Arbitrability of disputes arising from public procurement contracts – Lithuanian example

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Summary

I. Introduction

It is internationally recognized that one of the main advantages of arbitration, as compared with litigation, is the neutrality of the forum[1]. Parties tend to sign arbitration

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[1] Many authors agree that neutrality of the tribunal is one of the fundamental principles of commercial arbitration. See International Commercial Arbitration, Gary Born, Kluwer Law International, 2009, p. 73, Towards A Science Of International Arbitration: Collected Empirical Research, Christopher R. Drahozal,

agreements or to include arbitration clauses in their contracts in order to ensure that any dispute arising from the contract will be settled by an unbiased and neutral forum. Neutrality of the forum is even more important in cases where one of the parties is a public entity[2]. Thus, arbitration ensures equal opportunities for both parties to present their cases and to obtain an award, which would be enforceable, notwithstanding the fact that the other party to the dispute is a state or an entity controlled by a state. The latter situation often occurs in construction or other concession contracts were a state or public entity announces public procurement tender regarding the construction of public objects. It is common practice to include arbitration clauses in such contracts in order to ensure neutral settlement of disputes. However, as it will be observed in this article, a state or public entity still tend to recourse to local courts in order to set aside an inexpedient award on the grounds of public policy, because the latter option is the only option that is left for public entities[3]. The same situation arose in a recent Lithuanian arbitration practice. In *UAB Kauno vandenys v WTE Wassertechnik GmbH*[4] case the Supreme Court of Lithuania (SCL) set aside an award issued in favor of a private contractor arguing the breach of public policy. The SCL also stated that disputes arising from public procurement contracts are not arbitrable under Lithuanian law. The latter decision of the SCL brings up many questions which are of great importance for the arbitration practice in Lithuania, as it is still emerging and gaining confidence as an effective means of dispute resolution. However, questions which will be analyzed in this article will be focused on the relationship between the arbitration laws and public procurement laws, including the argument of public interest so to answer whether the court has a right to extensively interpret the provisions law.

Richard W. Naimark, Kluwer Law International, 2005, p. 34, Contemporary Problems in International Arbitration, Julian D. M. Lew, Brill Archive, 1987, p. 284;

[2] „When signing the *arbitration* agreement States and other *public entities* should be deemed to have waived any and all sovereign prerogatives and immunities. In *international* trade no national laws should be successfully invoked" in International arbitration in a changing world, A. J. van den Berg, T.M.C. Asser Instituut, International Council for Commercial Arbitration, Kluwer, 1994, p. 258; See also International commercial arbitration: a transnational perspective, Tibor Várady, John J. Barceló, Arthur Taylor Von Mehren, West Group, 1999, p. 281;

[3] As it is rightly noticed by scholars – "The party which feel it is in the wrong generally prefers to refuse a proposal to take the matter to arbitration, and to leave the dispute to be settled by an ordinary court, since it feels that it will then not have to pay until much later" in International Arbitration Law and Practice, Mauro Rubino-Sammartano, Kluwer Law International, 2001, pp. 177-178;

[4] The Supreme Court of Lithuania, *UAB Kauno vandenys v WTE Wassertechnik GmbH* (3K-7-304/2011);

II. Case facts

The facts of the case are 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 SCL 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.

Before analyzing main arguments of the SCL, Lord Woolf's *Cowl vs. Plymouth City Council* judgment can be referred to as a starting point, which was issued more than 10 years ago and which emphasized that the courts expect a local authority to have at least considered using ADR to resolve a dispute and that litigation should be seen as a last resort. Therefore, a very accurate quote of Lord Woolf's judgment must be mentioned: *""Particularly in the case of such disputes, both sides must by now be acutely conscious of the contribution alternative dispute resolution could make to resolving disputes in a manner that both met the needs of the parties and the public, and saved time, expense and stress . . . . Today, sufficient should be known about Alternative Dispute Resolution to make the failure to adopt it, in particular when public money was involved, indefensible."* [5].

[5] Cowl & Others v Plymouth City Council [2001] EWCA Civ 1935X,14 December 2001, para 25;

III. The SCL Ruling

The main emphasis of the SCL'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 Law on Commercial Arbitration of the Republic of Lithuania (hereinafter – the LCA), 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 SCL, the LPP should be the *lex specialis* as regards all matters arising from the public procurement contracts and not the LCA. Therefore, in every case provisions of the LPP would prevail. In addition to this, the SCL 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 LCA.

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 LCA, 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 SCL had itself established that the imperative list of the disputes provided in Art. 11 of the LCA cannot and should not be interpreted expansively. However, according to the rationale of the SCL, 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 SCL 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 SCL 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.

IV. Comment

As it can be observed, this ruling of the SCL raises many questions, for example, are there sufficient grounds to state that the question of arbitrability should be answered though interpretation of the LPP[6]; or does the object of the dispute makes this dispute not arbitrable[7]; or whether involvement of a public body in the dispute makes it not arbitrable; or whether there should be a distinction made between the disputes arising from the public procurement procedure and the disputes arising from the commercial relationship regarding the execution of the public contract; or whether the tribunal has a right to apply provisions of the LPP[8] as there are many similar examples regarding the application of competition law provisions by arbitrators[9].

However, only three main questions will be discussed further, which form a basis of the ruling of the SCL: 1) is the LPP *lex specialis* and should it be applied first instead of the LCA, having due regard to the fact that the LCA is the main legislation which sets out the list of disputes that cannot be referred to arbitration, 2) whether the court has a right to interpret the provisions of law in such an expansive way that it would create new legislation, and 3) relationship between the public interest and the arbitrability.

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[6] It is generally agreed that the question of arbitrability of disputes should be answered through the interpretation of provisions of the law of the place of arbiration (*lex loci arbitri).* Authors also provide for different options, for example, tribunals may determine arbitrability on the basis of genuinely international public policy, see Comparative International Commercial Arbitration, Julian D. M. Lew, Loukas A. Mistelis, Stefan Kröll, Kluwer Law International, 2003, p. 197;

[7] Distinction of the objective and subjective arbitrability is made through the object and subjects involved in the dispute, for example, if the legislator wants to prohibit *arbitration* for certain categories of *disputes*, it may employ either *objective* or subjective criteria, however, these two types of criteria may not always be available interchangeably, Comparative arbitration practice and public policy in arbitration , Pieter Sanders, T.M.C. Asser Instituut, International Council for Commercial Arbitration, Kluwer Law and Taxation Publishers, 1987, see p. 182;

[8] Some auhtors argue that the tribunal and an arbitrator is not only entitled but also obliged to apply the mandatory rules of law, see Nathalie Voser „Mandatory Rules of Law as Limitation to the Law Applicable in International Commercial Arbitration"**,** *American Review of International Arbitration,* (International Arbitration 1996, Vol. 7, issue 3/4), p. 330; [8] Stephen Burke, Accentuate Ltd v Asigra Inc: „Arbitration does not displace mandatory provisions of EU law", International *Arbitration Law Review*, (Sweet & Maxwell 2010), p. 17; However, as some authors argue, the arbitral tribunal may be more inclined to apply an international mandatory provision of a "foreign" law than a state court, in Conflict of Laws in International Arbitration, Franco Ferrari, Stefan Kröll, Walter de Gruyter, 2010, p. 252; As for Lithuanian law, the case law of SCL also recognizes that the arbitral tribunal and the arbitrator must apply the mandatory rules law - Ruling of the Supreme Court of Lithuania, 2002-01-21 case No. 3K-3-2002; Ruling of the Supreme Court of Lithuania, 2004-11-17, case No. 3K-3-612/2004; Ruling of the Supreme Court of Lithuania, 2008-11-24, case No. 3K-3-573/2008; Ruling of the European Court of Justice, 1999-06-01 case No. C-126/97; and etc;

[9] see part VI;

a) Ratione personae

As it is provided by a number of authors, the issue of arbitrability must be discussed in two parts – parties' capacity to refer their disputes to arbitration and the capacity of the subject matter of the dispute to be referred to arbitration[10]. As the SCL's decision is mainly based on the second part – the *ratione materae*, the first one will only be discussed briefly.

As it was observed, parties to the dispute were private contractors and two public entities. Thus, the question that can be raised in this context is the capacity of state entities to arbitrate disputes. According to the SCL's decision issued in 2008[11], if a public entity entered into an agreement for commercial purposes, then such an entity is regarded as a businessman in commercial relationship[12]. In addition, it is provided in Art. 11 of the LCA that 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 evident that the announcement of the tender by public entity and conclusion of the contract, which included the arbitration clause, should be sufficient to evidence the prior agreement of the establisher and must be regarded as an agreement by the public entity as required by the latter provision.

Therefore, it can be stated that the first part of the content of arbitrability, the *ratione personae* requirement is fully fulfilled, because there are no provisions in Lithuanian law which would prohibit public entities to enter into contracts which contain arbitration clauses.

b) Law on Arbitrability in Lithuania

First of all, a short review of the provisions of Lithuanian law regarding the objective arbitrability of disputes must be provided. Art. 23 of the Code of Civil procedure of the Republic of Lithuania (CCP) states that parties may agree to refer any dispute regarding the law, except disputes which, according to the law, cannot be referred to arbitration. As it was stated above, arbitration proceedings in Lithuania are governed by the LCA. Article 11 of the

[10] "Arbitrability of disputes" in Gerald Aksen, Karl Heinz Bockstiegel, Paolo Michele Patocchi and Anne Whitesell (eds.) Global reflections on International law, Commerce and dispute resolution: Liber Amicorum in Honour of Robert Briner (ICC publishing S.A. 2005).

[11] Ruling of the Supreme Court of Lithuania in civil case no 3k-3-132/2008;

[12] Similar view is also adopted internationally, which provides that "international arbitration agreements entered into by public entities are now universally considered to be valid", in Fouchard, Gaillard, Goldman On International Commercial Arbitration Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, John Savage , Kluwer Law International, 1999, p. 42;

LCA clearly sets out the list of the disputes, which cannot be referred to arbitration (public procurement contracts are not included in the list)[13]. Article 37.5 of the LCA states that the Court of Appeal of the Republic of Lithuania would set-aside an award it if finds that the dispute could not be referred to arbitration under the provisions of Lithuanian law, or an award is in breach of the public policy[14] as stated in the provisions of Lithuanian law. In addition, Art. 40 of the LCA sets out the grounds for refusing to enforce an award which are similar to the provisions of Art. 5 of the New York Convention of 1958. Thus, these are the main provisions, which provide grounds for setting aside the award by the court in the context of arbitrability of disputes.

Another reference should be made to provisions of public procurement law. As it was mentioned above, public procurement procedures are governed by the LPP. Art. 120.2 of the LPP provides that in case of disagreement between the supplier and the purchasing entity, the supplier has a right to file a claim to the court. What could be noted in this part, it that none of the provisions of the LPP establish that disputes arising from public procurement law cannot be referred to arbitration.

Therefore, when faced with similar situation as analyzed in this article, the court has two options. First one is to consider the LPP as the *lex specialis*, because the dispute arose from public procurement contract, thus the court could find that disputes should be heard by the court, as provided in LPP. The second option is to consider the LCA as the *lex specialis*, because the answer of the arbitrability of certain disputes is provided in Art. 11 of LCA, and to refer the dispute to arbitration, since disputes arising from public procurement are not included in the list of the LCA. It can be argued that the latter option has more legitimate grounds which will be provided next.

[13] It should be noted also that the new Draft project of the new LCA which is currently in the process of parliamentary discussion also changed the list of disputes which cannot be referred to arbitration (public procurement matters are not included), i.e. the draft provides in Article 12.2 – "Arbitral tribunal may not hear disputes which are dealt by administrative justice, and to hear disputes which fall under the jurisdiction of the Constitutional Court. Disputes cannot be referred to arbitration which arise from family legal relationships, also disputes arising from patents, trademarks and design registration. Disputes cannot be referred to arbitration arising from labor and consumer contract, unless the arbitration agreement was concluded after the dispute arose. Arbitration court may hear disputes regarding the damage arising from the breach of the provisions of competition law";

[14] The definition of "public order" is understood as the entirety of imperative provisions of the state. However, such a conception would mean a national public order. Taking into account the international character and purpose of the New York Convention, the international practice of foreign state's courts established that the definition of "public order" must be interpreted in narrow terms, so that national public order must only embody international public order, i.e. only the imperatives accepted in international practice, see The Review of the practice of the Supreme Court of Lithuania of application of international private law, No. A2-14, Courts' practice 21-12-2000;

c) Lex Specialis vs. Lex Generalis

It should be noted that provisions of the LCA were drafted in accordance with the UNCITRAL Model law on international commercial arbitration (Model law). As it is stated in Art. 7 of LCA, similar to Art. 5 of Model law - *"In matters governed by this Law, no court shall intervene except where so provided in this Law"*. Thus, it could be argued that the latter provision clearly sets out the *lex specialis* nature of the LCA[15]. As it can be observed from the provisions of the LCA, *matters governed by* the latter also include matters regarding the arbitrability of disputes - an imperative list of disputes which cannot be referred to arbitration is set in Art. 11 of the LCA. In addition, according to the Art. 7 of the LCA, the only basis for courts' intervention must be set *in this law* (the LCA). Therefore, the LCA does not provide for a possibility for the courts to interpret other disputes as not arbitrable or to interpret the list provided in Art. 11 of LCA in an expansive way. Consequently, it can be argued that SCL's argument that a list of disputes that are not arbitrable may be included in other legislation, contravenes the provisions of the LCA and its *lex specialis* nature.

In addition, the rationale of the basic doctrine of law – *Lex specialis derogat legi generali* means that a law governing a specific subject matter (*lex specialis*) overrides the law which governs general matters (*lex generalis).* It was stated in the ruling of the SCL that the object and subject matter of the respective dispute was concerned with a question of whether disputes arising from public procurement contracts are arbitrable under Lithuanian law. Therefore, it can be argued that the dispute was exceptionally concerned with the arbitrability issue. Accordingly, the law which specifically regulates which disputes may not be referred to arbitration should be the *lex specialis* and should lead the court while answering the question of arbitrability[16].

Furthermore, the object and purpose of the LCA should also referred to as the latter act should be the only act that regulates arbitration matters, including the procedure of arbitration, capacity of parties, as well as the issue of arbitrability,. It would be a very unusual practice to regulate matters exceptionally related to arbitration in other acts, especially, if the purpose of other acts (such as the LPP) clearly does not match with the purpose of the LCA. Similarly, the object and purpose of the LPP should also be analyzed.

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[15] Aron Broches, Selected essays: World Bank, ICSID, and other subjects of public and private international law, 1995, p. 397;

[16] "The governing *arbitration law*. unlike the governing substantive *law*, refers to the *law that governs* the parties' *arbitration* agreement and the conduct of any subsequent *arbitration"* in Commercial Contracts: Strategies for Drafting and Negotiating, Morton Moskin, Aspen Publishers Online, 2002, 5-58;

As it was stated by SCL, the LPP is the *lex specialis* to disputes arising from public procurement procedures[17]. However, the procedure of public procurement should not be confused or equalized with matters which arise from commercial contracts related to public procurement. As it is stated in Art. 1 of the LPP, this act is purposed to regulate the procedure of public procurement, rights and obligations of subjects involved in the public procurement, control of the public procurement and dispute resolution. Therefore, it can be argued that the LPP is purposed to regulate the procedure of public procurement and the application of the latter act should not extent to matters arising after such procedures were concluded, i.e. when the contract is signed and the procedure of public procurement is over. Similar argumentation was also provided by the SCL itself in the ruling analyzed. The SCL had stated that the purpose of the LLP is to ensure the rational use of state's budget, security of competition, transparency of public procurement procedures and etc. Thus, provisions of the LPP should not be applied when arguing a totally different issue of arbitrability[18] for a number of reasons.

Firstly, the LPP is not purposed to define disputes which may not be referred to arbitration. Secondly, legal relationship emerging after public procurement procedures and after the conclusion of contract should not be governed by the LPP. Instead, provisions which are generally applied to commercial conduct should govern parties' relationship after the procedure of public procurement is finished. Provisions applicable to commercial relationship would clearly state that if there is a valid arbitration agreement, than the arbitral tribunal should be the one obliged to settle parties' dispute instead of the court. Therefore, public entities may not take advantage of the restrictive provisions of their national law to question the validity of an arbitration agreement. This rule has been well established in international arbitration case law and in comparative law[19].

In addition, there are no other provisions in Lithuanian law, which would provide that certain dispute could not be referred to arbitration except the ones found in the LCA. The latter fact can be explained with reference to the principle of disposition, which is

[17] An emphasis should be made that the aim and purpose of the LPP is not the issue of arbitrability or similar, but the competitive bidding process among several suppliers and contractors. See further Corruption in International Trade and Commercial Arbitration, Abdulhay Sayed, Kluwer Law International, 2004, p. 30;

[18] As it is provided by some authors "the law governing the arbitrability of a dispute may depend on where and at what stage of the proceedings the question arises. Tribunals may apply different criteria that courts in determining this law and the criteria applied by courts at the post-award stage may differ" in Comparative International Commercial Arbitration, Julian D. M. Lew, Loukas A. Mistelis, Stefan Kröll, Kluwer Law International, 2003, p. 189;

[19] Olivier Fille-Lambie Jean-Marc Loncle Arbitration applied to projects structured on public service concession: aspects of French and OHBLA laws, International Business Law Journal 2003, I.B.L.J. 2003, 1, 3-37

provided in Lithuania's civil law. This principle can also be identified in Art. 23 of the CCP, which states that parties may agree to refer any dispute regarding the law, except disputes which, according to the law, cannot be referred to arbitration. Thus, the principle of disposition establishes that all disputes may be referred to arbitration, except the ones, which are clearly indicated by law, as not arbitrable (Art. 11 of the LCA).

It must be emphasized that arbitration is an alternative means of dispute resolution, which must be chosen by the parties. Thus, there is no need to include arbitration option in all legislation of the country. Generally, all state's legislation provides courts' jurisdiction as basic and general means of dispute resolution. As it was mentioned, the SCL stated that disputes arising from public procurement contracts cannot be referred to arbitration, because the LPP states that disputes regarding public procurement procedures should be dealt by court. Therefore, if one would agree with such rationale provided by the SCL, one could argue that any and every dispute is not arbitrable, because the basic jurisdiction of courts is provided in all legislation of the state. Clearly, such argumentation would not find support. Therefore, it is clear that such reasoning of the SCL is erroneous[20].

Finally, even if one would agree with the statement of the SCL, according to which, the LPP is the *lex specialis* in this case, this would not change an assessment of this situation. If one would apply the LPP first, instead of the LCA, it would find that there is no provision in the LPP which would state that disputes arising under this law are not arbitrable, and if one would next refer to the LCA, it would find that disputes arising from public procurement procedures are not included in the list provided in Art. 11 of the LCA.[21]

Consequently, a conclusion can be made that the LPP is not and should not be regarded as a *lex specialis* when questions of arbitrability of disputes are resolved. Arbitrability is an issue which should be exceptionally regulated by the provisions of the LCA. Furthermore, provisions of the LPP should be applied only to matters related to public procurement procedure and not to the commercial relationship, which evolves after conclusion of public procurement contracts. Therefore, it can be stated that the ruling of SCL is clearly subject to a lot of criticism.

[20] It would be unreasonable to provide for arbitration option in every law or statute of the country, because it is generally accepted that all disputes are arbitrable except the ones which are indicated in law as not arbitrable.

[21] Such an approach would be similar to the one adopted in France where courts use a criterion based on the subject matter of the dispute which enables the courts to determine the arbitrability or non-arbitrability of a dispute with ease – French law has thus returned to the simple technique of "non-arbitrable blocks" used in Article 2060 of the Civil Code, see further Fouchard, Gaillard, Goldman On International Commercial Arbitration, Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, John Savage, Kluwer Law International, 1999, p. 339;

d) The Expansive Interpretation of Law

Another question, which must be discussed next, is whether the court has a right to interpret the provisions of law in such an expansive way that it would create new provisions which would contravene with the existing legislation[22].

It was stated by the International court of justice (ICJ) that a court must seek to determine the ordinary meaning of the words[23] and to seek a reasonable approach[24]. However, the SCL took a rather expansive approach and stated that even if the list provided in Art. 11 of LCA is conclusive and may not be interpreted expansively, the SCL still found that there are also other disputes, which are not arbitrable under Lithuanian law. Thus, it can be legitimately stated that the court created a new provision, which states that disputes arising from public procurement contracts are not arbitrable[25] although the legislator chose not to include such provision in the LCA.

This raises an important question – is the court in Lithuania authorized to create provisions of law or should it adhere to the principles serving to this end, like primacy of literary construction and *etc.* This issue constantly raises substantial questions, as it was provided by some authors:

> "*How can we possibly plan our lives on the basis of the law of tomorrow when we can't predict what that law will be? Are courts that are attracted to dynamic statutory interpretation teaching us that we can no longer know and rely on the rule of law in our daily lives because months or years later they can use policy considerations to make new law?*"[26]

It can be argued that first - the doctrine of separation of powers should be followed. The latter doctrine (the *trias politica* principle) states that the state is divided into branches, each with separate and independent powers and areas of responsibility so that no branch has

[22] As it is argued by authors, interpretation of the law would usually take to forms – interpreting a normative text (interpretation in the narrow sence) and filling a gap in a text (interpretation if the broad sence). However, as it was provided above, the language of the LCA is clear and unambiguous, there are also no gaps which are needed to fill. Purposive Interpretation in Law, Aharon Barak, Princeton University Press, 2007, p. 68;
[23] Judgment of case Kasikili/Sedudu Island on 13 December 1999, the ICJ;
[24] Judgement of case *Oil Platform on* 12 December 1996, the ICJ;
[25] It is deeply embedded proposition in any civil law system that what the court says is merely evidence of what the law is. So, a number of cases supporting a law constitutes a body of evidence of the law. Courts do not and cannot make law, in Legal Method, Sharon Hanson, Routledge, 1999, p. 121;
[26] Anthony D'Amato, The Injustice of Dynamic Statutory Interpretation, 64 U. Cin. L. Rev. 911 (1996).

more power than the other branches. This doctrine was also accepted in Lithuania. As it was stated by the Constitutional Court of the Republic of Lithuania:

> *"<…>Under the Constitution, the organization of state power and its activity are based on the principle of separation of powers. The Constitutional Court has held in its rulings for more than once that the constitutional principle of separation of powers, among other requirements, implies that the legislative, executive and judicial powers must be separated, sufficiently independent, however, there must be a balance between them, also, that every state institution is attributed the competence which corresponds to its purpose, and the particular content of which depends on the place of the power in question in the entire system of state powers as well as its relation with the other powers, also, that upon direct establishment in the Constitution the powers of a particular state institution, one state institution may not take over such powers from another state institution, transfer or waive them<…>"*

Therefore, it can be argued that according to the principle of separation of state powers, courts may not create new provisions of law, as this is an exclusive prerogative of the legislator. Court's interpretation of law should be limited only to dynamic statutory interpretation, which would not amount to unconstitutional ex post facto legislation[27]. Thus, this would mean that statement of the SCL, which provided that the list of disputes which cannot be referred to arbitration (provided in Art. 11 of the LCA) may be extended by interpretation of provisions of the LPP, is erroneous. It should be noted once again, that there were no provisions in the LPP, which would state that disputes arising from public procurement are not arbitrable neither there were such provisions in the LCA. So the court had no right create new provisions out of thin air or according to its own view of what the development of the arbitration law would require.

In addition, it should be remembered that one of the most approved methods [of interpretation] is to discover the intent of the legislator[28]. Therefore, the intent of the legislator was to explicitly establish in the LCA and not in the LPP which disputes may not be referred to arbitration. Further, the wording of the Art. 7 of LCA - *"In matters governed by this Law, no court shall intervene except where so provided in this Law",* clearly suggests that the legislators' intent was to prohibit the court to intervene in matters governed by the LCA, including also the arbitrability of disputes.

Finally, it can be stated that the main purpose of court's ruling is to give detailed grounds and prove that the judgment necessarily results from applicable law. The applicable

[27] See also The Case Against Civil Ex Post Facto Law, Steve Selinger, Cato Journal, Vol. 15 No. 2-3;
[28] Max Radin, „Statutory Interpretation", Harvard Law Review 43 (1930):863;

law on questions of arbitrability in Lithuania is the LCA and not the LPP. The LCA does not forbid arbitrating disputes arising from public procurement.

e) Analogy to Competition Law

As it was argued above, after making reference to the LCA and finding that disputes arising from public procurement contracts are not included in the list of the LCA, the SCL referred to the provisions of the LPP, because according to court's view, it was the *lex specialis* in this case.

Another argument brought by the SCL was positioned as follows: "*While ensuring the best possible protection of the public interest in disputes arising from public procurement contracts, the extensive power must be provided for an institution which would decide such disputes. Therefore, there is no doubt that such power may be provided only to courts*".

However, it can be argued that, firstly, the arbitral tribunal has a power vested on it by the parties themselves and by the law (the LCA)[29]. In addition, while stating that there is a public interest in disputes arising from public procurement, the SCL had ignored the fact that the public interest only existed before the contract was concluded. More specifically, as it was stated, the object and purpose of the LPP is to secure public interest. Therefore, the LPP is purposed to secure the procedure of public procurement and to ensure the transparent and competitive tender. The latter should be regarded as a public interest. Moreover, conditions of the tender are provided by the state, thus the only way to influence the public interest is vested on the state and not the bidders. Therefore, after the certain bidder accepts the conditions provided by the state and wins the tender and the contract is concluded ensuring transparency, then the public interest disappears, because pure commercial relationship evolves. So the cited statement of the SCL is ungrounded, because the public interest is not existent when the procedure of public procurement is completed.

[29] Each arbitral tribunal derives its jurisdiction from a given arbitration agreement. The arbitration agreement was agreed upon and concluded by the public authority itself. Furthermore, it should be noted that the dispute arose from public procurement contract, the terms of whic where suggested by the public authority itself. Pursuant to the principle of *contra proferentem*, should there be any doubt as to the meaning to be attributed to a contractual provision, such provision should be interpreted against the party that drafted the clause, see Article 4.6 of UNIDROIT Principles of International Commercial Contracts, Fouchard Gaillard Goldman On International Commercial Arbitration (eds. E. Gaillard and J. Savage) (Kluwer Law International 1999), para. 479.;

Even if one would disagree with such argumentation and would argue that the public interest still exists after the completion of public procurement procedures, an analogy to competition law can be brought as a reference.

As it is generally accepted, competition law always includes public interest[30]. However, it does not mean that matters relating to competition law could not be subject to arbitration. For example, in *Mitsubishi Motor Corp v Soler Chrysler Plymouth Inc*[31], the US Supreme Court held by a majority that antitrust issues arising out of international contracts were arbitrable. The Court accepted that antitrust laws were extremely important and that such claims could be significant and complex. However, the Court also considered that it should respect arbitral tribunals and consider the need for predictability in commercial disputes.

Another example can be brought by the ECJ case in *Eco-Swiss*[32]. This case has been interpreted as meaning that an arbitral tribunal is enabled to apply EU competition law (even of its own accord) in cases where the award may be enforced in an EU state. In respect of the latter, the ECJ had provided:

> *"A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 [EC Treaty]"*

In addition, in the case of *ET Plus* SA *v Welter*[33] the High Court in England found that claims alleging a breach of Articles 81(101) and 82(101(2)) are arbitrable if they fall within the scope of a contractual arbitration clause.

Similarly, it was provided in ECJ case in *Nordsee Deutsche Hochseefischerei*[34] that the arbitral tribunal is obliged to apply mandatory provisions of EU law and it was confirmed numerously by the EJC that tribunals are enabled to apply also provisions which consider the public policy of EU law[35]. The main rationale of the EJC is that arbitrators must take

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[30] Modernised EC Competition Law in International Arbitration, Phillip Louis Landolt, Kluwer Law International, 2006, p. 23; Communications in EU antitrust law: market power and public interest, Antonio Bavasso – 2003, p. 351;

[31] Mitsubishi Motor Corp v Soler Chrysler Plymouth Inc. 473 US 614, 105 S. Ct. 3346 (1985);

[32] Eco Swiss China Time Ltd v Benetton International NVC-126/97 [1999] ECR 1-3055;

[33] ET Plus SA v Welter , [2005] EWHC 2115 (Comm);

[34] Nordsee Deutsche Hochseefischerei Gmb H v Reederei Mond Hochseefischerei Nordstern AG & Co KG

[35] *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* ECJ judgment of 26 October 2006, C-168/05; *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* EJC 6 October 2009, C-40/08; *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc* ECJ, C-381/98,[2001].;

into account mandatory rules eventually applicable to the case by reason of their connection to the case[36].

These decisions indicate that courts, at least in Europe and the United States, expect an arbitrator to have obligations to do more than just resolve a private dispute between parties, because statutory and regulatory claims are increasingly declared to be arbitrable[37].

Therefore, if one would argue that disputes arising from public procurement law also include public interest, then such disputes are similar to the disputes arising from competition law as the latter also includes protection of public interest. As it was observed, disputes arising in competition law area have no restrictions to be settled by arbitration. Even more, arbitrators have the power to apply competition law provisions. Therefore, an argument brought by the SCL that only the court has the power to rule on issues involving public interest cannot be regarded as grounded.

V. Conclusion

In conclusion, it can be stated that the Supreme Court's decision in *UAB Kauno vandenys v WTE Wassertechnik GmbH* case was a step back in evolution of arbitration practice in Lithuania. As it was observed, the ruling of SCL's lacked legal reasoning and basis to conclude that the disputes arising from public procurement contracts are not arbitrable under Lithuanian law.

More specifically, the court ignored the fact that the *lex specialis* in this case was not the LLP, but conversely, the LCA, which exclusively regulates the issue of arbitrability. Moreover, the court had erroneously stated that the question of arbitrability of disputes may be decided with reference to the legislation which is not even related to the provisions of arbitration law.

In addition, the court had interpreted the provisions of the LPP in such an extensive way that it created new legislation. Thus it can be argued that the court had ignored the intent of the legislator and also infringed the constitutional principle of the separation of powers.

[36] Conflict of Laws in International Arbitration, Franco Ferrari, Stefan Kröll, Walter de Gruyter, 2010 , p. 376;
[37] The Principles and Practice of International Commercial Arbitration p, Margaret L. Moses, Cambridge University Press, 2012, p. 85;

Furthermore, protection of public interest which was constantly echoed by the SCL is no longer a prerogative of the state courts, because, as it was confirmed by the ECJ, arbitrators are enabled and, in some cases even obliged, to protect the public interest. There were number of examples in competition law arbitration.

Therefore, it can be stated that this decision by the SCL is regrettable, because it provides doubts regarding the arbitration practice in Lithuania and presupposes the fact that legitimate arbitration awards may be set aside without sufficient and reasonable grounds.