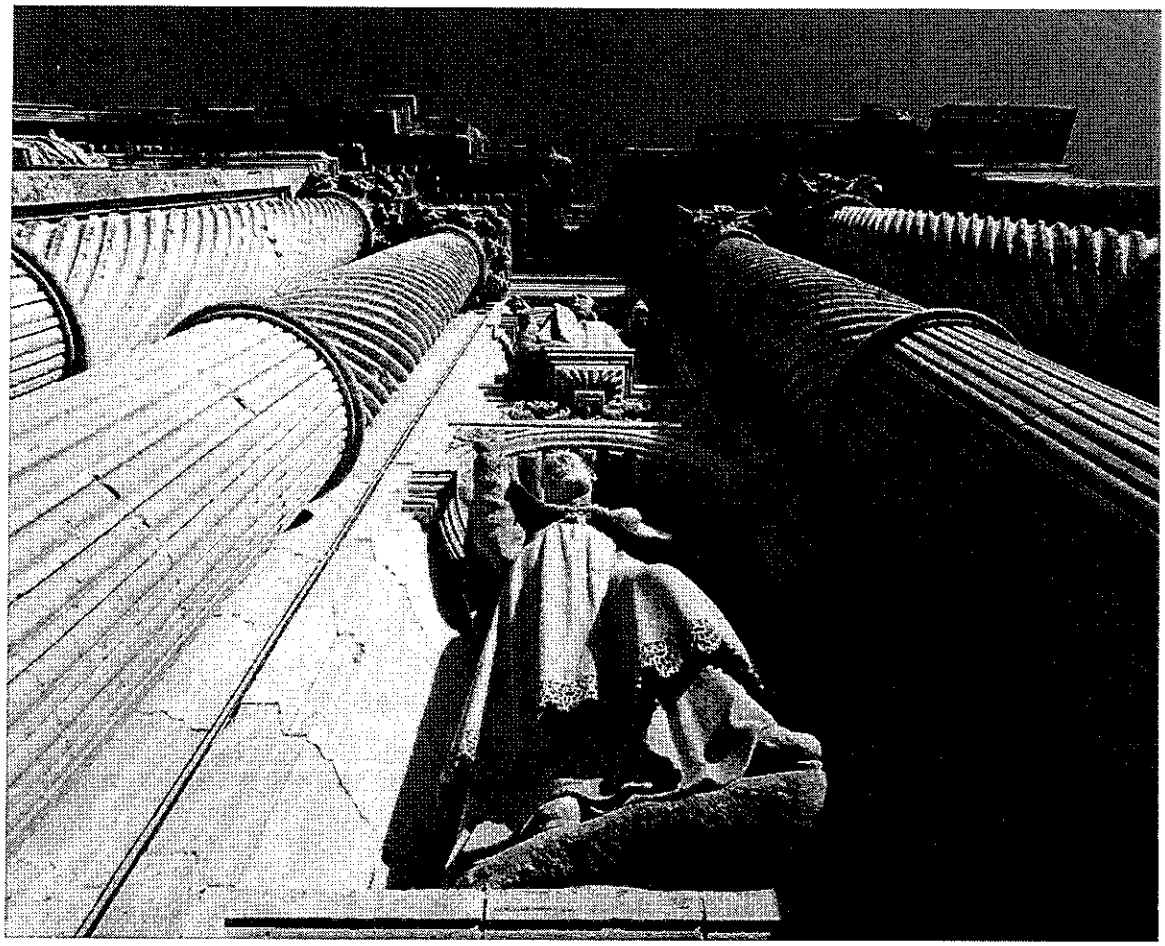


ARBITRATION IN BELARUS: RECENT TRENDS AND DEVELOPMENTS

By Alexey Anischenko and Elena Kumashova

For a number of years Belarus has been taking steps to gain the reputation of an arbitration friendly jurisdiction and substantially increase the number of arbitral proceedings as compared to litigation. This strategy, in addition to its positive vibe on the international arena, has a very pragmatic purpose of decreasing the workload of Belarusian commercial courts. On average, one judge of a Belarusian commercial court decides up to 1000 cases per year and, according to the authorities, such a work pace is not sustainable.

However, despite a comprehensive legal framework for the international and domestic arbitration, comprised of the New York Convention on the Recognition and Enforcement of Foreign *Arbitral* Awards, European Convention on International Commercial Arbitration and Law on International Arbitration Courts[1] which closely follows the UNCITRAL Model Law on International Commercial Arbitration in its 1985 version,[2] arbitration in Belarus has been relatively unpopular. Under the auspice of the leading (by the number of cases) and at that time, the only, arbitration institution in Belarus, International Arbitration Court of BelCCI, 77 arbitral awards were rendered in 2008. The number of the domestic arbitration proceedings has been historically close to zero.

One of the reasons for a low popularity of arbitration in Belarus could be an extremely limited knowledge about the arbitration regime in Belarus and higher costs and length of arbitration proceedings as compared to local commercial litigation. In this regard, the below question recently spotted on one of the Belarusian on-line legal forums is representative:

The resident of Belarus is in the process of concluding a supply contract with a Russian resident. For a reason unknown, the Belarusian resident is stubbornly insisting on the arbitration clause providing for the International Arbitration Court of BelCCI. Do I understand correctly that the disadvantages are:

- The Arbitration fee is much higher that the court fees.

- The length of the proceeding is one year and more.

What are other disadvantages of the proceedings in the International Arbitration Court of BelCCI? (emphasis added)

Recently, the problems of lack of awareness and the costs and length of the arbitration proceedings have been addressed by numerous conferences and articles devoted to arbitration, the modifications in the Rules of the International Arbitration Court of BelCCI and a legislative action. The two latter developments are discussed in more details below.

The modifications to the Rules of the International Arbitration Court of BelCCI address two sensitive issues: the length and the costs of the arbitration proceedings. In respect of the costs: to attract Belarusian parties to arbitrate disputes rather than litigate, the International Arbitration Court of BelCCI lowered arbitration fees to match those of the Belarusian commercial courts. What concerns the length of the proceedings: a new simplified documents-only procedure was introduced in the Rules. The new procedure has very short time terms for the parties' submissions, moreover the arbitral award must be rendered within three months after the submission of the request for arbitration. As of now, the simplified procedure is only available in the domestic arbitration proceedings.

As mentioned above, in addition to various promotional activities, the legislative action has been undertaken to improve the "arbitration climate" – the new Law on Arbitration Courts[3] was adopted in 2011. The immediate result of its adoption is the establishment of 16 new arbitral institutions in Belarus in 2011-2012. Some of those arbitral institutions are specialized in particular areas such as sports arbitration and construction arbitration. Considering that before 2012 there were three registered arbitral institutions in Belarus (the International Arbitration Court of BelCCI, International Arbitration Court attached to the Council of Lawyers and the arbitration commission of the commodity exchange), this is an impressive achievement. Even though all of the newly registered institutions will deal with domestic arbitration, a positive effect on international arbitration is also expected. The 2011 Law on Arbitration Courts currently governs domestic arbitration. However, this instrument has a rather ambiguous language regarding its coverage. Hence, though considered by academics as applicable solely to domestic arbitration, the 2011 Law on Arbitration Courts may apply to the international arbitration proceedings as well.

The provisions of the 2011 Law on Arbitration Courts are symptomatic of the struggle between, on one hand, Belarus' desire to gain the reputation of an arbitration friendly jurisdiction and, on the other, adherence to some concepts which may be incompatible with such "friendliness".

1. Transparency, state control and quality

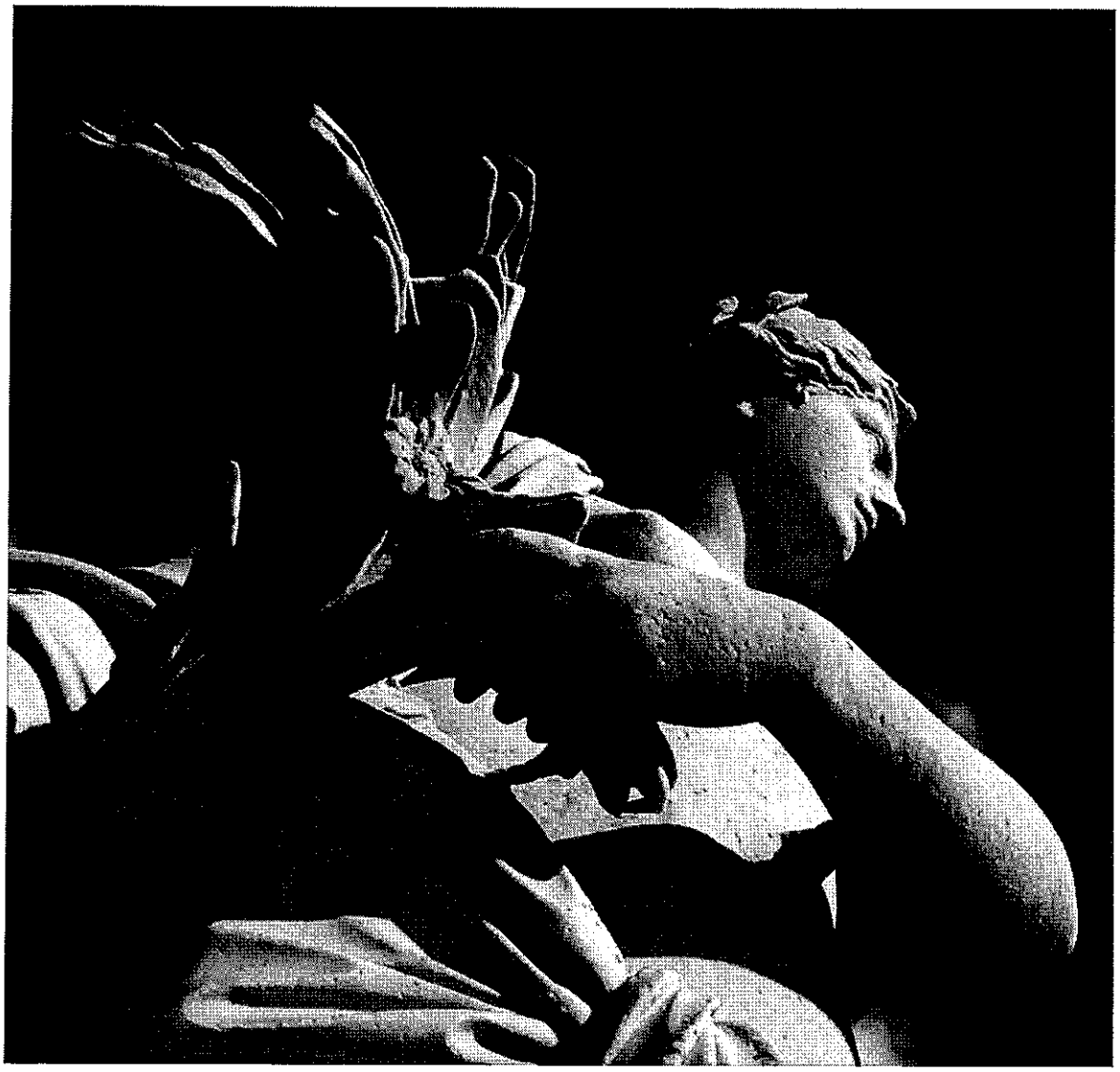
One of the distinctive features of the new framework for domestic arbitration is a number of measures aimed at ensuring the higher quality of the domestic arbitration proceedings coupled with certain degree of state control over the proceedings. In particular, under the new regime, the rules of the arbitral institutions must correspond to the model rules adopted by the Belarusian government (the Council of Ministers).[4] Despite the seeming incompatibility of this rule with the perception of the arbitration as a private and flexible method of dispute resolution, the wording of the actual model rules adopted by the Belarusian government adds a different flavour.[5] First, the model rules are similar to the rules of well-known international arbitral institutions, like Arbitration Institute of the Stockholm Chamber of Commerce. Secondly, the said model rules in fact allow parties to the arbitration agreement (but not the arbitral institution) to derogate from the model rules. The resulting regime allows parties to work out any procedures they see fit but does not allow the arbitral institution to offer "default" rules different from the model rules. On the other hand, the 2011 Law on Arbitration Courts contains certain mandatory provisions on the procedural aspects of the arbitration proceedings. Such mandatory provisions include the minimum information to be contained in the request for arbitration, the content of the answer to the request for arbitration, the time limits for certain procedural actions and the form and content of the arbitral award. Interestingly enough, the maximum time limit for the issuance of the arbitral award of one year is also mandatory. The consequences on non-compliance with such time limit are not free from ambiguity and possibly may imply that any arbitral award rendered past the one year limit may be recognized by the Belarusian courts as invalid or unenforceable.

Secondly, the 2011 Law on Arbitration Courts incorporates qualification requirements for persons wishing to sit as arbitrators, such requirement favouring lawyers. The Law on International Arbitration Courts does not contain any specific provisions regarding qualification of arbitrators. The only relevant provisions are that (1) the parties may agree upon specific qualifications of arbitrators in the arbitration agreement; and (2) when an arbitrator is being appointed by the appointing authority, all the requirements ensuring appointment of a qualified, independent and impartial arbitrator must be complied with.

Under the 2011 Law on Arbitration Courts, in case of a domestic arbitral proceedings, the sole arbitrator, respectively the chairman in case of the arbitral tribunal, must have legal education and at least three years of professional legal experience.[6] In addition, the Ministry of Justice must be informed about the persons included in the roaster of arbitrators of the arbitral institutions, and, in case of *ad hoc* arbitration, about the persons appointed as arbitrators following the formation of the arbitral tribunals.[7] The failure to provide the Ministry of Justice with the relevant information renders the relevant arbitral award invalid and unenforceable.

2. Arbitrability of deputes and essential content of the arbitration agreement

Traditionally, in the practice of Belarusian courts certain



categories of disputes were recognized non arbitrable. First of all, disputes, which arise from administrative relationships, such as tax, customs, antitrust and currency cannot be settled by arbitration. Secondly, certain types of disputes are subject to the so-called "exclusive competence" of the Belarusian commercial courts in accordance with the Code of Commercial Procedure, which some commentators tend to interpret as though such disputes are not arbitrable. Two types of them are of particular importance: (1) disputes concerning property which belongs to the Republic of Belarus, including disputes connected with the privatization of the state property and compulsory withdrawal of the property for state needs; and (2) disputes concerning real estate situated within the territory of Belarus. In addition, disputes over the rights on intellectual property are also sometimes claimed to be non-arbitrable. However no official clarifications or established court practice exist to confirm or disapprove such "pessimistic" approach. Given recent positive trends it could be well argued that insofar as no public or administrative element is involved purely contractual disputes even in relation to real estate or state property are perfectly arbitrable. Similar mostly theoretical debate is pending around arbitrability of disputes involving parties in the bankruptcy proceedings.

What concerns the subjective arbitrability, previously there was no direct prohibition for the state bodies or state enterprises to enter into the arbitration agreements or participate in the arbitration proceedings. However, the 2011 Law on Arbitration Courts incorporated the prohibition for state bodies, including the local governments, to be parties to the arbitration agreements.[5] Presumably, the prohibition will not affect the state bodies which were specifically authorized to enter into arbitration agreements by virtue of other legislative acts. The wording of the 2011 Law on Arbitration Courts is ambiguous as to whether this provision would be also applicable to arbitration agreements concluded between Belarusian state bodies and foreign parties.

Under the new framework, the approach towards the essential terms of the arbitration agreements has also been modified. It is not any longer sufficient for the parties to indicate only their desire to arbitrate certain disputes. The parties must indicate in the arbitration agreement the name of the permanent arbitral institution to which they intend to refer their disputes, or in case of *ad hoc* arbitration, the method for the formation of the arbitral tribunals and the procedural rules for the *ad hoc* arbitration proceeding. Absent such provisions,

the arbitration agreement is deemed invalid.

3. Privity of the agreement to arbitrate and interests of non-signatories

Unlike some other jurisdictions, Belarus has a strong tradition of respecting the privity of arbitration agreements. The 2011 Law on Arbitration Courts further continues with this tradition in two aspects. Firstly, the 2011 Law on Arbitration Courts confirmed that the arbitration agreements are deemed non assignable in Belarus.[9] Thus, in case one of the parties assigns its rights and obligations under a contract to a third party and the assignee wishes to arbitrate disputes with the remaining party to the contract, the new arbitration agreement must be concluded between the assignee and the remaining party. In Belarus, it is legally impossible to assign arbitration agreement. Effectively, though relevant practice has not been yet developed by the Belarusian courts, this approach also means that third party theories, including agency, instrumentality, apparent authority, alter ego, third-party beneficiary, theory of equitable estoppel, piercing the corporate veil, group of companies doctrine and similar are unlikely to find support in the Belarusian courts.

Secondly, the 2011 Law on Arbitration Courts also disposed with a much debated question of third parties interests and rights. The 2011 Law on Arbitration Courts provides that recourse to domestic arbitration is only possible if the outcome of the arbitration proceeding does not affect the rights and interests of third parties, non-signatories to the arbitration agreement. The arbitration court may not resolve disputes which directly affect "rights and legal interests" of the non-signatories third parties[10] and the arbitral award which affects such interests and rights is deemed invalid and unenforceable.[11] The exact reach of these provisions is not clear yet, though their potential effect is rather worrying. Indeed, the vast majority of commercial transactions involve the rights and obligation of multiple parties all of which may or may not be parties to the arbitration agreement. For example, in the relationships between a lender, debtor and guarantor, an arbitration clause may be contained in the loan agreement between a lender and a debtor and the guarantor may be not bound by the arbitration clause. Nevertheless, any dispute between the debtor and the lender will necessarily affect the rights of the guarantor. Therefore, if the guarantor is not a party to the arbitration agreement, the arbitration tribunal, despite the arbitration agreement between the lender and the debtor, would not have authority to resolve any disputes between the lender and the debtor. The same issue arise in case of the construction contracts, various financing transactions and even with regard to the rights of shareholders in a company who may be negatively affected by the outcome of arbitral proceedings in which the company is involved.

Formally, the rules of the 2011 Law on Arbitration Courts concerning the rights of the third parties are applicable only in case of the domestic arbitration. However, in the absence of the provisions to the contrary in the Law on International Arbitration Courts which governs the international arbitration proceedings in Belarus, those rules may also influence the approach to the international arbitration proceedings.

4. Interim measures of protection

As part of the arbitration friendliness agenda, the 2011 Law on Arbitration Courts re-enforced parties' ability to seek interim measures of protection to be ordered by the commercial and general courts. Previously, even though there was a declaratory provision in the Law on International Arbitration Courts allowing parties to arbitration agreement to petition courts to grant interim measures of protection, no implementation mechanism of such right was formulated in the codes applicable to procedure before the courts. As a result, getting court assistance was highly problematic. The 2011 Law on Arbitration Courts established and streamlined the mechanism for obtaining orders for interim measures of protection from the Belarusian state courts. Under the current framework, providing the arbitration proceedings have been initiated, such orders can be obtained in the same manner as orders requested in the course of litigation.[12]

5. Grounds the set aside the arbitral award

Under the Belarusian legislation awards rendered by the arbitral tribunals, whether international or domestic, are final and cannot be appealed on the merits. The aggrieved party has two legal means of evading enforcement of the arbitral award, it can (i) apply to set the award aside and/or (ii) object to the issuance of the enforcement order.

Belarusian law encompasses traditional grounds for the vacation of the arbitral awards, namely, (1) certain imperfection of the arbitration agreement (a party to the agreement was under some incapacity; or the agreement is not valid under Belarusian law); (2) one of the parties was not given proper notice of the date and time of the arbitration agreement or was not able to realize its rights for other valid reasons; (3) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or (4) the composition of the arbitral tribunal as constituted or the arbitration procedure was not in accordance with the agreement of the parties, the applicable arbitration rules or the Law on Arbitration Courts. Furthermore, the arbitral award can be set aside if the subject matter of the dispute is not arbitrable under Belarusian legislation or if the arbitral award contradicts the public policy of the Republic of Belarus.

In addition, the 2011 Law on Arbitration Court added two new grounds for setting aside the arbitral award. New relevant evidence not known to one of the parties at the time of the arbitration proceedings, providing that such party could not have diligently obtained such evidence, may be sufficient basis for the vacation of the arbitral award. If the arbitral

award is based on the fraudulent or untrue documents, witness statements, translations or expert submissions, recognized as such in a court decision, the arbitral award may be also set aside.[13] For the latter ground to be triggered the submission of untrue documents must be willing and knowing.

6. Enforcement of foreign arbitral awards

The legal framework for the enforcement of foreign arbitral awards has not been changed by the 2011 Law on Arbitration Courts. Foreign arbitral awards are recognized either on the basis of the New York Convention or based on the reciprocity principle. It should be noted, that Belarus made a reservation under article 1(3) of the New York Convention. Therefore, Belarus applies the New York Convention only to foreign awards made on the territory of states parties to the New York Convention. At the same time, Belarus did not make a reservation regarding commercial relationships. Thus, formally, the scope of the New York Convention for Belarus is not limited by commercial disputes.

In general, Belarusian courts, in line with current arbitration friendly policy, refused to recognize and enforce foreign arbitral awards (mostly originating from CIS countries, particularly from Ukraine) only once over last few years. If all formal requirements are complied with and no major political or state interest is involved one could not be concerned much about too broad interpretation of "public policy", odd notification requirements or similar bugbears, common for post-soviet jurisdictions.

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1. The Law of the Republic of Belarus of 9 July 1999 No. 279- Z "On the International Arbitration Court" (in its redaction of 27 December 1999.
2. The main deviations of the Belarusian law from the model law are: (1) the more limited approach to the definition of "international arbitration": under Belarusian law at least one party to the arbitration must not be a resident of Belarus; and (2) Belarusian law does not differentiate between the "place of arbitration" and the "place where the arbitration proceeding (e.g. the hearing)" takes place: the arbitral award is deemed to have the "nationality" of the country where the arbitral proceeding took place.
3. Law of the Republic of Belarus of 18 July 2011 No. 301-3 "On Arbitration Courts" ("Law on Arbitration Courts" or "2011 Law on Arbitration Courts").
4. Law on Arbitration Courts, Article 3, para. 4.
5. Resolution of the Council of Ministers of the Republic of Belarus of 18 January 2012 No. 52 "On the approval of the Model Rules of a permanent arbitration court".
6. Law on Arbitration Courts, Article 13.
7. Law on Arbitration Courts, Article 8.
8. Law on Arbitration Courts, Article 10, para. 2.
9. Previously, a similar provision was set forth in the clarifications of the Belarusian Supreme Commercial Court which stated that "In case of the assignment or cessation of rights and obligation, the new parties shall not be covered by the earlier arbitration clause." (Resolution of the Plenum of the SCC No. 34 of 23 December 2005 "On jurisdiction over disputes after the assignment of claim or debt transfer")
10. Law on Arbitration Courts, Article 19.
11. Law on Arbitration Courts, Article 47.
12. Law on Arbitration Courts, Article 30.
13. Law on Arbitration Courts, Article 47.