# ARBITRATION IN LITHUANIA

Practitioner's Report. 2nd Edition. 2020

RIMANTAS DAUJOTAS

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2nd Edition

BY

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2020

# ABOUT THE AUTHOR

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# Preface to the 2nd Edition

Being an effective way to solve disputes, arbitration is still a complex process comprising of various procedural principles, rules and regulations. Lithuanian arbitration practice is no exception. There is always a need for an authoritative and up-to-date literature on arbitration. Therefore, this report is a necessary tool for both international users and Lithuanian users with information on Lithuanian arbitration law and practice.

This report provides a comprehensive practical guidance to arbitration practitioners and in-house counsel on how to conduct arbitrations and arbitration-related proceedings in Lithuania. It provides guidance on how to navigate all the practical aspects of any kind of arbitration in Lithuania. Whether a dispute involves shareholder disputes, trade, sports, investment, or any of the other area, arbitrators and parties will find all the information and guidance they need in this report.

This report also draws on Lithuania's growing body of case law on arbitration, which substantially enhances reliability and predictability for foreign parties. This report is therefore valuable for anyone wishing to understand Lithuanian arbitration proceedings.

This report also aims to widen international practitioners' knowledge of Lithuanian arbitration law and practice, thereby providing an opportunity to gain insights into key concepts, such as arbitral proceedings, arbitral institutions, recognition and enforcement, arbitral awards, choice of law, etc.

Being the 2nd Edition, this report builds on the new and growing body of case law and further provides new overview of topics relevant to arbitration practice in Lithuania.

## What's new in the 2nd Edition:

- Latest amendments to the Arbitration law and developments in arbitral institutions;
- Latest case of law of the Supreme Court of Lithuania and the Court of Appeal;
- Overview of mediation and construction arbitration;
- Comprehensive overview of Lithuanian investor-state arbitration practice.

Dr. Rimantas Daujotas

Vilnius, February 2020

# I. Introduction

## A. History and Current Legislation on Arbitration

### Historical evolution of law relating to arbitration

Alternative dispute resolution and arbitration, in particular, is still a comparatively new method of dispute resolution in Lithuania. Prior to the restoration of independence of the Republic of Lithuania in 1990, commercial arbitration in its true sense was non-existent in Lithuania. The development and practice of arbitration institutions began after the Law on Commercial Arbitration was enacted in 1996 (the Arbitration Law). Since then arbitration has been continuously gaining popularity and trust among commercial entities, particularly in relation to international business transactions.

Over the last decade, Lithuania has developed a strong arbitration culture and is now an attractive forum for the resolution of disputes as an established civil law jurisdiction positioned in the Baltic sea region. Lithuania is also a forum which provides a neutral seat with modern legislative framework, supportive judiciary and world-standard infrastructure. While trade and shareholders' disputes have traditionally been the types of disputes most commonly arbitrated, the increase in trade between Lithuania and CIS or Scandinavian countries has resulted in arbitration increasingly becoming the method of choice for resolving disputes in matters related to energy, resources, oil & gas. In recognition of the growth of international arbitration in the Baltic region, the Arbitration Law was substantially amended in 2012.

Lithuania is a unitary state, with a legal system modelled on the basis of the continental (civil) law tradition. Therefore, the main legal sources are statutory acts passed by the Parliament of Lithuania. The system of legal acts is hierarchical, topped with the Constitution of the Republic of Lithuania, followed by the statutes, while the secondary legislation passed by competent state agencies (officials) is

the most common form of legislation that carries the least authority (although binding, it cannot contradict legislative acts that are higher in hierarchical terms).

International agreements and legal acts of the European Union (EU) are higher in the legislative hierarchy than national statutes. Following the civil law tradition, legal precedents are not significant sources of law, however, their importance has increased over the past years, mostly due to the rulings passed by the Constitutional Court of Lithuania and the Supreme Court of Lithuania. This is only one tendency that shows an increasing influence of the common law tradition in Lithuania. Another major change in Lithuania is the growing importance of the doctrine of the EU courts.

## Current law

### Domestic arbitration law

Primary domestic sources of law are the Code of Civil Procedure (CCP), which came into force on 1 January 2003, and the Law on Commercial Arbitration (the Arbitration Law), which came into force on 2 May 1996 and was substantially amended in June 2012.

Most of the important provisions of Lithuanian arbitration law are to be found in the statute of the Arbitration Law, meanwhile the CCP deals with the recognition and enforcement of arbitral awards. Both sources apply to domestic as well as foreign arbitration proceedings if carried out in Lithuania. Provisions regarding the recognition or challenge of the arbitration agreement, application of interim measures and recognition and enforcement of arbitral awards are also applicable notwithstanding the place of arbitration or the place of separate arbitration procedures.

The Arbitration Law is based on the UNCITRAL Model Law. Article 4(5) states that the Arbitration Law and definitions contained therein must be interpreted in the light of the 1985 UNCITRAL Model Law (Model Law) including all of its amendments and supplements. As compared with Model Law, major differences include:

differences in the scope and description of foreign arbitration; the number of arbitrators shall be odd (Article 13(1) of the Arbitration Law). The general rule is that parties are free to agree on the form of the arbitration procedure. Mandatory provisions usually mirror relevant provisions of the Model Law with some minor differences.

## International arbitration law

As it was mentioned, both the CCP and the Arbitration Law apply to domestic as well as foreign arbitration proceedings if carried out in Lithuania. However, provisions regarding the recognition or challenge of the arbitration agreement, application of interim measures and recognition and enforcement of arbitral awards are also applicable notwithstanding the place of arbitration or the place of separate arbitration procedures.

Lithuania is a contracting state to the New York *Convention* on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which entered into force in Lithuania on 12 June 1995. Lithuania has made a declaration on the basis of Article 1 of the New York Convention with regard to awards made in the territory of non-contracting states – Lithuania will apply the New York Convention only to the extent to which those states grant reciprocal treatment.

### *Lithuanian Supreme Court (2002):*

*When applying the 1958 New York Convention regard should be given to the necessity set out in the Convention to ensure its uniform application worldwide. Therefore, when applying and interpreting this Convention, courts must analyze and rely on the foreign case law relating to interpretation and application of this Convention.*

Lithuania is also a party to the Washington Convention of 18 March 1965 on the settlement of investment disputes between states and nationals of other states (ICSID Convention), which came into force in Lithuania on 5 August 1992.

## Law reform projects

A quite significant development in the area of international arbitration in Lithuania was the adoption of a new version of the Arbitration Law by the Lithuanian Parliament in June 2012. The new Law implemented changes made in 2006 to the UNCITRAL Model Law. It is now specifically stated in Article 4(5) that the Arbitration Law and definitions contained therein must be interpreted in the light of the 1985 UNCITRAL Model Law 'including all of its amendments and supplements'.

The most significant changes in comparison to the old version of the law are the extension of the scope of arbitration disputes and the addition of questions of fact to the issues that can be decided by the arbitral tribunal. Most differences between the treatment of local and international arbitration procedures have been eliminated to avoid different treatment of proceedings with a foreign element. Thus, it is important to emphasize that the Arbitration Law applies to domestic as well as foreign arbitration proceedings if carried out in Lithuania.

In addition, as compared with the old version of the law, significant procedural powers were assigned to the Vilnius regional court. For example, the arbitration court or the party with the consent of the tribunal may refer to the Vilnius regional court for assistance in taking evidence. Furthermore, in case joint claimants or respondents fail to appoint an arbitrator, such obligation extends to the appointing authority in case of institutional arbitration or the Vilnius regional court in case of *ad hoc* arbitration.

In case of challenges to the arbitrators and if the arbitrator does not resign and the other party objects to the challenge, the tribunal, excluding the challenged arbitrator, decides on the issue. However, this decision can be appealed within 20 days to the Vilnius regional court and its decision is final.

Moreover, requests of the parties regarding application of interim measures may be filled to the Vilnius regional court before the commencement of the arbitration proceedings or before the constitution of the arbitral tribunal.

The new version of the Arbitration law also provides that arbitration agreements concluded by electronic means are valid, but only if such agreements are

recorded and available for future reference. The list of disputes available for arbitration has also been extended to include disputes related to damages caused by breach of competition (antitrust) law. The new law also states that any disputes can be decided by arbitration, except those that must be decided exclusively by administrative procedures or those that fall under the jurisdiction of the Constitutional Court. Disputes related to family, labour and intellectual property (patent, trademark and design registration) law are generally not subject to arbitration proceedings. However, labour and consumer law-related disputes could be resolved by arbitration if they arose after the adoption of the new Arbitration Law. It is noteworthy that the requirement to obtain permission from the founder of state or municipality-owned entities in order to conclude arbitration agreement (where one party to the arbitration agreement is such an entity) has not been abolished in the new version of the Arbitration law, although such proposal was included in the draft law project.

The new version of the Arbitration law also provides that a failure of the party to provide evidence without a justified reason may in exceptional cases be considered as a failure to cooperate in the arbitration proceedings. The new law also established a general rule that initiation of an insolvency case against one party in court will not influence the arbitration process.

The new version of the Arbitration law also specifically indicates that foreign arbitration awards issued in any foreign countries will be recognised in Lithuania according to the New York Convention. Adequate changes to the CCP have also been adopted by the Parliament in order to maintain a uniformity of rules related to arbitration.

In 2017 there were few further amendments to the Arbitration Law. The newest amendments provide that writs of execution shall be issued by the District Court at the place of arbitration (for example, if an arbitration is seated in Vilnius, the Vilnius District Court will be competent to issue writs of execution for an award resulting from the arbitral proceedings). A district court can only refuse to issue a writ of execution under limited grounds established in the law. Those grounds are the following: (i) the documents submitted are insufficient to determine the contents

of the writ of execution; (ii) the arbitral award has been annulled; and (iii) the prescription period for applying for a writ of execution has expired. If a district court refuses to issue a writ of execution, that ruling may be appealed to the competent regional court. Thus, these amendments brought more certainty to the Lithuanian arbitration law as they clarified both the courts that have the jurisdiction to issue writs of execution for national arbitral awards and the circumstances under which courts can refuse to issue writs.

On further important amendment was related to the pace of annulment proceedings before national courts. The new amendments now provide that cases concerning the recourse against arbitral awards before the Court of Appeal of Lithuania shall be examined within 90 days of the Court's acceptance of the setting aside application. According to the explanatory note of the draft amendment law, this amendment aims to increase the effectiveness of arbitration and, consequently, will help to strengthen the position of arbitration as a method of dispute resolution.

All in all, it can be observed that the new amended Arbitration Law was a long-awaited development in the area of international commercial arbitration in Lithuania. The current law now reflects the modern changes and practice of international commercial arbitration and ensures that the practice of the Lithuanian courts related to commercial arbitration would develop in a path that is arbitration-friendly.

## Confidentiality and publication of awards

### Privacy of proceedings

The Arbitration Law only stipulates a general principle of confidentiality of arbitration procedure in Article 8(3) of the Arbitration Law. However, Article 6 of the Vilnius Court of Commercial Arbitration (VCCA) rules provides that arbitral tribunals must follow the principle of confidentiality in all proceedings.

It is noted that generally all proceedings in domestic courts are public with certain exceptions. Therefore, all information communicated to the domestic courts might be exposed to the public if the assistance of a domestic court is requested or if the award is sought for recognition and enforcement.

## Publication of awards

As it was mentioned above, Article 6 of the VCCA rules provides that arbitral tribunals must follow the principle of confidentiality in all proceedings. According to Article 43 of the VCCA rules, the award may not be published without the consent of both parties to the dispute.

In any case, confidentiality, as far as the arbitral awards are concerned, is also subject to provisions of the Lithuanian law. Noteworthy, under Lithuanian law, protection of confidential information is regulated under the notions of confidential information and commercial secret. Legal category of confidential information is broader than the legal category of commercial secret, hence commercial secret is one of the most sensitive types of information. Information that does not meet the requirements of business secrets, can get into the concept of confidential information and on this basis to be protected. The data constituting confidential information is not always a commercial secret.

### *Lithuanian Supreme Court, Case No. 3K-7-6-706 / 2016*

*Lithuanian Supreme Court in its latest case law notes that in practice, the terms "confidential information" and "commercial secrets" are often used interchangeably, however there is a significant distinction in the consequences of disclosing such information to the public. The extended panel of judges notes that the confidential information with regard to its nature and importance, the duty of confidentiality and the degree of intensity of such duty, can be broken down as follows: Information which, although was identified as confidential, is in itself obvious or easily accessible (e.g., Publicly available on the company's financial reporting data, publicly available information about the shareholders, projects, business partners etc.). Such information, even if it is identified as*

*confidential, may be considered non- confidential and its disclosure or use do not entail legal consequences. The information that the company's employees must be kept confidential, but such information when it is inspected, becomes an integral part of their abilities, skills and knowledge (e.g., The company follows best practice management techniques, negotiation techniques, etc.).*

## B. Arbitration Infrastructure and Practice in Lithuania

### Major arbitration institutions

#### Vilnius Court of Commercial Arbitration

The most prominent arbitral institution in Lithuania is the Vilnius Court of Commercial Arbitration (VCCA). Vilnius Court of Commercial Arbitration was established as a result of the reorganization of the two arbitration institutions. At the end of October 2003, two main Lithuanian permanent arbitration institutions — the Arbitration Court at the Association International Chamber of Commerce Lithuania and the Vilnius International Commercial Arbitration were merged into one institution – the Vilnius Court of Commercial Arbitration. Vilnius Court of Commercial Arbitration was registered as a permanent arbitration institution with the Ministry of Justice of the Republic of Lithuania on 27 September 2003.

VCCA has played an important role in shaping Lithuania's international arbitration landscape. VCCA is a not-for-profit public company that supports and facilitates international commercial arbitration and promotes Lithuania as a venue for international arbitration. It has facilities in Vilnius. In order to satisfy the need to facilitate and encourage cost effective arbitral proceedings, VCCA had amended and published its new set of comprehensive international arbitration rules in 2013, 2015, 2017, 2018.

The current VCCA rules include:

Rules of Arbitration of the Vilnius Court of Commercial Arbitration (wording from 1 January 2018)

- Annex No 1. Procedure for ordering interim measures prior to the constitution of the Arbitral Tribunal (wording from 1 January 2015)
- Annex No 2. Arbitration fees and procedure for their payment (effective from 1 January 2020)
- Annex No 3. Procedure for resolving disputes arising from legal relations of financial services and insurance (effective from 1 July 2014)
- Annex No 4. Procedure for resolving disputes arising from legal relations in sports (effective from 1 January 2020)

More information about the Vilnius Court of Commercial Arbitration can be found via website: http://www.arbitrazas.lt/ or

by contacting the court:

Permanent arbitral institution "Vilniaus komercinio arbitražo teismas" (Vilnius Court of Commercial Arbitration) M. Valančiaus str. 1A-7, 03155 Vilnius, Lithuania.

## Number of cases and other statistics

In light of the established and independent judicial system that exists in Lithuania, the majority of commercial disputes are resolved by way of litigation as opposed to arbitration, be it international or domestic. That said, there is a growing awareness amongst corporate counsel and those advising them in Lithuania of the benefits of international commercial arbitration in resolving disputes of a cross-border nature and the frequency of the use of international arbitration by Lithuanian corporations is on the rise.

According to the available statistics, from 2011 to 2017, 175 cases were registered at the VCCA. The most common type of arbitrated disputes arose from trading, construction and engineering, finance, insurance contracts and contracts for services.

There are no statistics available as to whether institutional or *ad hoc* arbitration is more commonly practiced in Lithuania. Both institutional and *ad hoc* arbitrations are common in Lithuania (including those under the UNCITRAL Rules).

### Development of arbitration compared with litigation

According to the 2019 World Bank's Ease of doing business index, Lithuania is 14th out of 190 countries. International business relations strengthen Lithuania's global positions and also stresses the necessity to have access to a just and open way of resolving disputes. The increasing number of such disputes shows that trade relations are expanding.

Although no statistical data exists for international commercial contracts, whether they were successful or not, the percentage of disputes, or the percentage of disputes resolved via mediation, arbitration, or in court, nevertheless, that arbitration is the main factor of attraction when developing agricultural, industrial, or commercial activities in a foreign country.

Therefore, arbitration is preferred instead of court litigation due to a faster process and relatively lower costs. In addition, confidentiality and the ability to choose arbitrators with experience and competence in a particular industry is usually appealing.

However, litigation in Lithuania is also considered very efficient. In fact, Lithuania is among the EU countries which provide the fastest and efficient civil case proceedings. At present, Lithuania is second fastest litigation country after Belgium. In 2018, the ECHR cases against the Republic of Lithuania did not establish any violation related to the overly long examination of cases.

## C. Mediation

Mediation as a means to resolve disputes without the assistance of the court is becoming more and more popular in Lithuania.

The old Law on Mediation in Lithuania was adopted by Parliament in 2008. However, mediation has not accelerated as fast as it was hoped. Thus, in order to increase the popularity of mediation, Lithuania decided to adopt a new and modern Law on Mediation in 2015.

After some lengthy considerations before the Parliament, on 1 January 2019, the recast Republic of Lithuania Law on Conciliatory Mediation in Civil Disputes went into effect (the new Law on Mediation). The objective of this law was to promote and enhance the use of mediation in civil disputes, and to establish a unified mediation system.

In Lithuania, mediation is a civil dispute resolution process where one or more mediators (neutral third parties) assist the parties to a dispute in resolving the dispute peacefully. According to the new Law on Mediation, mediation may be used to resolve civil (i.e. family or other) disputes that are or may be heard by way of civil procedure in court. The parties to the dispute may use this method of dispute settlement both when the dispute is not yet being heard in court (extrajudicial mediation) and when the case is already being heard in court (judicial mediation).

Mediation is applicable on the basis of a written agreement between the parties to the dispute. Mediation can only be agreed to be applied for disputes where the parties thereto are permitted, by law, to conclude a settlement. The parties to the dispute jointly appoint a mediator or, at the joint request of the parties to the dispute, the State-Guaranteed Legal Aid Service may propose candidates for mediators. The main task of the mediator is to help settle the dispute peacefully. It is precisely the aspect that the dispute resolution prerogative belongs to the parties themselves and not to the third party (the arbitrator) that sets mediation apart from other alternative dispute resolution methods (such as arbitration).

As of 1 January 2019, mediation services can only be provided by people who have passed a special examination (with certain exceptions), who meet other legal requirements (impeccable reputation, university education, mediation training), and who are included on the Republic of Lithuania List of Mediators. The List of Mediators is published on the State-Guaranteed Legal Aid Service website. The mediator is also subject to impartiality and professionalism requirements. Depending on the agreement, mediators provide their services either against payment or free of charge.

A person who is allowed to provide mediation services in any other Member State of the European Union can also be a mediator in Lithuania if he informs the respective state institutions. It follows that if parties to a mediation had agreed that their disagreements would be mediated by a well-known American mediator in Lithuania, he could not accept such an appointment because he would not be allowed to provide his mediation services in Lithuania.

In addition, new Law on Mediation allow the parties to choose a mediator themselves. It also permits parties to agree on the order of the mediation or to choose existing rules of mediation (for example, Rules of Mediation of the Vilnius Court of Commercial Arbitration). The central principles of mediation, such as confidentiality, are also stated in the new Law on Mediation.

Thus, new Law on Mediation aims to create better conditions to develop mediation in Lithuania. Now, though not the main method of alternative dispute resolution, mediation – particularly judicial mediation – is gaining popularity in Lithuania.

# II. Arbitration agreement

## A. Arbitration Agreement

Arbitration agreement is the cornerstone of arbitration. Considering the voluntary nature of arbitration, the parties to a contract should conclude an agreement according to which a potential dispute that might arise between them in connection with that contract must be subject to a special jurisdiction, abolishing the rules on the jurisdictional competence of courts of general competence.

The provisions of the international agreements to which Lithuania is a party and the provisions of the national law are relevant to the form that the arbitration agreement will take.

### Relevant provisions of international agreements

According to the New York Convention each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The Convention defines, the 'agreement in writing' as the arbitration clause inserted in a contract, or a submission to arbitration signed by the parties or included in an exchange of letters or telegrams.

According to such provisions, the arbitration agreement must be concluded in writing, either in the main contract or separately. The clarification 'Each Contracting State shall recognize the agreement in writing' shows that the provisions of the New York Convention require that the arbitration agreement is in writing, and an oral agreement has no legal effects within the meaning of the agreement. This condition can also be inferred from the interpretation of Article IV(1)(b) of the New York Convention, setting forth that: "to obtain the recognition

and enforcement mentioned in the preceding article, the party applying for the recognition and enforcement shall, at the time of the application, (...) supply the original agreement referred to in article II or a duly certified copy thereof."

In other words, the arbitration agreement concluded in writing is the only agreement which can produce the effects sought by the parties, i.e., the dispute is judged by an arbitration court and the arbitral award made is recognized and enforced.

According to the Geneva Convention (1961), 'the arbitration agreement' shall mean either an arbitral clause in a contract or a submission to arbitration, with the contract or the submission to arbitration being signed by the parties or contained in an exchange of letters, telegrams or in a communication by teleprinter, or, in relations between countries whose laws do not require that an arbitration agreement is made in writing, any arbitration agreement concluded in the forms authorized by these laws. Therefore, according to the provisions of this agreement, an arbitration agreement must not necessarily be concluded in writing in order to be valid, as it shall produce effects even when it is concluded orally under the specified conditions.

In order for an arbitration agreement concluded orally to be valid under the Geneva Convention (1961) the agreement should be concluded: "in the forms authorized by these laws [...] in relations between States whose laws do not require that an arbitration agreement be made in writing."

Corroborating the provisions of the Geneva Convention (1961), the text refers to arbitration agreements concluded between natural or legal persons who have their usual residence or headquarters in different Contracting States upon the conclusion of the agreement. In other words, an arbitration agreement concluded orally shall be considered as valid in the States where the recognition or enforcement of an arbitral award is sought according to the law of the State where the parties have their residence or headquarters, even if the law of the State where the recognition or enforcement is sought or the arbitration agreement is invoked requires the conclusion of an arbitration agreement in written form, as is the case for Lithuania.

It can be inferred from the interpretation of the provisions under the New York Convention and under the Geneva Convention (1961) that the contract including an arbitration clause and the submission to arbitration must be signed by the contracting parties. If an arbitration clause is included in a contract, signing the contract stands for signing the arbitration clause, which means that the parties accept all the provisions of the respective contract, including the content of the arbitration clause. In the case of the arbitration agreements included in other communications between the parties (exchange of letters, telegrams, telex, plus electronic mail or other such means of communication), the parties' signature is not necessary. However, the author believes that an arbitration agreement shall be valid provided that these types of communications permit the identification of the parties between whom the communication is held.

Since Lithuania is signatory to the New York Convention, the conditions included in this Convention regarding the valid conclusion of an arbitration agreement are directly applicable in the Lithuanian law system.

## B. Types and validity of agreement

### Clauses and submission agreements

An arbitration agreement may be a clause within a contract or a separate agreement between the parties. An arbitration agreement may arise during the course of an arbitration if a party, including a third party, submits to the jurisdiction of the tribunal.

### Minimum essential content

Invalidity of the underlying contract is not in itself sufficient for invalidity of the arbitration agreement (Article 19(1) of the Arbitration Law). However, the

arbitration agreement is not enforceable if it does not comply with formal requirements.

The dispute is not arbitrable if it is established by the court that the arbitration agreement is null and void or the parties agree (explicitly or implicitly) to terminate or waive the agreement. In the event of death, the arbitration agreement is enforceable against successors unless it is proven that the arbitration agreement was inseparable from the personality of the individual who died. In the event of legal incapacity, the arbitration agreement is enforceable upon the custodian of the person who has become legally incapable.

Arbitration agreements should contain consent of the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, and which may be the subject matter of arbitral examination.

Arbitration agreements can be stipulated in the general terms and conditions. The approval of an arbitration agreement by the founder of a municipality entity or state entity is required if such entity is a party to arbitration agreement.

## Form requirements

Pursuant to Article 10(2) of the Arbitration Law, the arbitration agreement shall be concluded in writing and shall be considered to be concluded if executed as a joint document signed by the parties, concluded in an exchange of letters (which can be sent electronically, provided that integrity and authenticity and availability of information is secured) or other documents that provide a record of the agreement, concluded in an exchange of statements of claim and defence in which the existence of an arbitration agreement is alleged by one party and not denied by another or there is other written evidence confirming that the parties have concluded an arbitration agreement or recognise it.

*The Court of Appeal of Lithuania gave a decision regarding form requirement in case No. e2A-1185-370/2018*

*The dispute arose in connection with a contract of sale of real estate. These kinds of agreements must be written and notarized by law. The parties thereto subsequently entered into a separate arbitration agreement in written form. The applicants argued that the arbitration agreement was null and void because the agreement on the transfer of disputes arising from the sale agreement had to be notarized similarly as the contract of sale of real estate. The Court of Appeal of Lithuania found that the arbitration agreement concluded in simple written form was in conflict with other provisions of the contract which required notarial approval as well as Article 6.183 (3) of the Civil Code of the Republic of Lithuania. Thus, the issue in this case was that a separate contract (arbitration agreement) must have been concluded in the same form (notarized) as the main agreement.*

## Incorporation by reference

A reference in a contract concluded by the parties to a document containing an arbitral clause shall constitute an arbitration agreement provided that the contract is in writing and reference is such as to make that clause part of the contract.

## Interpretation

Interpretation of the arbitration agreement would mainly depend on the law applicable to a contract and the arbitration agreement itself. The parties are free to choose the applicable law. The Arbitration Law (Article 39) provides that in the absence of the agreement of the parties on the applicable law, the tribunal shall determine the law applicable. In national commercial arbitration and in the absence of a choice on the applicable law, Lithuanian law would usually apply. In addition, the tribunal must always take trade customs (*lex mercatoria*) into account.

It is noted that Article 1.37 (7) of the Civil Code provides that an arbitration agreement shall be governed by the law applicable to the principal contract,

and in the case of invalidity of the principal contract, by the law of the place where the arbitration agreement was concluded. Where it is impossible to identify the place of conclusion, the law of the state in which the arbitration is situated shall apply.

### *Reference to a non-existing institution, Supreme Court of Lithuania, case No. 3K-3-431/2013*

*In the case of UAB AK „Aviabaltika" v Flight Test Aerospace Inc., the Supreme Court dealt with the following arbitration clause: If the parties fail to reach an agreement, all disputes and disagreements that may arise out of this Agreement or in connection with it, shall be settled by Arbitration in the Arbitration Court of the Chamber of Commerce of the Republic of Lithuania in accordance with the applicable arbitral procedure. Arbitral Awards shall be final and binding on both parties. As it turned out in the course of the proceedings, no such arbitral institution existed in Lithuania. The claimant brought an action in the national court, claiming the arbitration clause was void ab initio and consequently all the disputes must be submitted to the domestic courts. The respondent relied on the arbitration clause above and moved to dismiss the claim. The Supreme Court upheld the pathological arbitration clause. It reasoned that in cases where the Court decides on the validity of a "pathological" arbitration agreement, the Court is obliged to find out the meaning of such arbitration agreement and any doubts as to the existence or validity of the arbitration agreement must be interpreted in favour of the validity of the arbitration agreement, i.e. the Court relied on the in favor contractus principle. The Supreme Court also explained that if the parties have expressed their intention to settle their disputes in arbitration, the Court should respect such intention of the parties, even if some aspects of the arbitration agreement are inaccurate. Importantly, the Court emphasized its duty to give due consideration not only to the wording of the arbitration clause, but also to all other evidence gathered. In the Court's reasoning, failure to correctly specify the arbitral institution does not render the arbitration clause null and void so long as the case file presents sufficient evidence to single out the institution which the parties intended to designate. In the case at hand, the wording of the arbitration clause, in the Court's opinion, clearly nominated the predecessor of the Vilnius Court of Commercial Arbitration, namely the Arbitration Court at the Association International Chamber of Commerce Lithuania. Therefore, the Supreme Court had given effect to the pathological clause designating the Vilnius Court of Commercial Arbitration as the institution of the parties' choice.*

### *Failure to designate any arbitral institution, Supreme Court of Lithuania, case No. 3K-3-666/2013*

*In another case, UAB „Kistela" shareholders v UAB „Kistela", the Supreme Court even went beyond the conclusions discussed above. In a nutshell, the Court reasoned that as long as the parties clearly and unambiguously showed their intent to arbitrate, the arbitration agreement is valid even if its text does not determine the institution, composition of the tribunal, place or arbitral procedure. The arbitration clause read: All disputes arising between the company and the shareholders or between the shareholders based on the membership in the company, as well as disputes arising out of the Articles of Incorporation or validity its respective provisions shall be resolved by a mediator, without the recourse to the courts. If no agreement is reached, the dispute shall be referred to the Court of Arbitration on jurisdiction, composition and procedure of which the companies agreed in a separate document. No separate document, as specified in the clause, existed. Thus, essentially the parties expressed their will to arbitrate without ever agreeing on any institution. The Supreme Court upheld the pathological clause, noting that where the parties have expressed their intention to settle disputes in arbitration, the court must give effect to their arbitration agreement, even vague, unless it gives "a clear advantage" to any of the parties. The Court explained that the parties had effectively waived their right to litigate their dispute in court in writing, and thus are bound by such clause. According to the Supreme Court, the defects of the clause could have been cured under the principles enshrined in lex arbitri, including competence- competence.*

## C. Enforcing arbitration agreements

### Declaratory actions in court

As it can be observed from the practice of national courts, they tend to uphold valid arbitration agreements. Usually, the declaratory action in a court would follow after one party tries to refer to a court instead of arbitration, i.e. escaping the arbitration agreement. In such a case, the court will refuse to accept such claim if at least one of the parties to arbitration agreement demands so.

In another case, the one party may request the court to declare that arbitration agreement is invalid. As it was mentioned above, invalidity of the underlying contract is not in itself sufficient for invalidity of the arbitration agreement (Article 19(1) of the Arbitration Law). However, the arbitration agreement is not enforceable if it does not comply with formal requirements. The dispute is not arbitrable if it is established by the court that the arbitration agreement is null and void or the parties agree (explicitly or implicitly) to terminate or waive the agreement. In the event of death, the arbitration agreement is enforceable against successors unless it is proven that the arbitration agreement was inseparable from the personality of the individual who died. In the event of legal incapacity, the arbitration agreement is enforceable upon the custodian of the person who has become legally incapable.

Arbitration agreements may be found to be void and unenforceable when it is obvious that the agreement contradicts public policy or mandatory provisions of national law. This conclusion can be reached by the national court *ex officio*.

### *Supreme Court of Lithuania, case No. 3K-3-64/2010*

*According to the laws and the practice of the Lithuanian Supreme Court, if the parties had entered into arbitration agreement, in the absence of the plea for the invalidity of such arbitration agreement, neither the party nor the court may modify such agreement. If the arbitration agreement is effective, the dispute is not capable of being litigated in the court. Other important points: At the admission (claim acceptance) stage the court shall not analyze the scope and meaning of the arbitration agreement. This can only be dealt with if a party pleads invalidity or non-existence of the arbitration agreement. The court ex officio shall verify the arbitrability of the dispute. All other aspects to be decided by the arbitral tribunal.*

### *Supreme Court of Lithuania, case No. e3K-3-330-969/2018*

*Professional Law Partnership and its client concluded a contract for legal services in which an arbitration clause was agreed. Since the client did not pay for legal services, Professional Law Partnership brought an action before an arbitration and was awarded compensation. The client has sought the annulment of an arbitration award. The Lithuanian Court of*

*Appeal agreed with the annulment based on the considerations that of the specific regulation of the Law on the Bar and the fact that arbitration does not guarantee fundamental procedural rights to the client. However, the Supreme Court of Lithuania came to the opposite conclusion. The Supreme Court of Lithuania stated that disputes on remuneration for legal services between lawyers, professional law firms and clients are arbitrable. The exception to this rule is disputes concerning the payment for legal services which are based on legal service contracts classified as consumer contracts. Disputes arising out of such contracts may be submitted to arbitration only if the arbitration agreement was concluded after the dispute has arisen.*

## Applications to compel or stay arbitration

Articles 11 of the Arbitration Law and 137(2)(6) of the CCP provide that if the court receives a claim of the party regarding an issue that is covered by an arbitration agreement, it will refuse to accept such claim if at least one of the parties to arbitration agreement demands so.

*In its ruling of 9 February 2010 in case No. 3K- 3-64/2010 the Supreme Court of Lithuania held that court's order to accept the claim which is covered by the arbitration clause or agreement to arbitrate is subject to appeal.*

Furthermore, Article 11(3) of the Arbitration Law provides that the court must suspend the case if it could not be examined before the examination of the arbitration case.

## Anti-suit and other injunctions

To date, there is no well-settled regulation or case law on anti-suit injunctions. Moreover, Court of Justice of the European Court (CJEU) has precluded explicitly the EU Member States' courts to use anti-suit injunctions against other EU Member States' courts (*Turner*, case No. C-159/02; *Tankers*, case No. C-185/07).

*However, in one particular case of Gazprom v the Ministry of Energy of the Republic of Lithuania the Supreme Court of Lithuania decided to refer to the CJEU regarding relevant European Union law interpretation.*

*The Lithuanian Supreme court asked the CJEU for a preliminary ruling on the substantive issue – may or may not the international arbitral tribunal (SCC) prohibit the party to bring claims which violate the arbitration agreement before the court.*

*While making such a reference, the Supreme Court of Lithuania held that the CJEU has not yet examined the relationship between the New York Convention and the Brussels I Regulation. The panel held that the arbitral award in question had antisuit injunction features, where the award allegedly provided that Lithuanian courts did not have a right to hear the relevant civil cases, which fell under the jurisdiction of the arbitral tribunal. The court stated that according to CJEU case law in the West Tankers case, the prohibition of the member state to commence or continue proceedings in another Member State's court on the basis of the breach of an arbitration agreement was contrary to the provisions of the Brussels I Regulation. In the court's view, similar conclusions should be reached, when the decision regarding antisuit injunction was made by the arbitral tribunal, and it was sought for recognition and enforcement of such award. Otherwise, in the court's opinion, the arbitral award with antisuit injunction would prevail over the court's decision. According to argumentation above, the following questions have been referred to the CJEU:*

*Is it the national court's right to reject the recognition and enforcement of the arbitral award which provides for antisuit injunction on the basis that this would be the violation of the court's right to decide on its own jurisdiction according to the Brussels I Regulation?*

*If the answer to the first question is affirmative, would the same rule apply when the arbitral award issuing antisuit injunction limits the claimant's rights in the other case, which is presented before the national court of the other member state and which has jurisdiction according to the Brussels I Regulation?*

*Can the national court, in order to ensure the supremacy of the EU law and the full effectiveness of the Brussels I Regulation, refuse the recognition and enforcement of the arbitral award, which limits the courts powers to decide on its own jurisdiction to hear the relevant case, which falls under the Brussels I Regulation?*

*In its judgment of 2015-05-13 in Case C 536/13, the CJEU found that Brussels I Regulation must be interpreted as not precluding a court of a Member*

*State from recognizing and enforcing, or from refusing to recognize and enforce an arbitral award prohibiting a party from bringing certain claims before a court of that Member State.*

*Subsequently, in its judgment of 2015-10-23 the Supreme Court of Lithuania had granted recognition and enforcement of the SCC award by which the Ministry was obliged to withdraw certain claims from Lithuanian courts against Gazprom's officials.*

*The Lithuanian Supreme Court has noted that when a party concludes arbitration agreement it voluntarily limits its right to refer to the court. The measures taken by the arbitration tribunal in this case just protected the will of the parties regarding the method of dispute resolution chosen by them and the arbitration procedure itself. The Supreme Court had also held that recognition and enforcement of arbitration award in the Republic of Lithuania, by which a party is precluded from litigation in a court, has no impact to the courts' right to decide on their jurisdiction or to examine the merits of the case.*

*Fallowing the Supreme Court's judgment, in 2016 the Ministry of Energy had withdrawn all its claims in national courts, including all of its claims against Gazprom's officials.*

## D. Effects on third parties

### Extension of the agreement over third parties

According to the Arbitration Law and case law, an arbitration agreement shall be mandatory for:

- a party that has entered into a legal relationship to which the arbitration agreement is applicable by virtue of assignment of claim or transfer of debt;
- the principal in the case of an arbitration agreement concluded by the principal's agent; and
- for legal successors to a company reorganized by a merger or acquisition and, in certain cases, for legal successors after company's set-off.

### *The Numavičius case*

*On 2014-04-02 in the Numavičius case, the Lithuanian Supreme Court revisited the issue of applicability of the arbitration clause to non-signatories in a case between the shareholders of a major retail chain in the Baltics.*

*The Supreme Court had established that the arbitration agreement shall be applied only to signatories to the agreement and that an arbitral clause could be extended to non-signatories only in special circumstances. According to the Court, such special circumstances could potentially include:*

- *when there is a separate agreement;*
- *a party's tacit consent, i.e. in cases a party participates in arbitration procedure;*
- *when the arbitration agreement was concluded by the agent/representative of the respective party; and*
- *in case juridical persons are very closely connected, then arbitration agreement bounds both of them.*

*In this case, the Supreme Court of Lithuania analyzed the question of concurrent arbitral and court's jurisdiction and separate, but related contracts. Few of the contracts in question provided for an arbitration clause, but other related contracts provided for Lithuanian court's jurisdiction. The claimants in this case had also requested annulment of relevant contracts and awarding monetary and moral damages.*

*The Supreme Court had established that in the event of a valid arbitration agreement concluded by the parties, consideration of a particular dispute must be decided on the basis of the scope of the arbitration agreement, with the exception of statutory exceptions for disputes which are not subject to arbitration (non-arbitrable). A non-signatory person is deemed to have agreed to consider a dispute in arbitration when he expresses such a consent (will) in his or her conduct.*

*In addition, the Supreme Court ruled that in cases where part of the case is subject to a valid arbitration clause, and partly there is no such clause and claims can be effectively and legally separated (they arise from different transactions, between different persons, etc.), they must be dealt with separately. If the case cannot be considered before the arbitration is concluded, the court proceedings should be suspended. This is because such an interpretation confirms the binding nature of an arbitration agreement (pacta sunt servanda) to the parties to the contract. The*

*principle of contractual freedom prevents parties from abusing the obligations arising out of an arbitration agreement by filing a number of claims, where at least one would fall to the court's jurisdiction.*

*Furthermore, when deciding whether the claimant's claim for compensation of monetary and moral damages fell within the scope of an arbitration agreement, the Supreme Court ruled that the essence and content of an arbitration agreement must be assessed, while taking into account the rules of interpretation of contracts stipulated in the Civil Code (Article 6.193 of the CC), which provides that the will of the parties in concluding contracts and assuming obligations arising from such contracts must be established as precisely as possible. Attention must also be given to the fact that, according to the case law of the Supreme Court, any doubts about the existence and validity of an arbitration agreement must be interpreted in favour of arbitration agreement, i.e. the principle in favor of contractus is applied.*

*Finally, the Supreme Court ruled that where the claim for damages is arising out of or is subsidiary to the claim for annulment of the relevant contract, which contains a valid arbitration clause, such a claim for damages also falls within the arbitral jurisdiction.*

This interpretation is in line with Lithuanian courts' practice, which provides that contracts are to be interpreted in good faith (Article 6.193 of CC). While interpreting the contract, the actual intentions of the parties to the contract must be examined first and not merely based on a literal interpretation of the text of the contract. If the parties' genuine intentions cannot be determined, the contract must be interpreted in terms of the meaning it would have given them in similar circumstances to analogous parties to the intelligent persons (Article 6.193(1) of CC). All terms of the contract must be interpreted in the light of their interconnection, the essence and purpose of the contract and the circumstances in which it was concluded. When interpreting the contract, it is necessary to take into account the usual conditions, although not specified in the contract (Article 6.193(2) of CC). If there are doubts about concepts that may have several meanings, then these terms are considered to be the most appropriate, depending on the nature of the contract, the nature of the substance and its subject matter (Article 6.193(3) of CC). When in doubt as to the terms of the

contract, they shall be interpreted to the detriment of the party offering the terms (Article 6.193(4) of CC). While interpreting the contract, account must also be taken of the parties' negotiation of the contract, the practice of relations between the parties, the parties' conduct after the conclusion of the contract and customs (Article 6.193(5) of CC).

Article 6.196 of the Civil Code further distinguishes the types of contract terms according to their form of expression. These legal provisions provide that the terms of the contract may be clearly indicated or implied (Article 6.196(1) of CC). The implied contractual terms are determined by reference to the essence and purpose of the contract, the nature of the relations between the parties, the criteria for honesty, reasonableness and fairness (Article 6.196(2) of CC).

Thus, in the event that the parties agree to arbitration, unless explicitly agreed on certain exemptions, the arbitration agreement is interpreted as broadly as possible, i.e. as covering any disputes relating to a contract concluded between the parties. The parties' agreement to transfer all disputes to arbitration would clearly testify to their will to transfer as many disputes as possible to arbitration without any exceptions.

Therefore, the ruling of the Supreme Court of Lithuania in *Numavičius case* is important in that regard that it was established that consideration of a particular dispute and jurisdiction thereof must be decided on the basis of the scope of the arbitration agreement, the essence and content of an arbitration agreement, while taking into account the rules of interpretation of contracts and all relevant surrounding circumstances of the respective transaction(s).

It can be observed that this ruling of the Supreme Court of Lithuania is significant in respect of issues on non-signatories in commercial arbitration, as it has enumerated conditions under which an arbitration agreement may be applied to non-signatories. This guarantees certain level of legal certainty for the litigants regarding possible application of a non-signed arbitration clause. Although not extensively, the ruling sheds some light on the court's approach to assigning the arbitration clause to parties who were not originally signatories to original arbitration agreement. It seems that the Court also accepted some concepts

found in contemporary western law traditions which are used in cases of non-signatories, such as the tacit consent, agency, group of companies, alter ago, piercing the corporate veil, and others. While these are not specifically established in Lithuanian law, these concepts had long been used in western law such as US and French law.

In this respect, it must be added that the Supreme Court of Lithuania in *Numavičius case* reaffirmed the doctrine of non-signatories which was started to be formed by the Supreme Court in its earlier case law. In particular, at the end of 2013, in the *Kistela case*, the Supreme Court of Lithuania decided that an arbitration clause was applicable to the enterprise, whereas the arbitration agreement was signed by the shareholders of the company as part of the shareholders agreement.

Another case that is currently pending before the Lithuanian Supreme Court, also concerns applicability of arbitral clause to non-signatory.

*In 2015 one of the largest Serbian energy companies referred to the Court of Appeal of Lithuania regarding recognition and enforcement of two ICC Awards: Partial Award on Jurisdiction and the Final Award. According to the Award, the respondent (a non-signatory to the Arbitration Agreement) was found liable for over half a million euro. The case was deeply infused with contentious issues of the binding effect of the arbitration agreement on non-signatories on which there was no settled Lithuanian case-law on at that point. The Court of Appeal of Lithuania had struck down the Respondent's attempts to relitigate the issues already decided by the Arbitral Tribunal and made paramount findings on several salient issues.*

*Firstly, the Court of Appeal had refused to hold oral hearings relating to the pertaining enforcement issues. The Court reiterated that the Respondent had been given ample opportunity to comment on all the issues in writing and had failed to demonstrate the exceptional nature of the proceedings at hand, which could have justified setting an oral hearing.*

*Secondly, the Court confirmed that the latest version of the Code of Civil Procedure of Lithuania does not preclude the assignees of benefits under the Arbitral Awards from applying for recognition and enforcement of the latter in Lithuania.*

*Thirdly, and most importantly, the Court uphold the doctrine of piercing the corporate veil. The court had conceded that Lithuanian case law recognizes the possibility to extend the Arbitration Agreement to non-*

*signatories and enforced the Award that found the non-signatory Respondent liable.*

*Finally, the Court found that the mere fact of initiation of set-aside proceedings initiated at the place of the seat of arbitration was insufficient to justify the adjournment of the enforcement proceedings until the aforesaid set-aside proceedings are finished. Since the respondent had failed to demonstrate that the awards in question have become unenforceable, the Court enforced the Awards.*

*As noted, this Ruling of the Court of Appeal of Lithuania is very important for the purpose of further development of pro-arbitration jurisprudence. It is yet to be seen whether these findings shall be upheld by the Supreme Court.*

*Noteworthy Lithuanian courts have also recently analyzed two very similar situations and, surprisingly, made two different decisions in respect of non-signatories. In the first case (2019-06-06 Court of Appeal of Lithuania, case No. e2-453-464/2019), the bankruptcy administrator questioned the legitimacy of a loan agreement that reduced the balance of assets of the bankrupt company. The bankrupt company (bank) has not signed the loan agreement. In the second case (2019-05-21 Kaunas Regional Court, case No. eA2-913-657/2019), the bankruptcy administrator questioned the gift agreement, which also reduced the balance of assets of the bankrupt company. The bankrupt company was not a signatory to the gift agreement. An arbitration clause was provided in both contracts. The Court of Appeal of Lithuania, which was scrutinizing the first case, reached the conclusion that despite the fact that the bank did not enter into the loan agreement, the bank was aware of the agreement and accepted it, so the bank should be bound by an arbitration clause. However, Kaunas Regional Court has decided that a bankrupt company that has not signed a gift agreement is not bound by the arbitration clause contained in the agreement.*

## Other effects

Another relevant case of Serbian Privatization Agency v Alita is currently pending before the Lithuanian Court of Appeal. This case will also allow evaluating the case law on the non-signatories doctrine in the Lithuanian jurisprudence. It concerns the

applicability of arbitral clauses to companies which were formed in the process of reorganization and where the spin-off terms did not specifically assign liabilities arising from the arbitration agreement to the new (reorganized) company or to a company left as an empty shell after reorganization.

In that regard it can be noted that, from the procedural point of view, according to the case-law of the Lithuanian courts, the arbitration agreement is an independent agreement, separable from the commercial contract. In addition, pursuant to the Lithuanian Statute of Law on Companies, when a company is divided by the reorganization, the spin-off conditions must stipulate and define which assets, rights, and obligations are to be assigned to companies operating after the reorganization. If, under the reorganization terms, some duties and obligations are not assigned to any of the parties to be formed after the reorganization, all companies formed after reorganization shall be jointly liable for the obligations.

Therefore, it will be seen if companies operating after reorganization shall be jointly bound in respect of duties arising from the arbitration agreement (as well as the obligation to arbitrate).

## Termination and breach

Arbitral proceedings may be terminated if the case cannot be examined in arbitration, the dispute has already been decided in court or arbitration, the claimant withdraws its claim or there are other reasons which make further examination impossible.

The arbitral tribunal may also decide to leave the claim unexamined if further examination is temporarily impossible. A valid arbitration agreement, as with any other agreement, is obligatory to its parties and has the power of law (Article 6.189 of the Civil Code). The national court must leave the lawsuit unresolved in the initial phase of court proceedings if it establishes that the parties to the dispute have concluded a valid arbitration agreement and the respondent is requesting to

honour the arbitration agreement. If such information becomes available when the court proceedings have been already initiated, the proceedings must be terminated. In case of any doubts regarding the validity of the arbitration agreement, all doubts should be interpreted to the benefit of the arbitration agreement.

*The Supreme Court of Lithuania gave a decision on the problem of termination of arbitration agreement due to passivity of parties in case No. e3K-3-255-1075/2019.*

*In this case, despite the arbitration clause, both parties were actively seeking litigation and resolution of the dispute, in particular, in a court. The Supreme Court of Lithuania concluded that in doing so, the parties had expressed their will to renounce the arbitration agreement they had previously entered into. Such a conclusion is consistent with the contractual substance of commercial arbitration and with the requirements of the principle of autonomy of the parties. Since arbitration is a contractual means of settling disputes, it is the will of the parties that is given priority. A contrary assessment of the active procedural conduct of both parties would not be in line with the principles of fairness, protection of legitimate expectations and procedural economy, since it would allow the parties to abuse the law by invoking an arbitration clause only when the parties are comfortable.*

What is more, the Court of Appeal of Lithuania in case No. 1S-183-307/2018 stated that despite the fact that the arbitration clause is valid, the dispute shall not be subject to arbitration where the dispute arises under public law. According to the court, Article 11(3) of the Arbitration Law relates exclusively to private relations that may be settled by arbitration. What is more, the court found that compensation for the damage that was incurred due to crime is derived from the scope of public law. The declarations of this judgment clearly lead to the conclusion that the arbitration has no competence to settle the dispute which arose from the damage that was incurred due to crime (penal code).

*The Court of Appeal of Lithuania, Civil case No. e2-1420-516-2018*

*In this case the parties have entered into a sale contract which stated that if the parties fail to reach a negotiated agreement within certain period of time, the dispute, disagreement or claim arising out of or in connection with this contract, its breach, termination and validity shall be finally settled by arbitration. One of the parties to the contract applied to the National Energy Regulatory Council before the court of first instance. However, both first and second instance courts qualify the fact that the respondent appealed to the National Energy Regulatory Council does not invalidate the arbitration clause in the contract concluded between the parties. The Court also noted that the Arbitration Law does not specify the form in which the consent of the founder of a state or municipal undertaking to enter into an arbitration agreement is to be expressed. The absence of consent in the case does not necessarily lead to its absence at all.*

## E. Doctrine of Separability

### Statutory provisions

The separability of the arbitration clause is provided in Article 19(1) of the Arbitration Law, which states that invalidity of the underlying contract is not in itself sufficient for invalidity of the arbitration agreement. This means that arbitration agreement may be challenged as a separate contract.

### Practice and case law

The principle of the separability of arbitration agreements is well-recognized under Lithuanian law. In that connection, it is important to note that the arbitration agreement could be governed by different laws, another characteristic of the separability doctrine. For example, if the contract was void, it would not necessarily mean that the agreement to arbitrate would be also not enforceable. Such rule ensures the parties that the agreement to arbitrate would not be influenced by the contract itself and that the outcome of contractual obligations would be decided the way the parties intended – by international arbitration.

*In ICOR v Minskvodtsroj case before the Court of Appeal of Lithuania, where the SCC Award was successfully enforced, the court had ruled that in cases where the parties explicitly chose the law applicable to the contract, usually, there are fewer problems to arbitral tribunal compared with situations where there is no such a stipulation. In the latter case, the arbitral tribunal should, after considering all relevant facts and matters in the contract, decide what law should govern the contract. International conventions or conflict of laws rules should be applied. However, in international arbitration, parties can also choose the law applicable to the contract after the dispute arose. The Lithuanian Court of Appeal noted that the doctrine of separability does not per se mean that the arbitration agreement must be dealt with separately from the main contract where the transfer of rights in the main contract is concerned.*

# III. Jurisdiction

## A. Which forum decides jurisdiction

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Article 19(1) of the Arbitration Law affirms the '*competence-competence*' principle by providing, as a rule, that the arbitral tribunal may rule on its own jurisdiction.

Article 6 of the Arbitration Law provides that if a party being aware that its rights are violated still participates in the arbitral proceedings without objecting within a reasonable time, it is considered that the party has waived the right to make such objection. Pursuant to article 19 of the Arbitration Law, an objection to the jurisdiction of the tribunal must be raised no later than the statement of defence.

A party's participation in the appointment procedure of an arbitrator does not waive its right to raise such an objection. The tribunal then decides on its jurisdiction in one of the two ways – it either decides on it in the final award, or it decides on it in a partial award.

Moreover, if the tribunal exceeds its competence in the arbitration proceedings, the respective objection shall be brought by the parties immediately when the issue falling outside the tribunal's competence is raised. If such objection is presented later, the tribunal has the discretion to allow it if the reasons for such a delay are reasonable.

### Prima facie determination

Article 11(1) of the Arbitration Law provides that if the court receives a claim of a party regarding an issue that is covered by an arbitration agreement, it will refuse to accept the claim. If the fact of a valid arbitration agreement is found after the

proceedings in the court are commenced, the court leaves the claim unexamined. Therefore, a party claiming the jurisdiction of the arbitral tribunal should raise its objections and inform the court of a valid arbitration agreement as soon as possible.

Under VCCA rules, the *prima facie* determination is done by the Chairman of the Arbitration Court. Article 11 of the VCCA rules provides that the Chairman of the Court shall rule in its ruling whether the claim is admissible and the VCCA can start administering the case. Article 49 of the Arbitration Law similarly provides that the arbitration claim shall be left unexamined or rejected in case the arbitration case may not go forward due to lack of agreement or lack of capacity of the parties to arbitrate.

In a recent *Kistowski v Luksora* arbitration case, the Chairman of the VCCA had left the claim of the claimant unexamined since it was found that the arbitration agreement has not stipulated the VCCA as arbitration court chosen by the parties.

## B. Competence-Competence

It is fully accepted rule in Lithuanian law that the arbitral tribunal has the right to decide on its jurisdiction and such a right shall not be disputed. In its ruling in Civil Case No. 3K-3-116/2010 of 16 March 2010, the Panel of Judges of the Supreme Court of Lithuania pointed out that the arbitration court's right to rule on its jurisdiction as well as to resolve issues of the validity of the arbitration agreement is universally recognised (the doctrine of *competence-competence*).

This is enshrined in Article 16 of the UNCITRAL Model Law, on the basis of which the Arbitration Law has been prepared and Article 19(1) of which establishes that the arbitral tribunal has the right to rule on its jurisdiction to resolve the dispute, including those cases, where there is doubt about the existence of the arbitration agreement or its validity. Therefore, Article 19(1) of the Arbitration Law fully affirms the '*competence- competence*' principle by providing, as a rule, that the arbitral tribunal may rule on its own jurisdiction.

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

### *The Supreme Court of Lithuania, Civil case No 3K-3-61212004*

*The practice and doctrine of international arbitration recognizes that, in cases where there is uncertainty about the arbitration agreement, firstly, the tribunal shall decide whether the dispute falls within its jurisdiction (competence-competence principle). The right of the arbitral tribunal to decide on its jurisdiction is enshrined in the Article 16 of the UNCITRAL Model Law on International Commercial Arbitration and in the Article 19 of the Lithuanian Law on Commercial Arbitration.*

### *The Supreme Court of Lithuania, Civil case No 3K-3-64/2010*

*It must be stated that Art. 19.1 of the Law on Commercial arbitration provides that the arbitral tribunal has the right to decide on its own jurisdiction over the dispute, including also cases where there is a doubt about the existence of the arbitration agreement or its validity. This mandatory rule establishes the exclusive right of the arbitral tribunal to decide on the validity or invalidity of the arbitration agreement, including the decision on the fact that the arbitration agreement is concluded. The right of the arbitral tribunal to decide on its jurisdiction is also established in Article 16 of the UNCITRAL Model Law on International Commercial Arbitration.*

### *The Supreme Court of Lithuania, Civil case No 3K-3-116/2010*

*The Panel of judges notes in the countries of continental law it is generally recognized that the arbitral tribunal has a right to decide on its competence, as well as the validity of the arbitration agreement (competence-competence doctrine). This in turn means that the courts of general competence usually would not address the question of competence of the arbitral tribunal until the arbitrators would make a decision. The right of the arbitral tribunal to decide on its jurisdiction is enshrined in the Art. 16 of the UNCITRAL Model Law on International Commercial Arbitration, on which the Law on Commercial arbitration of*

*the Republic of Lithuania is based. The doctrine of competence-competence is enshrined in the Art. 19.1 of the Law on Commercial Arbitration, which provides that the tribunal has the right to decide on its jurisdiction over the dispute, including also cases where there is a doubt about the existence of the arbitration agreement or its validity. The fact that the tribunal is the first one who decides on its own jurisdiction is also recognized in the case law.*

### *The Supreme Court of Lithuania, Civil case No e3K-3-488-469/2018*

*On the basis of the arbitration clause contained in the subcontracting agreement with the defendant, the applicant applied to the arbitration, which partially upheld the applicant's claim and awarded the defendant compensation for the delay in the works. The defendant challenged the arbitration award on the ground that the composition of the arbitral tribunal was unlawful and that the parties did not comply with the mandatory rules of the law. The Lithuanian Court of Appeal annulled the arbitration award, stating that the composition of the arbitral tribunal was illegal. The applicant argued that it was not possible for the same dispute to be re-examined by an arbitral tribunal under the arbitration clause, so that such an examination would be contrary to the substance of the annulment as a form of judicial review. The defendant argued that the dispute was not subject to jurisdiction before the ordinary court because the arbitration clause agreed between the parties was not abrogated and was therefore valid.*

*According to the Supreme Court of Lithuania, neither the specific provisions of the Arbitration Law nor the systematic interpretation of the totality lead to the conclusion that the annulment of an arbitration award per se precludes the permanent arbitral body from re-administering the arbitration case after its annulment by the court. However, the Supreme Court of Lithuania noted that such consequences are possible where it is found that the organization and administration of arbitration by the same arbitrator cannot eliminate the reasons for annulling the first arbitration award and ensure proper arbitration in accordance with the general principles of law and arbitration process.*

### *Court of Appeal of Lithuania, case No. e2A-976-823/2018*

*In the Lithuanian-Polish contract, the Lithuanian text contained an arbitration clause, while the Polish version of the contract made no*

*reference to arbitration at all. When the dispute arose, the party concerned applied to the Kaunas District Court. The latter refused to accept the claim because of the arbitration clause. The party then went to arbitration, which also ruled that it had no jurisdiction. The case against such a partial decision of the arbitral tribunal was brought before the Court of Appeal of Lithuania. The Court of Appeal of Lithuania stated that arbitral tribunal has enough competence to rule on its own jurisdiction over the case. This does not mean, however, that a party cannot appeal against an arbitration award finding a lack of jurisdiction. If the court annuls such a procedural decision on jurisdiction, then parties may again reapply to arbitration. But if the arbitral tribunal determines for a second time that it has no jurisdiction, then that arbitral award shall not be subject to appeal. Furthermore, the Court of Appeal of Lithuania agreed with the arbitral tribunal's reasoning that the parties had not concluded an arbitration agreement at all.*

Further case law of the Supreme Court of Lithuania which is important and must be mentioned concerns the obligation toward the courts to enforce the parties' will to resolve disputes in an arbitral tribunal if an arbitration agreement can be executed without giving any advantages to the rights of any of the parties. Lithuanian courts often rule that, in general, the jurisdiction of the arbitral tribunal is not exclusive, the parties to an arbitration agreement have the right to challenge an arbitration agreement in a court. However, in the event that the validity of an arbitration agreement is raised in arbitration, this situation shall be resolved in accordance with the procedure provided for in Article 19 of the Law on Commercial Arbitration, i.e. the court should not rule on the arbitral jurisdiction to hear a dispute, including the validity of an arbitration agreement, until this is resolved in arbitration. When an arbitration procedure is initiated, which, *inter alia*, disputes the jurisdiction of the arbitral tribunal and contests the validity of the arbitration agreement, the court subsequently bringing an action for the invalidation of this arbitration agreement must refuse to accept such an action, and, if the specified circumstance becomes apparent after the admission of the claim, must leave the action unresolved, as at the same time two proceedings (arbitration and court) are not possible on the same basis.

Therefore, this case law of the Supreme Court of Lithuania is important in that regard that it accepts the binding nature of arbitration agreements and arbitral tribunals' primary right to rule on its own jurisdiction first.

## C. Interaction of national courts and tribunals

As it was mentioned above, a valid arbitration agreement, as with any other agreement, is obligatory to its parties and has the power of law (Article 6.189 of the Civil Code). The national court must leave the lawsuit unresolved in the initial phase of court proceedings if it establishes that the parties to the dispute have concluded a valid arbitration agreement and the respondent is requesting to honour the arbitration agreement. If such information becomes available when the court proceedings have been already initiated, the proceedings must be terminated. In case of any doubts regarding the validity of the arbitration agreement, all doubts should be interpreted to the benefit of the arbitration agreement.

In addition, the court may address this issue of jurisdiction if the defendant challenges jurisdiction of the national court or the arbitration agreement is held to be null and void or the party applied for the recognition of the issued award.

National courts tend to uphold the right of the arbitral tribunal to decide on its own jurisdiction. National court may also declare that an arbitration agreement shall be mandatory for:

- a party that has entered into a legal relationship to which the arbitration agreement is applicable by virtue of assignment of claim or transfer of debt;
- in the case of an arbitration agreement concluded by the principal's agent; and
- for legal successors to a company reorganized by a merger or acquisition and, in certain cases, for legal successors after company's set-off.

Furthermore, as it was already mentioned, in *the Numavicius case* the Supreme Court had established that if the case cannot be considered before the arbitration is heard, the Court proceedings must be suspended.

Under Lithuanian law, the grounds for suspension of the case are provided in Articles 163 and 164 of the CCP. Article 163 provides the grounds for mandatory suspension of the case while Article 164 deals with optional suspension. In case of optional suspension, the court has the right, but not the obligation to suspend the case, and in each case, the court decides whether or not it is necessary to suspend the case.

As far as concurrent proceedings of the court and the tribunal are concerned, Article 11(3) of the Arbitration Law obliges the court to suspend the case if the case cannot be examined until the arbitration case is resolved and this provision of the Arbitration Law was also referred to by the Supreme Court of Lithuania in the *Numavicius case*.

Therefore, based on Lithuanian court practice, in case of concurrent proceedings of the court and the tribunal, the courts have to suspend the case based on Article 11(3) of the Arbitration Law. In conjunction with Article 2(2) of the Arbitration Law, Article 11(3) is also applied when the arbitral tribunal has its seat abroad. An obligation to suspend the case is the component part of the recognition of an arbitration agreement.

Moreover, court practice accepts Article 164(4) of the CCP as the legal ground for the court to suspend the case in circumstances of concurrent jurisdiction of the court and the tribunal. The material circumstance for suspension of the court's case in case of concurrent proceedings is that arbitration and court proceedings have a direct relationship.

For example, the Supreme Court of Lithuania has ruled that when the case cannot be considered before the arbitration is heard, the court proceedings must be suspended based on Article 164(4) of the CCP. According to the Supreme Court, the Court's case must be suspended if the arbitration and court proceedings have a direct relationship and conclusions made by the arbitral tribunal will have a

direct effect to the matters decided in the Court's case. This is exactly the same rationale adopted in the *Numavicius case* and other cases of the Supreme Court of Lithuania.

Therefore, the Lithuanian court practice is settled and straightforward – if the arbitration and court proceedings have a direct relationship and conclusions made by the arbitral tribunal will have a direct effect to the matters decided in the Court's case, than the Court must suspend the case until the tribunal renders its decision. This is in line with Article 11(3) of the Arbitration Law.

## D. Arbitrability

### Notion and functions of arbitrability

Both the Model Law and the New York Convention limit arbitrable disputes to those "capable of settlement by arbitration".

Article 11 of the Arbitration Law provides a list of non-arbitral disputes: disputes arising from constitutional, employment, family or administrative legal relations; disputes related to competition law, intellectual property (patents, trademarks, design) and bankruptcy; and those arising from consumer relations. There are also limitations to the arbitrability of disputes where one of the parties is a state or municipal company (except the Bank of Lithuania). A prior consent of the state or the body that established such party is required.

Disputes arising out of securities transactions and intra-company disputes are arbitrable if they do not fall within the above-mentioned fields.

#### *Supreme Court of Lithuania, Civil case No. 3K-3-62/2007*

*The Panel of Judges is essence agrees with the statement of the cassator that the provision of the Article 11 of the Law on Commercial Arbitration of the Republic of Lithuania in respect of the disputes which may not be submitted to arbitration, i.e. non-arbitrable disputes, are of imperative*

*nature. Therefore, when deciding in respect of validity of the arbitration agreement of the parties the court must ascertain ex officio whether the dispute between the parties may be examined in the procedure of arbitration.*

### *The Supreme Court of Lithuania, Civil case No 3K-7-304/2011*

*Article 11 part 1 of the Law on Commercial Arbitration provides which disputes may not be referred to arbitration. The Lithuanian Supreme Court has already established that the provisions of law, which provide a list of the disputes which cannot be referred to arbitration, are imperative, thus the court, while deciding on the validity of the arbitration agreement, must first establish whether the dispute may be referred to arbitration; , i.e. the court ex officio may refuse to recognize the agreement only in cases where there is no doubt of that the arbitration agreement violates the public order, then there is no need to additionally analyze other circumstances of the case and to analyze other evidence (Ruling of the Lithuanian Supreme Court, case No. 3K- 3-62/2007, March 5, 2007). The expanded panel of judges states that the list of exceptions established under Law on Commercial Arbitration is exhaustive, list of non-arbitrable disputes may not be interpreted broadly.*

## Applicable law

The law applicable to questions of arbitrability depends on whether the issue is raised at the pre-award stage either before a court or the tribunal, or on recognition and enforcement before a court.

If arbitrability is raised at the pre-award stage before a court, the court will be bound to apply its own national laws as it can only deny jurisdiction on the basis of its own legal system. Tribunals are considered to have the competence to decide questions of arbitrability. While tribunals are not obligated to apply national laws of the seat in the same way as courts are, they do have a duty to produce an enforceable award. Any challenge to the award on questions of arbitrability would be reviewed by national courts applying the national law. As

such, tribunals generally determine questions of arbitrability on the basis of the law of the seat.

### *Lithuanian Supreme Court, case No. 3K-3-116/2010*

*In the established practice of the Cassation Court it was held continuously that in accordance with the doctrine of competence-competence when the dispute arises as to the validity of the arbitration agreement, such a question must be decided by arbitration. In accordance with Article 19.3 of the LCA, a parties' plea that arbitral tribunal does not have jurisdiction to decide parties' dispute as well as the plea that the arbitration agreement is invalid the arbitration court may decide in two ways: either to adopt preliminary decision (partial, preliminary award) or to adopt final award on the merits of the dispute. Cassation Court had held numerous times that the judicial control of the competence of arbitration may be executed latter, when filing for annulment of the arbitral award, however, not in the procedure for recognition and enforcement of foreign arbitration awards under the New York Convention.*

## Subjective arbitrability

### Natural persons

Subjective arbitrability refers to whether the parties have agreed to arbitrate certain claims or issues. The capacity of a party to enter into an arbitration agreement is properly characterized as a question of subjective arbitrability.

The capacity of legal entities and natural persons to enter into an arbitration agreement is the same as their capacity to enter into a contract. There is a presumption that a person who enters into a contract has the capacity to do so. The burden of proving otherwise rests on the party which alleges that there was lack of capacity to contract and consequently that the agreement is void.

As for natural persons, capacity of a party to contract is governed by the proper law of the contract. Therefore, if the law of the contract is Lithuanian, then the Civil

Code of Lithuania would apply when considering the capacity of the natural person.

Article 2.5. of the Civil Code provides that active civil capacity of natural persons is when a natural person is eighteen years of age, he, by his acts, shall have full exercise of all his civil rights and shall assume civil obligations.

## Legal persons

In case of a legal person, it is still a factor to take into account that the capacity of a legal person to enter into contracts is governed by the law of the place of incorporation. Therefore, if a legal person is incorporated in Lithuania, then the Law on Companies, Civil Code, Civil Procedure Code and the relevant Articles of Association would apply.

## States and state entities

As provided in the Arbitration Law, a state, municipality and other public legal entities may also conclude an arbitration agreement.

Moreover, Article 12 of the Arbitration Law provides that disputes to which a state or municipal enterprise or an institution or organisation, except for the Bank of Lithuania is a party to, may not be referred to arbitration, unless the prior consent of the founder of such enterprise, institution or organisation regarding the arbitration agreement has been obtained. The Government of the Republic of Lithuania or authorised state institution may conclude an arbitration agreement in respect of disputes relating to commercial contracts concluded by the Government or its authorised state institution under the general procedure.

## Objective arbitrability

Objective arbitrability refers to the limitations imposed by the State on the type of matters that may be referred to arbitration based on the subject matter of the dispute. In general, an arbitrator will have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter of the dispute. However, certain types of cases have been held to be non-arbitrable, particularly where there has been a sufficient element of legitimate public interest in the subject matter, making the enforceable private resolution of the dispute outside the national court system inappropriate.

Article 12 of the Arbitration Law specifically regulates the objective arbitrability. It provides that all disputes may be resolved in arbitration, except for cases stipulated in this article and this article stipulates that arbitration may not resolve disputes which should be heard under administrative proceedings or hear cases, the examination of which falls within the competence of the Constitutional Court of the Republic of Lithuania.

Disputes arising from family legal relationships and disputes regarding registration of patents, trademarks and design may not be referred to arbitration. Disputes arising from employment and consumers contracts, except for cases where the arbitration agreement was concluded after the dispute arose, may not be referred to arbitration. As it was mentioned above, disputes to which a state or municipal enterprise or an institution or organisation, except for the Bank of Lithuania is a party to, may not be referred to arbitration, unless the prior consent of the founder of such enterprise, institution or organisation regarding the arbitration agreement has been obtained.

*Important decision related to commercial arbitration and objective arbitrability, in particular, was issued by the Supreme Court of Lithuania on 17 October, 2011 where the court set aside an award issued in favor of a private contractor arguing the breach of public policy.*

*The Supreme Court of Lithuania stated that disputes arising from public procurement contracts are not arbitrable under Lithuanian law. The facts of the latter case could be summarized as follows: fallowing public procurement procedures, a contract regarding construction of wastewater treatment facilities was concluded between public entity (together with procuring entity) (hereinafter, the customers) and private construction contractors (hereinafter, the contractors). However, two years after conclusion of the agreement, contractors filed a claim requesting the increase of contract price. Subsequently, in accordance with the contract, a dispute resolution committee was organized, which decided to partly satisfy contractors' request and to increase the contract price. However, the customers refused to pay extra amount ordered. Therefore, contractors filed a claim to Vilnius Court of Commercial Arbitration, as this option was included in the agreement, and requested the customers to comply with the decision issued by the dispute resolution committee - to pay the extra price. The tribunal ordered the customers to pay extra amount requested. Thus, the customers applied to Court of Appeal of the Republic of Lithuania requesting to set aside the award issued by Vilnius Court of Commercial Arbitration arguing that disputes arising from public procurement were not arbitrable under Lithuanian law.*

*Subsequently, the Supreme Court of Lithuania agreed with the customers and upheld the appeal stating that disputes arising from public procurement contracts are not arbitrable under Lithuanian law and that only the courts have a right to hear disputes arising from public procurement contracts. The main emphasis of the Supreme Court of Lithuania's decision was concentrated on the fact that although the list of disputes which are not arbitrable in Lithuania, as provided in Art. 11 of the Arbitration Law, does not include public procurement contracts, these contracts should be regarded as not arbitrable according to other provisions of Lithuanian law.*

*The court stated that the Law on public procurement of the Republic of Lithuania (hereinafter, the LPP) provides that disputes regarding public procurement procedures should be heard by courts. Therefore, according to the Supreme Court of Lithuania, the LPP should be the lex specialis as regards all matters arising from the public procurement contracts and not the Arbitration Law. Therefore, in every case provisions of the LPP would prevail. In addition to this, the Supreme Court Of Lithuania stated that in case there was a dispute concerning the public procurement procedures, provisions of the LPP should be applied first, and if provisions of the LPP do not regulate certain matter, than the provisions of other laws can be applied, i.e. the Arbitration Law.*

*As it was mentioned, the LPP states that disputes regarding public procurement procedures should be heard by courts, namely, Art. 120.2 of the LPP states that in 'case of disagreement between the supplier and the purchasing entity, the supplier has a right to file a claim to the court'. It was also noted that the list of disputes that are not arbitrable in Lithuania is provided in Art. 11 of the Arbitration Law, i.e. disputes arising from constitutional, employment, family, administrative, competition, patents, trademarks, bankruptcy and consumer contracts. In addition, disputes cannot be referred to arbitration where one of the parties is a public or municipality entity and there was no prior agreement of the establisher of such entity to refer disputes to arbitration.*

*It is important to note that the Supreme Court of Lithuania had itself established that the imperative list of the disputes provided in Art. 11 of the Arbitration Law cannot and should not be interpreted expansively. However, according to the rationale of the Supreme Court of Lithuania, since the provisions of the LPP are lex specialis in such kind of disputes, provisions of the latter law should prevail. Therefore, as provided in the LPP, disputes regarding public procurement should be heard by courts. It was also stated by the Supreme Court of Lithuania that matters regarding the public procurement procedures are related to the protection of public interest, because of the need to ensure proper use of public budget, competition of suppliers and transparency of public procurement. Therefore, it was another basis, which confirmed the lex specialis nature of the LPP. Finally, the Supreme Court of Lithuania referred to the EU Remedies directive (89/665/EEC), which provides that public procurement procedures must be reviewed by a court or a corresponding body.*

*Another case important for the issue of objective arbitrability was the Luksora case decided by the Supreme Court of Lithuania on 26 June 2012. The case concerned shareholders agreement, which contained a defective arbitration clause. After a dispute arose, shareholders initiated investigation proceedings regarding the activities of legal entity – company "Luksora" before the Vilnius district court. Shareholders and "Luksora" itself objected to the jurisdiction of the Vilnius district court on the basis of the arbitration agreement contained in the shareholders' agreement. The Vilnius district court dismissed "Luksora" objections, which then appealed to the Court of Appeals of Lithuania. However, the latter also dismissed the objections holding that the dispute was not arbitrable under Lithuanian law. After the appeal claim, the Supreme Court of Lithuania affirmed the lower court's decision, holding that the dispute was not arbitrable under Lithuanian law. After referring to Article II(1) the New York Convention, the*

*Supreme Court of Lithuania concluded that an investigation of the activities of legal entity cannot be referred to arbitration. It reasoned that investigation is an instrument protecting the public interest, and that it could not be ensured that the public interest would be protected in arbitration proceedings in the same manner as in a court.*

As mentioned, the Supreme Court of Lithuania has also stated that disputes on remuneration for legal services between lawyers, professional law firms and clients are arbitrable. The exception to this rule is disputes concerning the payment for legal services which are based on legal service contracts classified as consumer contracts. Disputes arising out of such contracts may be submitted to arbitration only if the arbitration agreement was concluded after the dispute has arisen.

In addition, the Court of Appeal of Lithuania in case No. 1S-183-307/2018 stated that despite the fact that the arbitration clause is valid, the dispute shall not be subject to arbitration where the dispute arises under public law. According to the court, Article 11(3) of the Arbitration Law relates exclusively to private relations that may be settled by arbitration. The court found that compensation for the damage that was incurred due to crime is derived from the scope of public law. The declarations of this judgment clearly lead to the conclusion that arbitration has no competence to settle the dispute which arose from the damage that was incurred due to crime.

### *Supreme Court of Lithuania, case No. e3K-3-278-313/2018*

*Lithuanian company, which issued a promissory note for enforcement of the main contract, asked the Lithuanian court to recognize the foreign company's claim for damages and to cancel the notary's enforcement record for such debt. The action was dismissed by both first instance and appellate courts on the ground that the main contract contained an arbitration clause. The Supreme Court of Lithuania decided that the dispute as to whether the defendant is entitled to a claim under the promissory note must be settled by arbitration. However, the cassation court noted that the decision on the cancellation of the notary's executive record can only be taken by the court which is acting on behalf of the state. Thus, the claim for cancellation of the notary's executive record is not subject to arbitration.*

# IV. Arbitral Tribunal

## A. Status and qualifications of arbitrators

In Lithuania, the rules and procedure in respect of the arbitration tribunal are largely governed by the rules chosen by the parties to the arbitration agreement.

### Number of arbitrators

Parties to an arbitration agreement are free to determine the number of arbitrators. Failing such determination, three arbitrators shall be appointed. However, the number of arbitrators in all cases shall be odd (Article 13(1) of the Arbitration Law). An arbitral award made by an arbitral tribunal consisting of an even number of arbitrators shall not render such an award invalid.

### Legal status

In accordance with Article 14 of the Arbitration Law there are no restrictions on acting as an arbitrator. Anyone who is of age and in other respects has full legal capacity may serve as an arbitrator in Lithuania. However, there is a mandatory requirement for a written consent of a person to act as an arbitrator. Moreover, there is a general requirement that an arbitrator shall be impartial, independent and competent.

Generally, an arbitrator is immune from actions in negligence if he or she is acting independently. According to Article 6.252 of the Civil Code, the arbitrator could be liable for his deliberate actions or gross negligence if such actions cause damage to any of the parties to the arbitration.

## Qualifications and accreditation requirements

There are no limitations to the rights of foreign nationals in serving as arbitrators, and no specific immigration requirements apply to arbitrators (other than general visa and work permit rules, when applicable). To date, there is no reported case law regarding contractual restrictions for arbitrators based on their nationality, religion or gender. Therefore, any competent natural person may, irrespective of his nationality, be appointed as arbitrator, unless otherwise agreed by the parties.

Persons who are prohibited by law of the Republic of Lithuania from engaging in other paid labour may not practice arbitration on a permanent basis. This rule does not apply to attorneys and their assistants.

## Arbitrators' rights and duties

All arbitrators, including those appointed by the parties, must be neutral and independent throughout the proceedings. There is no case law regarding the nature of the relationship between the arbitrator and the party that appointed him or her, or case law regarding the liability of such arbitrator. However, the contractual nature of the arbitration itself leads to a conclusion that the relationship between the arbitrator and the party that appointed him or her should be viewed as contractual, keeping in mind the requirements for neutrality and independence.

An arbitrator is not exempt from liability due to gross-negligence or deliberate actions (Article 6.252 of the Civil Code of the Republic of Lithuania).

If the parties did not agree otherwise, the arbitration fees (including fees of arbitrators) are divided by the arbitration award (Article 48 of the Arbitration Law). Article 7 of the VCCA rules provides the same, upon the condition that parties did not agree otherwise.

*The Court of Appeal, case No. 2T-84/2014*

*Impartiality is a legal category of subjective character predetermining the arbitrator's inner state of mind which implies absence of the preconceived opinion on the legal relations/parties to the dispute. Consequently, being one of the subjective criteria, the impartiality (or its absence) may most often be established solely by judging from the arbitrator's behavior in the course of the proceedings (case No. 2T-84/2014 of the Court of Appeal dated 29 September 2014). Independence is a legal category of objective character, capable of being identified. Independence involves absence of personal, social, financial, business, superior-subordinate, etc. relationship between the arbitrator and the party and/or the party's representative or any other closely related person.*

### Relevant codes of ethics

An arbitrator must reveal any circumstances likely to give rise to justifiable doubts as to his impartiality or independence (Article 15 of Arbitration Law). To date, there are no established codes or rules of conduct aimed specifically at arbitrators.

## B. Appointment of arbitrators

### Methods of appointment

Pursuant to Article 14 of the Arbitration Law, if there is no prior agreement and if the arbitration consists of three arbitrators, each party selects one arbitrator, and the two of them appoint the third one. If the arbitration has a sole arbitrator and if the parties cannot agree on the appointment, an arbitrator is appointed by the head of the permanent arbitral institution upon the request of any of the parties; this also applies if one party does not appoint an arbitrator (or two arbitrators do not appoint the third one) within 20 days from the date the respective party had to appoint an arbitrator.

In the case of *ad hoc* proceedings, where a party fails to appoint an arbitrator or in the case that two arbitrators appointed by the parties fail to appoint the

chairman of the tribunal, an arbitrator-chairman of the tribunal is appointed by the Vilnius regional court within 20 days from the date the respective party had to appoint an arbitrator. A similar procedure and terms apply also in the case that there are two or more claimants or respondents in arbitration.

### *Supreme Court of Lithuania, case No. e3K-3-387-421/2016*

*Interested parties have applied for the arbitration award to be set aside on the ground that it constitutes a breach of public policy. According to the plaintiffs, the defendant in the arbitration case is represented by a lawyer whose place of business is in a law firm whose partners are also founders of associations which have established an arbitral tribunal. The Court of Appeal of Lithuania did not find any violation of the impartiality of the arbitral tribunal that could lead to a violation of public policy. However, the Supreme Court of Lithuania annulled the arbitral award. The Supreme Court of Lithuania has stated that the essence of arbitration, the principle of justice and human rights requirements mean that a person hearing an arbitration case and making an arbitration award must be appointed by a subject who has no direct or indirect interest in the outcome of such dispute. Since in this case two of the three votes in the arbitration tribunal were indirectly owned by the law firm representing the defendant, the Supreme Court of Lithuania considered this to be a reasonable doubt as to the impartiality of the arbitration body and its chairman.*

## Appointing authorities

As it was mentioned above, depending on the type of arbitration, i.e. institutional or *ad hoc*, the appointing authorities would be either the head of the permanent arbitral institution or the Vilnius regional court.

## Payment agreements

According to Article 5(3) of the Arbitration Law, permanent arbitral institutions may not refuse to execute their functions if the parties to the dispute have paid the fees required. Pursuant to Article 7 of VCCA rules the claimant shall pay a fixed

registration fee upon the submission of its claim. The claim shall not be prepared for settlement by arbitration before the payment of the registration fee is made.

The registration fee shall be non-refundable. Moreover, the claimant shall pay an advance administration fee for every claim filed with the court of arbitration. Until the administration fee is paid, the case shall not be transferred to the arbitral tribunal and substantive tribunal proceedings with regard to that claim shall not commence. The fixed amount shall be deemed to have been paid on the date it is credited to the bank account of the court of arbitration. When both parties to the dispute fail to pay the fees fixed by the chairman of the court of arbitration within a fixed period of time, the claim (counterclaim) file may be closed upon the expiration of the aforesaid term. Instead of the arbitration fees, the chairman of the court of arbitration may accept a bank guarantee from one or both parties to the dispute ensuring that these amounts shall be paid by the bank.

The tribunal in an *ad hoc* arbitration will generally request from the parties to provide advance deposits in respect of its fees and expenses.

## Procedure for challenge or replacement

If parties fail to agree otherwise, a party must apply to the tribunal within 15 days of learning about the constitution of the tribunal or the grounds for the challenge. If the arbitrator does not resign and the other party objects to the challenge, the tribunal, excluding the challenged arbitrator, decides on the issue. Such decision can be appealed within 20 days to the Vilnius regional court, whose decision is final.

Moreover, pursuant to Article 17 of the Arbitration Law an arbitrator must resign in case he/she cannot *de jure* or *de facto* perform his or her duties as an arbitrator or in case of parties' agreement. If the arbitrator refuses to resign or the parties cannot agree on the replacement of an arbitrator, parties may refer to the chairman of the permanent arbitral institution or, in case of *ad hoc* proceedings, to the Vilnius regional court.

Whilst the IBA Guidelines are non-binding, the tribunal may refer to them. it is noteworthy that in case the parties had not agreed otherwise, upon the replacement an arbitrator the arbitration procedure shall be restarted.

## C. Challenge and removal

### Grounds for challenge

According to Article 15 of the Arbitration Law, a party may challenge an arbitrator only in the case of justifiable doubts as to the arbitrator's impartiality or independence or due to a lack of qualifications required by the arbitration agreement.

### Procedure for challenge

The procedure for challenge or replacement is, if the parties fail to agree otherwise, that a party must apply to the tribunal within 15 days of learning about the constitution of the tribunal or the grounds for the challenge. If the arbitrator does not resign and the other party objects to the challenge, the tribunal, excluding the challenged arbitrator, decides on the issue. Such a decision can be appealed within 20 days to the Vilnius regional court, whose decision is final.

#### *The Court of Appeal, Case No. 2t-84/2014*

*Lithuanian Court of Appeal refused to recognize and enforce the ad hoc award in the Republic of Lithuania. The case arose out of the dispute on the contract concluded in the Republic of Estonia between company of the Republic of Estonia "Sativa Group" OU and private limited company "Galinta ir partneriai", according to which interim measures were applied to the assets of the private limited company "Galinta ir partneriai". E.N. was been appointed as an arbitrator, although he has drafted some procedural documents on behalf of one of the party against the other party. Also, he submitted those documents to the Courts of the Republic of Estonia and*

*represented the party in the proceedings before the Estonian courts. The Court stated: The same requirements of independence and impartiality for judges and arbitrators shall be applied; previous representation of one of the parties is the basis for challenging the arbitrators in arbitration case; arbitrator is not a representative of the party; by analogy, Article 48 of the Law on Courts is applicable – being both the judge and the representative of the party at the same time is impossible in general.*

### *Supreme Court of Lithuania, case No. e3K-3-298-687/2018*

*The applicant requested the Court of Appeal of Lithuania to set aside arbitral award as being contrary to Article 50(3) of the Law on Commercial Arbitration. In the applicant's view, during the arbitration proceedings, the arbitral tribunal and its chairman were only in favor of the person concerned and his representative. However, the Court of Appeal of Lithuania did not disclose such facts and noted that, in the absence of objective evidence of social, financial, business, subordinate and other links between the arbitrator and the representative of the party, their work in the same Bar Committee does not per se mean that the arbitrator violated the duty of impartiality.*

# V. Arbitration Procedure

## A. Law governing procedure

In principle, when parties decide to submit their existing or future disputes to an institutional arbitration they are also, automatically, opting for the application of the procedural rules of the designated organization or institution.

The parties are free to choose the applicable law. The Arbitration Law (Article 39) provides that in the absence of the agreement of the parties on the applicable law, the tribunal shall determine the law applicable *ex officio*, including applicability of trade usages such as *lex mercatoria*.

Failing an agreement by the parties on a particular procedure, the arbitral tribunal may conduct arbitration in such manner as it considers appropriate. This right includes the power to determine the admissibility, relevance, materiality and weight of any evidence (Article 33 of the Arbitration Law).

Provisions of the Arbitration Law are applicable to all arbitration proceedings held in Lithuania and rules of the VCCA are applicable only to the settling of commercial disputes in situations where the disputing parties have agreed to transfer their disputes to the VCCA or have settled them in accordance with these rules.

### Notion and role of seat of arbitration

As it was mentioned above, the Arbitration Law applies regardless of the citizenship or nationality of the parties to a dispute, whether the arbitration proceedings are organized by a permanent arbitral institution and whether the place of arbitration is in Lithuania. Whether or not the place of arbitration is in Lithuania, the Arbitration Law applies to recognition of the arbitration agreement

and disputes over its validity, application of interim measures by the courts and recognition and enforcement of foreign arbitral awards.

Mandatory laws of the seat of arbitration will generally prevail if they constitute public policy. Mandatory laws of another jurisdiction may also prevail over the law chosen by the parties. This is particularly relevant if the arbitral award has to be enforced in that other jurisdiction. A tribunal may also be required to apply mandatory principles of EU law.

Article 1.37 (7) of the Civil Code provides that an arbitration agreement shall be governed by the law applicable to the principal contract, and in the case of invalidity of the principal contract, by the law of the place where the arbitration agreement was concluded. Where it is impossible to identify the place of conclusion, the law of the state in which the arbitration is situated shall apply.

Therefore, as such, parties who choose Lithuania as the seat are no longer able to adopt a different procedural law. Despite this limitation, the Arbitration Law still provides the parties with significant flexibility when it comes to setting the procedure to be followed. An agreement between the parties as to procedure can usually be found in the chosen arbitration rules. In the absence of an agreement between the parties, the tribunal may, subject to the provisions of the Arbitration Law, conduct the arbitration as it considers appropriate.

## Methods for selection of seat absent party choice

According to the Arbitration Law, Arbitration place means the arbitration place indicated in the arbitration agreement or determined by the arbitral tribunal. If the parties have not agreed on the arbitration place or the parties' agreement regarding the arbitration place is not clear and as long as the arbitration place has not been determined by the arbitral tribunal, the arbitration place shall be deemed the office of the permanent arbitral institution. In the case of *ad hoc* arbitration, the residential place or office of the respondent, and in the case of several respondents, the residential place or office of one of the respondents at the claimant's choice.

The arbitration place may be different than the place of arbitral examination.

According to the Civil Code of the Republic of Lithuania, an arbitration agreement is subject to the law applicable to the main agreement. If this is not specified, the law of the place where the arbitration agreement was concluded shall apply. If the place cannot be determined, the arbitration agreement shall be subject to the law of the seat of arbitration.

### Mandatory rules of procedure

The general rule is that parties are free to agree on the form of the arbitration procedure. Mandatory provisions usually mirror relevant provisions of the Model Law with some minor differences.

The following provisions on procedure are considered mandatory:

- Article 28 (equality of the parties);
- Article 31 (tribunal's right to establish the language of the proceedings);
- Article 34 (basic requirements for the hearings and written procedure); and
- Article 46 (content of the award).

## B. Conduct of arbitration

### Basic procedural principles

Failing an agreement by the parties on a particular procedure, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. This right includes the power to determine the admissibility, relevance, materiality and weight of any evidence (Article 33 of the Arbitration Law). The general rule is that parties are free to agree on the form of the arbitration procedure.

As for basic procedural principles, the Arbitration Law provides that the issues governed by this Law, but not regulated in detail shall be dealt with in accordance

with the principles of justice, reasonableness, good faith and other general principles of law. Arbitration Law shall be interpreted to ensure the maximum compliance of the arbitration procedure taking place according to this Law with the arbitration principles.

Article 8 of the Arbitration Law also lists the basic procedural principles:

- The arbitral tribunal, permanent arbitral institution and its chairman shall be independent while resolving the issues regulated in this Law;
- Courts may not interfere with the activity of the arbitral tribunal, permanent arbitral institution and its chairman, except for cases stipulated in this Law;
- The arbitration procedure shall be confidential;
- The parties to arbitration shall have equal procedural rights;
- The parties to arbitration shall have the right to freely dispose of their rights;
- The arbitration procedure shall take place in compliance with the principle of autonomy of the parties, adversarial principle, principles of economy, cooperation and expedition.

## Party autonomy and arbitrators' power to determine procedure

The Arbitration Law provides the following rights to the arbitrators:

- to object being appointed as the arbitrator;
- to resign as an arbitrator;
- to solve competence issues;
- to accept documents from the parties that were delivered to the tribunal overdue;
- upon the request of the party, to oblige the other party to pay a deposit to secure the claim;
- upon the request of the party, to apply to the district court for application of interim measures or for assistance in taking evidence;
- to decide on the order of the procedures in the absence of agreement between the parties; and to conduct hearings, approve or refuse to approve the settlement agreement;

- to appoint an expert, to demand additional information from the parties, and to correct the mistakes in the awards or to explain awards.

Arbitrators also have an obligation to notify any circumstances that may cause doubts on their impartiality and neutrality. They also have an obligation to avoid any delay in conducting the proceedings or performing other obligations.

## Style and characteristics of the oral hearing

Subject to any agreement by the parties, the arbitral tribunal shall hold oral hearings and conduct proceedings on the basis of documents and other materials furnished by the parties. In case the parties agree that no hearings shall be held, the arbitral tribunal shall conduct oral hearings during the written proceedings if so requested by a party to the dispute.

All statements, documents or other such information supplied to the arbitral tribunal by one party must be transmitted to the other party.

## Documents only arbitrations

Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

The arbitral tribunal has a right to determine the admissibility, relevance, materiality and weight of any evidence (Article 33(7) of the Arbitration Law). The arbitral tribunal may order the parties to produce any evidence material to the case as well as to refuse to accept certain evidence. If the parties had not agreed otherwise, any evidence is not mandatory to the tribunal. In addition, the arbitral

tribunal or a party with the approval of the arbitral tribunal may request from Vilnius regional court assistance in taking evidence.

## Submissions and notifications

Unless the parties agree otherwise, the arbitral examination shall be deemed to have been commenced on the day on which the respondent received a request for arbitration or a claim. The request for arbitration or the claim shall contain the names or first and last names of the parties, the essence of the dispute, the reference to the arbitration agreement and the candidacy of the arbitrator.

The parties shall be notified on all hearings of the arbitral tribunal in advance, with reasonable notice of time required. All evidence, documents or other information presented by a party to the arbitral tribunal shall be presented to the other party.

Evidence, documents or other information received by the arbitral tribunal shall also be presented to the parties.

Under VCCA Rules, the parties' agreement on application of these Rules shall include their agreement on delivery of all procedural documents to them by e-mail. In this case procedural documents shall be deemed delivered to the party on the next day after sending thereof. The parties shall present the originals and electronic copies of all procedural documents to the Vilnius Court of Commercial Arbitration and the Arbitral Tribunal.

In exceptional cases, procedural documents may be delivered in person, by registered mail, courier, other electronic communications terminal equipment or by any other means that provides record of the sending thereof.

All procedural documents and other written statements or notifications of the party together with all annexes thereto shall be presented in the number of copies sufficient to present a copy thereof to each of the parties, each arbitrator and the Secretariat. After transmission of the case file to the Arbitral Tribunal, each party shall send all documents or other information directly to the Arbitral Tribunal and

the other party with a copy to the Secretariat, notwithstanding in which way the case will be considered.

All notifications and orders of the Arbitral Tribunal shall be sent to the parties with a copy to the Secretariat. All written notifications of the Secretariat and the Arbitral Tribunal shall be sent to the last known address of the party or its representative specified by the party itself or the other party. Such notifications may be delivered in person, by registered mail, courier, electronic communications terminal equipment or by any other means that provides record of the sending thereof. A written notification shall be deemed received on the day it is delivered to the party or its representative or would have been delivered if sent in accordance with the rules.

In calculating the time limits under VCCA arbitration Rules, it shall be deemed that a time limit started to run on the next day a communication, notification, prompting letter or proposal has been received in accordance with the rules. If at the addressee's place the last day of the time limit is an official holiday or a non-working day, the last day of the time limit shall be deemed the following working day after the official holiday or non-working day. Official holidays and non-working days shall be included in the time limit.

## Deadlines, and methods for their extension

Under the Arbitration Law, arbitral proceedings should be commenced on the date on which a request for that dispute to be referred to arbitration is received by the respondent, unless otherwise agreed by the parties. The tribunal should set timeframes during procedural directions to ensure that the arbitration runs efficiently, however these timeframes should be treated as targets rather than strict deadlines.

## Legal representation

In general, a lawyer from any EU Member State with the professional title conferred by the competent authority in his home country can temporarily provide legal services in Lithuania, including conducting cases in civil courts. He/she can provide legal services permanently, except representation in the Supreme Court, if he/she is registered with the bar association of Lithuania. Lawyers from non-EU Member States can only conduct cases in Lithuanian courts if this right is provided in bilateral international agreements.

Rules of arbitration of the VCCA and the Arbitration Law provide that a party in arbitration may be represented by an attorney or any other person.

## Default proceedings

Article 35 of the Arbitration Law provides that unless the parties have agreed otherwise, where a party fails to present a mandatory procedural document or does not take part in the arbitral hearing without a valid reason, the arbitral tribunal shall have the right to proceed with the arbitral examination and make an arbitral award based on the evidence available in the case or make procedural decisions.

Moreover, pursuant to article 14 of the Arbitration Law, if there is no prior agreement and if the arbitration consists of three arbitrators, each party selects one arbitrator, and the two of them appoint the third one. If the arbitration has a sole arbitrator, and if the parties cannot agree on the appointment, an arbitrator is appointed by the head of the permanent arbitral institution upon the request of any of the parties; this also applies if one party does not appoint an arbitrator (or two arbitrators do not appoint the third one) within 20 days from the date the respective party had to appoint an arbitrator.

In case of *ad hoc* proceedings, where a party fails to appoint an arbitrator or in case two arbitrators appointed by the parties fail to appoint the chairman of the tribunal, an arbitrator/chairman of the tribunal is appointed by Vilnius regional

court within 20 days from the date the respective party had to appoint an arbitrator.

Similar procedure and terms applies also in case there are two or more claimants or respondents in arbitration. The Arbitration Law (articles 14(5) and 14(6)) contain provisions according to which in the event of there being several claimants or respondents, such a group of claimants or respondents shall agree on the appointment of one arbitrator for that group. In the case of joint claimants or respondents failing to appoint an arbitrator, this obligation extends to the appointing authority in the case of institutional arbitration or the Vilnius regional court in the case of *ad hoc* arbitration. These provisions make the participation of several claimants and respondents in the arbitration possible.

## C. Taking of evidence

### Admissibility

The arbitral tribunal has a right to determine the admissibility, relevance, materiality and weight of any evidence (Article 33(7) of the Arbitration Law). The arbitral tribunal may order the parties to produce any evidence material to the case as well as to refuse to accept certain evidence. If the parties had not agreed otherwise, any evidence is not mandatory to the tribunal.

The arbitration court or the party with the consent of the tribunal may refer to Vilnius regional court for assistance in taking evidence.

According to the VCCA rules all issues related to the admissibility and significance of evidence are decided by the tribunal, unless the parties agree otherwise. The tribunal has the right to order the parties to provide evidence to prove certain claims and can ask a domestic court to assist in the gathering of evidence.

The tribunal may seek guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

## Burden of proof and Standards of proof

Unless the parties have agreed otherwise or otherwise required under the law applicable to the dispute, each of the parties shall prove the circumstances justifying its claims or points of defence.

During the arbitral examination, the arbitral tribunal may request the parties to present documents or other evidence relating to the case being examined. The arbitral tribunal shall have the right to refuse to admit the evidence which could have been presented earlier during the arbitral examination and the presentation of which will delay the arbitral examination. Unless the parties agree on the rules of evidence applicable to the arbitral examination, such rules shall be determined by the arbitral tribunal. Until determination of the rules of evidence applicable to the arbitral examination, gathering of evidence and distribution of the burden of proof shall be subject to the provisions of Arbitration Law.

If a party fails to present evidence as requested by the arbitral tribunal, the arbitral tribunal may make an award based on the available evidence or in exceptional cases evaluate the fact of failure to present the evidence against the defaulting party.

## Evidentiary means – in general

Within the term agreed by the parties or determined by the arbitral tribunal, the claimant shall indicate the circumstances justifying his claim, issues in dispute, appoint an arbitrator (if no arbitrator has been appointed) and state claims in action, while the respondent shall submit its points of defence, unless the parties have agreed otherwise.

Unless the parties agree otherwise, during the arbitral examination, any of them may change or supplement their claims in action or statement of defence, except for cases where the arbitral tribunal recognises that it is not expedient to allow

such changes or supplements to be made due to unreasonably delayed submission thereof.

## Documentary evidence and privilege

The Arbitration Law only stipulates a general principle of confidentiality of arbitration procedure in Article 8(3) of the Arbitration Law. However, article 6 of the VCCA rules provides that arbitral tribunals must follow the principle of confidentiality in all proceedings. The award may not be published without the consent of both parties to the dispute.

All proceedings in domestic courts are public with certain exceptions; therefore, all information communicated to the domestic courts may be exposed to the public if the assistance of a domestic court is requested.

The law does not specifically regulate issues of privilege in arbitral proceedings. However, since collection of evidence can be assisted by the national court according to the CCP, general rules of privilege must be observed. According to the Law of Advocacy, privilege extends to all communications by the attorney that is carried out on a client's behalf with third parties, and to the information provided by the parties. There is no division of privilege into litigation and legal advice privilege. Privilege extends only to attorneys and attorneys' assistants. In-house lawyers are not protected.

## Production of documents

Production orders, if any, are usually limited to specific identifiable documents that the requesting party proves is material to the outcome of the case. As stated above, the IBA Rules on Taking Evidence in International Arbitration are usually followed. An arbitral tribunal deciding on the matters in its competence is independent and no court of the state can intervene in its work except where so provided in the Arbitration Law. The arbitral tribunal or any party can at any time

ask a domestic court of the place of the arbitral tribunal's domicile for assistance in obtaining evidence.

## Witnesses

In accordance with Article 36 of the Arbitration Law, the arbitral tribunal shall determine the time, place and mode of examination of witnesses and experts. If persons called as witnesses fail to appear or having appeared refuse to be witnesses, the arbitral tribunal may allow the party requesting examination of the witness to apply to Vilnius regional Court within the term set by the arbitral tribunal requesting examination of the witnesses according to the procedure established in the Code of Civil Procedure and this Law. Examination of witnesses in Vilnius Court shall be mutatis mutandis subject to the provisions of the ninth clause of Chapter XIII of Section II of the Code of Civil Procedure. During examination of witnesses in court, the arbitral tribunal may stay or postpone the arbitral examination.

Under the VCCA rules, a party requesting to call and examine a witness shall, not later than 15 days prior to the hearing, notify the Arbitral Tribunal to that effect and indicate the first and last names, place of residence of the witness, the circumstances of the case which can be confirmed or denied by the witness and the language in which the witness will testify. If the party fails to fulfil these requirements, the Arbitral Tribunal shall have the power to refuse to call a person as a witness. Unless the Arbitral Tribunal specifies otherwise, the party inviting the witnesses shall inform the witnesses about the date, time and place of the hearing.

## Tribunal-appointed experts

Article 36 of the Arbitration Law provides that unless the parties agree otherwise, the arbitral tribunal has a right to appoint experts and to order the parties to provide the appointed experts with any information related to the dispute. Unless the parties agree otherwise, the experts are required to appear in the hearings in

person if any of the parties or the tribunal requests it. The parties can also invite their witnesses and experts to testify. The tendency is towards tribunal- appointed experts to ensure the impartiality of the experts. There are no restrictions on party officers and parties testifying.

## Party-appointed experts

The parties can invite their experts to be heard with the tribunal's approval. In such case expenses incurred by the expert shall be compensated and remuneration shall be paid to the expert by the party which invited the expert.

The tendency is towards tribunal-appointed experts to ensure the impartiality of the experts. There are no restrictions on party officers and parties testifying.

Under the VCCA rules, experts may be challenged on the same grounds as arbitrators in compliance. The Arbitral Tribunal examining the dispute shall decide on the validity of the challenge of experts. The expert's findings shall not be binding on the Arbitral Tribunal and shall be evaluated in compliance with the same principles as other evidence.

## Interim measures of protection

### Jurisdiction for granting interim measures

A party requesting the arbitral tribunal to apply the interim measures shall prove that:

- its claims in action are likely justified;
- determination of such likelihood shall not entail the right of the arbitral tribunal to make another award or ruling subsequently during the arbitration examination;
- failure to take these measures may render enforcement of the arbitral award considerably more difficult or impossible;

- interim measures are economic and proportional to the goal to be achieved by such measures.

## Availability of preliminary or *ex parte* orders

In accordance with Article 21 of the Arbitration Law, unless the parties have agreed otherwise, a party may request the arbitral tribunal to apply interim measures without notice to the other party by submitting an application for a preliminary ruling obligating the respective party not to take any actions that may impede the applying of interim measures during the examination of the application for interim measures.

The party requesting the arbitral tribunal to make a preliminary ruling shall prove that the notice to the other party on the application for interim measures may significantly prevent the goals of such measures from being achieved.

The party requesting the arbitral tribunal to make a preliminary ruling shall reveal to the arbitral tribunal all the circumstances that may be relevant in examining this request. The party shall have this duty throughout the term of the preliminary ruling. Upon making a preliminary ruling, the arbitral tribunal shall immediately deliver the application for interim measures, the application for a preliminary ruling, the preliminary ruling itself and any correspondence of the party applying for the preliminary ruling and the arbitral tribunal (if any) (including information about oral examination of the application for a preliminary ruling, if such examination was held) to all the parties.

The arbitral tribunal shall provide the party in respect of which the preliminary ruling was made with the possibility to be heard and examine the points of defence of this party in respect of the preliminary ruling as expeditiously as possible.

The law also provides that the preliminary ruling shall be effective for 20 days following making of the ruling. During this period, the arbitral tribunal, having heard the party in respect of which the preliminary ruling is made and having examined the points of defence of this party, if any, may apply the respective interim

measures. The preliminary ruling shall be binding upon the parties, however, it shall not be a document subject to enforcement.

### *The Court of Appeal of Lithuania, Civil case No. e2-1433-180/2018*

*The plaintiff applied to the Vilnius Regional Court for interim measures once the arbitration proceedings had been started. The Vilnius Regional Court rejected such a request. The Court of Appeal of Lithuania annulled the order and returned the case to the Vilnius Regional Court. The Court of Appeal of Lithuania clarified that, according to Articles 20(1) and 27(1) of the Law of Commercial Arbitration, a party has the right to apply for interim relief before the beginning of arbitration process or before the arbitral tribunal is constituted and shall have the right to apply for interim measures both by the Vilnius Regional Court and the arbitral tribunal hearing the case.*

Recently, there was also an important development in Lithuanian Courts related to application of interim measures. Previously, the Courts applied so-called "high-value-claim" presumption. The Courts assumed that there is a necessity of application of interim measures if value of the claim was relatively high. Whether the value of the claim was or was not high, depended on circumstances of the case. Another issue was that under the default rule the Courts applied interim measures on *ex parte basis*, i. e. without notifying a counterparty.

However, recently, the Court of Appeal has made three important statements which, hopefully, will positively affect further development of Lithuanian case law in this category of civil cases:

- First, the Court must clarify whether the parties do not have to refer the dispute regarding interim measures to the arbitration. The Court of Appeal rendered in this regard that: "[a]s assessed by the [C]ourt of [A]ppeal, the [C]ourt of first instance should have determined, under Article 27 (1) of the Commercial Arbitration Law, the stage at which the [claimant] <...> filed the request for provisional [measures], and should have requested information on the progress of the arbitration, since, as it may be seen from

the appellant's request, the [claimant] filed a request on the application of provisional [measures] in the arbitration proceedings; however, no data on the progress of that request have been submitted, nor has it been submitted to the court of appeal. These circumstances raise doubts as to whether the resolution of the same issue in several dispute resolution authorities (state court and arbitration) is being sought".

- Second, the Court of Appeal explained why it is important to clarify whether the Arbitral Tribunal can apply tantamount interim measures. Because the Arbitral Tribunal is better aware of the background of the case and can adequately determine, whether the provisional measures have to be applied. Thus, the Court of Appeal pointed out that the lower Court did not clarify important circumstances: "[i]n addition, [the circumstance has not been assessed] whether an international arbitration body ([tribunal]) could have assessed the best known facts of the case and the merits of the request more properly".
- Third, the Court of Appeal reasonably determined that the Vilnius District Court should not apply the interim measures on an *ex parte basis* in such category of cases: "[i]t should be noted that the [C]ourt of first instance, after having assessed the applicant's data entered upon the record and finding that the documents annexed to the request were defective, was required not only to remedy the defects but also to inform the appellant of the examination of the applicant's request".

## Types of measures and Form of measures

National courts tend to resolve such requests in the same manner as those provided in domestic litigation. If an arbitral tribunal has not yet been formed, a party must apply directly to a domestic court for interim measures. After the arbitration tribunal has been formed, the parties may request the arbitral tribunal to apply to the domestic court situated in the same district as the arbitral tribunal

for the application of interim measures, unless the parties have agreed otherwise (Article 20 of the Arbitration Law).

An application for the interim measures does not affect the jurisdiction of the arbitration tribunal.

In case the parties had not agreed otherwise, the arbitration court, having informed other parties, may apply the following interim measures (Article 20(2) of the Arbitration Law):

- order the party to refrain from conclusion of certain contracts or to refrain from certain actions;
- to oblige the party to ensure protection of certain assets, to provide a deposit, bank or insurance guarantee;
- to oblige the party to produce evidence, which may be material to the arbitration case.

The arbitrator may apply for assistance from the courts in enforcing such orders.

## Security for costs

Unless the parties have agreed otherwise, the arbitral tribunal, upon the request of any party, can order another party to pay security for costs, as well as apply for assistance from the courts in enforcing such order. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of any party, make the other party pay a deposit to secure the claim (Article 20 of the Arbitration Law).

The Arbitration Law stipulates that in case there is no agreement of the parties, the tribunal would allocate costs incurred at its discretion, taking into account all the circumstances of the case and conduct of the parties. Generally, the arbitral tribunal would allocate the costs of arbitration equally to both parties.

## Enforcement mechanisms

The ruling of the arbitral tribunal on interim measures shall be a document subject to enforcement.

Should the ruling of the arbitral tribunal on interim measures not be enforced, District Court shall, upon the party's request and according to the procedure established in the Code of Civil Procedure of the Republic of Lithuania issue an enforcement order. The application for an enforcement order shall be examined at a court hearing upon notice to the parties to the arbitral examination. Failure by the parties to appear at the hearing shall not prevent the court from deciding on the matter of issuing the enforcement order.

The party upon whose request District Court issued the enforcement order for enforcing the ruling on interim measures shall immediately notify this court of any change or cancellation of the interim measures. The request for revising or cancelling the enforcement order shall be examined at a court sitting upon notifying the parties to the arbitral examination. Failure by the parties to appear at the hearing shall not prevent the court from deciding on the matter of revising or cancelling the enforcement order.

District Court may refuse to issue an enforcement order only if:

- insufficient data is presented for determination of the mandatory content of the enforcement order and such deficiency cannot be removed during the examination of the request for the enforcement order in the court;
- the party in respect of which the enforcement order is requested proves that the arbitral tribunal has not notified it properly on the examination of the matter regarding application of the interim measures thus preventing the party from presenting its own explanations;
- the arbitral tribunal obviously exceeded its competence in making the ruling on interim measures;
- the ruling of the arbitral tribunal on securing compensation of losses that might possibly be incurred through application of the interim measures has not been enforced;

- the arbitral tribunal has revised or cancelled the ruling on interim measures.

A separate complaint may be submitted against the ruling of District Court on refusal to issue the enforcement order.

## D. Interaction between national courts and arbitration tribunals

### Court assistance before the arbitration begins

A valid arbitration agreement, as with any other agreement, is obligatory to its parties and has the power of law (article 6.189 of the Civil Code).

Having received a claim regarding a matter in respect of which the parties have concluded an arbitration agreement, the court shall reject the claim. If the fact of conclusion of the arbitration agreement transpires after the court has admitted the claim, the court shall not proceed with the case regarding the matter in respect of which the arbitration agreement was concluded.

In addition, the arbitration agreement may be recognised as invalid in judicial procedure upon request of one of the parties under the general grounds of recognising transactions as invalid. The court shall stay the case if hearing of the case may not proceed pending the disposition of the arbitration case.

Moreover, a party has the right to apply to Vilnius regional court for interim measures or preservation of evidence before commencement of the arbitral examination or before the formation of the arbitral tribunal. Upon the party's request, the court may also apply the interim measures or preserve the evidence after the formation of the arbitral tribunal.

Accordingly, the other party shall have the right according to the procedure established in the Code of Civil Procedure to request securing compensation of losses that might possibly be incurred through application of the interim measures or preserving the evidence.

Refusal by the court to apply the interim measures or preserve the evidence shall not prevent the party from requesting the arbitral tribunal during the arbitral examination to apply the interim measures or preserve the evidence.

## Court assistance during the arbitration

First of all, it must be noted that an arbitral tribunal deciding on the matters in its competence is independent and no court of the state can intervene in its work except where so provided in the Arbitration Law.

However, the arbitral tribunal or any party can at any time ask a domestic court of the place of the arbitral tribunal's domicile for assistance in obtaining evidence. The tribunal and any party may address the same court for an order to grant interim measures. The court's powers cannot be overridden by an agreement.

It is important to note that the previous version of the Arbitration Law provided that if during the arbitration proceedings the defendant becomes insolvent, all disputes related to its property immediately become subject to the jurisdiction of the national court which is hearing the insolvency case. The proceedings in the arbitration should be terminated and the claim should be submitted to the national court.

However, the new version of the Arbitration Law now states that instituting bankruptcy proceedings against a party to the arbitration agreement or application of other bankruptcy proceedings against a party to the arbitration agreement shall have no impact on the arbitration proceedings, validity and application of the arbitration agreement, the possibility to resolve the dispute in arbitration and the competence of the arbitration tribunal to resolve the dispute.

In addition, a company against which bankruptcy proceedings are instituted may not conclude a new arbitration agreement. Property claims against a party to the arbitration agreement against which bankruptcy proceedings are instituted shall be examined in the court instituting the bankruptcy proceedings, upon request of

all parties to the arbitration agreement against which no bankruptcy proceedings are instituted.

If property claims against the party to the arbitration agreement against which bankruptcy proceedings are instituted are examined in arbitration, the arbitral tribunal shall provide a reasonable period of time to the bankruptcy administrator to become familiar with the arbitration proceedings and prepare for its examination, and the claimant shall notify the court examining the bankruptcy proceedings on the claims being examined in arbitration and present explanations justifying such claims and schedule of evidence.

The arbitral tribunal shall in its award determine the amount of the mutual claims of the parties. Upon making the arbitral award, the court examining the bankruptcy proceedings shall approve the mutual claims of the parties determined in the arbitral award. The court examining the bankruptcy case may refuse to approve the creditor's claims examined in arbitration until the arbitral award approving the amount of those claims has been made. However, the court shall approve all undisputed claims (undisputed part thereof) according to the procedure established by the Enterprise Bankruptcy Law of the Republic of Lithuania.

Furthermore, the arbitral tribunal or a party with the approval of the arbitral tribunal may request assistance from Vilnius regional court in taking evidence. The court must execute the request according to the rules of the CCP. The courts will also intervene in the procedure regarding appointment of an arbitrator or in the case of interim measures.

A wide range of interim measures is available, including the arrest of property, funds or proprietary rights, orders to refrain from certain actions and designation of a property administrator (Article 145 of the CCP). Requests of the parties regarding the application of interim measures may be filled to Vilnius regional court before the commencement of the arbitration proceedings or before the constitution of the arbitral tribunal.

Under Article 34 of the VCCA rules, parties also may apply to the domestic court of any jurisdiction for the application of interim measures. Any such request by a party and any measures taken by the national court must be communicated immediately to the secretariat of the arbitration court.

According to the VCCA rules all issues related to the admissibility and significance of evidence are decided by the tribunal, unless the parties agree otherwise. The tribunal has the right to order the parties to provide evidence to prove certain claims and can ask a domestic court to assist in the gathering of evidence. The parties can invite their experts to be heard with the tribunal's approval.

In case of *ad hoc* proceedings, where a party fails to appoint an arbitrator or in case two arbitrators appointed by the parties fail to appoint the chairman of the tribunal, an arbitrator/chairman of the tribunal is appointed by Vilnius regional court within 20 days from the date the respective party had to appoint an arbitrator. Similar procedure and terms applies also in case there are two or more claimants or respondents in arbitration.

According to Article 15 of the Arbitration Law a party may challenge an arbitrator only in case of justifiable doubts as to arbitrator's impartiality or independence or due to lack of qualifications required by the arbitration agreement.

Local courts are also involved in procedure for challenge or replacement—if parties fail to agree otherwise, a party must apply to the tribunal within 15 days of learning about the constitution of the tribunal or the grounds for the challenge. If the arbitrator does not resign and the other party objects to the challenge, the tribunal, excluding the challenged arbitrator, decides on the issue. Such decision can be appealed within 20 days to the Vilnius regional court, whose decision is final.

## Court assistance after the arbitration

In addition to recognition and enforcement of the arbitral award, the courts would usually assist interested party to execute the award, i.e. after the court's judgment

comes into force the claimant has a right to ask the court to issue a writ of execution, which is submitted to the court bailiff for execution.

Sanctions in the event a court order is disobeyed are a monetary penalty and imprisonment lasting up to 30 days.

## Case law examples of best and worst practices

Since most of the arbitration proceedings in Lithuania are confidential, there is not much case law which could be referred to. However, a case regarding interim measures could serve as example of the court's assistance in regards of ensuring the compliance with a prospective award.

### *Privatisation agency of the Republic of Serbia v Alita*

*In 2007 a consortium between Swedish company and Lithuanian company has bought a majority stake in Serbian brewery. Under the Privatization Agreement, the consortium was obliged to invest 5.1 million EUR in modernization of the brewery by year 2010. However, this investment appeared to be very unsuccessful and embezzlement of the assets of the Serbian brewery followed. In 2009 the Lithuanian company was separated from the original company and registered as a new legal entity. The reorganization, according to original company, was carried out in order to separate the investment activity of original company from the production activity. However, under the spin off conditions, almost all assets, rights and obligations belonging to original company before the reorganization were assigned to new company. The old original was only left with the Privatisation agreement with all of the rights and obligations contained therein, including the arbitration clause, which later on filed for bankruptcy.*

*In 2010 the Privatisation agency of the Republic of Serbia (Agency) had initiated arbitration proceedings in Serbia against both, new company and the old company under the arbitration clause contained in the Privatisation agreement and claimed damages. New company objected that it was not bound by the arbitration clause contained in the Privatisation agreement because it was signed by the old original company and not by the new legal entity. Furthermore, the old company claimed that since the bankruptcy proceedings were initiated towards old company, it cannot be*

*brought to arbitration, because now it is only the Regional Court which will deal with all of the obligations of old company. However, in 2011, Serbian arbitration tribunal found (Partial award) that both – the new and the old company are bound by the arbitration clause contained in the Privatisation agreement and, accordingly, Tribunal has jurisdiction towards both of these companies.*

*At the same time, the Privatisation agency had filed a request to the district court were both companies are domiciled and requested to apply interim measures towards both companies securing Agency's claim in Serbian arbitration proceedings. Having combined the separability doctrine and group of companies doctrine, the district court, Lithuania had ruled to apply interim measures towards both companies and arrested all their assets in securing the execution of the award awaited. Therefore, this case may serve as a perfect example of the readiness of the Lithuanian courts to assist arbitration proceedings, even when the case and legal issues analyzed therein are of great complexity.*

## E. Multiparty, multi-action and multi-contract arbitration

### Consolidation of arbitrations

Article 37 of the Arbitration Law provides that arbitration cases may be joined upon agreement of the parties.

Although the Arbitration Law defines the arbitration agreement as an agreement of two or more than two parties to refer their disputes to arbitration, there are no other provisions regarding a consolidation of arbitrations. In case of multiparty arbitration agreement, it should, nevertheless, meet general requirements for arbitration agreements (i.e. concluded in writing, the dispute is arbitrable, the agreement meets to the requirements of validity and performance and all parties are identified).

## Joinder of third parties

In several cases an arbitration agreement may be extended to third parties or non-signatories. Therefore, an arbitration agreement shall be mandatory for: a party that has entered into a legal relationship to which the arbitration agreement is applicable by virtue of assignment of claim or transfer of debt; the principal in the case of an arbitration agreement concluded by the principal's agent; and for legal successors to a company reorganised by a merger or acquisition.

The Arbitration Law is silent on the questions of the participation of a third party through joinder or a third-party notice. In contrast, VCCA rules contain a provisions that, in the event of there being several claimants or respondents, such group of claimants or respondents shall agree on the appointment of one arbitrator for that group, who will then decide on the appointment of the third arbitrator. This provision makes the participation of several claimants and respondents in the arbitration possible.

Moreover, according to the Arbitration Law, arbitration agreement shall be mandatory for:

- a party that has entered into a legal relationship to which the arbitration agreement is applicable by virtue of assignment of claim or transfer of debt;
- the principal in the case of an arbitration agreement concluded by the principal's agent; and
- for legal successors to a company reorganised by a merger or acquisition and, in certain cases, for legal successors after company's set-off.

## Parallel and concurrent proceedings

A particular case which has dealt with the issue of parallel and concurrent proceedings is the Gazprom v Ministry of Energy case.

## *Gazprom v Ministry of Energy case*

*The story started with AB Lietuvos Dujos (Company) which was a joint stock company registered by the Lithuanian state and subsequently privatised. In 2004, Gazprom, Ruhrgas and the Republic of Lithuania (originally through its State Property Fund, which was later replaced by the Ministry of Energy (Ministry)), entered into the Shareholders' Agreement (SHA). The SHA recorded the terms and conditions of the parties' joint actions in the management of the Company and contained an arbitration clause referring disputes to arbitration in Stockholm, under the Arbitration Rules of the SCC Arbitration Institute (SCC Arbitration Rules). In 1999, Gazprom and the Company concluded a long-term agreement on the supply of gas for Lithuania for 2000 to 2015 (Long-Term Agreement). This Long-Term Agreement continued when Gazprom became a shareholder in the Company.*

*In February 2011, the Ministry raised allegations that the Company's management and the two Gazprom-nominated Board members did not act in the Company's best interests when agreeing on the price for gas supply for the year 2011, and when agreeing to revised terms for natural gas transit services. In March 2011, the Ministry filed an application for investigation proceedings before the Vilnius Regional Court in Lithuania (Lithuanian Court), pursuant to the Lithuanian Civil Code, against the Company, the two Gazprom-nominated members of the Company's Board and the Company's CEO (Investigation Proceedings). The Ministry requested the Lithuanian Court to appoint an expert to investigate whether the members of the Company's governing bodies acted appropriately and, if they acted inappropriately, to apply the measures and sanctions provided for in the Lithuanian Civil Code.*

*In addition, the Ministry alleged that Lithuania's interests as a shareholder in the Company were violated, and those of Gazprom were unduly promoted, when the board approved, and the Company executed, the Addendum to the Long-Term Agreement. In this regard, the Ministry requested that the Lithuanian Court oblige the Company to take certain actions, including the initiation of negotiations with Gazprom on setting a fair and correct purchase price for natural gas and the establishment of a new procedure for gas purchase and transit negotiations and their approval by the board.*

*Gazprom argued that the Investigation Proceedings were brought in breach of the arbitration agreement in the SHA. In June 2011, it commenced an emergency arbitration under the SCC Arbitration Rules in an attempt to preserve its right to have the dispute settled through*

*arbitration pursuant to the arbitration agreement in the SHA. Gazprom requested the Emergency Arbitrator to order the Ministry to: Stay the Investigation Proceedings pending a final award by the tribunal to be constituted pursuant to the SCC Rules. Refrain from any further action before the Lithuanian Court, or any state court, in relation to the dispute pending a final award by the SCC tribunal.*

*The Emergency Arbitrator, Professor Albert van den Berg, declined to grant the relief sought by Gazprom in light of a lack of urgency. Therefore, in August 2011, Gazprom filed a request for arbitration against Lithuania before the SCC Institute. It argued that the dispute pending before the Lithuanian Court fell within the scope of the arbitration agreement in the SHA. Therefore, the Ministry had breached the SHA by initiating the Investigation Proceedings. Gazprom sought a declaration to that effect, together with compensation for damage suffered as a result of the breach. It also requested the SCC tribunal to order the Ministry to discontinue the Lithuanian court proceedings and to refrain from taking any further action in Lithuanian court in violation of the arbitration agreement.*

*The Ministry did not dispute that the SHA included an arbitration agreement covering disputes between the parties in connection with the SHA. However, it argued that the action in the Lithuanian Court did not fall within the scope of that arbitration clause because it: Involved other parties; Concerned a legal relationship other than the one specified in the arbitration agreement; Fell within the exclusive jurisdiction of the Lithuanian courts; The parties were in agreement that the arbitration clause in the SHA was governed by Swedish law; The substantive rights and obligations under the SHA were governed by Lithuanian law.*

*The tribunal (Mr. Yves Derains (Chairman), Ms. Sophie Nappert and Ms. Sophie Lamb) ordered Lithuania to withdraw some of the claims brought in the Lithuanian court and to limit other requests so as not to jeopardise the rights and obligations established in the SHA. The tribunal noted that it was common ground between the parties that the obligation to submit disputes to arbitration included a duty not to submit such disputes to state courts (the so-called negative effect of the arbitration clause). Likewise, it was common ground that bringing disputes which fall under the scope of an arbitration clause before state courts would constitute a breach of such an arbitration clause. The tribunal noted that the object of the Investigation Proceedings was not whether the provisions of the SHA had been respected by the shareholders, but involved the actions of the company, its governing bodies or members of its governing bodies and the fiduciary duty owed by such members to the company. Therefore, the legal relationship involved in the Investigation Proceedings was not grounded in*

*the SHA. However, this did not mean that an application for investigation proceedings could never result in the breach of an arbitration agreement in a shareholders' agreement. The tribunal found that the wording "[a]ny claim, dispute or contravention in connection with this Agreement, or its breach, validity, effect or termination..." in the arbitration clause showed that the parties clearly intended that all disputes between them in connection with the SHA should be resolved by arbitration, whether contractual or non-contractual.*

*Further, the tribunal agreed with Gazprom that good faith did not allow a party to an arbitration agreement to resort to legal artifice in order to circumvent that agreement and to submit to a state court a dispute the substance of which fell within the scope of that agreement. In the tribunal's view, for an application for investigation proceedings to constitute a breach of the arbitration clause, two cumulative conditions must be met, namely the: Petitioner is seeking relief that could modify the SHA or affect the rights of the shareholders under the SHA, which is the realm of the arbitration clause. Party requesting the investigation could have obtained the relief sought in the investigation through arbitral proceedings. In order for the tribunal to make a determination in this respect, the substance of the dispute submitted before the Lithuanian Court had to be taken into consideration, although the identity of the parties also could not be ignored. In the tribunal's view, the relevant question was whether requesting the investigation of third parties would jeopardise the rights of other shareholders under the SHA. The Ministry's contention that an arbitration agreement did not cover disputes with third parties was therefore misplaced. Nor did the tribunal accept as relevant the Ministry's argument with respect to the alleged exclusive jurisdiction of the Lithuanian courts. The tribunal emphasized that, if a request was within the exclusive jurisdiction of the Lithuanian courts, it would not circumvent the arbitration clause, because the remedies sought could not be obtained through arbitration. Thus, the relevant issue was the remedies requested before the state court that could also be obtained through arbitration.*

*The same observation applied to the arbitrability of the issues in front of the Lithuanian Court and to the public interest involved therein. The tribunal concluded that an application before the Lithuanian courts pursuant to the Lithuanian Civil Code could, in principle, amount to bringing a dispute to Lithuanian state court which fell within the scope of the arbitration agreement in the SHA, and therefore could constitute a breach of the SHA. On the facts of this case, the tribunal found that, in some respects, the substance of the action before the Lithuanian Court was governed by the SHA. Therefore, a decision of the court would affect the rights of the parties to the SHA to have the disputes "in connection with" the SHA settled by*

*arbitration. In particular, the tribunal found that the Ministry could not resort to state courts to order the Company to renegotiate the terms agreed with Gazprom on the purchase of natural gas. Further, the Ministry could not request the Lithuanian courts to compel the Company to establish new rules relating to the procedure of gas purchases and transit negotiations, or the manner in which they should be approved by the Company's management bodies, as these matters were governed by the SHA. Likewise, the Ministry could not request Lithuanian courts to modify the shareholders' rights to vote as established in the SHA.*

*As regards the rights of the Lithuanian court under the Civil Code to "oblige a legal person to take or not take certain actions", the tribunal found that the provision was very broad and reiterated that the Ministry could not apply to the Lithuanian Court, or any state court, for relief that would jeopardise the rights and obligations established in the SHA.*

*In other respects, the tribunal found that the Ministry's requests either did not concern matters governed by the SHA or the measures requested could not have been obtained through arbitration. For example, the Ministry could not be prevented from requesting that the Lithuanian Court: Order the Company to announce certain annual report information. Adopt rules for avoiding conflicts of interests, provided that such new rules did not jeopardise the rights and obligations established in the SHA. Revoke decisions taken by the Company's managing bodies. Remove members of the Company's board and appoint provisional.*

*In light of its findings, the tribunal ordered the Ministry to withdraw certain requests made before the Lithuanian Court and to limit another request to measures that would not jeopardise the rights and obligations established in the SHA, and that could not be requested before an arbitral tribunal constituted pursuant to the arbitration clause in the SHA. As regards Gazprom's claim for damages, the tribunal concluded that it was impossible to quantify the amount of costs incurred by Gazprom. The tribunal also found that there was no evidence that part of the damages incurred by the Company as a result of the Lithuanian proceedings was or would be ultimately borne by Gazprom. Consequently, no damages were awarded.*

*Subsequently, in its judgment of 2015-10-23 the Supreme Court of Lithuania had granted recognition and enforcement of the SCC award by which the Ministry was obliged to withdraw certain claims from Lithuanian courts against Gazprom's officials.*

# F. Law and rules of law applicable to the merits

## Determining the applicable law and rules

The parties are free to choose the applicable law. Reference to the state's law applicable shall mean a reference to the material law and not the private international law of the state. Article 39 of the Arbitration Law provides that in the absence of the agreement of the parties on the applicable law, the tribunal shall have discretion to determine the law applicable, including the trade practices (*lex mercatoria*).

The older version of the Arbitration Law provided that in the absence of the agreement of the parties on the applicable law, the tribunal shall determine the law applicable in accordance with the conflict of law rules and in case of national commercial arbitration and in the absence of a choice on the applicable law, Lithuanian law would apply.

It is noted that Article 1.37 (7) of the Civil Code provides that an arbitration agreement shall be governed by the law applicable to the principal contract, and in the case of invalidity of the principal contract, by the law of the place where the arbitration agreement was concluded. Where it is impossible to identify the place of conclusion, the law of the state in which the arbitration is situated shall apply.

## Party autonomy

Party autonomy is paramount in determining the law applicable to the substance of the dispute and is generally considered a right in itself due to its universal acceptance in most developed legal systems. Despite this wide recognition, party autonomy is limited by mandatory laws of the seat and public policy.

Arbitration Law provides that the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties. The reference to

'rules of law' in the plural form suggests that the parties may choose more than one set of laws or rules, or non-legal standards to be applied as the substantive law of the dispute. Parties may also be able to apply different laws to cover different aspects of their relationship.

## Determination by arbitrators

Under the Arbitration Law, the arbitral tribunal may only decide *ex aequo at bono* or as *amiable compositeur* where expressly authorized to do so by the parties.

Similarly, the VCCA Rules provide that the arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have authorised the arbitral tribunal to do so in writing, and the law applicable to the arbitral procedure permits such arbitration.

### Non-national substantive rules, general principles of law and transnational rules

As it was mentioned, Article 39 of the Arbitration Law provides that in the absence of the agreement of the parties on the applicable law, the tribunal shall have discretion to determine the law applicable, including the trade practices (*lex mercatoria*). Parties may also expressly elect for *lex mercatoria*, or some other non-legal standard, to be applied as the substantive law pursuant to Article 39 of the Arbitration Law which refers to the parties' right to choose the 'rules of law' that govern the dispute.

## Mandatory rules

Mandatory laws of the seat of arbitration will generally prevail if they constitute public policy. Mandatory laws of another jurisdiction may also prevail over the law chosen by the parties. This is particularly relevant if the arbitral award has to be enforced in that other jurisdiction. A tribunal may also be required to apply mandatory principles of EU law.

Mandatory provisions defined in the Arbitration Law, CCP or the Civil Code are applicable to all arbitration proceedings sited in Lithuania notwithstanding the nationality of the parties. Failing an agreement by the parties on a particular procedure, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. This right includes the power to determine the admissibility, relevance, materiality and weight of any evidence (article 33(7) of the Arbitration Law).

The general rule is that parties are free to agree on the form of the arbitration procedure. Mandatory provisions usually mirror relevant provisions of the Model Law with some minor differences.

The following provisions on procedure are considered mandatory:

- article 28 (equality of the parties);
- article 31 (tribunal's right to establish the language of the proceedings);
- article 33 (basic requirements for the hearings and written procedure); and
- article 46 (content of the award).

## Costs

### Arbitration costs

The Arbitration Law stipulates that in case there is no agreement of the parties, the tribunal would allocate costs incurred at its discretion, taking into account all the circumstances of the case and conduct of the parties. However, if the arbitration is conducted under the VCCA rules, costs allocation would be decided in accordance with the respective rules. The VCCA rules (article 7) provide for the following costs to be compensated:

- registration fee;
- administration fee;
- compensation fee (which includes expenses for the services of experts, interpreters or translators);

- and the expenses of the proceedings, which include attorneys' fees and in-house fees.

According to the VCAA rules, the costs shall be credited to the party that prevails in the arbitral decision at the expense of the party against which the arbitral decision is made, unless otherwise agreed by the parties.

## Legal costs

The Arbitration Law does not distinguish separately the allocation of legal costs. However, important case in this regard is the Bosca v Lithuania case.

### *Bosca v Lithuania case*

*On 17 May 2013, the arbitral tribunal, composed of the Hon. Marc Lalonde (Presiding arbitrator) along with Mr. Daniel Price and Prof. Brigitte Stern, issued an award in favour of Mr. Luigi Bosca in which it was declared that the Republic of Lithuania had breached its obligation to grant just and fair treatment to the claimant. Award had confirmed the liability of the Republic of Lithuania for its illegal treatment of him under international law and the International Investment. Under the award, the tribunal have awarded Mr. Bosca 80% of the legal costs.*

*Mr. Bosca's claims were made in relation to the privatization process and illegal annulment of his successful bid for A.B. Alita ("Alita"), a leading Lithuanian alcoholic beverage producer. The illegality of Lithuania's treatment of Mr. Bosca under Lithuania law had earlier been determined by the Lithuanian Supreme Court, the Lithuanian Constitutional Court and the Lithuanian Parliament (the Seimas) through a special "Investigation Commission".*

*As noted in the Tribunal's award, "The Claimant has been successful on the issues of admissibility, jurisdiction and liability and on the principle of damages." The Tribunal specifically confirmed Lithuania's breach of its international obligations to provide Mr. Bosca with fair and equitable treatment stating that "...the actions of the Respondent vis-a-vis the Claimant during September and October 2003 constituted a breach of Article 2(2) of the Agreement concerning just and fair treatment and that the Respondent is liable for the damages resulting from such behaviour. The legitimate and reasonable expectations of the Claimant resulting from his*

*selection as the winning bidder were illegally frustrated by the Respondent's authorities."*

*Interestingly, on December 17, 2013 the court of Appeal decided that Lithuania does not have to pay 3.6 million euros in arbitration costs (which were mainly legal costs) awarded to Italian businessman in investor-state dispute against Lithuania. The Lithuanian Court of Appeals decided that recognizing and enforcing the arbitration court's decision in Lithuania would be contrary to the country's public policy. In the court's opinion, Bosca abused his rights by turning to arbitration. The material available to the court and research allegedly showed that Bosca turned to arbitration to seek indirect losses, although he had earlier won the case in Lithuanian courts and had been awarded direct losses. Therefore, the Court of Appeals stated that since Mr. Bosca abused his rights, he should not claim legal costs awarded by the tribunal.*

*However, the Lithuanian Supreme Court had squashed this ruling of the Court of Appeal and had recognized and enforced the award in Lithuania. The disputing parties had concluded amicable agreement signed by State Property Fund and Bosca by which the government recognized the arbitration award and pledged to transfer the awarded amount, 3.686 million euros, to Bosca within 45 days after the Supreme Court approved the amicable agreement. The Italian businessman, in his turn, waived the interest awarded by tribunal.*

## Security for costs

Unless the parties have agreed otherwise, the arbitral tribunal, upon the request of any party, can order another party to pay security for costs, as well as apply for assistance from Vilnius regional court in enforcing such order. Other interim measures can also be obtained through Vilnius regional court.

# VI. Arbitral Award

## A. Types of awards

### Partial awards

Under the Arbitration Law the arbitral tribunal can make the following awards and orders:

- final awards;
- partial awards;
- orders on procedural issues;
- additional awards (for claims presented in the proceedings but omitted from the award).

In accordance with Article 44 of the Arbitration Law, the arbitral tribunal shall resolve a part of the dispute by making a partial award. The partial arbitral award shall be final only in respect of the part of the dispute that has been resolved in full. A partial arbitral award may be made:

- on the competence of the arbitral tribunal to examine the dispute;
- on independent claims arising from substantive legal relationships;
- in other cases stipulated by the parties or the arbitral tribunal.

### Final awards

Article 43 of the Arbitration Law provides that the arbitral tribunal shall fully resolve the dispute by making its final award. The arbitral examination is completed by a final arbitral award or a ruling made by the arbitral tribunal.

The arbitral tribunal shall make a ruling to terminate the arbitral examination where:

- the case may not be examined in arbitration;

- the judgment of the court has taken effect in respect of the dispute between the same parties, regarding the same subject and on the same grounds;
- the arbitral award has taken effect in respect of the dispute between the same parties, regarding the same subject and on the same grounds;
- the claimant has withdrawn its claim, unless the respondent objects to such withdrawal of the claim and the arbitral tribunal recognises the legal interest of the respondent to finally resolve the dispute;
- the parties have concluded a settlement agreement;
- the natural person who was one of the parties to the proceedings has died and succession of his/her rights is not possible;
- the legal body that was one of the parties to the proceedings has been liquidated and succession of its rights is not possible;
- it is impossible to examine the arbitration case and the claimant has no right to apply to arbitration in future regarding resolution of the same dispute.

Upon termination of the arbitral examination, the parties shall not be allowed to make a repeat application to arbitration regarding a dispute between the same parties, regarding the same subject and on the same grounds.

The powers of the arbitral tribunal shall expire upon making the final arbitral award, termination of the arbitral proceedings or decision not to proceed with the request for arbitration or the claim.

## Interim awards

The Arbitration Law does not distinguish between partial and interim awards. Therefore, same for the partial award, the arbitral tribunal may issue an interim award:

- on the competence of the arbitral tribunal to examine the dispute;
- on independent claims arising from substantive legal relationships;
- in other cases stipulated by the parties or the arbitral tribunal.

## Consent awards

Consent award would usually mean an award that is made by mutual consent of all parties to the proposed award and includes any variation of an award that is made by mutual consent of all parties to the original award.

Therefore, under the Arbitration Law, the "consent award" would be generally referred to as an additional arbitral award which shall be made to resolve the claims stated during the arbitral examination, however, not resolved by the arbitral award made. The additional award may also be made to revise or interpret the arbitral award where it is necessary:

- to correct spelling, arithmetic or other similar mistakes in the arbitral award;
- to elucidate the substantive provisions of the arbitral award or its item;
- to resolve the issue of distribution of the arbitration costs.

## Default awards

It is not wise for a party against whom an arbitration has been commenced to refuse to participate in it and to present its defences. The arbitration will commence even without the participation of the respondent. It is the common rule currently that the failure of the respondent to submit a defence or to participate in the hearings to which it has been given adequate notice does not impede the arbitral tribunal from continuing the proceedings on the basis of what is presented to it. The absence of the respondent does not relieve the claimant from the obligation to present its evidence to sustain the claims that it has made. It can be anticipated that there will be such evidence and the award will favour the claimant in all respects.

Arbitration Law specifically states that if a party fails to present evidence as requested by the arbitral tribunal, the arbitral tribunal may make an award based on the available evidence or in exceptional cases evaluate the fact of failure to present the evidence against the defaulting party.

Article 35 of the Arbitration Law also provides that where a party fails to present a mandatory procedural document or does not take part in the arbitral hearing without a valid reason, the arbitral tribunal shall have the right to proceed with the arbitral examination and make an arbitral award based on the evidence available in the case or make procedural decisions.

The award issued at the end of an arbitration in which the respondent has not participated will be enforced so long as the respondent has been given proper notice and an opportunity to present its case.

### Awards and other decisions of the tribunal

There are two fundamentally different types of awards. There are those awards that are final in regard to what is decided in them and there are those awards whose contents can be changed at a later date by the arbitral tribunal. The term final award is restricted to those awards that are intended to resolve all of the issues in controversy.

A partial award settles one or more, but not all, of the issues in dispute. The term partial award is usually used in the sense of a final partial award.

If the parties reach a settlement during the arbitration, they can request the tribunal to issue an award on agreed terms.

## B. Form requirements

### Essential content

It is essential that an award of the arbitral tribunal shall be in writing and signed by the arbitrators or the arbitrator. The arbitral award shall be legitimate if signed by a majority of arbitrators with the other arbitrators indicating their reasons for not signing.

It shall also contain a statement of whether the claim is sustained or rejected, whether the expenses have been awarded and their allocation to the parties, the place where they were awarded, the names of the arbitrators, the names of the parties and their addresses, the names of the representatives of the parties, and the grounds and procedure for appealing the award.

According to the VCCA rules, an arbitral award shall be made in writing and signed by the arbitrator or arbitrators considering the case. If three or more arbitrators consider the case, the signatures of a majority of the arbitrators on the award shall suffice indicating the reasons for the other arbitrators not signing. An arbitrator or arbitrators refusing to sign the award shall have the right to present their separate opinion in writing which shall be attached to the arbitral award. The parties may agree that the Chair of the Arbitral Tribunal may sign the award solely.

An arbitral award shall contain the following information:

- the date and place of making the award;
- the first and last names of the arbitrator or arbitrators considering the case, the parties to the dispute, their place of residence or registered office, representatives of the parties;
- the substance of the demands and statements of defence of the parties;
- a short description of the case;
- reasoning based on which the award was made, except for the cases where the parties agree that indication of reasoning is not necessary or a settlement agreement signed by the parties is confirmed by the arbitral award;
- an opinion of the Arbitral Tribunal as to whether the claim is satisfied in full or in part or dismissed;
- grounds and procedure for annulment of the arbitral award;
- the amount of the arbitration fees, other costs of the proceedings, separately, and allocation thereof to the parties;

## Reasons

The arbitral award shall contain the reasoning on which it is based, unless the parties have agreed that reasoning is not necessarily to be provided or the arbitral award is made on the agreed terms, i.e. in case of settlement.

### Time limits for making award

The Arbitration Law does not provide for time limits for making award. However, according the VCCA rules, a dispute shall be resolved on the merits by rendering an arbitral award not later than within six months following the transmission of the case file to the Arbitral Tribunal.

A final award shall be made (written down) as soon as possible after the main hearing, but not later than within 30 days following the last main hearing (or the deadline for presentation of the closing statements) and shall be immediately transmitted to the Secretariat which shall send the award to the parties, if all arbitration fees determined for the parties to the dispute have been paid. In exceptional cases the Chair of the VCCA may extend at his/her own discretion the term for making (writing down) an award for another period of up to 30 days or longer provided the parties consent thereto.

A part of the dispute may be resolved by the Arbitral Tribunal by making a partial award which shall be final in that part.

The date of the delivery of the award is decisive for requests for correction of the award, or requests for an additional award, which are allowed within 30 days after receipt of the award (Article 45 of the Arbitration Law).

## Notification to parties and registration

In accordance with the VCCA rules, before signing any arbitral award, the Arbitral Tribunal shall submit it in draft form to the Vilnius Court of Commercial Arbitration (the Secretariat) for assessing the compliance of the arbitral award with the

requirements of form (in this case the legitimacy and validity of the rendered arbitral award shall not be assessed). Having received the draft arbitral award, the Vilnius Court of Commercial Arbitration (the Secretariat) shall present its assessment not later than within 10 days.

Having made a final arbitral award, an order on closing of the arbitral proceedings or an order on leaving the claim unconsidered, the Arbitral Tribunal shall transmit the case with all copies of the arbitral award to the Secretariat, and the Secretariat shall send the award or order to the parties and keep the case file for one year.

After making a final arbitral award resolving the dispute on the merits or an order on closing the arbitral proceedings or an order on leaving the claim unconsidered, the arbitrators' mandates shall expire.

An arbitral award shall take effect from the moment it is made. An arbitral award shall be deemed made from the moment it is written down and signed. An arbitral award shall be binding on the parties and the parties undertake to carry it out to the full extent without delay.

## C. Remedies

### Damages

First of all, if the question concerns the particular prescription (limitation of actions) period for indemnification of damage, it shall be noted, that Article 1.125(8) of the Civil Code establishes abridged three-year prescription with respect to claims for the compensation of damage. Article 1.127(1) of the Civil Code states, that prescription shall start its run from the day on which the right to bring an action may be enforced. The right to bring an action arises from the day on which a person becomes aware or should have become aware of the violation of his right.

Though, under Article 1.131(2) of the Civil Code, if the court acknowledges the time-limit of prescription as expired due to important reasons, the violated right must be protected and the expired time-limit restored.

Secondly, if the question concerns the limit as to the amount of money that shall be compensated, as it was mentioned-above, under Article 6.263(2) of the Civil Code any damage caused to another person and, in the cases established by the law, non-pecuniary damage must be fully compensated by the liable person.

Therefore, there is *per se* no limit as to the amount of any reparable damage and the particular amount of compensation depends on the claimant's ability to prove that the damage is real, certain and attributable to the faulty unlawful conduct.

What concerns the limits of the law as conditions of civil liability in relation to compensation of indirect damages, the Lithuanian case law (e. g. the Order of the Lithuanian Supreme Court on 11 February 2008 in civ. case No 3K-3-62/2008, etc.) evaluates different criteria in order to determine the loss as legally relevant and reparable, *inter alia*:

- whether the incomes (profits) has been foreseen as receivable;
- whether there has been the reasonable expectation of gaining profit in everyday business;
- whether the incomes (profits) has not been gained due to the unlawful acts of debtor.

In defining the legally relevant and therefore reparable losses due to the lost chance, Lithuanian case law employ the terminology, that the loss due to the loss of a chance shall be "based on real, proved, inevitable but not probable (hypothetic) incomes or expenses" (the Ruling of the Plenary Session of the Supreme Court of Lithuania on 6 November 2006 in civ. case No 3K-P-382/2006).

Moreover, Lithuanian case law recognize the provision, that "in case the party in bad faith gains the benefit from unlawful conduct the party in good faith shall have a right to claim such benefit to be its loss" (the Ruling of the Plenary Session of the Supreme Court on 6 November 2006 in civ. case No 3K-P- 382/2006).

Also, the loss due to the lost chance shall be calculated in various manners and can be calculated as, for example, the loss of interests (the order of Supreme Court on 18 July 2007 in civ. case No 3K-3-308/2007, on 3 April 2009 in civ. case No 3K-3- 126/2009), the price difference (the Order of the Supreme Court on 3 April 2009 in civil case No 3K-3-126/2009).

The losses due to the lost chance shall not be presumed; it shall be proved.

## Specific performance

In addition to a declaration of breach, the claimant is entitled to an order from the Arbitral Tribunal requiring respondent to perform its obligations and to cure its past defective performance of those obligations.

Article 1.138.1 Civil Code recognizes performance in kind as one of the remedies available for protecting civil rights. Article 6.213 of the Civil Code further provides that, where one party to a contract fails to perform either a monetary obligation (Article 6.213.1) or non-monetary obligation (Article 6.213.2) under the agreement, the other party may demand performance. Article 6.214 of the Civil Code specifies that the right to demand performance includes the right to demand a remedy for past defective performance: "The right to obtain performance includes the right to demand a repair or replacement of a defective performance, or elimination of defects in performance by other means taking into consideration the provisions of Article 6.208 of this Code."

In sum, the right to performance in kind of an obligation is available not only in respect of prospective performance (Article 6.213 of the Civil Code), but also to remedy past defective performance (Article 6.214 Civil Code).

## Other typical remedies

Where one party to a contract owing an obligation (the "debtor") to the other party (the "creditor") fails to perform that obligation, Lithuanian law makes

available to the beneficiary/creditor of the non-performed obligation a number of remedies.

Article 1.138.1 Civil Code provides the following non-exhaustive list of remedies:

1. Civil rights shall be protected by the court acting within its competence and according to the procedure established by laws. The ways of protecting civil rights are the following:

- acknowledgement of rights;
- restoration of the situation that existed before the right was violated;
- prevention of unlawful actions or prohibition to perform actions that pose reasonable threat of the occurrence of damage (preventive action);
- [a] judgement to perform an obligation in kind;
- interruption or modification of a legal relationship;
- recovery of pecuniary or non-pecuniary damage from the person who infringes the law and, in cases established by the law or contract, recovery of a penalty (fine, interest);
- other ways provided by laws.

Article 1.138.1 of the Civil Code recognizes the recovery of pecuniary compensation as one of the remedies available for the protection of civil rights.

Article 6.245.1 of the Civil Code similarly provides that civil liability gives rise to an entitlement by the aggrieved party to claim pecuniary compensation. Article 6.245.2 of the Civil Code notes that there are two kinds of civil liability: contractual and non-contractual. Article 6.245.3 of the Civil Code defines contractual liability in terms of the right of the creditor/beneficiary of a non-performed (or defectively performed) obligation under a contract to claim for damages.

One of the remedies available under Article 1.138.1 of the Civil Code for the protection of civil rights is the "restoration of the situation that existed before the right was violated".

Similarly, Lithuanian law recognizes, under Article 6.145.1 of the Civil Code, the remedy of restitution: Restitution shall take place where a person is bound to return to another person the property he has received either unlawfully or by error, or as

a result of the transaction according to which the property has been received by him being annulled ab initio, or as a result of the obligation becoming impossible to perform because of a superior force.

Article 6.145.1 of the Civil Code therefore requires the debtor to surrender any gains unlawfully obtained. As with Article 6.249.2 of the Civil Code, discussed above, here, too, the underlying rationale is the general principle according to which *nullus commodum capere potest de injuria sua propria* (no one should be permitted to gain from his or her own wrongdoing).

### Interest

The Civil Code (article 6.210) provides for a general fixed annual interest rate of 5 per cent in disputes where at least one party is not a businessman or private legal person and 6 per cent where both parties are such.

The Law on the Prevention of Late Payment in Commercial Transactions and the Law on the Payments for the Agricultural Production provide another interest rate for specific cases. The rate is adjusted semi-annually and equals the monthly VILIBOR interest rate plus 7 per cent.

Under Lithuanian law, interest begins to accrue from the date of the relevant breach until the commencement of civil proceedings (or, arbitration) ("pre-commencement interest"). Interest continues to accrue thereafter until full execution of the judgment (full enforcement of the award to be made by the Arbitral Tribunal) ("post-commencement interest").

For example, Article 6.37.2 of the Civil Code ("Interest on monetary obligations") provides that: "The debtor shall also be bound to pay a certain interest established by laws on the sum adjudged to the creditor for the period from the moment of the commencement of the case in the court until the final execution of the judgment". Article 6.37.1 of the Civil Code provides that "[i]nterest on [monetary] obligations may be fixed by laws or agreement of the parties" and Article 6.210.1 of the Civil Code provides that, "[w]here a debtor fails to perform his monetary obligation when it falls due, he shall be bound to pay an interest at the rate of five

percent per annum upon the sum of money subject to the non-performed obligation unless any other rate of interest has been established by the law or contract".

The Lithuanian law is silent on interest on an award on costs, i.e. there are no rules which allow to claim such interest and the Civil Code provides (Art. 6.37) that interest on obligations may be fixed by laws or agreements of the parties only. The position under Lithuanian law is that interest may only be claimed on the sum awarded (e.g. damages). This is explicitly established by the Supreme Court when discussing the procedural interest.

*For example, the Supreme Court of Lithuania, in the ruling of 2012-06-08 in case No. 3K-3-283/2012 had established:*

*"It is noted that procedural interest is calculated based on the sum awarded by the Court (Article 6.37.2 of CC), which includes amounts which the creditor has a right to claim due to the breach of contract. In this sum, the following amounts may be calculated: the main debt to the creditor and (or) damages incurred by the creditor, and (or) interest on the delay in execution of monetary obligations and (or) penalties. However, procedural interest is not calculated on the awarded costs of litigation which comprise the stamp duty and costs related to examination of the relevant case. Therefore, when a civil case is initiated and when there is a request of the creditor, procedural interest established by the law is calculated on the sum awarded by the court until the final execution of the court's ruling (Article 6.37.2 and Article 6.210 of CC), however, in this case, as it is requested in the claim, procedural interest is calculated and awarded not on the whole amount based on the main obligation (49 300 LTL, which was awarded by the Supreme Court by its 2009- 1012 ruling), but only on the amount left unpaid at the time of filing of the claim, i.e. on the outstanding debt balance (13 575,67 LTL) which, as it was established in the case, does not include awarded, but not yet settled litigation costs and the costs of court bailiff incurred in forced execution of the court's ruling."*

There is also an official consultation of the Supreme Court of Lithuania on award of interest where it is provided: "The definition of the sum awarded, on which the

procedural interest is paid, does not include costs of litigation which comprise of stamp duty and costs related to the examination of the case."

Thus although the Court's practice speaks only on the procedural interest, it also provides that the "sum awarded" would not include any litigation costs and, effectively, interest on such costs may not be claimed.

## Decision making

### Deliberation

According to the Arbitration Law, unless the parties have agreed otherwise, an arbitral award shall be made by a majority vote of the arbitrators. In case there is no majority of votes for making the arbitral award or in case of a tie, the chairman of the arbitral tribunal shall have the casting vote.

If an arbitrator refuses to participate in examining a dispute by the arbitral tribunal without any valid reason, this shall not preclude the remaining arbitrators of the arbitral tribunal from making a legitimate award.

Under the VCCA rules, if the case was considered by several arbitrators, an arbitral award shall be made by a majority vote of the arbitrators. Each arbitrator shall express his/her opinion regarding the award. The arbitrators can express their opinion regarding the award orally or in writing. If there is no majority of votes for making an arbitral award or in case of a tie, the presiding arbitrator shall have the casting vote.

## Majority or Consensus?

As it was mentioned above, unless the parties have agreed otherwise, an arbitral award shall be made by a majority vote of the arbitrators and if there is no majority of votes for making the arbitral award or in case of a tie, the chairman of the arbitral tribunal shall have the casting vote.

## Dissenting and concurring opinions

Both the Arbitration Law and the VCCA rules provide that an arbitrator or arbitrators refusing to sign the award shall have the right to present their separate opinion in writing which shall be attached to the arbitral award.

The arbitral award shall be legitimate if signed by a majority of arbitrators with the other arbitrators indicating their reasons for not signing. Dissenting opinions are not very common in practice.

## Signature

An award of the arbitral tribunal shall be in writing and signed by the arbitrators or the arbitrator. The arbitral award shall be legitimate if signed by a majority of arbitrators.

VCCA rules specifically provide that an arbitral award shall be made in writing and signed by the arbitrator or arbitrators considering the case. If three or more arbitrators consider the case, the signatures of a majority of the arbitrators on the award shall suffice indicating the reasons for the other arbitrators not signing. An arbitrator or arbitrators refusing to sign the award shall have the right to present their separate opinion in writing which shall be attached to the arbitral award. The parties may agree that the Chair of the Arbitral Tribunal may sign the award solely.

The award must contain reasons, unless the parties have agreed that reasons should not be provided (Article 46 of the Arbitration Law). It shall also contain a statement of whether the claim is sustained or rejected, whether the expenses have been awarded and their allocation to the parties, the place where they were awarded, the names of the arbitrators, the names of the parties and their addresses, the names of the representatives of the parties, and the grounds and procedure for appealing the award. There is no requirement for the arbitrators to sign every page.

## Settlement

### Settlement recorded in an award

The Arbitration Law expressly provides that upon settlement arbitral proceedings are to be terminated. The Law states that, should parties settle the dispute during arbitral proceedings, the tribunal shall terminate the proceedings. If requested by the parties the arbitral tribunal has the discretion to record the settlement in the form of an award.

The Arbitration Law expressly states that awards on agreed terms have the same status and effect as an award on the merits of the case. An award made on agreed terms must comply with the requirements of form, content and issuance for awards under the Arbitration Law. Therefore, parties may seek the enforcement of awards made on agreed terms in the same manner as seeking enforcement of a final award.

### Settlement without an award

As it was mentioned above, if the parties have concluded a settlement agreement and did not request confirmation of such agreement by an arbitral award, the Arbitral Tribunal or, where the case file has not been transmitted to the Arbitral Tribunal yet, the Chair of the VCCA shall make an order on termination of the arbitral proceedings.

### Use of settlement techniques by arbitrators

Where an arbitration is aborted prematurely due to a private settlement between the parties, the arbitrators would ordinarily be entitled to payment for the time and expenses they have incurred prior to settlement but not for any compensation for lost income as a result of the premature end of the arbitration. This, however, is subject to an alternative agreement between the arbitrator(s) and the parties.

Settlement should therefore be contemplated by arbitrators as a likely outcome of the arbitral process at the very outset of proceedings. Failure to do so may disentitle an arbitrator for remuneration for keeping his time available.

## Effects of award

### Effects between parties

The national courts shall dismiss a lawsuit if the same dispute has been already resolved by the arbitration.

It is a settled case law that a national court cannot annul the arbitration award even when the arbitration tribunal has misinterpreted the provision of law or has failed to correctly apply a legal norm. Judicial revision of the arbitration award on issues of fact and/or substantive law is not allowed in Lithuania.

### Effects against third parties

When the award is officially enforced, according to Article 362 of the Civil Procedure Code, a ruling is final and *res judicata* from the day it was passed.

However, *res judicata* court judgment acquires the quality of prejudiciality which applies not to all persons, but only to those who were involved in proceedings. Therefore, an award may only have prejudicial effect to third parties if they were involved in the arbitration proceedings.

As it was mentioned, the Arbitration Law (Articles 14(5) and 14(6)) contains provisions according to which in the event of there being several claimants or respondents, such a group of claimants or respondents shall agree on the appointment of one arbitrator for that group. In the case of joint claimants or respondents failing to appoint an arbitrator, this obligation extends to the appointing authority in the case of institutional arbitration or the Vilnius regional

court in the case of ad hoc arbitration. These provisions make the participation of several claimants and respondents in the arbitration possible.

### Res judicata

When the award is officially enforced, it acquires the same power as a final court judgment.

Article 18 of the CCP provides that *res judicata* court judgments, rulings, orders or decrees are binding to the government or municipal authorities, officers or officials, natural and legal persons. This Article establishes the main principle of civil procedure, namely, principle of the obligatory force of court decisions.

It is also important to note that according to Article 362 of the CCP a ruling of a court of cassation is final, not subject to appeal, and *res judicata* from the day it was passed, this would also apply to an award enforced in the courts of Lithuania.

In addition, the facts which are established by a *res judicata* court judgment in another civil case, participants to which were the same parties are not the subject of proof. It means that *res judicata* court judgment acquires the quality of prejudiciality which, as it was mentioned, applies not to all persons, but only to those who were involved in proceedings. Considering the said regulation, parties which were participating in arbitration proceedings, under Lithuanian law, are precluded from raising the same issues that were already decided in Lithuanian courts.

## Correction, supplementation, and amendment

### Correcting the award

According to the Arbitration Law, an additional arbitral award shall be made to resolve the claims stated during the arbitral examination, however, not resolved

by the arbitral award made. The additional award may also be made to revise or interpret the arbitral award where it is necessary:

- to correct spelling, arithmetic or other similar mistakes in the arbitral award;
- to elucidate the substantive provisions of the arbitral award or its item;
- to resolve the issue of distribution of the arbitration costs

## Additional award

As it was mentioned, the date of the delivery of the award is decisive for requests for correction of the award, or requests for an additional award, which are allowed within 30 days after receipt of the award (Article 45 of the Arbitration Law).

The additional arbitral award may be made on the initiative of the arbitral tribunal or upon request of an interested party. The arbitral tribunal may on its initiative make an additional award within 30 days after the final arbitral award has been made. The additional arbitral award shall be made within 30 days after the request for this award of the interested party has been received. The additional award shall be a composite part of the arbitral award. The additional award may not alter the essence of the arbitral award.

The VCCA rules provide for similar regulation.

## Interpretation of award

As it was mentioned above, the additional award may be made to revise or interpret the arbitral award where it is necessary.

# VII. Challenge and other actions against the Award

## A. Setting aside

### Grounds

Article 50 of the Arbitration Law provides that an award, in whole or in part, can be challenged if any of the following grounds exist:

- a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the applicable laws;
- the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable to present its case for other valid reasons;
- the award deals with the disputes falling outside the arbitration agreement; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the valid agreement between the parties or imperative requirements of Law on Commercial Arbitration if no such agreement was concluded.

The arbitration award will be set aside if the subject matter of the dispute could not have been resolved by arbitration or the arbitration award is contrary to public policy.

The Supreme Court of Lithuania has stated that the challenge of the arbitration award is possible only on the grounds defined in Article 50 of the Arbitration Law and public policy. Moreover, on 19 April 2018 the Court of Appeal of Lithuania clarified that the only procedural decisions that may be taken by the Court of Appeal of Lithuania under the current regulation after considering an appeal against arbitral award is its annulment or rejection of the appeal. Thus, Lithuanian law does not allow the court to partially annul arbitration award.

It is a settled case law that a national court cannot annul the arbitration award even when the arbitration tribunal has misinterpreted the provision of law or has failed to correctly apply a legal norm. Judicial revision of the arbitration award on issues of fact and/or substantive law are not allowed in Lithuania.

The term "public policy" is to be understood as international public policy, including fundamental principles of due process, as well as mandatory provisions enacting fundamental and publicly recognized legal principles. Public policy defined by Lithuanian laws should be understood as the entirety of mandatory provisions of legal acts.

## Time limits

An application for setting aside the arbitration award must be submitted to the Court of Appeals by a party to the arbitration proceedings within one month after the arbitral award is made. The Court of Appeals of Lithuania refuses to admit the appeal which was filed after one month following the rendering of the arbitral award, and if the appeal was filed in respect of the additional award, following the day on which the arbitral tribunal made the additional award.

## Procedure

An arbitral award may be set aside upon submitting an appeal to the Court of Appeals of Lithuania on the grounds stipulated above. Upon admitting the appeal regarding the arbitral award made, the Court of Appeals of Lithuania may, at the request of one of the parties, suspend enforcement of the arbitral award in exceptional cases.

Upon receipt of an appeal regarding the arbitral award, the Court of Appeals of Lithuania may by its reasoned ruling, if so requested by a party to the dispute, suspend the proceedings regarding setting aside the arbitral award in order for the arbitral tribunal to be able to resume the examination or take other actions

which, in the opinion of the Court of Appeals of Lithuania, would remove the basis for setting aside the arbitral award.

The ruling of the Court of Appeals of Lithuania regarding staying of proceedings and the ruling regarding setting aside or refusal to set aside the arbitral award may be appealed to the Supreme Court of Lithuania according to the procedure established by the Code of Civil Procedure.

The parties are not allowed to exclude any basis of appeal which is provided in law.

## Effects of successful challenge

As it was mentioned above, non-enforced award or annulled award in Lithuania does not have any legal power, including *res judicata* or prejudiciality between the parties. Therefore, parties may not claim any amounts awarded by such an award, i.e. execute such award.

Because there is not enough case law dealing with enforcement of set-aside awards, Lithuanian courts must take into consideration the application of the New York Convention in foreign case law. This presupposes that the enforcement of foreign awards set aside by the courts at the place of arbitration should follow general international practice.

## Appeal on the merits

### Is it allowed?

Lithuanian courts accept that the court before which the enforcement of an award is sought, may not review the merits of the award because a mistake in fact or law by the arbitral tribunal is not included in the list of grounds for refusal enumerated in both the Arbitration Law and the New York Convention.

### Grounds

Lithuanian courts state that the principle that a court may not subject an arbitral award to a review on the merits is not unfettered, in the sense that the court may examine the award for the purposes of verifying the grounds for refusal of enforcement, e.g., excess by the arbitral tribunal of its authority.

Excluding the right to appeal by agreement

The parties are not allowed to exclude any basis of appeal which is provided in law.

## B. Recognition and Enforcement of Awards

### Domestic Awards

#### Statutory or other regimes

*Distinction between recognition and enforcement*

Generally, Lithuanian courts do not make a distinction between recognition and enforcement, since the parties usually request for both, the recognition and enforcement in one petition. However, in order for the award to have a legal, *res judicata* and prejudicial effect is must be recognized in Lithuania.

Thus party may request only for recognition, but not for enforcement. On the other hand, if the award is not merely declaratory, it must be recognized and enforced. Enforcement would usually mean ordering the party to comply with the award, i.e. to pay certain sums awarded or to abstain from specific actions.

In case a party refuses to execute the award, then the court's bailiff would use its power to enforce an award which is recognized in Lithuania and enforcement of which is allowed by a court ruling.

## Grounds for refusing recognition and enforcement

According to the Arbitration Law, an arbitral award made in any state — a party to the New York Convention shall be recognised and enforced in the Republic of Lithuania according to the provisions of the New York Convention.

It is important to note that Lithuanian courts had established that Article V(2) of the New York Convention lists the grounds for refusal to recognise foreign arbitral awards the presence of which must be established by the court *ex officio*, i.e. in each case regardless of whether the party against whom the foreign arbitral award has been handed down relies on them or not (ruling in Civil Case No. 3K-3-145/2002 of 21 January 2002; ruling in Civil Case No. 3K-3-146/2002 of 21 January 2002, etc. of the Panel of Judges of the Supreme Court of Lithuania). Such verification must be conducted both in terms of the aspects of the procedure and the substantive law (ruling in Civil Case No. 3K-3-161/2008 of 12 March 2008 of the Supreme Court of Lithuania). Under these provisions, the court would *ex officio* comment on the grounds for refusal to recognise foreign arbitral awards stipulated in Article V(2) of the New York Convention.

## Formal requirement for enforcement of awards

A request for recognition of a foreign arbitration award should be submitted to the Court of Appeals according to the rules defined in CCP. Arbitration awards delivered in any jurisdiction can be denied recognition in Lithuania on the grounds defined in article V of the New York Convention. Unless those grounds are applicable, Lithuanian courts tend to look favourably upon enforcing arbitration awards.

The party wishing to enforce an arbitral award has to submit a written request and the original arbitration award or its copy, as well as the original arbitration agreement or its properly certified copy to the court. In case the arbitral award or/and the arbitration agreement is not made in Lithuanian, a certified Lithuanian translation shall also be submitted.

### Enforcement procedure and execution

After the court's judgment comes into force, the claimant has a right to ask the court to issue a writ of execution, which is submitted to the court bailiff for execution. The court bailiff has a right to enforce a judgment in the following ways (that may be used cumulatively):

- extraction from the debtor's assets;
- extraction from the debtor's assets that are possessed by third parties;
- prohibiting third persons from transferring property to the debtor or performing other obligations to him or her;
- seizure of documents that confirm the debtor's assets;
- extraction from the debtor's wage, pension, scholarship and other types of earnings;
- seizure of items indicated in the judgment and passing them to the claimant;
- designation of the debtor's estate administrator and transfer of the revenue obtained from the management to the claimant;
- order to the debtor to perform certain actions or to refrain from certain actions;
- the set-off of adversative (counter) receivables.

## C. Practice

### Grounds for refusing recognition and enforcement

The usual cause for refusing recognition and enforcement used by Lithuanian courts relates to public policy.

*On 17 December 2012, the Court of Appeal of Lithuania refused to recognize an award rendered by an arbitral tribunal at the Arbitration Institute of Stockholm Chamber of Commerce ("SCC") finding that some of the claims in an investigation proceeding initiated before the local courts by the Ministry of Energy of the Republic of Lithuania against a local gas company should not be submitted to arbitration. The Court of Appeal stated that it would be contrary to Lithuanian and international public policy to enforce an arbitral award that, in its view, had limited the Ministry's capacity to bring its dispute to court and had limited the courts' jurisdiction to hear it. As it was already explained above, this ruling was later squashed by the Supreme Court of Lithuania.*

*Other cases concern the arbitrability of disputes, as it was mentioned, in a ruling of UAB Kauno vandenys v WTE Wassertechnik GmbH the Supreme Court of Lithuania set aside an award issued in favor of a private contractor arguing the breach of public policy stating that disputes arising from public procurement contracts are not arbitrable under Lithuanian law.*

*In another decision, (case No 2T-164/2010) the Court of Appeal ruled that a dispute which arose from a claim by the basketball player to a sports club to pay remuneration should be qualified as a labor dispute. According to the Arbitration Law, labor related disputes are non-arbitrable i.e. cannot be referred to arbitration. The Court of Appeal applied the clause in the New York Convention which allows refusing recognition of an arbitral award if the dispute under the national law is non-arbitrable.*

*On 15 March 2017 the Court of Appeal of Lithuania has established the rule that if the court annuls the decision of the arbitral tribunal, the same dispute cannot be heard by the arbitral tribunal under the arbitration clause, because such an examination would not comply with the substance of nullity as a form of judicial review. In addition, the court stated that the factual situation in the present case, where the arbitral tribunal, following its previous decision, had reconsidered the dispute between the parties, constituted a breach of public policy.*

### Enforcement procedure and execution

To date, there were no significant and publicly available information regard issues concerning enforcement procedure and execution of awards. Since a recognized award has the same power as a final ruling of the court, the parties usually voluntarily execute recognized awards and bailiff's action is rarely applied.

## C. Foreign Awards

### Various regulatory regimes

#### Domestic rules

As it was mentioned above, a request for recognition of a foreign arbitration award should be submitted to the Court of Appeals according to the rules defined in CCP.

Arbitration awards delivered in any jurisdiction can be denied recognition in Lithuania on the grounds defined in article V of the New York Convention. Unless those grounds are applicable, Lithuanian courts tend to look favourably upon enforcing arbitration awards.

The party wishing to enforce an arbitral award has to submit a written request and the original arbitration award or its copy, as well as the original arbitration agreement or its properly certified copy to the court. In case the arbitral award or/and the arbitration agreement is not made in Lithuanian, a certified Lithuanian translation shall also be submitted.

*It is important to note the ruling of Supreme Court of Lithuania in Civil Case No. 3K-3-267-611/2017 which stated that there is no reason to qualify 5-year time limitation for the enforcement of a writ provided for in Article 606(2) of the CCP as a fundamental principle of good faith or a mandatory rule of law which establishes fundamental and generally recognized legal*

*principles. This term may be renewed under Article 608 of the CCP. Moreover, only a recognized foreign arbitral award acquires res judicata effect in the Republic of Lithuania. The Supreme Court of Lithuania has formulated the following rule of law interpretation: Article 606(2) of the CCP provides that the deadline for submitting enforcement documents for foreign court (arbitration) judgments shall run from the time when the judgment recognizing the foreign court (arbitral award) entry into force. The Supreme Court of Lithuania noted that the limitation period for the enforcement of a judgment of foreign court (arbitration) and the limitation period for applying to the court to initiate the process of recognition of an arbitral award and authorization of enforcement are different. Lithuanian laws which are in force do not directly determine the time limit for applying to the national court of the Republic of Lithuania for recognition and enforcement of foreign arbitral award.*

## The New York Convention

The New York Convention came in force in Lithuania in 1995-02-02. Implementing act —Resolution of the Parliament of the Republic of Lithuania regarding ratification of 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1995-01-17 No. I-760.

## Other international conventions

Lithuania is also a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (the Washington Convention). It came into force in Lithuania in 1992-08-05. Published in official gazette "Valstybes Zinios" in 2002, No. 115-5137.

## Court practice applying regimes other than the New York Convention

It is important to note that Lithuania is not a party to European Convention on International Commercial Arbitration of 1961. However, some questions related to

international arbitration as well as assistance and enforcement in the latter proceedings may be governed by bilateral agreements, such as the so called bilateral legal assistance agreements.

### *ICOR v Minskvodstroj*

*For example, Lithuanian Court of Appeal has enforced an SCC award against a Belarusian company, rejecting arguments that the service of documents was conducted improperly and in breach of a treaty between Lithuania and Belarus.*

*On 29 October, 2013 the court enforced the award in favour of a Lithuanian creditor, ICOR Group. An SCC tribunal chaired by Swedish arbitrator Christer Soderland issued the English-language award in June 2012, ordering Belarus company around US$700,000 dollars in compensation, legal costs and arbitration costs, plus damages and interest for breach of a 2008 loan agreement. The Court of Appeal noted in its decision that Minkvodstroj had originally entered into the 2008 loan agreement with a Luxemburg-based subsidiary of venture capital company Alta Capital Partners. The agreement contained an SCC arbitration clause specifying either Stockholm or Tallinn as the seat. After various amendments and an extension to the agreement, Alta transferred its rights and obligations as Minskvodstroj's creditor to an Estonian holding company, OU 2A. Minskvodstroj endorsed that transfer of rights by entering into an amended loan agreement with the Estonian company and changing the arbitration clause so that it stipulated only Stockholm as the seat. In 2010, ICOR purchased some shares and rights belonging to the Estonian holding company and informed Minskvodstroj that it now had the right to reclaim the loan debt. When Minskvodstroj did not repay the debt, ICOR obtained the 2012 SCC award for breach of the loan agreement, and moved unsuccessfully to enforce the award in Belarus. After the failed attempt in Belarus, ICOR sought enforcement in Lithuania. In the Lithuanian Court of Appeal, Minskvodstroj resisted enforcement on the grounds that it had never entered any loan agreement with ICOR, let alone any arbitration clause, and that it had to accept any transfer of rights and obligations to a third party for it to be valid. Minskvodstroj also claimed that, owing to the doctrine of separability, it would have had to enter into a separate agreement for the transfer of the arbitration clause.*

*The Belarusian company also argued that it had not participated in the arbitration proceedings, because it was not properly notified of the SCC case and did not have an opportunity to appoint a member of the tribunal.*

*Minskvodstroj said it only ever submitted a request before the tribunal to stay the case in favour of a settlement—and since it never submitted a statement of defence, it was deprived of an opportunity to present its case. Moreover, Minskvodstroj claimed that ICOR's enforcement action should fail because the Lithuanian company submitted invalid copies of the loan agreement and arbitral award before the Court of Appeal. It argued that only the originals were sufficient for an enforcement action under article IV of the New York Convention.*

*Finally, the Belarusian company claimed that it had not been properly served with the documents relating to the Court of Appeal proceedings in accordance with a 1992 Belarus-Lithuania treaty on legal assistance. The treaty requires that documents are certified by an official notary or translator and sent to the parties though official institutions of the signatory states. Rejecting all of Minskvodtsroj's arguments, the Lithuanian Court of Appeal said there was no reason to conclude that the Belarusian company as debtor had to accept a transfer of rights and obligations to a third party. Moreover, the doctrine of separability does not per se means that the arbitration agreement must be dealt with separately from the main contract where the transfer of rights in the main contract is concerned. It also found that Minskvodstroj was informed of and had participated in the SCC proceedings on account of the fact it had submitted certain procedural documents to the tribunal, but failed to exercise its right to challenge the tribunal's jurisdiction. These moves showed that the Belarusian company was provided with a full opportunity to present its case in the SCC arbitration, the court said. The Court of Appeal also confirmed that certified copies of the loan agreement and the arbitral award—not originals—were sufficient under Article IV of the New York Convention for a recognition and enforcement action. On the issue of the serving of documents, the court compared the process required by the Belarus-Lithuania treaty on legal assistance with that stipulated in the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. The Hague Convention permits documents to be served directed to the respondent's postal address without the official notification required under the Belarus-Lithuania treaty. The court found that ICOR had served the documents legitimately under the Hague Convention, and that this service was in line with the objectives for the recognition and enforcement of arbitral awards in the New York Convention.*

## Distinction between recognition and enforcement

As it was mentioned above, Lithuanian courts do not make a distinction between recognition and enforcement, since the parties usually request for both.

However, a party may request only for recognition, but not for enforcement. If the award is not merely declaratory, it must be recognized and enforced. Enforcement would usually mean ordering the party to comply with the award, i.e. to pay certain sums awarded or to abstain from specific actions.

## Application of New York Convention by local courts

### Grounds for refusing recognition and enforcement

In Lithuanian court practice, recognition of a foreign arbitral award is understood as granting the foreign arbitral award the same legal effect in the territory of the Republic of Lithuania as that of a decision by the national court (Article 18 of the Code of Civil Procedure).

Pursuant to Article 809(1) of the Code of Civil Procedure, foreign arbitral awards shall be effected in the Republic of Lithuania only after they have been recognized by the Court of Appeal of Lithuania, the judicial authority empowered to recognize the award.

Recognition and enforcement of any such awards in the territory of Lithuania are subject to the New York Convention (Article 810(6) of the Code of Civil Procedure) and the Arbitration Law. Article 51 (1) of the Arbitration Law entrenches the provision that an arbitral award handed down in another country which is a party to the New York Convention is recognised and enforced in the Republic of Lithuania according to the provisions of this article and the New York Convention.

The Supreme Court of Lithuania has on many occasions in its jurisprudence noted that the procedure for recognition of foreign arbitral awards means verification of whether the grounds for either enforcement or refusal to enforce the award

entrenched in Article V of the New York Convention are present without examining the legality and validity of any foreign arbitral award (Article 810(4) of the Code of Civil Procedure, Article V of the New York Convention).

Thus, a court deciding on the issue of recognition of a foreign arbitral award is not entitled to examine the dispute resolved by the arbitration court in substance i.e. to resolve the issues of fact or substantive law related to the examination of the dispute in substance (ruling in Civil Case No. 3K-3-323/2011 of 8 July 2011; ruling in Civil Case No. 3K-3-443/2008 of 30 September 2008; ruling in Civil Case No. 3K-7-179/2006 of 7 March 2006; ruling in Civil Case No. 3K-3-612/2004 of 17 November 2004; ruling in Civil Case No. 3K-3-278/2003 of 26 February 2003; etc. of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania).

It is established in the practice of the Supreme Court and the Court of Appeal of Lithuania that in the cases of recognition, the court does not decide whether the tribunal properly established the factual circumstances and correctly assessed them, it does not examine how the evidence was assessed in arbitration proceedings and whether process and the substantive law was applied properly.

Both under the current provisions of CCP and the Arbitration Law and under the practice of law interpretation and application formed by the Supreme Court, the court adjudicating a foreign arbitral award recognition and enforcement is granted a clearly defined arbitration judgment inspection powers. Recognition procedure means only assessment of the grounds of non-recognition set out in Art. V of the New York Convention. Supreme Court has stated that such a review would mean that, despite the fact that the parties' dispute is now settled, a thorough judicial review carried later would modify decision set out in the alternative jurisdiction.

In the case law of Supreme Court it is recognized that all uncertainties regarding the validity of the arbitration agreement shall be filled through law applicable to arbitration (*lex arbitri*). However, the analysis and application of *lex arbitri* to such situation is possible only in case of arbitral award annulment, since *lex arbitri* may only be analyzed and applied by competent courts of the place of arbitration and they could only apply *lex arbitri* in the case of arbitral award annulment in

place of arbitration proceedings. This position is shared by the Supreme Court of Lithuania, which has stated that the party disagreeing with the conclusion of validity of contested arbitration agreement, has a legal opportunity to address this issue before the court, submitting a request for annulment of arbitration award.

In the settled case law of the Supreme Court where it has repeatedly made clear that the concept of "public order" in international arbitration doctrine and practice is interpreted as international public policy, covering the fundamental principles of fair trial, as well as such mandatory substantive law rules relating to fundamental and universally accepted principles of law. Public order covers the basic principles on which the state legal system, the state and society function.

### *Lithuanian Supreme Court, case No. 3K-3-104/2011*

*On numerous occasions the Supreme Court has made clear that the review of the arbitral awards regarding the matters of fact or application of the substantive law is not permissible in Lithuania. The same conclusion can be made according to the Art. V(1)(a) of the New York Convention. This provision also states that the arbitration clause shall be determined in accordance with the law to which the parties of the agreement subordinated in the absence of such an indication, according to the law of the country in which award is rendered.*

*In the Ruling of the Collegium of Judges of the Civil Division of the Lithuanian Supreme Court of 27 March 2002 in the case no. 3K-3-681/2002, it is stated that it is established in the international arbitration doctrine and practice that, in the event of doubt as to the existence of the arbitration agreement, doubts must be interpreted in favor of the validity of the arbitration agreement, that i.e. the principle in favor contractus, and gaps in the arbitration agreement in such cases can be filled using the law applicable to the arbitration (lex arbitri), which is the place of the seat of the arbitration.*

Lithuanian courts provide that Article V of the New York Convention identifies two sets of grounds for refusal to recognise foreign arbitral awards which differ by the subject of who can/has the duty to initiate enforcement of awards and who has the burden of proof. Article V(1) of the New York Convention lists the grounds

applicable only when this is required by the party to arbitration against whom the recognition and enforcement of the foreign arbitral award is sought. Article V(2) of the New York Convention lists the grounds for refusal to recognize foreign arbitral awards the presence of which must be established by the court *ex officio*, i.e. in each case regardless of whether the party against whom the foreign arbitral award has been handed down relies on them or not.

### *Supreme Court of Lithuania, case No. e3K-3-336-611/2018*

*The plaintiff applied to the Court of Appeal of Lithuania for recognition and enforcement of a partial arbitral award in the Republic of Lithuania. The proceedings were stayed until the final judgment of the foreign court against the partial and final decisions of the foreign arbitral tribunal become final. The plaintiff sought an order requiring the defendant to secure the execution of the partial and final awards by way of a bank guarantee under Article VI of the New York Convention. The Court of Appeal of Lithuania rejected the application for such interim measure and held that it could not be re-examined. The plaintiff in the cassation appeal sought the annulment of part of the order of the Court of Appeal of Lithuania regarding the application of the guarantee under Article VI of the New York Convention. The Supreme Court rules that the guarantee under Article VI of the New York Convention is implemented in Lithuania through the institute for interim measures. The court shall apply the rules on interim measures by analogy when deciding on the decision requiring the other party to provide the guarantee. Article 151(2) of the CCP provides that court orders for interim measures are not subject to appeal in cassation. Thus, the ruling of the Lithuanian Court of Appeal is not subject to appeal in cassation.*

## Enforcement procedure

Similarly as to a local arbitration award, after the court's judgment by which recognition and enforcement is granted comes into force, the claimant has a right to ask the court to issue a writ of execution which is submitted to the court bailiff for execution.

The court bailiff has a right to enforce a judgment in the following ways (that may be used cumulatively):

- extraction from the debtor's assets;
- extraction from the debtor's assets that are possessed by third parties;
- prohibiting third persons from transferring property to the debtor or performing other obligations to him or her;
- seizure of documents that confirm the debtor's assets;
- extraction from the debtor's wage, pension, scholarship and other types of earnings;
- seizure of items indicated in the judgment and passing them to the claimant;
- designation of the debtor's estate administrator and transfer of the revenue obtained from the management to the claimant;
- order to the debtor to perform certain actions or to refrain from certain actions;
- the set-off of adversative (counter) receivables.

## Public policy as a ground to refuse enforcement

*Probably the most publicized decision of Lithuanian courts regarding application of public policy was related to Gazprom v Lithuania arbitration which began in August 2011, when Gazprom filed a claim against the Lithuanian state at the SCC, claiming that the Energy Ministry's lawsuit in a local court had breached an agreement among the company's shareholders — the State Property Fund, Gazprom and Ruhrgas. Gazprom requested that the arbitral tribunal order the Energy Ministry to discontinue the examination of the case at Vilnius Regional Court, and to decide all disputes in arbitration, as was initially agreed by the shareholders.*

*In July 2012, an SCC tribunal ordered the Lithuanian Energy Ministry to withdraw from the court any claims related to the redrafting of gas supply contracts regarding Gazprom. However, investigation proceedings initiated in the Vilnius court were permitted to remain before the Lithuanian courts. Gazprom subsequently applied to the Lithuanian Court of Appeal for recognition of the SCC award. The Court of Appeal has refused recognition of the award, stating that recognizing the award would limit*

*the legal capacity of the legal entities participating in the proceedings—and even the jurisdiction of the Lithuanian national courts. The court ruled that the latter circumstance would violate a number of Lithuania's constitutional principles, and also the sovereignty of the state which would be contrary to public policy.*

*As it was explained above, in its judgment of 2015-05-13 in Case C 536/13, the CJEU found that Brussels I Regulation must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State. Subsequently, in its judgment of 2015-10-23 the Supreme Court of Lithuania had granted recognition and enforcement of the SCC award by which the Ministry was obliged to withdraw certain claims from Lithuanian courts against Gazprom's former officials.*

### *Supreme Court of Lithuania, Civil case No. e3K-3-182-969/2019*

*In June 2019, the Supreme Court of Lithuania refused to recognize and enforce Serbian arbitral award against Lithuanian companies based on the public policy ground. The Court established that high penalties awarded, although validly agreed by professional business entities, were purposed to punish, rather to compensate the claimant. Therefore, the Supreme Court declared the Serbian award as "unfair" to the loosing parties and as being in contradiction with the Lithuanian Constitution. This ruling follows the recent and rather unwelcoming practice of Lithuanian Supreme Court of 'domestication' of the New York Convention in Lithuania.*

*"Azotara" Pančevo, once the largest factory of ammonia and artificial fertilizers in the Balkans, was privatized in 2006 by a consortium of Lithuanian companies "Arvi", "Sanitex" and Serbian company "Univerzal holding" (the 'Consortium') for 13 million EUR. However, the Privatization contract was canceled in January 2009 because of the sale of one of the units in "Azotara", which was prohibited by the Privatization agreement. Eventually, based on the arbitration agreement contained in the Privatization contract, the Serbian Privatization Agency referred to the Foreign Trade Court of Arbitration at the Chamber of Commerce and Industry of Serbia claiming a breach of the Privatization contract and requesting penalties envisaged in therein. The arbitral award was rendered in April 2012. Under the award, the Consortium was ordered to pay the Serbian Privatization Agency 4 million EUR in penalties. After unsuccessful attempts by the Consortium to annul the award in Serbia, in November 2017, the Serbian*

*Privatization Agency has applied to the Court of Appeal of Lithuania with a request to recognize and enforce the award in Lithuania.*

*In January 2019, the Court of Appeal of Lithuania has rejected all of the arguments of "Arvi" and "Sanitex" as ungrounded and has granted recognition and enforcement of the award in Lithuania. The Court of Appeal established that unreasonably high penalties could be considered as a violation of public policy in cases where they would legitimize usury. However, in the opinion of the Court of Appeal, the fact that the parties have set a significant penalty in the contract does not in itself mean that the arbitral award awarding such penalty infringes public policy. The Court of Appeal noted that the parties to the contract were private business entities with extensive experience in business, negotiation and large privatizations, who could foresee the consequences of default and could freely agree the contract terms.*

*However, upon the appeal of the Court of Appeal ruling, in June 2019, the Supreme Court of Lithuania quashed the ruling of the Court of Appeal and refused to recognize and enforce Serbian arbitral award based on public policy ground (Article V(2)(b) of the New York Convention). The ruling of 13 June 2019 the Supreme Court of Lithuania in Agency v Sanitex raised numerous questions regarding application of the New York Convention in Lithuania, such as the limits of de novo review of the award, relitigating the merits of the award, differential interpretation of the public policy ground and the diminishment of procedural difference between the annulment and recognition processes. However, the main issue in case rather concerned applying national law while reviewing foreign arbitral award, rendered under foreign law. In this context, the analysis should be carried out with predominant focus on the scope and purpose of the Convention rather than the provisions of the relevant domestic law. This latter point of view is consistent with the approach advocated in a considerable number of cases, according to which the Convention should be interpreted and enforced having in mind its 'international' character. It is generally accepted that the mere fact that the recognition or enforcement of the award (or for that matter, the contract upon which it is based) is contrary to the law of the forum state, does not per se ground the public policy exception. Municipal law is of course infinitely variable in its details, across the range of states. A technical or even a substantive illegality of a parochial kind ought not to render an award unenforceable as a matter of form, otherwise the enforcement of awards would be seriously compromised. Another question - the de novo review - exposed the recognition and enforcement process under the Convention to a potential abuse. Absent any evidence of procedural irregularity, it is also manifestly inefficient for courts to conduct an in depth review of the award when such*

*review has already been analyzed in annulment procedure by a court competent to apply foreign law (and even more so to carry out such a review at a second instance, as was the case here).*

*The respondents "Arvi" and "Sanitex" argued that part of the arbitral award for ordering payment of penalties agreed in the Privatization contract was contrary to the substantive public policy and could not be recognized in Lithuania. The respondents contended that the penalties ordered by the tribunal should be considered as punitive, therefore, not enforceable. The Serbian Privatization Agency, on the other hand, argued that the Consortium has freely agreed on the payment of penalties in case of breach of the Privatization contract. In addition, terms of the Privatization contract were based on Serbian privatization law and the respondents did not argue or claimed incorrect application of the contract terms by the tribunal.*

*In its ruling of 13 June 2019, the Supreme Court of Lithuania based its reasoning on the ruling of the Lithuanian Constitutional Court rendered back in 2012. In its ruling of 2012, the Constitutional Court of Lithuania established that the provisions of Lithuanian privatization law enabling the taking back of the object of privatization and keeping the amounts paid for the privatization object was contrary to the Lithuanian Constitution. In the light of the above, the Lithuanian Supreme Court found that, considering the fact Serbian state took over the shares of 'Azotara' and in the context of sanctions imposed on the purchaser, the amount awarded by the Serbian arbitration tribunal was intended to punish rather to compensate for the foreseeable or actual loss. The Supreme Court ruled that the prohibition of this kind of punishment constitutes not only the content of the public order of the Republic of Lithuania, but also the international public order. The Supreme Court also ruled that such a conclusion is not affected by the fact that the amount awarded was directly enshrined in the Privatization contract (governed by Serbian law) as a sanction for its infringement and that the party to the contract - the Consortium - was a professional who was aware of the specificity of such contracts. Court ruled that recognition of the Serbian award would entail legal situation that is worse (in terms of the balance of the investor and state property rights) than that envisaged by the Lithuanian Constitutional Court back in 2012. Finally, the Supreme Court also ruled that the enforcement of the award would contradict the constitutional principle of fairness, because the Serbian state punished "Arvi" and "Sanitex" with "unreasonable" penalties.*

## Other examples from practice

*Another important example which could be referred to here, is the L. Bosca v Lithuania dispute.*

*On December 17, 2013 the Lithuanian Court of Appeal refused recognition of investment treaty award issued against Lithuania. It decided that Lithuania does not have to pay 3.6 million euros in arbitration costs to Italian businessman Luigiterzo Bosca, whose bid for the state's stake in the alcoholic beverage producer Alita was rejected more than a decade ago. The Lithuanian Court of Appeals decided that recognizing and enforcing the arbitration court's decision in Lithuania would be contrary to the country's public policy and that approving of an amicable agreement between the parties would be contrary to the public interest.*

*The amicable agreement concluded between the parties while the request for recognition and enforcement was examined in the court defined the issue of covering claimant's expenses based on concessions from both sides. However, in the court's opinion, Mr. Bosca abused his rights by turning to arbitration. The Court of Appeals decided that Mr. Bosca turned to arbitration to seek indirect losses, although he had earlier won the case in Lithuanian courts and had been awarded direct losses. In addition, the Court of Appeals stated that Mr. Bosca should have acted reasonably and in good faith, as an honest businessman. Lithuanian courts ruled a number of years ago that Bosca, who in 2003 was named the winning bidder for a majority stake in local winery but was later removed from the bidding process, had suffered around 2 million litas (EUR 580,000) in direct losses. The State Assets Fund paid the Italian 1.754 million litas in court-awarded damages.*

*The Washington-based United Nations Commission on International Trade Law (UNCITRAL) ordered that Lithuania pay Bosca around 3.6 million euros in arbitration costs, but rejected his claim for indirect losses, saying that all of his losses incurred as a result of the privatization had been compensated for in Lithuanian courts.*

*As mentioned, the Lithuanian Supreme Court had squashed this ruling of the Court of Appeal and had recognized and enforced the award in Lithuania. The disputing parties had concluded amicable agreement signed by State Property Fund and Bosca by which the government recognized the arbitration award and pledged to transfer the awarded amount, 3.686 million euros, to Bosca within 45 days after the Supreme*

*Court approved the amicable agreement. The Italian businessman, in his turn, waived the interest awarded by tribunal.*

# VIII. Construction arbitration

The Lithuanian Law on Construction establishes all essential requirements for construction works which are being built, reconstructed and repaired within the territory of the Republic of Lithuania, and *inter alia* the minimum requirements for energy performance of buildings. The Lithuanian Law on Construction was first published on March 3, 1996 and last amended on 1 January 2017. The construction process is also regulated by technical construction acts: technical construction regulations, construction rules, technical certificates and methodological recommendations.

It is quite common practice for foreign contractors to enter into joint ventures with Lithuanian legal entities. The main reason is that Lithuanian contractors are fully informed about the legal and administrative issues regarding the project. Usually, there are no standard forms in use. There are no specified limitations when owners are private persons or private companies. For public entities there is a public tender process. General conditions of such contracts are stipulated by decisions of the director of the Public Procurement Office, but these forms are not obligatory and in certain conditions can be changed by the contracting authorities.

It should be noted that the use of the standard-contract forms created by the International Federation of Consulting Engineers (FIDIC) has increased in recent years. Changes in 2017 The new wording of the Construction Law prescribes shorter deadlines for the issuing of the terms and conditions of special requirements and connection to engineering systems. Special requirements will no longer be necessary on mandatory basis. These changes provide builders with the discretion to measure if these requirements are necessary to them at all, yet building projects still have to conform to the relevant requirements of laws and legislation as well as normative construction technical documentation. The simplified procedure of building completion will apply not only to one- and two-flat houses and appurtenances thereof, but to other special and ordinary structures from the list drawn by the Minister of Environment of the Republic of Lithuania that do not have a material environmental or social effect. This will

singularly accelerate the construction completion procedure. Both the red tape and time needed to process planning and building permits have been significantly reduced. Instead of 16 state authorities ruling on a construction project's compliance with legal and environmental requirements, since 1 January a maximum of 10 authorities are involved in the process. The time for the receipt of the building permit has been decreased by approximately 50%. Thus, the documents required to commence construction should now be issued within 20 business days for special purpose construction projects and within 10 for all other construction projects. One of the major new things about the new Construction Law is that the builder and the contractor will be required to guarantee the indemnity of the costs to remedy any defects as may be attributable to the contractors for the amount that, over the defects liability period, may not be less than 5 per cent of the construction cost of the building.

The main institution of trying court disputes of the members of construction process are considered to be the courts of general competence. Court dispute resolution methods of the members of construction process frequently stimulate to choose a typical form of agreements used in construction processes as well, which generally specifies that „disputes originating shall be resolved in court" or „disputes originating shall be resolved in the order specified in the laws of the Republic of Lithuania". However, according to the VCCA statistics, from 2010 to 2016 the most common type of arbitrated disputes arose from trading, construction and engineering, finance, insurance contracts and contracts for services.

Article 11 of the Lithuanian arbitration law provides a list of non-arbitrable disputes, and there are limitations to the arbitrability of disputes where one of the parties is a state or municipal company. The prior consent of the state or the body that established such party is required. As for adjudication, in Lithuania adjudication is an accepted form of dispute resolution with regard to construction contracts, but are rarely used. If the parties agree to adjudication in order to resolve their dispute, these proceedings will become a mandatory first step for the parties to solve their dispute before they are allowed to submit the dispute to court or arbitration. Various steps and rules of adjudication proceedings may be agreed by the

parties. The main steps include initiation, investigation and actions after the decision is issued. The investigation can itself consist of various stages such as the construction site visits by the adjudication board, a request for the parties to provide copies of all documents related to the dispute, hearings, and separate investigations of facts or circumstances or requests for the experts to provide opinions on specific facts or circumstances. After the decision is issued, and if parties have agreed that the decision is binding, they must submit a notice of dissatisfaction with the decision before the deadline. Even if the parties have agreed that the decision issued by the adjudication board will be binding, the decision is not final and can be referred to arbitration or court for final resolution. There are also other types of proceedings similar to adjudication, where public authorities are involved on a mandatory basis. They resolve disputes (i.e. ascertain important circumstances and facts) which are related to public 'authorities' actions (e.g. permission to build) or are deemed to be in the public interest (e.g. inspection after a constructed building has collapsed, etc.).

# IX. Investor-state arbitration

To date, the Republic of Lithuania has signed 55 BITs and is a party to 75 treaties with investment provisions (TIPs), which mainly consist of free trade agreements (FTA's) concluded by the EU. Lithuania also has its own Model BIT, which resembles the standard BITs that are short and focused on investment protection only. Majority of Lithuania's BITs are based on one of the most successful Netherlands Model BIT or the so-called 'Dutch gold standard model BIT' which was also followed by most of the European States when concluding their first BITs.

In particular, provisions on nationality of investors were also short and simple. For example, most of Lithuanian investment treaties provide that a juridical person incorporated or duly organised according to the laws of a contracting party (a country that is party to the treaty) is an 'investor'. However, there are treaties which require that such entities to have their 'substantive business operations' and (or) their 'seat' and (or) 'place of effective management' within the territory of a contracting party.

There are also treaties with denial of benefits clauses. For example, Lithuania–Australia BIT provides that where a company of a party is owned or controlled by a citizen or a company of any third country, the parties may decide jointly in consultation not to extend the rights and benefits of the agreement to such company.

Most Lithuanian investment treaties define 'investment' to include 'every kind of asset invested country by an investor of other contracting party in accordance with the laws of the host state'. However, several treaties contain a more extensive definition. For example, the Lithuania – Australia BIT requires that an asset invested to be 'owned or controlled' by an investor. Similarly, Lithuania – USA/Kuwait BITs provide that an investment must be 'owned or controlled directly or indirectly' by an investor. Whereas Lithuania–Czech Republic BIT sets a definition of investment in relation to 'economic activity' establishing that definition of investment would include every kind of asset related to economic activity. Similar definitions can be

found also in BITs between Lithuania and Denmark, Estonia, Iceland, Ukraine and Hungary.

Furthermore, most Lithuanian investment treaties explicitly require investments to have been made in accordance with the contracting party's laws. As an exception the Lithuania–Vietnam BIT could be mentioned. It stipulates that protection is only afforded to those investments made in Vietnam that were approved by the Vietnamese government.

Lithuanian investment treaties also simply provide that each contracting party shall ensure fair and equitable treatment to investments. However, the Lithuania – Kuwait BIT indicates that the treaty does not obligate the contracting party to provide any tax exemptions to foreign investors although such privileges could be provided for local nationals or other investors having their permanent place of residence in a contracting party. In addition, Lithuania – Russian Federation BIT provides a reservation that contracting parties have a right to deny or limit certain activity of investors in accordance with local laws of the host state.

Surely, most Lithuanian investment treaties enshrine a right of recourse to ICSID. It is noted that Lithuania–Israel BIT provides only and solely for ICSID arbitration. Majority of treaties also allow investors to pursue an arbitration claim through: (i) an ad hoc tribunal applying the rules contained within the Washington Convention; (ii) an ad hoc tribunal constituted in accordance with the UNCITRAL rules; and (or) (iii) any other tribunal acting in accordance with any other arbitration rules as is mutually agreed by the parties. Some of Lithuania's investment treaties also refer to the use of a commercial arbitral institution, such as ICC arbitration in Paris or SCC Stockholm arbitration.

All in all, despite a relatively short experience in commercial relations and FDI due its historic circumstance, Lithuania has a significant number or BITs and is a party of EU concluded FTAs with investment provisions (TIPs). 'Dutch gold standard model BIT' forms a basis of majority of Lithuania's BITs. They employ standard general rights, obligations and principles of investment protection. However due to the development of investment law interpretation of particular provisions and definitions such as 'investor', 'investment' and others may differ.

## A. Domestic legal status of ISA and alternative remedies

Foreign investments in Lithuania are regulated and protected by national legislation, as well as numerous international agreements on promotion and protection of investments. BITs and FTA's prevail over the provisions of the Lithuanian national laws and usually provide for more favourable treatment of reciprocal investments.

In 1999 Lithuania has adopted the Law on Investments. It sets forth the terms and conditions of investment in Lithuania, the rights of the investors and investment protection measures for all types of investments. This Law is rather general in its nature and provides for such basic principles as equal protection – rights and lawful interests of Lithuanian and foreign investors are equally protected by the laws of Lithuania; equal treatment – foreign investors enjoy the same rights and obligations relating to commercial activities as Lithuanian domestic investors, including the State and municipalities, and the economic conditions are the same for all investors. However, the Law on Investments is very rarely used in practice by foreign investors to base their claims against the Lithuania. To date there are no precedents when foreign investors themselves brought claims for violation of the BITs against the Lithuania in Lithuanian courts.

It is still unclear under Lithuanian law which national court is entitled to hear the claim. Firstly, none of the Lithuanian BITs establish any guidelines which national court shall have a jurisdiction in disputes relevant to BITs. Secondly, neither national civil nor administrative procedure laws explicitly provide the competent court to hear such disputes. Thus, the general rules of jurisdiction are applicable and the primary question is whether a dispute is administrative or civil legal matter.

In particular, administrative courts are the courts of special jurisdiction hearing disputes arising from the administrative legal relations, which are usually the basis for an investor-state claim. Consequently, if the legal relations constituting the object of the claim are administrative, for example request to annul the

administrative act of the state or municipal institutions on the basis of the breach of BIT, then administrative courts would usually hear the dispute.

On the other hand, if the object of the claim is the recovery of damages for the breach of the BIT caused by actions of the municipal or state's institutions, then it depends on the nature of such actions – if these actions were of civil nature then such claim would be heard by the courts of general competence. If, however, actions were of administrative nature, the claim would be heard by administrative courts. Therefore, in cases which could not be clearly defined as the ones indicated above, there is no clear distinction. Consequently, which courts have jurisdiction to hear a dispute arising from BITs should be assessed on a case-by-case basis.

In administrative cases where the BIT related claim is not brought by an investor, a court should establish that a specific claimant is not an investor and has to state that all the claims regarding the BIT are irrelevant in the respective case. That arises from the provisions of Art 86(3) of the Law on Administrative Procedure setting a duty to a court to analyse all the main claims filed by the claimant and to examine them in the court's ruling. On the other hand, the court has a duty to establish the breach of law based on concrete provisions of law. Thus, it is necessary to raise a concrete claim that the BIT was violated.

As for the competence of Lithuanian administrative courts to hear BIT disputes, it must be emphasized that the BIT claim must be filed by the investor, and the investor itself should prove that he is an investor according to the provisions of BIT. Therefore, if the BIT claim is not filed by the investor (in accordance with the definition found in the BIT), than none of the courts (that is administrative or the court of general competence) have jurisdiction to hear the BIT claim.

*There were a few cases where the alleged violations of the BIT were used as an argument by the parties. For example, in AB Panevezio cukrus, AB Kedainiu cukrus v State Tax Inspectorate creditors (Lithuanian sugar production and trading companies Panevezio cukrus and Kedainiu cukrus) of the Lithuanian company AB Marijampoles cukrus, almost 50 percent of shares of which was a property of a foreign Danish company Danisco sugar A/S, challenged the legality of the decision by the State Tax Inspectorate which was favourable to Marijampoles cukrus AB. Claimants argued that*

*such favourable decision to Marijampoles cukrus AB was contradictory to the Lithuanian-Danish BIT, distorted economic conditions on the market and breached the equality of the investors (equal treatment clause). The court dismissed the arguments by the claimants on the grounds that they were not investors in Marijampoles cukrus. However, it specified that the arguments based on the BIT could in principle be heard in the court if these arguments were raised by the investor: 'Appellant's claims regarding violations of the Law on Investments and the Agreement between the Republic of Lithuania and the Kingdom of Denmark regarding promotion of investments and security could be examined in case such claims would be raised by the investor'. Thus, this was the acknowledgment by the court that BIT claims can in general be heard by the Lithuanian administrative courts.*

*In flyLAL case the argument based on the BIT was brought by the foreign investor itself. In the case of private enforcement of the competition law Latvian company AirBaltic (the investor) and Riga International Airport challenged a ruling of Vilnius district court by which interim measures, namely arrest of property and fund, were applied towards the assets of both AirBaltic and Riga International Airport. Investor invoked the provisions of the Lithuanian-Latvian BIT in arguing that the fact that investors were not notified about the hearing was a breach of bona fide treatment of investors under the BIT. The Lithuanian Court of Appeals accepted the argument and agreed with the investors that absence of notification could have meant the breach of Lithuania's international obligations under the BIT, but held that other circumstances of the case showed that the challenged decision of the Vilnius district court did not come into force and the investors were actually granted the full and equal right to challenge it. Therefore, the Court of Appeals held that Vilnius district court committed a procedural breach by adopting the decision on interim measures without informing the investors about the hearing, but in the light of other circumstances (that investors actually were granted rights to present arguments and they did so as is apparent from their appeals) this procedural breach did not amount to constitute grounds for annulment of the decision of the Vilnius district court. Therefore, this was yet another acknowledgment that national courts, including civil courts, may hear the BIT arguments by the foreign investors.*

## B. Recognition and enforcement of investor-state awards

As for cases in respect of recognition and enforcement of investor-state awards, to date there is only one case, which may be brought as an example – the L. *Bosca v Lithuania* case. The latter was a dispute between an Italian wine producer L. Bosca against Lithuania conducted under the UNCITRAL Arbitration rules. On 17 May 2013 the arbitral tribunal issued an award in favour of Mr L. Bosca which declared that Lithuania had breached its obligation to grant just and fair treatment to the claimant. This investor-state arbitration case is the first case in the legal history of Lithuania where the investor-state tribunal declared Lithuania liable for its conduct under a bilateral investment agreement and directed Lithuania to compensate to the investor 80 percent of the arbitration costs.

The recognition and enforcement procedure of this award was initiated in Lithuanian courts. Although the parties had reached a settlement agreement in respect to the award, the Court of Appeal, which is a court of first instance to review claims regarding the recognition and enforcement of foreign arbitral awards, decided that the award infringed public policy. It ruled that the investor acted in bad faith by seeking compensation for lost profits and a declaration that Lithuania's acts had been illegal as the investor had previously won a case in national courts and received their compensation in direct damages.

Therefore, the Supreme Court of Lithuania (SCL), that is the appellate and final instance to review such case, had to respond to the question whether the fact that investors had received compensation for the costs they incurred in national courts deprived them of their right to request compensation for lost profits. In June 2014, the SCL reversed the decision of the Court of Appeal and granted the recognition and enforcement of the ad hoc award.

The SCL formed a number of key rules in relation to the application of the public policy clause. Firstly, the question arose whether courts could rely on a public policy exception without party's request. Although the SCL stressed that the courts' power to apply Article V(2) of the New York Convention (NYC) ex officio, the judiciary was also obliged to consider whether the arbitral tribunal analysed

relevant issues which might be treated as a violation of public policy. The court noted that, if the tribunal provides arguments why certain issues should not be considered in violation of public policy, those arguments may be treated as important criteria negating violation. Moreover, the courts should consider the parties' procedural behaviour both when examining the case in arbitration and during the procedure of recognition of the arbitral award. If a respondent did not raise questions relevant to ascertaining a violation of public policy, respondent's silence indicates a common will of the parties. The court should in such a case provide sufficiently strong arguments why the parties' will should be ignored.

Secondly, according to the SLC ruling, the NYC should be interpreted by taking into consideration the decisions of foreign courts as they might be useful from a comparative point of view. The SCL referred to the relevant case law of the United Kingdom, United States, Germany, France and Canada. The reliance on foreign case law as a source for interpreting the NYC has also persisted in later jurisprudence.

Thirdly, it was explicitly concluded that public policy within the NYC should be interpreted as an international one, which encompasses fundamental legal principles. The SCL approved its intention to interpret public policy narrowly: '[a lack of] good faith [as violation of public policy] should be understood and interpreted not broadly, as a person's general lack of sufficient attentiveness or carefulness, but narrowly, as a person's deliberate attempt to jeopardize fundamental values: fraud, corruption, or other evidently illegal activity'. The SCL stressed that filling a claim to investment arbitration, where the tribunal finds its jurisdiction and the infringement of fair treatment, should not be treated as an act of bad faith.

As mentioned, this case is significant because for the first and currently the only time the Supreme Court of Lithuania analysed and enforced an investor-state arbitration award against Lithuania. All in all, the outcome of L. Bosca v Lithuania case was considered as quite favourable for Lithuania, because the tribunal dismissed Bosca's request to award more than EUR 200 million of damages and only awarded Bosca EUR 4 million arbitration costs.

Even though to date only one adverse investment treaty award was rendered against Lithuania in the *Bosca v Lithuania* case conducted under the UNCITRAL arbitration rules at the PCA, there were a number of other significant disputes between a foreign investor and Lithuania which had caused a lot of political and policy debate.

### *Kaliningrad v Republic of Lithuania*

*One of the oldest investor-state or rather state to state dispute concerned a treaty-based claim brought by the Russian region of Kaliningrad against Lithuania. Kaliningrad, a Russian territory located between Poland and Lithuania, initiated arbitration under the Russia-Lithuania BIT after a Lithuania-based building owned by the Kaliningrad regional government was seized by order of the Lithuanian courts.*

*The building located in Lithuanian capital Vilnius was targeted by a Cyprus-based entity Duke Investments Ltd which was seeking to enforce a 2004 commercial arbitration award rendered against Kaliningrad. The earlier commercial arbitration proceedings related to a $10 million (US) loan issued by Dresdner Bank to the Kaliningrad regional government. Kaliningrad failed to repay the loans and they were sold to Duke Investments Ltd which turned to the London Court of International Arbitration (LCIA) in order to obtain an arbitral award against Kaliningrad.*

*When Kaliningrad proved unsuccessful in its efforts to challenge the freezing of its property in Lithuania, its regional government alleged that Lithuania was liable for expropriating the property in question. In 2006 the Kaliningrad government initiated arbitration under the rules of the International Chamber of Commerce (ICC) and asked a tribunal to consider whether Lithuania had breached the terms of the Russia-Lithuania treaty.*

*Unusually the arbitral claim was filed under the investor-state arbitration mechanism provided in the Russia-Lithuania BIT. Lithuania has questioned whether the proceeding should have been handled under the state-to-state mechanism under the treaty. However, the tribunal determined that the Kaliningrad regional government qualified as an investor according to the definition contained in the treaty; for its part, the treaty refers to Russian law for guidance as to which persons and entities can be considered 'investors'. The import and persuasiveness of this approach was of course*

*debated, particularly given the large volumes of foreign investments made in recent years by states or state entities.*

*Kaliningrad had sought to characterize the actions of the Lithuanian courts as leading to an expropriation of its assets in Lithuania. In its February 2009 award on jurisdiction , the ICC tribunal acknowledged that court decisions can give rise to an expropriation as defined in a BIT. However, it remained to be seen whether court decisions enforcing an arbitral award under the NYC could be deemed an expropriation. If fact, that the Kaliningrad v Lithuania case marked one of the first instances where arbitrators were asked to grapple with such a question. Arbitrators in the ICC case were obliged to consider the relationship of two treaties, the NYC and the Russia-Lithuania BIT which was concluded some years later.*

*As part of this effort the arbitrators referred to relevant provisions of the Vienna Convention on the Law of Treaties (VCLT) to ascertain whether the Russia-Lithuania BIT was intended to modify the earlier NYC. Indeed, the arbitrators saw no evidence that Russia and Lithuania had sought to modify the specialized (lex specialis) multilateral framework for enforcement and recognition of foreign arbitral awards by means of the BIT.*

*Accordingly, the tribunal noted that a holding of expropriation in cases such as the present dispute – where national court decisions pursuant to the NYC were at issue – would, in essence, mean that the BIT would be viewed as obliging the Contracting States to breach their obligations under the NYC. Rather, on this view, the tribunal held that it lacked jurisdiction to review rulings of domestic courts on questions of enforcement and recognition of foreign arbitral awards pursuant to the NYC. Ultimately the arbitrators held that they lacked jurisdiction to hear Kaliningrad's claim for expropriation arising out of the Lithuanian courts' handling of the enforcement of the 2004 LCIA award.*

*Later on, Kaliningrad sought the annulment of the award before the Paris Court of Appeal on the ground that the tribunal had ruled without complying with the mandate conferred upon it. Before the Court of Appeal, Kaliningrad first argued that the arbitral tribunal erred in its application of the NYC. Second, it alleged that the tribunal erred in holding that Kaliningrad was improperly attempting to use the BIT as a mechanism to appeal the LCIA award, while the ICC arbitration did not involve the same parties (Kaliningrad and Region of Kaliningrad being different entities) or causes of action.*

*The Court of Appeal rejected Kaliningrad's application and found that the enforcement of an international arbitral award did not amount to*

*expropriation under a BIT. It also held that the arbitral tribunal's interpretation of the BIT was correct, insofar as it related to the principles established by the NYC and the VCLT. Furthermore, the Court noted that the BIT could not be interpreted as giving rise to state liability for complying with its obligations under the NYC.*

*This arbitration case can be considered as a consequence of the Kaliningrad's ongoing economic problems. In 2001, the Russian Audit Chamber issued an indictment of Kaliningrad's regional government, effectively declaring it bankrupt. Past governors of Kaliningrad allocated tax credits from the federal government to encourage expansion by local enterprises. These enterprises had partially repaid the credit into the regional fund, but that fund never repaid the federal government for the original credit; the regional fund just reallocated the payments, as new loans to other enterprises. The cumulative debt to the federal government for the original line of credit with interest was more than the budget of the regional government in 2002. Further adding to this bleak financial situation was the unpaid $30 million loan from the German Dresdner Bank, which was supposed to stimulate local entrepreneurs but instead ended up disappearing from the records completely and eventually was the subject matter of the arbitration proceedings analysed above.*

### *Parkerings v Lithuania*

*Parkerings v Lithuania case related to a violation of most-favoured nation treatment (MFN) clause and provides a clarification of application and interpretation of this clause. A Norwegian corporation Parkerings-Compagniet AS (Parkerings) involved in development and operation of parking facilities claimed that Vilnius City Municipality treated a Dutch investor more favourably and infringed Lithuania-Norway BIT.*

*The Parkerings dispute evolved around the decision to approve the parking plan in Vilnius City, which was also impacted at the time by the change in city's management and municipality officials. At that time a new mayor of Vilnius has argued that the contract with Parkerings was concluded in a disadvantage to the City, therefore, upon failure to reach an agreement on the amendments to it resulted in the decision to terminate the contract. The municipality accused investors of not setting up a number of parking lots and other contractual violations and rejected Parkerings's proposed project situated in the Old Town which is a UNESCO protected area. However, according to Parkerings, the City authorized another investor, a Dutch company, to build parking facilities in that area.*

*Consequently Parkerings brought a claim under Norway-Lithuania BIT. Among other matters, it claimed that Parkerings was treated less favourably than the Dutch investor and a clause of most-favoured nation treatment (MFN) was violated.*

*According to the tribunal the essential condition of a violation of MFN clause is the existence of a different treatment accorded to another investor in a similar situation. But the situation of the two investors will not be similar if the different treatment is justified. The tribunal found that Parkerings and the Dutch investor were not in a similar situation. Even though both projects were located in Old Town, Parkerings project extended significantly more into the Old Town near the culturally sensitive area of the Cathedral. This was not the case with the Dutch investor's project.*

*The tribunal, therefore, reasoned that the refusal of the project was justified by historical and archaeological conservation and environmental protection reasons. It went on to say that refusal of one site did not deprive the investor of the possibility to propose other locations. The tribunal rejected other claims by Parkering in their entirety.*

*Although Parkerings dispute did not attract much of public or media attention, it had clearly arisen in the context of fighting and power shift in the government of Vilnius city municipality. The political environment was changing in Vilnius' municipality at the time of the negotiation of the contract with Parkerings. However, as noted by the Parkerings tribunal, the investor should have known that the legal framework was unpredictable and could evolve.*

## *Gazprom v Lithuania*

*The business relation between Russian Federation owned gas company OAO Gazprom, an investor into Lithuanian energy sector, and Lithuania is marked by a number of legal disputes, including ISA and competition law based litigation. These ISA disputes attracted most of the public and political attention compared to the other ISA cases in Lithuania.*

*Lithuanian natural gas reform and implementation of the European Union's Third Energy Package was at the epicenter of Gazprom's and Lithuania's disputes. The Lithuanian government used the provisions of these EU laws and competition law to reform the natural gas sector with an emphasis on the security of supply (gas supply diversification) aims. The implementation of the package involved the unbundling of gas transmission, distribution and supply operations of Gazprom-co-owned Lithuanian gas company*

*Lietuvos Dujos (Lithuanian Gas). Consequently, from 2010 to 2016 both of the conflicting sides employed political, diplomatic and legal tools to deal with their dispute due to the reform of the Lithuanian natural gas market. The reform started, when in 2008 the newly elected conservative politicians formed the ruling majority. The new government used EU energy policy tools, such as the EU Third Energy Package of 2009, and the Security of Supply Regulation of 2010 to reform the domestic natural gas sector.*

*Lithuanian political actors that were inclined towards gas supply diversification occupied positions of power in the country. But Lithuanian political actors mainly used the Third Energy Package for their security of supply aims. The Lithuanian case was the second case in the EU gas sector, in which the European Commission participated in what were usually bilateral negotiations between a state entity and foreign energy companies, in this case Gazprom and E.ON. The European Commission not only acted as an advisor and a legal expert, but also co-signed a joint statement by representatives of the Lithuanian government and Gazprom.*

*First of the claims by Gazprom was filed with the UNCITRAL arbitration in order to protect Gazprom's investments in Lithuania amid the country's natural gas sector reform. In particular, the claim related to the EU Third Energy Package. However, the dispute had never materialized and the case was closed after Gazprom had withdrawn its claim .*

*Second claim by Gazprom was filled with ICC arbitration in Paris in order to protect Gazprom's investment in power plant Kauno Termofikacijos Electrine (KTE). In 2002 KTE, in which Gazprom held 99.5 percent of shares, took part in bidding for the set of assets of Kaunas Combined Heat and Power Plant and became a winning bidder. Consequently, in 2003 the agreements were signed specifying the terms of transactions and heat energy sales and stipulating business conditions of power supplies for a 15-year term in compliance with a specific pricing formula. Despite the contractual agreements the Lithuanian National Control Commission for Prices and Energy adopted a regulation on benchmark prices for KTE heat energy production, which fixed a mandatory rate flouting the specific formula stated in the agreements. Therefore, in 2012 Gazprom filed a relevant claim to the Court of Arbitration of the ICC. However, similarly as to the first dispute, the claim was withdrawn, as Gazprom closed the transaction on selling KTE shares at a price which enabled to refund investments and make a reasonable profit.*

*On Lithuanian side, the Lithuanian Government has filed a formal complaint to the European Commission over possible unfair pricing and abuse of market dominance by Gazprom, which was at the time the*

*country's sole gas supplier. The European Commission started a formal investigation under EU competition law in September 2012. The case is still not resolved at the time of writing.*

*In addition, in June 2016 Lithuania has lost its own initiated a EUR 1.6 billion case against Gazprom at the Stockholm arbitration court, the resolution of which took nearly four years.*

*The case in the Stockholm arbitration court did not concern any bilateral investment treaty and was in essence a contractual and commercial dispute similar to other gas price review arbitrations, where the arbitrators are usually asked to determine whether the contractually stipulated criteria for an adjustment of the contract price formula have been satisfied and, if so, what that adjustment should be.*

*Lithuania's side argued that the Russian supplier made a commitment to supply gas at a "just price" when it bought a 34 percent stake in the natioanl utility Lietuvos Dujos in 2004, but later altered the price formula, making gas more expensive.*

*The arbitration court, however, ruled that the term "just price" was too vague to assess losses and award the compensation and had rejected Lithuania's claim $1.6 billion in compensation from Gazprom in its entirety. This was one of the last of several legal actions between Gazprom and Lithuania deriving from the implementation of the Third Energy Package in Lithuania starting from 2010.*

*As the disputes involved the management and operation of state-owned companies, Gazprom's business activities were always under scrutiny of politicians. Lithuania used the EU laws to shape the national energy policy and to reform its natural gas sector by focussing on security of supply aims and measures. In practice that meant a change in investment conditions in the sector which was not favourable policy for Gazprom. The aftermath of all these disputes was on 17 June 2014, when Gazprom sold off its shares (two packages of 37.1 percent each) in two Lithuanian state-owned companies from the gas sector.*

## *Veolia v Lithuania*

*In January 2016 Veolia, a French investor, and Vilniaus Energija initiated a dispute against Lithuania at the ICSID in Washington. At the time of writing, the Veolia v Lithuania dispute is still ongoing under the auspices of ICSID. However, the dispute is interesting, as it shows a pattern of foreign investor*

*referring to ISA after a number of various state legal actions under domestic laws regarding their business activities. The case is also related to the energy sector which is continuously of the highest political concerns.*

*Veolia has been an investor in Lithuania for two decades. It was a heat in Lithuania's capital Vilnius and another nine municipalities in the Baltic state. Its 15-year lease on the central heating grid in Vilnius, expired in 2017, and the municipality has said it doesn't plan to extend it. The government has also scrapped subsidies for gas use in the power and heating sector from 2016, forcing Vilniaus Energija to close one of its combined heat and power (CHP) plants in Vilnius. Thus, at ICSID Veolia is seeking EUR 100 million compensation from Lithuania due to 'unfair and discriminatory legal acts and decision regulating its activities' in the country. On top of that, Veolia started the SCC arbitration in November 2017 alleging various breaches of the concession agreements by the city council.*

*The company says the state has engaged in 'a campaign of harassment' against it for 'political reasons'. Veolia's Lithuanian operations have recently suffered a series of difficulties with regulators and in the courts. For example, the persons related to the company have been under criminal prosecution due to alleged criminal activities in the heat sector which ended after limitation period of 10 years expired and prosecutors did not manage to prove the wrong. In addition, Vilniaus Energija faced antitrust investigations by national competition authority. Veolia has been an investor in Lithuania for two decades, but is now reported to be looking to exit the country.*

*Potentially, the tribunal in Veolia case will analyse whether Lithuania's fair and equitable treatment (FET) obligations under the BIT, especially the obligation to provide a stable and transparent legal framework were breached. In addition, the tribunal will analyse whether Lithuania breached a prohibition on unreasonable and discriminatory measures and whether any such potential discrimination was legitimately based on public policy considerations.*

*It is rather settled practice the FET standard should be interpreted considering the object and purpose of the BIT, as reflected in its Preamble. The object and purpose of the Lithuania - France BIT was to intensify economic co-operation between Lithuania and France. However, there is a number of types of conduct that would violate the FET standard, namely conduct that is substantially improper (for example, conduct that is arbitrary, manifestly unreasonable, discriminatory or in bad faith). In Veolia case, it would be of utmost importance to analyze the protection granted by the BIT in respect of regulatory changes. However, the FET standard in*

*the BIT could not be interpreted as the equivalent to a stabilisation clause. A state may always change its legislation, taking into consideration that an investor's legitimate expectations must be protected, the state's conduct must be substantively proper (that is, not arbitrary or discriminatory), the state's conduct must be procedurally proper (namely, in compliance with due process and fair administration).*

*If the tribunal eventually finds that Lithuania had breached the above standards, Lithuania may incur international liability.*

## *Vladimir Antonov v. Republic of Lithuania*

*In 2012, Vladimir Antonov, former owner of bankrupt Lithuanian bank Snoras, has accused the Lithuanian authorities of persecution and threatened taking the country to investment arbitration under the auspices of the International Chamber of Commerce's International Court of Arbitration. Vladimir Antonov claimed at that time that the Lithuanian authorities' decisions to place Snoras into administration, then to nationalize it and finally to liquidate it, and to make criminal allegations against the investor were motivated by political reasons and reasons of discrimination on the grounds of the Investor's Russian nationality.*

*However, to date, no further actions of Vladimir Antonov were seen in that regard and eventually, no investment dispute was ever initiated.*

*On the other hand, on 5 August 2016, Vladimir Antonov filed a claim against the Republic of Lithuania for an amount exceeding 40 billion Rubles (more than 500 million Euro) in the Moscow State Arbitration Court. The basis of the claim was not publicly available.*

*However, the immediate question raised by these proceedings was whether or not there is a legal basis for a claim to be brought against a sovereign state in a Russian state court and how it might affect investor-state arbitration provisions in an applicable treaty.*

*Thus, as it was expected, the Commercial Court of Moscow terminated the proceedings based on the court's lack of jurisdiction over the dispute. The court reached its decision in reliance on, inter alia, the Russian-Lithuanian "Agreement on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters" dated 21 July 1992 and "Investment Promotion and Protection Treaty" dated 29 July 1999 (Lithuania-Russia BIT).*

*The former provides that claims for damages shall be considered by the competent court of the state-party in whose territory the action or circumstance giving rise to the claim took place and provides for the resolution of BIT disputes between a covered investor and a host state through international arbitration (a choice between arbitration under the rules of the Stockholm Chamber of Commerce and the International Chamber of Commerce), or in the state courts of the respondent, but not in the state courts of the investor's state (in this case, Russia).*

*Therefore, it is yet to be seen whether Vladimir Antonov will pursue his claims against Lithuania in investor-state arbitration.*

# X. Appendices

## The Arbitration Law (in English)

***Consolidated version valid from 30 June 2012 until 30 June 2017***

**REPUBLIC OF LITHUANIA**

**LAW**

**ON COMMERCIAL ARBITRATION**

21 June 2012 No I-1274

(As last amended on 21 June 2012 No XI-2089)

Vilnius

**CHAPTER I**

**GENERAL PROVISIONS**

**Article 1. Purpose of the Law**

This Law shall regulate arbitral proceedings taking place on the territory of the Republic of Lithuania, set requirements for the form and content of an arbitration agreement, define constitution and competence of an arbitral tribunal, application of interim measures and delivery of a preliminary order, arbitral awards and closure of proceedings without an award being made on its merits, setting aside of an arbitral award, recognition and enforcement of foreign arbitral awards on the territory of the Republic of Lithuania, and regulate other issues related to arbitration.

**Article 2. Scope of the Law**

1. This Law shall apply to arbitration proceedings taking place on the territory of the Republic of Lithuania irrespective of the citizenship or nationality of the parties to a dispute or of their being natural or legal persons, also regardless of whether arbitral proceedings are organised by a permanent arbitral institution or take place on an *ad hoc* basis.

2. The provisions of this Law regulating the judicial recognition of an arbitration agreement, challenging of such an agreement, application of interim measures and recognition and enforcement of foreign arbitral awards shall apply regardless of the state in which the place of arbitration is or of the place where separate actions of arbitral proceedings are taken individual arbitral proceedings take place.

**Article 3. Definitions**

1. ***Ad hoc* arbitration** means arbitration when, by an agreement between the parties, dispute resolution procedure is not organised by a permanent arbitral institution;

2. **Arbitrator** means a natural person appointed by a party to a dispute or by an agreement of the parties to the dispute or as established by this Law to resolve the dispute.

3. **Place of arbitral proceedings** means a place of hearing of an arbitral tribunal and other actions of examination of a commercial dispute.

4. **Arbitral proceedings** mean a commercial arbitration procedure from the commencement of examination of a dispute in arbitration until the effect day of an arbitral award or ruling closing the case without making an award on its merits a decision being taken as to the substance of the matter.

5. **Arbitration agreement** means an agreement between two parties or more to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or

not, and which may be subject to arbitral proceedings. The state, a municipality or other public legal persons may also enter into an arbitration agreement.

6. **Arbitration rules** mean the rules approved by a permanent arbitral institution and observed when hearing and resolving of disputes in arbitration.

7. **Arbitral tribunal** means a sole arbitrator or a panel of arbitrators hearing an arbitration case.

8. **Place of arbitration** means the place of arbitration indicated in an arbitration agreement or determined by an arbitral tribunal. If the parties have not agreed on the place of arbitration or their agreement regarding the place of arbitration is not clear and until the place of arbitration is determined by the arbitral tribunal, the place of arbitration shall be deemed the office of a permanent arbitral institution or, in the event of *ad hoc* arbitration, the place of residence or business of the respondent or, at the discretion of the claimant, the place of residence or business of one of the respondents where there is more than one respondent. The place of arbitration may differ from the place of arbitral proceedings.

9. **Institutional arbitration** means arbitration when, by an agreement between the parties, dispute settlement is organised and administered, conditions are established for arbitral proceedings and other powers are granted by the agreement of the parties are exercised by a permanent arbitral institution.

10. **Commercial arbitration** (hereinafter: **'arbitration')** means a method of resolving a commercial dispute, where natural or legal persons, as mutually agreed, refer or undertake to refer to an arbitrator/arbitrators, appointed by the agreement of the parties or according to the procedure established by this Law, rather than to a court to have their dispute resolved by an arbitral award binding on the parties, whether administered by a permanent arbitral institution (institutional arbitration) or in the form of *ad hoc* arbitration.

11. **Commercial dispute** means any disagreement of the parties over a fact and/or matters of law arising out of contractual or non-contractual legal relations, including but not limited to supply of goods or services, distribution, commercial agency, factoring, lease, contracting, consulting, engineering services, licensing,

investment, financing, banking, insurance, concession, creation and involvement in a joint venture, any other type of industrial or business cooperation, payment of damages caused by breach of rule of competition law, contracts concluded on the basis of public procurement, carriage of goods or passengers by air, sea and road.

12. **Permanent arbitral institution** means a public legal entity organising and administering arbitration on a regular basis.

13. **Chair of a permanent arbitral institution** means a natural person appointed according to the procedure established by incorporation documents of a permanent arbitral institution to organise activities of the institution and perform administrative functions and other functions delegated to him by this Law.

14. **Court** means any institution or organisation making part of the judicial system of the state.

15. **Foreign arbitral award** means an arbitral award made in arbitral proceedings, where the place of arbitration is other than on the territory of the Republic of Lithuania.

**Article 4. Interpretation of the Law and Definitions**

1. In all cases, where this Law grants the parties to a dispute the right to use their discretion in deciding on a particular matter, except for the right to choose substantive law applicable to dispute resolution, the parties to the dispute shall be free to determine this matter or authorise any third party or institution to make that determination.

2. Parties to the dispute shall have the right, by a mutual agreement, to deviate derogate from all provisions of this Law, except for its imperative provisions.

3. An agreement of the parties on examination of a dispute in arbitration shall also cover the application of any provisions of the arbitration rules referred to in the said agreement.

4. The provisions of this Law referring to a claim or a statement of defence shall also *mutatis mutandis* apply to a counterclaim or a defence to a counterclaim.

5. Interpretation of this Law and its definitions shall be subsidiarily governed by the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, as last amended.

6. The issues governed by this Law, but not regulated in detail shall be dealt with in accordance with the principles of justice, reasonableness and good faith and other general principles of law.

7. This Law must be interpreted so that arbitration proceedings taking place in accordance with this Law is in maximum conformity with arbitration principles.

**Article 5. Permanent Arbitral Institution**

1. Associations of the Republic of Lithuania representing entities of the Republic of Lithuania engaged in production, business and legal activities may establish independent legal persons with limited liability the legal form of which is a permanent arbitral institution. The main function of a permanent arbitral institution shall be to organise and administer arbitration and perform other functions delegated by the parties to a dispute and related to the activities of a permanent arbitral institution.

2. The issues of the establishment and management, representation and responsibility of permanent arbitral institutions referred to in paragraph 1 of this Article shall be resolved in accordance with the procedure established by laws. The statute of a permanent arbitral institution drafted and approved by the founders of the permanent arbitral institution shall be registered with the Register of Legal Entities according to the procedure established by laws.

3. A permanent arbitral institution shall be prohibited from handling disputes by way of arbitration or exert any influence on arbitral examination, an arbitral tribunal or arbitrators, except for giving advice to the arbitral tribunal in relation to the form of an arbitral award. In arbitral proceedings, a permanent arbitral

institution shall have only the rights granted to it by an agreement of the parties to a dispute. The permanent arbitral institution may not refuse to perform its functions where it has made a public notice of its activities, and the parties to the dispute have paid the fees set by the permanent arbitral institution.

4. A permanent arbitral institution shall approve arbitration rules. The arbitration rules approved by the permanent arbitral institution shall be legally binding upon the parties only where the parties have decided to apply them by their arbitration agreement.

5. A permanent arbitral institution shall be presided by a chair. The chair of the permanent arbitral institution shall perform the functions defined by this Law and delegated to him by the permanent arbitral institution.

**Article 6. Receipt of Written Notifications**

Unless otherwise agreed by the parties:

1) any written notification communication shall be deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence, mailing address or by electronic communications terminals. If none of these can be found after making a reasonable inquiry, a written communication shall be deemed to have been received by the addressee if it is sent to the addressee's last-known place of business, habitual residence, mailing address by registered letter or any other means which provide a record of the attempt to deliver it or by electronic communications terminals;

2) the notification shall be deemed to have been received on the day it is handed in or delivered according to point 1 of this Article.

**Article 7. Waiver of the Right to Object**

1. If a party to a dispute knows that his right has been infringed and yet proceeds with arbitration without stating his objection to such infringement within a reasonable period, the party shall be deemed to have waived his right to object.

2. The rule of paragraph 1 of this Article shall also apply to requirements concerning the recognition of an arbitration agreement as invalid, its setting aside and recognition and enforcement of an arbitral award.

**Article 8. Principles of Arbitral Proceedings**

1. An arbitral tribunal, permanent arbitral institution and its chair shall be independent in handling issues governed by this Law.

2. Courts may not intervene in the activities of an arbitral tribunal, permanent arbitral institution and its chair, except for the cases provided for in this Law.

3. Arbitral proceedings shall be confidential.

4. Parties to an arbitration shall enjoy equal procedural rights.

5. Parties to an arbitration shall be free in disposing of their rights.

6. Arbitral proceedings shall conform to the principles of autonomy of the parties, competition, cost-efficiency, cooperation and rapidity.

**Article 9. Court Assistance in Arbitral Proceedings**

An arbitration agreement shall not prevent a party or parties or, in cases provided by this Law, an arbitral tribunal from referring to:

1) Vilnius Regional Court in relation to taking actions defined in Articles 14, 16, 17, 25, 27, 36 and 38 of this Law;

2) Court of Appeal of Lithuania in relation to taking actions defined in Articles 26, 50 and 51 of this Law.

**CHAPTER II**

**ARBITRATION AGREEMENT**

**Article 10. Form of an Arbitration Agreement**

1. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement between the parties.

2. An arbitration agreement shall be concluded in writing and be deemed valid if:

1) executed as a joint document signed by the parties; or

2) concluded in an exchange by the parties of letters, which may be transmitted by electronic communications terminals provided that the integrity and authenticity of information so transmitted is ensured, or of other documents recording the fact of entering into such an agreement; or

3) concluded by using electronic communications terminals provided that the integrity and authenticity of information so transmitted is ensured and the content of the transmission is made available for later access; or

4) the parties submit to each other a claim and a statement of defence in which the existence of the arbitration agreement is alleged by one party and not denied by another; or

5) there is other written proof of conclusion or recognition by the parties of the arbitration agreement.

3. A reference in a contract between the parties to a document containing an arbitration clause shall constitute an arbitration agreement provided that the contract or document is in conformity with the requirements laid down in paragraph 2 of this Article in relation to the form of an agreement.

**Article 11. Judicial Recognition of an Arbitration Agreement**

1. Upon the receipt of a claim in relation to a matter that is the subject of an arbitration agreement between the parties concluded in the form specified in Article 10 of this Law, a court shall refuse to admit it. Where the fact of the conclusion of the arbitration agreement is established after the admission by the court of the claim, the court shall not consider the claim related to the matter that is the subject of the arbitration agreement.

2. An arbitration agreement may be judicially recognised null and void at the request of one of the parties, on the general grounds for recognising transactions null and void, or if any breach of Articles 10 and 12 of this Law has been established. After commencing arbitral proceedings, the issue of invalidity of an arbitration agreement shall be handled only according to the procedure defined by Article 19 of this Law.

3. A court must suspend the hearing of a case if the case may not be heard before the resolution of an arbitration case.

**Article 12. Disputes Which May Not Be Submitted to Arbitration**

1. All disputes may be settled by arbitration except as provided by this Article.

2. Arbitration may not settle disputes that are subject to the administrative procedure or hear cases that fall within the remit of the Constitutional Court of the Republic of Lithuania. Disputes arising from family legal relations and disputes concerning registration of patents, trademarks and design may not be submitted to arbitration. Disputes arising from employment and consumer contracts may not be submitted to arbitration except for the cases where an arbitration agreement is concluded after the dispute has arisen.

3. Disputes may not be submitted to arbitration where one of the parties to a dispute is a state or municipal enterprise, also a state or municipal institution or organisation, with the exception of the Bank of Lithuania, unless a prior consent to an arbitration agreement has been given by the founder of this enterprise, institution or organisation.

4. The Government of the Republic of Lithuania (hereinafter: 'the Government') or a state institution authorised thereby may, in accordance with the regular procedure, enter into an arbitration agreement concerning disputes arising out of commercial contracts concluded by the Government or a state institution authorised thereby.

## CHAPTER III

## COMPOSITION OF AN ARBITRAL TRIBUNAL

### Article 13. Number of Arbitrators

1. Parties shall be free to determine the number of arbitrators. The number of arbitrators shall be uneven. An arbitral award of an arbitral tribunal consisting of an even number of arbitrators shall not be deemed invalid for this reason.

2. Where the parties fail to determine the number of arbitrators, three arbitrators shall be appointed.

### Article 14. Appointment of Arbitrators

1. Any legally capable natural person may be appointed as an arbitrator, unless otherwise agreed by the parties. In all cases, a written consent of the person for his acting as an arbitrator shall be required.

2. Parties shall be free to agree on a procedure for appointing an arbitrator or arbitrators provided that they comply with paragraphs 5 and 6 of this Article.

3. Unless agreed otherwise by the parties,

1) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator as the chair of the arbitral tribunal;

2) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the chair of a permanent arbitral institution;

3) in the case of the failure of the claimant to appoint an arbitrator when lodging a claim or within 20 days of the filing of the claim, the arbitrator shall be appointed by the chair of the permanent arbitral institution within 20 days of the expiry of the time limit set for the claimant to appoint the arbitrator;

4) in the case of the failure of the respondent to appoint an arbitrator within 20 days of the receipt of the claim, the arbitrator shall be appointed by the chair of the permanent arbitral institution within 20 days of the expiry of the time limit set for the respondent to appoint the arbitrator;

5) in the case of the failure of the arbitrators appointed by the parties to agree on the appointment of the third arbitrator within 20 days of their appointment, this arbitrator shall be appointed by the chair of the permanent arbitral institution within 20 days of the expiry of the time limit set for the arbitrators to appoint the third arbitrator;

6) in the case of a party's failure to appoint an arbitrator in *ad hoc* arbitration, the arbitrator shall be appointed by Vilnius Regional Court, and if the arbitrators appointed by the parties fail to agree on the appointment of the chair of the arbitral tribunal within 20 days of their appointment, the chair of the *ad hoc* arbitral tribunal shall be appointed by Vilnius Regional Court within 20 days of the expiry of the time limit set for the party to appoint the arbitrator or for the arbitrators to appoint the chair of the arbitral tribunal.

4. If, upon the agreement of the parties on the procedure for the appointment of arbitrators, one of the parties fails to comply with the agreement, the arbitral tribunal shall be constituted according to the procedure established by paragraph 3 of this Article.

5. In the case of two claimants or more (multiple claimants), co-claimants must, when filing a claim with an arbitral tribunal, submit a written agreement on the appointment of a common arbitrator. In the case of their failure to submit to the arbitral tribunal the written agreement on the appointment of the common arbitrator when filing the claim, the co-claimants must submit the agreement to the arbitral tribunal within 20 days of the filing of the claim with the arbitral tribunal. Where the co-claimants fail to appoint the arbitrator within the given time limit, the arbitrator shall be appointed by the chair of a permanent arbitral institution within 20 days of the expiry of the said time limit. In the event of the failure of the co-claimants to appoint the arbitrator within the set time limit in the case of the *ad*

*hoc* arbitration, the arbitrator shall be appointed by Vilnius Regional Court within 20 days of the expiry of the said time limit.

6. In the case of two respondents or more (multiple respondents), co-respondents must submit a written agreement on the appointment of a common arbitrator. The written agreement must be submitted to the arbitral tribunal within 20 days of the receipt of the application of the claimant or co-claimants for the appointment of the arbitrator. Where the co-respondents fail to appoint the arbitrator within the given time limit, the arbitrator shall be appointed by the chair of a permanent arbitral institution within 20 days of the expiry of the said time limit. In the event of the failure of the co-respondents to appoint the arbitrator within the set time limit in the case of the *ad hoc* arbitration, the arbitrator shall be appointed by Vilnius Regional Court within 20 days of the expiry of the said time limit.

7. When appointing an arbitrator/arbitrators, the chair of a permanent arbitral institution or Vilnius Regional Court must take into consideration the substance of the dispute, requirements for the arbitrator set by the agreement of the parties and circumstances securing independence and impartiality of the arbitrator/arbitrators.

8. Decisions of the chair of a permanent arbitral institution falling within his remit in the cases defined in this Article and orders of Vilnius Regional Court falling within its remit in the cases defined in this Article shall be final and shall not be subject to appeal.

**Article 15. Grounds for Challenging an Arbitrator**

1. When a person is approached in connection with his possible appointment as an arbitrator, he must, before accepting to act as an arbitrator and taking into account Article 6 of this Law, disclose in writing to the parties, a permanent arbitral institution, Vilnius Regional Court (or other entity, where he is obliged to do so by an agreement of the parties or arbitration rules chosen by the parties) any circumstances likely to give rise to justifiable doubts as to his independence and impartiality. The arbitrator must, from the time of his appointment and throughout

the arbitral proceedings, also disclose any such circumstances, unless he did so before or if the circumstances occurred after his appointment or during arbitral proceedings.

2. An arbitrator may be challenged only if justifiable doubts arise as to his independence or impartiality, or if he does not possess qualifications agreed to by the parties.

3. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which the party becomes aware after the appointment has been made.

**Article 16. Procedure for Challenging an Arbitrator**

1. Parties may agree on the challenge of an arbitrator, appeal against a decision on the challenging of the arbitrator or other issues related to the challenging of the arbitrator.

2. In the absence of an agreement on the procedure for challenging an arbitrator, a party who intends to challenge the arbitrator must, within 15 days after becoming aware of the constitution of the arbitral tribunal or of the circumstances referred to in Article 15(2) of this Law, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the issue of the challenge of this arbitrator shall be decided by the other arbitrators of the arbitral tribunal. Where the arbitral tribunal consists of a sole arbitrator or where all arbitrators of the arbitral tribunal are challenged, the issue of the challenge shall be decided by the arbitrator/arbitrators himself/themselves.

3. If a challenge is rejected in accordance with the procedure laid down in paragraph 2 of this Article, the challenging party may request, within 20 days after the receipt of the notice of the decision rejecting the challenge, Vilnius Regional Court to issue an order concerning the challenge of the arbitrator. The order issued by Vilnius Regional Court in this respect shall be final and not subject to appeal. While the request of the party for the challenge of the arbitrator is pending in

Vilnius Regional Court, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an arbitral award.

**Article 17. Termination of an Arbitrator's Mandate**

1. An arbitrator must withdraw if he becomes *de jure* or *de facto* unable to perform or delays the performance of his functions without a solid reason. His mandate shall terminate if he withdraws from his office or if the parties agree on his removal from the office. If the arbitrator fails to perform his duty to resign or the parties fail to agree on his removal from his office, any party may request the chair of a permanent arbitral institution to decide on the relevant issue. In this case, the decision of the chair of the permanent arbitral institution shall be final and not subject to appeal. In the event of the *ad hoc* arbitration, the relevant issue shall be resolved by Vilnius Regional Court; the order of this Court shall be final and not subject to appeal.

2. Termination of the mandate of an arbitrator shall not imply acceptance of the validity of any ground referred to in this Article or Article 15.

**Article 18. Appointment of a Substitute Arbitrator**

1. Where the mandate of an arbitrator terminates under Article 15 or 17 of this Law or the arbitrator withdraws from office for another reason or where his mandate terminates on any other grounds, a substitute arbitrator shall be appointed according to the same procedure that was applicable to the appointment of the arbitrator whose mandate terminated.

2. Upon the appointment of a substitute arbitrator, the examination shall commence anew, unless otherwise agreed by the parties.

**CHAPTER IV**

**JURISDICTION OF THE ARBITRAL TRIBUNAL**

**Article 19. Competence to Rule on Jurisdiction**

1. An arbitral tribunal may rule on its own jurisdiction, including the cases where doubts arise with respect to the existence or validity of an arbitration agreement. For this purpose, an arbitration clause, which forms part of a contract, must be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

2. A plea of a party that an arbitral tribunal does not have jurisdiction must be raised no later than the submission of the statement of defence. The party shall not be precluded from raising such a plea by the fact that he has participated in the appointment of an arbitrator. The plea that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may admit a later plea if it considers the delay justified.

3. An arbitral tribunal may take a partial decision on the statement referred to in paragraph 2 of this Article or resolve the issue by a final arbitral award.

**CHAPTER V**

**INTERIM MEASURES AND PRELIMINARY ORDERS**

**Article 20. Interim Measures**

1. Unless otherwise agreed by the parties, an arbitral tribunal may, at the request of any party and with a notice to other parties, order to take interim measures of protection
aimed at securing settlement of the party's claims and preservation of evidence.

2. Interim measures may include the following:

1) prohibition of engagement by the party in certain transactions or taking of certain actions;

2) obligation of the party to keep safe assets related to arbitral proceedings, provide a monetary deposit or a bank or insurance guarantee;

3) obligation of the party to preserve evidence that may be significant in arbitral proceedings.

3. A party requesting an arbitral tribunal to take interim measures referred to in points 1 and 2 of paragraph 2 of this Article must prove that:

1) his claims are likely to be founded; the determination of such likelihood shall not affect the power of the arbitral tribunal to subsequently give a different arbitral award or order in arbitral proceedings;

2) failure to take the measures can substantially preclude the enforcement of the arbitral award or render it impossible;

3) interim measures are cost-effective and proportionate to the goal sought.

4. A party requesting an arbitral tribunal to take interim measures referred to in point 3 of paragraph 2 of this Article must prove that:

1) evidence requested to be preserved may be significant to the case;

2) there is a real risk that the failure to take interim measures will result in the destruction by the other party of evidence requested to be preserved or its damage rendering it incapable of being used in arbitral proceedings.

5. An arbitral tribunal may oblige a party to give a prompt notice of a substantial change of the circumstances in relation to which the issue of taking of interim measures has been resolved.

**Article 21. Preliminary Orders**

1. Unless otherwise agreed by the parties, a party may apply to an arbitral tribunal for interim measures without a notice to the other party by submitting an application for a preliminary order obliging the respective party, in the course of

handling of the application for interim measures, not to take any actions that may affect the application of interim measures.

2. A party requesting an arbitral tribunal to give a preliminary order must prove that:

1) a notice to the other party of the application for interim measures may be substantially detrimental with regard to the purposes of those measures;

2) there are grounds indicated in Article 20(3)(1) and (3) of this Law.

3. A party requesting an arbitral tribunal to give a preliminary order must inform the arbitral tribunal of all circumstances that may be significant for the consideration of the application. This obligation of the party shall be valid over the period of validity of the preliminary order.

4. Upon issuing a preliminary order, an arbitral tribunal must, in accordance with the procedure established by Article 6 of this Law and with the immediate effect, provide each party with the application for interim measures, the application for a preliminary order, the preliminary order and, if any, correspondence between the requesting party and the arbitral tribunal, including information about the consideration of the application for the preliminary order by an oral procedure, if any.

5. An arbitral tribunal must, as effectively as possible, provide an opportunity to a party in respect of which a preliminary order has been issued, to be heard and consider objections of this party with regard to the issue of the preliminary order.

6. A preliminary order shall be valid for 20 days of its issue. In this period, after having heard a party, in respect of which the preliminary oder has been issued, and considered the objections of this party, if any, the arbitral tribunal may use respective interim measures.

7. A preliminary order shall be binding to the parties, but shall not be deemed as an enforceable document.

**Article 22. Amendment and Seeting Aside of Orders Regarding Interim Measures and Setting Aside of Preliminary Orders**

At the request of a party or, in exceptional cases, on its own initiative with a notice to each party, an arbitral tribunal may amend or annul an order concerning interim measures or annul a preliminary oder.

**Article 23. Security for Compensation for Losses Likely to Result from Taking of Interim Measures or the Issue of a Preliminary Order**

1. An arbitral tribunal may oblige a party applying for interim measures to provide a security for compensation for losses of the other party likely to result from taking of interim measures.

2. An arbitral tribunal shall oblige a party requesting the issue of a preliminary order to provide a security for compensation for losses of the other party likely to result from the issue of the preliminary order, unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

**Article 24. Compensation for Losses Likely to Result from Taking of Interim Measures or the Issue of a Preliminary Order**

1. A party that has applied for interim measures or a preliminary order shall be liable for losses resulting from taking of such measures or the issue of the preliminary order provided that, in the process of arbitral proceedings, it is established that the interim measures or the preliminary order is unfounded.

2. At the request of a party, an arbitral tribunal may, by a final arbitral award, oblige a party at the request of which interim measures have been taken to cover losses resulting from taking of such interim measures.

**Article 25. Enforcement of Orders on Interim Measures and Grounds for a Refusal to Issue A Writ of Execution**

1. An order of an arbitral tribunal on application of interim measures shall be an enforceable document.

2. Where an order of an arbitral tribunal on application of interim measures is not enforced, Vilnius Regional Court shall, at the request of a party, issue a writ of execution according to the procedure established by the Code of Civil Procedure of the Republic of Lithuania (hereinafter: 'the Code of Civil Procedure'). An application for the issue of the writ of execution shall be considered at a court hearing with a notice to the parties to the arbitral proceedings. The failure of the parties to appear in court shall not prevent the Court from resolving the matter of the issue of the writ of execution.

3. A party at the request of which Vilnius Regional Court has issued a writ of execution to enforce an order on application of interim measures must give the Court a prompt notice of the replacement or cancellation of interim measures. An application for the amendment or setting aside of the writ of execution shall be considered at a court hearing with a notice to the parties to the arbitral proceedings. The failure of the parties to appear in court shall not prevent the Court from resolving the matter of the amendment or setting aside of the writ of execution.

4. Vilnius Regional Court may refuse to issue a writ of execution only in the case where:

1) data provided to determine the obligatory content of the writ of execution are insufficient and this cannot be rectified during the consideration of the application for the issue of the writ of execution;

2) a party in respect of which the writ of execution is requested provides evidence that an arbitral tribunal failed to inform him, in an appropriate manner, of the consideration of the matter of taking of interim measures and thus prevented him from providing his explanations in this relation;

3) an arbitral tribunal has evidently exceeded its competence in issuing the order concerning taking of interim measures;

4) an order of the arbitral tribunal on security for compensation for losses likely to result from application of interim measures has not been executed;

5) the arbitral tribunal has amended or annulled the order on application of interim measures.

5. A separate appeal may be filed against the order of Vilnius Regional Court refusing the issue of a writ of execution.

**Article 26. Recognition or Enforcement of Foreign Arbitral Awards or Orders on Interim Measures and Grounds for the Refusal to Recognise or Enforce a Foreign Arbitral Award or Order**

1. An arbitral award or order on application of interim measures given in any other state may be recognised and enforced on the territory of the Republic of Lithuania.

2. An application of a party for the recognition and permission to enforce an arbitral award or order of an arbitral tribunal on application of interim measures shall be filed with the Court of Appeal of Lithuania. The provisions of Article 51(2) of this Law shall *mutatis mutandis* apply to the content of this application.

3. By its order, the Court of Appeal of Lithuania may refuse to recognise or enforce a foreign arbitral award or order on application of interim measures, where:

1) such an award or order is not enforceable on the territory of the Republic of Lithuania;

2) there are grounds indicated in Article 25(4)(2), (3), (4) and (5) of this Law.

4. The provisions of Article 51(3) of this Law shall *mutatis mutandis* apply to appeals against orders of the Court of Appeal of Lithuania, as defined in this Article.

**Article 27. Taking of Interim Measures and Preservation of Evidence by a Court Order**

1. A party shall be entitled to request Vilnius Regional Court to take interim measures or require to preserve evidence before the commencement of arbitral proceedings or the constitution of an arbitral tribunal. At the request of the party, the Court may apply interim measures or require to preserve evidence also after the constitution of the arbitral tribunal. Accordingly, the other party shall have the right, according to the procedure established by the Code of Civil Procedure, to apply for the security for compensation for losses likely to result from taking of interim measures or preservation of evidence.

2. A refusal of the Court to take interim measures or preserve evidence shall not preclude a party, during arbitral proceedings, from requesting an arbitral tribunal to apply interim measures or preserve evidence.

**CHAPTER VI**

**ARBITRAL PROCEEDINGS**

**Article 28. General Provisions of Arbitral Proceedings**

1. Parties to a dispute shall enjoy equal procedural rights in arbitral proceedings. Each party shall be given equal opportunity of supporting his claims or objections.

2. Without prejudice to the imperative provisions of this Law, parties to a dispute shall be free to agree on the procedure to be followed by an arbitral tribunal in conducting the proceedings.

3. In the absence such an agreement, an arbitral tribunal may, subject to the provisions of this Law, conduct proceedings in such a manner as it considers appropriate.

**Article 29. Place of Arbitral Proceedings**

1. Parties shall be free to agree on a place of arbitral proceedings. Failing such an agreement, the place of arbitral proceedings shall be determined by an arbitral tribunal having regard to the background of the case and the convenience of the parties.

2. Notwithstanding the provisions of paragraph 1 of this Article, an arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among arbitrators, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other assets.

**Article 30. Commencement of Arbitral Proceedings**

Unless otherwise agreed by the parties, arbitral proceedings shall be deemed to have commenced on the day of receipt by the respondent of a request for arbitration or a claim. The request for arbitration or the claim must indicate the names of the parties, the substance of the dispute, reference to an arbitration agreement and the person nominated to be an arbitrator. The claim must conform to the requirements of Article 32 of this Law.

**Article 31. Language of Arbitration**

1. Unless otherwise agreed by the parties, the language or languages to be used in arbitral proceedings shall be determined by an arbitral tribunal. Failing such an agreement, the language of an arbitration agreement shall be the language of arbitration until the language to be used in arbitral proceedings is determined by the arbitral tribunal.

2. Unless otherwise defined by an agreement of the parties or an order of an arbitral tribunal, all written documents of the parties submitted to the arbitral tribunal or a permanent arbitral institution, arbitral proceedings, arbitral awards, decisions of the permanent arbitral institution, orders or other documents delivered by the arbitral tribunal or permanent arbitral institution shall be in the language of arbitration.

3. An arbitral tribunal may, at any time during arbitral proceedings, determine a different language of arbitration provided that this does not infringe the right of the parties to be heard.

**Article 32. Claims and Statements of Defence**

1. Within a time limit agreed by parties or determined by an arbitral tribunal, a claimant must state the facts supporting his claim and the points at issue, appoint an arbitrator, unless already appointed, and formulate his claims, while a respondent must state his defence, unless otherwise agreed by the parties.

2. Unless otherwise agreed by the parties, either party may amend or supplement his claim or statement of defence in the course of arbitral proceedings, unless an arbitral tribunal considers that allowing such amendment or supplementing is inexpedient, taking into consideration their undue delay.

**Article 33. Evidence and the Burden of Proof**

1. Each party must prove the facts supporting his claims or statements of defence, unless otherwise agreed by the parties or required by law governing the dispute.

2. In the course of arbitral proceedings, an arbitral tribunal may require that parties provide documents and other evidence related to the case being heard.

3. An arbitral tribunal shall have the right to refuse to admit evidence which, in the course of arbitral proceedings, could have been provided at an earlier date and the submission of which will delay arbitral proceedings.

4. No evidence shall be obligatory to an arbitral tribunal, unless otherwise agreed by the parties.

5. Unless agreed by the parties, the rules of evidence applicable to arbitral proceedings shall be defined by an arbitral tribunal. The provisions of this Law shall

apply to the collection of evidence and allocation of the burden of proof until the determination of the rules of evidence applicable to arbitral proceedings.

6. Subject to a party's failure to deliver evidence requested by an arbitral tribunal, the arbitral tribunal may make an arbitral award on the basis of available evidence or, in exclusive cases, to consider the fact of the failure to provide evidence unfavourably for the failing party.

7. An arbitral tribunal shall be entitled to determine the admissibility, sufficiency and relation of any evidence to the case.

**Article 34. Oral and Written Proceedings**

1. An arbitral tribunal shall decide on the form of arbitral proceedings, unless agreed by the parties. Arbitral proceedings may be conducted in the form of oral hearings or a written or any other procedure. Where the parties agree on proceedings *in absentia*, the arbitral tribunal must, at any time in the course of arbitral proceedings, switch to oral proceedings, if so required by any party to the dispute.

2. Parties must be given sufficient advance notice of any hearing of an arbitral tribunal within a reasonably required period.

3. All evidence, documents or other information supplied to an arbitral tribunal by one party must be communicated to the other party. Evidence, documents or other information received by the arbitral tribunal must also be transferred to the parties.

**Article 35. Default of a Party**

Unless otherwise agreed by the parties, where a party, without valid reason, fails to produce an mandatory procedural document or to appear at a hearing of an arbitral tribunal, the arbitral tribunal shall be entitled to continue arbitral

proceedings and make an arbitral award on evidence before it or take procedural decisions referred to in Article 49 of this Law.

**Article 36. Witnesses and Experts**

1. An arbitral tribunal shall determine the time, place and method of examination of witnesses and experts.

2. Subject to the absence or refusal of witnesses to testify, an arbitral tribunal may allow the party requesting examination of witnesses, within a time limit set by the arbitral tribunal, to file a request with Vilnius Regional Court for the examination of witnesses according to the procedure defined by the Code of Civil Procedure and this Law. Examination of witnesses at Vilnius Regional Court shall be conducted *mutatis mutandis* in accordance with the provisions of Section Nine of Chapter XIII of Part II of the Code of Civil Procedure. During examination of witnesses at the Court, the arbitral tribunal may suspend or adjourn arbitral proceedings.

3. Unless otherwise agreed by the parties, an arbitral tribunal may:

1) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

2) require a party to provide the expert with any relevant information or to produce or provide access to evidence related to the case.

4. Unless otherwise agreed by the parties, if a party so requests or if an arbitral tribunal considers it necessary, an expert must participate in the hearing, present his conclusions and respond to questions asked by the parties or the arbitral tribunal.

5. Parties shall be entitled to request an arbitral tribunal to examine their witnesses.

**Article 37. Consolidation of Arbitration Cases**

Arbitration cases may be consolidated by an agreement of parties.

**Article 38. Court Assistance in Collecting Evidence**

An arbitral tribunal or a party, with the approval of the arbitral tribunal, shall be entitled to request from Vilnius Regional Court assistance in collecting evidence. Evidence shall be collected at court *mutatis mutandis* in accordance with the provisions of Section Nine of Chapter XIII of Part II of the Code of Civil Procedure. Arbitrators and the parties shall be entitled to participate in any hearing of Vilnius Regional Court held at the request defined in this Article and also put questions, provide clarifications, whether oral or written, and exercise other procedural rights necessary for collecting evidence.

**CHAPTER VII**

**ARBITRAL AWARDS AND CLOSING OF ARBITRAL PROCEEDINGS WITHOUT MAKING AN AWARD ON ITS MERITS**

**Article 39. Substantive Law Applicable to a Dispute**

1. An arbitral tribunal shall resolve disputes in accordance with law chosen by parties as applicable to a dispute. Any reference made to applicable foreign law shall mean a reference to national substantive law of a relevant state rather than international private law of that state.

2. Where the parties have not agreed on applicable law, an arbitral tribunal shall apply law which, in its reasonable opinion, is applicable to resolution of a specific dispute, including *lex mercatoria*.

3. An arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if expressly authorised by parties to do so.

**Article 40. Making of Awards by an Arbitral Tribunal Consisting of Multiple Arbitrators**

1. Unless otherwise agreed by the parties, an arbitral award shall be made by majority vote of arbitrators. In the event of the absence of majority vote required to make an arbitral award or of a tie, the chair of an arbitral tribunal shall have the casting vote.

2. Notwithstanding the provisions of paragraph 1 of this Article, procedural issues of arbitral proceedings may be resolved by the chair of an arbitral tribunal at his own discretion if so authorised by parties or all other arbitrators of this arbitral tribunal.

3. The failure of an arbitrator to attend arbitral proceedings without justified reason shall not prevent other arbitrators of an arbitral tribunal from making a lawful award.

**Article 41. Taking Effect and Enforcement of an Arbitral Award**

1. An arbitral award shall take effect and be binding upon parties from the moment it is made.

2. An arbitral award shall be deemed made as of the day stated in the arbitral award.

3. Upon taking effect of an arbitral award, the parties to a dispute shall not have the right to bring an action in relation to the same subject matter and on the same grounds.

4. An arbitral award shall be an enforceable document to be enforced as of the moment of its taking effect in accordance with the procedure laid down by the Code of Civil Procedure.

**Article 42. Types of Arbitral Awards**

1. An arbitral tribunal may make a final arbitral award on its merits, a partial award and an additional award.

2. In the event of procedural matters, an arbitral tribunal shall be entitled to issue orders.

**Article 43. Final Arbitral Award**

The arbitral tribunal shall fully resolve a dispute by making a final arbitral award.

**Article 44. Partial Arbitral Award**

1. A partial arbitral award shall resolve a dispute only in part.

2. A partial arbitral award shall be final only in respect of the part of a dispute that is fully resolved.

3. A partial arbitral award may be made in relation to the following:

1) competence of an arbitral tribunal to resolve the dispute (Article 19 of this Law);

2) separate claims arising out of substantive legal relations;

3) other cases provided for by parties or an arbitral tribunal.

**Article 45. Additional Arbitral Award. Revision and Interpretation of an Arbitral Award**

1. An additional arbitral award shall resolve claims brought during arbitral proceedings, but not resolved by an arbitral award made. The additional award may also revise or explain an arbitral award, where it is necessary:

1) to correct in the arbitral award any clerical or typographical errors, errors in computation or errors of similar nature;

2) to give an interpretation of the operative part or a specific point of the arbitral award;

3) to resolve the issue of allocation of arbitration costs.

2. An additional arbitral award may be made on the initiative of an arbitral tribunal or at the request of the party concerned. The arbitral tribunal may, on its own

initiative, make the additional award within 30 days of the final arbitral award. The party concerned shall be entitled, no later than within 30 days of the receipt of the arbitral award, to request the arbitral tribunal to make the additional arbitral award.

3. An additional arbitral award must be made within 30 days of the receipt of the request of the party concerned for this award. The additional arbitral award shall form part of the arbitral award and shall be subject to the provisions of Article 46 of this Law.

4. An arbitral tribunal shall have the power to extend or renew the time limits defined in paragraphs 2 and 3 of this Article.

5. An additional arbitral award may not change the substance of the arbitral award.

**Article 46. Form and Contents of an Arbitral Award**

1. An arbitral award must be made in writing and signed by arbitrators or an arbitrator. In arbitral proceedings with more than one arbitrator, the signatures of the majority of arbitrators shall suffice, provided that the reason for any omitted signature is stated. The arbitrator or arbitrators who disagree with the majority shall have the right to state their dissenting opinion in writing, which shall be enclosed with the arbitral award. Parties may agree that the award may be signed by the chair of an arbitral tribunal at his sole discretion.

2. An arbitral award shall state the reasons upon which it is based, unless parties have agreed that no reasons are to be given or the arbitral award is an arbitral award on agreed terms in accordance with Article 47(1)(1) of this Law.

3. An arbitral award must state its date and the place of arbitration. The arbitral award shall be deemed to have been made on the day and at the place stated in the arbitral award.

4. A signed copy of an arbitral award must be delivered to each party. The delivery of the arbitral award may be postponed until full payment of all arbitration costs.

**Article 47. Settlement Agreement**

1. Parties shall have the right to close arbitral proceedings by settlement agreement. At the parties' request, an arbitral tribunal shall have the power:

1) to approve the settlement agreement of the parties by an arbitral award; or

2) to issue an order to close arbitral proceedings.

2. An arbitral award approving a settlement agreement of parties shall be a final arbitral award.

**Article 48. Decision on Arbitration Costs**

1. Arbitration costs shall include the following:

1) remuneration of arbitrators and other reasonable expenses incurred by them;

2) reasonable expenses of a permanent arbitral institution or other reasonable expenses arising out of agreements of parties;

3) reasonable expenses incurred by the parties.

2. Fee rates of a permanent arbitral institution and the procedure for calculation, payment and refund of arbitration costs shall be defined in the arbitration rules and/or agreement of parties which is in conformity with the arbitration rules. In the case of *ad hoc* arbitration, the amount of arbitrators' remuneration and the procedure for calculation, payment and refund of arbitration costs shall be defined by an agreement of the parties and/or *ad hoc* arbitration rules.

3. Unless otherwise agreed by the parties, an arbitral tribunal must distribute arbitration costs among the parties by an arbitral award taking into consideration the facts of the case and the conduct of the parties.

4. Where the proceedings are closed on any ground provided for by this Law, an arbitral tribunal shall have the power to use its own discretion in resolving the issue of allocation of arbitration costs.

**Article 49. Closure of Arbitral Proceedings**

1. Arbitral proceedings shall be closed by a final arbitral award or by an order of an arbitral tribunal on the grounds defined in paragraphs 2 and 4 of this Article.

2. An arbitral tribunal shall issue an order regarding closure of arbitral proceedings where:

1) the case may not be subject to arbitration;

2) a court decision made in relation to a dispute between the same parties, the same subject-matter and on the same ground has taken effect;

3) an arbitral award made in relation to a dispute between the same parties, the same subject-matter and on the same ground has taken effect;

4) a claimant withdraws his claim, unless a respondent objects thereto and the arbitral tribunal recognises the legitimate interest on his part in obtaining a final resolution of the dispute;

5) parties reach a settlement agreement or the arbitral tribunal determines to close the arbitral proceedings by an order in accordance with Article 47(1)(2) of this Law;

6) a natural person, as one of the parties to the dispute, dies, and succession of his rights is not possible;

7) a legal person, as one of the parties to the dispute, is liquidated, and succession of its rights is not possible;

8) the continuation of the proceedings becomes impossible, and the claimant has no right to refer, in the future, to arbitration in relation to resolution of the same dispute.

3. Upon closure of arbitral proceedings, parties shall not be permitted to repeatedly refer to arbitration in relation to a dispute between the same parties, the same subject-matter and on the same ground.

4. An arbitral tribunal shall have the power to issue an order to dismiss a request for arbitration or a claim where:

1) the request for the opening of arbitral proceedings or the claim has been filed by a natural person who is legally incapable;

2) the request for the opening of arbitral proceedings or the claim has been filed on behalf of the claimant by a person having no authorisation to represent him in arbitral proceedings;

3) arbitral proceedings are pending in relation to a dispute between the same parties on the same subject-matter and on the same ground;

4) both parties that have not requested proceedings *in absentia* fail to appear without good reason;

5) the person that has filed the request for the opening of arbitral proceedings or the claim fails to pay set arbitration costs;

6) the claimant fails to file a claim according to the requirements of Article 30 or 32 of this Law;

7) the parties that are not subject to bankruptcy proceedings request not to consider the dispute in arbitration on the basis of paragraph 8 of this Article;

8) the arbitral tribunal determines that continuation of arbitral proceedings is not possible or practicable.

5. Where no further action is taken in relation to a request for the opening of arbitral proceedings or a claim, the parties shall not be prevented from repeatedly submitting to arbitration their dispute.

6. An order of an arbitral tribunal shall take effect and be binding upon parties from the moment it is made.

7. The opening of bankruptcy proceedings or the application of any other bankruptcy procedure in respect of a party to an arbitration agreement shall not affect arbitral proceedings, the validity and application of the arbitration agreement, possibility of resolving a dispute in arbitration or the competence of an arbitral tribunal to hear the dispute, except for the reservations of paragraphs 8 and 9 of this Article.

8. A company which is subject to bankruptcy proceedings may not enter into a new arbitration agreement. Proprietary claims brought in respect of a party to an arbitration agreement which is subject to bankruptcy proceedings shall be considered by the court that has opened bankruptcy proceedings, where so requested by all parties to the arbitration agreement which are not subject to bankruptcy proceedings.

9. Where proprietary claims in respect of a party to an arbitration agreement which is subject to bankruptcy proceedings are considered by arbitration, an arbitral tribunal must provide a reasonable period for a bankruptcy administrator to get familiar with the arbitration case and prepare for proceedings, while a claimant must inform the court concerned of claims brought before arbitration and provide supporting explanations and evidence list. An arbitral award shall determine the set-off amount of mutual claims of the parties. Upon making the arbitral award, the court hearing the bankruptcy case shall confirm mutual claims of the parties determined by the arbitral award. The court hearing the bankruptcy case may delay the confirmation of a creditor's claims considered in arbitration until there is an arbitral award confirming the amount of such claims, however, the court shall confirm all undisputed claims (of the undisputed part thereof) in accordance with the procedure laid down by the Enterprise Bankruptcy Law of the Republic of Lithuania.

10. The mandate of an arbitral tribunal shall expire following a final arbitral award (except for the cases provided for in Articles 45 and 50(6) of this Law), closure of the arbitration proceedings or if no further action is taken in relation to the claim or the request for the opening of arbitral proceedings.

## CHAPTER VIII

## SETTING ASIDE OF AN ARBITRAL AWARD

### Article 50. Grounds and Procedure for the Setting Aside of an Arbitral Award

1. An arbitral award may be set aside by filing an appeal with the Court of Appeal of Lithuania on the grounds defined in this Article.

2. Upon admitting an appeal against an arbitral award, the Court of Appeal of Lithuania may, in exclusive cases and at the request of one of the parties, suspend the enforcement of the arbitral award.

3. The Court of Appeal of Lithuania may annul an arbitral award where the appellant party provides evidence that:

1) one party to an arbitration agreement, according to applicable laws, was legally incapable or the arbitration agreement is not valid according to laws applicable according to the agreement of the parties, or, in the absence of an agreement of the parties on law governing the arbitration agreement, according to the laws of the state in which the arbitral award was made; or

2) the party in respect of which the arbitral award is intended to be invoked has not been duly notified of the appointment of an arbitrator or arbitral proceedings or has not been otherwise enabled to give his explanations; or

3) the arbitral award has been made in relation to a dispute or part thereof which has not been submitted to arbitration. Where part of the dispute which has been submitted to arbitration may be distinguished, the part of the arbitral award that resolves matters submitted to arbitration may be recognised and enforced; or

4) the composition of an arbitral tribunal or arbitral proceedings do not conform to the agreement of the parties and/or the imperative provisions of this Law; or

5) the dispute may not be submitted to arbitration according to the laws of the Republic of Lithuania; or

6) the arbitral award is in conflict with the public policy of the Republic of Lithuania.

4. The Court of Appeal of Lithuania shall verify *ex officio* whether the arbitral award appealed against is in conflict with the grounds defined in points 5 and 6 of paragraph 3 of this Article.

5. The Court of Appeal of Lithuania shall refuse to admit an appeal filed one month after the day of an arbitral award, and where the appeal is filed against an additional award, as defined in Article 45 of this Law, after the day of the additional award made by an arbitral tribunal.

6. Upon receipt of an appeal against an arbitral award, the Court of Appeal of Lithuania may, by its reasoned order, if so requested by a party to a dispute, suspend proceedings in relation to the setting aside of the arbitral award in order to enable an arbitral tribunal to resume the arbitral proceedings or take other actions which would, in the opinion of the Court of Appeal of Lithuania, eliminate the ground for the setting aside of the arbitral award.

7. An order of the Court of Appeal of Lithuania concerning the suspension of proceedings, as defined in paragraph 6 of this Law, also the order concerning the setting aside of an arbitral award or the refusal to annul an arbitral award may be subject to appeal before the Supreme Court of Lithuania in accordance with the procedure established by the Code of Civil Procedure.

## CHAPTER IX

## RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

### Article 51. Recognition and Enforcement of Foreign Arbitral Awards

1. An arbitral award made in any state which is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall be recognised and enforced in the Republic of Lithuania according to the provisions of this Article and of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

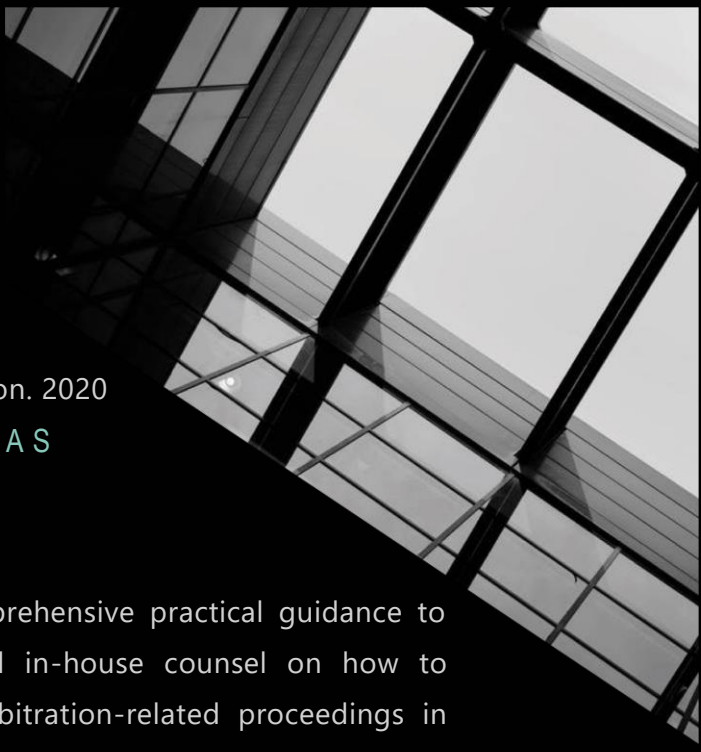
2. A party applying for the recognition or recognition and enforcement of a foreign arbitral award shall file an application with the Court of Appeal of Lithuania. The application shall be accompanied by the original copy of an arbitral award requested to be recognised or recognised and enforced and of an original arbitration agreement or duly certified copies thereof. If the arbitral award or arbitration agreement is not made in an official language of the State, the applying party shall supply a duly certified translation thereof into such language.

3. The Court of Appeal of Lithuania shall issue an order in relation to an application for the recognition or recognition and enforcement of a foreign arbitral award. This order shall take effect on the day of its issue. The order of the Court of Appeal of Lithuania may be appealed against to the Supreme Court of Lithuania within 30 days of the day of its issue. The provisions of Chapter XVII of the Code of Civil Procedure shall *mutatis mutandis* apply to appeal against the order of the Court of Appeal of Lithuania, as defined in this paragraph, and to proceedings based on this appeal.

4. Upon taking effect of an order concerning the recognition or recognition and enforcement of a foreign arbitral award, the foreign arbitral award shall become enforceable and shall be enforced in accordance with the procedure established by the Code of Civil Procedure.

*I promulgate this Law passed by the Seimas of the Republic of Lithuania.*

PRESIDENT OF THE REPUBLIC ALGIRDAS BRAZAUSKAS



# ARBITRATION IN LITHUANIA

Practitioner's Report. 2nd Edition. 2020

RIMANTAS DAUJOTAS

This report provides a comprehensive practical guidance to arbitration practitioners and in-house counsel on how to conduct arbitrations and arbitration-related proceedings in Lithuania. It provides guidance on how to navigate all the practical aspects of any kind of arbitration in Lithuania. Whether a dispute involves shareholder disputes, trade, sports, investment, or any of the other area, arbitrators and parties will find all the information and guidance they need in this report.

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