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Constitutional aspects of dispute resolution by means of arbitration

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Abstract

In this article the question of constitutionality of arbitration is raised, since the choice of the dispute settlement by means of arbitration waives the right to judicial defence guaranteed by the Constitution, other laws and international conventions. As one of the main features of the judiciary is that it is the only subject to administer justice in the Republic of Lithuania, the question arises whether such strict limitation of the Constitution on any subject other than the court to implement justice precludes the existence of arbitration courts. It can be concluded that arbitration neither violates Constitution, nor *per se* administers justice, but is a valid method of dispute resolution, having an obligation to comply with the basic standards of justice and legitimacy.

Keywords

Arbitration, Judicial Protection, Administration of Justice, Constitutionality of Arbitration, Legitimacy of Arbitration, Protection of Human Rights in Arbitration

I Introduction

In the evolution of mankind a number of means of dispute settlement, based on law, morality and justice, were formed: negotiation, mediation, conciliation, judicial, arbitration, etc. The latter two are exceptional for their significance, effectiveness, and practical application.¹ Although the court's decision and the arbitral award have equal legal consequences and power, the proceedings of the national court and the commercial arbitration court have completely different natures.²

Judicial proceedings are a certain method of dispute resolution, where the parties turn to the state authority, *i.e.*, a state court or a court formed under a national or cross-border agreement. Under Article 2 of the Law on Commercial Arbitration of the Republic of Lithuania³ (hereinafter – the LCA), arbitration is a dispute resolution method where natural or legal persons subject to their agreement submit or undertake to submit the claim to the third party or parties, chosen under the agreement between the parties to the agreement or appointed in the manner provided by the law, instead of submitting it to the state court.

Arbitration as a method of dispute resolution is fundamentally different from the judicial dispute resolution. In the first case, the dispute is solved by a third person, selected by the parties; meanwhile, in court the dispute is adjudicated by a public body – the national court. If the first method mentioned above, *i.e.* arbitration, is chosen, it usually avoids the interference of public authorities into the matters of private parties. This means that arbitration, unlike court proceedings, is a private dispute resolution method where the state has no authority; private persons selected by the parties, *i.e.* arbitrators, solve the dispute.

Concluding the above mentioned, it could be stated that the national courts (acting in a particular area in which the arbitral tribunal also has jurisdiction to act) and the arbitration court shall perform the identical function, which is to solve the disputes between the parties.

Analysing the legal background of the dispute settlement by these two different means, a clear distinction could be seen. The national court is usually seen as an exclusive administrator of justice, whereas arbitration has no definite constitutional background – no provision of the Republic of Lithuania expressly

1 Juozas Šatas, *Arbitražas tarptautinėje komercijoje: pažintiniai ir praktiniai aspektai* (Arbitration at international commerce: cognitive and practical aspects), Kaunas: Technologija (1998) 6.

2 Such doctrine is formulated in the court practice, e.g. Lithuanian Supreme Court, *Rusijos Federacijos viešoji akcinė bendrovė "Vladimiro chemijos gamykla" v. akcinė bendrovė "Dirbtinis pluoštas"*, Judgment of 16 December 1998 in case No 3K-67/1998.

3 Law on Commercial Arbitration of the Republic of Lithuania (1996, with further amendments).

provides legal grounds for alternative dispute resolution. Therefore, a few fundamental questions in relation to the existence of arbitration arise, i.e.:

- Does such a strict limitation of the Constitution on any subject other than the court to implement justice preclude the existence of arbitration courts and arbitral institutions?
- Could it be claimed that the arbitral tribunal has no connections with the administration of justice in general?
- Having concluded a valid arbitration agreement exists, could the parties be deprived of a constitutional right to defend their violated rights in court?

The questions indicated above shall be addressed further in this publication.

II Constitutional guarantees of judicial protection

The principle of access to judicial protection is established in Paragraph 1 of Article 30 of the Constitution of the Republic of Lithuania⁴ (hereinafter – the Constitution), which specifies that a person whose constitutional rights and freedoms are violated has the right to apply to the court. The principle is also established in Article 4 of the Law on Courts of the Republic of Lithuania⁵, Paragraph 1 of Article 5 of the Code of Civil Procedure of the Republic of Lithuania⁶ (hereinafter – the CCP), Article 8 of the Universal Declaration of Human Rights⁷, Paragraph 3 of Article 2 of the International Covenant on Civil and Political Rights⁸, Articles 6 and 13 of the European Convention on Human Rights and Fundamental Freedoms⁹, etc. Therefore by selecting to resolve the dispute in arbitration, the parties waive their right to judicial defence, guaranteed by the Constitution, laws and international conventions.

A Constitutional provisions with regard to means of dispute resolution: court as the only vehicle for administration of justice

While examining the constitutional and other provisions, one of the highlights in the features of the judiciary – and perhaps the most important – could be envisaged: it is the only subject to administer justice in the Republic of Lithuania. The question arises whether such a strict limitation of the Constitution and other legal acts for justice to be administered only by national courts precludes the existence of arbitration courts and arbitral institutions? Can arbitration as an

4 Constitution of the Republic of Lithuania (1992, with further amendments).

5 Law on Courts of the Republic of Lithuania (1994, with further amendments).

6 Code of Civil Procedure of the Republic of Lithuania (2002, with further amendments).

7 Universal Declaration of Human Rights (1948).

8 International Covenant on Civil and Political Rights (1966).

9 European Convention on Human Rights and Fundamental Freedoms (1950).

alternative method of dispute resolution exist when the Constitution and other legal acts clearly implies an exclusive right of the judiciary to implement justice?

The Constitutional Court of the Republic of Lithuania has not solved any cases in which the question of the constitutionality of the LCA would be challenged or discussed so far, whereas in the practice of the Supreme Court of Lithuania and the Lithuanian Court of Appeal, a number of considerations in this matter can be seen. According to P. B. Rutledge, an arbitration theorist and practitioner, arbitration in fact causes serious constitutional objections that have not attracted adequate attention from law theorists and practitioners so far¹⁰.

Article 109 of the Constitution of the Republic of Lithuania and Paragraph 1 of Article 1 of the Law on Courts stipulate that justice should be administered exclusively by the courts in the Republic of Lithuania. Many authors argue that the administration of justice is the most important function of the judiciary, which no one else can fulfil.¹¹

Logical and systematic analysis of the provisions of the Constitution which state that in Lithuania the "state power shall be executed by the [...] Judiciary" (Paragraph 1 of Article 5 of the Constitution) and "justice shall be administered only by courts" (Paragraph 1 of Article 109 of the Constitution) suggests that administration of justice is one of the key functions of state government, which is embodied by the courts. The question arises whether the Constitution and other accompanying legal provisions, which establish that justice shall be administered by the courts, prevent the arbitration courts from exercising the functions assigned to their competence?

In order to answer the question above, the concept and definition of justice should be outlined. Therefore the necessity arises to determine what the main features of the justice are, and why it is so important to the state that its enforcement function is delegated exclusively to one subject – the national court?

The Constitution does not explain directly what exactly the words „justice is administered“ mean. It is clear that justice is a multi-legal, political, and philosophical concept which in principle cannot be defined briefly and in detail¹².

10 Peter B. Rutledge, Arbitration and Article III, *Vanderbilt Law Review*, 61 No. 4 (2008) 1189.

11 Toma Birmontienė/Egidijus Jarašiūnas/Egidijus Kūris/Mindaugas Maksimaitis/Gediminas Mesonis/Augustinas Normantas/Alvydas Pumputis/Elena Vaitkienė/ Saulė Vidrinskaitė/Juozas Žilys, *Lietuvos konstitucinė teisė (Lithuanian Constitutional Law)*, Vilnius: Lietuvos teisės universiteto Leidybos centras 2002, 769.

12 Egidijus Šileikis. *Alternatyvi konstitucinė teisė (Alternative Constitutional Law)*, Vilnius: Teisinės informacijos centras (2005) 386-387.

Discussions about the essence of justice were initiated a very long time ago, and this concept was subject to changes of public order, political ideas, historical circumstances, etc. The essence of justice has not changed over the centuries. This is a conservative value, which has been recognized and nurtured at all times.

Justice could be characterized very differently – as a legal rule, as a certain set of rules, as a virtue, or even as criterion for the decision making of judges and people of other legal professions.

In its rulings, the Lithuanian Republic Constitutional Court has repeatedly held that justice is one of goals of law as a regulatory measure of social relationships. It is one of the most important moral values and the framework of rule of law. It can be implemented only by ensuring a balance of interests, avoiding the chance of instability and conflict of interests.¹³ The Constitutional Court has also repeatedly emphasized that justice is a universal principle of law.¹⁴

It can be clearly seen that the Constitutional Court's doctrine of justice is associated with the security of the state's public order, as well as the application of coercive measures, which, of course, is a prerogative of the state. Therefore it is reasonable to conclude that the Constitution's provision that justice can only be administered by the national courts embodies the idea that the execution of justice is the sphere exclusively belonging to the state.

B Arbitration as a proper administrator of justice? Input of arbitration into the realization of justice

While recognizing that the exclusive competence to administer justice is vested with the courts, could it be said that this function cannot be attributed to the arbitration court?

In formal terms, while analysing the words „justice is implemented by the courts“ linguistically and logically and focusing only on the word "implement“, one might conclude that justice is carried out only by the courts because the arbitral award can not by itself be a background for the enforcement procedure, i.e., if one party refuses to comply with the arbitration decision, it shall be referred to the competent national court, which will be requested to issue an order (in case of the decision of foreign arbitration, firstly it shall be recognized under the procedure set forth in the laws). So, in formal terms, the analysis of the function of justice leads to the conclusion that the court of arbitration does not administer justice.

13 Constitutional Court of the Republic of Lithuania, rulings of 3 December 2003, 24 December 2008, etc.

14 Constitutional Court of the Republic of Lithuania, rulings of 22 December 1995, 6 December 2000, etc.

Could the arbitral tribunal then be dissociated from the general concept of justice at all? Is it possible to claim that if the dispute is entrusted to arbitration, it will be resolved without reference to principles of justice and will not pretend to enforce any standards of justice? Is it possible to assert that arbitration is law without justice?

The answer is diverse to some extent. First of all, the procedures of recognition and enforcement of the arbitral decision usually presuppose that the arbitral award will not be enforced unless it will comply with the general principles of public order. Clause B of Paragraph 2 of Article V of the Convention on Recognition and Enforcement of Foreign Arbitral Awards¹⁵ (also referred to as the New York Convention) establishes that recognition and enforcement of an arbitral award may be refused if the competent authority of the country in which recognition is sought and pursued ascertains that the recognition and enforcement of the arbitral award is contrary to public policy of that country. The term “public order” is usually interpreted as an order encompassing fundamental principles of procedural fairness, as well as mandatory substantive rules, which lay down the fundamental and universally recognized principles of law. This leads to the conclusion that an arbitral award could not contradict the principle of justice and therefore is a justice-based method of dispute settlement.¹⁶

It should be noted that the arbitral award is not always based on the existing and relative law. Sometimes the parties agree that the dispute shall be solved according to the principles of *ex aequo et bono*, i.e. according to the right and good, or from equity and conscience, or *amiable compositeur*, i.e. according to the legal principles arbitrators believe to be just. This means that the arbitrator is allowed to solve the dispute in accordance with his or her internal perception and feeling of justice. Thus, the difference between the justice operated by the judges and the justice operated by the arbitrators remains, and it shall be recognized that sometimes arbitral awards could be based on the internal sense of justice, which is not always objective.

To conclude the above mentioned, it could not be stated that the arbitral award is completely separated from the concept of justice. Nevertheless, the award has to be in compliance with the main measures and ideas of justice, since the court shall refuse to recognize and enforce an arbitral award that violates the basic concept of justice and public order.

In this case, the ideas of ancient philosophers could be reminders. Even the ancient Roman philosopher Cicero at 1st Century BC argued that justice is the state of spirit that protects the common good, giving people things that belong to them, and especially protecting the equitable agreements of people.¹⁷ Thus, the

15 Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958).

16 Lithuanian Supreme Court, Algirdo Vaičio individuali įmonė v. Kazimierz Czarniecki firma „Schwarz“, Judgment of 17 November 2004 in case No 3K-3-612/2004.

17 Aaron A. Olizarovius *De politica hominum societate*. Vilnius: Aidai (2003) 481-483.

nature of arbitration, which is based on the particular agreement between the parties, could not be opposed to the concept of justice.

Considering the scope of implementation of justice narrowly, and recognizing only the “reward” function of the organs executing justice, *i.e.* punishing the guilty party, then the administration of justice shall not be assigned to arbitration, since the adjudication of criminal matters is usually not delegated to the arbitration. Realizing justice more broadly, *i.e.*, as rebuilding the equality between the parties, it shall be concluded that arbitration contributes to the execution of justice. Moreover, the enforcement and recognition of the arbitral award by a national court could be understood as turning the award into reality, allowing the arbitral award to finally gain power.

III Binding arbitration¹⁸

A Obligation to resort to arbitration

The examination of the legitimacy of the arbitration raises a lot of questions and considerations. Another angle of the issue of constitutionality could also be emphasized – according to Article 10 of the LCA, the court shall, at the request of a party, refuse to accept a claim, the subject matter of which is subject to an arbitration agreement made by the parties. The same provision is enforced in Paragraph 1 of Article 8 of the UNCITRAL Model Law on International Commercial Arbitration¹⁹ (hereinafter – the UNCITRAL Model Law). Does this mean that, after concluding an arbitration agreement, a party has no right to file a claim to the court and expect that the dispute will be settled in the competent national court as is provided by the Constitution and other legal acts? Does this legal regulation mean that the conclusion of the arbitration clause leads to forced arbitration against party’s will, even if a party requires the dispute to be heard by a court? May the accessibility of legal protection be denied by the conclusion of an arbitration clause?

According to Paragraph 1 of Article 6.189 of the Civil Code of the Republic of Lithuania²⁰ (hereinafter – the CC), a valid arbitration agreement, like any other contract, shall be binding and must be complied with by the parties (*Latin – pacta sunt servanda*). Choosing to settle the disputes by means of arbitration could have a sole meaning – elimination of the disputes from the jurisdiction of the national courts.²¹ It is also worth mentioning that only upon proof that the arbitral agreement is recognized as invalid by a court decision, or a new agreement

18 This publication does not discuss the type of arbitration which is compulsory according to some countries’ legal acts, e.g. certain consumer or labour disputes in United States of America, etc.

19 UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006).

20 Civil Code of the Republic of Lithuania (2000, with further amendments).

21 Lithuanian Supreme Court, *Jungtinių Amerikos Valstijų ribotos atsakomybės bendrovė “Main Bridge, L.L.C.” v. UAB “Lakvita”*, Judgment of 27 March 2002 in case No 3K-3-681/2002.

between the parties that withdraws the arbitration agreement is concluded, can the parties' dispute be settled in court (Article 10 of LCA and Paragraph 1 of Article 8 of the UNCITRAL Model Law).

It is reasonable to suggest that in cases where parties conclude an arbitration agreement, if the claimant applies to the court with a claim and the defendant does not express his intention to settle the dispute by means of arbitration, the parties by implication agree to revoke the arbitration agreement. If no such refusal is obtained by the court, the latter should undertake the resolution of the dispute. This provision not only ensures the principle of equality of parties in civil proceedings (Article 17 of CCP), but also prevents the possible abuse of process (Paragraph 5 of Article 42 of CCP) and ensures the concentration and economy of the process (Article 7 of the CCP).²²

Generally, when speaking about a person's participation in arbitration proceedings, it should be noted that there may be cases when a person is forced to become one of the parties of the dispute being settled by arbitration. This can happen even in the absence of the agreement of the party, *i.e.* being a third party not directly included in the arbitration agreement (when theories of agency, piercing the corporate veil and others are applied). This possibility is not a subject matter of this article, therefore it needs to be discussed separately.

B Arbitration and human rights

Statements that arbitration may be not only contrary to the Constitution, but may also violate fundamental human rights, can be found in the legal literature.²³ Paragraph 1 of Article 6 of the European Convention on Human Rights and Fundamental Freedoms states that every person has the right to a fair and public hearing. Superficially, it might seem that the process of arbitration does not reflect those fundamental human rights – it is not public, and the relationship is contractual rather than based on the law. However, in the case *Deweere v. Belgium*²⁴, European Court of Human Rights (hereinafter – the ECHR) expressed the view that waiving the right to a court by concluding the arbitration agreement does not in principle offend the Convention.

One more ECHR case that had a decisive role of arbitration as a legitimate means of dispute settlement was *Jakob Boss Sohne KG v. Federal Republic of Germany*,²⁵ where the European Commission of Human Rights found that a party resorting to arbitration renounces its right to have its civil rights determined in court proceedings, and there are no reasons to state that the arbitration

22 Lithuanian Court of Appeal, Akcinė bendrovė „Kauno energija“ v. UAB Kauno termofikacijos elektrinė, Judgment of 6 May 2004 in case No 2-239/2004.

23 E.g. please see Julian D. M. Lew/Loukas A. Mistelis/Kröll Stefan, *Comparative International Commercial Arbitration*, The Hague 2003, para. 5-59.

24 ECHR, *Deweere v. Belgium*, Judgment of 27 February 1980 in case No 6903/75.

25 The European Commission of Human Rights, *Jakob Boss Sohne KG v. Federal Republic of Germany*, Decision of 2 December 1991 in case No 18479/91.

process will be unfair and wrong. The European Commission argued that the arbitration award usually has to be recognized by the national courts and shall be given executory effect only after it has been reviewed by the court. The court reviewing the arbitration decision exercises a certain control and guarantees the fairness and correctness of the arbitration proceedings.

As it can be clearly seen from the practice of ECHR, arbitration does not violate the human right to a fair and public hearing. Therefore, statements that arbitration violates the fundamental right to a fair trial are unfounded.

IV Conclusion

To conclude the above mentioned, arbitration is a dispute resolution method that complies with the constitutional provisions regarding the means of dispute resolution. It also corresponds to the basic concept of protection and security of fundamental human rights. While the national court is the exclusive administrator of justice and arbitration *per se* does not implement justice, arbitration is a valid vehicle for dispute resolution. Stating that arbitration does not administer justice does not allow the delimiting of the arbitral proceedings from the concept of justice. The arbitral award shall nonetheless conform to the standards of justice and legitimacy.

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