation amends previous legislation based on the Model Law.
Cyprus	1987	
Denmark	2005	
Estonia	2006	
Germany	1998	
Greece	1999	
Hungary	1994	
Ireland	2010	Indicates legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006. The legislation amends previous legislation based on the Model Law.
Lithuania	1996	
Malta	1996	
Poland	2005	
Slovenia	2008	Indicates legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006.
Spain	2003	
Croatia	2001	*Acceding Country to the EU*
The former Yugoslav Republic of Macedonia	2006	*Candidate Country to EU accession*
Serbia	2006	*Candidate Country to EU accession*
Turkey	2001	*Candidate Country to EU accession*

Disclaimer: A model law is created as a suggested pattern for law-makers to consider adopting as part of their domestic legislation. Since States enacting legislation based upon a model law have the flexibility to depart from the text, the above list is only indicative of the enactments that were made known to the UNCITRAL Secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted. The year of enactment indicated above is the year the legislation was passed by the relevant legislative body, as indicated to the UNCITRAL Secretariat; it does not address the date of entry into force of that piece of legislation, the procedures for which vary from State to State, and could result in entry into force some time after enactment.

REFERENCES

- Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (See here)
- Rules of Procedure of the Court of Justice (See here)
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- BARENTS, R.; VON HOLSTEIN, H.; PLENDER, R. *European Courts Procedure*, Release No. 7, Published November 2005. Sweet&Maxwell.
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- UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006 (See here)
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- Statistics concerning the judicial activity of the General Court (See here)