UNIVERSITY OF ECONOMICS, PRAGUE
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Master's field: International Trade

Procedural Aspects of International Commercial Arbitration

(Master's thesis)

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Declaration of Authenticity:

I hereby declare that the master's thesis presented herein is my own work, or fully and specifically acknowledged wherever adapted from other sources. This work has not been published or submitted elsewhere for the requirement of a degree program.

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In Prague ……..……. …….....

Jakub Vach

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List of Abbreviations

ADR	Alternative dispute resolution
BIT	Bilateral investment treaty
Czech Act on arbitration	Zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálazů
HKIAC	Hong Kong International Arbitration Centre
ICC Court	The International Court of Arbitration of the International Chamber of Commerce
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
MIT	Multilateral investment treaty
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vienna International Arbitral Centre

Introduction

The volume of international trade deals has been growing rapidly within the past decades. Subsequently, this growth has been followed by the rising number of disputes which arise because of unsuccessful international business deals. The traditional way of resolving the disputes, the litigation, started to appear as an insufficient and inefficient. The parties to disputes began to search for an alternative way of how to effectively resolve their disputes with the minimum risk of harming their relations with business partners. For its advantages, arbitration became the prevailing method of dispute resolution and today is a standard way of resolving disputes within international business. The role of arbitration within international business is very important and therefore, it is crucial to pay a close attention to it.

The main aim of my diploma thesis is to identify and evaluate the international commercial arbitration with a focus on the definition of international commercial arbitration, the legal regulations governing the international commercial arbitration and the discovery of differences between arbitration rules of The International Court of Arbitration of the International Chamber of Commerce and London Court of International Arbitration using comparison, the agreement to arbitrate, the appointment and the rights and duties of the arbitrator, the proceedings of international commercial arbitration and the arbitral award.

The reason why I have decided to write my diploma thesis in English is primarily because international commercial arbitration is the topic of international commercial law and English is the language used in the vast majority of cases and it is the language of jurisprudence regarding this matter.

I have developed the following research questions for the purpose of this diploma thesis:

1. What is international commercial arbitration and how does it vary from other types of arbitration and from other methods of alternative dispute resolution?
2. What are the fundamental conventions governing the international commercial arbitration?
3. What is the lex arbitri?

4. What are the similarities and differences between arbitration rules of The International Court of Arbitration of the International Chamber of Commerce and London Court of International Arbitration?
5. What is the agreement to arbitrate?
6. What are the essentials of the agreement to arbitrate?
7. What is the way of appointing the arbitrator in the process of international commercial arbitration? What are the powers and duties of the arbitrator?
8. What does the proceedings of international commercial arbitration consist of?
9. What is the arbitral award? How does New York arbitration convention define the arbitral award?

The diploma thesis is divided into four chapters. The first chapter focuses on the definition and legal regulation of international commercial arbitration. Subsequently, the second chapter is devoted to the agreement to arbitrate. Close attention is then, in the third chapter, paid to appointment of arbitrators and rights and duties of arbitrators within international commercial arbitration. Finally, the fourth chapter deals with proceedings of international commercial arbitration and the arbitral award.

To develop this diploma thesis, I use the following methods: analysis, description, comparison and synthesis. Analysis is used to the greatest extent, it is used in each chapter. Furthermore, I use the method of comparison, which is used mostly within the first chapter to discover the differences between the ICC Arbitration Rules and LCIA Arbitration Rules. Description is used throughout the thesis, especially within the first chapter. Synthesis is used to summarize the key findings within each chapter and within the conclusion, it is also used to recapitulate the answers to every research question.[1]

[1] Please, note that after agreement with the supervisor I use Oxford University Standard for the Citation of Legal Authorities, Fourth Edition, (combined with ČSN ISO 690 for Czech legislature and case law) for citations within this thesis.

1 Definition of International Commercial Arbitration and the Law Governing the International Commercial Arbitration

The first chapter of this thesis discusses the definition of international commercial arbitration and the law governing the international commercial arbitration. Within this chapter I will answer the first, second, third and fourth research question.

1.1 Definition of International Commercial Arbitration as a Method of Alternative Dispute Resolution

This subchapter deals with the definition of the international commercial arbitration.

1.1.1 Alternative Dispute Resolution – Definition and Selected Methods

In the last few decades the alternative dispute resolution has surpassed litigation within international business. One of the main reasons for this is the fact that costs of litigation have become expensive and in some cases unbearable. As a result, the parties have begun to seek alternative methods of dispute resolution that are more affordable, less time consuming and that will not damage the working relationships of the parties to dispute.[2]

Alternative methods of resolving disputes to traditional court litigation are referred to as alternative dispute resolution (also called "ADR"). Within the process of alternative dispute resolution, there is usually a third party involved whose objective is to assist the parties to dispute to resolve the dispute by agreement, or the third party provides the parties with a binding or non-binding decision.[3]

The main advantages common to most of the methods of ADR are the lower costs, fast and more efficient process of dispute resolution, flexibility of the proceedings and the possibility of "win-win" solution for both parties to dispute. There is also a potential of enhancing the communication and developing cooperation and, importantly, maintaining the existing relationships between parties.[4] The sole fact that the parties usually do not want to break

[2] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 4.
[3] Tania Sourdin, *Alternative Dispute Resolution* (Thomson Legal & Regulatory Australia 2008) 3-5.
[4] Michael King et al., *Non-Adversarial Justice* (2nd edition, The Federation Press 2014) 98-100.

their business relationship by litigation often leads them to use a simpler way of resolving their dispute than litigation. In some cases, there are multiple disputes between the parties in complex business deals and, therefore, there is a need for a fast and effective way to resolve such disputes.

Alternative dispute resolution is a complex of procedures, excluding litigation, which are designed to resolve disputes. However, there is no universally accepted definition of alternative dispute resolution.[5]

Except for arbitration, the alternative dispute resolution is not meant to replace the litigation (or arbitration in case of its usage instead of litigation), their task is often to complement it. It is often perceived as a precursor to litigation (or arbitration). They are often adopted within the contract in a way that their usage is obligatory prior to the litigation or arbitration; in such cases their role is to be a kind of filter that forces the contractual parties to act quickly and economically and they help to reduce the number of cases that need to be resolved within litigation or arbitration.[6]

The common methods of alternative dispute resolution are mediation, conciliation, arbitration, renegotiation, dispute-resolution board, expert intervention, pre-arbitral referee procedure, minitrial[7], adjudication, expert determination, neutral evaluation, med/arb and other forms of hybrid arbitration,[8] good offices, model cases, test cases, etc. There are, however, many other methods of alternative dispute resolution, for example Online arbitration is a method of ADR that has emerged recently and has become very popular as an alternative method of dispute resolution.[9]

It is not possible to enumerate all the methods of alternative dispute resolution as there are no rules on what is capable of being an ADR. However, the methods of ADR can be divided

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[5] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 3.
[6] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 1.
[7] Alena Winterová et al., *Civilní Právo Procesní: Část První: Řízení Nalézací* (8th edition, Nakladatelství Leges 2015) 557-573.
[8] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 10-24.
9 "Online Dispute Resolution: A Modern Alternative Dispute Resolution Approach" (2015) 32 The Computer & Internet Lawyer 1-2.

into two groups. The first group consists of methods that aim to persuade the parties to settle their dispute. The other group is composed of methods that provide the parties of the dispute with a decision. The ADR methods that provide a decision can be further differentiated based on whether they provide a binding decision or a non-binding decision.[10] A typical and most frequently used method of ADR which provides the parties with a binding decision is arbitration.[11] Arbitration is the method of ADR that will be further thoroughly discussed with the focus on its procedural aspects.

1.1.1.1 Negotiation

Negotiation is a process that is not clearly defined, as it extends the mere interaction that occurs between the parties to dispute. The result of negotiation does not necessarily need to represent a sense of mutuality nor does it need to have a proposed agreement and the aim of negotiation can be different depending on the strategy of negotiation and the features of negotiation.[12] Legal negotiation is different from other kinds of negotiation for the fact that there are lawyers involved within the negotiation and they act as agents of the parties to negotiation.[13] Negotiation is different from other methods of alternative dispute resolution in a way that there is no third party involved within and therefore, only the parties are able to agree upon the possible rules of the process or on the decision itself.

Negotiation is usually used as a precursor to other methods of ADR and the negotiation itself resolves most of the disputes. On the other hand, the result of negotiation can be unfair, and the disputes are often resolved inadequately.[14] I find it advisable for the parties to a dispute to start their dispute resolution with negotiation. The parties can discuss the case again and, as aforementioned, they can reach a consensus without a need to spend money

[10] There are, however, certain methods of ADR which combine processes with a non-binding decision and with a binding decision. For example, mediation-arbitration is a hybrid process of ADR which incorporates both mediation and arbitration.
[11] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 4-5.
[12] Tania Sourdin, *Alternative Dispute Resolution* (Thomson Legal & Regulatory Australia 2008) 29-31.
[13] Jacqueline Nolan-Haley, *Alternative Dispute Resolution in a Nutshell* (4th edition, West Academic Publishing 2013) 19.
[14] Michael Noone, *Mediation: Essential Legal Skills Series* (Cavendish Publishing Limited 1998) 10-11.

on a method of dispute resolution that involves a thirds party. Also, it is a way how not to damage relationship between the parties.

The negotiation is the easiest way how to resolve a dispute and if the parties to dispute manage to do so, they save time and money. Therefore, if it is possible, it is advisable to use this method and in the best scenario, it would be sufficient.

1.1.1.2 Mediation

Another popular method of ADR is mediation. Mediation is a short, structured, task oriented process of negotiation assisted by a third party.

Parties to a dispute can talk openly to a mediator in private sessions where they can concentrate on their aims that they would like to achieve within mediation, because the actual interests of parties might be different from what they present to the other party within the process of mediation.[15] There are similarities to negotiation, such as low cost of process, parties have got the control over the outcome of the process. The difference, though, is that there is a mediator present within the process.[16]

The conduct of mediation is usually divided into a few phases. At the beginning, the mediator builds confidence between the parties and him or her. He or she identifies the dispute between the parties, the possibility of the parties to negotiate and the positions of the parties. Within the process there are usually separate meetings and the meetings of both parties with the mediator. The mediator pursues to keep the parties able to communicate and proposes the mutually acceptable solution for both parties to dispute. If the parties come to a consensus, they accept a written document as an addendum to a current contract or they form a brand-new contract containing the consensus from mediation.[17]

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[15] Julie Macfarlane, *Rethinking Disputes: The Mediation Alternative* (Cavendish Publishing 1997) 146-147.
[16] Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (2nd edition, Oxford University Press 2014) 215-217.
[17] Alena Winterová et al., *Civilní Právo Procesní: Část První: Řízení Nalézací* (8th edition, Nakladatelství Leges 2015) 565-566.

The concrete legal regulation of mediation varies from country to country, for instance in Czech Republic the mediation is governed by Mediation act.[18]

Mediation is an advisable method which can help the parties to find an agreement and to be prevented from long-lasting and expensive procedures which would otherwise occur.

1.1.1.3 Conciliation

Conciliation is one of the popular methods of ADR. The basic difference from mediation is that the neutral third party is striving to facilitate the negotiations between the parties to a dispute rather than mediating between the positions of the parties.[19] Apart from that, the process of both the mediation and conciliation is very similar.

Conciliation is perceived in two ways – either as a standalone method of ADR or as a specific version of mediation. The conciliator is usually a person educated in law and his or her aim is to achieve a resolution of the endangered and damaged legal relations between the parties to conciliation. The process of conciliation is more formal compared to mediation and the conciliator provides the parties with a legal advice in order to reach an agreement between the parties.[20]

1.1.1.4 Med-Arb

Med-arb is a combination of two methods of ADR, mediation and arbitration, and together they form a single process. These two processes are very different. The arbitration pursues to decide who is right and who is wrong, the mediation seeks to broaden the potential options for settlement. In med-arb, the parties to dispute play a more important role in the process of hearing compared to mediation, where a mediator usually controls the majority of the questioning; the parties cannot meet with arbitrators privately, whereas in mediation they can meet privately with the mediator; in arbitration the parties try to make the best possible

[18]Czech name of Mediation act is "Zákon č. 202/2012 Sb., o mediaci a o změně některých zákonů (zákon o mediaci)."
[19] Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (2nd edition, Oxford University Press 2014) 29-30.
[20] Alena Winterová et al., *Civilní Právo Procesní: Část První: Řízení Nalézací* (8th edition, Nakladatelství Leges 2015) 567.

impression, within mediation the impression is not relevant.[21] The procedure starts with mediation and in case the parties do not reach an agreement, then follows the arbitration which resolves the dispute. This combined method of mediation and arbitration is, in my opinion, reasonable, as gives the space to parties to dispute to try to resolve their dispute by the agreement at first and if they fail to do so, then the arbitration revolves it. It can prevent unnecessary arbitration procedures from occurring.

1.1.1.5 Partnering

Partnering is a method of ADR that emerged in the eighties of the twentieth century in relation to growing business activities in the area of software development and relating to the construction industry. It is a form of ADR which is based on the will of the parties to a dispute to resolve such a dispute as soon as possible and in the most efficient way possible. There is an effort to avoid any possible disputes that might occur and that might cause complications, such as interruption of work. This method became popular, especially within the construction, industry when the companies began to realize the importance of not having disputes and the long-lasting litigations that delay work. The process of partnering consists of four phases. First is a partnering agreement, second is a group meeting, third is a working conference and the forth are following activities. The great advantages of partnering are the very low costs compared to litigation and other ADR methods. Another advantage is the informality of the process, the mutual cooperation and the improvement of mutual relations between the parties, flexible adjustment to new conditions and improvement of quality of organization of the project.[22]

1.1.1.6 Online Dispute Resolution

Online dispute resolution is a method of ADR that has become recently popular. Online dispute resolution stands for any form of online alternative dispute resolution

[21] Alexander Bělohlávek et al., *Rights and Duties of Parties in Arbitration* (Lex Lata BV 2016) 157-158.
[22] Martin Janků, *Rozhodčí řízení. Alternativní způsoby rozhodování sporů* (1st edition, EUPRESS 2015) 16.

process, e-ADR, virtual alternative dispute resolution or cyber alternative dispute resolution. The efficient medium used for resolution of disputes is the internet.[23]

Online dispute resolution varies significantly from other methods of ADR. Especially in a way that the parties do not have to be physically present at a meeting in order to be able to resolve a dispute which, besides saving time, saves costs of transportation, accommodation, etc. Another advantage is the fact that managing the electronical files is cheaper and the delivery is faster compared to the printed form of documents.[24] An additional advantage is the easy access to information that the parties can easily access by logging into a legal database and the parties to dispute also have an option to search for other relevant cases, legislation and other sources that might be useful.[25]

The main problems of online dispute resolution, especially with online arbitration, are that usually national and international laws require the written form. For instance, the printed form is required for an arbitration agreement and therefore there is a problem with agreements formed by electronic means. Also, the electronic documents should be able to serve as a functional substitute of a paper document and the information must be stored in a format that would be possible to be used as evidence in the future. There are also problems with recognition and enforcement of decisions. There are a lot of laws that restrict the categories of disputes that are arbitrable.[26]

The European Commission has established an ODR platform[27] within the European Union to provide consumers and traders with a possibility to resolve their contractual disputes that arise from online purchases of goods and services in an online low-cost and fast way.

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[23] Fangfei Wang, *Online Dispute Resolution: Technology, Management and Legal Practice from an International Perspective* (Chandos Publishing 2009) 23-24.
[24] Paul Breaux, 'Online Dispute Resolution: A Modern Alternative Dispute Resolution Approach' (2015) 32 Computer & Internet Lawyer 1, 4.
[25]Anthony John Sissian, *Online Dispute Resolution: The Advantages, Disadvantages, And the Way Forward, vol 42 (2014) <http://www.westlaw.com.au.ezp.lib.unimelb.edu.au/maf/wlau/app/document?&src=search&docguid=I5cf2af31745811e49e2888ff8c71c53d&epos=1&snippets=true&fcwh=true&startChunk=1&endChunk=1&nstid=std-anz-highlight&nsds=AUNZ_SEARCHALL&isTocNav=true&tocDs=AUNZ_AU_JOURNALS_TOC&context=10&extLink=false&searchFromLinkHome=true> accessed June 17, 2017,* 1-2.
[26] Jaroslav Valerievich Antonov et al., *Czech (& Central European) Yearbook of Arbitration: Conduct of Arbitration* (7th edition, Lex Lata BV 2017) 13.
[27] "Online Dispute Resolution" (*European Commission official website*2017) accessed June 17, 2017.

In my opinion, the online dispute resolution has a great potential to provide the parties to dispute with a simple and efficient way of resolving their dispute. If the online dispute resolution becomes more regulated and the decisions become easily enforceable, it is probable, in my opinion, that the usage of this method will grow significantly.

1.1.2 International Commercial Arbitration – Definition, Advantages and Disadvantages

This subchapter focuses on definition of the arbitration and the international commercial arbitration and the advantages and disadvantages of international commercial arbitration.

1.1.2.1 Definition of International Commercial Arbitration

There is no general history of arbitration[28]. Arbitration as a method of resolving disputes by a third party is one of the oldest methods of dispute resolution. Its origins date back to the times of antiquity. In the modern age, the first legal regulations of arbitration started to emerge. As the arbitration happened to be more and more regulated, the new, less formal methods of dispute resolution began to appear.[29]

The usual description of arbitration has been the "*apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualification is that of being chosen by the parties*"[30]

The common scenario throughout the history would be the two parties, usually merchants, having a dispute over the goods and they would turn to a third trustworthy person to resolve their dispute with the agreement that the decision would be binding for them.

Arbitration has been used throughout the history since the ancient ages, however, its use as a method of dispute resolution has grown rapidly since the second half of the twentieth

[28] It would be hardly possible to track the history of arbitration precisely. It would have to be considered from the global perspective and with considering the changes within the ages. The problem would be especially with the sources which are in some cases more than 2500 years old and using unriddled languages. Defining the general history would require going through the historical documents all around the world.

[29] Naděžda Rozehnalová, *Rozhodčí Řízení v Mezinárodním a Vnitrostátním Obchodním Styku* (3rd edition, Wolters Kluwer Česká Republika 2013) 55.

[30] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 5.

century and especially in the last decades[31]. It has been used widely, especially within international business as the consequence of the increasing role of international business in the globalized economy and the ongoing removal of the barriers of international trade.

International arbitration is the most used method of dispute resolution between the parties of international business, commerce and investment and the established centers of arbitration have been reporting the increasing numbers of cases every year.[32]

Arbitration as a method of alternative dispute resolution is not universally defined. The process of arbitration is governed by different rules in different legal systems and therefore, the process itself varies because of different legal approaches.[33] Furthermore, the parties have the possibility to adopt certain arbitration rules and they may also agree upon specific provisions.[34]

There are, however, basic elements common to the arbitration in all jurisdictions. First of these elements is the arbitration agreement[35] which will be dealt with in the second chapter of this diploma thesis.

The next common element is an arbitrator or an arbitral tribunal. The number may vary but in general, there is either a sole arbitrator or an arbitral tribunal within every arbitration. In an ad hoc arbitration, arbitrators are usually appointed at the outset, whereas in administrated arbitration the arbitrators are appointed when a dispute arises.[36] The appointment of arbitrators will be further discussed in the third chapter of this diploma thesis.

The third common element to arbitration is a dispute or a difference. The aim of the process of arbitration is to resolve a dispute or difference between the parties to the arbitration

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[31] Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014) 93-95.
[32] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 1.
[33] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 33.
[34] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 33.
[35] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 34.
[36] Mauro Rubino-Sammartano, *International Arbitration: Law and Practice* (3rd edition, JurisNet 2014) 449.

agreement. However, the existence of a dispute does not necessarily mean that the dispute resolution is arbitration. The dispute must be able to be resolved within the arbitration, in other words, it must be arbitrable. The word "*dispute*" is in general interpreted broadly and therefore, it is unusual to succeed with the claim that there is no dispute between the parties.[37]

The forth basic element of arbitration is that arbitration is a judicial process.[38] The process of arbitration should be customized accordingly to the needs of parties to arbitration, as there are no fixed rules unless the parties have agreed upon some. The arbitrator or the arbitral tribunal must come to a decision according to the law the parties have chosen and according to the arbitration procedure that applies to such case.

The last basic element of arbitration is the binding award.[39] This diploma thesis focuses on the arbitral award in the fourth chapter.

One of the possible ways how to define the arbitration is that the arbitration is "*a voluntary submission of a dispute resolution to a third neutral party, arbitrator or the arbitration tribunal that will issue a binding decision after the arbitration proceedings*."[40,41] There are, however, other definitions of arbitration and none of them is universal. Therefore, the aforementioned basic elements of arbitration are crucial to be taken into consideration when defining the arbitration.

The outcome of arbitral proceedings is the binding decision (the arbitral award) which resolves a dispute in accordance with the principle of neutrality and with the principle that each party has the right to be heard.[42]

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[37] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 36-37.
[38] That does not mean that the proces of arbitration should mirror judicial proceedings.
[39] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 38.
[40] Naděžda Rozehnalová, *Rozhodčí Řízení V Mezinárodním a Vnitrostátním Obchodním Styku* (3rd edition, Wolters Kluwer Česká Republika 2013) 57.
[41] Translated definition from the Czech language. In Original: "dobrovolné postoupení řešení sporu neutrální třetí straně, rozhodcům či rozhodčímu soudu (tj. soukromým osobám či nestátní instituci), která vydá po provedeném řízení závazné a vykonatelné rozhodnutí."
[42] Margaret Moses, *The Principles and Practice of International Commercial arbitration* (2nd edition, Cambridge University Press 2012) 1.

International commercial arbitration can be defined as a method of resolving disputes over commercial claims that arise from international commercial relations between the parties.[43] There have been various attempts to define international commercial arbitration and none of them are universally accepted.

Besides the efforts to define international commercial arbitration, there are also tendencies to define the terms "*international*" and "*commercial*" within the "*international commercial arbitration*" phenomenon, in order to define it in a more complex way.

The term "*international*" differentiates the international commercial arbitration from the arbitrations that are national or domestic and transnational.[44] In a narrow sense, every arbitration can be perceived as a national arbitration, as it must be held at a certain place and must be decided according to the national law of that certain place. [45] However, for legal and practical reasons, it is usually distinguished between the arbitrations that are solely national and those that are international. Furthermore, the other distinction is that the national arbitration is usually regulated by the law of the place of arbitration whereas the international arbitration is generally not bound to the legal regulation of the place of arbitration. The other common difference is that the parties to international arbitration are usually corporations or states, whereas the individuals are the usual parties to national arbitration. The third fact that distinguishes national and international arbitration is the amount of money that is the subject of the arbitration which is usually significantly higher within international arbitration than in national arbitration.[46]

Every state has its own criteria on how to determine whether the arbitration is domestic or international.

There are even different languages for these terms. For example, the New York Convention defines '*foreign'* awards. The convention defines foreign awards as "*awards made in the*

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[43] Naděžda Rozehnalová, *Rozhodčí Řízení v Mezinárodním a Vnitrostátním Obchodním Styku* (3rd edition, Wolters Kluwer Česká Republika 2013) 57.
[44] These arbitrations in some way exceed the national or domestic arbitration and therefore are "*international*".
[45] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 8.
[46] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 8-9.

territory of a State other than a State where the recognition and enforcement of such awards are sought". Further, it adds that the convention applies also on arbitral awards not considered as domestic awards.[47]

UNCITRAL Model Law on International Commercial arbitration defines in article 1 (3) that an arbitration is international if: "*(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country*."[48] UNCITRAL Model Law on International commercial arbitration was architected specially to be applied to international commercial arbitration.[49]

The meaning of the term "*commercial*" usually refers to the business character of arbitrations.[50] The oldest multilateral conventions governing international arbitration that were adopted between the first and second world war were dealing with only commercial matters, because many of the national legal systems did not allow other matters to be decided by arbitration.[51]

The first major treaty to define that "*commercial matters*" can be resolved within arbitration and that other matters cannot was the Geneva Protocol.[52] This term was further developed

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[47] 'Convention on The Recognition and Enforcement of Foreign Arbitral Awards', *The New York Convention* (UNCITRAL 1958) accessed June 11, 2017, art I (1).
[48] 'Uncitral Model Law on International Commercial Arbitration' (UNCITRAL 1985) accessed June 11, 2017, art I (3).
[49] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 12.
[50] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 13.
[51] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 9.
[52] 'Geneva Protocol on Arbitration Clauses' (New York arbitration convention 1923) <http://www.newyorkconvention.org/11165/web/files/document/1/5/15938.pdf accessed 12 June 2017>, Art I.

within The New York Convention.[53] Neither of these conventions defined the term "commercial", though.

The definition of what is and what is not a commercial dispute has not been provided by the international conventions and it has been left to the national law of each contracting party of those conventions.[54] This can be found for instance in The New York Convention, where the article I (3) states that every contracting state may "*declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.*"[55]

The convention that defines the commercial disputes is the European Convention on International Commercial Arbitration. It states in the article I that the convention applies to "*arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States*."[56]

Unlike the litigation, the international commercial arbitration is a contractually based method of dispute resolution. It is accompanied with principles which are common to other methods of ADR that vary from those common to litigation and the difference is that the result of international commercial arbitration is binding and enforceable even in the cases when one of the parties refuses to attend the arbitral proceedings or would be passive within the proceedings or would obstruct the arbitral proceedings.[57]

"*Principal of equality of arms*" is typical for international commercial arbitration. The Supreme Court of the Czech Republic has recently ruled that according to the principal of equality of arms, it is necessary to provide both of the parties with opportunity to

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[53] 'United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (New York Convention 1958) <http://www.newyorkconvention.org/english> accessed 12 June 2017, art I (3).
[54] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 10.
[55] 'Convention on The Recognition and Enforcement of Foreign Arbitral Awards', *The New York Convention* (UNCITRAL 1958) <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> accessed June 11, 2017.
[56] 'European Convention on International Commercial Arbitration' (United Nations, 1961) <https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf> accessed October 1, 2017.
[57] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 4.

claim, prove claims and to make objections against the claims of the other party also in the process of arbitration (not only within litigation).[58]

International commercial arbitration is not to be mistaken with international investment arbitration (or also known as investment treaty arbitration).

International investment arbitrations are arbitrations that are based on international treaties and which entitle the foreign investors to claim for loss or damage in relation to their investment against a state within which the investment has been made. In international investment arbitration, there is at least one state or state entity as a party to the procedure of arbitration (international commercial arbitration does not require it), the legal rights that are dealt with, in general, arise from treaties and public international law, rather than from national law and contracts, and in case of ICSID arbitration, the arbitration procedure is delocalized (almost completely).[59]

1.1.2.2 Advantages and Disadvantages of International Commercial Arbitration

The main perceived advantage of arbitration is the neutrality that it provides. It is guaranteed by the free will of the contractual parties to choose where and which way their dispute would be resolved. This means that the contractual parties have the option to choose from the existing arbitral rules, or even to create their own rules which would be binding for them. The only limit for them are the legal principles that the rules must obey or otherwise the arbitral award might not be enforceable or even might be annulled.[60] As parties come from different countries (in terms of international commercial arbitration), the national court of one of those parties would be foreign for the other party and vice versa. Resolving the potential dispute using a national court and national rules of one party would put the other party into a great disadvantage considering the language barrier, law that the other party knows better, the need to hire different lawyers than the party uses usually, longer distance

[58] Rozsudek Nejvyššího soudu ze dne 27. 2. 2013, sp. zn. 23 Cdo 2016/2011, [online]. [cit. 13.10.2017] Dostupné z http://www.nsoud.cz/.
[59] Simon Greenberg, Christopher Kee and Ramesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2010) 477-478.
[60] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 4.

etc.[61] For these reasons it is suitable to choose a way of dispute resolution that minimizes such issues, and arbitration is a suitable way how to do so.

Another advantage of international commercial arbitration is the possibility of the contractual parties to choose the arbitrator (or arbitrators). The parties have the option to choose the number or arbitrators, as well as choose the concrete persons to have such a role or they can adopt a binding procedure that will select the arbitrators. The free choice of arbitrators accompanied by the free choice of arbitral rules helps to perceive the international commercial arbitration as a just procedure and therefore it makes it a popular method of dispute resolution.[62]

The next important advantage of arbitration is that its decision in a form of the arbitral award is enforceable both nationally and internationally. The arbitral award issued at the end of arbitration is a binding decision and the parties cannot reject it; the award is final and there is no option of appeal and the award is directly enforceable. Compared to the decisions of the courts which are governed by treaties of reciprocal enforcement of court decisions, the arbitral awards are more accepted thanks to the international conventions that govern enforceability of them.[63] Thanks to The New York Convention the arbitral awards are enforceable in 157 countries in the world, which makes The New York Convention one of the most successful conventions in the field of international commercial arbitration.

Another advantage of international commercial arbitration is the flexibility.[64] The parties to dispute have a wide possibility of customization of the arbitration according to their needs and there are usually very few limitations within national legal norms of the customization of the arbitration.

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[61] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 32.
[62] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 4.
[63] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 32.
[64] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 5.

Furthermore, the procedure of arbitration is in general much less time consuming compared to litigation and since there is no possibility of appealing, the total time of resolving a dispute is significantly shorter compared to litigation.

Generally, the procedure of arbitration is private. If the parties wish so, the procedure of arbitration can be confidential which makes it easier for the parties not to disclose information to the public. Litigation is, in general, public and cannot be completely confidential. The confidentiality helps the parties not to damage their business relationships.

The arbitration procedure is also less formal compared to the litigation, for instance the delivery of writings internationally is informal which makes the procedure faster.

Another advantage is the continuity of decisions. This is helpful in cases where are series of disputes regarding the same matter. The arbitrators do not need to spend time again to analyze the facts of the case and thanks to that the procedures are less time consuming. This is particularly helpful when there are multiple disputes arising from one contract (typically in construction deals).[65]

The disadvantage can be the high costs which might exceed the costs litigation. The costs of arbitration are usually high at the international arbitration institutions. However, the costs may be also lower, depending on the choice of arbitrators, the rules, etc.

The high flexibility of arbitration may be also seen as a disadvantage, as it allows the parties to choose concrete persons as arbitrators and to define the procedure. The parties to dispute should, therefore, be careful when entering into arbitration agreement.

The parties have the possibility to relocate the place of proceedings which can be helpful in international commercial disputes, as the parties can save the costs and time to the parties.[66]

The disadvantageous is the fact that there are differences between legal norms of jurisdictions and, therefore, the subject-matter of a dispute might not be arbitrable according

[65] Naděžda Rozehnalová, *Rozhodčí Řízení v Mezinárodním a Vnitrostátním Obchodním Styku* (3rd edition, Wolters Kluwer Česká Republika 2013) 85.
[66] Naděžda Rozehnalová, *Rozhodčí Řízení v Mezinárodním a Vnitrostátním Obchodním Styku* (3rd edition, Wolters Kluwer Česká Republika 2013) 84.

to certain national law. This can be the reason for the arbitral award not to be arbitrable, as provided by The New York Convention.[67]

The next disadvantage is, in general, that the arbitrators cannot merge the arbitrators into one and therefore, there can be simultaneously more arbitrations.[68] This may bring the higher costs, longer time needed to resolve the disputes, and in some cases, can even lead to contradictive arbitral awards.

Another disadvantage may be the fact that there is no system of binding precedents in international commercial arbitration[69] and, therefore, the awards regarding the same matter can be conflicting.[70]

1.2 Law Governing the International Commercial Arbitration

International commercial arbitration is regulated by different types of legal norms. The core norms regulating international commercial arbitration are international treaties, national laws, arbitral rules of arbitration tribunals, arbitral rules of international organizations and UNCITRAL Model Law on International Commercial Arbitration. Within the European Union, the arbitration is regulated significantly by secondary legal norms of EU, especially by Rome I Regulation. The influence of these norms varies considerably.[71,72]

1.2.1 International Treaties

There are various conventions governing international commercial arbitration. The most important international treaties governing the international commercial arbitration are: The Geneva Protocol on Arbitration clauses (1923)[73], The Geneva convention (1927)[74], The

[67] The New York Convention, art V (2).
[68] Naděžda Rozehnalová, *Rozhodčí Řízení v Mezinárodním a Vnitrostátním Obchodním Styku* (3rd edition, Wolters Kluwer Česká Republika 2013) 83.
[69] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (6th edition, Oxford University Press 2015) 33.
[70] Which happened for example in cases *Ronald Lauder v Czech Republic*, Final Award, UNCITRAL, 3 September 2001, and *CME v Czech Republic*, Final Award, UNCITRAL, 14 March 2003.
[71] Full name: Regulation (EC) NO 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
[72] Naděžda Rozehnalová, *Rozhodčí Řízení v Mezinárodním a Vnitrostátním Obchodním Styku* (3rd edition, Wolters Kluwer Česká Republika 2013) 103-104.
[73] Protocol on Arbitration Clauses 1923.
[74] The Convention for the Execution of Foreign Arbitral Awards 1927.

New York Convention (1958)[75], The European Convention (1961)[76], The Panama Convention (1975)[77], The Washington Convention (1965)[78], The UNCITRAL Model Law (1985)[79] and revisions to the UNCITRAL Model Law (2006). The international investment arbitration is regulated by many bilateral (BIT) and multilateral investment treaties (MIT).

The treaties and conventions that govern the process of arbitration can be divided into separate groups. The first group consists of treaties and conventions that regulate the recognition and enforcement of arbitral awards. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958 has been the most influential of these conventions.[80]

The second group is formed by treaties that include arbitration provisions. There are more than two thousand bilateral and multilateral investment treaties existing. Most of these treaties include arbitration provisions and the investors can use them in case their rights under such treaties have been infringed.[81]

There is a general consensus that The New York Convention is the most crucial international treaty in the field of arbitration.[82] Since many states have adopted UNCITRAL Model Law, The New York Convention is not as important as it used to be, however, its role is crucial even today.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards governs, despite its name, not only the recognition and enforcement of arbitral awards, but also the validity of arbitration agreements.[83]

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[75] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
[76] European Convention on International Commercial Arbitration 1961.
[77] Inter-American Convention on International Commercial Arbitration 1975.
[78] The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965.
[79] UNCITRAL Model Law on International Commercial Arbitration 1985.
[80] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 449.
[81] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 449-450.
[82] Mauro Rubino-Sammartano, *International Arbitration Laws and Practice* (Third edition, JurisNet 2014) 1418.
[83] Mauro Rubino-Sammartano, *International Arbitration Laws and Practice* (Third edition, JurisNet 2014) 1418.

UNCITRAL Model Law is also a very important convention regarding the international commercial arbitration. Its major goal is to create a special regime for international commercial arbitration so that the local differences which cause difficulties in practice are overcome. The substantive scope of arbitration is restricted to international commercial arbitration. It also sets that Model Law applies to international commercial arbitrations held only in the enacting state (with exceptions).[84]

1.2.2 National Legal Norms

Every country has its own legal system and it is usual that the country has some laws or other legal norms governing the arbitration.

For instance, in the Czech Republic there is an Act No. 2016/1994 Coll., on Arbitration Proceedings and Enforcement of Arbitral Awards.[85] This act regulates not only disputes resolved within the international arbitrations, but also the disputes that are resolved within national arbitration. This law governs both the ad hoc proceedings and the proceedings at arbitral tribunals. It governs the whole proceedings: the commencement of arbitration, establishment of powers and duties of arbitrators, conduct of proceedings, relationship of arbitration to litigation, arbitral award, enforcement of the arbitral award, refusal to execute the arbitral award.[86]

1.2.3 Lex Arbitri

Within the process of international commercial arbitration there is usually an influence of more than one national legal systems. The law governing international commercial arbitration can be divided into four categories: the law applicable to the arbitration agreement, the law applicable to arbitrability, lex arbitri and the procedural law (curial law).[87]

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[84] Frank-Bernd Weigand, *Practitioner's Handbook on International Commercial Arbitration* (2nd edition, Oxford University Press 2009) 962.
[85] In Czech language: "Zákon č. 2016/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálezů."
[86] Naděžda Rozehnalová, *Rozhodčí Řízení v Mezinárodním a Vnitrostátním Obchodním Styku* (3rd edition, Wolters Kluwer Česká Republika 2013) 111-113.
[87] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 216-253.

For defining of lex arbitri, the rule of law must exist so that it legitimizes the arbitration contract on which the arbitration is based; there must be a legal order that enables the parties to give the power to arbitrators.[88] Lex arbitri can be defined as a legal order and its standards which are used to decide whether the arbitration procedure and the arbitration award are valid. Lex arbitri is a part of national law of the concrete state that governs the matter of arbitration. The single elements of lex arbitri can be set in various legal norms and as a whole the lex arbitri makes the arbitration binding.[89]

Lex arbitri can be distinguished from procedural law and it can be defined also as a "*set of mandatory rules of law applicable to the arbitration at the seat of arbitration.*"[90]

Another definition of lex arbitri is that it is a "*a body of rules which sets a standard external to the arbitration agreement and the wishes of the parties, for the conduct of the arbitration.*"[91] Lex arbitri usually deals with the definition and form of arbitration agreement, with whether a dispute is arbitrable, with the constitution of arbitration tribunal, the entitlement of arbitration tribunal, freedom to agree upon rules of procedure, statement of claim and defense, default proceedings, court assistance, etc.[92]

"*Lex arbitri*" in Latin means the law of arbitration. It describes the law of arbitration in general. "*Lex loci arbitri*" is used when a concrete arbitration or a seat of arbitration have been set.[93] When the parties to arbitration decide to choose a certain country as a seat of arbitration, the law of said country becomes the lex arbitri without any additional need of expression. Lex arbitri provides legitimization and a general legal framework for international arbitration. Besides the legal norms of the country, lex arbitri of certain jurisdiction can include statutes and codes and case law related to a basic legal framework

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[88] William Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 International and Comparative Law Quarterly 21.
[89] Georgios Petrochilos, *Procedural Law in International Arbitration* (1st edition, Oxford University Press 2004) 19-20.
[90] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2005) 233.
[91] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 175.
[92] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 176-177.
[93] Simon Greenberg, Christopher Kee and Ramesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2010) 58.

of international arbitrations that have the seat in such country. An additional feature of lex arbitri is the fact that the parties to arbitration are able to choose the law and rules that would be applied in their case and lex arbitri also indicates what matters cannot be resolved within arbitration.[94]

1.2.4 Arbitration Rules

The arbitration rules are the rules that the parties to arbitration have chosen and that relate to the mechanism and process of arbitration. These rules typically govern the conduct of the arbitration from the initiation, until the issue of an award. The arbitration rules include the rules of arbitration institutions, ad hoc arbitration rules and the rules made and agreed upon by the parties to arbitration. Arbitration rules in general are applicable based on a contract between the parties, however, there are arbitral rules that are used as default. These are set by procedural laws. The arbitration rules usually govern the practical aspects of commencing an arbitration and the rest of the proceedings until the rendering of arbitral award. The arbitral rules usually include provisions on how to fill a request for arbitration, how to answer such a request, how to appoint an arbitrator, how to challenge a non-neutral arbitrator, remove a non-performing arbitrator, and about the rights and duties of an arbitrator or an arbitral tribunal.[95]

1.2.5 Arbitration Rules of The International Court of Arbitration of the International Chamber of Commerce and London Court of International Arbitration

In this subchapter, I compare the arbitral rules of ICC International Court of Arbitration and the arbitral rules of London Court of International Arbitration.

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[94] Simon Greenberg, Christopher Kee and Ramesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2010) 58-59.
[95] Simon Greenberg, Christopher Kee and Ramesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2010) 59.

1.2.5.1 Arbitration Rules of The International Court of Arbitration of the International Chamber of Commerce

The International Court of Arbitration of the International Chamber of Commerce was established in 1923 within ICC (headquartered in Paris) as its interdependent arbitration body for resolving disputes within arbitration. It ensures the proper application of arbitration rules of International Chamber of Commerce and assists parties and arbitrators in overcoming the procedural obstacles. It confirms, appoints and replaces arbitrators, monitors the process of arbitration, scrutinizes and approves the arbitral awards, sets, manages, and adjusts fees and advances, and oversees emergency proceedings before the beginning of the process of arbitration.[96]

The aim of the ICC Court is to secure the application of the ICC Arbitration rules and other ICC rules in the procedures which are conducted under ICC auspices.[97]

International Court of Arbitration uses its own rules of arbitration, the current arbitration rules are from 2012 and amended in 2017 (effective as of 1 March 2017).[98]

The arbitration rules are divided into eight headlines and each is further developed by single articles. The arbitration rules also contain six appendixes. The rules consist of forty-two articles in total.

ICC arbitration is the global brand for the international commercial arbitration. When the agreements refer to 'ICC arbitration', it is generally recognized as the arbitration under the rules of arbitration of ICC. By agreeing to 'ICC arbitration', parties to agreement agree that the potential dispute will be resolved under the auspices of the ICC.[99]

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[96] 'International Court of Arbitration' (*ICC*, 2017) <https://iccwbo.org/dispute-resolution-services/arbitration/icc-international-court-arbitration/> accessed 9 October 2017.
[97] John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (1st edition, Oxford University Press 2000) 47.
[98] '2017 Arbitration Rules and 2014 Mediation Rules' *(ICC*, 2017)
<https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/> accessed 9 October 2017.
[99] Frank-Bernd Weigand, *Practitioner's Handbook on International Commercial Arbitration* (2nd edition, Oxford University Press 2009) 1133.

1.2.5.2 Arbitration Rules of London Court of International Arbitration

LCIA issues the arbitration rules, the most recent are LCIA Arbitration Rules (2014) and the previous are LCIA Arbitration Rules (1998).[100]

The LCIA Arbitration rules consist of thirty-four articles and preamble and these rules have one annex.

The LCIA is, generally, not so institutionalized and interventionist as the ICC.[101] The notable difference is in the fee structure where ICC enumerates on basis of ad valorem structure, and also in the institutional engagement in the arbitral process (the LCIA does not require terms of reference, a designated counsel team per arbitration case, nor does it scrutinize arbitral awards). LCIA should not be perceived as competing with ICC but rather as an alternative.[102]

1.2.5.3 Comparison of Arbitration Rules

Similarly, according to both arbitration rules, the process of arbitration commences when the Request for Arbitration is delivered to The Secretariat of the ICC Court (The Secretariat will then inform the respondent and claimant about the receipt)[103] or to registrar[104].

There is a difference regarding the appointment of arbitrators. The ICC Court may appoint or confirm arbitrators, the confirmation is made based on the nomination from the parties; the court appoints arbitrators upon proposal of a national committee or group of the ICC that it considers to be appropriate[105]. Whereas only the LCIA Court has the power to appoint arbitrators according to LCIA rules and no party or third person can appoint any arbitrator (however, the court considers any written agreement or joint nomination by the parties).[106]

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[100] 'LCIA Arbitration' (*LCIA*, 2017) <http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx> accessed 9 October 2017.
[101] Jean-Francois Poudret et al, *Comparative Law on International Arbitration* (2nd edition, Sweet & Maxwell 2007) 103.
[102] Frank-Bernd Weigand, *Practitioner's Handbook on International Commercial Arbitration* (2nd edition, Oxford University Press 2009) 1618.
[103] ICC Arbitration Rules 2017, art 4.
[104] LCIA Arbitration Rules 2014, art 1.
[105] ICC Arbitration Rules 2017, art 13.
[106] LCIA Arbitration Rules 2014, art 5 (5).

The place of arbitration according to ICC rules shall be fixed by the court[107], whereas LCIA rules provide differently that in case the parties fail to agree upon place of arbitration, the seat of arbitration shall be London.[108]

There is a difference regarding the language of arbitration. The ICC rules provide that if the parties do not agree upon the language of arbitration, the court will determine it based on the relevant circumstances, including the language of the contract.[109] According to LCIA rules the initial language of arbitration is the language of arbitration agreement; in case the arbitration agreement is written in more than one language of equal standing, the LCIA court determines the initial language of arbitration; after the arbitral tribunal has been formed, the arbitral tribunal will decide the language of the arbitration unless the parties have agreed upon the language of arbitration.[110]

Differently is also governed the law applicable to arbitration. According to ICC rules, the parties are free to choose the law that will be applied by the arbitral tribunal; if the parties fail to do so, the arbitral tribunal will apply the law which the tribunal determines to be appropriate.[111] The LCIA rules provide that unless the parties to arbitration agree upon other law, the law applicable to the arbitration agreement and arbitration will be the law which is applicable at the seat of arbitration.[112]

The article 7 of ICC Arbitration rules more strictly provide that the additional parties to arbitration can join the arbitration but it must be done until the appointment of any arbitrator.[113] The LCIA Arbitration rules also allow the third persons to join in the arbitration, however, they do not provide the deadline to do so, they merely provide it must be "in writing following the Commencement Date or (if earlier) in the Arbitration Agreement."[114]

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[107] ICC Arbitration Rules 2017, art 14 (1).
[108] LCIA Arbitration Rules 2014, art 16.
[109] ICC Arbitration Rules 2017, art 20.
[110] LCIA Arbitration Rules 2014, art 17.
[111] ICC Arbitration Rules 2017, art 21 (1).
[112] LCIA Arbitration Rules 2014, art 16 (4).
[113] ICC Arbitration Rules 2017, art 7 (1).
[114] LCIA Arbitration Rules 2014, art 22 (1) (viii).

According to the ICC rules, the arbitral award must be rendered within six months from the date of the last signature by the arbitral tribunal, the court may extend this time limit in case a reasoned request from the arbitral tribunal occurs, or based on its own initiative in case it finds it necessary to do so.[115] Whereas according to LCIA rules, there is no time limit within which the arbitral award should be delivered. The ICC Rules are more formal and strict in this issue.

Both the ICC Arbitration Rules (in article 10) and LCIA Arbitration rules (in article 22) allow the consolidation of two or more simultaneous arbitrations. According to ICC rules, this is allowed if the parties agree to consolidation or the claims in arbitrations are based on the same arbitration agreement, and also if the ICC Court finds more arbitration agreements compatible in cases where more claims are made under the same arbitration agreement, or the arbitrations are between the same parties, or the dispute in the arbitrations arise in connection with the same legal relationship.[116] The LCIA court can make the consolidation of more than one arbitrations if the parties agree with that and in case there are more arbitrations commenced according to LCIA Rules and under the same arbitration agreement or any compatible arbitration agreements between the same disputing parties.[117] The consolidation of arbitrations in practice is used mainly by the international arbitration institutions and it hasn't been used until recently.

What makes the arbitration at ICC International Court of Arbitration exceptional, is the obligation of the arbitral tribunal according to the article 34 of ICC Arbitration Rules to submit a draft of any award to The International Court of Arbitration for approval before rendering it. The court may then lay down any modifications regarding the form of the award and it may also draw its attention to points of substance without affecting the liberty of decision of the arbitration tribunal. No award can be rendered by the arbitral tribunal before its approval by the court as to its form.[118] In my opinion, this rule makes the arbitration process quite rigid and formal. On the other hand, this formal requirement helps to prevent potential errors from happening and since there is no further appealing possible

[115] ICC Arbitration Rules 2017, art 31.
[116] ICC Arbitration Rules 2017, art 10.
[117] LCIA Arbitration Rules 2014, art 22.
[118] ICC Arbitration Rules 2017, art 34.

after the final award as been issued, it makes the process of arbitration more complex which can make the result of arbitration more persuasive. There is no such requirement according to the LCIA arbitration rules. This makes the ICC Arbitration Rules more formal compared to LCIA rules.

As mentioned above, the ICC Arbitration rules in article 23 require the arbitral tribunal to draw up a document defining the terms of reference. This document must include names, description, address and other contact details of the parties and persons representing the parties, the address to which notifications and communications should be made, a summary of the claims of the parties and the relief sought by each party together with the amounts of qualified claims and an estimate of the monetary value of other claims, a list of issues to be determined (unless found inappropriate by the tribunal), the details of the arbitrators, the place of arbitration, particulars of applicable procedural rules and, eventually, a reference to the power conferred upon the tribunal to act as amiable compositeur or to decide ex aequo at bono.[119] There is no such requirement according to LICA Rules and, therefore, this additional requirement makes the ICC Arbitration Rules more formal compared to LCIA arbitration rules.

Even though it is not expressly provided by the arbitration rules of ICC, nor by the LCIA Arbitration Rules, in practice, it is possible to bring claims by a third-party usually before the confirmation or appointment of the arbitral tribunal.[120]

Both the ICC Arbitration Rules and LCIA Arbitration rules directly provide that the arbitral awards are binding on the parties.[121]

Article 26 of ICC Arbitration Rules provides that if any party fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing.[122] Similarly, the LCIA Arbitration Rules provides that if at any time any party fails to avail

[119] ICC Arbitration Rules 2017, art 23.
[120] Stavros L Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edition, Oxford University Press 2010) 109-113.
[121] ICC Arbitration Rules 2017, art 35 (6); LCIA Arbitration rules 2014, art 26 (8).
[122] ICC Arbitration Rules 2017, art 26 (4).

itself of the opportunity to present its written case in the manner required the arbitral tribunal can proceed with the arbitration (with or without a hearing).[123]

1.3 Recapitulation

In this subchapter, I recapitulate the answers to the first, second, third and fourth research question.

Regarding the first research question, international commercial arbitration is a method of resolving disputes over commercial claims that arise from international commercial relations between the parties. As aforementioned, there are, however, other possible definitions of international commercial arbitration. International commercial arbitration varies from standard arbitration in a way that the arbitration must be both "*international*" and "*commercial*"; these terms are not universally defined, however, there are ways how to determine whether the arbitration is international and commercial, as specified in this chapter. International commercial arbitration varies from other forms of alternative dispute resolution in some ways. For instance, the process is very formal in comparison to other methods and the final decision (the award) is binding and enforceable. Also, the costs are usually significantly higher within international commercial arbitration compared to other ADR methods. The international commercial arbitration is different from international investment arbitration within which at least one party is state or state entity, the legal rights that are dealt with, generally, arise from treaties and public international law and the procedure is almost completely delocalized.

The fundamental conventions governing the international commercial arbitration are The Geneva Protocol on Arbitration clauses (1923), The Geneva Convention (1927), The New York Convention (1958), The European Convention (1961), The Panama Convention (1975), The Washington Convention (1965), The UNCITRAL Model Law (1985) and Revisions to the UNCITRAL Model Law (2006).

Lex arbitri is a set of mandatory rules of law applicable to the arbitration at the seat of the arbitration (however, it is not universally defined, and the single definitions vary).

[123] LCIA Arbitration Rules 2014, art 15 (8).

I compared the arbitration rules of The International Court of Arbitration of the International Chamber of Commerce and London Court of International Arbitration. The arbitration rules of International Court of Arbitration in Paris and the arbitration rules of London Court of International Arbitration are similar in certain ways. There are, however, certain differences as discussed above. In general, I find the ICC Arbitration Rules more formal and strict compared to LCIA Arbitration Rules, especially due to the requirement of drawing terms of reference and the requirement of submission of an arbitral award by the arbitral tribunal to the ICC Court for approval before it can be rendered. There are similarities between the rules, for example, regarding the commencement of the arbitration, consolidation of more arbitrations, binding effect of award, proceeding with arbitration in case party does not appear. The arbitration rules provide differently regarding the appointment of arbitrators, the law applicable to arbitration, the place of arbitration, the language of arbitration, the joinder of additional parties, the time limit for rendering an arbitral award, the terms of reference and the submission of a draft of an award for approval.

2 The Agreement to Arbitrate

This chapter deals with the agreement to arbitrate. Within this chapter I will answer the fifth and sixth research question.

2.1 Definition and the Types of the Agreement to Arbitrate

A dispute can be resolved within an arbitration only if the parties to dispute have agreed upon that. The agreement must have a written form, it is called the arbitration agreement or the agreement to arbitrate. The agreement can be made even after the dispute has occurred, but in the vast majority of cases the agreement is made prior to the dispute. Typically, when the parties form a contract for their business transaction, they include an arbitration clause in it, which serves as an arbitration contract.[124]

The agreement to arbitrate is the basic element and fundamental element of international commercial arbitration. Without the agreement to arbitrate the parties to a dispute cannot resolve their dispute within an arbitration. The agreement to arbitrate records that the parties to a dispute have decided to submit their case to arbitration. Such consent of parties is crucial if the parties do not wish to resolve their dispute within a litigation.[125]

The agreement to arbitration constitutes the legal scope, as the parties to arbitration agreement choose which legal norms will be used within the arbitration. The autonomy of the parties to choose legal norms is extensive, as the parties are free to choose from various arbitration rules, national laws governing the arbitration and international conventions governing the arbitration.[126]

The two most important types of arbitration agreement are the arbitration clause and the submission agreement. The arbitration clause is made pro futuro before the dispute emerges. Arbitration clause is the most common form of arbitration agreement. It is usually incorporated into the principal agreement between the parties to the dispute and within this

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[124] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 11.
[125] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 85.
[126] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 11-12.

agreement the parties agree to resolve their possible future disputes by arbitration. The other very often used method of arbitration agreement is the submission agreement, in other words the agreement to submit existing disputes to arbitration.[127]

In practice, the arbitration clauses can be short. Even though, it is not advisable, the agreement can merely provide that a dispute will be settled by arbitration in London and it is sufficient for the arbitration agreement to be valid.[128] Nevertheless, if the arbitration clause is not drafted properly, it may end up being taken before a national court.[129]

The jurisdiction of an arbitration tribunal is constituted only by the expressed consent of the parties (by the arbitration agreement).

The agreement to arbitrate is also usually defined within national laws. For instance, the Czech Act on arbitration proceedings and on enforcement of arbitration awards[130] in section 2 provides: "*The parties may conclude an agreement that property disputes between them falling within the jurisdiction of courts shall be decided by one or more arbitrators or by a steady court of arbitration (arbitration agreement) except for disputes connected with enforcement of a decision and for disputes provoked by bankruptcy and composition*."[131]

The Czech Act on Arbitration Proceedings and Enforcement of Arbitration Awards provides the conditions that must be fulfilled cumulatively so that the arbitration can be processed. There must be a dispute between the parties to arbitration agreement. The dispute must be regarding property, the dispute must not arise from enforcement of the decision, the dispute can be resolved by a judicial settlement, the dispute would otherwise be decided by a court.[132]

The most important element of the agreement to arbitrate is undoubtedly the contractual freedom of the parties on which the agreement to arbitrate is based. There must be the will

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[127] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 86.
[128] *Arab African Energy Corporation Ltd v Olieprodukten Nederland BV* [1983] 2 Lloyd's Rep 419.
[129] *Insigma Technology Co. Ltd v Alstom Technology Ltd* [2008] SGHC 134.
[130] In Czech: "Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů."
[131] Zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálazů, § 2.
[132] Alexander Bělohlávek, *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů: komentář* (2nd edition,C. H. Beck 2012) 105.

of the parties to enter into arbitration agreement and have their current or potential dispute resolved within arbitration; without such a will, there can be no arbitration.

2.2 Parties, Validity and Arbitrability of the Agreement to Arbitrate

This subchapter discusses the parties to the agreement to arbitrate, the validity and arbitrability of the arbitration agreement.

2.2.1 Parties to the Agreement to Arbitrate

The legal capacity of the parties to an agreement to arbitrate is an essential condition for the agreement to be valid. In general, all natural and legal persons who have the capacity of entering into a contract have the capacity to enter into an agreement to arbitrate. If a certain party of an agreement to arbitration does not have such capacity, it is possible to bring into operation provisions of The New York Convention at the beginning or at the end of the process of arbitration.[133]

At the beginning of the process of arbitration, according to the article two of The New York Convention, it is possible to ask a competent court to stop the arbitration based on the fact that the agreement to arbitrate is void, inoperative or incapable of being performed.[134]

At the end, it is possible to ask for refusal of recognition and enforcement of arbitral award due to the fact the agreement to arbitrate does not have a certain capacity which the applicable law requires.[135]

The parties to arbitration agreement can be divided into four groups: natural persons, legal entities, public bodies and states. In case there is no legislation that would restrict these persons from being a party to arbitration agreement, all of these parties, in principle, can enter into arbitration agreement and consequently be a party to arbitration procedure.[136]

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[133] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 95.
[134] 'Convention on The Recognition and Enforcement of Foreign Arbitral Awards', *The New York Convention* (UNCITRAL 1958) accessed June 11, 2017, art II (3).
[135] 'Convention on The Recognition and Enforcement of Foreign Arbitral Awards', *The New York Convention* (UNCITRAL 1958) accessed June 11, 2017, art V (1).
[136] Mauro Rubino-Sammartano, *International Arbitration Laws and Practice* (Third edition, JurisNet 2014) 550.

In general, the persons in the states with a developed arbitration legislation are able to enter into arbitration agreement in case they are able to enter into agreements in general. This is valid for natural persons as well as for legal entities, and entities of private law as well as entities of public law including the state and the legal entities established by the state. This is not the case in some states with a developed arbitration legislation, for instance in France or Belgium; they restrict the right of corporations of public law and the legal entities established by state of entering into arbitration agreements. These entities are either completely restricted from entering into arbitration agreements or they need an approval from the state to enter into such agreements.[137]

2.2.2 Validity of the Agreement to Arbitrate

There are formal requirements that need to be fulfilled so that an agreement to arbitrate can be valid. The nonvalidity of an agreement to arbitrate shall be decided by a court according to the law chosen by the parties or according to lex arbitri in case the law was not chosen by the parties.[138]

The agreement to arbitrate typically includes the consent of parties to resolve their dispute within arbitration, the choice of law, language of arbitration, the way of appointing the arbitrators and their number, seat of arbitration, and the matter to be dealt with in arbitration.

In general, almost every international convention governing the international commercial arbitration requires the agreement to arbitrate to have a written form.[139]

When considering the requirements of agreement to arbitrate in international disputes, it is crucial to take The New York Convention into consideration.

Regarding the validity of the agreement to arbitrate in international business, there are essential elements that need to be fulfilled according to The New York Convention. These are formal validity (the written form of the agreement), the agreement must deal with

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[137] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 35.
[138] Klára Drličková, *Vliv legis arbitri na uznání a výkon cizího rozhodčího nálezu* (1st edition, Masarykova univerzita 2013) 50.
[139] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 89-90.

disputes that already exist or with the disputes occurring in the future, a dispute must arise according to defined legal relationship and a subject-matter that is capable of being settled by arbitration.[140] The article V of The New York Convention further provides that the parties must have legal capacity according to the law which applies to them and the agreement to arbitrate has to be valid according to the law to which the parties have subjected the arbitration agreement, or failing any indication thereon, under the law of the country where the award was made.[141]

The New York Convention defines in article II (2) "*agreement in writing*" as following: "*The term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."*[142] However, there have been changes in practice since adoption of The New York Convention, for instance Model Law provides that the obligation of written form can be fulfilled *"in any form of the content of the arbitration agreement*."[143]

Problematical is the issue of signature. For instance, the Brazilian Supreme Court of Justice decided that the signature is necessary in cases where a party wants to incorporate into an agreement an arbitration clause which is contained in a set of standard terms.[144] However, in general, it is viewed that the signature is not necessary considering that the agreement to arbitrate is in the written form.[145]

[140] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art II (1).
[141] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art V (1) (a).
[142] 'United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (New York Convention 1958) <http://www.newyorkconvention.org/english> accessed 12 June 2017.
[143] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (5th edition, Oxford University Press 2009) 91.
[144] *Kanematsu USA Inc. v ATS do Brasil Ltda* [2012], SEC 885.
[145] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (6th edition, Oxford University Press 2015) 76.

2.2.3 Arbitrability

The arbitrability provides whether a dispute is capable of being resolved within arbitration or whether it can be resolved only within litigation. If the dispute is not arbitrable, the contract to arbitrate cannot establish the power of arbitrators to decide such a dispute.[146]

As aforementioned, the international conventions provide that what is arbitrable is governed by national laws. In some countries, the arbitrability is defined relatively widely, for instance English law on arbitration does not define what is arbitrable and the English courts do not accept the arguments that some matter is not arbitrable. The legal systems of Sweden, Italy and the Netherlands allows all disputes with which the parties can dispose of.[147] In comparison, the Czech Act on arbitration in sections 1 and 2 allows only disputes regarding the property to be resolved within arbitration.[148] The international practice has not given the definite answer whether it is necessary to take into account the norms of lex arbitri of the seat of arbitration when deciding about the arbitrability or whether to only decide about the arbitrability merely based on the law governing the arbitration contract in the sense of contractual freedom (lex electa). The Czech Act on Arbitration Proceedings and Enforcement of Arbitral Awards on arbitration is based on the conception of lex arbitri.[149] It defines the arbitrability positively and negatively. The positive definition defines as arbitrable the disputes that can be decided by courts, the disputes also must relate to property (property disputes are, however, not defined in Czech legal system) and these disputes must be able to be resolved by court settlement. The negative arbitrability excludes the disputes that arise as a consequence of bankruptcy or settlement.[150]

There are in general, several exceptions from the general arbitrability within the legal systems of different countries. These are usually regarding the law of insolvency, the law

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[146] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 87.
[147] Jean-Francois Poudret et al, *Comparative Law on International Arbitration* (2nd edition, Sweet & Maxwell 2007) 289.
[148] Zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálazů, §§ 1-2.
[149] Alexander Bělohlávek, *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů: komentář* (2nd edition, C. H. Beck 2012) 106.
[150] Martin Janků, *Rozhodčí řízení. Alternativní způsoby rozhodování sporů* (1st edition, EUPRESS 2015) 26.

on protection of competition, the law of securities, the labor law and law of intellectual property.[151]

Jurisprudence differentiates between objective arbitrability and subjective arbitrability. The objective arbitrability determines subject-matters that can be resolved within the arbitration. The objective arbitrability is governed by a national law whereas the subjective arbitrability is based on a consensus of the parties to an arbitration contract which cannot exceed the limits of applicable national law for the arbitration; according to the subjective arbitrability, the parties can further restrict what can be dealt with in arbitration. It might happen that the subjective arbitrability is in accordance with objective arbitrability of one country and not in accordance with the objective arbitrability of the other country. In such cases it is necessary to apply the law determined by the international law.[152]

The arbitrability is in a close connection with validity of arbitration contract and with the public order which consists of enforcing legal provisions which protect the important social values of the state. The public order also restricts the contractual freedom of the parties to adopt an agreement to arbitrate, especially regarding the choice of lex arbitri, the procedural law of arbitration or the procedural rules of arbitration. Both arbitrability and the public order protect the most important social values and therefore are the arbitrability and the public order in the close connection. In case an agreement to arbitrate is in conflict with the public order or with the arbitrability, the consequence is the same in both cases – the agreement to arbitrate does not have legal effects despite the fact that such a contract is valid.[153] The New York Convention allows a state to not recognize an arbitral award in case the matter of a dispute is not arbitrable and if an arbitration agreement is in conflict with public order.[154]

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[151] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 87-93.
[152] Martin Janků, *Rozhodčí řízení. Alternativní způsoby rozhodování sporů* (1st edition, EUPRESS 2015) 26.
[153] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 96.
[154] 'Convention on The Recognition and Enforcement of Foreign Arbitral Awards', *The New York Convention* (UNCITRAL 1958) accessed June 11, 2017, art V (2).

The arbitrator must consider the dispute and determine from the agreement to arbitrate whether there was an intention of the parties to arbitration to resolve such a question in the arbitration.[155]

In practice the non-arbitrability is an uncommon reason for canceling of arbitral award. The reason for this is that it is usual that the law of the states which are usually a seat of arbitration define the arbitrability very widely.[156]

2.3 Recapitulation

In the subchapter, I recapitulate the answers to the fifth and sixth research question.

The agreement to arbitrate is the essential element of the international commercial arbitration. This element constitutes the arbitration and the existence of arbitration is impossible without it. The agreement to arbitrate represents the will of the parties to have their dispute resolved by arbitration and such a will is necessary for the arbitration to exist.

Considering the international commercial arbitration, the essentials of agreement to arbitrate are provided most importantly by The New York Convention. These are the written form of the agreement, the agreement to arbitrate must deal with disputes which already exist or which will arise in the future, a dispute must arise according to defined legal relationship, a subject-matter is capable of being settled in arbitration, the parties must have legal capacity according to applicable law and the arbitration agreement must be valid according to the law to which the parties have subjected the arbitration agreement, or failing any indication thereon, under the law of the country where the award was made.

[155] *Fiona Trust and Holding Corporation v Privalov* [2007] UKHL 40.
[156] Vít Makarius, *Rozhodčí smlouvy v mezinárodním obchodě* (1st edition, Nakladatelství C. H. Beck 2015) 301.

3 Arbitrators

This chapter focuses on appointment of arbitrators and on rights and duties of arbitrators. In this chapter I will answer the seventh research question.

3.1 Appointment of Arbitrators

In general, the international conventions governing the international commercial arbitration and the national laws provide that the parties to arbitration can choose the number of arbitrators and in case they do not do so, the process will be decided by a senate consisting of three arbitrators. In the past the standard was to have one arbitrator deciding a dispute and due to the higher objectivity and required knowledge and complexity of the cases, the senates of three arbitrators started to prevail. On the other hand, the more arbitrators there are, the longer and more complicated the procedure of arbitration can be.

It is recommended to have an odd number of arbitrators deciding a dispute and according to many international conventions and national laws the parties are obliged to choose only an odd number of them. The Czech Act on arbitration provides in section 7 that the agreement to arbitrate can specify the number of arbitrators, the concrete persons and the way of appointment and that the final number of arbitrators must be odd.[157] UNCITRAL Model Law also provides the parties with opportunity to choose the number of arbitrators and requires that the number of arbitrators is odd.[158] Some states allow the parties to choose an even number of arbitrators, however the arbitral tribunal or the chosen arbitrators are obliged to add an additional arbitrator to make an odd number. In general, the number is primarily decided by the parties to a dispute, it is usually a three-membered senate that decides the case. In my opinion, it is practical to have an odd number of arbitrators, as in practice it is far simpler to decide in an odd number and it eliminates situations in which it would be impossible to decide a case. I reckon that the three-membered senates deciding the case are a wise set, as it minimizes the risk of a biased arbitrator which might more easily occur in cases decided by a sole arbitrator.

[157] Zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálazů, §7.
[158] UNCITRAL Model Law on International Commercial Arbitration 1985, art 10 (1).

The arbitrators can be appointed by agreement of the parties, by an arbitral institution, by means of a list system, by means of the co-arbitrators appointing a presiding arbitrator, by a professional institution, or a trade association or by a national court.[159]

The way of appointing the arbitrators is primarily governed by an agreement to arbitrate between the parties, as it can contain the name of the concrete person or the way how the person would be appointed.

Choosing a concrete arbitrator in advance is non-practical, as the dispute usually arises in the future. On the other hand, when a dispute has already arisen, it is usual that the parties appoint a concrete person as an arbitrator – if the parties do not do so, the contract will not be void since there are mechanisms of how to appoint an arbitrator. The agreement to arbitrate does not necessarily have to choose a concrete person to be an arbitrator, the contract can only define a way (mechanism) how the arbitrators will be chosen. It can define the way how the parties will reach a consensus about the arbitrators; it can allow each party to choose some of the arbitrators (for instance, each party choosing one arbitrator and the chosen arbitrators chose the third arbitrator); the parties may also agree to entrust a person to appoint an arbitrator or an arbitral tribunal; the arbitrators can also be drawn.[160] These are the popular ways of defining the mechanism of appointing the arbitrators. However, there are almost no limitations of how the parties can define this mechanism within an agreement to arbitrate.

Other way of appointing the arbitrators is by an arbitral institution. These institutions appoint arbitrators according to their rules. These rules vary and according to them, parties have a higher or lower possibility to influence what persons are going to be appointed as arbitrators. For instance, according to ICC Rules in case of a sole arbitrator, the ICC court will appoint the arbitrator in case the parties do not reach a consensus in 30 days from the communication of the request for arbitration; and in case of an arbitral tribunal of three

[159] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (6th edition, Oxford University Press 2015) 240.
[160] Naděžda Rozehnalová, *Rozhodčí Řízení v Mezinárodním a Vnitrostátním Obchodním Styku* (3rd edition, Wolters Kluwer Česká Republika 2013) 217.

arbitrators, the court appoints the third arbitrator if the parties do not choose another procedure within which the arbitrators must be appointed in a certain time.[161]

Within the list system, each party selects three or four persons that they would find acceptable as arbitrators. After that, the parties exchange their selected persons and try to reach a consensus. It might happen that some person can be on both lists.[162]

There is also a way of appointing the presiding arbitrator by the two selected arbitrators who were appointed by the parties to arbitration. This is very usual when appointing a three-membered senate, and it is usually simple to reach a consensus, as each party nominates one arbitrator and the two arbitrators appoint the third arbitrator.

Arbitrators can also be appointed by a professional institution – the president or a senior officer of such a professional institution can be the appointing authority. This way should be used in cases where the matter of the case is a field in which the professional institution is specialized.[163]

In case the parties to arbitration agreement cannot reach a consensus regarding the appointing of arbitrators and nobody is empowered to appoint the arbitrators, it is crucial to determine which national court is empowered to do so. It is usually the court of the seat of arbitration that is empowered to do so, no matter which nationality the parties are or what is the matter of the dispute. In case the seat of arbitration has not been specified, then the party who wishes to continue in resolving the dispute within arbitration applies to the national court asking to appoint the arbitrators.[164]

3.2 Rights and Duties of Arbitrators

By entering into an arbitration agreement, the arbitrator gains the rights and duties. These are dealt with in this subchapter.

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[161] ICC Rules 2017, art. 12.
[162] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (6th edition, Oxford University Press 2015) 241-242.
[163] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (6th edition, Oxford University Press 2015) 243.
[164] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (6th edition, Oxford University Press 2015) 243.

3.2.1 Rights of Arbitrators

The agreement to arbitrate provides an arbitrator with rights and protections. The most important are the following.

3.2.1.1 Right to Remuneration

For performing his or her mandate, the arbitrator is entitled to financial remuneration by the parties to arbitration. This right is not expressly within the key international conventions and even in cases where national laws do not constitute arbitrator's right of remuneration, it is generally accepted that an arbitrator is entitled to receive a remuneration for providing of his or her services within arbitration. This is an understandable consequence for being part of an arbitration agreement with the parties to arbitration, and a custom in the practice of international arbitration. The actual amount of remuneration depends on how it is specified within agreement to arbitrate. Almost all international institutions have defined how the remuneration of arbitrators will be calculated with various methods. The decisions of the institutions about remuneration of arbitrators is almost never a subject to judicial review. In ad hoc arbitration, the remuneration is specified solely by agreement between arbitrator and parties to arbitration.[165]

3.2.1.2 Right to Cooperation

An arbitrator has a right to good faith cooperation of the parties to arbitration when dealing with the dispute. When entering into an agreement to arbitrate, the parties express their will to resolve their dispute by arbitration which includes collective effort to resolve the dispute efficiently and fairly.[166]

Certain jurisdictions impose obligations on the parties by the statutes. If a party to arbitration fails to fulfil such obligations to be cooperative, it constitutes a breaching of the agreement to arbitrate and the other party is entitled to relief, including the wasted costs and damages to be reimbursed. [167]

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[165] Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014) 2018.
[166] Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014) 2025.
[167] English Arbitration Act 1996, s 40; Victoria Commercial Arbitration Act 2011, s 24B.

3.2.1.3 Right to Immunity

The international conventions regarding the arbitration do not govern the immunity of arbitrators. The exception is the ICSID Convention which gives the arbitrators wide grant of absolute immunity from jurisdiction of national courts.[168]

Most of the national arbitration laws give the international arbitrators immunity from civil claims. Many statues regarding the arbitration provide arbitrators with absolute or qualified immunity. In case there is no statutory provision regarding the immunity within the jurisdiction, the courts usually consider the immunity either to be absolute or broadly qualified.[169] For instance, the Revised Uniform Arbitration Act provides the arbitrators with the same immunity as the judges have.[170]

The civil law jurisdictions usually provide a broad immunity to arbitrators with exception for fraud and similar misconducts. For example, this applies to Switzerland, Belgium, the Netherlands, Finland and Spain.[171]

Most of the arbitral rules of arbitral institutions exclude the civil liability of arbitrators. For instance, the ICC Rules in article 41 provide that the ICC Court and its members and employees are not liable to any person for any act or omission regarding the arbitration, this does not apply if this limitation of liability is prohibited by relevant law.[172]

3.2.1.4 Right to Confidentiality

There are beliefs that arbitrators have a right of confidentiality which protects them in case someone would make a disclosure to third parties of the award of arbitrator as well as in cases within process of arbitration. Nevertheless, if the parties to arbitration would wish to disclose the arbitral award to third parties, the arbitrator would almost certainly not have a possibility to object. The confidentiality rights of arbitrators are presumed to arise from

[168] Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014) 2027.
[169] Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014) 2028.
[170] Revised Uniform Arbitration Act 2000, s 14.
[171] Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014) 2032.
[172] ICC Arbitration Rules 2017, art 41.

the agreement to arbitrate. It is very uncommon in practice for arbitrators to raise their confidentiality rights.[173]

3.2.1.5 Right to Override a Procedural Agreement of the Parties

The parties to arbitration sometimes tend to override mandatory norms of procedure. This gives an arbitrator the right to override a procedural direction of the parties to arbitration in a situation where the parties make an agreement which does not comply with a mandatory procedural norm. This can be, for example, a case when both parties agree that the case will be presented by only one of the parties.[174]

3.2.1.6 Right to Determine Issues Not Raised by the Parties

It is not certain if the arbitrator should apply laws which were not raised by the parties to arbitration based on the principle Iura novit curia.[175]

3.2.1.7 Right to Dissent

Since the arbitrations are often dealt with by more than one arbitrator, the arbitrators which find themselves not sharing the opinion of the majority have the right to present their dissenting opinion.

3.2.1.8 Right to Mediate and Conciliate when Facilitating Settlement

It is not generally accepted whether the arbitrator has power to promote a settlement, as there is no duty that would prevent him or her from doing so. Then there is not a unity about whether the settlement agreements can be considered as arbitral awards.[176]

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[173] Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014) 2039.
[174] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (1st edition, Kluwer Law International 2012) 120.
[175] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (1st edition, Kluwer Law International 2012) 122.
[176] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (1st edition, Kluwer Law International 2012) 123.

3.2.2 Duties of Arbitrators

Besides rights and powers, the arbitrators have duties that they have to fulfill. Besides the duties which are provided by international conventions and other legal norms, it is crucial to note that the parties to arbitration agreement have a possibility to impose duties onto arbitrators within the agreement (it is up to the arbitrator whether he or she accepts to enter into an agreement with duties that the parties agreed upon). Furthermore, there are ethical and moral duties of arbitrators, these are provided especially by ethical codes – for instance, the International Bar Association Rules of Ethics for International Arbitrators[177], Code of ethics for Arbitrators in Commercial Disputes (American Bar Association)[178].

3.2.2.1 Duty to Carry Out the Arbitration and to Decide

The basic duty of arbitrators is to carry out the arbitration and at the end of the procedure to make a decision. The arbitrator is obliged to decide whether he or she is entitled to carry out the arbitration and decide. In case the arbitrator concludes that he or she is entitled to these, he or she must continue the proceedings and carry out the arbitration and decide the case.

3.2.2.2 Other Duties or Arbitrators

The arbitrators have a duty to remain independent and impartial, the duty of disclosure, due process obligations (duty to act judicially), the duty to have an equal and fair approach to the parties, the duty to provide parties to arbitration with an opportunity of presenting its case, the duty to communicate with the parties, the duty to be efficient and expedient, the duty of commerciality (their role is to guard the international commercial order, the arbitrators must respect customs and principles of international commerce), the duty to be cooperative and the duty to act in good faith, the duty to complete his or her mandate (the duty to finish the arbitration), the duty to not exceed his or her mandate, the duty to render an enforceable arbitral award, the duty of confidentiality, the duty to investigate corruption

[177] IBA Rules of Ethics for International Arbitrators 1987.
[178] Code of ethics for Arbitrators in Commercial Disputes, 1977.

and fraud, the duty to know the law (based on a principle "*Iura novit curia*"), and the duty to apply mandatory legal norms.[179] Besides the mentioned duties, there are also potential duties about which there is no general consensus whether they are or are not duties.

The Czech Act on arbitration in section 6 provides that the arbitrators are obliged not to disclose the issues of the dispute that they discovered during the arbitration procedure, unless they were relieved of this duty.[180] The permanent arbitration institutions are obliged to deposit the arbitral awards for 20 years since its entering into force and the arbitrators have the duty to submit the arbitral award and other documents detailing the procedure of arbitration to district court within 30 days.[181] Section 18 provides that the parties to arbitration must be given the equal status and they must have a possibility to exercise their rights[182]from which it can be deduced that these are the duties of arbitrators.

3.3 Permanent Arbitration Institutions

The permanent arbitration institutions play a significant role within international commercial arbitration. These institutions are often sought after for their good reputation, professionalism and also for their assistance to parties to a dispute; these institutions, for instance, provide sample arbitration agreements which are simple for the parties to dispute to fill.

The most important arbitral institutions are International Court of Arbitration, London Court of International Arbitration, American Arbitration Association and International Center for Dispute Resolution, The Permanent Court of Arbitration (headquartered in Hague), Swiss Chamber's Arbitration Institution, Vienna International Arbitral Centre, Stockholm Chamber of Commerce Arbitration Institute, Singapore International Arbitration Centre, Hong Kong International Arbitration Centre, and other institutions.[183]

[179] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (1st edition, Kluwer Law International 2012) 74-110.
[180] Zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálazů, § 6 (1).
[181] Zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálazů, § 29 (1), (2).
[182] Zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálazů, § 18.
[183] Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014) 175-198.

3.3.1 American Arbitration Association

The American arbitration association was originally established in 1926 as a non-profit public service organization.[184]

The International Centre for Dispute Resolution of American Arbitration Association with its, which was established in 1996, provides conflict-management services in more than 80 countries worldwide. It provides administrative services such as assisting the appointment of arbitrators, sets hearings, and provides users with information on dispute resolution options. It pursues to move cases of arbitration fairly and impartially until the end of procedure.[185]

3.3.2 ICC International Court of Arbitration

The International Court of Arbitration is the leading arbitration institution in the world. It was established in 1923 and since then it has been helping to resolve difficulties within international commercial and business disputes to support trade and investment. Its purpose is ensuring that the ICC Rules are applied properly as well as assisting the parties to disputes and arbitrators in overcoming procedural obstacles.[186] The ICC international Court of Arbitration itself is not an arbitration tribunal, however, it has the appointing authority, which means it appoints the arbitral tribunals.

3.3.3 The London Court of International Arbitration

London Court of International Arbitration, headquartered in London, was established in 1883. The Court of Common Council of the City of London set up a committee whose task was to draw up proposals to establish a tribunal for the arbitration of domestic and international commercial disputes. In 1884, the committee proposed a plan for a tribunal

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[184] Martin F Gusy et al, *A Guide to the ICDR International Arbitration Rules* (1st edition, Oxford University Press 2011) 3.

[185] 'About the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)' (*AAA*, 2017) <https://www.icdr.org/icdr/faces/s/about?_afrLoop=6499350429318064&_afrWindowMode=0&_afrWindowId=1ahrobmyv7_52#%40%3F_afrWindowId%3D1ahrobmyv7_52%26_afrLoop%3D6499350429318064%26_afrWindowMode%3D0%26_adf.ctrl-state%3D1ahrobmyv7_96> accessed 8 November 2017.

[186] 'International Court of Arbitration' (*ICC*, 2017) <https://iccwbo.org/dispute-resolution-services/arbitration/icc-international-court-arbitration/> accessed 9 October 2017.

with the co-operation of the London Chamber of Commerce. This scheme was adopted in 1891 due to the passing of the arbitration act in 1889. The new tribunal was named "The City of London Chamber of Arbitration" and twelve years later it was renamed to "London Court of Arbitration." It was renamed again to "The London Court of International Arbitration" in 1981 due to the fact that the court was dealing mainly with international disputes.[187]

It is an authority for the proper application of the LCIA rules. Its main responsibilities are appointing tribunals, determining challenges to arbitrators and controlling costs.[188] The London Court of International Arbitration does not serve as an arbitral tribunal, though, it has the appointing authority and therefore appoints the arbitral tribunals.

3.3.4 Vienna International Arbitral Centre

Vienna International Arbitral Centre ("VIAC") was founded in 1975 as a department of the Austrian Federal Economic Chamber. It serves as a body for settlement of international commercial disputes, or more precisely, the cases involving at least one party with its place of business or normal residence outside of Austria or cases concerning disputes with an international character.[189]

3.3.5 Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic

Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic was established in 1949 and was attached to Czechoslovak Chamber of Commerce. Afterwards, it was renamed to Arbitration Court attached to the Czechoslovak Chamber of Commerce and Industry and finally in 1995 the court obtained its present name, Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic. The court has already decided more than 15 000 disputes. In 2005 the court was appointed by EURid and serves

[187] 'History' (*LCIA*, 2017) < http://www.lcia.org/LCIA/history.aspx> accessed 9 October 2017.
[188] 'Organisation' (*LCIA*, 2017) <http://www.lcia.org/LCIA/organisation.aspx> accessed 9 October 2017.
[189] 'About us' (*VIAC*, 2017) <http://www.viac.eu/en/viac/about-us-en> accessed 7 November 2017.

as the .EU domain name disputes provider and since 2016 it administers also .ЕЮ[190] domain name disputes and also since 2004 it serves as a center for domain name disputes for ccTLD .cz[191]

3.4 Recapitulation

In this subchapter, I recapitulate the answer to the seventh research question.

The parties to arbitration decide the number of arbitrators that will be appointed, however, some jurisdictions require this number to be odd. The arbitrators can be appointed by the agreement of the parties, by an arbitration institution, by means of a list system, by means of the co-arbitrators appointing a presiding arbitrator, by a professional institution, by a trade association or by a national court.

The arbitrators have rights and duties within the arbitration. The rights are especially the right to remuneration, the right to cooperation, the right to immunity, the right to confidentiality, the right to override a procedural agreement of the parties, the right to determine issues not raised by the parties, the right to dissent and the right to mediate and conciliate when facilitating settlement. The basic duty of an arbitrator is to carry out the arbitration and to decide. There are, however, many other duties which are set out in this chapter. Furthermore, there are ethical and moral duties provided by ethical codes.

[190] "EU" in Cyrillic.
[191] 'Arbitration Court' (Arbitration Court, 2017) <http://en.soud.cz/arbitration-court> accessed 9 November 2017.

4 Arbitration Proceedings and Arbitral Award

This chapter deals with the procedure of arbitration and with the arbitral award. In this chapter I will answer the eighth and ninth research question.

4.1 Arbitration Proceedings

Apart from the standard procedure, there are various types of arbitration proceedings, such as expedited procedures which are not dealt with in this diploma thesis.

The Proceedings of arbitration vary based on the applicable laws and rules. The parties to arbitration can define the way of the arbitration procedure which is usually done by provisions within the arbitration agreement. The parties may also agree that certain rules (for instance, rules of arbitration institution) will govern the procedure of arbitration between them. The parties, however, must respect the mandatory legal norms. Compared to litigation, the parties have a significantly wider possibility to change and define the procedure of arbitration and they can do so even after the procedure has already been commenced. In case the parties do not adopt any rules of procedure, the relevant national law will provide the way how the procedure will be proceeded.

The usual arbitral proceedings consist of notice to arbitration (request for arbitration), response to the notice of arbitration, appointment of arbitrators, preliminary meeting between the arbitral tribunal and the parties, exchange of written submissions, disclosure of documentary evidence (requests to produce), oral hearing, post-hearing submissions, deliberations of the arbitrators, issuance of the ward and setting aside or enforcement of the award in domestic courts.[192]

For instance, the Czech Act on arbitration provides that in case the parties do not agree upon the procedure of arbitration, the arbitrators will proceed with the procedure in a way they find suitable.[193]

[192] Simon Greenberg, Christopher Kee and Ramesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2010) 322.
[193] Zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálazů, § 19 (2).

4.1.1 Commencement of Arbitration

Despite some differences, according to most of the national laws the arbitration commences when the request for arbitration (or also a notice of arbitration) has been delivered to the respondent by the claimant. This may not be required in cases where there have been reasonable efforts made to do so. The national and international legal norms do not provide any time limitations to commence an arbitration. Some national laws provide a limit within which the claims must be asserted. The time limits may be provided by the agreement to arbitrate.[194] There is no prescribed form for the request of arbitration but in the vast majority of the cases the request of arbitration is in the written form. The receipt of the request of arbitration by the respondent is crucial and can eventually lead to annulment of the arbitration.[195]

There is a generally accepted consensus that the national and international requirements for the service of process applicable in litigation are not applicable to international arbitrations.[196]

4.1.2 Between Commencement and Hearing

After the respondent has received the request for arbitration, he is given time to reply.

Reply to request for arbitration is governed differently. The institutional arbitration rules usually govern the replies of the respondent and provide certain time to do so. For example, the ICC Rules provide thirty days for reply[197] as well as HKIAC Rules.[198]

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[194] Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014) 2217-2218.
[195] *Blackpool Borough Council v F Parkinson Ltd* [1992] 58 BLR 85 (QB).
[196] *Skorimpex Foreign Trade Co. v* Lelovic [1991] O.J. No. 641; *Vanol Far E. Mktg Pte Ltd v Hin Leong Trading Pte Ltd* [1997] 3 SLR 484.
[197] ICC Arbitration Rules 2017, art 5.
[198] HKIAC Administered Arbitration Rules 2013, art 5.

The institutional rules usually require that the respondents provide a counterclaim within the reply to request for arbitration in a provided time limit.[199] In case the respondent provides a counterclaim, the claimant is given the same time for response.[200]

Afterwards, an arbitral tribunal is constituted (in case of arbitrations before arbitral tribunals) and the arbitrators are appointed. These are discussed within the third chapter. Then it is possible to eventually challenge an arbitrator which can be a difficult step to make since it can influence the arbitrator's objectivity in case he or she will not be challenged.

After the arbitrators have been appointed (or the arbitral tribunals have been appointed), it is usual to have an initial procedure conference with the parties to arbitration for identifying the approaches and ensuring time efficiency.[201] Some institutional rules require this, for instance ICC Arbitration Rules 2017 (called "Case Management Conference").[202]

ICC Arbitration Rules require the arbitral tribunal to draw the terms of reference and submit it to ICC Secretariat. It must be signed by the arbitral tribunal and the parties.

After that, the arbitrators usually order the parties to arbitration to exchange the written submissions, and to gather evidence relevant to the case before the commencement of the oral stage of procedure.[203] However, the written submissions can be done flexibly throughout the proceedings. Subsequently, the there is a disclosure of documentary evidence.

4.1.3 Hearing and Proceedings after the Hearing

Afterwards follows the oral phase, which usually occurs within the arbitration procedure. Only a small number of arbitrations are resolved without the oral phase.

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[199] ICC Arbitration Rules 2017, art 5; LCIA Rules 2014, art 2 and 6; HKIAC Rules, art 5 (4); SIAC Rules, art 4 (2).
[200] LCIA Rules 2014, art 15; ICC Arbitration Rules 2017, art 5 (6).
[201] Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014) 2232.
[202] ICC Arbitration Rules 2017, art 24.
[203] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (6th edition, Oxford University Press 2015) 373.

The hearing is generally understood as a meeting where counsel and the arbitrators are physically present to present each party's oral arguments, to examine the witnesses, and for the arbitrators to ask questions to the counsels and witnesses.[204]

The procedure of hearing generally consists of opening statements, examination of witnesses, conferencing of witnesses and closing submissions.[205]

Hearing should ideally be the final phase of participation of the parties to arbitration in the arbitration procedure, however, in practice, if the arbitrators agree, the parties can submit briefs even after the hearing. The parties in these briefs summarize the core information from their evidence and argument. In a situation when new evidence occurs after the hearing has been finished, the arbitrators can open the proceedings again if some party requests to do so and wishes to present it.[206]

In the larger cases, the parties are usually permitted to the post-hearing written submissions that comment on the evidence given during hearing and they can be allowed to summarize all factual and legal arguments presented during the proceedings. The parties are usually required to provide these submissions simultaneously after the final hearing.[207]

Subsequently, there is a date announced to the parties to arbitration when the additional submissions and arguments will not be permitted anymore.

After that, the arbitrators have a time for deliberation. Followingly, there is the phase of rendering and notification of the arbitral award. The issued award can be set aside or enforced at in the domestic courts.

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[204] Simon Greenberg, Christopher Kee and Ramesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2010) 354.
[205] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (6th edition, Oxford University Press 2015) 404-409.
[206] Nigel Blackaby et al., *Redfern And Hunter on International Arbitration* (6th edition, Oxford University Press 2015) 411-412.
[207] Simon Greenberg, Christopher Kee and Ramesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2010) 328.

4.2 Arbitral Award

This subchapter discusses the definition of the arbitral award, the types of the arbitral award and the formal requirements of the arbitral award.

4.2.1 Definition of the Arbitral Award

The New York Convention defines that the term arbitral award "*shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.*"[208]

The arbitral award is the final step within the process of arbitration. After the arbitral proceedings have been concluded, the arbitrators will deliberate and issue a final award which grants relief on the claims of the parties and resolves the dispute. The award is a final and a binding legal instrument which has an immediate legal effect and creates immediate rights and obligations for the parties. After the arbitral award has been made, the arbitrator's mandate is concluded. Their remaining powers and responsibilities are very restricted. The following steps, including proceedings, that follow the issuing of an award are in most of the cases a matter for national courts.[209]

The award may deal with legal or factual disputes, with interpretation of agreements or with rights and duties arising from the contract. All arbitral awards are also arbitral decisions, however, not all the arbitral decisions are arbitral awards. The arbitration award is a decision which constitutes rights and duties between the parties to arbitration and it is directly enforceable. In general, once the arbitrator/arbitrators issue an arbitral award, they cannot make further decisions in the case.[210]

The arbitration award is the final, binding and enforceable decision. The other decisions that are made within the process of arbitration are usually done in an informal way without the reasoning. These decisions are procedural. Such a decision can be, for instance, a decision about place of oral hearing (decision about the place which is not a seat of the arbitration court). In general, there is no possibility of appeal against the decision, however, in some

[208] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art I (2).
[209] Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014) 2894.
[210] Petr Dobiáš et al., *Současné trendy řešení sporů v rozhodčím řízení* (1st edition, Aleš Čeněk 2013) 149.

cases the procedural decisions can have effect on the parties similar to awards and in such cases, they may be perceived as arbitral awards and the courts decide whether such a decision should be requalified as an award.[211]

There are basic characteristics that differentiate awards from other types of decisions. The award concludes a dispute between parties with the effect of res judicata, it solves the claims of the parties to a dispute, it can be recognized and enforced, and it can be reviewed by a court in the place of arbitral proceedings.[212]

In most of the cases, the parties to arbitration comply with the arbitration awards and after a final award has been made, the parties accept the result, and this means the end of a dispute. There are, however, cases when one or both parties refuse the arbitral award or arbitrators' decision; in these cases, it is crucial to determine the effects of the arbitral award and of the following proceedings which can challenge and enforce the arbitral award.[213]

4.2.2 Types of Arbitration Awards

There are different types of arbitration awards recognized internationally. According to the international rules of arbitration and rules of arbitral courts (especially UNCITRAL, ICC arbitration rules, LCIA rules) we distinguish final award, partial (or separate) award, draft award and interim (interlocutory) award,[214] provisional award[215], default award, additional award, settlement or consent agreement as award, refusal to adopt settlement agreements as award, foreign award, termination of proceedings without an award.[216]

The term 'final award' means an award resolving issues in arbitration. It can have a form of a single award which deals with all issues or it can be the last one of more awards in case

[211] Petr Dobiáš et al., *Současné trendy řešení sporů v rozhodčím řízení* (1st edition, Aleš Čeněk 2013) 150.
[212] Petr Dobiáš et al., *Současné trendy řešení sporů v rozhodčím řízení* (1st edition, Aleš Čeněk 2013) 151.
[213] Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer Law International 2014) 2897.
[214] Petr Dobiáš et al., *Současné trendy řešení sporů v rozhodčím řízení* (1st edition, Aleš Čeněk 2013) 151.
[215] 'Provisional' award is sometimes used instead of 'interim (interlocutory)' award.
[216] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (1st edition, Kluwer Law International 2012) 1270-1288.

of dealing with the issues in sequence. The final award is an award which is intended to completely determine every issue submitted.[217]

4.2.3 Formal Requirements of the Arbitral Award

There are formal requirements that the arbitral award must meet. Otherwise, it can be annulled, or it can be unrecognized in a foreign state. These formal requirements are governed differently in each state by its legal norms and by international conventions regarding the international arbitration. For instance, the Czech Act on arbitration requires the award to be in the written form.[218] Generally, the formal requirements of awards are governed by the agreement to arbitrate and by the lex arbitri.

4.3 Recapitulation

In this subchapter, I recapitulate the answers to the eighth and ninth research question.

The standard proceedings of international commercial arbitration consists of request for arbitration (notice of arbitration), response of the respondent with the eventual counterclaim (in such case, the claimant is given the possibility to respond to it) to the request for arbitration, appointment of the arbitrator (or arbitral tribunal) and eventual challenge of him/her/them, initial procedure conference (preliminary meeting) with the parties to arbitration, exchange of written submissions (complex pleading of the parties to arbitration), disclosure of documentary evidence, oral hearing, post-hearing submissions, deliberations of the arbitrators, issuance of the award and setting aside or enforcement of the award in national courts.

The New York Convention defines the arbitral awards as awards made by arbitrators appointed for each case and the awards made by permanent arbitral bodies to which the parties have submitted. In most cases, the arbitral award is the final step of the process of arbitration. It is a final, binding and enforceable decision with immediate legal effect that constitutes immediate rights and obligations to the parties.

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[217] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (1st edition, Kluwer Law International 2012) 1271.
[218] Zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálazů, § 3 (1).

Conclusion

The main aim of my diploma thesis was to identify and evaluate the international commercial arbitration with a focus on the definition of international commercial arbitration, legal regulations governing the international commercial arbitration and the discovering of differences between arbitration rules of The International Court of Arbitration of the International Chamber of Commerce and London Court of International Arbitration using comparison, the agreement to arbitrate, the appointment and the rights and duties of the arbitrator, the proceedings of international commercial arbitration and the arbitral award. I have set nine research questions which I have answered and made the recapitulations of the relevant research questions at the end of each chapter.

Within the first chapter, I focused on the definition of international commercial arbitration and on the law governing the international commercial arbitration.

I defined the alternative dispute resolution and specified the selected methods of alternative dispute resolution. The chapter further defines arbitration and differentiates it from other methods of alternative dispute resolution. Then I have defined the international commercial arbitration and specified its advantages and disadvantages. Subsequently, the chapter discusses the law governing the international commercial arbitration, the important international treaties, national legal norms, lex arbitri and arbitration rules.

I compared the ICC Arbitration Rules and LCIA Arbitration Rules. I found the ICC Arbitration Rules more formal and strict, especially because of the requirement of drawing the terms of reference and because of the obligation of submission of an arbitral award by the arbitral tribunal to the ICC Court for approval before it can be rendered. I discovered the similarities and differences between these rules, as discussed above. There are similarities between the rules, for instance, regarding the commencement of the arbitration, consolidation of more arbitrations, binding effect of award, proceeding with arbitration in case party does not appear. The arbitration rules provide differently regarding the appointment of arbitrators, the law applicable to arbitration, the place of arbitration, the language of arbitration, the joinder of additional parties, the terms of reference, the submission of a draft of an award for approval, and the time limit for rendering an arbitral award.

Within the second chapter, I dealt with the agreement to arbitrate.

I discussed the definition and the types of the agreement to arbitrate. The agreement to arbitrate is the basic essential element of international commercial arbitration which constitutes the arbitration itself and, therefore, is essential for the arbitration to exist. The most usual types of arbitration agreement are the arbitration clause and the submission agreement. For entering into the agreement to arbitrate, it is necessary for the parties to have the legal capacity to do so. For the arbitration agreement to be valid, according to The New York Convention, it is crucial to be in the written form, it must deal with existing disputes or the disputes emerging in the future, a dispute must arise according to defined legal relationship and the subject-matter of the dispute must be capable of being settled within arbitration, the parties must have a legal capacity according to the law applicable to the arbitration agreement and the agreement to arbitrate must be valid according to the law to which the parties have subjected the agreement to arbitrate. The arbitrability provides whether a dispute is capable of being resolved within arbitration. The jurisprudence differentiates between objective and subjective arbitrability – the objective arbitrability determines subject-matters that are possible to resolve within arbitration; the subjective arbitrability provides that the parties to arbitration can further restrict the subject-matter that is capable of being resolved within arbitration.

The third chapter dealt with the appointment of arbitrators, with the rights and duties of arbitrators and with the permanent arbitration institutions.

The way of appointing the arbitrators is possible by the agreement of the parties to arbitration, by an arbitral institution, by means of a list system, by means of the co-arbitrators who appoint a presiding arbitrator, by a professional institution, by a trade association or by a national court. Some jurisdictions require the obligatory odd number of arbitrators within arbitration, some have it merely as a recommendation. The arbitrators are entitled to various rights and duties. The rights are especially the right to remuneration, the right to cooperation, the right to immunity, the right to confidentiality, and other rights. The basic duty of the arbitrator is to carry out the arbitration and to decide the case. Other duties are, for instance, the duty to remain independent and impartial, the duty of disclosure, the duty to have an equal and fair approach to the parties to arbitration, the duty not to exceed the mandate, and other duties.

There are many international arbitration institutions which play a very important role within the international commercial arbitration. The most important arbitral institutions are International Chamber of Commerce International Court of Arbitration, London Court of International Arbitration, American Arbitration Association and International Center for Dispute Resolution, and other.

In the fourth chapter, I discussed the arbitration proceedings and the arbitral award.

The standard proceedings of international commercial arbitration usually consist of commencement of the arbitration, reply of the respondent with the eventual counterclaim, appointment of the arbitrator or arbitrators and eventual challenge of them, initial procedure conference with the parties to arbitration, written submissions of complex pleading of the parties to arbitration, disclosure of documentary evidence, oral hearing, post-hearing submissions deliberation of the arbitrators, rendering of the arbitral award and setting aside or enforcement of the arbitral award in national courts.

The New York Convention defines the arbitral award as awards made by arbitrators appointed for each case and the awards made by permanent arbitral bodies to which the parties have submitted. The arbitration award is the final, binding and enforceable decision. The arbitral award concludes a dispute between parties with the effect of res judicata. The types of arbitration awards are the final award, partial award, draft award and interim award, provisional award, default award, additional award, settlement or consent agreement as an award, refusal to adopt settlement agreements as an award, foreign award and the termination of proceedings without an award. The formal requirements of the arbitral award are governed differently in different jurisdictions.

I believe that international commercial arbitration is still, in general, the most suitable method of dispute resolution in international commerce, as its advantages significantly outweigh the disadvantages, and compared to litigation it is a more suitable method of dispute resolution regarding the international commercial disputes. In my opinion, the most significant advantages are its relatively short duration and flexibility, as the parties to arbitration are able to customize the arbitration according to their needs and do not need to follow rigid obligatory legal norms which are typical for litigation.

I reckon that international commercial arbitration will remain the leading method of alternative dispute resolution used for resolving international commercial disputes in the following years. Nevertheless, it is possible that online dispute resolution and other forms of dispute resolution using IT technologies will change this trend once there will be a more complex legal regulation of these alternative methods and when IT technologies develop even further so that they will make the procedure simple, fast, cheap and safe. Therefore, it would be worthwhile to pay a closer attention to these new online ADR methods. However, the international commercial arbitration is a well-established and well recognized method of ADR and it will keep its prime for some time.

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