INTERNATIONAL ARBITRATION IN BELARUS

2021

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- ☑ Preparing opinions on the prospects of pre-trial dispute settlement procedures
- ☑ Elaborating standards, policies, guidelines on choosing a dispute settlement body

Dear reader!

International commercial arbitration is actively used worldwide as an effective dispute resolution mechanism and an alternative to the state courts. In this guide we aim to describe the Belarusian commercial arbitration – we are going to highlight the existing court practice in this sphere and the peculiarities you normally have to bear in mind when applying for arbitration in Belarus.

Information in this guide basically covers international commercial arbitration in the Republic of Belarus, unless directly indicated otherwise. This guide is not legal advice, as each case is individual and must be considered by a specialist. All court practice mentioned is available either at the website of the Supreme Court of the Republic of Belarus or through the legal information systems.

At the date of the present guide preparation, the Belarusian basic unit amounts to 29 BYN. Official currency exchange rates are available at the official website of the National Bank of the Republic of Belarus.

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ABBREVIATIONS

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
European Convention	Convention on International Commercial Arbitration of 1961 (Geneva, 21 April 1961)
CC	Civil Code of the Republic of Belarus (7 December 1998)
CCP	Code of Civil Procedure of the Republic of Belarus (11 January 1999)
CEP	Code of Economic Procedure of the Republic of Belarus (15 December 1998)
Law on IAC	Law of the Republic of Belarus dated 09.07.1999 No. 279-3 “On international arbitration courts”
Law on arbitration courts	Law of the Republic of Belarus dated July 18, 2011 No. 301-3 “On arbitration courts”
Law on commodity market	Law of the Republic of Belarus dated 05.01.2009 No. 10-3 “On commodity exchanges”
Rules of the BelCCI at the IAC	Regulation of the Belarusian Chamber of Commerce & Industry dated March 17, 2011 “Rules of the International Arbitration Court at the BelCCI”
UNCITRAL Model Law	Model law of the UN Commission on International Trade Law “On International Commercial Arbitration” (New York, 21 June 1985)
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules (2013 ed.)
Law on HTP	Hi-Tech Park Regulation approved by Presidential Decree No. 8 dated 21.12.2017 “On developing digital economy”
Arbitral tribunal	Composition of the International Arbitration Court
IAC at the BelCCI	International Arbitration Court at the BelCCI
SEC	Supreme Economic Court of the Republic of Belarus
SC	Supreme Court of the Republic of Belarus
SCC	Arbitration institution at the Stockholm Chamber of Commerce
VIAC	Vienna International Arbitration Centre
ICAC at the CCI	International commercial arbitration court at the Chamber of Commerce and Industry
JCED	Judicial Chamber on Economic disputes of Supreme Court

I. LEGISLATION IN THE SPHERE OF INTERNATIONAL COMMERCIAL ARBITRATION

Legislation of the Republic of Belarus acknowledges arbitration as a dispute resolution technique and involves the following main components.

1.1. International law

The Republic of Belarus acknowledges the priority of generally accepted principles of international law and procures the compliance of Belarusian legislation with them[1]. Moreover, in the sphere of international commercial arbitration, an international agreement will have priority over the provisions of the Law on IAC[2].

The Republic of Belarus is a participant of the New York Convention, of the European Convention, and of a number of bilateral agreements containing special provisions applying to international commercial arbitration.

The New York Convention stipulates, *inter alia:*

- the obligation to recognize and enforce foreign arbitral awards;
- a definition of an arbitration agreement, and requirements to its form and contents;
- grounds for denying recognition and enforcement of arbitral awards.

By December 2020, the New York Convention had 166 member states, including the Republic of Belarus, which allows seamless recognition and enforcement of arbitral awards in Belarus.

The European Convention regulates such issues as:

- definition of an arbitration agreement;
- foreigner's right to be arbitrators;
- competence of arbitral tribunals and arbitration mechanisms despite any wording defects in the arbitration agreement or other problems hindering proper adjudication (appointment of arbitrators);
- challenge of arbitrators and jurisdiction of state courts;
- applicable law to the merits;
- grounds for recognition and enforcement of arbitral awards.

The Republic of Belarus does not have international agreements or protocols stipulating any restrictions in terms of application of the European Convention.

Some bilateral agreements stipulate special regulations with respect to arbitration proceedings. For instance, art. 21 and art. 22 of the agreement between the Republic of Belarus and the Republic of Turkey on legal aid in civil, commercial and criminal cases executed in Ankara on March 13, 2012 stipulates special procedures and grounds for denying recognition and enforcement of arbitral awards.

[1] art. 8 of the Constitution of the Republic of Belarus

[2] art. 5 of the Law on IAC

1.2. National law

<table>
<tr><td>Law on IAC</td><td>Where a dispute is adjudicated via arbitration in the territory of the Republic of Belarus, the Law on IAC is applied as a lex arbitri. The Law on IAC is based on the UNCITRAL Model Law in the original wording with minor alterations. It is used by a permanent international arbitration court formed pursuant to section 2 of the Law on IAC, as well as by international arbitration courts, to adjudicate concrete disputes located in the territory of the Republic of Belarus (ad hoc proceedings).
The Law on IAC regulates:
• definition, operating principles, creation/liquidation procedures for a permanent international arbitration court;
• definition, contents and form of arbitration agreements, as well as invalidity conditions;
• formation of an arbitral tribunal, disqualification of arbitrators and participants of arbitration proceedings (experts, translators);
• main provisions on arbitration procedures;
• rendering of arbitration awards and allocation of charges;
• grounds to annul an arbitral award.</td></tr>
<tr><td>Law on arbitration courts</td><td>This law is used by arbitration courts and does not apply to international commercial arbitration.
Arbitration courts consider general civil and commercial disputes, including disputes with non-residents.
The Law regulates such issues as:
• definition, operating principles, creation/liquidation procedures for a permanent arbitration court;
• definition, contents and form of arbitration agreements, as well as invalidity conditions;
• formation of a arbitration tribunal, arbitration procedures;
• rendering of awards and allocation of costs;
• grounds to annul a arbitration court award.</td></tr>
<tr><td>Law on commodity market</td><td>This law is used for dispute resolution proceedings by the Arbitration Committee of Belarusian Commodity Exchange and does not apply to international commercial arbitration.
The Law on commodity market itself only stipulates adjudication by an arbitral committee and refers to the CEP with respect to appeals and execution of arbitration awards.
Dispute resolution procedures are regulated by arbitration committee rules.</td></tr>
<tr><td>CC</td><td>A source of substantive law that may be applied both to civil contracts and/or arbitration agreements, and regulates, inter alia:
• legal capacity and competency of persons;
• invalidity conditions, execution/amendment/termination procedures with respect to arbitration agreements;
• requirements to for of the contract (arbitration agreements);
• rules of interpretation of agreements (arbitration agreements).</td></tr>
<tr><td>CEP</td><td>It's a general rule, procedural legislation is not applied to international commercial arbitration (inter alia, by analogy).
At some time, the CEP regulates the following issues:
• application of principles of commercial procedural legislation, which do not contradict with operating principles of an international arbitration court;
• state court procedures with respect to claims out of contracts containing an arbitration clause;
• taking interim measures in cases considered in an international arbitration court;
• recognition and enforcement with respect to foreign arbitration awards and issuance of enforcement documents based on arbitration awards;
• appeal against arbitral awards.</td></tr>
</table>

1.3. Arbitration and court practice

	Substantive law issues
Resolution of SEC Plenum dated 16.12.1999 No. 16	Includes regulation of procedures of CC application with respect to execution/amendment/termination of contracts and arbitration agreements.
	Procedural issues
Resolution of SEC Plenum dated 27.05.2011 No. 6	Enshrines general rules for leaving a claim without an action in case a dispute is submitted to an international arbitration court pursuant to an arbitration agreement.
Resolution of SC Plenum dated 23.12.2014 No. 18	Regulates how courts apply the norms of international law, including the New York Convention with respect to recognition and enforcement of arbitral awards.
Resolution of SEC Plenum dated 23.12.2005 No. 34	Establishes rules of jurisdiction of economic courts, as well as of arbitration courts in case of substitution of persons in an obligation (cession of right and transfer of debt). Moreover, it regulates some issues with respect to parties involved in an arbitration agreement and correlation of competences of state courts and arbitration courts.
Resolution of SEC Plenum dated 31.10.2011 No. 21	Section 3 of this Resolution dwells on the definition of arbitration agreement and respective procedures and forms. Please also note para. 14 of this Resolution, which defines estimation rules with respect to validity of arbitration agreements, including, inter alia, with respect to its enforceability (i.e., whether respective arbitration authority has been clearly defined).
Resolution of SEC Presidium dated 26.06.2013 No. 25	Prescribes methodical guidelines with respect to adjudication of cases involving foreign persons, in particular, prescribes guidelines on the procedures used to evaluate validity of arbitration agreements.

Resolutions of SEC Plenum are normative legal acts. However, the existing arbitration decisions and awards *per se*, as separate judgments in concrete cases, are not a normative source of law. However, while applying norms of substantive law, including the legislation of the Republic of Belarus, the arbitral tribunal also consider the existing court practice, in accordance with para. 4 art. 38 of the Rules of the IAC at the BelCCI.

II. ARBITRATION INSTITUTIONS AND AD HOC ARBITRATION

2.1. Arbitration institutions and ad hoc arbitration

In the Republic of Belarus, arbitration proceedings may be held either by way of institutional arbitration, or by way of an arbitration proceeding with respect to a particular dispute (*ad hoc* proceeding).

Institutional arbitration (official term – permanent international arbitration court) – is a type of arbitration, carried out by arbitration institutions, a non-state, non-commercial organisations aiming at streamlining external economic links.

The arbitration institution is easy to understand and apply in practice, as it has a permanent staff and an administrative office supporting arbitration proceedings. Arbitration institution uses specially designed rules establishing dispute resolution procedures and mechanisms to calculate arbitration costs.

At present, two arbitration institutions are registered in the Republic of Belarus:

- IAC at the BelCCI;
- Chamber of Arbitrators under the Belarusian Republican Union of Lawyers.

The IAC at the BelCCI, established in 1994, is the most active arbitration institution in the territory of the Republic of Belarus. The list of recommended arbitrators is available at its official website (www.iac.by).

The IAC at the BelCCI uses the uniform Rules of the IAC at the BelCCI. It is applied to resolve any economic disputes, regardless of parties involved. Also, the IAC at the BelCCI uses the Conciliation Rules.

The IAC at the BelCCI considers both domestic and external economic disputes, regardless of participants' status (legal entities, individual entrepreneurs, or individuals). Domestic disputes between residents of the Republic of Belarus are adjudicated via a special simplified procedure.

At average, the IAC at the BelCCI considers 80 to 100 cases per year.

Alongside with the IAC at the BelCCI, there is another arbitration institution: the international arbitration court "Chamber of Arbitrators under the Belarusian republican union of lawyers". Detailed information is available on the websites of the Chamber of Arbitrators the Belarusian republican union of lawyers. Just like the IAC at the BelCCI, the Chamber of Arbitrators under the Belarusian republican union of lawyers also has uniform rules to resolve any economic disputes.

The Chamber of Arbitrators under the Belarusian republican union of lawyers does not provide statistics of its cases. However, it is known about at least two cases in 2020.

The Law on IAC does not provide possibility of establishing branches of foreign arbitration institutions.

Ad hoc arbitration (official term – international arbitration court to consider a particular dispute) – is an arbitration procedure arranged by parties independently, outside an existing arbitration institution. Accordingly, only parties to the dispute are responsible for the constitution of arbitral tribunal. The arbitration court itself is a panel of arbitrators formed for the purpose of adjudicating a particular dispute and dissolved after rendering the award.

The Belarusian legislation allows considering disputes via *ad hoc* arbitration, without registration or another formality for the constitution of arbitral tribunal. However, in practice such procedures are quite rare. Normally, ad hoc arbitration procedures are used to resolve major disputes, for the purpose of cost-saving and higher confidentiality.

Pursuant to sub par. 2 para. 1 art. 13 of the Law of the Republic of Belarus "On investments" (hereinafter – the "Investment Law"), a foreign investor may choose an *ad hoc* arbitration procedure pursuant to UNCITRAL Arbitration Rules, in order to settle a dispute with the Republic of Belarus.

Ad hoc arbitration's prime advantage is that it is flexible and allows choosing adjudication procedure independently, even with regard to particular circumstances. For instance, the parties involved may choose an expedited procedure to adjudicate within few days – which is quite convenient for spheres often facing minor disputes: in the construction industry or in

case of holding a major public event. This type of procedure also improves the confidentiality level, as only the parties involved and the arbitral tribunal participate.

Amounts of arbitration fees are defined by parties involved, in agreement with arbitrators, which allows cost saving, as compared with the institutional arbitration normally offering calculation of arbitration fees based on amount claimed or hourly rates.

On the other hand, these very advantages of the *ad hoc* arbitration imply its defects. The flexibility of the *ad hoc* procedure requires a quite detailed description of an arbitration proceeding, as well as a high level of fairness of both parties. An *ad hoc* arbitration allows parties to delay adjudication, and sometimes even to make it impossible. As there is no dedicated administrative body, parties have to arrange technical matters themselves (forward documents, supervise proper delivery, choose hearings venue, etc.). Some of these problems are tackled by the Law on IAC: for instance, the chairman of the BelCCI may appoint, for the purpose of an *ad hoc* arbitration, an arbitrator on behalf of a party deliberately delaying the term of appointment. Moreover, parties may agree to apply an existing ad hoc arbitration standard, for instance, the UNCITRAL Arbitration Rules.

2.2. Special types

Arbitration courts

Arbitration courts are basically regulated by the Arbitration Courts Law and the Rules of permanent arbitration court. January 2021 saw the introduction of amendments into the Arbitration Courts Law.

An arbitration court may adjudicate any disputes related to arbitration agreements, except[3]:

- disputes immediately affecting rights and legitimate interests of third parties not being parties to an arbitration agreement;
- other disputes not falling under the competence of a arbitration proceeding pursuant to legislation (for instance, pertaining to administrative and other public relations, including customs and tax disputes; appealing against a state body's acts).

There are 35 permanent arbitration courts in the Republic of Belarus, including 3 established by educational institutions, 1 established by a public lawyers' association, 3 established by natural persons, and 1 established jointly by an educational institution and a public lawyers' association.

State registers of arbitrators and permanent arbitration courts are available on the official website of the Ministry of Justice of the Republic of Belarus.

There are no consolidated statistical data on the number of disputes adjudicated by arbitration courts. REVERA's experience of interacting with arbitration courts and available information shows that many arbitration courts are actually inactive or only adjudicate single disputes rarely. According to REVERA's estimates, annual number of cases adjudicated in all arbitration courts is about 20 to 30.

Arbitration Commission

The Arbitration Commission of Belarusian Commodity Exchange adjudicates disputes between participants of exchange transactions (including external economic transactions). The Arbitration Commission's official website offers answers to specific questions, according to its practice.

The Arbitration Commission is regulated by the Law on commodity market and the Arbitration Commission's Rules, duly approved by the SC. The Law on IAC does not apply to the Arbitration Commission. Arbitration commission's adjudication procedures bear resemblance to the traditional arbitration procedures, and also have some peculiarities natural for state courts.

Specific peculiarities of Arbitration Commission's procedures:

- tribunal (composition of court) is formed by the chairman of the Arbitration commission, and the parties involved are not entitled to appoint their own arbitrators (therefore, the Arbitration Commission's website does not recommend a list of arbitrators normally found on other arbitration institutions' websites);
- as a rule, disputes are adjudicated by a sole arbitrator, while examination by several arbitrators may be held by Arbitration Commission's chairman's decision, and the parties are not entitled to stipulate collegial consideration in an arbitration agreement;

as a rule, hearings are held at the location of the Arbitration commission (the city of Minsk) – another venue may be proposed, but it cannot be agreed upon by parties (as in an arbitration proceeding).

[3] art. 10 and 19 of the Law on arbitration courts

Arbitration committee's fees	
Amount of claim	Fee rate
up to 100 basic units (2,900 BYN)	5%, but at least 3 basic units (87 BYN)
100 to 500 basic units (2,900 – 14,500 BYN)	4 %, but at least 5 basic units (145 BYN)
500 to 1,000 basic units (14,500 – 29,000 BYN)	3 %
1,000 to 10,000 (29,000 – 290,000 BYN)	2 %
over 10,000 basic units (over 290,000 BYN)	1 %

2.3. Principal distinctions between international arbitration proceedings and ordinary arbitration

There is no distinct delineation of competences of international and ordinary arbitration courts. Ordinary arbitration courts may adjudicate civil disputes, both of economic and non-economic nature, including disputes involving a foreign person. Due to this, competences of international arbitration and ordinary arbitration courts overlap in terms of economic disputes, and foreign entities are often confused.

Ordinary arbitration courts, unlike international arbitration courts, may adjudicate disputes of non-economic nature, for instance, disputes between individuals arising from loan agreements or sale of private goods. The existing legislation does not define clearly, whether labour disputes may be adjudicated by arbitration courts[4].

Ordinary arbitration proceedings have a number of peculiarities, as compared to international arbitration proceeding.

1. Persons involved in an arbitration agreement	The Law on arbitration courts defines a clear list of persons that may not be parties to an arbitral agreement, for instance, state bodies; founder, spouse and relatives of an arbitral court or a legal entity under auspices of which the arbitration court has been established. The Law on IAC does not provide for such a list of persons directly. However, we believe that an arbitral award in a dispute with the founder of the arbitration court will not be enforceable.
2. Number of arbitrators	The Law on arbitration courts prescribes that the number of arbitrators must be odd. The Law on IAC has not such requirement. The Rules of the IAC at the BelCCI only permits one or three arbitrators to adjudicate.
3. Grounds for invalidity of arbitration agreement	The Law on arbitration courts stipulates that a arbitration agreement is invalid where any requirements as to its form, parties involved or content have not been met[5]. The Law on IAC does not directly prescribe such a provision, however any violations of form, parties involved or content may also be regarded as grounds for the invalidity of the arbitration agreement.
4. Power of attorney enter into arbitration agreement	The Law on arbitration courts stipulates that powers of party's representative to conclude an arbitration agreement must be distinctly specified in a proxy. The Law on IAC has no such requirement. In practice, it suffices for a representative to have powers of authority to conclude the principal agreement containing the arbitration clause.
5. Requirements to arbitrators	The Law on arbitration courts specifies a number of additional requirements to arbitrators, including: • a sole arbitrator judge or a chairman (where there is a panel of arbitrators) must have a university degree in Law and a period of service in legal profession of at least three years; • there is a dedicated register of arbitrators maintained by the Ministry of Justice of the Republic of Belarus. The Law on IAC only stipulates that legally capable natural persons may be appointed as arbitrators. There is no dedicated register of arbitrators, and there are no special requirements to education degree or period of service in legal profession.

[4] Skobelev V.P. "On the jurisdiction of arbitration courts in individual labour disputes"

[5] art. 9-11 of the Law on arbitration courts

6. Requirements to procedural documents	The Law on arbitration courts specifies requirements to the contents of statements of claim and statements of defense. The Law on IAC does not regulate this issue, referring us to arbitration rules. The Rules of the IAC at the BelCCI specifies requirements to the contents of statements of claim and statements of defense.
7. Grounds for appealing against award of arbitration courts	The Law on arbitration courts provides additional grounds to invalidate awards of arbitration courts, provided they pertain to the merits of dispute, where: • any essential circumstances have been revealed, that had not been known and could not have been known to a party; • an effective court verdict has declared that any evidence is forged or any witnesses statement is false. The Law on IAC does not contain such grounds to invalidate an arbitration award.
8. Term to adjudicate a case on merits	Term of an arbitration proceeding is limited and shall not exceed 3 months from the date of initiation of arbitral proceeding, unless a term of up to 12 months provided by arbitration agreement. The Law on IAC does not stipulate any restrictions as to term of adjudication: the issue is regulated at the level of arbitration rules.
5. Requirements to arbitrators	The Law on arbitration courts stipulates that arbitration courts do not adjudicate disputes directly affecting rights and legitimate interests of third persons not being parties to arbitration agreement. The amendments in force from January 2021 amendments allow third parties to participate in a arbitration proceeding provided all parties involved (including such third party) consent thereto. The Law on IAC does not regulate involvement and status of third parties.

All decisions on merits of the Arbitration Commission and of arbitration courts are arbitral awards according to the New York Convention, and shall be recognized and enforced according to the standard procedure.

III. ARBITRATION AGREEMENT

The Law on IAC stipulates that an arbitration agreement is an agreement on the submission to an international arbitration court of all or particular disputes between the parties that might arise from legal relations between the parties.

Foreign arbitration institutions (for instance, SCC, VIAC, ICAC under the Russian CCI, etc.) may not consider the disputes between subjects of the Republic of Belarus. The only exception is disputes arising from shareholder agreements on the exercise of rights of shareholders of limited liability (additional liability) companies between participants of Hi-Tech Park residents[6].

Where an arbitration agreement is independent from the main contract, it is recommended to specify the following basic components:

1. scope of the disputes (that have already arisen or may arise in future) to be submitted to arbitration;

2. correct name of an arbitration institution of a competent body responsible for the appointment of arbitrators or the administration of arbitration proceeding;

3. applicable rules (rules of chosen arbitration institution; other rules);

4. applicable law;

5. the seat of arbitration;

6. the number of arbitrators;

7. the language of arbitration proceeding.

3.1. Form of arbitration agreement

Under art. 11 of the Law on IAC, an arbitration agreement must be concluded in writing either as an arbitration clause (a standalone provision of a civil agreement) or as an independent agreement.

Corresponding to art. 7 of the UNCITRAL Model Law and art. II of the New York Convention, art. 11 of the Law on IAC provides that the arbitration agreement is concluded:

1. where it is contained in the document duly signed by the parties, or

2. where it is concluded by way of exchanging messages via mail or any other communication facility ensuring written record of parties' intentions, or

3. where it has been concluded by way of forwarding a statement of claim and a statement of defence, in which, accordingly, one party proposes to resolve the case in an international arbitration court, and the other party does not object, or

4. where it has been concluded by way of giving a reference (in the agreement) to a document containing an arbitration clause, provided the contract itself has been concluded in writing, and such reference stipulates that respective arbitration clause shall be an integral part of the contract.

Such wording of the Law on IAC is more "*strict*" than the wording of art. 161 and 404 of CC and art. 21 of the Law on HTP in regard to the written form of an agreement. Moreover, such provisions of the Law on IAC with respect to the electronic form of arbitration agreements (including electronic messages in messenger services, via Internet websites, etc.) do not comply with international standards, including art. 7 (option 1) of the UNCITRAL Model Law. Due to this, at the law enforcement practice, courts should broadly interpret the norms of Law on IAC and consider the arbitration agreements in electronic form as duly concluded.

Where there is no proof confirming that the arbitration agreement has been concluded in writing, pursuant to art. 11 of Law on IAC, the tribunal may refuse to consider the dispute, if respondent objected to the competence of the arbitral tribunal[7].

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[6] art. 22 of the Law on HTP

[7] *Award of the IAC at the BelCCI dated 16.11.2005 (case No. 530/45-05)*

Art. 22 of the IAC Law provides the principle of the autonomy of arbitration agreements under which if the substantive contract is void, the arbitration agreement will not be declared void[8].

3.2. Scope of arbitration agreement

Parties to an arbitration agreement shall decide which particular disputes will be examined in the manner stipulated by arbitration agreement, i.e. define the scope of the arbitration agreement.

It is appropriate to divide the arbitration agreements, according to their scope, into general agreements (encompassing all disputes arising from respective relations) and specific agreements (encompassing specific disputes between parties arising from certain relations).

As a general rule, the arbitration agreements contain such formulations as:

- *"any dispute arising from or in relation to the present agreement"*
- *"all disputes arising from or in connection with the present agreement".*

In some cases, parties use so-called "narrow" clauses (for instance, "*disputes, arising from the agreement*"), that is without such wording as "*disputes relating to the agreement*" or "*disputes in connection with the agreement*". As a result, there is a high likelihood that an arbitral tribunal will not declare the existence of the competence to resolve certain types of disputes[9], including non-contractual disputes.

When defining the scope of disputes subject to arbitration with such wording as "*disputes shall be examined at…"* without further explanation such as *"arising from the agreement*" or "*in connection with the agreement*", there may a situation where the arbitral tribunal will consider them as embracing only "contractual disputes", which may cause the above-mentioned risk[10].

To minimise the risks connected with the absence of arbitral tribunal's competence, it is commonly recommended to use only model arbitration agreements (clauses). They are provided by most arbitration institutions at their websites. For instance, the IAC at the BelCCI model arbitration agreement is available at official website. It is noted that the alterations or amendments of the arbitration agreement should be made under the advice of lawyers practicing in the sphere of commercial arbitration, with the proper analysis of applicable law and factual circumstances.

3.3. Arbitrability

Arbitrability of disputes indicates whether a certain category of disputes may be subject to arbitration or they may be referred exclusively to the state courts. Basically, it is a restriction for arbitration of certain types of disputes.

The following disputes *are* subject to arbitration:

- civil disputes arising from the international economic relations;
- other disputes of economic nature, provided that parties agreed to submit the dispute to international arbitration court.

The following disputes *may not* subject to arbitration:

- non-economic disputes;
- disputes of public nature, including family disputes, tax dis-

[8] *Award of the IAC at the BelCCI dated 21.02.2013 (case No. 1187/35-12)*

Arbitration clause is not subject to other terms of agreement, does not depend on them, and is not derivative. It is an autonomous component of a contract, not being dependent upon other terms of the contract.

[9] *Judgement of the JCED dated 02.09.2014 (case No. 158-7/2014/538A/804K)*

Arbitration agreement: *"any disputes connected with the execution, alteration, amendment, improvement or abrogation of this Agreement during the period of its validity shall be resolved by the parties by way of negotiations. Where the parties fail to settle a dispute amicably, such dispute shall be resolved … pursuant to the applicable Rules of the IAC at the BelCCI…".*

The JCED decided that the content of this arbitration agreement indicates that the parties have agreed to refer any disputes arising out of parties' contractual relations to an arbitration court. However, any disputes connected with the validity of the agreement were not stipulated in the agreement.

Award of the IAC at the BelCCI dated 21.01.2010 (case No. 852/57-09)

The tribunal decided that the arbitration agreement *"any disputes arising from, or relating to, this agreement shall be examined by the International Arbitration Court under the Belarusian Chamber of Commerce and Industry according to its Rules"* allows to resolve a dispute seeking to recover a sum of unjust enrichment in arbitration.

Judgement of the JCED dated 03.10.2017 (case No. 2-2Их/2017/1285K)

Arbitration agreement *"any disputes and/or contradictions between the parties that cannot be settled by way of negotiations and/or consultations shall be submitted for examination to an authority at the respondent's location".*

Consideration of the counter-claim was not covered by this arbitration agreement, as its terms did not stipulate the consideration of the counter-claim by the mentioned court.

[10] Award of the IAC at the BelCCI dated 05.07.2012 (case No. 1055/42-11)

With respect to the scope of disputes encompassed by the arbitration agreement, the tribunal stated that the arbitration clause contained in the substantive agreement applies to procedures of any disputes between the parties which are connected with the contract.

putes, disputes involving procurements, antitrust disputes, disputes with respect to intellectual property, involving a government authority as a party, etc.;
- bankruptcy disputes [11].

The following disputes *can be* subject to arbitration:

Investment disputes

The disputes between parties of agreements on investment activity can be subject to arbitration where such dispute is encompassed by the scope of respective arbitration agreement[12].

At the same time, such investment disputes that have public nature (for instance, appeal of a decision of an authority that concluded an investment agreement; appeal of the rulings of customs or tax authorities with respect to additional charge of tax or fees) cannot be subject to arbitration.

Along with this, an investor is entitled to, for instance, appeal in an arbitration court against a unilateral refusal of the Republic of Belarus to execute an investment agreement expressed by a decision of a government authority, as *"expressing of executive committee's unilateral refusal to perform the obligations under the agreement (by way of decree) does not change the nature of respondent's actions that are subject to the scope of the arbitration clause […]"* [13].

Corporate disputes

Resolution of corporate disputes via international arbitration is not directly stipulated by the legislation of the Republic of Belarus.

Pursuant to art. 47 of CEP, special jurisdiction of economic courts applies to disputes involving conditions of foundation of legal entities. Special jurisdiction implies the difference between resolving disputes in state courts and arbitration, in particular, between economic courts and international arbitration courts (art. 1 CEP). Accordingly, the arbitrability of corporate disputes in Belarus still remains to be under the question.

Arbitration of corporate disputes is quite rare in the Republic of Belarus, and they mostly occurred before 2002[14], that is when the CEP was not using the term of "special jurisdiction'.

At the same time, in some cases an arbitration court may considered some categories of corporate disputes. Thus, in a dispute arising from an agreement on the exercise of rights of shareholders of a commercial company (corporate agreement) HTP resident are entitled to agree upon an arbitration as mechanism of dispute resolution[15]. Other corporate contractual disputes may be adjudicated by way of arbitration, for instance, pertaining to agreements on the incorporation of commercial companies.

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[11] art. 23 of the Bankruptcy Law

[12] ***Award of the IAC at the BelCCI dated 19.06.2012 (case No. 1076/63-11)***

Tribunal of the IAC at the BelCCI confirmed its competence to resolve the dispute involving a default in performance of obligations under an agreement on investment activity.

[13] ***Award of the IAC at the BelCCI dated 03.03.2014 (case No. 1217/65-12)***

The investment agreement contained the following arbitration agreement: *"all disputes, disagreements or claims arising from the investment agreement shall be resolved in compliance with applicable legislative acts of the Republic of Belarus in the IAC at the BelCCI (Minsk), according to its Rules"*.

Arbitral tribunal of IAC at the BelCCI confirmed that it had competence to consider the investor's claims seeking to invalidate the executive committee's unilateral refusal to perform the obligation under the investment agreement that was expressed by a decision of a governmental authority. The tribunal considered the case on merits and refused to claim.

[14] ***Award of the IAC at the BelCCI dated 12.11.1996 (case No. 60/49-96)***

The foundation of entity agreement contained the arbitration agreement: *"any disputes or disagreements arising from this agreement, unless resolved by JV's supreme body, shall be examined by the Arbitration Court under the CCI of the Republic of Belarus, Minsk, in accordance with its Rules"*.

Arbitral tribunal of IAC at the BelCCI stated that the claim based on the default of respondents to perform obligations under foundation agreement (acting as co-founders/shareholders) falls within the scope of the arbitration agreement.

Award of the IAC at the BelCCI dated 16.12.2002 (case No. 333/28-02)

The foundation of entity agreement contained the arbitration agreement: *"Where any dispute arising from co-founder status cannot be resolved by the General Meeting of Shareholders, a shareholder may submit a claim to the International arbitration court under the Chamber of Commerce and Industry of the Republic of Belarus»*.

With account of the arbitration agreement, arbitral tribunal of IAC at the BelCCI concluded that the claim seeking to collect the cost of claimant's (which was an individual) share in the statutory fund of the limited liability company (respondent) falls within the competence of IAC at the BelCCI.

Award of the IAC at the BelCCI dated 06.05.1998 (case No. 117/43-97)

The arbitral tribunal of IAC at the BelCCI concluded that disputes arising from a foundation of entity agreement may be resolved by the IAC at the BelCCI. In this case, the arbitration agreement was concluded by way of parties' implicit conduct. The claimant submitted a claim, and the respondent did not object. On the contrary, the respondent participated in the dispute and agreed with the claim.

[15] art. 22 of the Law on HTP

We also believe that corporate disputes may be subject to arbitration where there are relations involving a foreign person, as far as in such a case the special jurisdiction of economic courts will be established by art. 236 of CEP that stipulates a narrower restriction with respect to corporate disputes, as compared with art. 47 of CEP.

Therewith, regardless of the persons involved, the disputes involving appeal of acts or decrees (for instance, of decisions of shareholders) and involving appeal of rulings of government authority (for instance, involving refusal to register a legal entity) are not arbitrable, i.e. may not be considered in arbitration.

Disputes in the sphere of intellectual property

Legislation of the Republic of Belarus does not prohibit directly resolution of disputes in the sphere of intellectual property by way of arbitration.

Pursuant to art. 45 of CCP, the Supreme Court of the Republic of Belarus resolves at first instance the disputes arising from relations connected with the creation, legal protection and use of intellectual property objects.

However, in contrast to corporate disputes, CCP does not define the disputes in the sphere of intellectual property as falling within the jurisdiction of state courts, therefore they may be resolved via arbitration[16]. In arbitration may be resolved contractual disputes, including, those seeking to collect debt under software development agreements and those arising from licensing agreements.

However, in arbitration may not be resolved disputes that have public nature (for instance, disputes appealing against decisions of the Appeal board of the National intellectual property centre or disputes connected with the registration or termination of legal protection of a trademark).

3.4. Interpretation of arbitration agreement

As arbitration agreement is a type of contract, its content shall be analysed with account of the general principles set forth by the civil law. Art. 401 of CC establishes the following means of interpretation:

- where interpreting the terms of contract, the literal meaning of words and expressions is considered[17];
- in case of ambiguity – the literal meaning of the terms of agreement shall be established by way of comparing with other terms and the sense of the contract as a whole;
- where rules of literal interpretation do not allow to establish the contents of the contract, the actual common intentions of parties shall be considered, with regard to the purpose of the contract and all factual circumstances, including the negotiations, correspondence and common practice between the parties, as well as subsequent actions of parties[18].

The Republic of Belarus has formed the following practice of interpretation of certain types and wordings of arbitration agreements.

Arbitration agreement with an unclear specification of arbitration institution

In practice, there are many arbitration agreements having wording inaccuracies, in particular:

- *"All disputes that may arise from this Contract shall be resolved by the International Arbitration Court under the Belarusian Chamber of Commerce & Industry of Minsk"* [19];
- *"Any disputes, disagreements or claims arising from this Contract or in relation thereto, as well as those involving any violation, abrogation or performance, shall be resolved by way of arbitration in an international commercial arbitration court in Belarus"* [20];

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[16] ***Award of the IAC at the BelCCI dated 22.10.2009 (case No. 786/67-08)***

Arbitration agreement contained in the licensing agreement: *"any disputes or disagreements between the parties that might arise from, or in relation to, this agreement … shall be resolved by the IAC at the BelCCI in accordance with the Rules of the Arbitration Court…".*

The arbitral tribunal' competence was confirmed with respect to the dispute in regard to collect a debt due to improper execution of obligations under the licensing agreement.

Award of the IAC at the BelCCI dated 10.05.2011 (case No. 958/64-10)

Under parties' consent, arbitral tribunal' competence was confirmed with respect to the dispute arising from the claim of a contractor seeking to collect debt in amount of costs of works (design of documentation), including author's remuneration.

[17] ***Judgement of the JCED dated 18.12.2014 (case No. 1-12Mx/2014/1199K)***

Arbitration agreement: *"any disputes, disagreements or claims arising from this Contract or in connection with it, in particular those involving any violation, termination or validity, shall be resolved by the parties by way of negotiations, and where an agreement cannot be reached, they shall be resolved by the IAC at the BelCCI (city of Minsk) in accordance with its Rules. Decisions of the IAC at the BelCCI shall be final and binding upon the parties".*

The literal interpretation of this arbitration agreement indicates that, when concluding the arbitration agreement the parties assumed IAC at the BelCCI's competence with respect to any disputes arising from or in connection with the Contract.

[18] ***Judgement of the SEC Presidium dated 31.01.2006 No. 12***

The absence in contract of a distinct designation of an arbitration institution only means that the court has to interpret the arbitration agreement in order to reveal parties' common intentions.

[19] ***Award of the IAC at the BelCCI dated 02.04.2013 (case No. 1106/93-11); Award of the IAC at the BelCCI dated 12.11.1996 (case No. 60/49-96)***

[20] ***Award of the IAC at the BelCCI dated 01.07.2010 (case No. 907/13-10)***

- *"Where there is a default to perform obligations, disputes shall be submitted for resolution to the permanent international arbitration court – "the Arbitration Court under the CCI of the Republic of Belarus"* [21]*;*
- *"Where the parties fail to reach an agreement, the dispute shall be considered by the Arbitration Court in Minsk pursuant to its rules"* [22].

With respect to abovementioned clauses, the competence of the IAC at the BelCCI was established. When interpreting them, tribunal took into account that IAC at the BelCCI:

- is the sole arbitration institution at the BelCCI, accordingly, the parties could not have intend to choose another arbitration institution;
- is one of the two existing arbitration institutions in the Republic of Belarus, and the title of the other arbitration institution (the Chamber of Arbitrators) is quite different, which excludes any error[23].

By virtue of art. 14 of Resolution of SEC Plenum No. 21 dated 31.10.2011, courts of the Republic of Belarus shall consider the enforceability of an arbitration agreement, in particular, to assess whether arbitration institution is defined clearly.

There are some examples of interpretation of unclear titles of foreign arbitration institution:

- *"where the parties cannot settle a disagreement without engaging a third party, such dispute shall be resolved by the international Arbitration Court in Stockholm, Sweden, and such case will be heard pursuant to the requirements of the court"* – SEC established that the arbitration institution of SCC was a competent arbitration institution in this case[24];
- *"All unsettled disputes connected with the present contract shall be resolved by the Centre Arbitration of the Federal Economic Chamber, Vienna, by one or more arbitrators, pursuant to its Rules of Arbitration and Conciliation"* – the court established that the arbitration agreement is void due to the fact that it did not clearly indicate arbitration institution[25];
- Disputes shall be resolved by *"…an arbitration court according at claimant's location…»* – the JCED refused to recognise and enforce the arbitral award rendered by an arbitrator of Kazakhstan International Arbitration Court in the territory of the Republic of Kazakhstan[26].

Pathological arbitration agreements

Pathological arbitration agreements contain ambiguity, contradictions, double meanings, or otherwise incorrectly worded terms that enable establishing the common intentions (common will) of parties with respect to considering the disputes in arbitration. Due to this, when drafting an arbitration agreement, one should avoid even the slightest "pathological" traits.

Here are some examples of potentially pathological arbitration agreements in the Republic of Belarus:

- Non-binding arbitration agreements. Such agreements contain such wording as *"the parties may submit disputes to arbitration"* or *"disputes may be submitted to arbitration"*; while appropriate wording is *"the parties shall (must) submit disputes to arbitration"* or *"disputes shall (must) be submitted to arbitration";*
- Contradictory arbitration agreements. Such agreements contain contradictions as to selection of arbitrators, seat of arbitration and applicable rules. For instance, *"disputes shall be resolved by way of arbitration at the International Chamber of Commerce (ICC) in the city of Paris. The place of arbitration is Minsk, IAC at the BelCCI";*
- Arbitration agreement indicating a non-existent arbitration

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[21] ***Award of the IAC at the BelCCI dated 05.09.2008 (case No. 724/05-08)***

[22] ***Award of the IAC at the BelCCI dated 04.02.2005 (case No. 453/28-04)***

[23] Please note, from 21.08.2020 in the Republic of Belarus an arbitration court with title "International independent arbitration" has been registered.

[24] ***Judgement of the SEC dated 30.01.2006 (case No. 3-3Их/2005/4K).***

SEC established that the SCC is competent to resolve this case.

[25] ***Judgement of the JCED dated 07.04.2020 in case No. 189-6/2019/64A/336K***

Based on public Internet sources, the court established that in Vienna there were two arbitration institutions located at the same address: the International central arbitration of the Federal Economic Chamber, and the Vienna International Arbitral Centre (VIAC) – on this basis, the court ruled that the arbitration institute was not defined clearly.

[26] ***Judgement of the JCED dated 15.12.2020 in case No. 5-18ux/2020/1201K***

The JCED ruled that, since in this instance the Claimant was located in the territory of the Republic of Kazakhstan, which (according to public sources) has at least 9 permanent arbitration institutions titled as "arbitration courts", the parties have not agreed explicitly on the submission of disputes to this very arbitration institution.

body, for instance, ***"disputes shall be resolved by way of arbitration at the Chamber of Commerce of the city of Brest"***[27].

One should also remember that an arbitration agreement having an unclear designation of a competent arbitration institution is not always a pathological one, as proper intentions of parties may be "restored" by way of interpreting of the arbitration agreement.

Therewith, one should take account the provisions of art. IV of the European Convention that allows to address the chairman of a chamber of commerce and industry indicated in an agreement or of a respective chamber of commerce at respondent's location, in order to define the arbitrators and competent arbitration institution, if such arbitrators or arbitration institution are not designated by the arbitration agreement. In the Republic of Belarus there are some cases, where this provision was relied upon[28].

Blank arbitration agreements

Blank arbitration agreements only contain a brief reference to arbitration as a means of dispute resolution. For instance: *"disputes shall be resolved by way of arbitration"* or *"all disputes – in arbitration"*. In the Republic of Belarus, courts evaluate such phrases in arbitration agreements through the issue of their enforceability, which shall be made in each particular case with respect to applicable interpretation rules. However, it is highly probable that such an arbitration agreement will be considered as unenforceable.

In such case, it is recommended to use the mechanism stipulated by art. IV of the European Convention, where applicable.

Multi-tiered (multi-stage) arbitration agreements

Multi-tiered arbitration agreements include provisions on settling disputes by way of arbitration along with other alternative means of dispute resolution (negotiations, mediation, expert determination, etc.).

Under art. 10 of CC, the mandatory pre-trial procedure is required before referring to the state court. In regard to arbitration this norm may be considered as applicable in terms of the general civil rules of pre-trial procedure[29]. However, with regard to art. 31 of Rules of IAC at the BelCCI, application of art. 10 of CC is quite doubtful, as it may be assessed as a procedural norm of the national legislation which is not applicable to arbitration[30].

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[27] ***Judgement of the JCED dated 27.08.2019 in case No. 131-15/2019/750A/978K***

The parties reached an agreement to settle disputes in Riga Arbitration Court, but the court ruled that the parties agreed at non-existent arbitration court in the arbitration agreement.

Award of the IAC at the BelCCI dated 03.09.2002 (case No. 284/11-01):

Arbitration agreement: *"Any disputes or disagreements that may arise from the contract or in relation to it, where they cannot be settled via negotiations, shall be finally resolved by an international arbitration court"*. The court ruled that the arbitration agreement did not specify a particular arbitration institution, and therefore IAC at the BelCCI refused to consider the claim.

Award of the IAC at the BelCCI dated 21.06.2010 (case No. 866/71-09)

Arbitration agreement: *"All disputes arising in the course of performance of this Agreement (where they cannot be settled via negotiations), will be resolved by the International Arbitration Court under the Chamber of Commerce and Industry of the city of Minsk»*. Tribunal of IAC at the BelCCI decided that it was competent to resolve the dispute.

[28] ***Award of the IAC at the BelCCI dated 27.06.2013 (case No.1216/64-12)***

Chairman of BelCCI nominated IAC at the BelCCI as the arbitration institution to resolve the dispute between a Belarusian and a Polish companies.

Award of the IAC at the BelCCI dated 05.02.2003 (case No. 216/38-99).

Arbitration agreement reads: *"Should the parties fail to reach an agreement through negotiations, a dispute shall be resolved in the arbitration court of the city of Minsk"*. At the same time, the German text of the arbitration agreement indicated another arbitration court located in Paris ("…des Schied geriechtes, das in Paris Frankreich seinen Sitz hat"). The arbitral tribunal, based on art. IV of the European Convention, made a request to define an arbitration court competent to resolve the dispute between the parties, to a competent authority at respondent's location, that is (according to cl. 6 art. X of the Convention) to German arbitration committee.

Award of the IAC at the BelCCI dated 16.07.1998 (case No. 122/48-97)

Arbitration agreement: "excluding the jurisdiction of general courts, and shall be resolved via arbitration in the Republic of Belarus (Minsk)". Jurisdiction of the IAC at the BelCCI was established in accordance with the procedure stipulated by clause 6 article IV of the European Convention, and was confirmed by the tribunal.

[29] ***Award of the IAC at the BelCCI dated 02.05.2012 (case No. 1059/46-11)***

The respondent believes that, in accordance with art. 10 of CC mandatory procedure of pre-trial claims had to be complied with. The tribunal stated that such pre-arbitration dispute resolution procedure, as stipulated by the contract, was complied.

Award of the IAC at the BelCCI dated 22.12.2007 (case No. 526/41-05)

The Russian text (art. 13.3. of the Contract) indicates the International arbitration court under the Chamber of Commerce and Industry of the Republic of Belarus, and the English text indicates another institution: *"International Arbitration Tribunal under the Chamber of Commerce of Pirmasens, Germany"*. As the respondent was located in Minsk, the claimant filed a reasonable request to the Chairman of BelCCI, who appointed the IAC at the BelCCI as an arbitration institution.

[30] ***Award of the IAC at the BelCCI dated 05.01.2015 (case No. 1346/18-14)***

The arbitral tribunal stated that, under para 1 of art. 31 of the Rules of the IAC at the BelCCI, the arbitral tribunal is not bound by the norms of procedural legislation of the Republic of Belarus. Therefore, the procedural provision of para 2.2 of art. 10 of CC (prescribing mandatory pre-trial procedure before state courts) is not obligatory for the purposes of cases resolved by the IAC at the BelCCI, unless otherwise stipulated by an agreement of parties or implied by the essence of obligation.

At the same time, state courts take a position that art. 10 of CC must be applied even in arbitration, where the legislation of the Republic of Belarus is applied[31].

The current practice of IAC at the BelCCI shows that arbitral tribunals take into account whether the contract or arbitration agreement stipulates mandatory pre-arbitration stage[32]. Moreover, where an agreement stipulates pre-arbitration settlement of disputes via negotiations, tribunals take into account whether a particular time period for negotiations has been stipulated[33]: the exchange of letters is normally deemed to be enough to constitute the fact of compliance with pre-arbitration procedure.

Alternative arbitration agreements

This type of agreement provides both parties with equal rights to choose between a state court and an arbitration court. The judicial and arbitration practice, there is a position acknowledging the validity of such arbitration agreements, however only provided such agreement has been correctly drafted, in particular, it shall have an unambiguous expression of parties' intentions and the phrase *"at claimant's option (choice)"* [34] (symmetric arbitration agreement), but not of a one particular party, for instance, *"a dispute resolution means shall be chosen by the Seller*" (asymmetric arbitration

[32] *Award of the IAC at the BelCCI dated 29.12.2006 (case No. 569/04-06)*

A multi-tiered arbitration agreement: *"All disputes or disagreements that may arise from, or in connection with this Contract shall be, where possible, settled via negotiations and correspondence between the parties. Where the parties cannot achieve the consent, such case shall be submitted to the International Arbitration Court under the Belarusian Chamber of Commerce and Industry in accordance with its rules/procedures and applicable legislation of the Republic of Belarus. All court decisions shall be deemed final and binding upon the parties".* In this case, the arbitration highlighted that such wording does not provide that negotiations between the parties were a mandatory requirement for the submission of disputes to the IAC at the BelCCI.

[33] ***Award of the IAC at the BelCCI dated 05.07.2012 (case No. 1055/42-11)***

This arbitral award indicates that the negotiations process must be finished. However, in this case the tribunal was not examining whether the fact that negotiations were not finished shall be regarded as a ground to dismiss the claims, as negotiations had actually been duly held with by the parties. Due to this, respondent's statements (stating that the parties had not executed all their tools to settle the disagreement in pre-arbitration procedure) were rejected.

[34] ***Judgement of the Economic Court of Vitebsk region dated 26.05.2020 (case No. 26-8/2020)***

An alternative arbitration agreement: *"disputes shall be resolved in the Economic Court of Vitebsk region or in the International Arbitration Court under the Belarusian Chamber of Commerce and Industry (Minsk) at claimant's choice in accordance with substantive and procedural legislation of the Republic of Belarus".* The Economic Court of Vitebsk region deemed that, in such circumstances pursuant to art. 48, 52, 235, 237 of CEP and art. 9 of Resolution of SEC Plenum No. 21, the Economic Court of Vitebsk region shall have jurisdiction over the case.

Award of the IAC at the BelCCI dated 20.04.2011 (case No. 967/73-10)

An alternative arbitration agreement: *"where the parties fail to reach an agreement, such disagreement shall be resolved by a commercial court at respondent's location or by the International arbitration court under the Belarusian Chamber of Commerce and Industry, Minsk".*

Arbitral tribunal of the IAC at the BelCCI deemed that the parties agreed upon an alternative method of dispute resolution, including the possibility of either party to submit claims to the IAC at the BelCCI.

Award of the IAC at the BelCCI dated 05.08.2010 (дело N 875/80-09)

Alternative arbitration agreement: *"Any disputes or disagreements that may arise from, or in the context of, this Agreement, unless resolved via negotiations, shall be resolved at claimant's choice in accordance with the CIS Agreement "On procedures of resolution of disputes involving economic operations" dated March 20, 1992, or by the International Commercial Arbitration Court under the Chamber of Commerce and Industry, Minsk, according to its Rules and the norms of substantive law of the Republic of Belarus, or by the Arbitration Court under the Chamber of Commerce and Industry of the Russian Federation, Kyiv, according to its Rules and the norms of substantive law of Russia, at claimant's location".*

In this case, the Presidium of the IAC at the BelCCI agreed to the opinion of Chairman of IAC at the BelCCI declaring that this arbitration clause establishes a distinct criterion for the claimant to choose between the two above-mentioned permanent international arbitration courts. In case of a dispute, a party acting as claimant has the right to choose an arbitration court, without any additional coordination with respondent.

Additionally, see the opinion of judge R.A. Kolbasov, deputy chairman of the Economic Court of Minsk region: article *"Minimising risks: defining a dispute resolution procedure in a foreign trade agreement".*

agreement), complying with the principle of equality of parties[35].

Asymmetric arbitration agreements

Pursuant to an asymmetric arbitration agreement, only one party (for instance, seller) may choose a dispute resolution means, i.e. such a party has the right to refer (submit all or some disputes) to an arbitration or a state court, at its choice, while the other party is limited in resolving the disputes exclusively in the state court or in the arbitration.

In the Republic of Belarus, the arbitration and state courts have not yet established the practice with respect to the validity of asymmetric arbitration agreements, as well as to the recognition and enforcement of arbitral awards rendered on the arbitration on the basis of such agreements.

In 2003 and 2006, Minsk Economic Court considered the disputes on merits, despite the fact that respective contracts contained asymmetric agreements on dispute resolution:

- *"All controversies arising from this agreement shall be resolved by the parties in an arbitration (commercial) court at the location of Seller or Buyer, at Seller's choice"* [36];
- *"Where an agreement cannot be reached between the parties, disputes shall be resolved in an arbitration (commercial) court at the location of Seller or Buyer, at Seller's choice"*[37].

However, Minsk Economic Court did not consider the issues of the essence and quality of such asymmetrical agreements.

[35] ***Judgement of the SEC dated 12.11.2007 (case No. 463-21/07/1110K)***

Arbitration agreement: *"where a dispute cannot be resolved via negotiations, any disagreements or disputes shall be submitted for examination and final resolution to the International Commercial Arbitration court under the Chamber of Commerce and Industry of the Republic of Belarus or to the Supreme Commercial Court of the Republic of Belarus"*. The court resolved that the parties had not reached an agreement to submit disputes to an arbitration court, as the alternative clause does not clearly and definitely specify the parties' intent with respect to a competent court.

Award of the IAC at the BelCCI dated 16.02.2015 (case No. 1377/49-14

Arbitration agreement: *"the claimant has a right to choose between "the IAC at the BelCCI", on the one hand, and "any competent court specified by the CMR Convention", on the other hand"*.

The arbitral tribunal pointed out that the claimant filed a claim to the IAC at the BelCCI rightfully exercising its right of choice. The arbitral tribunal confirmed that it was competent to resolve the dispute.

Award of the IAC at the BelCCI dated 12.06.2014 (case No. 1308/69-13)

Arbitration agreement: *"where an agreement cannot be reached, disputes shall be resolved by Saint-Petersburg and Leningrad region Arbitration Court or by the IAC at the BelCCI of the Republic of Belarus"*.

The arbitral tribunal confirmed that it was competent to resolve the dispute, as the Claimant exercised its right of choice, although it was not evident clearly from the agreement's wording.

Award of the IAC at the BelCCI dated 19.06.2012 (case No. 1076/63-11)

Arbitration agreement: *"all unsettled disputes and disagreements arising from, or in connection to this Contract … shall be resolved, at claimant's choice:*

a) by a state court at respondent's location;

б) by the IAC at the BelCCI (Republic of Belarus, city of Minsk, Pobediteley Av., 23/1, room 706) according to its Rules in force on the date of conclusion of the present contract".

Award of the IAC at the BelCCI dated 05.07.2012 (case No. 1055/42-11)

Arbitration agreement: *"In case of any disputes, the parties shall apply their best efforts to resolve them via negotiations or correspondence. Where an agreement cannot be reached, such dispute shall be resolved, at claimant's choice: in a state court at claimant's location, or in the International Arbitration Court under the Belarusian Chamber of Commerce and Industry, in accordance with its Rules"*.

Arbitral tribunal of IAC at the BelCCI confirmed that such clause was well-drafted and stated that the parties agreed that the claimant was entitled to choose between a *"court of law at claimant's location"* and *"the International Arbitration Court under the Belarusian Chamber of Commerce and Industry"*. *At the same time, in this particular case, the IAC at the BelCCI could also be regarded as a "court of law at claimant's location"*.

[36] ***Judgement of Minsk Economic Court dated 22.05.2003 (case No. 60-17/03)***

[37] ***Judgement of Minsk Economic Court dated 15.06.2006 (case No. 96-17/06)***

IV. ARBITRAL TRIBUNAL IN IAC AT THE BELCCI

4.1. Appointment of arbitrators

Under art. 5 of the Rules of IAC at the BelCCI, as a general rule, international arbitration disputes are resolved either by an arbitral tribunal consisting of three arbitrators or by a sole arbitrator chosen by the parties. In absence of an agreement between the parties the dispute is considered by three arbitrators.

When a dispute is considered by three arbitrators, one of them is appointed by each party, after that the chairman of the tribunal shall be appointed by two arbitrators.

When a dispute is considered by sole arbitrator, the parties shall appoint specific persons chosen by their mutual agreement as the main and reserve arbitrators. If such an agreement is not reached, the chairman of the IAC appoints the main and reserve arbitrators.

In the IAC at the BelCCI the parties have the right to choose an arbitrator included as well as not included in the recommendation list of arbitrators at their choice. However, there are the following exceptions to this rule:

- in disputes between subjects of the Republic of Belarus – only the persons included in the recommendation list of arbitrators can be chosen;
- in disputes considered by a sole arbitrator – only a person included in the recommendation list of arbitrators can be such an arbitrator;
- only a person included in the recommendation list of arbitrators may be elected (appointed) as a chairman of the arbitral tribunal.

The appointment of an arbitrator(s) is one of the main advantages of arbitration in comparison to state courts, therefore, the parties are advised to carefully analyze the following information about the candidates before choosing arbitrators:

- the potential or existing conflict of interests of the arbitrator with the parties (representatives, experts, witnesses, etc.), including the existence of a conflict of interest with the company's management or its shareholders;
- the status and reputation of an arbitrator (professional activity; academic degree; work in a scientific organization or educational institution; recommendations; other publicly available information);
- the qualification of an arbitrator (education; knowledge of the applicable law; specialization in the relevant sphere of law or economics; knowledge of the arbitration rules; other experience, for example, experience in a company's management);
- the knowledge of the language of proceedings, including professional vocabulary;
- the previous work experience of an arbitrator, for example, in governmental authorities and organizations, state courts, as far as this may also affect the assessment of the circumstances of a dispute;
- legal position of an arbitrator in regard to relevant issues, for example, the presence of scientific publications that express an opinion supporting or refuting the position of the party in a dispute.

To simplify the procedure of selecting arbitrators, it is recommended to select several candidates who seem to be most suitable for the dispute and to collect all available information about them by the categories provided above. After that, it is recommended to form a table on the candidates with a brief indication of all relevant information.

Moreover, depending on the category of a dispute, other circumstances may be of significant importance when choosing a particular candidate, for example:

- in a dispute under English law the knowledge of the English language and experience with English law or, at least, with other foreign law are extremely important;
- in a dispute arising from the supply of petroleum products it is recommended to select arbitrators with some experience in the sphere due to the specifics of the supply contracts;
- if a dispute requires specific legal assessment of the situation, it is not desirable to choose an arbitrator who unambiguously expressed his or her opinion in publications which contradicts to the position of a party.

The parties are also advised to refrain from designation of concrete arbitrators before a dispute arises, as the selected arbitrators may subsequently be conflicted or be unable to consider the dispute for other reasons.

4.2. Grounds for the challenge of an arbitrator

In the IAC at the BelCCI, an arbitrator may be challenged only if one of the following circumstances exists[38]:

- the reasonable doubts about the impartiality of the arbitrator;
- the reasonable doubts about the independence of the arbitrator[39];
- if the arbitrator does not have the qualifications required by the agreement of the parties[40].

These grounds also apply to the challenge of an expert and a translator.

There are no additional criteria for disclosing the abovementioned grounds in regard to challenge of arbitrators neither in the Rules of ICA at the BelCCI, the Law on IAC, or any other acts.

The guidelines of the IBA Rules on conflict of interests in international arbitration are rarely applied in the territory of the Republic of Belarus, except for the express consent of the parties.

In this regard, one should also take into account the position of the courts of the Republic of Belarus reflected in the decision of the Judicial Branch on economic disputes of Supreme Court dated 16 December 2020 in case No. 11-31Mx/2020/1113A/1206K. In this case, the respondent asked to set aside the arbitral award of the IAC at the BelCCI dated 30.04.2020 in case No. 1850/46-19 and referred to the following circumstances in support of the existence of conflicts of interest and contradictions of award to the public policy:

- the chairman of the arbitral tribunal of IAC at the BelCCI and one of the arbitrators were employees of the IAC at the BelCCI, while the arbitrator is subordinate to the chairman as the head of the information and consulting center;
- the chairman, the arbitrator and the claimant's representative are members of the Presidium of IAC at the BelCCI;
- *ex officio* the chairman independently resolved the issue of his own challenge and the challenge of his colleagues acting as the Chairman of the IAC at the BelCCI;
- the representative of the claimant was the main legal consultant of the legal department of the BelCCI, which is the founder of the IAC at the BelCCI and works with the Chairman and the arbitrator in the same building.

Despite all the abovementioned arguments, the JCED concluded that there was no evidence that these circumstances directly or indirectly affected the outcome of the case by the arbitral tribunal.

In addition, JCED pointed out that the arbitral award did not contradict the public policy of the Republic of Belarus, since the mere presence of the arbitrators considering the dispute, the claimant's representative in the Presidium of IAC at the BelCCI, as well as possible employment relations between the arbitrators, acquaintances between the arbitrators and the claimant's representative did not indicate on the breach of the principles of independence and impartiality of arbitrators.

4.3. The procedure for the challenge of an arbitrator

Below there are main steps for challenge of the arbitrator in IAC at the BelCCI:

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[38] Art. 18 Law on IAC and art. 9 Rules of IAC at the BelCCI

[39] *Award of the IAC at the BelCCI dated 14.12.2012 (case No. 910/16-10)*

"V" represented the interests of the claimant in the case, and V is the subordinate to "K" in company "C", which indicates that the arbitrator "K" is interested in resolving the case in favor of the claimant. In connection with these circumstances, "K" announced the withdrawal by himself.

Award of the IAC at the BelCCI dated 25.01.2011 (case No. 759/40-08)

In this case the director of the respondent submitted a request for the challenge of the persons selected by the claimant as the main and reserve arbitrators, who were colleagues of the claimant's representative in a law firm. The chairman of the tribunal and the second arbitrator agreed with the respondent and confirmed the challenge of those two arbitrators.

[40] *Award of the IAC at the BelCCI dated 25.01.2011 07.10.2013 (case No. 1246/07-13)*

Once the translator participated in case, the participation of an arbitrator who does not have a sufficient knowledge of the language of the proceedings does not prevent the compliance with the requirement to conduct the case in Russian and cannot rise the issue of impartiality, independence and qualifications of the arbitrator.

In addition, the threat of the prolongation of the proceedings and increasing arbitral expenses cannot be a circumstance related to the grounds for challenge of an arbitrator.

	Step	Time limits
Self-disqualification of the arbitrator	arbitrator has a right to withdraw	During 10 days from the date of receipt of the notification about the appointment as an arbitrator or chairman of the tribunal
	the application for withdrawal is considered by the Chairman of IAC at the BelCCI	During 7 days
Challenge of the arbitrator	interested party requests the challenge of the arbitrator	During 15 days from the date when the party became aware of the appointment of the respective arbitrator or about existence of the ground for challenge
	If the arbitrator does not agree to the self-disqualification, the challenge is resolved by two other arbitrators	Before the beginning of the proceedings
	If arbitrators does not agree or if there is a challenge in regard to two or more arbitrators or sole arbitrator, the challenge is resolved by the Chairman of IAC at the BelCCI	No limits
Replacement of the arbitrator	In case of sustaining of the challenge (withdrawal) of arbitrator, the arbitrator's functions are removed to reserve arbitrator (chairman-arbitrator)	From the moment of sustaining of the request for challenge (self-disqualification)
	The respective party or arbitrators appoint a new reserve arbitrator or reserve chairman-arbitrator.	During 10 days
	If there is no agreement on appointment of the reserve arbitrator or reserve chairman-arbitrator within specified term, the appointment is made by Chairman of IAC at the BelCCI	No limits

V. ARBITRAL PROCEEDINGS

5.1. Seat of arbitration

The seat of arbitration has little in common with geographical factors, as it mainly determines the law applicable to arbitration (*lex arbitri*).

If there is an agreement between the parties that the seat of arbitration shall be the Republic of Belarus, the scope of the law applicable to the arbitration procedure regulates *inter alia*[41]:

- procedural stages and terms of dispute resolution;
- the rules to the submission of evidence and the conduct of proceedings;
- the powers of arbitrators;
- the requirements to the arbitration agreement, including the scope of disputes that may be subject of arbitration;
- the grounds for challenging arbitrators;
- the requirements to the arbitral award and its form;
- the procedures for the setting aside, recognition and enforcement of an arbitral award and other issues.

The seat of arbitration may differ from the actual place of proceedings and oral hearings. For example, the seat of arbitration is the Republic of Belarus, but in sense of art. 26 of the Law on IAC, hearings can be held on the territory of another state. In the absence of an agreement, the venue of the hearings is determined by the arbitral tribunal, taking into account all circumstances of the case and the parties' opinions, which would usually be the location of the arbitration institute.

5.2. Main stages of arbitral proceedings and time limits

1. Submission of statement of claim

Claimant: submits the claims, the position on the case, describes the actual circumstances of the case, nominates the main and reserve arbitrators chosen by him (suggests the candidacy of the sole arbitrator), and pays the arbitration fee.

As a general rule, the proceedings begin on the day when the statement of claim is received by the respondent (ad hoc) or at the time established by the rules of the arbitration institute[42]. In the IAC at the BelCCI, the statement of claim is considered as submitted from the moment of payment of the registration fee.

Unlike state courts, the IAC at the BelCCI sends the statement of claim, annexes and notifications to non-residents directly by mail to the address specified in the statement of claim. The claimant has the right to deliver the claim by other reasonable means at his own expense, for example, through courier delivery services.

2. Submission of the statement of defense / counter-claim

Respondent: prepares and submits to the IAC at the BelCCI a response to the statement of claim indicating its position on the case, nominates the main and reserve arbitrators (suggests a sole arbitrator).

Time limit: within 30 calendar days from receiving the statement of claim and the attached documents. When considering disputes between the subjects of the Republic of Belarus without applying the simplified procedure – within 15 days.

A counter-claim may be submitted in the presence of an arbitration agreement. It is considered together with the statement of claim, if it is directed to set-off of claims or its satisfaction excludes in whole or in part the satisfaction of the original claims. The counter-claim is submitted no later than the first argument of the respondent in the case.

3. Constitution of the arbitral tribunal

Two appointed arbitrators: nominate the main and reserve chairman-arbitrator. From this moment, the tribunal is considered to be constituted and the deadline for the resolution of a dispute begins.

[41] art. 4 of the Law on IAC

[42] art. 28 of the Law on IAC

Time limit: within 10 days.

The Chairman of the IAC at the BelCCI: appoints the main and reserve arbitrators, if they were not nominated by the parties.

4. Decision on the competence of the arbitral tribunal

The arbitral tribunal: has the right to decide on its own competence.

Time limit for objections: the respondent's statement about the lack of competence of the arbitral tribunal may be raised no later than first submission on the merits of the dispute.

Time limit for resolving the issue of competence: until a decision on the merits of the dispute is rendered.

If the arbitral tribunal decides that it has competence, the respondent has the right to appeal this decision to the Presidium of IAC within 15 days after receiving the notification of the arbitral tribunal. If the Presidium of IAC also recognizes the competence of the arbitral tribunal, the respondent has the right to appeal the issue of competence at the stage of recognition and enforcement of the arbitral award in a foreign court[43] or at the stage of setting aside of the arbitral award on procedural issues or when issuing an enforcement document in a state court of Republic of Belarus.

If the arbitral tribunal states that it has no competence over the dispute, the claimant has the right to apply to the state court in the general order.

5. Challenge to arbitrators, other participants of the dispute

Interested party: has the right to file a motion for the challenge of an arbitrator (including a reserve one[44]), an expert or the translator, if there are grounds specified in art. 18 of the Law on IAC and art. 9 of the Rules of IAC at the BelCCI.

The motion must be made in writing and be motivated.

Time limit: within 15 days from the date when the party became aware of the appointment of the relevant arbitrator or of the existence of grounds for the challenge. There is no express time limits for the motion to challenge the expert or the translator.

6. Arbitral proceedings (hearings, assessment of evidence, etc.)

As a general rule, the form of the proceedings includes both oral hearings and the exchange of written positions of the parties. In view of the spread of COVID-19, video conferencing and online services are actively used in arbitration. However, the Rules of IAC at the BelCCI do not provide for a special procedure for conducting the process in an online format, due to which the parties submit procedural documents in written form.

Under the agreement of the parties or by the determination of the arbitral tribunal, an additional exchange of scanned copies of documents by e-mail may be agreed.

The arbitral tribunal: may state that the case shall be considered only on the basis of written evidence, if either party does not request an oral hearing.

Pursuant to art. 31 of the Rules of IAC at the BelCCI, unless the parties agreed otherwise, the hearing shall be conducted in such order that the tribunal considers necessary for making a lawful and reasonable decision. At the same time, the tribunal is obliged to take into account the opinion of the parties and the rules of the Rules of IAC at the BelCCI.

The arbitral tribunal has powers to, *inter alia:*

- apply interim measures in respect of the subject matter of the dispute, which it deems necessary;
- independently or by the motion of the party request the state court for the application of interim measures or securing evidence;
- appoint expert(s);
- require the parties to provide additional evidence;
- require the parties to make an advance payment on the costs;
- suspend the proceedings;
- terminate the proceedings.

When determining the procedures, the arbitral tribunal takes into account the opinion of the parties, comply with the applicable laws and provisions of Rules of IAC at the BelCCI, including the principles listed in art. 3 of the Law on IAC and art. 13 of the Rules of IAC at the BelCCI (principles of equality, promotion of amicable settlement of disputes, confidentiality, etc.).

7. Rendering of the arbitral award

Time limit for rendering of the arbitral award: no later than 6 months from the date of constitution of the arbitral tribunal,

[43] Award of the IAC at the BelCCI dated 02.01.2014 (case No. 990/96-10)
[44] Award of the IAC at the BelCCI dated 25.01.2011 (case No. 759/40-08)

but the Chairman of the IAC may extend this period. As a matter of practice, disputes with non-residents are usually considered in about 1 year.

Any party: by notifying the other party may request the arbitral tribunal to correct any error in computation, any clerical or typographical errors or any errors of similar nature in the award, as well as to request the arbitral tribunal to interpret any specific point or part of the award.

Within 30 days from the date of receipt of the award, notifying the other party, the party has the right to request an additional award in respect of claims that have been submitted, considered at the hearings, but not resolved. If the arbitral tribunal considers the request justified, it shall render an additional award within 60 days.

5.3. Specifics of the simplified dispute resolution procedure

The simplified procedure is the form of dispute resolution in the IAC at the BelCCI by a sole arbitrator on the basis of written materials only, i.e. without oral hearings.

Along with this, the oral hearing may be initiated by a sole arbitrator at any time before rendering the award or upon written request of the party.

Conditions for application of the simplified procedure[45]:

- dispute between the subjects of the Republic of Belarus;
- the amount of claims in the dispute does not exceed 10,000 basic units (290 000 BYN).

Thus, the Rules of IAC at the BelCCI do not provide a simplified procedure for a dispute where one of the parties is a non-resident of the Republic of Belarus.

However, to reduce the costs of the proceedings with the participation of non-residents of the Republic of Belarus it is possible to agree in the arbitration agreement that the dispute shall be resolved exclusively on the basis of written submissions without an oral hearing. The right of the parties to refuse to hold the oral hearings is provided by art. 28 of the Rules of IAC at the BelCCI. At the same time, one shall notice that, if necessary, the arbitral tribunal can hold an oral hearing.

Specifics of the simplified procedure:

- the time limit for the respondent to submit a statement of defense – 10 days;
- the time limit for the parties to reach an agreement on the main and reserve sole arbitrators is 10 days, while in the normal procedure it is 30 days, and if the dispute is between the subjects of the Republic of Belarus -15 days;
- the time limit for eliminating defects of the statement of claim should not exceed 10 days from the date of receipt of the proposal of the Chairman of the IAC to eliminate them;
- parties may submit only one additional written submission. As a general rule, the term for the claimant – no later than 10 days after receiving the statement of defense, for the respondent – no later than 10 days after receiving an additional submission of the claimant;
- the time limit for rendering the award on the merits of the case – within 3 months from the date of the constitution of the arbitral tribunal.

5.4. Settlement agreement (amicable settlement of disputes)

Taking into account art. 39 of the Law on IAC and art. 17 of the Rules of IAC at the BelCCI, the arbitral tribunal terminates the arbitral proceedings, fixing the settlement agreement in the arbitral award as agreed by the parties. At the same time, the arbitral tribunal is guided by the principle of facilitating the amicable settlement of dispute through the conclusion of a settlement agreement by the parties[46].

Such an award has the same force and is enforceable in the same manner as any other award of the arbitral tribunal.

5.5. Applicable law

As a general rule, the arbitral tribunal resolves the dispute in accordance with the law that the parties have chosen as applicable to the merits of the dispute[47].

[45] art. 3 and art. 62 of the Rules of IAC at the BelCCI

[46] *Award of the IAC at the BelCCI dated 14.11.2014 (case No. 1379/51-14); Award of the IAC at the BelCCI dated 01.10.2014 (case No. 1327/88-13)*

[47] *art. 36 of the Law on IAC*

Award of the IAC at the BelCCI dated 05.08.2010 (case No. № 875/80-09)

Arbitration agreement: *«All disputes and disagreements which may arise out of this Contract or in connection with it when they are not resolved by negotiation, shall be settled at the option of the claimant in accordance with the Agreement of the CIS "About the dispute resolution, connected with implementation of business activities" dated 20 March 1992 or the International commercial arbitration court at the chamber of Commerce and Industry in Minsk, in accordance with its rules and applying the substantive law of the Republic of Belarus or in the Arbitration court at the chamber of Commerce and Industry of the Russian Federation in Kiev, in accordance with its regulations and the norms of the substantive law of Russia, at the location of the claimant».*

With regard to the issue of applicable law, the arbitral tribunal of the IAC at the BelCCI applied the law of the Republic of Belarus, stating that claimant is a subject to the law of the Republic of Belarus and the claimant justified his claims by the norms of the substantive law of the Republic of Belarus, must be meant that claimant realized its choice.

In absence of choice of law agreement made by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable. Despite the fact that the arbitral tribunal is not bound by the national conflict of law rules, in practice the arbitral tribunal often applies the conflict of laws rules of the state where the seat of arbitration takes place[48].

When considering a dispute, the arbitral tribunal takes into account the contract binding upon the parties, other legal relationship between the parties and existing commercial and legal practice. In addition, the arbitral tribunal at any stage of the process may request the Presidium of IAC to give an interpretation of the applicable law and the existing practice.

5.6. Interim (provisional) measures

On the basis of the Law on IAC, there are two main types of interim measures:

Interim measures in respect of the subject matter, which are applied by one of the parties on the basis of the resolution of the arbitral tribunal

Such interim measures are applied by the parties themselves, and the arbitral tribunal only obliges them to perform certain actions in relation to the subject matter of the dispute or to refrain from doing them (for example, transferring the subject matter of the dispute to a third party for storage, prohibiting its sale, etc.).

However, these resolutions of the arbitral tribunal on interim measures are not subject to judicial enforcement and are not binding on third parties (including banks, cadastral agencies, notary, etc.).

Interim measures that are applied by a state court at the request of the arbitral tribunal (including in ad hoc arbitration) or by a party with the consent of the arbitral tribunal

Under para 3 of art. 113 of the CEP, in respect of the debtor or his property in the territory of the Republic of Belarus, the economic court takes measures to secure the claims considered in the international arbitration at the request of the arbitral tribunal or a party in the arbitration.

If a party requests the economic court, it must submit the consent of the arbitral tribunal (after its formation) or the Chairman of the IAC (before the formation of the arbitral tribunal) to file a motion for securing the claim[49]. Such request is subject to a fee of 10 basic units (290 BYN).

In *ad hoc* arbitration a party may requests the economic court for the application of interim measures only after the formation of the arbitral tribunal, since before the formation there is no subject capable of giving consent to such a request.

[48] *Award of the IAC at the BelCCI dated 29.05.2015 (case No. № 1382/54-14); Award of the IAC at the BelCCI dated 01.08.2014 (case No. 1006/112-10)*

[49] *Award of the IAC at the BelCCI dated 02.02.2015 (case No. 1384/56-14)*

Claimant asked tribunal to consent to a motion to the economic court with a request to take measures to secure the claim in the form of arrest of the respondent’s funds in the amount of 89 335.84 Euro, since the non-application of these measures may make it difficult or even impossible to enforce the award of the IAC at the BelCCI.

Award of the IAC at the BelCCI dated 08.06.2012 (case No. 1158/06-12)

The arbitral tribunal agreed to the motion of claimant to the state court at the location of the respondent with a request to secure the claim. The court took into account that the respondent had not taken any measures to pay the debt.

VI. ARBITRAL AWARD

Arbitral award – the judgement of the arbitral tribunal, which resolves the dispute on the merits.

The arbitral tribunal renders the award by a majority vote of the arbitrators. However, some procedural issues may be decided by the arbitrator-chairman if he is authorized by the parties or other arbitrators. An arbitrator who does not agree with the majority may state in written form a dissenting opinion, which is attached to the award.

6.1. Interim (partial) award

An interim (partial) arbitral award is a type of arbitral award that resolves certain issues before the final award on the merits of the dispute is rendered, if such an award will increase the efficiency of the arbitration and reduce arbitration costs.

Neither the Rules of the IAC at the BelCCI, nor the Law on IAC regulate the procedure for rendering an interim (partial) arbitral award.

6.2. Additional award

Unless the parties have agreed otherwise, either of the parties, notifying the other party thereof, may, within 30 days from the date of receipt of the award, unless otherwise provided by the arbitration rules, request the arbitral tribunal to render an additional award in respect of the claims that were considered during the proceeding, however, were not reflected in the award.

6.3. Consequences of the award

The main consequence of rendering of a final arbitral award is the effect of the principle of the finality of the award *(res judicata)*, which means that the rights and legitimate interests or obligations, as well as the facts established in the arbitral award, can not subsequently be disputed between the same parties, including in a state court. If one of the parties lodges a claim with a state court in an identical dispute, Belarusian court will refuse to accept it, except in cases when the award was set aside or Belarusian court refused to recognize it[50].

Issue of preclusion effect of the arbitral award is ambiguous, since it is not regulated directly by Belarusian law. Nevertheless, in court and arbitration practice, there are examples of confirming the issue preclusion effect of arbitral awards in relation to the arbitration itself, but not to state courts[51].

[50] Art. 164, 256 of the CEP

[51] *Award of the IAC at the BelCCI dated May 17, 2002 (case № 309 / 04-92)*

The Arbitral Tribunal considered that the award of the IAC at the BelCCI in another case (№ 280 / 07-01) has prejudicial significance in terms of the choice of the applicable law for another dispute between the same parties.

Judgment of Economic Court of the Minsk Region of July 27, 2004 (case № 304-4 / 04)

The court indicated that the arguments of the plaintiff with reference to the decision of the IAC at the BelCCI cannot be taken into account, since it does not have prejudicial significance for the economic court.

VII. RECOGNITION AND ENFORCEMENT OF THE ARBITRAL AWARD

Foreign arbitral awards are recognized and enforced by economic courts of the Republic of Belarus in accordance with the provisions of the New York Convention and national procedural legislation.

7.1. Application for the recognition and enforcement of the foreign arbitral award

Requirements for the content, form and annexes of the application are established in art. 246 of the CEP.

The application is submitted to the economic court at the location (residence) of the debtor or at the location of its property, if its location or place of residence is unknown.

The deadline for the presentation of a writ of execution, obtained on the basis of an arbitral award, is no more than three years from the date of its entry into force. If the mentioned period is missed, it could be restored by the court if the reasons for missing it are recognized as justifiable.

The term for consideration of this application is no more than one month from the date of receipt of the application by the court.

7.2. Grounds for refusal to recognize and enforce the arbitral award

The economic court of the Republic of Belarus *may refuse* to recognize and enforce the arbitral award on the grounds specified in para 2 of art. 248 of CEP and art. V of the New York Convention:

- incapacity of the parties or invalidity of the arbitration agreement[52];
- improper notification of the party against whom the award is invoked about the appointment of an arbitrator or arbitration proceeding, or there are other reasons why that party could not present its case;
- the award was rendered in a dispute that does not fall under the terms of the arbitration agreement[53];
- the composition of the arbitral authority or the arbitration process did not comply with the agreement of the parties or the law of the place of arbitration (*lex arbitri*);
- the award has not yet become binding, or has been set aside or suspended [54];
- the subject matter is not capable of settlement by arbitration under the law of that country (non-arbitrability of the dispute);

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[52] *Judgement of the Supreme Economic Court of June 28, 2012 (case № 4-18Их/2012/403К)*

The debtor was not notified about the appointment of the arbitrator, about the arbitration proceedings and could not present his explanations in this regard.

Judicial practice in civil and economic cases on the recognition and enforcement of decisions of foreign courts and foreign arbitral awards dated December 23, 2014

In the case of the recognition and enforcement of the arbitral award, the debtor challenged the proper notification of the dispute in the arbitration court. The duty of proving the improper notice of the arbitration proceeding is vested in the debtor.

Refusing to satisfy the debtor's claims, the court considered it sufficient that there was a certificate from the arbitration court that the debtor was duly notified of all stages of the arbitration proceedings.

[53] *Decision of the Economic Court of Grodno Region dated August 14, 2017 (case № 2-2Их/2017)*

To accept the counterclaim, the arbitral tribunal had to establish the presence of two conditions in the aggregate, namely: the existence of a reciprocal connection between the counterclaim and the claims of the plaintiff, as well as the existence of an arbitration agreement to consider the counterclaim.

However, the agreement did not contain an arbitration agreement on the consideration of the counterclaim.

Judgement of the Appellate instance of the Economic Court of the city of Minsk dated 10.16.2014 (case № 1-12Мх / 2014 / 860а)

[54] A lawsuit was filed for compulsion to transfer documents according to the generated list. The types of these documents and the grounds for their issuance, the issues of the fulfillment of the obligations of the investor and the customer were included in the subject of the dispute, considered on the merits in the arbitration court. Therefore, in resolving this dispute, the IAC did not go beyond the scope of the arbitration agreement.

Judgement of the JCED dated 05/07/2018 (case № 03к-23/2018)

The debtor's objections were recognized by the court as unfounded, since there was no reliable and sufficient evidence that the competent authority of the Republic of Latvia had suspended the award of the Riga Arbitration Court.

the recognition or enforcement of the award would be contrary to the public policy of the Republic of Belarus.

Please note, that the recognition and enforcement of the foreign arbitral award on the grounds established in the above para 1 – 5 (para 1 of art. V of the New York Convention) *may be refused* at the request of the party against which it is invoked only if that party provides appropriate evidence. Thus, the obligation to provide evidence of the absence of grounds for recognition of the arbitral award lies with the party against which the demand for recognition and enforcement is directed[55].

At the same time, the recognition and enforcement of a foreign arbitral award on the grounds established in the above para 6 and 7 (para 2 of art. V of the New York Convention) *may be refused* if the court independently establishes the existence of such grounds.

In certain cases the state court has the right to recognize and enforce the arbitral award, which was set aside, in accordance with the procedure established by art. 9 of the European convention, for example, if the decision is canceled due to its contradiction with the public order of the country in which the decision was made. However, in the Republic of Belarus, there is no practice in the public domain of applying this article of the European Convention.

Public order

Public order is an evaluative category under which the result (consequences) of the execution of a foreign court decision or a foreign arbitral award is subject to assessment from perspective of its compatibility with the fundamentals of the legal order of the Republic of Belarus.

Belarusian judicial practice in relation to the application of the criterion «public order» in relation to foreign court decisions and arbitral awards	
Judgement of JCED dated July 31, 2019 on case No. 1-5Их/2019/840K	The court established, firstly, a violation of the principle of equality in the refusal by a foreign arbitral tribunal to exercise the right of a party to participate in the proceedings through an interpreter, and secondly, the fact of initiating a criminal case on the basis of a corruption offense. In this regard, the court considered that the recognition and enforcement of the award of the foreign arbitration court would be contrary to the public order of the Republic of Belarus.
Judgement of JCED dated October 15, 2019 on case No. 3-31Мх/2019/947А/1197К	The court concluded that the award of the IAC at the BelCCI was rendered in a dispute that was not covered by the arbitration agreement, and therefore, contradicts to Belarusian public order.
Decision of the Economic Court of Minsk dated April 9, 2019 on case No. 4-31мх/2018	The court found that the applicant, acting in good faith, was unable to deliver goods to the buyer, and therefore the recovery of the penalty is unreasonable, but the above circumstances were not assessed by the arbitral tribunal. Consequently, there was a significant violation of the fundamental norms of substantive and procedural law of the Republic of Belarus, which in its totality gives reason to conclude that the decision in case № 5-09и/ 2017 contradicts the public order of the Republic of Belarus.
Judgement of JCED dated August 20, 2019 on case No. 4-31мх/2018/696А/965К	The international arbitration court (arbitral tribunal) is obliged to send the case to the economic court not later than five days from the date of receipt of the request of the court considering economic cases. It appears from the materials of the case that the materials of case № 5-09и/2017 were not submitted to the economic court of Minsk by the arbitral tribunal "A". Thus, the arbitral tribunal "A", when making a decision dated 06.12.2017 in case № 5-09и/2017, violated the principles of legality, and therefore the award contradicts the public order of the Republic of Belarus.

[55] *Judgement of the Supreme Economic Court of January 30, 2006 (case № № 3-3Их/2005/4K)*

Judgement of JCED dated June 3, 2020 on case No. 13-1их/2015/507К	The third party (operator) under the tripartite construction contract did not participate in the SCC arbitration between the customer and the contractor. In this regard, the court considered that the operator was deprived of the right to protect his interests guaranteed by the legislation of the Republic of Belarus. In this case, the court referred to art. 13 of the Constitution, art. 2 of the CC, art. 15 of the CEP, as well as art. 10 of the Code on the Judicial System and the Status of Judges, which enshrines the principle of equality of citizens, organizations, individual entrepreneurs before the law and the court, and also guarantees the right to judicial protection of their rights and legitimate interests. As a consequence, the court established a contradiction of the arbitral award to the public order of the Republic of Belarus and refused to recognize and enforce it.
Judgement of the second instance of the Economic Court of the Grodno Region dated February 25, 2019 on case № 5-8Сж/2018/18А	By the decision of a foreign state court (the Moscow Arbitration Court), the amount of unjust enrichment was recovered in favor of LLC "P". However, due to the fact that LLC "P" is a pseudo-business structure, the activities of LLC "P" are regarded by the court as aimed at the detriment of the interests of the Republic of Belarus. As a result, the award was found to be contrary to the public order of the Republic of Belarus.
Judgement of JCED dated December 15, 2020 on case № 5-18их/2020/1201К	If the parties have not chosen the applicable law to the contract of sale between the Buyer (Republic of Kazakhstan) and the Seller (Republic of Belarus), in accordance with the conflict of laws of both countries, the law of the country of the seller (i.e. the law of the Republic of Belarus) shall apply. However, as follows from the decision of the Supreme Court, in this case the parties did not reach an agreement on the applicable law, and the arbitral tribunal of Kazakhstan International Arbitration Court unreasonably applied the norms of the Civil Code of the Republic of Kazakhstan (i.e. the law of the buyer's country). The court considered this a violation of the principles of legality and the rule of law. In this regard, JCED refused to the Buyer in recognition and enforcement of the arbitral award on the basis of subpara b) para 2 art. V of the New York Convention (contradiction to public order).

VIII. APPEAL (SETTING ASIDE) OF THE ARBITRAL AWARD. REFUSAL TO ISSUE AN EXECUTIVE DOCUMENT

8.1. Appeal (setting aside) of the arbitral award

The appeal (cancellation) of the arbitral award is governed by Chapter 29 of CEP and Chapter 8 of the Law on IAC and is applied to arbitral awards made in the territory of the Republic of Belarus.

An application for setting aside of the arbitral award is submitted to the economic court at the location of the international arbitration court that rendered the award.

The award of the International Arbitration Court *may be set aside* if the relevant party provides evidence that[56]:

- one of the parties at the time of conclusion of the arbitration agreement was fully or partially incapable or this agreement is invalid under the law to which the parties subordinated it, and in the absence of such a subordination – under the law of the Republic of Belarus;
- the party was not duly notified about the appointment of an arbitrator or the proceedings, or for other valid reasons could not present its case;
- the award was rendered in a dispute that is not covered by the arbitration agreement or does not fall under its terms, or contains provisions on issues beyond the scope of the arbitration agreement. Herewith, if some provisions could be separated from those that are not covered by such an agreement, then only that part of the award, which contains provisions related to issues not covered by the arbitration agreement, could be set aside;
- the arbitral tribunal or the order of the proceedings did not comply with the agreement of the parties, unless such agreement contradicts the Law on IAC.

Also, the decision of the international arbitration court *may be set aside*[57]:

- if the subject of the dispute cannot be the subject of arbitration in accordance with the legislation of the Republic of Belarus;
- if the award of the arbitral tribunal contradicts the public order of the Republic of Belarus.

The time limit for appealing (setting aside) an arbitral award is three months from the day when the party submitting the application received the arbitral award or from the date of the decision on the motion to correct mistakes (typos or errors) in the named award.

8.2. Refusal to issue an executive document

The Economic Court has the right to refuse to issue an executive document for the execution of an award of the international arbitration court if the relevant party presents evidence that[58]:

- the arbitration agreement is invalid on the grounds provided by law;
- at least one of the parties has not been duly notified about appointment of arbitrators or about the arbitration proceedings, including the time and place of the hearing of the international arbitration court, other permanent arbitration authority, or for other valid reasons it could not present its case before the international arbitration court or any other permanent arbitration authority;
- the award of the international arbitration court, other permanent arbitration authority was rendered in a dispute that is not covered by an arbitration agreement or does not fall under its terms, or contains decisions on issues that go beyond the arbitration agreement. If in the award of an international arbitration court, other permanent arbitration authority, the decisions on the issues covered by the arbitration agreement could be separated from

[55] ч. 2 ст. 43 Закона о МАС

[56] ч. 3 ст. 43 Закона о МАС и ч. 3 ст. 255 ХПК

[57] ч. 1 ст. 260 ХПК

those that are not covered by such an agreement, the state court has the right to issue an executive document only for that part of the award of the international arbitration court, other permanent arbitration authority, which contains decisions on issues covered by the arbitration agreement;

- the arbitral tribunal, other permanent arbitration authority or the order of the arbitration proceedings did not comply with the agreement of the parties or the legislation;
- the award has not yet become binding on the parties to the arbitration proceedings, or has been set aside, or its execution was suspended by the state court.

In addition, the court *refuses* to issue a writ of execution[58]:

- if the subject of the dispute cannot be the subject of arbitration in accordance with the legislation of the Republic of Belarus;
- if the award of the arbitral tribunal contradicts to the public order of the Republic of Belarus.

[58] Para 2 of art. 260 of the CEP

IX. ARBITRATION COSTS IN THE IAC AT THE BELCCI

In the IAC at the BelCCI, the costs of arbitration proceedings consist of a registration fee, an arbitration fee and costs associated with the consideration of the case.

The registration fee is paid by the claimant upon filing a statement of claim in the amount of €150 + VAT. The registration fee is included the amount of the payable arbitration fee.

Arbitration fee – an amount of money that must be paid in advance when filing a statement of claim and is used to cover the costs of organizing the arbitration proceedings (payment for premises and equipment, arbitrators' fees, work of permanent employees and secretaries-recorders, taxes, etc.).

The costs associated with the consideration of the case consist of travel and other costs incurred by the arbitrators, amounts paid to witnesses, experts (expert institutions) and specialists, costs associated with on-site inspection, transportation and storage of material evidence and other costs of the court.

Below there are indicative arbitration costs in several arbitration institutions with the participation of 3 arbitrators (taking into account the information provided by the official Internet resources of the respective arbitration institutions) for 2020.

According to art. 52 of the IAC Rules at the BelCCI, based on the results of the consideration of the dispute, the costs of the case are subject to distribution between the parties in proportion to the amount of the satisfied claims. Herewith, it is important to take into account that arbitral tribunal may fully or partially refuse to reimburse the costs associated with the consideration of the case, if it admits that they were excessive.

	IAC at BelCCI (excluding VAT 20%)	Arbitration Institute of the Stockholm Chamber of Commerce	Vienna International Arbitration Center	Vilnius Commercial Arbitration Court	ICAC at CCI RF	ICAC at CCI Ukraine
€100 000	5 075	37 950	18 000 – 24 000	7 290 – 7 910	15 820	5 070
€500 000	12 825	77 970	51 375 – 67 875	18 510 – 20 360	31 480	12 450
€1 000 000	17 825	108 445	80 750 – 107 250	55 840 – 61 430	4 070	16 550

X. INVESTMENT ARBITRATION

10.1. Basics of regulation

In Belarus investment legislation is based on the Constitution and consists of the Investment Law and other legislative acts.

Belarus recognizes the priority of international treaties in this area. If the international treaty establishes rules other than those stipulated in the Investment Law, the rules of the international treaty are applied.

Belarus is a party to more than 60 bilateral *international treaties* on the encouragement and mutual protection of investments (BITs).

Belarus is also a party to the Treaty on the Eurasian Economic Union (2014), Annex 16 to which contains provisions on the promotion and protection of investments.

Belarus is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965), under which disputes between a foreign investor and a state could be resolved at the International Center for Settlement of Investment Disputes.

Belarus signed the Energy Charter Treaty (1994), which regulates investment activities and the resolution of investment disputes in the energy sector, but has not yet ratified it.

International treaties establish guarantees of the rights of foreign investors and standards for the protection of their investments, including, inter alia:

- prohibition of the expropriation and nationalization of investments, except in the public interest, on a non-discriminatory basis, while ensuring timely, adequate and effective compensation;
- provision fair and equitable treatment;
- provision of national treatment and most favored nation treatment;
- compensation for damages caused to investments as a result of civil unrest, hostilities, revolution, rebellion, and the imposition of a state of emergency.

The Investment Law provides investors and their investments with a number of benefits and advantages, including:

- unimpeded transfer of profits and other lawfully received funds related to investments in Belarus, compensation payments in connection with nationalization or requisition outside Belarus;
- recognition for investors of exclusive rights to intellectual property objects;
- the right to create commercial organizations with any volume of investments and in any organizational and legal forms provided for by Belarusian legislation;
- the right to benefits and preferences when investing in priority activities (sectors of the economy).

10.2. Settlement of investment disputes

The Investment Law, the Treaty on the Eurasian Economic Union and the vast majority of BITs contain provisions on the procedure for resolving disputes between a foreign investor and the state related to investments.

According to the Investment Law, such disputes are subject to judicial resolution. Moreover, if the dispute does not fall within the exclusive competence of the courts of the Republic of Belarus, it could be resolved at the choice of the foreign investor:

- in *ad hoc* arbitration in accordance with the UNCITRAL Arbitration Rules;
- at the International Center for Settlement of Investment Disputes.

The Investment Law establishes a mandatory pre-trial procedure in the form of negotiations within 3 months from the date of receipt of a written proposal to resolve the dispute.

The Treaty on the Eurasian Economic Union also contains provisions on the resolution of disputes between the investor and the state and, in addition to the options specified in the Investment Law, provides for the possibility to refer a dispute to international commercial arbitration at the chamber of commerce of any state agreed by the parties to the dispute. The period of pre-trial procedure is 6 months.

BITs also contain provisions on the resolution of disputes, according to which, in addition to the above options, depending on the specific BIT, there is also the possibility of considering the dispute in the Arbitration Court of the International Chamber of Commerce (ICC) and in the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

The procedure for the recognition and enforcement of arbitral awards in investment disputes depends on the dispute resolution authority.

If the dispute is considered by the International Center for the Settlement of Investment Disputes on the basis of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the arbitral award does not require additional recognition and is enforceable in the territory of a member state in the same manner as the final decision of the court of the given state.

If the dispute is considered by *ad hoc* arbitration or arbitration administered by an institution (such as SCC), the foreign arbitral award shall be recognized and enforced in accordance with the ordinary procedure provided for by the New York Convention.

10.3. Investment disputes against Belarus

Since 2018 there have been 4 international arbitration proceedings against Belarus:

- OOO Manolium Processing v. Republic of Belarus (PCA Case № 2018-06);
- GRAND EXPRESS Non-Public Joint Stock Company v. Republic of Belarus (ICSID Case № ARB (AF)/18/1));
- Delta Belarus Holding BV v. Republic of Belarus (ICSID Case № ARB/18/9);
- UAB Pavilniu saules slenis 14 and UAB Modus grupe v. Republic of Belarus (ICSID Case № ARB/21/2)

As of January 2021 these proceedings are still pending, no final decisions have been made on them.