

UNCITRAL Model Clause on Confidentiality



UNITED NATIONS

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL
Model Clause on
Confidentiality



UNITED NATIONS
Vienna, 2024

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This publication has not been formally edited.

Publishing production: Publishing Section, United Nations Office at Vienna.

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Decision by the United Nations Commission on International Trade Law on the adoption of the UNCITRAL Model Clauses on Specialized Express Dispute Resolution¹

The United Nations Commission on International Trade Law,

Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its decision at the fifty-fifth session, in 2022, to entrust Working Group II (Dispute Settlement) with considering the topics of technology-related dispute resolution and adjudication jointly, and with considering ways to further accelerate the resolution of disputes,

Recognizing the value of model clauses on specialized express dispute resolution, which provide parties with a streamlined and simplified procedure for settling disputes that arise in the context of international commercial relations within a shortened time frame,

Recognizing also the need to balance the efficiency of arbitral proceedings with the rights of disputing parties to due process and fair treatment,

Noting that the preparation of the draft model clauses on specialized express dispute resolution and the explanatory notes benefited greatly from consultations with Governments and interested intergovernmental and international non-governmental organizations,

Expressing its appreciation to Working Group II for its work in developing the draft model clauses on specialized express dispute resolution and the explanatory notes and to relevant international intergovernmental and non-governmental organizations for their support and contributions,

¹ *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 17 (A/79/17, para. 93).*

1. *Adopts* the UNCITRAL Model Clauses on Specialized Express Dispute Resolution, as contained in annex II to the report of the United Nations Commission on International Trade Law on the work of its fifty-seventh session;

2. *Approves* in principle the draft explanatory notes to the UNCITRAL Model Clauses on Specialized Express Dispute Resolution contained in document A/CN.9/1181, as revised by the Commission at its fifty-seventh session, and authorizes Working Group II (Dispute Settlement) to edit and finalize the text at its eightieth session, in 2024;

3. *Recommends* the use of the UNCITRAL Model Clauses on Specialized Express Dispute Resolution by parties and administering institutions in the settlement of disputes arising in the context of international commercial relations;

4. *Requests* the Secretary-General to publish the UNCITRAL Model Clauses on Specialized Express Dispute Resolution and the final text of the explanatory notes, including electronically, in the six official languages of the United Nations, and to make all efforts to ensure that they become generally known and available.

I. Preface

1. This Model Clause is one of the four UNCITRAL Model Clauses on Specialized Express Dispute Resolution (SPEDR) (2024) (the “Model Clauses”). The Model Clauses have been developed as part of UNCITRAL’s efforts to achieve three common objectives, namely, expeditious dispute resolution, comprehension of technical matters, and maintaining confidentiality. They are designed as a resource for businesses and practitioners engaging in international dispute resolution.
2. The four Model Clauses are on: Highly Expedited Arbitration, Adjudication, Technical Advisers and Confidentiality.
3. The Model Clauses are contractual texts, flexible enough for users to adapt and adjust them to their circumstances and preferences. Parties can use any of the model clauses individually or combine them as they wish, depending on their specific needs. For this reason, the Model Clauses are presented to potential users in both consolidated and separate formats, in order to accommodate their flexibility and facilitate its use.
4. The Model Clauses are also accompanied by explanatory notes to promote their best possible use. These notes provide guidance to parties on their specific objectives and any associated risks or alternate approaches that can be adopted while including them in contracts.
5. This Model Clause intends to help parties who wish to establish clear and robust confidentiality safeguards, in order to ensure the privacy of the arbitration process.

II. Model Clause on Confidentiality*

Model Clause

1. Each party shall maintain confidentiality of all aspects of the proceedings, including the existence of the proceedings, all non-public information disclosed by another party in the proceedings, all non-public decisions or awards, [and any decisions or awards that have been proven to have become public unlawfully] with the following exceptions: to the extent that such disclosure is required by legal duty, to protect or pursue a legal right or interest, or in relation to enforcing or challenging awards in legal proceedings before a court or other competent authority, or for the purposes of having, or seeking, legal, accounting or other professional services.
2. The arbitral tribunal and the parties shall seek the same undertaking of confidentiality in writing from all those that they involve in the proceedings.
3. The arbitral tribunal may, upon the request of a party, make orders concerning the confidentiality of the arbitral proceedings and take measures for protecting confidential information.

Explanatory notes

1. Parties wishing to ensure confidentiality in arbitral proceedings and choosing to conduct their arbitration under the UARs are encouraged to address confidentiality explicitly in their arbitration agreements or consider entering into additional confidentiality agreements, as permitted by applicable law. Unlike some institutional rules or national legislation, the UNCITRAL Arbitration Rules (“UARs”) do not specifically cover provisions regarding confidentiality.

* In some jurisdictions, a valid confidentiality agreement can only be concluded once a dispute has arisen. In such cases, parties may add a first paragraph to the Model Clause: Upon commencement of a dispute, parties may consider agreeing on the following: (and then have the Model Clause as it currently stands).

*Obligation to maintain confidentiality –
paragraph 1*

2. This paragraph establishes an obligation of each party involved in the arbitral proceedings to maintain confidentiality regarding all aspects of the proceedings, including the existence of the proceedings, all non-public information shared by other parties and all non-public decisions or awards. It also outlines specific exceptions to the duty of confidentiality allowing disclosure to the extent necessary, when legally obligated, when required to protect or pursue legal rights or interests, when enforcing or challenging awards in legal proceedings, or when obtaining legal, accounting, or other professional services. Normally, consulting with a third-party funder would fall within these exceptions.

3. Parties may wish to consider including the text within square brackets, “and any decisions or awards that have been proven to have become public unlawfully” according to their specific needs and concerns. Inclusion of the text would provide the parties the flexibility to address situations where decisions or awards have been unlawfully disclosed to the public. In addition, parties could add language to uphold the confidentiality of any information that has been unintentionally or intentionally made public contrary to a confidentiality provision of the relevant applicable law.

*Written undertaking of confidentiality –
paragraph 2*

4. Paragraph 2 establishes a requirement for the arbitral tribunal and the parties involved in the proceedings to obtain a written undertaking of confidentiality from all individuals/entities they involve in the arbitration process. This undertaking is aimed at ensuring that everyone participating in the proceedings, including witnesses and experts, agrees in writing to maintain the confidentiality of various aspects, including the existence of the proceedings, non-public information, and decisions or awards.

5. In all cases involving other persons in the arbitration, it is the parties’ responsibility to enter into a confidentiality agreement with these persons. On the same basis, where the tribunal invites third parties, such as experts and the secretaries, to become involved in the proceedings, this responsibility rests with the arbitral tribunal.

Orders and measures on confidentiality – paragraph 3

6. Paragraph 3 gives the arbitral tribunal the authority to address confidentiality issues in the arbitral proceedings, providing a mechanism for parties to request intervention and for the tribunal to address such concerns. In the event of a breach of confidentiality, parties may have the right to seek remedies from the party that breaches confidentiality in accordance with the applicable law. Moreover, under the Model Clause, a party may request that the arbitral tribunal issue orders and adopt appropriate measures to address and restore the confidentiality of the arbitral proceedings.

Confidentiality within the proceedings

7. Paragraph 3 also covers scenarios where a party has sensitive information of intrinsic value, such as highly valuable trade secrets, know-how, algorithms or proprietary data, that it wishes to use in arbitration but wants to keep confidential from the opposing party. In such situations, measures can be discussed during a case management conference. The arbitral tribunal may classify such information as “confidential” and implement protective measures. For instance, information in a party’s possession that it treats as confidential (otherwise inaccessible to the public or the opposing parties) and that is of commercial, scientific or technical sensitivity may be classified as confidential. A party can submit a request to classify information as confidential by providing justifiable reasons. If the arbitral tribunal grants such a classification, it may adopt protective measures if needed after hearing both parties and, considering potential harm to the requesting party if confidentiality is not safeguarded. Such protective measures, for example, may limit access to specific information to counsel’s eyes only or experts’ eyes only, controlling the distribution of specified information, permitting the submission of specified information in redacted form only as documentary evidence, and requesting witnesses and experts to sign a corresponding undertaking of confidentiality.

