The definitive device of the term "international commercial arbitration"

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Abstract

Objectives are to reveal the essence of the institution of international commercial arbitration. Methods comprise the comparative analysis of scientific approaches of various legal systems of the world, judicial practice of both national courts and the European Court of Human Rights. Results and implications. As a result of this study the term "international commercial arbitration" was indicate from both side - of a general theoretical nature and in the law enforcement activities of national courts; the efforts of bringing the arbitration laws to the "unified rules of arbitration" was confirmed as a best way of their reform.

Keywords: *arbitration; recognition and enforcement of the awards; New York Convention of 1958.*

JEL Classification: K22, K33

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1. Introductory considerations

The question of when or where arbitration was first adopted is lost in history, but it is generally believed that commercial arbitration has existed since the beginning of commercial activity. In the ancient world, disputes, including between states and state entities, were already settled by arbitration, and it is argued that arbitration owes its popularity as the primary method of settling international commercial disputes to merchants who advocated it primarily because it could apply the *lex mercatoria*[2]. Although arbitration has been a popular and effective mechanism for centuries, it has had some fundamental shortcomings due to the lack of an effective enforcement mechanism[3]. Thus, the value of the arbitration agreement and the arbitral decision largely depends on the willingness of the parties to voluntarily comply with the arbitration agreement and the arbitral decision. Subsequently, these shortcomings were eliminated in national legislation and international legal acts[4].

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[2] Vytautas Nekrošius, Vigita Vėbraitė, Iryna Izarova, Yurii Prytyka, "Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine," *Teise (Law)* 116 (2020): 8-23, https://doi.org/10.15388/Teise.2020.116.1.

[3] N. Peters, *The fundamentals of international commercial arbitration*, 1st ed. (Apeldoorn: Maklu, 2017), 24.

[4] Such international documents include: (1) Protocol on Arbitration Clauses of 24 September, 1923 (Geneva Protocol 1923); (2) Convention on the Enforcement of Foreign Arbitral Awards of 26

One of the key issues in the theory and practice of both international private law and international commercial arbitration remains the motives for which the parties to foreign economic relations prefer arbitration[5]. And it is the presence of an arbitration agreement that becomes decisive in this context.

The participants of the arbitration agreement in its content determine the methods and forms of arbitration settlement for the future. Understanding how to navigate the preliminary proceedings and early stages of arbitration can give a disputing party a good opportunity to quickly take enforcement action and can reduce the amount of time the arbitration is delayed and thus the potential costs it will incur. Familiarity with the international arbitration procedure allows the lawyer and the party to effectively participate in the proceedings, thereby maximizing the possibility of minimizing costs while achieving the desired result. Often, this desired result is not a favourable decision, but a settlement of the dispute, in particular when during the dispute the party *de facto* and *de jure* understands that it is no longer worth continuing the dispute.

And what to do when both sides of the arbitration proceedings have the same opportunities to obtain the required result? The dispute could not be resolved. The desired solution was not received. Even with an existing arbitration decision, a specific dispute may not end. If the arbitral decision is not enforced voluntarily, it must be enforced at the expense of the assets of the losing party, which greatly complicates the settlement of the dispute[6]. Appeal to enforcement takes place through the national model of control by the judicial system of a particular state. Finding assets can be a serious commercial challenge, especially in deals involving the use of special funds.

Such commercial issues aside, arbitral decisions enjoy a relatively favourable enforcement regime around the world thanks to international treaties governing the enforcement of such decisions by national courts. International treaties provide that arbitral decisions are enforced if they meet clearly defined standards. *De facto* international standards in practical implementation undergo significant changes.

Today, many disputes can be considered by arbitration. In general, it can be argued that the rights and obligations, which the parties can freely exercise, are dispositively established by arbitration. Whether a matter may be arbitrable under

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September, 1927 (1927 Geneva Convention); (3) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June, 1958 (New York Convention); (4) European Convention on International Commercial Arbitration of 21 April 1961 (1961 European Convention); (5) Convention on Settlement of Investment Disputes between States and Citizens of Other States of 18 March, 1965 (ICSID Convention); (6) Inter-American Convention on International Commercial Arbitration of 30 January, 1975 (Panama Convention); and (7) UNCITRAL Model Law on International Commercial Arbitration, adopted on 11 December, 1985, as amended on 4, December 2006 (the UNCITRAL Model Law).

[5] Popa (Tache) Cristina Elena, „Defense or cooperation between states and international investors in times of crisis?", *Juridical Tribune – Tribuna Juridica*, Vol. 11 (2021), Special Iss., Pp. 380-394. 10.24818/TBJ/2021/11/SP/07.

[6] Iryna Izarova, "Sustainable Civil Justice Through Open Enforcement – The Ukrainian Experience Studying," *Academic Journal of Interdisciplinary Research* 9, no. 5 (2020): 206-216.

any particular law must be decided on the merits under that law. Although each state can thus decide for itself which issues within its territory can be arbitrated, the question of arbitrability does not generally arise in commercial matters. For example, the 1923 Geneva Protocol provides that commercial matters can be settled by arbitration, but other matters cannot[7].

Despite all the attractiveness of this type of alternative method of dispute resolution, the understanding of its legal nature is rather ambiguous and debatable, because the content of the definition "international commercial arbitration" includes different application in national law, therefore we consider it justified to reveal the essence of this institution through the analysis of scientific approaches of various legal systems of the world, judicial practice of both national courts and the European Court of Human Rights.

2. On the definition of the term "commercial"

The concept of "commercial" in legal theory and practice did not find a clear definition for a considerable time and became a really serious problem. In some legal systems, the term "commercial" is a purely technical definition in a general sense. In other legal systems, this term has no legal meaning. Despite efforts to regulate this definition at the level of national legislation, the first mention of this term was during the ratification of the European Convention of 1961.[8] Although the concept of "commercial" was not defined in this regulatory act, it was noted at the same time that the convention applies to both physical and legal persons of arbitration agreements on the arbitration of disputes that arise during foreign trade transactions.

In the broadest sense, matters are commercial if they affect an economic interest. According to the UNCITRAL Model Law, a matter is commercial if it arises from commercial relations, regardless of whether these relations are contractual or not[9]. According to Art. 1 of the UNCITRAL Model Law, relations of a commercial nature include (but are not limited to) any commercial agreements for the supply of goods or services or the exchange of goods or services; agreements on distribution, trade representation; factoring; leasing; engineering; construction of industrial facilities; provision of advisory services; purchase and sale of licenses; investment; financing; banking services; insurance; exploitation or concession agreements; joint ventures and other forms of industrial or entrepreneurial cooperation; transportation of goods and passengers by air, sea, railways and roads.

Attempting to harmonize national regulatory acts in accordance with unified standards and rules, Ukrainian arbitration legislation regulates that the term "commercial" is interpreted broadly and covers issues arising from all commercial

[7] Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157, https://treaties.un.org/doc/Publication/MTDSG/volume%20II/ LON/PARTII-6.en.pdf.

[8] European Convention on International Commercial Arbitration (1961), https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf.

[9] UNCITRAL Model Law on International Commercial Arbitration, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

relations, both contractual and non-contractual[10]. Commercial relations include, but are not limited to the following agreements: any commercial agreements for the supply of goods or provision of services or the exchange of goods or services; agreements on distribution, trade representation; factoring; leasing; engineering; construction of industrial facilities; provision of advisory services; purchase and sale of licenses; investment; financing; issuance of bonds, provision of security for bonds; banking services; insurance; agreements on exploitation or concessions; joint ventures and other forms of industrial or entrepreneurial cooperation; transportation of goods and passengers by air, sea, rail and road (Article 2 of the Law of Ukraine "On International Commercial Arbitration")[11].

For the purposes of, for example, the Geneva Protocol of 1923 and the New York Convention of 1958[12], the question of whether a particular matter should be regarded as commercial may be relevant, since each Contracting State may reserve the right to limit its obligations by defining a national framework areas of disputes that are considered commercial. Less than a third of the 157 states that are currently parties to the 1958 New York Convention have made trade reservations. Thus, in these states, the latter convention applies exclusively to arbitration agreements and decisions relating to commercial disputes.

Some international legal acts (Article I (3) of the New York Convention of 1958, Article I (a) of the European Convention on Foreign Trade Arbitration of 1961[13], Article 1(1) of the UNCITRAL Model Law) and national arbitration laws (Article 1 of the Canadian Commercial Arbitration Act[14], Article 1 of the Costa Rican Arbitration Act[15] , etc.) regulate that their scope directly or indirectly extends exclusively to arbitration agreements arising from "commercial" relations. This leads to the exclusion of "non-commercial" issues from the scope of the pro-arbitration regimes of such regulations.

For a clearer understanding of "commercial" in the structure of the entire definition of international commercial arbitration, it is necessary to analyze not only international unified norms and national arbitration legislation, but also the judicial practice of national courts.

Even in those Contracting States to the 1958 New York Convention that have adopted a commercial nature clause, domestic courts have generally not interpreted the requirement of a "commercial" relationship as limiting the scope of

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[10] Yu. Prytyka, V. Komarov, S. Kravtsov, "Reforming the Legislation on the International Commercial Arbitration of Ukraine: Realities or Myths," Access to Justice in Eastern Europe 3, no. 11(2021): 117-128, DOI: 10.33327/AJEE-18-4.3-n000074.

[11] Law of Ukraine "On International Commercial Arbitration", https://zakon.rada.gov.ua/laws/show/4002-12#Text.

[12] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, https://www.newyorkconvention.org/11165/web/files/ original/1/5/15432.pdf.

[13] European Convention on International Commercial Arbitration (1961), https://treaties.un.org/doc/Treaties/1964/01/19640107 %20 02-01%20AM/Ch_XXII_02p.pdf.

[14] Canadian Commercial Arbitration Act, https://laws-lois.justice.gc.ca/eng/acts/c-34.6/fulltext.html.

[15] Costa Rican Arbitration Law, https://www.nfral.in/media/file/resource-pool/download_file/costa-rican-intl-arbitration-law-1616 740258.pdf.

the Convention. This is vividly illustrated by an example of the USA, where national courts have repeatedly denied that specific disputes are not "commercial" within the meaning of the New York Convention of 1958. Thus, during the consideration of the Bautista v. Star Cruises courts established the fact that an explosion occurred on a cruise ship in the waters of Miami, as a result of which six crew members were killed and four were injured. All victims had employment contracts that contained an arbitration clause. The subject of the discretionary American judicial system was whether the dispute regarding compensation for damage to family members of the ship's crew fits in the jurisdiction of international commercial arbitration. Despite the parties' arguments regarding the impossibility of applying arbitration law to this dispute, the United States Court of Appeals for the Eleventh Circuit concluded that the arbitration clause contained in the employment contracts of cruise ship crew members is subject to the New York Convention of 1958 and the Federal Arbitration Act, as contracts are commercial relations[16].

The subject of consideration in the case of *Prograph Intern. Inc. v. Barhydt* was a discretionary issue regarding the extension to legal relations regarding the illegal dismissal of an employee of the "commercial" category due to the presence in the employment contract of a clause on the arbitration procedure for settlement. In this case, the court finds that there can be no doubt that the contract between the plaintiff and the defendant, who works in the United States for a foreign corporation, is related to transnational or foreign trade and thus the arbitration agreement arises from a legal relationship that is considered commercial within the meaning of the New York Convention of 1958[17].

Corporate disputes, disputes arising between shareholders of large international companies are also referred to as "commercial" by law enforcement practice, and accordingly decisions on such disputes should be considered to be subject to the New York Convention of 1958. Thus, during consideration of a request for recognition and implementation of the decision of the international commercial arbitration in the case of *Henry v. Murphy*, the defendant argued that the court should refuse to enforce the arbitration decision because it did not arise out of a commercial relationship. The court came to the conclusion that the agreement concluded in February 1989 arose as a result of a dispute regarding commercial relations within the meaning of the Convention, namely a conflict between corporate shareholders, in particular, regarding the financial gains from the deal with shares. Therefore, the Court rejected the defendant's argument that the Convention does not apply in this case[18].

In addition, legal relations arising from insurance contracts are also considered "commercial" by national courts. The Florida District Court in the case of VVG *Real Estate Invs. v. Underwriters at Lloyd's* noted that the policy is a

[16] Bautista v. Star Cruises, 396 F.3d 1289 (11th Cir. 2005), https://casetext.com/case/bautista-v-star-cruises-3.

[17] Prograph Intern. Inc. v. Barhydt, 928 F. Supp. 983 (N.D. Cal. 1996), https://casetext.com/case/prograph-intern-inc-v-barhydt.

[18] Henry v. Murphy, M-82 (PART I JFK) (S.D.N.Y. Jan. 8, 2002).

contract of insurance which entitles the insurers to insure the property belonging to the claimant in the event of its loss, and therefore contracts of insurance are commercial in nature. In this case, the agreement arises out of a contractual commercial relationship between a Florida corporation and a foreign entity regarding real estate investment corporation insurance[19].

As we can see, in most cases, in the case of disputes regarding the recognition of a particular dispute as "commercial", national courts support the point of view of giving preference to arbitration. But Art. 1(3) of the New York Convention of 1958 gives us the right to consider that the national law of each country that joined this Convention may introduce its own restrictions on the categories of cases that fall under the category of "commercial". This provision provides that upon signing, ratifying or acceding to this Convention, or upon notification provided for in Article X of this Convention, any state may, on the basis of reciprocity, declare that it will apply this Convention only to disputes arising under contractual or other legal relations that are considered commercial under the national law of the state that makes such a statement.

In other words, Art. 1(3) of the New York Convention of 1958, leaves it to the discretion of individual Party States to define the term "commercial" in accordance with national law without establishing any international restrictions on national definitions. Such an interpretation of Article 1(3) would lead to the fact that this provision would largely duplicate the doctrine of non-arbitrability, allowing the Contracting States to rely on national legislation to avoid the application of the mechanism provided for in the Convention, which facilitates the application of arbitration for consideration of foreign economic disputes. In addition, as G. Born claims, it also dilutes the task of the Convention by adopting artificially narrow definitions of the term "commercial". As we can see, the commercial requirement in practice has created a lot of conflicting views in the majority of national courts, and has contributed to the development of liberal and expanding national legislation in the enforcement of rights.

The laws of some countries do not have or have a less strict requirement for a "commercial" relationship in order to be able to consider such disputes in arbitration. In particular, the English Arbitration Act of 1996[20] does not contain any requirements or restrictions that would apply to the "commercial" relationship of arbitration and therefore, it applies to all arbitration agreements. In Art. 1030 of the German Code of Civil Procedure states that any claim of property nature may become the subject of an arbitration agreement; in turn, the arbitration agreement relating to claims of a non-property nature has authentic legal force for the parties to the dispute[21] .

Similarly, Italian arbitration law does not contain any reference to the category of "commercial" disputes. Thus, according to Art. 806 of the Italian Code

[19] VVG Real Estate Invs. v. Underwriters at Lloyd's, 317 F. Supp. 3d 1199 (S.D. Fla. 2018) https://casetext.com/case/vvg-real-estate-invs-v-underwriters-at-lloyds.
[20] Arbitration Act 1996, https://www.legislation.gov.uk/ukpga/1996/23/data.pdf.
[21] Code of Civil Procedure, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

of Civil Procedure, the parties may refer any dispute to an arbitrator, with the exception of disputes regarding personal status and marital separation[22].

The analysis of this national legal framework makes it possible to conclude that a significant number of countries at the level of national legislation believe that the introduction of a significantly narrow framework for the term "commercial" dispute will lead to a legal vacuum during the consideration of foreign economic disputes. And therefore, in our opinion, the dominant advantage of international commercial arbitration should not depend on specific national legislation, but should correspond to unified rules.

3. The theoretical and legal nature of the "international" legal institute

Commercial arbitration can only take place in a national context, but is not bound by national borders. But as a rule, in commercial arbitration (which distinguishes it from such methods of dispute resolution as arbitration courts) there is a foreign element. Such features of "international" arbitration include:

- if the parties have different citizenships or live in different countries, it is obvious that the arbitration is international;
- if the parties have the same citizenship and their place of residence is within the same country, the impression is that the arbitration is national, but not always because there may be cases where the subject of the arbitration settlement is another foreign element;
- if the place where the agreement is to be concluded may, for example, be in another country.

Please note that a broad definition of the term "international" is used at the convention level and at the level of legislative national regulation. For example, according to Art. 1 (3) of the UNCITRAL Model Law, the arbitration is international if:

a) commercial enterprises of the parties to the arbitration agreement at the time of its conclusion are located in different states; or
b) one of the following places is outside the state in which the parties have their commercial establishments:
c) the place of arbitration, if it is specified in or pursuant to the arbitration agreement;
d) any place where a substantial part of the obligations arising from the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
e) the parties, by actual expression of will, have agreed that the subject of the arbitration agreement is related to more than one country.

The Law of Ukraine "On International Commercial Arbitration" applies to international commercial arbitration if the place of arbitration is located on the territory of Ukraine[23]. In some cases, there is a different understanding of the

[22] Italian Code of Civil Procedure, http://www.arbitrations.ru/userfiles/file/Law/Arbitration%20acts/Italian%20Code%20of%20 Civil%20Procedure.pdf.
[23] Law of Ukraine "On International Commercial Arbitration".

definition of "international". These are disputes on contractual and other civil law relations that arise in the implementation of foreign trade and other types of international economic relations, if the commercial enterprise of at least one of the parties is located abroad, as well as disputes between enterprises with foreign investments, disputes between international associations and organizations created on the territory of Ukraine, among themselves, disputes between their participants and other subjects of Ukrainian law, if the party has more than one commercial enterprise.

A broad definition of "international" is contained in the Civil Procedure Code of France (Articles 1442-1527). According to Article 1504 of the French Civil Code, the arbitration is international if the field of settlement is international trade[24]. According to the UNCITRAL Model Law and French law governing arbitration, an arbitration is considered international if the parties have the same nationality and domicile, but the contract must be concluded in accordance with the conditions of another country.

This approach to the broad definition of the term "international" is not always applied in national legislation and international legal acts. According to Article 1.1(a) of the European Convention on Foreign Trade Arbitration of 1961, the arbitration is international only if the natural or legal persons who are parties to the arbitration agreement at the time of the conclusion of the arbitration agreement had their permanent residence or residences in different Contracting States[25]. Pursuant to Article 176(1) of the Swiss Federal Law on Private International Law, an arbitration is international if, at the time of the conclusion of the arbitration agreement, at least one of the parties was neither domiciled nor permanently resident in Switzerland. In the last two articles, the domicile or habitual residence of the parties is the decisive factor as to whether the arbitration is international. For example, when both parties are domiciled in Switzerland, the arbitration is national, even if the contract is to be performed in another state or the dispute has another international element[26].

Indication of the national or international status of arbitration has different legal regimes. For example, France and Switzerland have established separate legal regimes for international arbitration, as defined in Article 1504 of the French Civil Code and Article 176(1) of the Swiss Federal Law on Private International Law, respectively. For example, Belgian national courts may deny a party to an arbitral proceeding the right to challenge an arbitral decision pursuant to Article 1718 of the Belgian Judicial Code if neither party to the dispute is a natural person with Belgian citizenship or a natural person with place of residence or permanent residence in Belgium, or by a legal entity that has its registered office, its main place of work or a branch in Belgium[27].

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[24] Code de procédure civile, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070 716/LEGISCTA0000061172 71/#LEGISCTA000023450640.

[25] European Convention on Foreign Trade Arbitration of 1961.

[26] Switzerland's Federal Code on Private International Law (CPIL), https://www.rwi.uzh.ch/dam/jcr: ffffffff-fc61-e805-0000-0000 115fcc32/PILA.pdf.

[27] Belgian Judicial Code, https://www.uv.es/medarb/observatorio/leyes-arbitraje/europa-resto/belgica-judicial-code-arbitration-20 13.pdf.

4. Regarding the definitive apparatus of the term "arbitration"

There is a common but incomplete consensus in the academic community and legal practice as to what the term "arbitration" means for the purposes of both international arbitration conventions and national arbitration legislation. With some isolated variations, virtually all recognize that arbitration is a special procedure in which the parties agree to submit a dispute to a non-governmental body chosen by or on behalf of the parties and renders a decision that is final in nature in accordance with neutral procedural rules that provide opportunity for the parties to be heard. This definition does not reflect a precise formulation of the nature of international commercial arbitration, but is a generalization of a wide range of sources.

Trying to investigate this issue, one should nevertheless analyze both the doctrinal and practical approaches of national courts.

Thus, N. Blakaby observes that, in the event that two or more parties, faced with a dispute which they cannot resolve for themselves, have agreed that one or more private persons shall resolve it for them by arbitration, and that, if the arbitration is completed in full and the dispute is not resolved by negotiation, mediation or any other compromise, then such decision will be binding for them[28]. In turn, Henry de Vries notes that arbitration is a way of resolving disputes by one or more third parties who are empowered by the consent of the parties and whose decision is binding for them[29]. When analyzing arbitration, V. Raisman comes to the conclusion that arbitration is a contractual method for relatively private settlement of disputes[30]. Zh-F. Poudre and S. Besson come to a similar conclusion, defining arbitration as a contractual form of dispute resolution carried out by natural persons appointed directly or indirectly by the parties to the dispute and empowered to resolve the dispute instead of national courts by passing a decision that has consequences similar to those provided for in a court decision[31].

Summarizing the legal positions of representatives of the world's leading scientific schools, we come to the conclusion that the definition of "arbitration" can be defined as:

- a mechanism by which the settlement of an issue of interest to two or more persons (disputing parties) is entrusted to one or more other persons - an arbitrator or arbitrators - whose authority derives from a private agreement and is not the power of public authorities, and which have to make a decision in the case on the basis of such an agreement[32];

[28] N. Blackaby et al. (eds.), *Redfern and Hunter on International Arbitration* (6th ed. 2015).
[29] H.P. de Vries, "International Commercial Arbitration: A Contractual Substitute for National Courts" *Tul. L. Rev.* 57 (1983): 42-43(1983).
[30] W. Reisman et al., *International Commercial Arbitration* 4 (2d ed., University Casebook Series, 2015).
[31] J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration* 3 (2d ed., London: Thomson, Sweet & Maxwell, Schulthess, 2007).
[32] R. David, *Arbitration in International Trade* 5 (1985).

- the voluntary participation of the parties in a special private legal process, which is recognized, allowed and sanctioned by international public law and the laws of most civilized jurisdictions[33];
- a process in which the parties agree to the binding resolution of their disputes by judges, known as arbitrators, who are chosen by the parties either directly or indirectly through a mechanism chosen by the parties[34].

The views of domestic scientists on the definition of "arbitration" deserve special attention. Thus, V.V. Komarov proposed the definition of arbitration as a non-state court established by the parties between whom a dispute arose, the source of whose law enforcement activity is the agreement of the parties, and not a prescription of the law, which excludes the jurisdiction of a state court from considering a specific case within the framework provided by the arbitration agreement[35]. Y.D. Prytyka defined arbitration as a form of private justice based on an agreement concluded specifically for this purpose by the parties to the dispute, where the arbitrator is given powers similar to those of a public judge; at the same time, these powers derive from the agreement between the parties[36].

Theoretical approaches to the definition of arbitration are reflected in the collateral judicial practice of foreign national courts. Thus, in the decision of the Supreme Court of the United States dated 17 June, 1974 in the case of *Scherk V. Alberto-Culver Co.* it is noted that an arbitration agreement in a specific arbitration court is, in fact, a special type of clause on the choice of court, which establishes not only the place of hearing, but also the procedure that will be used in resolving the dispute[37].

In another decision, the Supreme Court of Auckland (New Zealand) in the case of *Methanex Motunui Ltd v. Spellman* concludes that arbitration is a contractual method of dispute resolution. In accordance with their contract, the parties agree to the resolution of differences between them by the decision of an arbitrator or a panel of arbitrators, including the intervention of national courts, which are bound to accept and recognize such an decision, after its adoption, regardless of whether they consider it correct or not[38].

Another example of a law-enforcement approach to the understanding of arbitration is the decision of the Swiss Federal Court, in which it is assumed that, according to the traditional concept of private arbitration, an arbitration clause can be defined as an agreement according to which two or more parties agree to transfer their disputes (existing or those that may arise in the future) to an arbitral tribunal,

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[33] Wetter, "The Legal Framework of International Arbitral Tribunals: Five Tentative Markings", in H. Smit, N. Galston & S. Levitsky (eds.), *International Contracts* (New York, 1981)*:* 271, 274.

[34] M. Mcllwrath & J. Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International, 2010) 1-015.

[35] Komarov, V. V., *International commercial arbitration* (Kharkiv: Osnova, 1995): 301.

[36] Y. Prytyka, "Some aspects of the concept of international commercial arbitration and its application" *Law of Ukraine* no.11 (1995): 36-39.

[37] Scherk v. Alberto-Culver Co., https://caselaw.findlaw.com/us-supreme-court/417/506.html.

[38] Motunui Ltd v. Spellman, https://www.nzdrc.co.nz/wp-content/uploads/2019/11/Methanex-Motunui-Ltd-v-Spellman-ID-26266.pdf.

excluding the competence of state courts and subject (directly or indirectly) to a defined legal system[39].

However, Ukrainian law enforcement practice approaches the understanding of arbitration somewhat differently, giving a certain degree of preference to the national judiciary. In its decision, the Cassation Commercial Court concludes that the arbitration agreement is a prerequisite for transferring the dispute between the parties for resolution to the arbitration institution designated by them, as well as its consideration according to the rules and in the order established by this institution or determined by the agreement between the parties. But despite such an approach, the court notes that the arbitration agreement cannot be considered as immunity from state regulation of relations related to the conclusion and performance of contracts, or as a way to avoid the state mechanism for resolving disputes arising between the parties[40].

Many other definitions of the term "arbitration" have been proposed[41].

In many cases, individual examples of these and other definitions are incomplete or (partially) wrong. However, as discussed in more detail below, these formulations are brought together to encompass a common core definition that applies equally within international arbitration conventions and developed national arbitration law: that is, in accordance with the same international standards of the New York Convention of 1958 and provisions of national arbitration legislation, arbitration is a special procedure in which the parties agree to refer the dispute to a non-governmental body (a body chosen by them or on their behalf) to make a binding decision that is final for the parties in accordance with court procedures.

As noted above, the definition of arbitration contains a number of elements, each of which is important to the qualification of a particular dispute resolution process as "arbitration". Arbitration, in particular, requires a consensual agreement between the parties to transfer the disputes to a non-governmental body that examines them on behalf of the parties in order to make a decision that finally resolves the dispute in accordance with the procedural regulations (rules) and accordingly gives the parties an opportunity to be heard. Each of the elements of this definition of arbitration is important and requires careful analysis.

5. The legal characteristic of consensual agreement as an element of arbitration

It is quite obvious that "arbitration" is a consensual process that requires the consent of the parties. As you know, Article II of the New York Convention applies

[39] Swiss International Arbitration Decision, https://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s.

[40] Ruling of the Commercial Court of Cassation dated 07.10.2020 in case № 911/1803/19, https:// reyestr.court.gov.ua/Review/ 92673992.

[41] S. Kravtsov, O. Surzhenko, N. Golubeva, "The validity, effectiveness, and enforceability of an arbitration agreement: Issues and solutions" *Access to Justice in Eastern Europe* 4 (4) 2021: 116-130.

only to "an agreement by which the parties undertake to submit to arbitration all or any dispute, while Article 8 of the UNCITRAL Model Law applies only in cases where there is "an agreement of the parties to referral of all or some disputes to arbitration. The same approach can be observed in national arbitration laws (§5 of the English Arbitration Act of 1996[42], Article 1442 of the French Civil Procedure Code[43], Article 1031 of the German Civil Procedure Code[44] etc.)

Consensus, as an element of arbitration, is reflected in the numerous law enforcement practice of national courts, which in most cases come to a single opinion.

Thus, in the case of *Dell Computer Corp. v. Union des Consommateurs*, Supreme Court of Canada notes that arbitration is a phenomenon that owes its existence only to the will of the parties[45]. In another case, *Howsam v. Dean Witter Reynolds, Inc.,* the US Court of Appeals for the Tenth Circuit observed that arbitration is a contractual matter and a party cannot be required to submit to arbitration any dispute that they have not agreed to submit[46]. Another manifestation of consensual arbitration can be seen in the decision of the Supreme Court of Great Britain in the case of *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*, according to which the arbitration in question in this appeal is consensual in nature, which is a manifestation of the choice of the parties to submit existing or future disputes between them to arbitration[47].

In addition, the decision of the Civil Court of Cassation dated 18 November, 2021 in case No. 824/30/21 deserves attention, in which the Supreme Court comes to the conclusion that the arbitration decision is the implementation of the agreement of the parties on the possibility of settling disputes that will arise during execution of the contract concluded between them, by certain arbitration. This is the manifestation of the principle of freedom of contract, which the parties legitimately used during the establishment and settlement of the contractual obligation that arose and exists between them[48].

Dispute settlement procedures that are mandatory under national law are not arbitration within the meaning of the New York Convention of 1958 or national arbitration regulations in most countries. These processes may resemble arbitration in many cases, but the settlement model without the consent of the parties is simply

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[42] Arbitration Act 1996, https://www.legislation.gov.uk/ukpga/1996/23/section/5.

[43] French Code of Civil Procedure, http://www.parisarbitration.com/wp-content/uploads/2014/02/French-Law-on-Arbitration.pdf.

[44] Zivilprozessordnung - German Code of Civil Procedure, https://www.trans-lex.org/600550/_/german-code-of-civil-procedure/.

[45] Dell Computer Corp. v. Union des consommateurs, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2374/index.do.

[46] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002), https://supreme.justia.com/cases/federal/us/537/79/.

[47] Dallah Real Estate and Tourism Holding Company (Appellant) v. The Ministry of Religious Affairs, Government of Pakistan (Respondent), https://www.supremecourt.uk/cases/docs/uksc-2009-0165-judgment.pdf.

[48] Ruling of the Civil Court of Cassation dated 18 November 2021 in case № 824/30/21, https://reyestr.court.gov.ua/Review/ 101279973.

not "arbitration" for the purposes of the specific arbitration convention or national arbitration law.

Thus, in the system of alternative methods of dispute resolution, in addition to arbitration, mediation, conciliation, negotiation, etc. are also distinguished. In these types of dispute settlement, the involvement of a neutral party is allowed, who will help the parties reach a consensus by concluding a final document, which the parties must adhere to. But in these cases, the "arbitration" quintessence of consideration of foreign economic disputes will still be absent.

6. The existence of a dispute, as a prerequisite for arbitration settlement

A distinctive feature of arbitration is the resolution of "disputes" or "disagreements". Scientists and law enforcement national practice have repeatedly touched on this issue.

Thus, the House of Lords in its decision in *Sutcliffe Appellant v. Thackrah and Others Respondents* emphasizes that one of the features of arbitration is that there is a dispute between two or more persons who agree to refer it to any chosen person whose decision they agree to accept[49]. In the decision of the Supreme Court of Canada in the case of *Sport Maska Inc. v. Zittrer*, it is argued that the common law actually developed two concepts that are intrinsic to arbitration: the existence of a dispute and the obligation or intention of the parties, depending on the specific case, to submit this dispute to arbitration[50].

In the legal literature, the presence of a dispute as an element of arbitration is reflected in the scientific works of both domestic and foreign scientists. As V. Nagnybida rightly points out, in order to exercise the abstract right to appeal to arbitration, in addition to the appropriate amount of legal personality and arbitrability of the dispute itself, there must be grounds and prerequisites for the emergence of the right to appeal and resolve the dispute by arbitration. The grounds for the emergence of such a right include: 1) the existence of a specific arbitrable dispute about the right; 2) submission of one of the parties to such a material and legal dispute with a claim for protection in the arbitration procedure[51].

One should also agree with the point of view of Gaylord, who, considering the nature of international commercial arbitration, concludes that arbitration should be defined by reference to two constituent elements. And the first element is the task of the arbitrators, which consists precisely in resolving the dispute[52].

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[49] Sutcliffe Appellant v. Thackrah and Others Respondents, https://www.trans-lex.org/311320/_/sutcliffe-v-thackrah-and-others-[19 74]-ac-727-et-seq/.

[50] Sport Maska Inc. v. Zittrer, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/312/index.do.

[51] V. I. Nagnybida, "Appeal to arbitration as a subjective right" *Private law and entrepreneurship* 17 (2017): 167-171, http://nbuv.gov.ua/UJRN/Ppip_2017_17_40.

[52] E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999).

Thus, Article II (1) of the New York Convention of 1958, defining the concept of an arbitration agreement, uses the definition of "differences" (differences), while Article 7(1) of the UNCITRAL Model Law and most other national laws on arbitration use an arbitration agreement like "disputes" or "controversies".

Therefore, it can be argued that arbitration, in most cases, does not apply to the settlement of other types of matters, such as the negotiation or formulation of contractual terms, the creation of commercial enterprises, or the expression of abstract legal or other opinions outside the context of "disputes". But the national legislation of some countries broadly interprets the limits of defining disputes that can be considered in arbitration, supplementing them with related (additional) procedures. For example, in Art. 1020(4) of the Dutch Code of Civil Procedure provides that the parties may also agree to submit to arbitration the following matters: (a) determining only the quality or condition of the goods; (b) determining only the amount of the loss or monetary debt; (c) filling gaps in contracts or changing the legal relationship between the parties[53]. Pursuant to Clause 1 of the Swedish Arbitration Act, arbitrators are empowered to fill gaps in contracts and decide on the civil law consequences of competition law in relations between the parties[54]. Another example of such a broad understanding of the boundary of the definition of a dispute is Art. 1(2) of the Law of Bulgaria "On International Commercial Arbitration", according to which international commercial arbitration resolves civil property disputes arising as a result of foreign trade relations, as well as disputes regarding the filling of gaps in the contract or its adaptation to newly discovered circumstances, if the place of residence or the location of at least one of the parties is not in the Republic of Bulgaria[55].

Despite the fact that in the above cases a dispute between the parties may not arise, it is still more appropriate to say that real arbitration is possible only in those situations in which there is a dispute that needs to be settled. If the parties still reach an agreement on the settlement of their dispute, without bringing this arbitration proceeding to a decision on the merits, they can ask the arbitrators to reflect such actions in the text of the procedural document, which in its form meets the requirements of the arbitration decision, but in content does not.

For example, in Art. 37 of the Arbitration Rules of the International Arbitration Center of Vienna provides that, at the request of the parties, the arbitral tribunal may make a decision on the agreed terms reflecting the content of the settlement reached. And exactly such a settlement must be registered by the arbitrators in the decision to stop the arbitration proceedings[56]. A similar norm is contained in Art. 61 of the ICAC Regulations at the Chamber of Commerce and Industry of Ukraine, which essentially equates an arbitration decision with a decision

[53] Netherlands Code of Civil Procedure, https://wipolex.wipo.int/en/text/191705.
[54] Swedish Arbitration Act, https://sccinstitute.com/media/37089/the-swedish-arbitration-act.pdf.
[55] Bulgarian Arbitration Law, https://www.bcci.bg/intlaw-ru.html#it1.
[56] VIAC Rules of Arbitration and Mediation 2021, https://www.viac.eu/en/arbitration/content/vienna-rules-2021-online#Rules_of_ Arbitration_Article_37.

in the case of independent settlement of the dispute by the parties. According to this norm, if during the arbitration proceedings, the parties settle the dispute by concluding a settlement agreement, the composition of the Arbitration Court, at the request of the parties and in the absence of objections on its part, can record this settlement in the form of an arbitration decision on the agreed terms. The relevant provisions regarding the form, content and procedure of adoption shall be applied to the arbitration decision on the agreed terms. Such decision shall have the same force and effect as any other arbitration decision on the merits of the dispute[57].

7. Manifestation of the will of the parties regarding the choice of a "non-state" body for the consideration of disputes

Another key element of "arbitration" is the transfer of the dispute to a non-state body chosen by or acting on behalf of the parties, rather than a national court or government agency. It should be noted separately that the laws of some countries have the status of emergency arbitrators, which are part of a court in the sense of national legislation (for example, Article 2(1) of the Singapore International Arbitration Act[58], Article 2(1b) of the New Zealand Arbitration Act[59]).

On the one hand, this element of "arbitration" can be called quite clear and does not require additional explanation, but the presence of ambiguous law enforcement practice of national courts indicates the opposite. Thus, in the case of *Bakoss v Certain Underwriters at Lloyds of London*, Imad John Bakoss filed a lawsuit in state court seeking disability benefits from the insurance company Lloyds of London. The parties concluded an insurance certificate, which provides for the payment of a fixed benefit to Bakoss in the event that he becomes "totally disabled". According to the terms of that certificate, each party seeking relief was entitled to have Bakoss examined by a physician of his choice to determine whether he was indeed "permanently disabled." If the doctors did not agree with Bakoss's status, they had to jointly choose a third doctor to make a final and binding decision (third doctor clause). The insurance company filed a counterclaim, arguing that the third-party clause was an arbitration agreement. Applying federal common law, the district court held that the third-party physician provision constituted an arbitration agreement capable of providing federal subject matter jurisdiction under the Federal Arbitration Act. The US Court of Appeals for the Second Circuit, after reviewing this decision, noted that federal common law governs the meaning of the term "arbitration" within the Federal Arbitration Act because Congress intended to provide a uniform approach to the understanding of this term. And therefore, under federal common

[57] Regulations of international commercial arbitration at the Chamber of Commerce and Industry of Ukraine, https://icac.org.ua/wp-content/uploads/Reglament-ISAS-pry-TPP-Ukrayiny.pdf.
[58] International Arbitration Act (1994), https://sso.agc.gov.sg/Act/IAA1994?WholeDoc=1.
[59] New Zealand Arbitration Act (1996), https://www.legislation.govt.nz/act/public/1996/0099/latest/DLM403282.html.

law, contractual language that clearly indicates the parties' intent to submit certain disputes to a third party for binding settlement should be considered "arbitration" precisely within the context of the Federal Arbitration Act[60].

In turn, the Federal Court of Switzerland, determining the legal nature of the arbitration agreement in the decision dated 21 November, 2003, came to the conclusion that, according to the traditional concept of private arbitration, the arbitration agreement is an expression of will, according to which two or more parties agree to transfer existing disputes or such that may arise in the future to arbitration, completely excluding appeals to national courts in accordance with the directly or indirectly defined legal procedure[61].

That is, the defining feature of arbitration is the will to select specific arbitrators to settle a specific dispute or a specific category of cases. As a rule, arbitrators are chosen independently by the parties or, in the absence of the parties' agreement, by an arbitration institution chosen by the parties. In contrast, the concept of "arbitration" does not extend to a choice of court agreement where the parties agree to submit their disputes to a clearly defined national court.

8. The finality and binding nature of the arbitration decision as an element of the arbitration settlement

The third characteristic feature of arbitration is that this subject of dispute settlement makes a decision, which has binding force and finally resolves the dispute between the parties and which is subject only to the possibility of its appeal in national courts. This element of arbitration has a very important scientific and practical significance, without which it is impossible to determine the nature of international commercial arbitration. The finality and binding nature of the arbitration decision is reflected in many scientific works and directly in the practice of protection of rights[62].

Scientists, considering this issue and assessing the nature of the arbitration decision, mostly come to the conclusion that the arbitration decision is an expression of the will of the parties and therefore does not raise doubts about its finality and bindingness for them. Redfern and Hunter argued that an arbitral decision is final and binding on the parties because it was the parties who agreed that it should be final and not in accordance with the existing enforcement powers of any state[63]. Goldman also notes that an arbitral decision will always be binding on the parties to the arbitration. And therefore, arbitration can be easily distinguished from other alternative methods of dispute resolution, when the intervention of a third party does

[60] Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135, https://www.govinfo.gov/content/pkg/USCOURTS-ca2-11-04371/pdf/USCOURTS-ca2-11-04371-0.pdf.

[61] Judgment of 21 November 2003, DFT 130 III 66,70 (Swiss Fed. Trib.), https://www.bger.ch/

[62] Groza Anamaria, „The principle of mutual recognition: from the internal market to the European area of freedom, security and justice", *Juridical Tribune – Tribuna Juridica*, Vol. 12 (2022), Iss. 1, pp. 89-104. 10.24818/TBJ/2022/12/1.07.

[63] Redfern and Hunter on International Arbitration 1.04 (6th ed. 2015).

not lead to the adoption of a binding decision[64]. At the same time, Jean Baptiste correctly points out that it is impossible to imagine an arbitration where the arbitrator would simply express his unargued opinions, which would be based on his inner conviction and which would not be binding on the parties to the dispute[65].

Domestic scholars do not pay much attention to a detailed analysis of the finality and binding nature of the arbitration decision, defining these characteristic elements of arbitration only as advantages over other jurisdictional procedures[66].

The law enforcement practice of national courts plays an equally important role in the interpretation of the issue under investigation. It is in the decisions of the courts that we can observe the development trends of both international commercial arbitration throughout the world as a whole, and a separate problematic issue in particular.

Evaluating the relationship between international commercial arbitration and other alternative dispute resolution methods (mediation), the United States Court of Appeals for the Eleventh Circuit in the case of *Advanced Bodycare Solutions v. Thione International has quite rightly concluded that if a dispute resolution proceeding does not result in any decision that can reasonably be affirmed, modified, or set aside by a court on motion, such proceeding cannot be considered an arbitration under the Federal Arbitration Act*[67].

Revealing the more practical significance of the finality and binding of the arbitration decision, attention should be paid to the decision of the Supreme Court of Auckland (New Zealand) in the case of *Methanex Motunui Ltd v. Spellman*. This case concerned a contract for the purchase of gas and its supply to consumers. In this contract, there was an arbitration agreement, according to which it was assumed that any decision of the independent expert could not be appealed. This provision should not apply to the possibility of annulment of the arbitration decision on the grounds that it was made on the basis of or under the influence of fraud or corruption. Based on the results of the consideration of the case, the Supreme Court of Auckland came to the conclusion that since arbitration is a contractual method of dispute settlement and the parties agree in their contract to transfer the consideration of their disputes to arbitrators, who undertake to make a decision based on the results of the consideration of the case, while excluding appeals to national courts, the parties to such arbitration shall treat it as final and binding, regardless of whether they believe it to be correct or not[68].

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[64] E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999).

[65] Jean-Baptiste Racine, *Droit De L'arbitrage* (Paris: PUF, 2016).

[66] Y.D. Prytyka, *International Commercial Arbitration: Issues of Theory and Practice: Monograph*. (Kyiv: Concern Publishing House "In Yure", 2005): 516; L. Vynokurova, "The procedure for consideration of disputes in international commercial arbitration" *Law of Ukraine* 1 (2011): 79–96; G. A. Tsirat, *International commercial arbitration* (ed. G.A. Tarpaulin) (K.: Alerta, 2019): 201.

[67] Advanced Bodycare Solutions v. Thione, 524 F.3d 1235, 1239 (11th Cir. 2008), https://caselaw.findlaw.com/us-11th-circuit/1140785.html.

[68] Methanex Motunui Ltd v Spellman, https://www.nzdrc.co.nz/wp-content/uploads/2019/11/Methanex-Motunui-Ltd-v-Spellman-ID-26266.pdf.

In addition, one should also agree with the position of the Civil Court of Cassation in the case of the application for annulment of the decision of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine. Thus, the court comes to the conclusion that the issue of these violations belongs exclusively to the competence of the ICAC and takes into account that any assessment by the court of first instance of the circumstances of the arbitration dispute, the completeness and appropriateness of the evidence submitted by the parties to the arbitration proceedings, etc., would mean unlawful judicial interference, prohibited by Article 5 of the Law of Ukraine "On International Commercial Arbitration", and violation of the principle of legal certainty of a court decision[69].

After the adoption of the arbitration decision, the party to the dispute who won the dispute may apply to the national court with a request for recognition and enforcement of such decision. But in this case, there may be certain restrictions on the part of the national legislation for the parties to the dispute, which allow the arbitration decisions to be considered final, but not binding. This limitation applies exclusively to the immunity of the state in which such decisions can be presented for recognition and enforcement. This issue is not the object of scientific research in this article, but we consider it necessary to analyze the Ruling of the Civil Court of Cassation from 25 January, 2019 in the case of recognition on the territory of Ukraine of the decision of the Arbitration Court (The Hague, Kingdom of the Netherlands), which recognized the illegality of actions of the russian federation[70] regarding the expropriation of the plaintiffs' property in violation of Article 5 of the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the promotion and mutual protection of investments of 27 November, 1998 and subsequent compensation at the expense of the defendant's property in the territory of Ukraine.

According to Article 9 of the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the promotion and mutual protection of investments dated 27 November, 1998, ratified by the Law of Ukraine dated 15 December, 1999, "any dispute between one of the Contracting Parties and an investor of another Contracting Party, arising in connection with the investment, including disputes concerning the amount, conditions or procedure for payment of compensation provided for in Article 5 of this Agreement or the procedure for carrying out the transfer of payments provided for in Article 7 of this Agreement, will be the subject of a written notification accompanied by detailed comments, which the investor will send to the Contracting Party participating in the dispute. The parties to the dispute will try to settle such dispute through negotiations

[69] Ruling of the Civil Court of Cassation dated 23.06.2022 in case 824/241/21, https://reyestr.court.gov.ua/Review/104987553.

[70] Lately, the word "russia" has been written with a lowercase letter. As linguist Oleksandr Avramenko explains, people's surnames and names that are used disparagingly are written with a lowercase letter. This rule is an old one, it has been in our spelling since Soviet times. For example, we can safely write "hitlers", "putins" with a lowercase letter, this meets the requirements of the current spelling.

if possible. If in this way the dispute is not resolved within six months from the date of the written notification referred to in paragraph 1 of this Article, it will be referred to: a) a competent court or arbitration of the Contracting Party in whose territory the investment was made; b) Arbitration Institute of the Stockholm Chamber of Commerce; c) ad hoc arbitration court in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The arbitration decision will be final and binding on both parties to the dispute. Each of the Contracting Parties undertakes to implement such a decision in accordance with its legislation."

The Supreme Court makes fairly precise conclusions, including an arbitration clause in the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the promotion and mutual protection of investments dated 27 November, 1998, and providing for the finality and binding for both parties of the arbitration decision adopted on the basis of the results of any dispute arising from this Agreement, the debtor - the Russian Federation has ipso facto agreed to waive the types of state immunity provided for in Article 79 of the Law of Ukraine "On Private International Law" and the 2004 UN Convention on Jurisdictional Immunities of States and Their Property: a) immunity from filing a lawsuit against a foreign state, b) immunity from preliminary enforcement of a lawsuit, c) immunity from enforcement of a court decision.

As a result, initially on 20 March, 2017, the Arbitration Court (The Hague, Kingdom of the Netherlands) adopted a Decision on jurisdiction in the case under consideration by the Arbitration Court established in accordance with the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the promotion and mutual protection of investments from 27 November, 1998 and the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 (PTS case No. 2015-36), and later the main decision was adopted, which satisfied the claims in full[71].

The main reasons for not applying judicial immunity either by an arbitral court or a national court during the consideration of a petition for recognition and enforcement of an arbitral decision clearly stemmed from the provisions of Part 1 of Art. 12 of the European Convention on State Immunity of 1972 and paragraphs ii) clause a) part 1 of Art. 19 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property, according to which if the parties have agreed to submit their disputes to arbitration, they are not entitled to refer to their judicial immunity. Thus, it can be concluded that the force of the arbitration decision in this case as a final and binding jurisdictional act of justice in international legal regulation has a higher force than any other mechanism.

Summarizing the above-mentioned views on the finality and binding nature of the arbitration decision as a characteristic element of international commercial arbitration, the following conclusions can be drawn:

[71] Ruling of the Civil Court of Cassation dated 25 January 2019 in case №796/165/18, https://reyestr.court.gov.ua/Review/79573187.

- during the arbitration proceedings, the arbitrators do not adopt advisory recommendations that are not binding and which the parties can either accept or reject;
- in its essence, arbitration is not just a negotiation process between the parties, during which they can freely agree or object to such a dispute settlement procedure;
- the finality of the arbitration decision deprives the disputing parties of the opportunity to exercise their rights regarding consideration of the case in national courts.

9. The presence of clear procedural mechanisms, as a condition for consideration of the case in arbitration

Finally, in our opinion, the defining characteristic of "arbitration" is the use of impartial procedural mechanisms that give each party the opportunity to present its position during the arbitration proceedings. This element of arbitration, in terms of its consequences, distinguishes it from other possible ways of resolving disputes or conciliation procedures.

To confirm the effectiveness and the need to use clear procedural mechanisms, it is advisable to refer to the law enforcement practice of national courts, which to a certain extent provide answers to the questions raised. Thus, according to the fabula of the case of *Portland General Electric Company v Bank Trust National Association*, during the execution of the lease agreement, the parties agreed to appoint a qualified independent appraiser to determine the fair market value of two turbine generators, whose decision will be final and not subject to review by any jurisdiction. After the evaluation, one party was not satisfied and appealed to the district court with a lawsuit to challenge this evaluation. The district court considered the determination of the valuation as an arbitral award and interpreted the case in the context of the Federal Arbitration Act. Disagreeing with the position of the court of first instance, the Court of Appeals of the Ninth Circuit of the United States, canceling this decision, notes that in this case, arbitration legislation should not be applied, but exclusively customary law, since the agreement of the parties to determine the appraiser is not an agreement to transfer the dispute to arbitration. In support of its arguments, the court concludes that arbitration agreements allow arbitrators to resolve existing disputes between the parties exclusively during arbitration proceedings, usually by conducting adversarial hearings at which evidence is received, and the arbitrator plays a quasi-judicial role[72].

Another manifestation of the fact that non-compliance with the procedural mechanisms of arbitration, which entails the refusal to recognize a certain dispute settlement procedure as arbitration, is the participation of a mandatory expert, whom the parties to the contract authorize to resolve certain disputed issues that may arise

[72] Portland General Electric Company V. Bank Trust National Association, https://caselaw.findlaw.com /us-9th-circuit/1210916.html.

during the execution of the main contract. In the case of *MacDonald Estates Limited V. National Car Parks Ltd. (NCP)*, the parties to the contract agreed that any disputes arising out of the contract and the procedure for its performance would be resolved by a qualified expert appointed solely by agreement of both parties. The Inner Chamber of the Sessions Court of Scotland in its decision quite clearly delineated the status of an arbitrator and an expert and the differences in the procedure for their consideration of disputes. Thus, the court notes that the words "act as an expert" are usually used in legal practice as the opposite of the words "act as an arbitrator". These words mean that the person who makes the decision must justify their decision with their own experience, and not refer to the arguments of the parties and the totality of evidence, that is, they must provide the opinion of an expert, and not conduct a full-fledged arbitration[73].

Therefore, a comprehensive study of the categorical interpretation of "international commercial arbitration" may indicate the presence of problematic issues both of a general theoretical nature and in the law enforcement activities of national courts. But, in order to eliminate the above-mentioned contradictory views, it is still necessary to adhere to those international standards and rules that are the basis for their introduction into national legislation. And it is the effort of the majority of member states of the New York Convention of 1958 to reform their arbitration laws and bring them to these "unified rules of arbitration" that is the driving force in the recognition of international commercial arbitration, although not the only, but the most attractive way of resolving foreign economic disputes.

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[73] MacDonald Estates Limited V. National Car Parks LtD(NCP), https://www.scotcourts.gov.uk/ search-judgments/judgment?id =e97e86a6-8980-69d2-b500-ff0000d74aa7.

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