

International Comparative Legal Guides



Investor-State Arbitration 2020

A practical cross-border insight into investor-State arbitration

Second Edition

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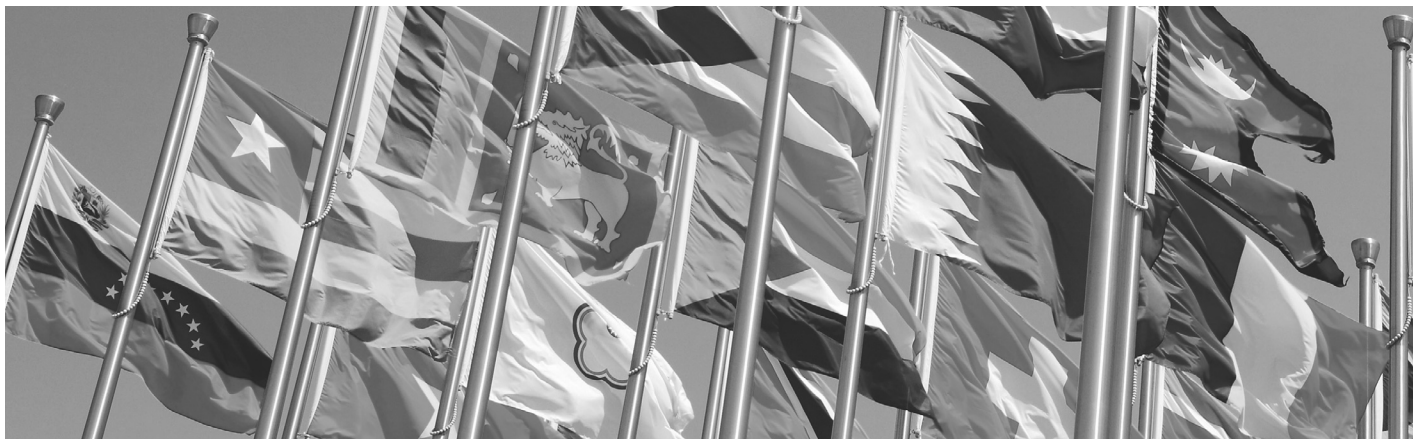
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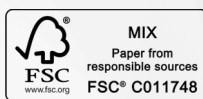
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Belarus

Sorainen



Alexey Anischenko



Valeria Dubeshka

1 Treaties: Current Status and Future Developments

1.1 What bilateral and multilateral treaties and trade agreements has your jurisdiction ratified?

Belarus has ratified treaties and trade agreements with more than 60 countries. Among them are: Austria; Belgium; Germany; Great Britain; Italy; Netherlands; UAE; the USA; and Venezuela, etc. The full list can be checked on the website of the Ministry of Economy: <http://economy.gov.by/ru/perechen-stran-ru/>.

Belarus has joined: the World Bank Group; International Bank for Reconstruction and Development (IBRD); International Finance Corporation (IFC); International Centre for Settlement of Investment Disputes (ICSID); and the Multilateral Investment Guarantee Agency (MIGA).

1.2 What bilateral and multilateral treaties and trade agreements has your jurisdiction signed and not yet ratified? Why have they not yet been ratified?

Bilateral treaties with China and Iran have not yet entered into force and are undergoing ratification processes. Ratification of the Energy Charter Treaty (ECT) is still pending.

1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Belarus does not have a model BIT. Drafting of treaties and trade agreements is conducted on a case-by-case basis.

1.4 Does your jurisdiction publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

No, Belarus does not.

1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

No, there are no such official commentaries.

2 Legal Frameworks

2.1 Is your jurisdiction a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Belarus is a party to (1) the New York Convention, and (2) the Washington Convention.

2.2 Does your jurisdiction also have an investment law? If so, what are its key substantive and dispute resolution provisions?

Yes. The investment law in Belarus is based on the Constitution of Belarus and consists of the Investment Law and other laws and regulations of Belarus. If an international treaty of Belarus establishes rules other than those provided by the Investment Law, then the rules of the international treaty shall be applied.

Key substantive provisions

The Investment Law recognises the priority of the universally accepted principles of the international law.

The Investment Law imposes certain restrictions on the investments:

- no investments can be made in the prohibited types of activities;
- restrictions can be imposed in the interest of national security, public order, protection of morality, health, rights and freedoms of others; and
- the permission of the antimonopoly authority is required if the investment is made in the assets of the legal entity with dominant position on the market.

The Investment Law guarantees to the investor, *inter alia*, the following:

- free transfer outside Belarus of the profit (income) and other legally obtained monetary funds related to making investments on the Belarussian territory, as well as the payments made in favour of the foreign investor, and related to making investments, after the payment of taxes and levies (duties) and other obligatory payments established by Belarussian law;
- free transfer of the compensation for foreign investors outside Belarus in case of nationalisation or requisition;
- the right for property protection against nationalisation and requisition;
- the right to exercise its property and non-property rights in accordance with Belarussian law;
- the exclusive rights to the objects of intellectual property;
- the right to create commercial organisations on Belarussian territory with any volume of investments, in any organisational and legal forms stipulated by Belarussian law;

- the right for benefits and preferences when making investments into the priority types of activities (sectors of economy), and in other cases established by the legislative acts of Belarus and (or) international treaties;
- the right to hire foreign citizens and stateless persons; and
- the right to conclude an agreement (agreements) with Belarus.

Key dispute resolution provisions.

Dispute resolution provision envisages pre-trial stage in the form of negotiations. The pre-trial stage runs for three months from the receipt of a written proposal for settlement.

An investor can resolve the dispute in the state court, or in an *ad hoc* arbitration under the UNCITRAL Rules and in ICSID, if the dispute does not fall in the court's exclusive jurisdiction. The Investment Law recognises that other dispute resolution provisions may apply if the international agreement of Belarus and/or an agreement settled between an investor and Belarus establish such.

2.3 Does your jurisdiction require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Generally, no.

However, if an investor wants to sign an investment agreement with Belarus, the requirements for that are stipulated in the Decree of the President of Belarus "On Constitution of Additional Terms for Implementation of Investments in the Republic of Belarus". The Decree sets that the investment agreement can be concluded:

- only in the priority types of activities (sectors of economy); and
- upon decision of the state authorities.

It is the investor's responsibility to file an application and provide the set of documents (e.g. draft of the investment agreement, audit report, articles of incorporation, business-plan and complex due diligence) in one of the state languages of Belarus, with the state authorities. The state authorities review documents and send an answer within 30 or 60 days (the timeline might be extended) from the date when the application was registered.

3 Recent Significant Changes and Discussions

3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

The Economic Court of the CIS issued interpretation of the second part of Article 10 of the Cooperation Agreement for Investment Activities of 24 December 1993 (2010) paragraph 1 of Article 2 of the Free Trade Area Agreement of 18 October 2011 (2013), and of Article 11 of the Convention for Protection of Investors' Rights of 28 March 1997 (2014).

3.2 Has your jurisdiction indicated its policy with regard to investor-state arbitration?

In three pending investor-state arbitration cases, Belarus is actively defending itself.

3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your jurisdiction's treaties?

Most of the BITs expressly address MFN and national regimes. The state guarantees to the investments the regime no less favourable than with respect to investments of their own investors or investors of third countries.

3.4 Has your jurisdiction given notice to terminate any BITs or similar agreements? Which? Why?

No, Belarus has not.

4 Case Trends

4.1 What investor-state cases, if any, has your jurisdiction been involved in?

There are three investment cases against Belarus. All of them were initiated in 2018 and are still pending:

- ICSID Case No. ARB/18/9: *Delta Belarus Holding BV v. The Republic of Belarus* (case details: <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/9>);
- ICSID Case No. ARB(AF)/18/1: *Grand Express Non-Public Joint Stock Company v. The Republic of Belarus* (case details: [https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB\(AF\)/18/1](https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)/18/1)); and
- PCA Case No. 2018-06: *OOO Manolium Processing v. The Republic of Belarus* (case details: <https://pca-cpa.org/en/cases/161/>).

4.2 What attitude has your jurisdiction taken towards enforcement of awards made against it?

Since all investment arbitrations are still pending, there is no enforcement practice yet.

4.3 In relation to ICSID cases, has your jurisdiction sought annulment proceedings? If so, on what grounds?

No, Belarus has not.

4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

According to the publicly available information in PCA Case No. 2018-06 the arbitral tribunal requested Belarus not to pursue any criminal actions in relation to the management of the company until the end of arbitration in order not to jeopardise consistency of arbitration.

4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

This is not applicable to the jurisdiction of Belarus.

5 Funding

5.1 Does your jurisdiction allow for the funding of investor-state claims?

The Investment Law is silent on this issue and there is no case law so far.

5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

This is not applicable to the jurisdiction of Belarus.

5.3 Is there much litigation/arbitration funding within your jurisdiction?

No, there is not.

6 The Relationship Between International Tribunals and Domestic Courts

6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

The possibility to review criminal investigations and court judgments is limited to the parties to the case (civil claimants, civil and criminal defendants, their representatives, etc.). The tribunals might get access to criminal investigations and court judgments if they do not contain information that constitutes state secrets or other secrets specially protected by law and if they are submitted as evidence by the party to the dispute.

6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

Yes, they do. For example, the court has the jurisdiction to grant interim measures or measures on evidence preservation. The request for the measures has to be filed in the court where the arbitration is seated or in the court where the evidence/property is located. The request can be filed by the arbitral tribunal or by the party to arbitration proceedings with permission of the arbitral tribunal.

6.3 What legislation governs the enforcement of arbitration proceedings?

- ICSID. Belarus is a party to the ICSID Convention; therefore it has an obligation to recognise and enforce ICSID awards, that are treated for the purposes of enforcement, as the final decision of a local court.
- The New York Convention. Non-ICSID awards fall under the scope of the New York Convention and are subject to the reasons for non-enforcement listed in Article V.
- The Law on the International Arbitration Court (the “International Arbitration Law”) governs cases seated in Belarus. This law is based on the UNCITRAL Model Law, and since its enactment on 9 July 1999, no significant amendments have been made.
- The Code of Commercial Procedure regulates recognition and enforcement procedure of local and foreign arbitral awards in more detail.

6.4 To what extent are there laws providing for arbitrator immunity?

The laws are silent on the issue of arbitrator immunity. There is no publicly available information on any case where an arbitrator was sanctioned for exercising an arbitrator’s mandate.

6.5 Are there any limits to the parties’ autonomy to select arbitrators?

The limits to the parties’ autonomy depends on the place of arbitration and applicable laws. The International Arbitration Law envisages general limits of qualification, impartiality and independence of an arbitrator.

6.6 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?

Yes, the International Arbitration Law stipulates default procedure. If parties fail to agree on the appointment procedure then each party appoints one arbitrator and the two appointed arbitrators select the presiding arbitrator.

If the respondent or the two party-appointed arbitrators fail to choose an arbitrator and presiding arbitrator respectively within the specified time then the Chairman of the arbitration institution (the Chairman of the Belarusian Chamber of Commerce and Industry in *ad hoc* arbitration) appoints them.

6.7 Can a domestic court intervene in the selection of arbitrators?

No, it cannot.

7 Recognition and Enforcement

7.1 What are the legal requirements of an award for enforcement purposes?

For the recognition and enforcement of an arbitral award a duly authenticated original of a foreign award or its duly certified copy is required.

If the seat is Belarus the International Arbitration Law requires the award be in writing, and, unless otherwise agreed by the parties, state the reasons upon which the award is based. An award shall include the date of the award, the seat and be signed by all arbitrators (or at least the majority arbitrators with reasoning on the absence of the remaining signatures).

7.2 On what bases may a party resist recognition and enforcement of an award?

The International Arbitration Law stipulates that recognition and enforcement is conducted in accordance with the Code of Commercial Procedure and international treaties. The Code of Commercial Procedure envisages that public policy is the basis to resist recognition and enforcement of arbitral awards if otherwise not indicated in the international treaty. Since Belarus is a party to the New York Convention, THE Belarusian economic court shall apply the grounds for refusal, established by Article V of the New York Convention.

7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

So far, there is no specific position.

7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

So far, there is no case law.



Alexey Anischenko is a partner and a head of Dispute Resolution team at Sorainen Belarus. Alexey's practice comprises client representation in commercial arbitration and litigation both in and outside Belarus. As a counsel, he has experience in high-value arbitrations under ICSID, ICC, LCIA, SCC, VIAC, IAC at the BelCCI and UNCITRAL rules and litigation in the Belarusian courts. As an arbitrator, he is on the Lists of Recommended Arbitrators of IAC at the BelCCI, VIAC, VCCA and the Sports Arbitration Court of the Belarusian Republican Union of Lawyers. He has recently been appointed as an arbitrator under the ICC, SCC and IAC Rules both by parties and institutions.

Alexey has unique experience of acting as the General Advisor to the CIS Economic Court and delivering expert reports to the EurAsEC Court in cases related to investment and arbitration. He is also designated to the ICSID Panel of Arbitrators and to the roster of experts for resolution of CIS disputes by Belarus.

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As a student Valeria participated in moot courts (e.g. the Willem C. Vis Moot, ICC *lex mercatoria*) and in a number of well-renowned competitions in Paris and Vienna, where she developed negotiation skills and inheld spirit, the set of skills and stamina required for the successful resolution of disputes.

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