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Recognition and enforcement of foreign arbitral awards in Lithuania – GAZPROM case from a national perspective

Uznanie i wykonanie zagranicznych orzeczeń arbitrażowych na Litwie– sprawa GAZPROM z perspektywy krajowej

Abstract

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 is a great achievement in the field of arbitration. However, its application in the Contracting States, due to the differences in internal laws and practices, can differ. Analysis of the national practices is important in terms of identifying obstacles for internationally uniform application of the NYC. The paper aims to fill the gap in international legal doctrine regarding the Lithuanian national perspective on some issues of recognition and enforcement of the foreign arbitral awards. Its main focus are the problematic issues raised by the Lithuanian courts. Moreover, the article addresses one of the most essential and well-known recent cases – the Gazprom case.

Keywords

arbitration, Lithuania, recognition, and enforcement, foreign arbitral awards, Gazprom, private international law

Abstrakt

Konwencja o uznawaniu i wykonywaniu zagranicznych orzeczeń arbitrażowych z 1958 r., zwana konwencją nowojorską, jest wielkim osiągnięciem w dziedzinie arbitrażu. Jednak jej stosowanie w poszczególnych umawiających się państwach, ze względu na różniące się krajowe systemy prawne oraz praktyki, może się znacznie różnić. Z tego też względu analiza prawodawstwa krajowego, a w szczególności praktyk krajowych, jest ważna z punktu widzenia zidentyfikowania przeszkód dla międzynarodowo jednolitego stosowania konwencji. Niniejszy artykuł ma na celu wypełnienie luki w międzynarodowej doktrynie prawnej dotyczącej litewskiej narodowej perspektywy w niektórych kwestiach dotyczących uznawania i wykonywania zagranicznych orzeczeń arbitrażowych. Analiza koncentruje się przede wszystkim na problematycznych kwestiach podniesionych przez sądy litewskie. Ponadto artykuł dotyczy jednej z najbardziej ważnych zarówno z punktu widzenia międzynarodowego, europejskiego, jak i krajowego i najbardziej znanych ostatnich spraw – sprawy Gazpromu.

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Słowa kluczowe

arbitraż, Litwa, uznanie i wykonanie, zagraniczne orzeczenie arbitrażowe, GAZPROM, prawo prywatne międzynarodowe

1. Introduction

Arbitration in Lithuania, in a contemporary meaning, is a relatively new notion. However, some roots of the arbitration could be found already in XV-XVI centuries in the Grand Duchy of Lithuania. There were possibilities to settle the dispute, for instance, regarding the land property, in an amicable court. However, in practice, it was difficult to distinguish these courts from the state courts. Their composition, and naming, as well as the competence of the both courts were very similar, often even identical[2]. In 1918-1940, in most of Lithuania, the civil procedural law of tsarist Russia was in force. Only *ad hoc* arbitration was possible during a given period. Later, in 1940-1990, possibility to settle the dispute in a non-state court was rather theoretical[3]. Lithuanian legislator included the provisions on arbitration in the Lithuanian Civil Procedure Code of 1964, and the Annex to the Code regarding the rules of the arbitrage. There is limited information in the literature regarding the number of cases solved by arbitrage. Therefore, one can argue that before restoration of independence, the arbitration was not well-rooted neither in Lithuanian legal practice nor in doctrine.

After restoring its independence in 1990, Lithuania became an active member of the international community. The State joined a significant number of international treaties, among the others – the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention of 1958. The Lithuanian Parliament (Seimas) ratified it in 1995[4]. The legal environment in Lithuania was changing. Lithuanian Parliament was striving to rebuild the country and to introduce a new legal system, which is corresponding to the new market reality, and encouraging investing in Lithuania. One of the measures to achieve that goal was the adoption of a new Law on Commercial Arbitration in 1996[5]. Attempts to regulate arbitration have been raised since 1993. At that time, neighboring countries (Estonia, Latvia) ratified New York Convention and adopted new laws on arbitration. Lithuanian Parliament also

[2] Jevgenij Machovenko, *Valstybinių išvažiuojamųjų, trečiųjų ir kuopos teismų veiklos nagrinėjant žemės bylas teisinis reguliavimas Lietuvos Didžiojoje Kunigaikštystėje*. 46 Teisė 98, 102 (2003).

[3] Valentinas Mikelėnas, *Lietuvos Respublikos komercinio arbitražo įstatymo dvidešimtmetis: ištakos, taikymo patirtis ir perspektyvos*, II Arbitražas: teorija ir praktika 3, 4 (2016).

[4] The Convention is in force in Lithuania since 12th June 1995, it was announced in the State's Official Journal (Valstybės žinios), 1995-02-01, Nr. 10-208.

[5] Official Journal (Valstybės žinios), 1996-05-02, Nr. 39-961.

initiated the ratification of the Convention. Finally, strengthening private business needed an alternative to traditional litigation[6].

Lithuanian legislator strived to ensure the provisions of the Law on Commercial Arbitration are in line with the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985). Despite the differences of the Model Law and Lithuanian arbitration law, the rules on recognition and enforcement of the foreign arbitral awards are the same. The Model Law rules on recognition and enforcement of arbitral awards follow the New York Convention closely. Chapter VIII of the Law on Commercial Arbitration of 1996 regulates recognition and enforcement of foreign arbitral awards. The chapter consists of two Articles, first of which makes a reference to the New York Convention and stipulates that an arbitral award rendered in any State that is a party to the convention can be recognized and enforced in Lithuania under the convention and Article 40 of the Law on Commercial Arbitration. However, Lithuanian Law on Commercial Arbitration of 1996 does not provide any particular or new grounds for refusing to recognize and enforce foreign arbitral awards. Article 40 of the Law on Commercial Arbitration reiterates the grounds established in Article V of the New York Convention. Notably, Lithuanian Courts, in relevant judgments, as a ground for refusal of recognition and enforcement, provide both Article V of the Convention and Article 40 of the Law.

In order to familiarize the reader with some particular procedural issues of the issue at stake, it is worth noting that the applications concerning recognition and enforcement of foreign arbitral awards are examined by the Court of Appeals of Lithuania. Within one month, the judgment in this regard may be appealed to the Supreme Court of Lithuania. In order to recognize and enforce a foreign arbitral award, the party should provide the original or certified copies of an award and arbitration agreement. The Lithuanian translation of the documents should also be included. In the first years of the application, both in case of the Law and the Convention, lack of translation was the most common ground for refusing to grant recognition and enforcement for the foreign arbitral awards.

2. Case-law of the national courts – statistics and primary considerations

Statistics provided by Vilnius Court of Commercial arbitration reveal that the popularity of alternative dispute resolution in Lithuania is quite stable, with higher popularity in particular years. Two hundred eighty-five disputes were settled in the mentioned

[6] Valentinas Mikelėnas, *Lietuvos Respublikos komercinio arbitražo įstatymo dvidešimtmetis: ištakos, taikymo patirtis ir perspektyvos*, II Arbitražas: teorija ir praktika 3, 6-7 (2016).

court from 2008 until 2018, nearly half of them were international cases[7]. The information provided by the Lithuanian Court of Arbitration for the years 2012-2016 shows an apparent increase in cases referred to this arbitration court (only 5 cases in 2012 and already 41 cases in 2016)[8].

The analysis of the case law shows that Lithuanian companies willingly settle disputes with their foreign collaborators not only in Lithuanian arbitration courts but also abroad. Respectively, after the intensification of the use of alternative dispute resolution, the Lithuanian courts have to deal with more foreign arbitral awards, to be precise – with the question of their recognition and enforcement. On the one hand, it as a challenge for the judicial system of the State without well-rooted traditions in the application of private international law. On the other hand, how the Lithuanian courts apply the provisions of both national arbitration law and the New York Convention depends on the trust of both domestic and foreign business partners on the Lithuanian judicial system as a whole[9].

Analysis of the case-law of the Lithuanian courts, primarily of the Court of Appeal of Lithuania and the Supreme Court of Lithuania, of the last 20 years leads to the conclusion that in terms of private international law the majority of the cases were related to recognition and enforcement of foreign arbitral or court awards. The grounds of the refusal of recognition and enforcement of foreign arbitral awards are the most important in this regard. Frequent refusals to recognize arbitral awards may have a deterrent effect on the use of this, widely recognized, way of dispute resolution.

The study includes a case-law of the Court of Appeal and the Supreme Court of Lithuania in the period from 1999 to 2018. Unfortunately, the accessibility to the earlier case law, mainly of the '90s, is limited. Nevertheless, the analysis includes a sufficiently representative number of judgments. During a given period, the Court of Appeal settled 173 cases related to recognition and enforcement of foreign arbitral awards, and the Supreme Court accordingly – 30. The Court of Appeal recognized and enforced 144 foreign arbitral awards, and five awards were partly recognized, 11 – not recognized, one case was suspended until the judgments of the other court came into force, and, finally, in 15 cases applications were left unrecognized (for instance due to formal deficiencies). Thirty judgments of the Court of Appeal related to the recognition and enforcement of foreign arbitral awards were appealed to the Supreme Court of Lithuania. It is essential to mention that in the majority of cases, the Supreme Court decided

[7] A website of the Vilnius Court of the Commercial arbitration, http://www.arbitrazas.lt/subsite-2.htm (accessed 30 June 2018).

[8] A website of the Lithuanian Court of Arbitration, https://arbitrazoteismas.lt/lt/apie-teisma/veiklaskaiciais/ (accessed 30 June 2018).

[9] Egidijus Laužikas. Beata Kozubovska, *Praktyka Sądu Najwyższego Litwy w rozwiązywaniu problemów arbitrażu*, 4 Arbitraż i Mediacja 95 (2011).

to leave the same judgment as of the Court of Appeal; only in few cases, the Court decided differently and in a few – returned the case for the reconsideration of the Court of Appeal. The latter appeared in the cases, where the Court of Appeal left some allegations of the parties without proper consideration. The court, when deciding on the recognition of an arbitral award, has not only to *ex officio* verify the grounds for a refusal to recognize and enforce an arbitral decision, but also assesses all the factual and legal arguments put forward by the person concerned if the person concerned requires this. The court has the right not to analyze only the arguments of the party concerned, which are entirely unrelated to the case. However, in each case, the refusal to analyze the arguments of the party concerned the court should properly substantiate the decision.

The study shows that the Court of Appeal grants recognition and enforcement for more than 80 percent of the foreign arbitral awards. Only 7 percent of the arbitral awards in nearly 20 years was refused to recognize and enforce. In five cases, the Court of Appeal refused to grant recognition and enforcement for the foreign arbitral award on the ground of Article V par. One of the Convention and six awards were not recognized on the ground of Article V par. 2 of the Convention.

According to the established case-law of the Lithuanian courts, Article 40 par. 2 of the Law on Commercial Arbitration[10] lists the grounds for refusal that courts have to check *ex officio*. It means that the court will raise those grounds in each case of the recognition and enforcement of the foreign arbitral award, irrespectively of whether the party, against whom the award has been handed down, relies on them or not. The wording of the Article 40 par. 2 differs from Article V (2) of the Convention. Under Article V (2) of the Convention, "*an arbitral award may also be refused*", which does not imply the obligation on a national authority to consider those grounds in each case. While under Article 40 par. 2 of the national law, "*the arbitral award is refused to recognize and enforce if the Court of Appeal of Lithuania admits that*" if one of the following grounds for refusal of the recognition and enforcement apply. Consequently, this practice could lead to the extensive use of the public policy as the ground of non-recognition of the foreign award[11].

The study shows that Lithuanian courts usually refuse to recognize foreign arbitral awards because of the violation of public policy or because of the lack of arbitrability of the dispute. For instance, in a *Gazprom* case, the Court of Appeal refused to recognize an award rendered by an arbitral tribunal at the Arbitration Institute of Stockholm Chamber of Commerce on the ground of the abovementioned Article V (2) b of the Convention. The arbitral tribunal issued an anti-suit injunction. The Court found that the award

[10] And, respectively, Article V (2) of the New York Convention.

[11] *„Apatit Fertilizers S. A." v. AB „Lifosa*," 3K-3-146/2002, the Supreme Court of the Republic of Lithuania (2002); *„Belaja Rus" v. Westintorg Corp*, 3K-3-161/2008, the Supreme Court of the Republic of Lithuania (2008).

limited the right of the national courts in Lithuania to initiate a proceeding. According to the Court, this would also limit the court's right to determine whether it has jurisdiction according to the provisions of Brussels I Regulation. The court found that recognition of the award, which is limiting one of the parties' capacity to bring a claim before a national court would be contrary to the Lithuanian and international public policy. The ruling was appealed to the Supreme Court of Lithuania. The Court decided to stay the proceeding and to refer a question to the Court of Justice of the European Union for a preliminary ruling. In the broadly discussed ruling, the CJEU did not share the Lithuanian courts' findings. The CJEU explained that Brussels I Regulation does not require refusing to recognize and enforce an anti-suit injunction issued by an arbitral tribunal[12]. After the ruling of the CJEU, the Supreme Court of Lithuania ordered to recognize and enforce the arbitral award. It is worth to mention that in the *Gazprom* case, both the Court of Appeal of Lithuania and the Supreme Court of Lithuania raised more questions. The courts had to examine all the grounds for refusal of recognition established in Article V (2) of the New York Convention, thus also the arbitrability of the dispute at stake, and there were doubts in this regard as well.

In one of the cases, the Court of Appeal of Lithuania refused to recognize and enforce the arbitral award, finding that the claimant abused his rights by turning to arbitration. The purpose of that was to seek indirect losses, although earlier, he won the case in a national court and had been awarded direct losses. The Court found, in this case, a violation of public policy.

Nevertheless, there is no undesirable practice to overuse the public policy exception or the ground of the non-arbitrability of the dispute. The Supreme Court of Lithuania is tending to explain those clauses very strictly. The reasoning of the rulings sometimes include references to the case-law of the foreign national courts in this regard[13]. The Court a concept of the "public order" explains as an international public order covering the fundamental principles of the honest process as well as mandatory rules of the substantive law, which establish the fundamental and universally recognized principles of law[14]. Therefore, not any objection to the mandatory rules of the Republic of Lithuania may be a sufficient basis for refusing to recognize and enforce the decision of a foreign arbitral tribunal. The violation of public order can be constituted if the recognition and enforcement of a foreign arbitration award would conflict with the basic principles of law and moral norms recognized internationally, as well as if arbitration or arbitration agreement was obtained by coercion, deception or threats.

[12] *„Gazprom" OAO v Lietuvos Respublika*, C-536/13, *Grand Chamber*, ECJ, (2015).

[13] *„Interperformances Inc. Case,* 3K-3-483-421/2015, the Supreme Court of the Republic Lithuania (2015).

[14] *Duke Investment Limited v. Kaliningrad Region and Kaliningrad Region Development Fund*, 3K-3-179 / 2006, the Supreme Court of the Republic of Lithuania (2006).

In some cases, the parties tried to justify a need to refuse to recognize and enforce foreign arbitral awards because this could infringe an international bilateral treaty with the other State, with which the case was related. For instance, in one of the cases, the appellant claimed that the recognition and enforcement of the foreign arbitral award would violate the international bilateral obligations established by the Bilateral Treaty between the Republic of Lithuania and the Republic of Belarus on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters[15]. According to the party, it was undermining the good relations of neighboring countries and should be recognized as a violation of public order, and should be a ground for refusing to recognize foreign arbitral awards[16].

However, the courts did not follow this kind of reasoning. The rulings were strict in this regard, providing that the application of international treaties *per se* cannot be regarded as contradictory to public policy. Article 135 of the Constitution of the Republic of Lithuania stipulates that Lithuania generally recognized principles of international law, for instance, the principle *pacta sund servanda*. When ratifying the 1958 New York Convention, Lithuania undertook to recognize foreign arbitral awards, unless the grounds for refusal provided in Article V of the Convention apply. The non-recognition of a foreign arbitral award on grounds not specified in the New York Convention or inappropriate application of the Convention would be a violation of Lithuania's international obligations. The Great Chamber of the Lithuanian Supreme Court has noted that the Republic of Belarus is also a party to the New York Convention of 1958. Consequently, the Republic of Belarus has also committed itself to resolve the issue of recognition of foreign arbitral awards in accordance with the rules laid down in the Convention. Consequently, compliance with the international agreement and its proper implementation, i.e., legitimate actions, cannot adversely affect the good neighborly relations of the States and cannot justify a violation of public order.

An example of a violation of public policy following from the Lithuanian case-law is the recognition and enforcement of an arbitral award, which would lead to recognition of punitive damages. The latter is probably one of the most popular bases raised by the parties in order to refuse recognition of the foreign arbitral award. The courts, however, are rigorous in consideration of this ground. First, it is being examined whether the parties had agreed on such a size of penalties and whether this could have been challenged under applicable law. According to the established case-law of the Supreme Court of Lithuania, the courts can consider the penalties provided for in the contract as viola-

[15] The bilateral agreement was signed on 20th October 1992, and is in force in Lithuania since 11th July 1993, it was announced in the State's Official Journal (Valstybės žinios), 1994-06-08, Nr. 43-779.

[16] *Westing corp.* V. „Belaya Rus," 3K-7-132/2007, the Supreme Court of the Republic of Lithuania (2007).

tion of public policy if they would amount to legalization of punitive damages[17]. However, the fact that the parties to the contract award a significant amount of penalties does not mean that the recognition of the arbitral award and the permit to pursue it would be contrary to the Lithuanian or international public policy. In deciding on the number of penalties, the court has to consider the size of penalties chosen by parties of the agreement. Moreover, the court has to examine if the penalties were due to contractual relations and the nature of these relationships. For instance, the court could check if both parties to the agreement are private business entities with experience in business as well as in the area of negotiation, which can predict the consequences of default and choose the contract terms freely. The court should not substantially deny the will of the parties in respect of liability for non-performance of contractual obligations. According to the case-law of the Supreme Court of Lithuania the number of penalties can be recognized as being in line with the interests of the parties, the requirements of the principle of justice, reasonableness, and integrity[18].

3. *Gazprom* case in the light of the former case-law of the Lithuanian courts

3.1. *Gazprom* case – general remarks

Recently, Lithuania was involved in several disputes with energy giants as Gazprom and Veolia[19], not to mention smaller cases between private companies.

The *Gazprom* case may be considered as exceptional due to the several facts. First, this was a case were the Lithuanian State was involved. Moreover, the foreign arbitral award to be recognized was issued against the State. The case concerns four critical national judgements and one ruling of the Court of Justice of the European Union[20].

The original case, which initiated the series of further cases, was related to the investigation of the activities of the company "Lietuvos dujos". The following questions needed to be considered in the case: the court ruling, which commences the investigation of the activities of a legal person, possibility to challenge the ruling, the procedure for

[17] *Duke Investment Limited v. Kaliningrad Region and Kaliningrad Region Development Fund,* 3K-3-179 / 2006, the Supreme Court of the Republic of Lithuania (2006).

[18] *UAB Kaduva v. UAB Okadeta*, 3K – 3-401/2008, the Supreme Court of the Republic of Lithuania (2008).

[19] The case is pending in the arbitral court.

[20] Respectively: *Gazprom v. Government of the Republic of Lithuania*, 3K-7-326/2013, the Supreme Court of the Republic of Lithuania (2013); *AB „Lietuvos dujos", V. V., V. G. ir K. S. v. Government of the Republic of Lithuania,* 3K-3-548/2013, the Supreme Court of the Republic of Lithuania (2013); *Gazprom v. Government of the Republic of Lithuania*, 3K-7-458-701/2015, the Supreme Court of the Republic of Lithuania (2015); and: *AB „Energijos skirstymo operatorius", V. V., V. G. (V. G.) ir K. S. (K. S.) v. Government of the Republic of Lithuania*, 3K-3-149-915/2016, the Supreme Court of the Republic of Lithuania (2016).

investigating the pre-trial dispute, the legality of the commencement of the investigation of the legal person's activity, the right to proper process, the sufficient information of the court, the question of a national jurisdiction of the Lithuanian courts, possibility to refer to the Court of Justice of the European Union for a preliminary ruling, the arbitrability of the dispute regarding the investigating of the activities of a legal person, and, finally, the scope of the issues covered by the arbitration clause. The Supreme Court decided to refer a question for a preliminary ruling to the CJEU and suspended the case until the question of the recognition and enforcement of the arbitral award rendered by the Arbitration Institute of Stockholm Chamber of Commerce is solved[21]. Meanwhile, the Supreme Court referred a question to the CJEU for a preliminary ruling concerning the foreign arbitral award at stake[22]. After the ruling of the CJEU, the arbitral award was recognized and enforced[23]. Finally, the first case was also finished: the court ruled to terminate the investigation of the legal entity AB Lietuvos Dujos.

The consequences of the case are very important, because at the same time this could be an example of both consistent and inconsistent case-law of the Lithuanian courts. Energetic security of the State is one of the most critical questions of the internal and foreign policy of Lithuania, and the Gazprom case was related to both issues. International authors present the case in the light of the Brussels I Regulation and anti-suit injunctions, the relation between the Regulation and arbitration matters[24]. However, looking at the case from a national standpoint, the other relevant issues could be identified. Namely, the question of arbitrability of the dispute, the question of whether the dispute falls within the scope of the arbitral clause, and finally, the question of the possibility to apply public order clause.

3.2. Arbitrability of the dispute

Lithuanian courts *ex officio* consider the arbitrability of the case and possibility to apply a public order clause. While the parties to the dispute can also invoke the other grounds for possible non-recognition of the arbitral award, among the others, it could be the case when the arbitral tribunal ruled on the issue that fell outside the scope of the arbitral clause.

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[21] *AB „Lietuvos dujos", V. V. , V. G. ir K. S. v. Government of the Republic of Lithuania,* 3K-3-548/2013, the Supreme Court of the Republic of Lithuania (2013).

[22] *Gazprom v. Government of the Republic of Lithuania*, 3K-7-326/2013, the Supreme Court of the Republic of Lithuania (2013).

[23] *Gazprom v. Government of the Republic of Lithuania*, 3K-7-458-701/2015, the Supreme Court of the Republic of Lithuania (2015).

[24] For instance: Pietro Ortolani, *Anti-suit injunctions in support of arbitration under the recast Brussels I regulation*, 6 MPILux Working Chapter 1(2015), available at www.mpi.lu

According to Article V (2) (a) of NYC, the national authority can refuse to grant the arbitral award recognition and enforcement if it finds that the subject of the dispute cannot be settled by arbitration under the law of that country. Lithuanian law on arbitration provides a list of disputes that cannot be subject to arbitration. It is worth to mention that at the time when the arbitration agreement was concluded, and when the dispute in the courts arose, different versions of the Law on Commercial Arbitration were in force. In this regard, the Supreme Court pointed out that arbitrability of the case shall be considered in the light of the provisions that were in force when the parties had settled the dispute in the arbitration. According to the Article 11 of the Law on Commercial Arbitration the disputes excluded from the arbitration were the following: disputes arising from constitutional, labour, family, administrative legal relations, as well as disputes related to competition, patents, marks of goods and services, bankruptcy, and disputes arising from consumer contracts, as well as disputes, where one of the parties is a State or municipality enterprise, as well as a State or municipality institution or organization, with the exception of the Bank of Lithuania, if such an agreement was not prior approved by the founder of this company, institution or organization. In the prior case-law, the Supreme Court finds out that the case related to the investigation of the company's work cannot be settled in an arbitration[25]. The rules governing the investigation of the activities of a legal person provide the shareholders of the legal person with the legal means to ensure that the legal person is properly managed. The main purpose of this institute is to safeguard the public interest, in particular by granting minority members of the legal entity the right to control the activities of the legal person. Lithuanian Civil Code (paragraphs 2 and 3 of Article 2.126 CC) grants also a prosecutor the right to begin a procedure for investigating the activities of a legal person. These rules are mandatory, and therefore, cannot be derogated by the parties to the contract.

Noteworthy, that the arbitral court may rule on both arbitral and non-arbitral issues. In such a case, the national court must examine whether it is possible to distinguish between arbitral and non-arbitral issues legally, and to recognize an arbitral award partially. If such separation is possible, the court cannot apply the Article V(2)(a) of the NYC in the regard of arbitral dispute solved by the arbitral court.

In *the Gazprom* case, the Supreme Court has found out that the arbitral award was not related to the non-arbitral issue, namely the case of the investigation of some actions of the administration of the company. The arbitral court examined whether the parties violated the shareholder agreement thereunder and the question of the protection of the rights arising from this agreement. The arbitral court did not evaluate issues that fell out of the scope of the arbitral agreement, moreover, the issues regulation by mandatory

[25] *N. K. v. UAB „Luksora" ir kt.*, 3K-3-353/2012, the Supreme Court of the Republic of Lithuania (2012).

national rules. Those issues left for the national court were following: removal of some of the company's managing staff, including CEO, from the office, announcement of the data in the annual report, annulment of some of the decisions of the managing bodies, obligation to adopt certain decisions, finally, liquidation of a legal person or appointment of a liquidator. Respectively, if the arbitral court would have ruled on one or more above-mentioned issues, then recognition of a part of the arbitral award could be questionable. However, it was not the case.

The Supreme Court concluded that the dispute at stake is arbitrable and, as such, could have been a subject of arbitration. The Court's decision is not surprising in this regard. It follows very clearly from the previous case-law of the Court that it applies Article V (2)(a) in a very restrictive way.

3.3. Application of the public order clause

The other, probably the most important issue in the given case, was the question of whether the recognition and enforcement could violate the public order of the Republic of Lithuania. The case-law of the Supreme Court of Lithuania is very restrictive and consistent in this regard. As it was already mentioned, the Court explained the „public order" as an international public order covering the fundamental principles of the fair process, as well as mandatory legal norms that establish the fundamental and universally accepted principles of law.

In the *Gazprom* case, the Court refers to the case-law of the CJEU in this regard. The Court clarifies that an anti-suit injunction is a court's prohibition on initiating or continuing litigation before a foreign court, provided with a legal sanction. The court's right to impose an anti-suit injunction and the possibility of imposing legal remedies for failure to comply with it, or an offense stems from the power given to courts to administer justice. The State provides the courts, which are acting on behalf of the State, the power to apply coercive measures. Unlike the courts, the arbitrators, whose powers are based on the arbitration agreement concluded between the parties, cannot apply coercive measures. Nevertheless, the Court considers the arbitrary nature of arbitration as an alternative means of resolving disputes, and the powers of the arbitrators to act, as well as the nature and effect of the measures taken by the arbitral tribunal. Those measures the Court qualified as party's obligation to perform the contract (arbitration agreement). Which means that parties have to comply with the chosen dispute resolution procedure. This agreement also precludes the parties from acting in a way that could undermine the arbitration process or, in the future, the effectiveness of the adjudication of the arbitration award. In the event of a valid arbitration clause, the possibility of arbitration itself to take measures to protect the arbitration process as well as the legitimate expectations of the

other party is compatible with the legal nature of the arbitration. The arbitral court does not have to wait, for a court of a State, to which a party has sued a claim that may violate the arbitration clause, to resolve the issue of admissibility. Therefore, in the *Gazprom* case was no legal basis for refusing to recognize and enforce an arbitration award on the grounds of public policy based on the nature and substance of the adopted measures.

An expanded panel of judges dismissed as unfounded the arguments of the party concerned, arguing that the arbitration award violated the principle of the independence of the judiciary. The arbitration, as has been said more than once, is based on a contract basis. The national and international contract law is governed by the privacy privilege of the contract, and arbitration can, therefore, generally only be *inter partes,* and decisions made by it are not binding for the third parties, including courts or other arbitrations. Thus, the arbitral award and the obligation imposed on the parties are directed not to the court but the particular party to the agreement. Therefore, by imposing an obligation on one of the parties not to settle a case in a national court, does not limit the possibility of a court of the State to decide on its own competence (and once it has been established, to consider the case in essence) is neither in any way affected nor restricted, The risk of adverse legal consequences, in this case, lies only on a side of the party that is acting in violation of an arbitration agreement. Recognition of an arbitral award imposing an obligation not to settle a case in court, does not affect the right of the courts of the State to decide on the issue of their jurisdiction or to hear the case.

The mere fact that one of the parties to the case is a State, which participates in private legal relations on the same basis as private persons, are legally irrelevant. The Lithuanian case-law clarifies that modern international law and international legal doctrine recognize the limited doctrine of State immunity, according to which a State or an institution acting on its behalf may have immunity only in respect of actions in the field of public law (*Acta jure imperii*). Whereas in cases, where the State or her institution is involved in private-law relations (*Acta jure gestionis*), the State cannot rely on immunity, because in these relations the State participates on the same basis as private persons[26].

4. Conclusions

After the restoration of independence, the Lithuanian Government introduced a modern system of law, including the law on commercial arbitration. Despite the soviet heritage, deficiencies both in theoretical knowledge and practice of the courts regarding arbitration Lithuanian courts practice reveals very consistently and well-grounded case-law on the application of the NYC. In majority of the cases the courts respect the foreign arbitral

[26] *SN v. Embassy of the Kingdom of Sweden*, 3K-3-142 / 2007 the Supreme Court of Lithuania (2007).

award and grant the recognition and enforcement. The most problematic appear to be the cases, where the State is one of the parties to the dispute.

The *Gazprom* case concerned all the main grounds for the refusal of granting a recognition and enforcement: arbitrability of the dispute, the question of whether the dispute falls within the scope of the arbitral clause, and finally, the public order clause. The Lithuanian Supreme Court did not find any of those grounds applicable in the case. *Gazprom* case, which at the beginning could be seen as the infamous example of treating the case, finally resulted in a well-grounded decision of the Supreme Court of Lithuania.

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