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International Arbitration 2023

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Lithuania: Law & Practice

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WALLESS

LITHUANIA

Law and Practice

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vices; transportation; insurance; private clients; sanctions; and asset recovery. Recent work highlights include representation in disputes of the government of Lithuania against a Belarusian company in connection with sanctions; an environmental damage case regarding continued pollution of the Curonian Lagoon; client off-boarding by several commercial banks for compliance reasons; several cases involving airlines; several multimillion D&O liability cases relating to the largest independent oil products terminal operator in the Baltic Sea rim; and others.

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1. General

1.1 Prevalence of Arbitration

Although statistically litigation is much more popular in Lithuania, international arbitration is a universally recognised alternative dispute resolution method and increasingly is gaining its ground. Statistics show that there is approximately the same number of national and international arbitrations submitted to tribunals annually. In most international arbitration cases decided in Lithuania, at least one of the parties is a local (Lithuanian) person. Arbitrations where none of the parties is Lithuanian are less common.

1.2 Key Industries

In Lithuania, the key industries that have seen significant international arbitration activity in 2022–23 involve energy, construction and real estate disputes, insurance, in particular disputes regarding hardship of fulfilling obligations, related to the volatile prices of energy and natural resources. Disputes and matters regarding the application of EU sanctions to subjects, shareholders of sanctioned subjects and related persons have also been prevalent. Other industries that have seen increased arbitration activity include IT/telecoms.

1.3 Arbitral Institutions

The only recognised arbitration institution in Lithuania is the Vilnius Court of Commercial Arbitration (VCCA). No new institutions have been established in the current period.

1.4 National Courts

No specific courts are designated to hear disputes related to international and/or domestic arbitrations. However, the Court of Appeal of the Republic of Lithuania decides cases for the setting aside of domestic awards, as well as on recognition and enforcement of foreign arbitral awards. Court of Appeal decisions in such cases may be further appealed to the Supreme Court.

2. Governing Legislation

2.1 Governing Legislation

Lithuania is a UNCITRAL Model Law country. The Lithuanian Commercial Arbitration Act (2012) is based on the UNCITRAL Model Law, though there are a few divergencies. For example, the Commercial Arbitration Act regulates the activities of permanent arbitral institutions, and also stipulates the requirement that the number of arbitrators must be uneven. Arbitrability is also dealt with in the Commercial Arbitration Act.

2.2 Changes to National Law

The Commercial Arbitration Act has not been amended since 2017. There are no pending amendments.

3. The Arbitration Agreement

3.1 Enforceability

The arbitration agreement must be in writing and shall be deemed valid if:

- it is signed by the parties; or
- it is concluded by an exchange of letters or other documents between the parties recording the fact of the conclusion of the arbitration agreement; or
- it is signed using electronic devices, provided that the integrity and authenticity of the information transmitted is guaranteed and the information contained therein is available for further use; or
- the parties exchange a statement of claim and a statement of defence in which one party asserts and the other party does not deny that they have concluded an arbitration agreement; or
- there is other written evidence that the parties have entered into or accepted an arbitration agreement.

3.2 Arbitrability

The Commercial Arbitration Act spells out non-arbitrable disputes. They are:

- administrative cases;
- cases falling within the competence of the Constitutional Court of the Republic of Lithuania.

Categories of non-arbitrable disputes include:

- disputes arising out of family legal relations;
- disputes concerning the registration of patents, trademarks and designs.

Disputes arising out of the following contracts require ad hoc consent (ie, after the disputes have arisen) in order to be submitted to arbitration:

- employment contracts;
- consumer contracts.

In general, the list of non-arbitrable disputes shall not be interpreted broadly.

3.3 National Courts' Approach

Lithuanian law recognises the principle of the binding nature of a contract, which also applies to an arbitration agreement. If the courts find that the parties have concluded an arbitration agreement, they usually do not proceed with the case. Generally, Lithuanian courts are very pro-arbitration orientated.

3.4 Validity

As a UNCITRAL Model Law country, Lithuania has implemented the separability of the arbitration agreement doctrine. Under the law, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Thus, the invalidity of the contract does not necessarily entail invalidity of the arbitration agreement.

4. The Arbitral Tribunal

4.1 Limits on Selection

There are no limits to the parties' autonomy to select arbitrators unless such limitations are

established by the arbitration agreement. Arbitrators are subject to universal requirements of impartiality and independence.

4.2 Default Procedures

If, after the parties have agreed on a procedure for the appointment of arbitrators, one of them fails to comply with this agreement, the arbitral tribunal shall be constituted in accordance with the procedure established by law or the parties' agreement, such as the rules of the arbitration institution.

When appointing an arbitrator, the president of the arbitration institution or the court shall take into account the circumstances of the case, the requirements for the arbitrator set out in the agreement, and the circumstances that ensure the arbitrator's independence and impartiality.

Under the Commercial Arbitration Act, if the co-claimants do not appoint an arbitrator, the arbitrator shall be appointed by the president of the arbitration institution or, in the case of ad hoc arbitration, by the court. This also applies to co-respondents.

4.3 Court Intervention

A court can intervene in the selection of arbitrators at the request of one of the parties in ad hoc arbitration when the other parties do not appoint the arbitrator. When appointing an arbitrator, the court shall take into account the circumstances of the case, the requirements for the arbitrator set out in the agreement, and the circumstances that ensure the arbitrator's independence and impartiality.

4.4 Challenge and Removal of Arbitrators

An arbitrator may be removed only if there are reasonable doubts as to his or her independence or impartiality or if he or she does not possess

the qualifications set out in the parties' agreement.

The Commercial Arbitration Act does not provide grounds for challenge and removal, but case law often refers to the IBA Guidelines on Conflicts of Interest in International Arbitration.

4.5 Arbitrator Requirements

Any natural person having the legal capacity to act may be appointed as arbitrator. Under the Commercial Arbitration Act, before agreeing to serve as an arbitrator, the arbitrator must notify the parties, the arbitration institution, or the court in writing of any circumstances which may give rise to reasonable doubts as to his independence or impartiality.

Under the case law of the Supreme Court of Lithuania, independence is a legal category of an objective nature, identifiable externally. The independence of an arbitrator refers to the absence of organisational, personal, structural, social, economic, business, subordinate, etc, ties between several entities.

Impartiality is defined as the internal state of the subject, which implies the absence of any pre-conceived notions about the legal relationship at issue or the parties to it. The internal state and judgement of an impartial person must not be influenced by subjective mental or emotional factors which may interfere with the exercise of his or her duties, including the exercise of his or her best endeavours in good faith to reach an objective decision.

Under the Rules of the Vilnius Court of Commercial Arbitration, when a person is approached regarding his/her possible appointment as an arbitrator, such person shall, prior to accepting to act as an arbitrator, notify in writing of all cir-

cumstances that could give rise to reasonable doubts as to the arbitrator's independence or impartiality. An arbitrator must also notify of such circumstances after his/her appointment or during the arbitral proceedings if this was not done earlier, or if the circumstances occurred after the appointment or during the arbitral proceedings.

Before considering the case, each arbitrator appointed in the case by the parties, the arbitrators, or the chair of the VCCA shall sign a statement of acceptance, impartiality, and independence in the respective case. The arbitrator shall be deemed appointed from the moment of concluding an agreement with such arbitrator.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

In addition to the non-arbitrable disputes described in **3.2 Arbitrability** (such as administrative disputes), disputes regarding the pricing of contracts entered through public procurement procedures and bankruptcy cases cannot be referred to arbitration. In addition, where the party to the agreement is a state-owned enterprise or institution, for the arbitration agreement to be valid a prior approval of the superior body (the founder) is required.

5.2 Challenges to Jurisdiction

The Commercial Arbitration Act recognises the competence-competence doctrine. The arbitral tribunal is entitled to decide on its competence to hear the dispute, including where the existence or validity of the arbitration agreement is in doubt.

5.3 Circumstances for Court Intervention

A party has a right to challenge an award on jurisdiction. The general grounds for setting

aside an award on jurisdiction apply. Courts can review all types of decisions on jurisdiction but generally are very unwilling to set aside awards on jurisdictional grounds. The practice of challenging negative awards is not developed, so no particular conclusions can be drawn in this regard.

5.4 Timing of Challenge

The time limit for the request for setting aside an award on jurisdictional grounds is the same as regards any award – ie, one month after the date of the award.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review is deferential for arbitration. There is a firm judicial policy in Lithuania that the court cannot review the arbitral award on the merits. Decisions de novo would be incompatible with Lithuanian law. Judicial review of arbitral awards in Lithuania takes the form of annulment rather than appeal or remission.

5.6 Breach of Arbitration Agreement

An arbitration agreement is a contract and, in the event of a dispute as to the content of the arbitration agreement, the court must interpret the agreement following the general rules of contract interpretation, including the principle of the binding nature of contracts. Where the parties have concluded an arbitration agreement, it cannot be modified by either party or by the court in the absence of a claim for annulment.

If the arbitration agreement remains in force, the dispute must be referred to arbitration. Under Lithuanian law, if the court finds that the parties have concluded an arbitration agreement, it shall refuse to decide the case ex officio (ie, even if there is no request by a party to do so).

5.7 Jurisdiction Over Third Parties

Under case law, an arbitration agreement can be extended in the following cases:

- where a person, by a separate agreement, takes over the rights and obligations of one of the parties to a particular contract containing an arbitration clause;
- where the person has, by his or her subsequent conduct, consented to the already-started arbitration procedure of the dispute (for instance, participated in the hearing);
- where a person who has not signed an arbitration agreement may be deemed to have consented to arbitration if the arbitration agreement or the contract containing the arbitration clause was concluded by a legal representative of the person, and the representative acted within the scope of the person's authority;
- where the arbitration agreement binds a single legal person, another person with a particularly close connection to that person may also be deemed to have consented to the arbitration of the particular dispute.

This applies to both foreign and domestic parties.

6. Preliminary and Interim Relief

6.1 Types of Relief

The arbitral tribunal has the power to issue preliminary orders and apply interim measures. The preliminary order is legally binding.

The following are types of interim measures specified in the Commercial Arbitration Act:

- prohibition of a party from engaging in certain transactions or performing certain actions;

- an obligation on a party to preserve assets related to the arbitration proceedings, and to provide a cash deposit, bank or insurance guarantee;
- an obligation on a party to secure evidence that may be relevant to the arbitration.

6.2 Role of Courts

If a party fails to comply with the tribunal's order on interim measures, the Vilnius Regional Court may issue an enforcement order at the request of the party (enforceable in the same way as a procedural judgment, in accordance with the procedure laid down in the Code of Civil Procedure). This allows a party to execute the arbitral award through a bailiff.

Parties also have the right to request the Vilnius Regional Court to impose interim measures or to secure evidence prior to the arbitration proceedings or prior to the composition of the arbitral tribunal.

An arbitral award or an order on interim measures rendered in any other country may be recognised and enforced in the territory of the Republic of Lithuania.

There are no specific rules for intervention in the appointment of an emergency arbitrator in the Commercial Arbitration Act. Under the rules of the VCCA, an emergency arbitrator may be appointed to resolve applications for interim measures.

6.3 Security for Costs

Lithuanian law allows for the ordering of security for costs. The arbitral tribunal may order the party requesting interim measures to provide security for the other party's damages that may result from the imposition of interim measures.

7. Procedure

7.1 Governing Rules

The procedure of arbitration is more likely to be regulated by the rules of the relevant institution. Under the Commercial Arbitration Act, the arbitration institution adopts the rules of procedure. The rules of arbitration adopted by the arbitration institution shall have the legal effect of an agreement between the parties only if the parties have agreed to apply them by the arbitration agreement. The VCCA has procedural rules that are sufficiently detailed and comparable with international equivalents.

7.2 Procedural Steps

The Commercial Arbitration Act does not provide for a specific list of steps to be performed, though in practice steps have been developed and influenced by the requirements of the law. For example, within a time limit agreed upon between the parties or set by the arbitral tribunal, the claimant must state the facts on which it bases its claim, the matters at issue, the appointment of an arbitrator (if no arbitrator has been appointed) and the formulation of the relief sought; and the respondent must file its statement of defence. There must also be an arbitration hearing (written or oral, depending on the agreement and the rules). The arbitrators are also obliged to finish the case with an award.

7.3 Powers and Duties of Arbitrators

Arbitrators have general inherent powers (to decide the dispute, and the right to apply to a court for help in gathering evidence) and general inherent duties (to maintain impartiality and independence).

7.4 Legal Representatives

There are no specific qualification requirements for representatives appearing in commercial arbitration cases in Lithuania.

8. Evidence

8.1 Collection and Submission of Evidence

Generally, discovery and disclosure procedures are not natural in the Lithuanian legal process. However, the proliferation of international arbitration techniques has brought about some change. Document production is common in international arbitration cases. Witness statements are widespread, but their use depends on the background and habits of the tribunal. The IBA Rules on the Taking of Evidence in International Arbitration are routinely used and applied.

8.2 Rules of Evidence

The following are specified in the Commercial Arbitration Act regarding rules of evidence:

- each party shall prove the facts on which it bases its claims or arguments;
- the arbitral tribunal may require the parties to provide evidence;
- the arbitral tribunal has the right to refuse to accept evidence that could have been submitted earlier and the submission of which will delay the procedures;
- unless the parties agree otherwise, no evidence shall be binding on the arbitral tribunal;
- if the parties do not agree on the rules of evidence to be applied in the arbitration, the arbitral tribunal shall determine them;
- if a party fails to provide the arbitral tribunal with the evidence requested, the arbitral tribunal may decide based on the available evidence or, in exceptional cases, may consider

the fact of the failure to provide the evidence against the party that failed to provide it (contra spoliatorem);

- the arbitral tribunal shall have the right to determine the admissibility, sufficiency, and relevance of any evidence.

As mentioned in **8.1 Collection and Submission of Evidence**, with the consent of the parties, the IBA Rules on the Taking of Evidence in International Arbitration are often used and applied.

8.3 Powers of Compulsion

Generally, under Lithuanian law, the tribunal does not have any particular powers of compulsion. However, the arbitral tribunal, or a party with the approval of the arbitral tribunal, has the right to apply to the Vilnius Regional Court for assistance in taking evidence. Court orders on document production are legally binding; in this way, document production and witness testimony can be compelled by a court order.

If the witnesses summoned to the arbitration hearing fail to appear or refuse to testify, the arbitral tribunal may allow the party requesting the examination of the witnesses to apply to the Vilnius Regional Court within the time limit set by the arbitral tribunal for the examination of the witnesses in accordance with the procedure laid down in the Code of Civil Procedure.

Regarding the parties specifically, when a party fails to file a mandatory procedural document or to attend the arbitral tribunal hearing without a justifiable reason, the arbitral tribunal shall have the right to continue the arbitral proceedings and to render an award on the basis of the evidence in the case or to make final procedural rulings.

9. Confidentiality

9.1 Extent of Confidentiality

The entire arbitration procedure is confidential. The information can only be disclosed in the enforcement or set-aside procedures.

10. The Award

10.1 Legal Requirements

Unless the parties agree otherwise, the arbitral award shall be made by a majority of the arbitrators.

There are some minimal formal requirements for awards. The arbitral award must be: (i) in writing and signed by the arbitrators; (ii) valid when signed by a majority of the arbitrators; and (iii) state the reasons for the non-signature of the other arbitrators. However, arbitrators who disagree with the majority opinion shall have the right to state their dissenting opinion in writing, which shall be annexed to the arbitral award.

The arbitral award must state the reasons on which it is based unless the parties have agreed that it is not necessary to state reasons.

The arbitral award must also state the date and place of its adoption. One signed copy of the arbitral award shall be served on each party.

The law does not provide any time limits on the delivery of the award. Under VCCA rules, the award must generally be delivered within six months of handing over the case file to the tribunal and within 30 days of the closing of the proceedings (the last procedural action, such as final submissions, submissions on costs, etc). The time limit on the delivery of the award can be extended in exceptional circumstances.

10.2 Types of Remedies

There is no specific list of types of remedies. Generally, these stem from the general principles of Lithuanian civil law. Thus, certain remedies may be considered as impermissible for public policy reasons, for example, a claim for excessive interest, etc.

10.3 Recovering Interest and Legal Costs

Awarding of procedural interest (ie, interest on the amount awarded from the date of the statement of claim to the full payment under the award) is universally accepted in the Lithuanian legal system, and accordingly in arbitration. Under the law, the annual procedural interest is the EU Central Bank lending rate plus eight basis points.

In addition, in commercial transactions, it is a common practice for the parties to agree to a delayed interest normally calculated daily. Agreements range from 0.01% to 0.5% per day. Both courts and arbitral tribunals commonly award but reduce the amounts of delay interest to reasonable sums.

According to the Commercial Arbitration Act, the costs of arbitration include:

- the fees and other reasonable expenses of the arbitrators;
- the costs and reasonable expenses incurred by the arbitral institution and other costs agreed between the parties;
- other reasonable expenses incurred by the parties.

VCCA rules establish a “costs follow the event” principle with respect to the institution and tribunal costs. There is no rule regarding the legal fees. In practice, the tribunals apply

various approaches including the cost-sharing approach.

11. Review of an Award

11.1 Grounds for Appeal

The Lithuanian Court of Appeal may set aside an arbitral award when the party filing the complaint provides evidence that:

- one of the parties to the arbitration agreement was incapacitated under the applicable law, or the arbitration agreement is invalid under the law applicable to the agreement of the parties, or, where the parties have not agreed on the law applicable to the arbitration agreement, under the law of the country in which the award was rendered; or
- the party against whom the award is sought to be invoked has not been given adequate notice of the appointment of the arbitrator or the arbitration proceedings, or otherwise an opportunity to be heard; or
- the arbitral award was rendered in respect of a dispute or part of a dispute that was not submitted to arbitration – if the part of the dispute that has been referred to arbitration can be distinguished, the part of the arbitral award that resolves the matters referred to arbitration may be recognised and enforced; or
- the composition of the arbitral tribunal or the arbitral proceedings was not under the agreement of the parties and/or the mandatory provisions of the Commercial Arbitration Act; or
- the dispute is not arbitrable under the laws of the Republic of Lithuania; or
- the arbitral award is contrary to the public policy of the Republic of Lithuania.

11.2 Excluding/Expanding the Scope of Appeal

There are no rules on expanding or excluding the scope of appeal. Nevertheless, the list of grounds for setting aside an arbitral award should be interpreted as a mandatory provision of law and expanding it by agreement of the parties would defeat the purpose of the arbitration. Meanwhile, narrowing the list of grounds could be considered a violation of a person's right to a judicial remedy.

11.3 Standard of Judicial Review

The standard of judicial review is deferential. The court does not review the arbitral award on the merits. A contrary view would be incompatible with Lithuanian law and the policy of the Lithuanian courts.

12. Enforcement of an Award

12.1 New York Convention

Lithuania is a party to the New York Convention, which it ratified on 17 January 1995 with the following reservation: "The Republic of Lithuania will apply the provisions of the said Convention to the recognition of arbitral awards made in the territories of the Non-Contracting States, only on the basis of reciprocity."

12.2 Enforcement Procedure

Domestic arbitration awards are enforced and executed under the execution writ issued by the local court. The bailiff is responsible for execution procedures.

Foreign arbitral awards must be granted recognition and enforcement. Article V of the New York Convention provides for an exhaustive list of possible grounds for non-recognition of an arbitral award, and therefore the procedure for

recognition and enforcement of foreign arbitral awards entails verification of the existence or non-existence of the grounds set out in Article V of the New York Convention.

Formally, in Lithuania there is no legal prohibition on recognising and enforcing an award that has been set aside by the courts in the seat of arbitration. However, this is one of the grounds for refusal under the New York Convention, and thus may be applied by the court if requested by the relevant party.

When an award is subject to ongoing set-aside proceedings at the seat, the Lithuanian court may suspend the recognition and enforcement proceedings at the request of the relevant party. The court is likely to do so unless there are compelling reasons for taking the contrary view.

A state or state entity may invoke sovereign immunity on the basis of public international law and is unlikely to be successful in commercial transactions.

12.3 Approach of the Courts

The courts in Lithuania have taken a very favourable approach to the recognition and enforcement of foreign arbitral awards. The Supreme Court of Lithuania has consistently emphasised in its case law that in deciding on the recognition and enforcement of an arbitral award in Lithuania, the Court will not review the merits of the case: the Court will not examine the manner in which the evidence was evaluated, nor will it assess whether the procedural and substantive law has been properly applied.

As constantly repeated by the Supreme Court, public policy is to be understood as international public policy: ie, fundamental principles of due

process and mandatory rules of substantive law embedding generally accepted principles of law.

13. Miscellaneous

13.1 Class Action or Group Arbitration

There is no specific regulation on this issue of class actions in Lithuania. The question is to be decided in accordance with the general principles of arbitration law, the main question being whether there is an arbitration agreement binding all the parties concerned. The same applies to group arbitrations.

13.2 Ethical Codes

There are no specific documents in this regard in Lithuania. Case law often refers to the IBA Guidelines on Conflicts of Interest in International Arbitration. Under the case law of the Supreme Court of Lithuania, the IBA Guidelines should be assessed systematically in conjunction with other criteria for assessing impartiality and independence, as well as with standards customary in international practice.

13.3 Third-Party Funding

There are no restrictions on third-party funding under Lithuanian law. Under 2023 amendments to the VCCA rules, if a party concludes an agreement with a third-party funder, such an agreement and the third-party funder must both be disclosed. After the disclosure arbitrators must reveal if there are circumstances that may raise doubts regarding their independence and/or impartiality. If VCCA deems necessary, it can request a party to provide additional information.

13.4 Consolidation

Under the Commercial Arbitration Act, arbitration proceedings can be consolidated by the agreement of the parties. VCCA rules contain provisions on the consolidation of proceedings.

13.5 Binding of Third Parties

Generally, third parties are not bound by an arbitration agreement. However, as discussed in 5.7 Jurisdiction Over Third Parties, in certain situations the arbitration agreement can extend to parties that have not technically signed the arbitration agreement.

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