

Intellectual Property and Arbitrability: analysis of one significant judgement

Dr. Tadas Varapnickas

Associate Partner at Ellex Valiunas, lecturer at Vilnius University Faculty of Law

As a general rule, all disputes can be resolved via the means of arbitration. However, some types of disputes are usually considered non-arbitrable by different lawmakers around the world. One of the most common types of non-arbitrable disputes concerns the intellectual property disputes. Indeed, the views in different jurisdictions differ with respect to the intellectual property disputes: while some jurisdictions forbid the arbitration in the realm of intellectual property, the others are much more liberal. Desputeaux case in Canada is a good example of how the approaches of different courts even in one state may differ. Yet, this case sets clear guidelines concerning the arbitrability of IP disputes that may be relevant outside Canada. This article aims to discuss this case as well as to describe the main issues that usually arise with respect to intellectual property disputes in Lithuania and other countries. The article concludes that as a preferred method of dispute settlement, arbitration is fully capable of dealing with IP issues. The only issue that still might create some uncertainty and where the regulations differ the most, is whether issues directly concerning the validity of IP rights could be brought before arbitrators.

INTRODUCTION

Article V(2)(a) of the New York Convention¹ foresees that the recognition of an arbitral award may be refused if it is found that the subject-matter of the difference is not capable of settlement by arbitration under the law of that country. On the same token, UNCITRAL Model Law² provides the same provision in its Article 34(2)(b)(i) with respect to the annulment of an award. Hence, both the New York Convention and the Model Law refer to arbitrability as a ground to deny recognition of a foreign award or to annul the award before the courts of the seat.

Arbitrability “involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of

the courts.”³ In general, any dispute should be capable of being resolved via arbitration unless the law provides otherwise. However, there is no unified approach of what could be arbitrable and what could not. As put by Born, “the types of disputes that are non-arbitrable differ from nation to nation. In general, disputes or claims are deemed “non-arbitrable” because of their public importance or a perceived need for judicial protections. Among other things, various nations refuse to permit arbitration of at least some disputes concerning criminal law, labor grievances; intellectual property; real estate; bankruptcy; and domestic relations.”⁴

Indeed, although the lawmakers are free to decide what types of disputes should not be arbitrable, some categories tend to repeat in most

¹United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) (“**New York Convention**”).

²UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (“**Model Law**”).

³Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, 2015) 110.

⁴Gary B. Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012) 82.

jurisdictions. One of such types of disputes that for a long time was considered controversial for being resolved via arbitration is intellectual property (“IP”) disputes. Yet, in recent years the approach has been changing with more countries acknowledging the arbitrability of IP disputes (sometimes with some limitations). One of the most important examples in this respect is the judgement of the Supreme Court of Canada in the case *Desputeaux v. Éditions Chouette (1987) inc.*⁵ delivered twenty years ago in 2003 (“**Desputeaux case**”). This article aims to discuss this judgement in detail by presenting the key findings of Canada’s highest court as well as to provide explanations concerning the issues of arbitrability of IP disputes in more general terms including the presentation of the approach in Lithuania in the last section of this article.

I. IP RIGHTS AND KEY ISSUES OF ARBITRABILITY OF IP DISPUTES

The list of IP rights is established in Article 2(viii) of the Convention Establishing the World Intellectual Property Organization.⁶ Pursuant to this provision, IP shall include the rights relating to literary, artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

Thus, the notion ‘IP’ contains very different categories of IP rights. For instance, while copy-

rights are basically safeguarded *ipso facto* in the whole world,⁷ the patents and trademarks must usually be registered in state registries to be safeguarded in the territory of that particular state.

This is so because based on the principle of territoriality,⁸ the latter rights are conferred on the owner exclusively by registration (with some exceptions). In other words, IP rights “are, in a sense, monopolies granted by states (and in some cases also by supranational organizations) over the use and the commercial exploitation of intangible goods. This is why national legal systems have often reserved jurisdiction over disputes concerning IP rights to state courts, at least when matters of validity and registration are at stake.”⁹

Since it is state responsible for registration of certain IP rights, it made it uncertain for a long time whether disputes concerning the registration and validity issues could be arbitrable. To note, Legler distinguishes four types of IP claims: *first*, claims stemming from a contractual relationship; *second*, disputes concerning the paternity of the ownership of a right, such as a patent; *third*, conflicts regarding the infringement of IP rights; *finally*, lawsuits concerning the validity of a patent, trademark or a design.¹⁰ With respect to the first category, IP issues typically arise in four categories of contracts: (i) licence agreements; (ii) joint venture agreements; (iii) business acquisition agreements; and (iv) employment contracts.¹¹

Despite very different types of IP disputes that may arise and that are unrelated to validity of an IP right, “it appears that the lack of specific guidance in national legislation on issues of arbitrability of IP disputes constitutes the main source of doubts in this respect.”¹²

⁵ *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17.

⁶ Convention establishing the World Intellectual Property Organization (adopted 14 July 1967, entered into force 26 April 1970).

⁷ Thomas Legler, ‘Arbitration of intellectual Property Disputes’ (2019) 37(2) ASA Bulletin 290.

⁸ Hanns Ullrich, ‘TRIPS: Adequate Protection, Inadequate Trade, Adequate Competition Policy’ (1995) 4(1) Pacific Rim Law & Policy Journal 157.

⁹ Dário Manuel Lentz de Moura Vicente, ‘Arbitrability of intellectual property disputes: a comparative survey’ (2015) 31(1) *Arbitr. Int.* 152.

¹⁰ *Ibid* 291.

¹¹ Blessing, ‘Arbitrability of Intellectual Property Disputes’ (1996) 12(2) *Arbitr. Int.* 197-198.

¹² Trevor Cook and Alejandro I. Garcia, *International Intellectual Property Arbitration* (Kluwer Law international 2010) 52.

Therefore, while the Swiss Patent and Trade Mark Office already in 1975 stated that arbitral awards rendered in connection with the validity of IP rights are recognized as a basis for revoking registration, other countries such as Australia, Germany, Great Britain, the Netherlands and France supported a completely different approach.¹³ The national lawmakers were concerned to allow arbitrators to rule on IP rights because it may have also meant that private individuals would be allowed to rule on a validity of a particular IP right as well as to deal with the rights of third parties, something that the state, responsible for granting those rights, could not control. As put in the doctrine, *“given that intellectual property rights are granted by states in the exercise of their sovereignty, it might be legitimate to conclude that disputes concerning such rights are not arbitrable.”*¹⁴

Yet, registration and validity has been only one of the issues that may arise in the field of IP. Nevertheless, other IP claims were deemed non-arbitrable as well. For instance, France’s Patent Law of 1968 specifically foresaw that all disputes involving patents were to be adjudicated by one of the courts granted with a specific jurisdiction and such disputes were non-arbitrable.¹⁵

The reason why the lawmakers were reluctant to allow arbitrators to adjudicate on IP disputes in general was simple – it concerns the matters of public policy: *“whether or not a patent or trade mark should be granted is plainly a matter for the public authorities of the state concerned, these being monopoly rights that only the state can grant. Any dispute as to their grant or validity is outside the domain of arbitration.”*¹⁶ In IP disputes *“the existence, validity, ownership or*

*scope of certain IP rights are at least preliminary questions to be resolved before the merits of a case can be determined.”*¹⁷ Hence, even when the dispute does not concern the validity of an IP right, it was considered inevitable that those questions may arise at some stage of the proceedings and this was something undesirable.

Different approach was used for copyrights. Since the copyrights exist without any need for a registration, *“issues on copyright are very largely arbitrable, except where unalienable rights (personality rights) of authors are at issue (which, thus, are not deemed freely disposable).”*¹⁸ Therefore, while IP rights dealing with registration were considered non-arbitrable or arbitrable with limitations, the same issue did not arise with respect to copyrights.

II. CANADA’S SUPREME COURT BRINGS CLEARANCE WITH RESPECT TO COPYRIGHT DISPUTES

While arbitration of copyrights has not been an issue in itself, Desputeaux case is important in confirming that copyrights may be subject-matter of arbitration.

As a matter of context, the Quebec Court of Appeal annulled the arbitral award concerning copyright issues on the arguments that historically were applied only to patents or trademarks arbitration, namely, public policy and limitation of arbitral jurisdiction. It was so unexpected that it was even seen as a threat to any further developments of IP arbitration in Canada: *“it raises critical questions about the ability of arbitrators to decide copyright disputes and about the proper scope of the arbitrability doctrine more generally.”*¹⁹

¹³ Marc Blessing (n 11) 201.

¹⁴ Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 352.

¹⁵ Edouard Fortunet, ‘Arbitrability of Intellectual Property Disputes in France’ (2010) 26(2) *Arbitr. Int.* 282.

N.B. Approach in France changed 10 years later when in 1978 it was expressly stated that issues relating to trademarks and patents are arbitrable (see Fortunet 282).

¹⁶ Blackaby and others (n 3) 112.

¹⁷ Michael Woller, Michaela Pohl, ‘IP Arbitration on the Rise’ (2019) *Kluwer Arbitration Blog* <<http://arbitrationblog.kluwerarbitration.com/2019/07/16/ip-arbitration-on-the-rise/>> accessed 29 September 2021.

¹⁸ Blessing (n 11) 202-203.

¹⁹ M Paul Michell, ‘Arbitrability of Copyright Disputes: Desputeaux v. Les Editions Chouette (1987) Inc.’ (2003) 38 *Can Bus LJ* 126.

Eventually, the Supreme Court confirmed that the arguments of the Court of Appeal are groundless as they tend to limit arbitrators' jurisdiction too much without any sound reason. The very fact that the Supreme Court very clearly confirmed the arbitrability of copyrights disputes makes this judgement so important in terms of IP arbitration not only in Canada but worldwide.

2.1. RELEVANT CONTEXT: WHAT HAPPENED BEFORE THE SUPREME COURT WAS INVOLVED?

It all started in 1988 when Christine L'Heureux, H el ene Desputeaux, and Les  ditions Chouette (1987) inc. (whose major shareholder was Ms. L'Hereux) formed a partnership for the purpose of creating children's books. As a result of this collaboration, a popular character – Caillou – was born. The idea was that Desputeaux draws Caillou while L'Heureux writes the texts for the books.

Between 1989 and 1995 Desputeaux and Chouette entered into a number of contracts relating to the publication of illustrations of Caillou, including a licencing contract in 1993.

Eventually, in 1996 Chouette brought a motion before the Canadian court regarding the interpretation and application of the licencing contract. However, pursuant to Desputeaux's request, the court sent parties to arbitration and noted that the existence of the contract was not in issue, i.e. the question of validity was excluded from arbitration proceedings. After hearing the case the arbitrator ruled in Chouette's favour.

Being unsatisfied with the award, Desputeaux requested its annulment on the basis that, *first*, the arbitrator had ruled on a dispute that was not before him – the IP in the Caillou character and the status of the parties as co-authors.

Second, she criticized the arbitrator for failing to apply mandatory provisions.

After hearing the application for annulment, Quebec Superior Court dismissed it in full. It ruled that none of the grounds of nullity was material. Desputeaux appealed and this is where the legal story starts.

2.2. SUPREME COURT'S FINDINGS: PRO-ARBITRATION APPROACH

Quebec Court of Appeal disagreed with the Superior Court and annulled the arbitral award on several different grounds concerning arbitrability. Conclusions of the court went against the trend limiting non-arbitrability of IP disputes. Therefore, before the Canadian highest court adopted its judgement, Michell wrote on the importance of the future judgement: *“the manner in which the court addresses the question of the arbitrability of copyright disputes will affect how the boundaries of arbitrability are drawn in other types of disputes.”*²⁰ Indeed, the Supreme Court used this opportunity to bring more clarity to copyrights arbitration. The importance of the Court's conclusions even went beyond Canada's borders.

2.2.1. INTERPRETATION OF CANADA'S COPYRIGHT ACT

Section 37 of Canada's Copyright Act²¹ foresees: *“The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings, other than the prosecution of offences under section 42 and 43, for the enforcement of a provision of this Act or of the civil remedies provided by this Act.”* Meanwhile, Quebec's Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters²² in also Section 37 provided that in the absence of an express renunciation, every dispute arising from the interpretation of the contract shall be submitted to an arbitrator at the request of one of the parties.

²⁰ M Paul Michell, 'Arbitrability of Copyright Disputes: Desputeaux v. Les Editions Chouette (1987) Inc.' (2003) 38 Can Bus LJ 149.

²¹ Canada's Copyright Act, Section 37 (in force until 7 November 2012).

²² Quebec's Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, Section 37.

Despite the latter provision, the Court of Appeal concluded that the award was null under Section 37 of the Copyright Act. The court held that the said provision foresees for courts' jurisdiction, thus, arbitration is not authorized to deal with copyright disputes.

The Supreme Court disagreed. It unequivocally ruled in para. 38 of its judgement that the Court of Appeal substantially and incorrectly limited the powers of arbitrators in relation to copyright based on a strict interpretation of Section 37 of Copyright Act. Even more, the Supreme Court noted that the conclusions of the appellate court go against the trend to accept and even encourage the use of civil and commercial arbitration, particularly in modern western legal systems.

In Supreme Court's view, Quebec Civil Code excludes from arbitration only disputes over the status and capacity of persons, family members or other matters of public law. Furthermore, the federal lawmaker enacted the Commercial Arbitration Act based on the Model Law whose Article 5 makes arbitration the preferred method of resolving disputes in matters to which it applies.

Therefore, the Supreme Court stated in para. 42 of its judgement that Section 37 of Copyright Act is not intended to exclude arbitration. It merely identifies the court which will have jurisdiction within the judicial system. Most importantly, it cannot be assumed to exclude arbitration jurisdiction unless it expressly so states. If the Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so. Therefore, Section 37 of Copyright Act could not be considered as an obstacle for arbitration proceedings.

The conclusions of the Supreme Court seem to be grounded. Indeed, the very fact that a specific provision in a law provides for a court jurisdiction, does not in itself mean that arbitration is excluded. The opposite rule should apply – if there is no explicit prohibition to agree on

arbitration, parties should be allowed to enter into arbitration agreement. Otherwise, limited nature of arbitrability could be broadened by the courts even where the lawmaker might not have an intention to exclude arbitration.

The same view with respect to the wording of the legal text and IP arbitrability was confirmed by Bombay High Court in India. The court found that a provision in the law foreseeing for district court's jurisdiction only limits a right to bring a claim before lower courts but not arbitration.²³

2.2.2. PUBLIC ORDER ISSUE

The Court of Appeal also found that the award exceeds the strict interpretation of the contract documents and violates public order. Namely, the arbitrator decided on the legal status of Desputeaux and L'Heureux: the paternity of the respondent's copyright was a moral right attached to her personality and, therefore, exempted from arbitrator's jurisdiction. Besides, arbitrator's award could be set up against persons other than those involved in the arbitration dispute.

The Supreme Court disagreed. It provided an in-depth analysis of the notion of public policy and stated that a broad interpretation of this concept has been rejected by the legislature. In the Supreme Court's view, arbitrators are allowed to deal with questions of public policy. An exception is provided for only certain fundamental matters relating, for example, strictly to the status of persons. Consequently, even if the arbitrators erred in interpreting mandatory provisions, this would not in itself constitute a violation of public order, unless fundamental principles of public order are infringed.

With respect to moral rights arising out of copyright, the Supreme Court held that Canadian legislation recognizes the overlap between economic and moral rights in the definition of copyright. Therefore, in the context of Canadian copyright legislation, although the work is a manifestation of the personality of the author,

²³ *Eros International Media Ltd. v. Telex Links India Pvt. Ltd. and Ors.* [2016] (6) ARBLR 121 (BOM), 2016 (6) BomCR 321.

this issue is very far removed from questions relating to the status and capacity of persons and family matters within the meaning of Quebec Civil Code.

Furthermore, in para. 59 the Supreme Court emphasized that the above-mentioned provision stipulated in Section 37 of the Act respecting the professional status of artists explicitly provides for the jurisdiction of arbitration. Therefore: “*it would be paradoxical if the legislature were to regard questions concerning copyright as not subject to arbitration because they were matters of public order, on the one hand, and on the other hand to direct that this method of dispute resolution be used in the event of conflicts relating to the interpretation and application of contracts that govern the exercise of that right as between artists and promoters.*”

Consequently, the Court ruled that the arbitral award does not deal with a matter that by its nature falls outside the jurisdiction of the arbitrators. Therefore, it is not contrary to the public policy.

The Supreme Court also disagreed with the Court of Appeal’s argument that the dispute could not be submitted before the arbitrator because a decision in respect of copyright may be set up against the entire world and, therefore, only courts could hear such cases.

The Supreme Court noted that this is not a ground for annulment established in the law. Besides, the view taken by the Court of Appeal fails to have regard to *res judicata* principle – the award is authority between the parties and binds only the parties. Thus, in case of a claim concerning Caillou books, any third party could apply to a court to have its copyright recognized.

The Supreme Court’s approach is reasonable and corresponding to the case-law of other countries such as France²⁴ or Italy,²⁵ where it is also recognized that arbitral award concerning the IP validity will only have effect *inter partes*. Thus, any third parties would still have a right to bring their own claims afterwards. However, “*a decision on the validity of an IP right may require erga omnes effect in order to adequately serve the interest of the winning party and to ensure legal certainty.*”²⁶ Thus, an issue remains with respect to *inter partes* effect. Yet, without legislative amendments this issue most likely cannot be solved. Belgium is a good example – Article 51 of its Patent Law foresees that a patent may be revoked by arbitral award. In this case the revocation shall constitute a final decision in respect of all parties, subject to opposition by third parties.²⁷

III. FUTURE OF THE ARBITRABILITY OF IP DISPUTES: ARE DESPUTEAUX FINDINGS APPLICABLE IN OTHER JURISDICTIONS?

In recent years the approach to arbitrability of other IP rights is also changing and Desputeaux case is a good example of this change. For instance, Fouchard, Gaillard and Goldman stated in 1999: “*there is no reason why arbitrators should not, for example, determine the validity of the assignment, performance or termination of a contract granting a licence in respect of intellectual property rights.*”²⁸ Even the European Union that is so reluctant towards the investment arbitration, has an intention of creating a patent mediation and arbitration centre in Ljubljana and Lisbon.²⁹

Today South Africa is probably the only country to fully exclude arbitration of IP disputes.³⁰ Several countries, for instance Germa-

²⁴ *Liv Hidravlika DOO v. Diebolt* [2008] 05-10577 Cour d’appel de Paris.

²⁵ Vicente (n 9) 156.

²⁶ Yoanna Schuch, ‘Protecting IP: arbitration v litigation’ (2018) Commercial Dispute Resolution <https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/documents/20181129-cdr-protecting-ip-arbitration-v-litigation.pdf> accessed 22 October 2021.

²⁷ Belgium Patent Law, Article 51.

²⁸ Gaillard and Savage (n 14) 344.

²⁹ Agreement on a Unified Patent Court of 20 June 2013 [2013] OJ C 175/1, Article 35.

³⁰ Vicente (n 9) 153.

ny³¹ and, as it is discussed below, Lithuania³² also still reject the possibility to arbitrate disputes concerning the validity of registered IP rights. Despite different approaches, a survey by Vicente shows “*a clear trend towards a greater liberalization in relation to arbitration of IP disputes.*”³³

However, the question of arbitrability cannot be considered fully resolved. As noted by Mantakou, “*the variety of IP rights together with the great diversity of national legal systems with regard to arbitrability of IP disputes are factors which require the parties’ extreme caution in drafting arbitration clauses involving IP issues. This is especially so regarding IP titles, such as patents and trademarks, that require the involvement of the state.*”³⁴

Therefore, although for a long time the concerns regarding public policy and other issues were an obstacle for IP arbitration, with some reservations it does not seem to be an issue in most of the cases nowadays. Indeed, it appears that only the validity of registered IP rights such as trademarks remains a rare issue of arbitrability in this field while other questions like licencing or termination may be and are even encouraged to be arbitrated.

IV ARBITRABILITY OF IP DISPUTES IN LITHUANIA

In Lithuania issues of arbitrability are regulated in Article 12 of the Law on Commercial Arbitration. Pursuant to Article 12(1) of the said Law, all disputes may be resolved via arbitration unless provided for otherwise in the subsequent parts of that article. In turn, Article 12(2) lists the disputes that are not arbitrable such as disputes arising out of the family law. Disputes concerning the registration of patents, trademarks and designs are also among those disputes. In

other words, Lithuanian Law on Commercial Arbitration foresees that the disputes arising out of the registration of patents, trademarks and designs are not arbitrable in Lithuania.

As it is explained in the Lithuanian doctrine, “*disputes concerning the registration of patents, trademarks and designs are non-arbitrable, i.e., disputes on the refusal to register, annulment of registration, invalidity of the patents etc., because under the Law on Patents of the Republic of Lithuania and the Law on Trademarks of the Republic of Lithuania these disputes are assigned to the exclusive jurisdiction of the State Patent Bureau and courts. However, contractual disputes arising out of licence or franchise agreements are arbitrable as well as disputes regarding the compensation of damages where the court determined the violations of the Laws on Patents or Trademarks but the claim on the compensation of damages was not brought before the court.*”³⁵

It, therefore, follows that while the Lithuanian approach is not as liberal as in some other jurisdictions, Lithuania did not totally exclude the IP disputes from international arbitration.

Notably, before the Law on Commercial Arbitration was amended in 2012, the previous version of the Law in its Article 11 foresaw that the disputes related to patents, trademarks or marks of services are not arbitrable, i.e. the version that was in force between 1996 and 2012 provided for much more limited regulation. Therefore, the current regulation quoted above may be considered as a huge step up towards the full arbitrability of IP disputes.

The fact that the Lithuanian lawmaker narrowed down the list of non-arbitrable IP disputes was also noticed by the Supreme Court of Lithuania. In 2017 a dispute between two Lithuanian football clubs – Vilnius “Žalgiris” and “Kauno Žalgiris” – arose with respect to

³¹ Ibid 154.

³² Law on Commercial Arbitration of the Republic of Lithuania, Article 12(2).

³³ Vicente (n 9) 161.

³⁴ Loukas A. Mistelis, Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009) 271.

³⁵ Vytautas Nekrošius and others, *Lietuvos Respublikos komercinio arbitražo įstatymo komentaras* (Registru centras, 2016) 56.

the latter's right to use the word 'Žalgiris' in its name. The respondent ("Kauno Žalgiris") requested the first instance court to send the parties to arbitration since the statute of the Football Federation of Lithuania foresees for an arbitration clause. Both the first instance and appellate courts dismissed this request *inter alia* on the basis that the disputes concerning trademarks fall under the exclusive jurisdiction of the Vilnius Regional Court as per Article 49 of the Law on Trademarks.

The Supreme Court, however, ruled to annul the decisions of the lower courts and sent the parties to arbitration with respect to the claim on the use of the trademark. The Supreme Court noted that the registration of trademarks and the questions thereof determine *erga omnes* effects and, therefore, arbitration may not be suitable to solve this kind of disputes. Yet, since the dispute at hand did not consider the registration of the trademark and Article 49 of the Law on Trademarks is not intended to solve the issues of arbitrability, the Supreme Court ruled that the said issue is arbitrable.³⁶

The updated legal regulation and the above-quoted case-law of the Supreme Court of Lithuania confirms the pro-arbitration stance of Lithuania. It demonstrates that, as per the linguistic formula of Article 12 of the Law on Commercial Arbitration, only the disputes concerning the registration of patents, trademarks and design as well as the issues thereof should be considered non-arbitrable. All the other IP disputes should be arbitrable under the Lithuanian law without any further limitations. Should the list of arbitrable IP disputes

be broaden following, for instance, the French approach? Lithuanian practitioners believe it is a discussion for the future: although in case the arbitrability was broaden, the respondent would have better possibilities to defend itself against the claim submitted as well as the dispute could be examined more efficiently, "*taking into account the fact that there are not many IP disputes examined by arbitration in Lithuania, there is no practical impulse to change the existing national regulation [...]*".³⁷

CONCLUSIONS

Desputeaux case serves as a good example of how courts should deal with cases concerning IP arbitration. While Quebec Court of Appeal for some reason put the equals sign between registered IP rights and copyrights and, therefore, found the dispute non-arbitrable, the Supreme Court lined everything up. This judgment confirms that there is no reason why arbitrators could not deal with copyright disputes. On the contrary, being a preferred method of the settlement of international business disputes, arbitration is fully capable of dealing with IP issues. The only issue that still might create some uncertainty, is whether issues directly concerning validity of IP rights could be brought before arbitrators. This is the approach of Lithuania where only the questions concerning the registration of patents, trademarks and design and the questions thereof are non-arbitrable. However, views of national lawmakers worldwide differ in this respect and, therefore, the parties should always check this before deciding on the seat of arbitration.

³⁶ *Viešoji įstaiga futbolo klubas "Žalgiris" v. Viešoji įstaiga Futbolo klubas "Kauno Žalgiris"* [2017] Supreme Court of Lithuania, No e3K-3-686/2017.

³⁷ Rugilė Gediminskaitė, 'Arbitrability of intellectual property disputes in Lithuania and internationally' (2020) 6 *Arbitražas: teorija ir praktika* 60.