

# Kluwer Arbitration Blog

## Claims for Losses Caused by Criminal Offences not to be Arbitrated, Say Lithuanian Courts

Stasys Zelenekas (Greenlex) · Saturday, November 10th, 2018 · Young ICCA

The Court of Appeal of Lithuania (“Court of Appeal”) in *Prosecutor v. Public Entity “Pramog? sala”*,<sup>1)</sup> has ruled on 9 August 2018 that claims for damages are not arbitrable in cases where the (disputable) loss is caused by a criminal act. It must be noted, though, that the Law on Commercial Arbitration of the Republic of Lithuania (2012) does not contain this prohibition. However, it establishes that disputes arising from family legal relations and disputes concerning registration of patents, trademarks and design may not be submitted to arbitration. Moreover, disputes arising from employment and consumer contracts may not be referred to arbitration only where an arbitration agreement is concluded after the dispute has arisen.

The list of non-arbitrable subject matter does not include claims when loss is caused by a criminal act. Therefore, the position of the Court of Appeal clarifies the limits of arbitrability of certain types of disputes under Lithuanian law. What remains in doubt, however, is whether the ruling of the Court of Appeal fully complies with the parties’ freedom to arbitrate any disputes (including tort disputes).

### Facts of the case

The dispute in question concerned a concession contract concluded between the municipality of Šiauliai (“Municipality”) and a public enterprise (incorporated by the Municipality). The contract included a standard arbitration clause stating that any disputes arising about the performance of the contract shall be decided by an arbitral tribunal. Eventually, the manager of the public enterprise was accused of abuse of powers resulting in failure to perform the contract and an associated loss suffered by the Municipality. The Lithuanian court (which heard the criminal case) has recognised the Municipality’s right to damages arising from the manager’s criminal act and determined damages to be recoverable from both the enterprise and the manager.

At the onset of the civil proceedings, the manager and the enterprise challenged the court’s jurisdiction claiming that the dispute is subject to arbitration in accordance with the contract’s arbitration clause, which provided that *any* disputes shall be settled by an arbitral tribunal. The Lithuanian court of first instance supported this position. The Court of Appeal, however, reversed the decision.

### Court of Appeal’s ruling

The Court of Appeal has ruled that “the *private nature* [emphasis added] of arbitration determines that only disputes arising from private (commercial) legal relationships might be arbitrable. Meanwhile, disputes arising in relationships regulated by public law (e. g., criminal law) cannot be arbitrable”. On the basis of this, the Court of Appeal found that claims for losses arising from criminal offences should be heard by courts and not by an arbitral tribunal.

The Court of Appeal also noted that if the claims for damages were filed against one of the joint debtors, all associated claims must be dealt with jointly by the court and not by an arbitral tribunal, despite an arbitration agreement in the contract between the creditor and one of the debtors. The reason – the connection between the private contractual relationship and the criminal conduct that caused the loss.

## Comment

Lithuanian arbitration law does not explicitly state that disputes for damages caused by criminal activities are non-arbitrable. Neither is such a restriction established by other Lithuanian legislation. Therefore, the recent ruling of the Court of Appeal is of great importance as it limits the parties’ right to refer these disputes to arbitration.

It must be noted that in this case, the Court of Appeal also pointed out that such disputes may be dealt with by two different bodies (the court or an arbitral tribunal) if the claims can be separated on the basis of both *fact and law*. The Court of Appeal emphasised the necessity of the claims being *inextricably linked* to be heard by the same adjudicatory authority (i.e., by the court). However, the Court of Appeal did not provide any specific guidelines that enable parties to identify when the claims might be seen as inextricably linked. To that extent, the reasoning of the Court of Appeal might be considered to have some shortcomings.

In this case, the claimant had sought joint and several liability of both defendants (i.e., the manager and the enterprise). Moreover, the claims were based on the same factual circumstances. Therefore, in opinion of the Court of Appeal, both criteria (factual and legal) were satisfied: the Court of Appeal held that the claims being “inextricably linked” meant that they could not be resolved by arbitration.

There is no doubt that portions of the claim (to some extent) might have been based on provisions of public (i.e., criminal) law. Nevertheless, there do not appear to be any obvious reasons under Lithuanian law for the Court of Appeal to have held that the claim could not be heard by an arbitral tribunal, as the arbitration clause stipulated in the contract covered *any* disputes, including contractual claims and tort claims. Therefore, despite the fact that both claims were “inextricably linked”, the Court of Appeal could still have held the dispute with the enterprise to be arbitrable. This position might also have been supported by the fact that the court (which found the manager guilty) recognised, inter alia, the Municipality’s right to reimbursement of damages.

Moreover, the manager of the enterprise had already been convicted. Therefore, no element of public law remained in the civil case that was to be heard. The only question to be resolved was whether (and to what extent) the loss caused by the manager and the enterprise (incurred because of criminal activity) should be recovered from them (i.e., a question only of civil law). The Court of Appeal, however, gave no justification for how this situation differed from a regular civil claim (i.e., where the enterprise is held liable for the loss, but no criminal activity is involved) subject to hearing by an arbitral tribunal. Indeed, the presence of this difference was uncertain and, therefore,

the Court of Appeal had no reasonable grounds to give preference to the jurisdiction of courts.

Courts of certain other countries maintain a similar position. For instance, the courts of England & Wales have noted that even when a criminal act gives rise to a claim for damages, the case might be arbitrable.<sup>2)</sup> The courts have also admitted that in some cases an arbitral tribunal itself might “find facts that constitute a criminal offence and even find that a criminal offence has been committed”. Thus, an arbitral tribunal could have jurisdiction over claims for damages arising from criminal activities.

The ruling of the Court of Appeal, however, reveals that Lithuanian courts tend to limit opportunities to arbitrate disputes involving elements of public (in this case – criminal) law. Unfortunately, this position may adversely affect the development of Lithuanian arbitration law.

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#### References

?1 Ruling of the Court of Appeal of Lithuania in case No. 1S-183-307/2018 dated 9 August 2018.

For example, the decision of the High Court of England in *The London Steam-Ship Owners'*

?2 *Mutual Insurance Association Ltd v The Kingdom of Spain and the French State* [2013] EWHC 3188.

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