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Lithuania's Aspirations to Become a Preferred Seat of Arbitration: Is It Ready Yet?

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Global arbitration centers such as Paris or London are well known and need no introduction. In contrast, there are many other arbitration sites around the world that seek a larger role on the international stage of dispute settlement. Lithuania and its capital Vilnius in particular is no exception.

In 2014 the Vilnius Court of Commercial Arbitration organized an international conference on "*Lithuania as a Place for Arbitration*" where well-accomplished arbitration practitioners such as Emmanuel Gaillard and Kaj Hober presented an optimistic outlook for the country. Since then six years have passed, making it only right to check whether Vilnius' ambition of becoming an internationally renowned place of arbitration is getting any closer to reality.

Below we discuss few recent case law of Lithuanian Courts, placing them in the context of the local arbitration law, both of which one might consider before choosing Lithuania as a seat of arbitration.

Legal Regulation: A Long Way in a Short Time

Before Lithuania regained its independence in 1990, arbitration was essentially non-existent. However, significant progress was made in 1992 when Lithuania ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, and in 1995, when the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**") was ratified as well. Finally, the Lithuanian Law on Commercial Arbitration ("**Law on Commercial Arbitration**"), based on the 1985 UNCITRAL Model Law, was adopted in 1996.

The 1996 Law on Commercial Arbitration was replaced in 2012 with the current Law on Commercial Arbitration which generally mirrors the UNCITRAL Model Law as adopted in 2006. Article 4(5) of the updated Law on Commercial Arbitration explicitly provides that the law and definitions contained therein must be interpreted in light of the UNCITRAL Model Law including all its amendments and supplements. Thus, it was ensured that not only the current law would be in conformity with the UNCITRAL Model Law, but that future interpretation of the Law on Commercial Arbitration would stand in accordance with international standards and would reflect

modern practices in international arbitration.

Even though the Law on Commercial Arbitration is based on the UNCITRAL Model Law, it does not avoid provisions that do not originate from such, which makes Lithuania's arbitration regulation distinct from other countries.

The main particularity is the fact that Lithuania's law puts heavy emphasis on confidentiality. Article 8(3) of the Law on Commercial Arbitration provides that arbitration proceedings are confidential, which means that neither parties nor arbitrators can reveal anything about arbitration proceedings to a third party. In 2016 this provision was extended even further by providing that these confidentiality protections also apply to court assistance for arbitration, such as default arbitrator appointments. This means that national courts' decisions on matters related to assistance to the arbitral tribunal are not publicly available. However, these new confidentiality provisions do not cover court proceedings for the annulment or recognition of arbitral awards, which remain public.

Another particularity relates to arbitrability. According to Article 12 of the Law on Commercial Arbitration, a public body cannot be referred to arbitration without the prior consent of the founder (usually the relevant ministry under which supervision the state's company operates) of said enterprise, institution, or organisation. This means that public bodies have to receive the founder's consent in order to conclude a valid arbitration agreement. According to case law, such consent may be verbal, written, or expressed by conduct (Ruling of the Appeal Court of Lithuania in civil case No. 2A-57-241/2016 dated January 26, 2016).

Recent Case Law of the Supreme Court: Does One Bad Apple Spoil the Bunch?

Although Lithuanian courts often made procedural and judicial errors as arbitration first took hold in the newly independent nation, in general those courts later developed a history of pro-arbitration case-law. When interpreting the Law on Commercial Arbitration, Lithuanian courts often explicitly rely on foreign doctrine and case-law.[1)] Lithuanian courts do not avoid difficult and modern interpretations of arbitration provisions. Few recent examples are discussed below.

The Supreme Court has formed a clear case-law that the arbitration agreement has a compulsory effect upon the relevant parties (civil case No. 3K-3-545/2009 dated 1 December 2009) and that the principle of *favorem contractus* prevails (civil case No. 3K-3-431/2013 dated 2 October 2013). However, the Supreme Court also recognizes that when both parties agree to have their dispute examined before national courts, they implicitly terminate that arbitration agreement. This may happen when the claimant initiates court proceedings and the respondent does not object to the court's jurisdiction. Should one of the parties later claim that the dispute had to be examined before an arbitral tribunal, such a claim normally would not be satisfied (civil case No. e3K-3-255-1075/2019 dated 17 July 2019).

Another interesting and unusual question that the Supreme Court recently dealt with was related to the request for recognition of a foreign court's ruling refusing the annulment of an arbitral award. After a privatisation agency in Serbia won a dispute in arbitration with a seat in Serbia against three Lithuanian companies, Lithuanian courts refused to enforce the arbitral award in Lithuania. Soon after, the privatisation agency submitted a request to recognize and enforce in Lithuania the

ruling of Belgrade Commercial Court refusing to annul said arbitral award. The Supreme Court of Lithuania held that foreign courts' rulings on the annulment of arbitral awards are not subject to the recognition and enforcement. In the Supreme Court's opinion, recognition of such a ruling would not mean that Lithuanian courts agree that there are no grounds not to recognize the award (civil case No. e3K-3-173-469/2020, dated 27 May 2020). Conversely, recognition of such a ruling would only mean that Lithuanian courts agree that Serbian courts did not find ground for annulment under Serbian law.

However, as another recent case law shows, even the Supreme Court occasionally adopts controversial decisions in terms of well-established arbitration doctrine (civil case No. e3K-3-343-916-2019, dated 14 November 2019). Recently the Supreme Court ruled that it has jurisdiction to rule on its own jurisdiction to hear a case when the matter includes an arbitration clause. In this example, an Austrian company approached the Lithuanian court in order to recover the debt for the shipment of goods from a Lithuanian company. The defendant's standard terms of the order contained arbitration clauses and it therefore contested that the dispute could be brought before a national court. The claimant meanwhile denied having accepted the arbitration clause. The Court of First Instance and the Court of Appeal entertained the claim and concluded that the claimant had not accepted the defendant's standard contract text without any reservations; namely, it disagreed with the arbitration. In the cassation appeal to the Supreme Court, the defendant raised the issue of application of the doctrine of *competence-competence* and denied the possibility for the court to decide on the competence of the arbitral tribunal. The defendant relied on the right of the arbitral tribunal under Article 19 (1) of the Law on Commercial Arbitration to decide on its own jurisdiction to hear a dispute, including in cases where there are doubts about the existence or validity of an arbitration agreement. However, the Supreme Court in the ruling found that Article 19 of the Law on Commercial Arbitration does not preclude the national court to rule on the validity of an arbitration agreement when (i) the validity of the agreement to arbitrate is being challenged at court, and (ii) arbitration proceedings have not yet commenced. Thus, the Supreme Court's decision presumably opened a window for any party acting in bad faith to initiate proceedings at a national court in order to avoid resolution by an arbitral tribunal. This decision is arguably inconsistent with the supportive attitude displayed towards arbitration by the Lithuanian Supreme Court.

Conclusion

Examples of recent cases examined before Lithuanian courts suggest on the one hand a pro-arbitration approach, yet reveal controversial decision related to the *competence-competence* principle, which remains the cornerstone of arbitral tribunals' activities. However, considering the pro-arbitration legal regulation and generally arbitration-friendly case law, there is no certainty that this rule of national courts' jurisdictional competence will be followed by Lithuanian courts in future cases.

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References

?1 MIKEL?NAS, Valentinas. Twenty years of Lithuanian Law on Commercial Arbitration: origins, experience of application and perspectives. *Arbitražas. Teorija ir praktika*, vol. 2, 2016, p. 10.

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