Pathological Arbitration Clauses Through the Lens of Lithuanian Practice

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Pathological arbitration clauses are not a new issue for the Lithuanian practice. However, this has played out in new colours recently when the Vilnius Regional Court (case no. e2S-2082-656/2025) and the Klaipėda Regional Court (case no. e2A-81-613/2026), as the appellate instance, reached diametrically opposite conclusions over an identically worded arbitration clause: the former court ruled on its validity, whilst the latter decided that its pathological nature renders the clause devoid of its effect. This precedent is a clear example of how pathological arbitration clauses create unpredictability for the parties, leaving them in an uncertain position over the resolution of their disputes. In light of this, the article purports to delve into the notion of a pathological arbitration clause, whether such a clause is automatically null and void, and to identify best practices that may assist the parties in drafting arbitration clauses to ensure the effective conduct of arbitral proceedings.

INTRODUCTION

Smooth arbitration proceedings begin with a well-drafted arbitration clause. Nevertheless, it is not unusual for international arbitration agreements, like other contractual provisions, to contain defects in drafting.[1] An arbitration clause is defective when, due to its flawed, imprecise or incomplete wording, it hinders the proper conduct of the arbitration.[2] Common defects affecting arbitration clauses include errors in specifying the seat of arbitration, the institutional arbitration rules, the appointing authority, the applicable law, or other aspects of the arbitral process, as well as clauses that contain internal contradictions, lack certainty, or otherwise contain flaws.[3]

The concept of pathological arbitration clauses was formulated by Frédéric Eisemann in one of his seminal works in 1974 and has been followed by scholars to date.[4] To define the pathological clause, Eisemann begins from the opposite: what does a well-drafted arbitration clause purport to achieve for the parties? According to Eisemann, the arbitration clause ordinarily serves the following functions: *(i)* produces binding effects for the parties, *(ii)* precludes the intervention of state courts in the resolution of a dispute, at least until an award has been made, *(iii)* empowers arbitrators to settle disputes that may arise between the parties, and *(iv)* enables the establishment of the proceedings that, under the most efficient conditions, lead to the delivery of an enforceable award. On this basis, any arbitration clause that does not allow for the harmonious exercise of these four

[1] Gary B Born, Matteo Angelini and Carina Albornoz Llivina, 'Rethinking "Pathological" Arbitration Clauses: Validating Imperfect Arbitration Agreements' in Sherlin Tung and others (eds), Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy (Kluwer Law International 2019) 36.

[2] Nathalie Petit-Claustre, 'Clause d'arbitrage pathologique: à formulation choisie, problèmes choisis' (2021) Modes Alternatifs 7.

[3] Born, Angelini and Albornoz Llivina (n 1) 36.

[4] Benjamin G Davis, 'Pathological Clauses: Frédéric Eisemann's Still Vital Criteria' (1991) 7(4) Arb Intl 365.

functions, or of any one of them, will be deemed pathological. [5]

Parties may produce such pathological results out of haste, lack of attention, inability to reach agreement on anything else, or simple ignorance.[6] Indeed, it is no secret that dispute resolution provisions are often left to the last minute and are even dubbed "midnight" clauses by legal advisors. However, this disregard results in the parties becoming stuck in battles over the interpretation of an arbitration clause, rather than using this time to settle their core contract or tort dispute. To this end, imprecisely drafted arbitration agreements unjustifiably protract the dispute settlement process. Needless to say, if a disagreement surrounding the arbitration clause pathologies ends up in a national court, the crux of the underlying tortious or contractual dispute no longer remains confidential, contrary to what the parties may have strived for when concluding the arbitration agreement. Also, a pathological arbitration clause may even lead to non-recognition of a foreign arbitral award as per Article V(1)(a) of the New York Convention or setting aside of the issued national award[7] in case the opposing party proves that the pathology rendered the arbitration agreement null and void.

The recent rulings by the Vilnius Regional Court[8] and the Klaipėda Regional Court[9] are bringing the problem of pathological arbitration clauses into the spotlight in the Lithuanian arbitration practice. Both cases revolve around the interpretation of the same arbitration clause, which the party inserted into its contracts with different counterparties. The clause has been drafted, if translated, as follows: "*If disputes are not resolved within 30 (thirty) days from the commencement of negotiations regarding such dispute, either party may refer the dispute to arbitration in accordance with the Arbitration Rules, to an arbitral tribunal composed of 1 (one) arbitrator appointed in accordance with the said Arbitration Rules. The seat of arbitration shall be Stockholm, Sweden*." The clause is pathological, as it is unclear whether the parties agreed to institutional or *ad hoc* arbitration, which exact arbitral rules apply, and, not to mention, the language in which the arbitration proceedings should be conducted is also not specified in the clause. Despite the same wording, two Lithuanian courts reached diametrically opposite conclusions regarding the viability of this arbitration clause. The Vilnius Regional Court decided that the parties agreed to refer their disputes to arbitration, whereas the Klaipėda Regional Court held that such an agreement was too vague to demonstrate the parties' intention to arbitrate and, therefore, their dispute can be resolved in a national court.

In light of this, the article analyses how Lithuanian law interprets pathological arbitration clauses and whether it accords with the validation principle, commonly upheld in international arbitration practice. The author then proceeds to the question of which body should decide on the interpretation of arbitration clauses (whether it is the national court or the arbitral tribunal) and addresses the applicable law in determining the validity of arbitration clauses. Ultimately, the article concludes by outlining the matters to be covered by the clause to effectuate the arbitral proceedings.

I. WORKABILITY OF PATHOLOGICAL CLAUSES UNDER LITHUANIAN LAW

In a nutshell, an arbitration agreement is pathological when it contains a defect or defects liable

[5] Frédéric Eisemann, 'La clause d'ar bitrage pathologique' in João Bosco Lee and Daniel de Andrade Levy (eds), Revista Brasileira de Arbitragem, vol XIV (Kluwer Law International 2017) 163–64.

[6] Gary B Born, International Commercial Arbitration (3rd edn, Kluwer Law International 2020) 813.

[7] Law on Commercial Arbitration of the Republic of Lithuania (2 April 1996) No. I-1274, Official Gazette 2012 76-3932 (LCA), Art 50(3)(1).

[8] Vilnius Regional Court, 11 September 2025, civil case No e2S-2082-656/2025.

[9] Klaipėda Regional Court, 16 March 2026, civil case No e2A-81-613/2026.

to disrupt the smooth progress of the arbitration, irrespective of whether such a defect renders it impossible to proceed with the arbitration.[10] A pathological clause simply does not effectuate what it was supposed to: clear, step-by-step arbitration proceedings through which the parties ultimately resolve their disagreements. In any event, either the court or the arbitral tribunal that faces the issue of the pathological arbitration clause has to decide *(i)* whether the parties have, in fact, intended to proceed with arbitration, and if yes, *(ii)* how to enforce the will of the parties. This chapter is therefore divided into two parts accordingly.

1.1. PATHOLOGICAL CLAUSE AS A BINDING AGREEMENT TO ARBITRATE

As stated by Eisemann, the most important function that an arbitral clause serve is the creation of a binding agreement to arbitrate between the parties. If no binding arbitration agreement is in place, a pathological clause cannot be remedied.[11] This view has been further upheld in international practice. For example, as held by the Swiss Federal Tribunal: *"Incomplete, unclear or contradictory provisions in arbitration clauses create pathological clauses. To the extent that they do not concern mandatory elements of the arbitral agreement, namely the binding submission of the dispute to a private arbitral tribunal, they do not necessarily lead to invalidity."*[12] If an arbitration clause omits certain elements (e.g., the arbitration seat, the language of the proceedings, the number of arbitrators), this can be resolved under the institutional or *ad hoc* arbitration rules, gap-filling statutory terms, or contract interpretation principles.[13] But if the clause lacks its basis – a binding agreement to submit a dispute to arbitration – the arbitration clause is deemed uncreated. Following Eisemann's idea, the mere indication that the parties agree to submit their disagreements to arbitration suffices to establish that the arbitration clause binds the parties, and all other elements of this pathological clause can be remedied. In other words, even if the clause is framed as *"Dispute resolution method – arbitration,"* this already produces its effects and bars a national court from considering the parties' dispute. Non-mandatory and mandatory elements of the agreement to arbitrate can be compared to the bricks and foundation of a building – only the absence of the latter renders the building unviable; the bricks are recoverable, but not the foundation.

Nevertheless, the establishment of the binding agreement and the filling of gaps in pathological arbitration clauses are interrelated. As further Lithuanian case law illustrates, the parties often rely on the absence of certain elements of the arbitration clause to claim, as a corollary, that the binding arbitration agreement is uncreated. The prevalent approach in the Lithuanian judicial practice is that such defects do not render the pathological arbitration clause non-enforceable by default. What is crucial for Lithuanian courts, in order to rule on the validity of an arbitration agreement, is that the parties intended to choose arbitration as their preferred dispute-resolution method.

In the civil case no. 3K-3-681, the Supreme Court of Lithuania had to interpret whether the binding agreement to arbitrate emanates from the following pathological clause: *"8. Arbitration. The seat of the arbitration shall be in Denver, Colorado, USA. The decisions of the arbitrator are final and binding both parties."* The Supreme Court of Lithuania ruled that the agreement to arbitrate was established, hence barring consideration of the parties' dispute in the Lithuanian national courts. It has been emphasised that the fact that an arbitration agreement is sufficiently concise and does not regulate some issues, such

[10] Duarte G Henriques, 'Pathological arbitration clauses, good faith and the protection of legitimate expectations' (2015) 31(3) Arb Intl 354.

[11] Eisemann (n 5) 164.

[12] Swiss Federal Tribunal, 7 November 2011, case No 4A_246/2011.

[13] Swiss Federal Tribunal, 7 November 2011 (n 12); Born (n 6) 817.

as the number of arbitrators, the procedure for their appointment, etc., is not a sufficient basis for not recognising it as an arbitration agreement. The Supreme Court of Lithuania concluded that the arbitration agreement gaps in such cases were to be filled by applying the law applicable to the arbitration (*lex arbitri*), which in the case at hand was the law of the seat, i.e., the law of the State of Colorado, USA.[14]

The subsequent Lithuanian case law also hinges on the premise that where the parties expressed the intention to resolve disputes in arbitration, the court should implement the will of the parties, even if some aspects of the arbitration agreement are inaccurate and the clause is, thus, pathological. For example, in the civil case no. 3K-3-431/2013, which concerned a non-existent arbitral institution inserted into the arbitration clause, the Supreme Court of Lithuania found that the arbitration agreement was nevertheless concluded. In order to "repair" the arbitration clause, the adjudicator employed the contract interpretation method: it analysed the correspondence between the parties and found that they had in mind the Vilnius Court of Commercial Arbitration.[15] What emanates from this precedent is that the contract theory applies when interpreting the pathological arbitration clause. The parties' intentions, preliminary negotiations, their conduct, and other means of contractual interpretation, as per Article 6.193 of the Lithuanian Civil Code, are tools for determining whether the parties have entered into a binding agreement to arbitrate.

However, what is especially acute in the ruling over the civil case no. 3K-3-431/2013 is the validation mechanism set out by the Supreme Court of Lithuania. As stipulated by the cassation instance, while interpreting pathological arbitration clauses, firstly, courts must apply the *favor contractus* principle, and secondly, preference must be given to an interpretation that preserves the effectiveness of the agreement to arbitrate.[16] In short, between two different readings of a pathological arbitration agreement, as a first step, the preference should be given to the one that implies its validity[17] and, as a second step, preserves arbitration as the chosen dispute-resolution method (i.e., effectuates arbitration). Importantly, this approach coincides with the established international practice. As stipulated in the doctrine, "*foreign national courts apply a validation principle to give effect to commercial parties' dominant intention to resolve their international disputes by arbitration, notwithstanding errors or defects in the expression of the particular means of dispute resolution.*"[18] The validation practice is also consistent with the pronouncements of international arbitral tribunals.[19] For example, as one ICC tribunal held: "*when inserting an arbitration clause in their contract, the intention of the parties must be presumed to have been willing to establish an effective machinery for the settlement of disputes covered by the arbitration clause.*"[20] To this end, the economically rational parties would not purport to enter into an unworkable contract, including an unworkable arbitration agreement.

It is of note that under Lithuanian statutory law, an arbitration clause is presumed to constitute a separate agreement[21] and, according to the Lithuanian case law, when one of the parties,

[14] Supreme Court of Lithuania, 27 March 2002, civil case No 3K-3-681.

[15] Supreme Court of Lithuania, 2 October 2013, civil case No 3K-3-431/2013.

[16] Supreme Court of Lithuania, 2 October 2013 (n 15); Supreme Court of Lithuania, 29 November 2018, civil case No e3K-3-278-313/2018.

[17] Valentinas Mikelėnas, Lietuvos Respublikos civilinio kodekso komentaras: Šeštoji knyga. Prievolių teisė, vol 1 (Justitia 2003) 252.

[18] Born, Angelini and Albornoz Llivina (n 1) 55.

[19] Born, Angelini and Albornoz Llivina (n 1) 55.

[20] Contractor v State Enterprise (Preliminary Award) ICC Case No 2321 (1974), reproduced in Pieter Sanders (ed), Yearbook Commercial Arbitration, vol 1 (ICCA 1976) 133.

[21] LCA, Art 19(1).

contrary to its obligation, submits the dispute not to arbitration but, for example, a national court, it is deemed a contractual breach.[22] What the Lithuanian case law also entrenches is that *(i)* neither of the parties may unilaterally refuse performance of their own obligation to arbitrate, and *(ii)* an opposing party should be entitled to request the performance of obligations undertaken and object to the resolution of the dispute by non-agreed means.[23] Given this, even a defective arbitration clause produces the effects as per Article 6.189 of the Lithuanian Civil Code (*pacta sunt servanda*). Namely, under Article 6.189, the contract has the force of law between its parties.

The commercial parties are sophisticated enough to understand the consequences of the contractual arrangements they conclude.[24] Hence, they have not only the right but also the duty to assess the consequences of the arbitration clause. When inserting an arbitration clause into their main contract, the parties must acknowledge that they are concluding not one but two agreements simultaneously, each limiting their rights and obligations accordingly. Because of an arbitration clause, the right of the parties to submit a potential dispute to a national court, to mediation, or to any other dispute resolution method should be deemed waived in favour of arbitration. In other words, a party enters into a duty to refer a potential dispute with its counterpart to arbitration, and this obligation gains the force of law for it, even if the parties failed to agree upon certain parts of the arbitration agreement. To this end, in the author's opinion, the party is precluded from claiming the invalidity of the concluded arbitration agreement on the basis of its drafting defects. The court, while refusing to open the proceedings due to the bar produced by an arbitration clause (even if the clause is a pathological one), protects the contractually undertaken obligations.

Although the *pacta sunt servanda* force applicable to the arbitration clause[25] seems self-evident, the main question is how to establish that the parties actually intended to enter a separate agreement to arbitrate. It is worth noting that the Lithuanian judiciary does not apply the validation principle in a vacuum; rather, it is applied to effectuate the parties' intention at the time they were concluding the arbitration agreement. In other words, the intention to arbitrate should be established to consider further questions surrounding the pathological arbitration clause.[26] Establishment of the intention appears impossible without applying the general contract interpretation principles. Therefore, the author turns to analysing the statutory provisions governing contract interpretation under Lithuanian law further.

In accordance with Article 6.193(1) of the Lithuanian Civil Code, in interpreting a contract, it is necessary to seek the real intentions of the parties without being limited by the literal meaning of the words. In a similar vein, the Lithuanian case law stipulates that in the event of a difference between the linguistic meaning of the text of the contract and the actual intentions of the parties, priority must be given to the intentions of the parties which the parties had in mind when concluding the contract.[27] However, what if the parties had different intentions in mind while entering into the arbitration agree-

[22] Supreme Court of Lithuania, 28 June 2013, civil case No 3K-7-181/2013; Lithuanian Court of Appeal, 2 March 2017, civil case No e2A-61-381/2017; Lithuanian Court of Appeal, 6 October 2016, civil case No 2-1314-943/2016.

[23] Supreme Court of Lithuania, 28 June 2013 (n 22); Lithuanian Court of Appeal, 2 March 2017 (n 22); Lithuanian Court of Appeal, 6 October 2016 (n 22); Civil Code of the Republic of Lithuania (18 July 2000) No. VIII-1864, Official Gazette 2000 74-2262, Art 6.59.

[24] Supreme Court of Lithuania, 23 April 2026, civil case No e3K-3-78-421/2026; Vilnius Regional Court, 11 September 2025 (n 8).

[25] Lithuanian Court of Appeal, 6 October 2016 (n 22).

[26] Supreme Court of Lithuania, 15 September 2021, civil case No e3K-3-228-823/2021; Supreme Court of Lithuania, 29 November 2018 (n 16).

[27] Supreme Court of Lithuania, 4 April 2023, civil case No e3K-3-110-823/2023.

ment? For instance, one party understood the provision as binding, while another considered it as an option to litigate, which did not necessarily exclude the national judiciary. If such a situation arises, the literal text of the arbitration clause shall prevail in interpreting this agreement. According to the established practice of the Supreme Court of Lithuania, "*if the intentions of the parties do not coincide, the text of the contract has greater significance; therefore, a literal analysis of the text of the contract is more important, as it can help determine which party's intentions correspond to the literal meaning of the contract.*"[28] Therefore, in the author's opinion, the arbitration "veil" can be "lifted" only where the intentions of both parties indicate that they considered arbitration as an optional (non-mandatory) means of resolution of their disputes. The uniformity of the parties' intention is the core in establishing that the binding agreement to arbitrate was not created. To the contrary, if at least one of the parties deems the agreement to arbitrate mandatory, and the text of the clause does not expressly indicate otherwise, the dispute shall be submitted to arbitration.

With this in mind, the author turns to the aforementioned judgments issued by the Vilnius Regional Court and the Klaipėda Regional Court, as the appellate instances, in civil cases no. e2S-2082-656/2025 and no. e2A-81-613/2026, respectively. The Vilnius Regional Court validated the arbitration clause in question governed by the following: *(i)* the pathological nature of the arbitration clause should not be considered as a determining factor for declaring the arbitration clause invalid *ab initio; (ii)* the will of the parties to submit potential disputes under their contract to arbitration was expressed clearly in the clause's text; and *(iii)* gaps in the arbitration agreement could have been filled by applying *lex arbitri*, which in that case was the law of the seat of arbitration, i.e., Swedish law.[29]

The interesting argument is presented in the reasoning of the Klaipėda Regional Court, which held that the clause was non-mandatory given the wording of the arbitration clause in question. Namely, the arbitration clause contained the phrase "*may refer the dispute to arbitration*" instead of "*shall*" or "*must*". Given this "*may*" part, the Klaipėda Regional Court held that the parties' intention was expressed not as a definite resolution to arbitrate, but as a litigation option. Subsequently, another party was permitted to proceed with dispute resolution in the national court, notwithstanding the presence of the arbitration clause in its contract.[30] Notably, the Supreme Court of Lithuania refused to accept the cassation appeal on the ruling issued by the Vilnius Regional Court,[31] while the cassation appeal on the ruling of the Klaipėda Regional Court can still be filed (as of the day of the submission of this article to the editor).

It is ironic how a single word, in essence, predetermined the fate of the arbitration clause. Indeed, in contractual provisions, each and every comma matters; nonetheless, given the *pacta sunt servanda* principle, one may hardly imagine the parties entered into the arrangement according to which one of them is given a choice to provide services, do certain works, etc., simply depending on its willingness to do so. To compare, the contract to deliver goods will not be deemed invalid by a Lithuanian adjudicator if, for example, the contract does not stipulate some terms, such as the place of delivery or the price of the goods. Should it be the case, this would completely contradict the principle of contractual effectiveness. The arbitration clause is the same contractual arrangement, akin to the contract to deliver goods or perform a service, whose effectiveness should be presumed despite defects attributable to drafting imperfections. To add on top, as stipulated in the doctrine with respect to so-called permissive arbitration

[28] Supreme Court of Lithuania, 25 June 2020, civil case No e3K-3-197-469/2020.
[29] Vilnius Regional Court, 11 September 2025 (n 8).
[30] Klaipėda Regional Court, 16 March 2026 (n 9).
[31] Selection Panel of the Supreme Court of Lithuania, 3 December 2025, case No eCIK-1104/2025.

agreements: "*It would make little sense for parties to agree to optional arbitration in an entirely non-mandatory sense [...] both parties free to decide after a dispute had arisen whether or not they wish to arbitrate.*"[32] Indeed, nothing prevents the parties from entering into the arbitration agreement when the dispute crystallises, rendering the optional clauses redundant.

To summarise the above, when interpreting a pathological arbitration clause, an adjudicator must first raise, as a question, which dispute resolution method the parties intended to choose – was it arbitration or not? Omission of any other details in the clause (seat, language, number of arbitrators, arbitral institution, etc.) does not hold primary significance at this stage; what matters is whether the parties intended to arbitrate.

1.2. REMEDIATION OF PATHOLOGICAL ARBITRATION CLAUSES

The arbitration clauses' pathologies have a rather wide spectrum, covering any forgotten or misplaced procedural aspect that later obstructs the efficient course of arbitration proceedings. The contemporary approach is that such defects do not automatically render the clause devoid of its practical effect as long as the defects can be remedied. International practice shows that national courts and arbitral tribunals tend to remedy the pathological arbitration clauses in the following way: *(i)* by filling a gap in the parties' arbitration agreement with either a statutory default term or otherwise; *(ii)* by determining what poorly-drafted or apparently uncertain provisions were intended to mean; *(iii)* by harmonising apparently contradictory or inconsistent provisions; or *(iv)* by severing defective terms from the arbitration agreement.[33]

The Lithuanian judiciary stands on the premise that gaps and other contradictions of the clause shall be resolved in accordance with *lex arbitri*.[34] Importantly, in civil cases no. 3K-3-681 and e2S-2082-656/2025, the Lithuanian courts ruled that US and Swedish laws were applicable to remedy the pathological arbitration clauses as *lex arbitri*, but the courts did not correct the clauses in question by themselves through filling a clause's gap or using any other plausible method. In essence, the Lithuanian judiciary determined which procedural rules (the instrument) should apply to remedy the issue, though it was reluctant to use this instrument, i.e., to remedy the pathological arbitration clauses themselves by applying the determined *lex arbitri*.

But what if it is established that the *lex arbitri* is Lithuanian law? Who should take the lead and resolve the complex pathological puzzle and remedy the clause – judges or arbitrators? This further part discusses which issues arising from the pathological arbitration agreement should be decided by the Lithuanian court and which by the arbitral tribunal.

The Lithuanian Law on Commercial Arbitration contains a number of provisions concerning the parties' failure to determine the seat of arbitration,[35] the number of arbitrators,[36] to appoint arbitrators,[37] to agree upon the language of arbitration[38] or the substantive law applicable to a dispute.[39] All of these provisions, except those concerning the number and appointment of arbitrators, can be subsumed under a common denominator: the Lithuanian legislator empowers the arbitral tribunal to determine the matters in its discretion.

Notably, the Lithuanian Law on Commercial Arbitration does not contain a default statutory term to address uncertainties regarding

[32] Born, Angelini and Albornoz Llivina (n 1) 50.
[33] Born (n 6) 817.
[34] Supreme Court of Lithuania, 27 March 2002 (n 14); Vilnius Regional Court, 11 September 2025 (n 8).
[35] LCA, Arts. 3(8), 29.
[36] LCA, Art 13.
[37] LCA, Art 14.
[38] LCA, Art 31.
[39] LCA, Art 39.

which method of arbitration – institutional or *ad hoc* – the parties chose, as well as issues arising from non-existent arbitral institutions specified in their arbitration clause. In this situation, as an exception, a national judge steps in to remedy a pathological arbitration clause. As a rule, Lithuanian courts apply the general contract interpretation rules under Article 6.193 of the Lithuanian Civil Code to address this uncertainty.[40] For instance, in the civil case no. 3K-3-431/2013, the Supreme Court of Lithuania noted the correspondence between the parties to determine which exact arbitral institution they actually had in mind, instead of the non-existent one that finally appeared in their clause,[41] whilst in the later civil case no. e3K-3-278-313/2018, the Supreme Court of Lithuania considered the previous contracts that the parties concluded to determine which arbitral institution the parties intended to lay down in the disputed clause at hand.[42]

To this end, the Lithuanian law marks a certain demarcation line: uncertainties surrounding the formation of the arbitral tribunal can be remedied by the national court, whilst other defects of the arbitration clause shall be further resolved by the formed arbitral tribunal. The Lithuanian policymaker seems reluctant to vest in the national court the role intrinsic to the arbitral tribunal, which, in turn, can be attributed to the *competence-competence* principle. The *competence-competence* is recognised in the Lithuanian statutory law in a separate provision and is firmly entrenched in the Lithuanian case law.[43] Under Article 19(1) of the Lithuanian Law on Commercial Arbitration, an arbitral tribunal may rule on its own jurisdiction, including cases where doubts arise regarding the existence or validity of an arbitration agreement. The Supreme Court of Lithuania, in one of its cases, notes that the legal consequence of the *competence-competence* doctrine is that "*a court of general jurisdiction cannot usually decide the issue of the competence of an arbitrator until the arbitrators have made a decision*".[44] To this end, an arbitral tribunal is authorised to decide upon gaps, contradictions, and any other uncertainties present in a pathological arbitration clause, as they are directly intertwined with the scope of the arbitral tribunal's jurisdiction. It is up to arbitrators to determine to what extent a pathological arbitration clause shapes their authority and the conduct of the arbitration procedure. The arbitrators' pronouncement may be reassessed by a national judge after the arbitration is concluded, and only in exceptional cases, namely: during the proceeding to set aside a national award or to recognise a foreign award, as a question of whether the arbitration agreement was rendered null and void by its drafting defects.

Given the wording of Article 19(1) of the Lithuanian Law on Commercial Arbitration, the question arises whether the Lithuanian judiciary is empowered to decide on the existence or validity of an arbitration agreement. In the author's view, the court should usually refuse to consider this point in favour of the arbitral tribunal under the caveat that the procedure for the formation of the arbitral tribunal is clear. Where the procedure for the formation of the arbitral tribunal is one of the arbitration clause's pathologies, the national court should *(i)* determine whether the parties intended to arbitrate, *(ii)* if such intention is established, presume the existence or validity of the arbitration clause, *(iii)* assist the parties by determining the *lex arbitri*, and, finally, *(iv)* when the court finds that Lithuanian *lex arbitri* applies, determine whether the parties agreed upon the institutional or *ad hoc* arbitration. The presumption of the existence or validity of the

[40] Supreme Court of Lithuania, 15 September 2021 (n 26).
[41] Supreme Court of Lithuania, 2 October 2013 (n 15).
[42] Supreme Court of Lithuania, 29 November 2018 (n 16).
[43] Supreme Court of Lithuania, 17 November 2004, civil case No 3K-3-612; Supreme Court of Lithuania, 9 February 2010, civil case No 3K-3-64/2010.
[44] Supreme Court of Lithuania, 2 October 2013 (n 15).

arbitration clause may be later refuted only by the arbitral tribunal itself if the arbitrators find that they lack jurisdiction to resolve the parties' dispute.

Overall, the national court's role should be limited to remedying the arbitration clause defects only with respect to uncertainties surrounding the arbitral tribunal formation. Remedying all other defects of the pathological arbitration clause should lie within the *domaine réservé* of the tribunal.

II. APPLICABLE LAW TO PATHOLOGICAL ARBITRATION CLAUSES

As the Lithuanian practice shows, the core submission the opposing party advances when faced with a pathological arbitration clause is its invalidity. Subsequently, either a judge or an arbitrator inevitably faces the dilemma of which law governs the arbitration clause at hand. Empirical research demonstrates that the prevailing majority of jurisdictions choose between the following options of applicable law to the arbitration clause: *(i)* law of the seat or *(ii)* law of the main contract.[45] In turn, if asked in the Lithuanian *lex arbitri* context, the answer to this question is set out in Article 1.37 of the Lithuanian Civil Code, which the author would like to unpack further.

First, in the spirit of the contractual freedom principle, Article 1.37(1) of the Lithuanian Civil Code stipulates that the parties are free to choose the law governing their agreement. That is, the parties may stipulate the law applicable to the arbitration clause in its text itself. Nevertheless, it is highly unlikely that the parties would do so. The author bases this proposition upon the following. The common practice for the parties is to adopt a model clause of an arbitral institution and insert it into their underlying contract. Subsequently, whether the parties determine the applicable law under the arbitration clause largely depends on whether the model clause directs them to do so. The author analysed the model clauses (worded as of May 2026) of the following arbitral institutions on whether they contain the line about the law regulating the arbitration clause itself: the Dubai International Arbitration Centre (DIAC),[46] International Chamber of Commerce (ICC),[47] London Court of International Arbitration (LCIA),[48] Singapore International Arbitration Centre (SIAC),[49] SCC Arbitration Institute (SCC),[50] Vienna International Arbitral Centre (VIAC),[51] Vilnius Court of Commercial Arbitration (VCCA).[52] The analysis demonstrates that SIAC is the only arbitral institution among the above-listed, whose model clause suggests that the parties pre-determine the applicable law to their arbitration agreement. Namely, the SIAC model clause is drafted as follows: "*Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore Interna-*

[45] Maxi Scherer and Ole Jensen, 'Towards a Harmonized Theory of the Law Governing the Arbitration Agreement' (2021) 10(1) IJAL 16.

[46] Dubai International Arbitration Centre, 'Model Clause - Arbitration' <https://www.diac.com/en/adr-services/arbitration/arbitration-model-clause/> accessed 6 May 2026.

[47] International Chamber of Commerce, 'Arbitration Clause' <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/arbitration-clause/> accessed 6 May 2026.

[48] London Court of International Arbitration, 'Recommended Clauses' <https://www.lcia.org/dispute_resolution_services/lcia_recommended_clauses.aspx> accessed 6 May 2026.

[49] Singapore International Arbitration Centre, 'SIAC Model Clause' <https://siac.org.sg/siac-model-clause> accessed 6 May 2026.

[50] SCC Arbitration Institute, 'Dispute Resolution Clauses - English' <https://sccarbitrationinstitute.se/en/dispute-resolution-clauses/english/> accessed 6 May 2026.

[51] Vienna International Arbitral Centre, 'Standard Model Arbitration Clause' <https://www.viac.eu/en/arbitration-basics/arbitration-clauses/standard-model-arbitration-clause/> accessed 6 May 2026.

[52] Vilnius Court of Commercial Arbitration, 'Vilnius Commercial Arbitration Court' <https://lvk.lt/en/vilnius-commercial-arbitration-court/> accessed 6 May 2026.

tional Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause. The seat of the arbitration shall be [...]. The Tribunal shall consist of [...] arbitrator(s). The language of the arbitration shall be [...]. The law governing this arbitration agreement shall be [...]."[53] In turn, the ICC and VIAC stipulate on their official websites, as a recommendation, that the parties may wish to stipulate in the arbitration clause the law governing the arbitration agreement.[54] To this end, determining this matter through model clauses is only gaining momentum.

Since the parties are unlikely to regulate the applicable law to their arbitration agreement themselves, the clash between the law of the seat and the law governing the main contract becomes acute. The Lithuanian statutory law resolves this conflict-of-laws in Article 1.37(7) of the Civil Code in a peculiar three-step "waterfall" way. Pursuant to Article 1.37(7), *(i)* the law governing the main contract shall apply to the arbitration agreement, and if the main contract is invalid, *(ii)* the law of the place of conclusion of the arbitration agreement, and, when the place of conclusion cannot be determined, *(iii)* the law of the state of the seat of arbitration shall apply. To this end, the legislator set a priority: the law of the seat applies only if the two prior steps fail to resolve the issue.

Despite the fact that the matter in question is regulated under Article 1.37(7) of the Lithuanian Civil Code, in the author's opinion, the parties should not be afraid to amend the suggested model clauses by arbitral institutions and insert a line specifying the law governing their arbitration agreement. Under Lithuanian case law, persons participating in arbitration should be given the opportunity to fully implement the principle of autonomy of will and, hence, are free to adapt the arbitration agreement to their needs.[55] As a consequence, amending the model arbitration clause would not, in any case, deprive it of effect. Rather, it would enhance the efficiency of arbitration by pre-determining the applicable law if one of the parties later submits that the clause in question is pathological.

III. DRAFTING NON-PATHOLOGICAL ARBITRATION CLAUSES

The wise one learns from others' mistakes, to cite a seminal quote.[56] Because pathological clauses protract arbitration proceedings and may even result in non-enforcement of the final award or setting aside of the national award, our examination turns to practical considerations that may assist the parties in drafting the arbitration agreement.

It is usually intuitive to follow the model clause suggested by the arbitral institution or the model clause contained (if any) in the *ad hoc* arbitral rules, depending on where the parties aim to proceed with arbitration. Nevertheless, the model clause is not always a silver bullet to avoid the conclusion of pathological arbitration agreements. For instance, although it is customary for arbitration clauses to cover the law of the seat and the substantive law applicable to the dispute, certain arbitral institutions may still consider these matters as optional for indication. One may have a look at a model clause suggested by the China International Economic and Trade Arbitration Commission, according to which: "*Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for arbitration, which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award*

[53] Singapore International Arbitration Centre (n 49).
[54] International Chamber of Commerce (n 47); Vienna International Arbitral Centre (n 51).
[55] Lithuanian Court of Appeal, 6 October 2016 (n 22); Lithuanian Court of Appeal, 2 March 2017 (n 22).
[56] Karina Urbach, 'Between Saviour and Villain: 100 Years of Bismarck Biographies' (1998) 41(4) HJ 1157.

is final and binding upon both parties."[57] As appears, the substantive law applicable to the dispute, the law of the arbitration seat, let alone the language of the arbitral proceedings, the number of arbitrators and how they should be appointed, are not covered by this model clause. Should a disagreement arise in respect of these matters, a national judge or an arbitral tribunal will presumably consult the applicable CIETAC arbitration rules, which the parties incorporated into their arbitration agreement by referring to them.[58] Still, these omissions may lead to lengthy procedural debates, protracting the arbitration. It is therefore important to set the arbitration clause as clearly as possible at the time of its framing. Turning again to the functions of the arbitration clause, laid down by Eisemann, when drafting the arbitration clause, the party should project the scenarios of how their arbitral clause will play out in practice, namely, how the arbitral tribunal will be constituted, how the arbitral proceedings will be conducted, and how the final award will be enforced.

The contemporary international practice determines what the arbitration clause should cover in order to produce effective arbitral proceedings. In this respect, for instance, the International Bar Association (IBA) collected best practices, resulting in Guidelines for Drafting International Arbitration Clauses as of 7 October 2010. This document covers the eight guidelines for basic drafting that careful parties may use as a checklist to draft their clause. According to the IBA, while negotiating an arbitration agreement, *(i)* the parties should decide between institutional and *ad hoc* arbitration, *(ii)* the parties should select a set of arbitration rules and use the model clause recommended for these arbitration rules as a starting point, *(iii)* absent special circumstances, the parties should not attempt to limit the scope of disputes subject to arbitration and should define this scope broadly, *(iv)* the parties should select the seat of arbitration; this selection should be based on both practical and juridical considerations, *(v)* the parties should specify the number of arbitrators, *(vi)* the parties should specify the method of selection and replacement of arbitrators and, when *ad hoc* arbitration is chosen, should select an appointing authority, *(vii)* the parties should specify the language of arbitration, and *(viii)* the parties should ordinarily specify the rules of law governing the contract and any subsequent disputes.[59] The Guidelines also address how to draft the optional elements of arbitration clauses (e.g., on document production, cost allocation, etc.), as well as drafting arbitration clauses to address peculiar situations involving multi-tier dispute resolution, multiparty arbitration, or multi-contract arbitration.[60]

In light of the analysed ruling of the Klaipėda Regional Court, the author also notes the importance of the definite language used in the arbitration clause. Namely, the parties should avoid any phrasing that could lead to interpreting arbitration as a possible but not mandatory method of dispute resolution. For instance, the IBA Guidelines for Drafting International Arbitration Clauses suggest framing the beginning of the arbitration clause as follows: "*All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be finally resolved by arbitration [...].*"[61] In comparison to "*disputes […] shall be finally resolved by arbitration*", the phrase "*may submit a dispute to arbitration*" or any similar wording can be interpreted by some adjudicators as indicating

[57] China International Economic and Trade Arbitration Commission, 'Model Arbitration Clause' <https://www.cietac.org/en/articles/25117> accessed 6 May 2026.

[58] Supreme Court of Lithuania, 29 November 2018 (n 16).

[59] International Bar Association, 'IBA Guidelines for Drafting International Arbitration Clauses' (7 October 2010) <https://www.ibanet.org/MediaHandler?id=D94438EB-2ED5-4CEA-9722-7A0C9281F2F2> accessed 6 May 2026.

[60] International Bar Association (n 59).

[61] International Bar Association (n 59).

that the parties have assumed other dispute resolution mechanisms.

As a final point, the author mentions that the IBA Guidelines for Drafting International Arbitration Clauses were issued in 2010, and the current state of the art[62] suggests that the arbitration clause may, and even should, cover the law applicable to the arbitration agreement itself. The author considers this indication as useful in the event of future disputes between the parties regarding the pathological nature of the arbitration clause, including its existence or validity.

CONCLUSIONS

Pathological arbitration clauses obstruct the smooth conduct of arbitration by creating uncertainty about its conduct. Nevertheless, the Lithuanian case law holds that a pathological arbitration clause does not automatically equate to an invalid arbitration clause. The gaps and other contradictions in such clauses can be remedied. The most important consideration to validate the clause is that the parties intended to arbitrate rather than litigate in the national court, negotiate, advance mediation or employ any other alternative dispute resolution method. If the parties' intention to arbitrate is established, their will should be preserved. The national court may assist the parties with respect to defects in the arbitration clause that concern the formation of the arbitral tribunal. In turn, a formed arbitral tribunal later should decide how other defects of the arbitration clause can be remedied, given the *competence-competence* principle. Nonetheless, it is better to avoid drafting pathological clauses for the parties rather than enter into subsequent disputes over their scope. To achieve this, the parties may, for instance, consult the IBA Guidelines for Drafting International Arbitration Clauses while framing their arbitration agreement. In addition, since a pathological arbitration clause often implicates the questions over its validity, the author considers it advisable that the parties indicate in their clause the applicable law governing the arbitration agreement itself.

[62] International Chamber of Commerce (n 47); Singapore International Arbitration Centre (n 49); Vienna International Arbitral Centre (n 51).