THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF LATVIA

JUDGEMENT

on behalf of the Republic of Latvia

Riga 23 February 2023

in Case No. 2022-03-01

The Constitutional Court, composed of Aldis Laviņš, Chairperson of the Court Hearing, Justices Irēna Kucina, Gunārs Kusiņš, Jānis Neimanis, Artūrs Kučs and Anita Rodiņa,

on the basis of a constitutional complaint filed by "VZAIMNIJ KREDIT", a limited liability company registered in the Russian Federation,

on the basis of Section 85 of the Constitution of the Republic of Latvia and Paragraph 1 of Section 16, Paragraph 11 of Section 17(1), Sections 19.^{2} and 28.^{1} of the Constitutional Court Law,

at the hearing on 24 January 2023, in the written procedure, examined the case

"On Compliance of Section 534, 534^{1}, 535, 536 and 537 of the Civil Procedure Law with the first sentence of Section 92 of the Constitution of the Republic of Latvia (Constitution)".

Establishing Part

1. On 14 October 1998, the Parliament of the Republic of Latvia (hereinafter – the *Saeima*) adopted the Civil Procedure Law, which entered into force on 1 May 1999.

Sections 534, 534^{1}, 535, 536 and 537 of the Civil Procedure Law are contained in Chapter 66 of this Law regarding enforcement of a ruling of a permanent court of arbitration (hereinafter referred to also - the Court of Arbitration) established in Latvia. Article 534 of the Civil Procedure Law stipulates the procedure

for filing an application for the issue of a writ of execution for the enforcement of an arbitral award. Section 534[1] of the Civil Procedure Law governs referral of such an application to the parties to the case. Section 535 of the Civil Procedure Law provides for the procedure for the decision-making on the application, while Section 536 stipulates the grounds for refusal of the issue of a writ of execution for the enforcement of an arbitral award. Finally, Section 537 of the Civil Procedure Law stipulates the legal consequences of refusal to issue a writ of execution.

2. The Applicant, **Limited Liability Company "VZAIMNIJ KREDIT"** (*общество с ограниченной ответственностью "ВЗАИМНЫЙ КРЕДИТ"*; hereinafter referred to as - the Applicant) **registered in the Russian Federation**, holds that Sections 534, 534[1], 535, 536 and 537 of the Civil Procedure Law (hereinafter referred to as - the contested provisions) do not comply with the first sentence of Article 92 of the Constitution of the Republic of Latvia (hereinafter referred to - the Constitution).

On 26 November 2019, a court of arbitration registered in the Republic of Latvia rendered a judgement ordering the Applicant to repay the loan and the penalty. The Applicant learned about the arbitral award from the Court Information System of the Russian Federation, which published a notice that the St. Petersburg Court of Arbitration would consider the issue of recognition and enforcement of the arbitral award in the Russian Federation. However, the Applicant submits that it has never entered into any transactions with the creditor in question, including an arbitration agreement, and that other procedural violations have also been established in the arbitral proceedings in question.

According to the Applicant, the first sentence of Article 92 of the Constitution and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as - the Convention on Human Rights) contain the obligation of the state to establish a legal mechanism by which the activities of courts of arbitration tribunals would be controlled. The state has allegedly failed to fulfil this obligation, as it is allegedly not possible to apply to the courts established by

the state for the revocation of an arbitral award. Thus, the Applicant has been denied the right of access to a court.

The fact that it is not possible to seek revocation of an arbitral award in Latvian courts could be explained by the efforts to ensure the efficiency of the arbitral proceedings and to reduce the workload of courts of general jurisdiction. However, the aforementioned interests per se cannot serve as a basis for depriving a person of the right to a fair trial on the merits. Those interests may be protected by means less restrictive of the fundamental rights of the Applicant. Namely, if arbitral awards were subject to the control of courts of general jurisdiction, the reduction in the number of courts of arbitration in Latvia would also reduce the increase in the workload of courts of general jurisdiction. Moreover, introduction of a regulation which would allow the court of general jurisdiction to decide on the revocation of the arbitral award at the stage of the issue of the writ of execution for the arbitral award would also be considered to be, at least in part, a less restrictive remedy.

The harm caused to the Applicant is greater than the public benefit created by the contested provisions. In this particular situation, when the enforcement of the arbitral award is sought abroad, the Applicant allegedly has no possibility to defend its fundamental rights and legal interests against the arbitral award in question, although the Applicant has not voluntarily waived those rights. Even if the Applicant had voluntarily waived its right of access to a court, it allegedly has no access to even minimum safeguards commensurate with the importance of such a waiver, namely, and no judicial control of the impartiality of the arbitral proceedings and the arbitrator's conflict of interest is implemented. Moreover, according to the case-law of the European Court of Human Rights, even a voluntary waiver of such guarantees of the right to a fair trial as the equality of the parties, the right to be heard, independence and impartiality of arbitrators is not permissible.

3. The institution which has issued the contested act, the **Saeima**, holds that the proceedings in the present case should be terminated.

The scope of the first sentence of Article 92 of the Constitution allegedly does not include an abstract interest of a person to appeal against an arbitral award, i.e., to

have its legal validity reviewed according to the appeal or cassation procedures. The legislator, within the framework of its freedom of action, has allegedly chosen a system which, first, provides a remedy against procedural violations in arbitral proceedings and, second, does not recognise the result of unlawful arbitral proceedings. This allegedly ensures comprehensive supervision of the arbitral proceedings and safeguards the individual's right of access to justice.

Since the established system under which a writ of execution is issued for the enforcement of an arbitral award or the issue of such a writ of execution is refused allegedly functions effectively in the jurisdiction of Latvia, a person’s right to request an alternative remedy mechanism does not derive from the first sentence of Article 92 of the Constitution. The mechanism proposed by the Applicant - appeal of arbitral award to a court of general jurisdiction - is allegedly incompatible with the speed, confidentiality and finality of the arbitral proceedings, as well as with the separation from the Latvian judicial system, which allegedly form the basis and the meaning of the existence of courts of arbitration.

Moreover, in the present case, the Applicant allegedly has not used the regulation included in other legal provisions for the protection of its rights - neither with regard to the possibility to challenge the competence of a court of arbitration to hear a civil law dispute, nor with regard to alleged forgery of documents or other criminal offences.

4. The invited person - the Ombudsman - states that the contested provisions do not comply with Article 92 of the Constitution.

Individuals may waive their right to recourse to a court of general jurisdiction by agreeing on the possible referral of further dispute resolution to arbitration. This choice is an expression of the free will of individuals, which the state allegedly may not influence. However, when a state recognises alternative dispute resolution mechanisms such as arbitration, it must establish a legal mechanism to control their functioning, so that the state authority, by its action, recognises only arbitration that respects justice and impartiality. Otherwise, the state would become jointly liable for

an arbitral award rendered in violation of fundamental rights and the principles enshrined in Article 92 of the Constitution.

Allegedly neither Chapter 66 of the Civil Procedure Law nor other normative legal acts provide the parties to arbitral proceedings with access to court in an action for revocation of arbitral ruling or suspension of execution thereof, therefore the existing remedies in case of an illegal arbitral award are not considered to be sufficient. The state must find a solution so that arbitral awards made by the courts of arbitration and effective, but unlawful cannot be recognised and enforced abroad.

5. The invited person - the Ministry of Justice - holds that the contested provisions comply with the first sentence of Article 92 of the Constitution.

The right of a person to consent to an arbitration agreement is based on the principle of dispositivity. In the case of an arbitration agreement, the freely expressed will of the person is allegedly expressed in the form of a legal transaction, which is allegedly an appropriate criterion for the permissibility of a voluntary restriction of fundamental rights. Article 92 of the Constitution allegedly requires that a procedure be provided which, if necessary, would enable it to ascertain that a person has knowingly and voluntarily waived the jurisdiction of the courts of general jurisdiction. This process can be carried out by a person bringing and the court of general jurisdiction adjudicating an action on the validity of the arbitration agreement. If no lack of personal will or other grounds for invalidating the arbitration agreement were established, it should be concluded that the person has voluntarily waived the dispute settlement before a court of general jurisdiction. Accordingly, in such cases, the state allegedly should not interfere in the arbitral dispute resolution process and the enforcement of the arbitral award as in proceedings arising from agreements between the parties.

The state allegedly controls the lawfulness of arbitral proceedings when a party applies for the same coercive mechanisms as those stipulated by the legislator for the enforcement of general court rulings and requests to issue a writ of execution to enforce the arbitral ruling. Thus, the person against whom the arbitral award has been rendered allegedly has the right to raise objections to the conduct of the arbitral proceedings and

to submit supporting evidence when the application for enforcement of the arbitral award is pending before the court and, accordingly, it is also possible to have an arbitral judgement rendered according to an unlawful procedure declared unenforceable. However, in the Applicant's situation, when the recognition and enforcement of the arbitral award is sought in the Russian Federation, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as - the New York Convention) is applicable and the Applicant may protect its rights by opposing the enforcement of the arbitral award in the Russian Federation.

6. The invited person - *LL. M.* Aija Lejniece - states that the contested provisions do not comply with the first sentence of Article 92 of the Constitution.

The first sentence of Article 92 of the Constitution allegedly guarantees not only the right of the parties to the arbitral proceedings to appeal against an arbitral award that has already been made, but also the right to fair, independent, impartial and competent arbitral proceedings. The state is allegedly obliged to guarantee that, where arbitration is permitted, the court of arbitration functions according to the Constitution and, in particular, the right to a fair trial included in Article 92 thereof.

The current legal framework of the civil proceedings which does not provide for the possibility for a court of general jurisdiction to revoke an arbitral award, is incompatible with Article 92 of the Constitution for two reasons. First, a party to arbitral proceedings whose fundamental rights have been affected by the arbitral proceedings has no possibility of obtaining definitive confirmation that the arbitral award rendered in such proceedings has no legal effect. Moreover, it is allegedly possible that enforcement of this judgement is sought in different countries and that the courts in those countries reach different conclusions. Second, the absence of a mechanism for challenging and revocation of arbitral awards has a negative impact on the quality of Latvian arbitral awards and, consequently, on the right to a fair trial of the parties to arbitration cases.

The institution of revocation of arbitral award has a deterrent effect on potential bad faith in the arbitral proceedings. As long as a mechanism for challenging and revocation of arbitral awards in courts of general jurisdiction will not be introduced,

Latvian courts of arbitration will allegedly never gain the trust of merchants and continue to exist in the Stone Age.

7. The invited person - Lauris Rasnačs, *Dr. iur.*, Associate Professor, Faculty of Law, University of Latvia - expresses his opinion that the contested provisions do not comply with the first sentence of Article 92 of the Constitution.

A person who has been adversely affected by an arbitral award has several remedies available in the Latvian legal system, but they do not ensure procedural equality of that person, since the enforcer may take active steps to secure enforcement of the arbitral award, but the debtor has no means to prevent enforcement of such an award. There are no overriding public interests that would justify such a situation. Moreover, the absence of the possibility to seek the revocation of an arbitral award violates the principle of legal certainty, since a creditor may seek the enforcement of an unlawful arbitral award months or even years after the date of the award.

The effectiveness of the arbitral proceedings allegedly cannot be considered in isolation from the right of the parties to participate effectively, and only arbitral proceedings that respect the procedural equality of the parties are effective. A solution that significantly restricts the procedural equality of the parties cannot be justified by the efficiency of the arbitral proceedings as a possible legitimate aim.

Concluding Part

8. On the basis of Section 29, Paragraph One, Clause 6 of the Constitutional Court Law, the Saeima requests to terminate legal proceedings in the case, as the contested provisions do not infringe the Applicant's fundamental rights.

In accordance with the Constitutional Court Law, infringement of a person's fundamental rights is to be established if: first, the Constitution contains the specific fundamental rights, namely, the contested provision falls within the scope of the specific fundamental rights; second, that is the contested provision that infringes the fundamental rights included in the Constitution *(cf. Paragraph 11 of the Decision of*

the Constitutional Court of 7 October 2019 on Termination of Proceedings in Case No. 2018-19-03).

The Application seeks assessment of compliance of the contested provisions with the first sentence of Article 92 of the Constitution. Consequently, the Constitutional Court will examine whether the contested provisions affect such rights of the Applicant which fall within the scope of the first sentence of Article 92 of the Constitution.

9. First sentence of Article 92 of the Constitution states: "Everyone has the right to defend his or her rights and lawful interests in a fair court."

9.1. The Constitutional Court has recognised that the concept of "fair trial" used in the first sentence of Article 92 of the Constitution includes two aspects, namely, "fair court" as an independent institution of the judicial power which hears a case, and "fair trial" as due proceedings adequate to the state governed by the rule of law in which a case is heard. This means that the state has a duty to establish courts and to stipulate such legal proceedings that allow anyone whose rights or legitimate interests have been unlawfully violated or infringed to obtain an effective remedy for their rights and legal interests. Namely, the first sentence of Article 92 of the Constitution includes the fundamental right of a person to protect his/her rights and legal interests in a fair court *(see Paragraph 12.1 of the Decision of the Constitutional Court of 30 December 2020 on Termination of Proceedings in Case No. 2020-08-01*).

In civil proceedings, the content of the right to a fair trial included in the first sentence of Article 92 of the Constitution is specified in Section 1, Paragraph One of the Civil Procedure Law, according to which every natural person and legal entity has the right to protect his or her infringed or contested civil rights or interests protected by law in the court *(cf. Paragraph 14 of the Decision of 30 December 2020 of the Constitutional Court on Termination of Proceedings in Case No. 2020-08-01*). The legislator has further specified this right in Section 23, Paragraph One of the Civil Procedure Law, according to which all civil disputes are subject to the jurisdiction of the court, unless otherwise stipulated by law. However, the general rule on the subordination of civil disputes to a national court does not deprive the parties of the

right to mutually agree on the settlement of the dispute before a court of arbitration - an alternative institution for dispute resolution not belonging to the judiciary, the establishment and functioning of which is governed by general principles of law and other provisions of the Constitution, the Arbitration Law, the Arbitration Rules and the arbitration agreement concluded between the parties.

Functioning of a court of arbitration as a legal institution is based on the arbitration agreement - agreement based on the parties' free will to adjudicate dispute before a court of arbitration. Arbitration proceedings are aimed at rapid, relatively cheaper, final and confidential resolution of a dispute in question in a process agreed by the parties, based on the professional specialisation of the arbitrators. These features of arbitration proceedings define its nature and distinguish it from proceedings before national courts. In view of the above, the application of certain legal provisions contained in Article 92 of the Constitution may be limited in this procedure due to its meaning and essence. Namely, in the case of an arbitration agreement, the freely expressed will of a person is a suitable criterion of admissibility of a voluntary restriction of this person's right to a fair trial. Neither the legislator nor the Constitutional Court has the task to replace the freely expressed will of a person with its assessment of the reasonableness of his or her actions. However, the freedom of a person to waive the fundamental rights included in the Constitution extends only insofar as it does not jeopardise the functioning of the legal system of a democratic state governed by the rule of law *(cf. Paragraph 8 of the Judgement of the Constitutional Court of 17 January 2005 in Case No. 2004-10-01 and Paragraph 14.1 of the Judgement of 28 November 2014 in Case No. 2014-09*-01).

The functioning of the Latvian legal system is based on the principle of the state governed by the rule of law, which should be taken into account when specifying the right to a fair trial included in Article 92 of the Constitution. The requirement of fundamental rights to a fair trial must ensure that a person is seriously perceived as a subject, and not an object, of such proceedings *(cf. Paragraph 11 of the Judgement of the Constitutional Court of 5 November 2008 in Case No. 2008-04-01*). If a person were to become the mere object of proceedings, the functioning of the legal system of a democratic state governed by the rule of law would be undermined. In order to

prevent this, the possibilities of a person to refuse the application of certain legal provisions contained in Article 92 of the Constitution should be limited. More specifically - it is not allowed to waive , inter alia, the right to equality of the parties, independence of the court and the possibility to be heard, as well as the right to an impartial court by an arbitration agreement *(cf. Paragraph 9.1 of the Judgement of the Constitutional Court of 17 January 2005 in Case No. 2004-10-01*). It is also recognised in legal science that independence and impartiality, as well as the principles of equality of the parties and fairness must be respected throughout the arbitral proceedings*(see*: *Kačevska I. International Commercial Arbitration Law. PhD thesis, p. 252. Available at: dspace.lu.lv*). A similar view is expressed by the invited persons *(see the opinion of the Ombudsman and* LL. M. *Aija Lejniece opinion in Volume 3 of the case file, p. 37 and vol. 6, p. 135*). Otherwise, the arbitration proceedings would not be fair.

Consequently, the right to a fair trial included in the first sentence of Article 92 of the Constitution requires that the arbitral proceedings ensure, inter alia, equality of the parties, independence and impartiality of the arbitrators, as well as the opportunity for the parties to be heard.

9.2. When specifying the content of fundamental rights included in the Constitution, Latvia's international obligations in the field of human rights must also be taken into account. Namely, it is necessary to ensure mutual harmony between the provisions of the Constitution and the provisions of human rights contained in international treaties binding on Latvia *(see, for example, Paragraph 7.2 of the Judgement of the Constitutional Court of 8 June 2022 in Case No. 2021-40-0103*).

The Constitutional Court has already indicated above, when specifying the fundamental rights included in Article 92 of the Constitution in conjunction with Article 6 of the Convention on Human Rights, that this provision does not preclude the establishment of courts of arbitration to resolve disputes of a commercial nature between individuals. A person has the right to waive hearing of a case in a national court, and Article 6 of the Convention on Human Rights allows such a waiver,

however, it must be free, in accordance with the law, and unambiguous *(see Paragraph 14.2 of the Judgement of the Constitutional Court of 28 November 2014 in Case No. 2014-09-01*).

The European Court of Human Rights has also recognised that the existence of an arbitration agreement does not automatically mean that the parties to that agreement have expressly waived all their rights under Article 6 of the Human Rights Convention. In the case of certain rights under the Human Rights Convention, the waiver also requires a minimum level of legal protection commensurate with the importance of such waiver *(see, for example, Paragraph 96 of the Judgement of the European Court of Human Rights of 2 October 2018 in Case "Mutu and Pechstein v. Switzerland", Application No. 40575/10 and others, and Paragraph 127 of the Judgement of 20 May 2021 in Case "Beg S.P.A. v. Italy", Application No. 5312/11*). When deciding whether such a remedy exists, the legal framework of arbitration proceedings established in the Member States is assessed, including the control implemented by the courts of the Member States over the application of that framework, namely, it has been assessed whether a minimum remedy is provided through judicial review of general jurisdiction (*see, for example, the Decision of the European Commission of Human Rights of 27 November 1996 on the Admissibility of the Application in Nordström-Janzon and Nordström-Lehtinen v. the Netherlands, Application No. 28101/95, and the Decision of the European Court of Human Rights of 23 February 1999 on the Admissibility of the Application in Suovaniemi and Others v. Finland, Application No. 31737/96*). Thus, from the need to ensure minimum legal protection, arises a conclusion that the existence of an arbitration agreement per se is not sufficient to waive all the rights included in Article 6 of the Human Rights Convention. For example, when determining whether the parties have unequivocally waived their right to an independent and impartial court by the arbitration agreement, the European Court of Human Rights has also taken into account whether the parties have had the opportunity to object to a possible conflict of interest of the arbitrator in the arbitral proceedings and whether the party has exercised that opportunity by objecting both during the arbitral proceedings and within the framework of the supervisory mechanism of those proceedings *(see the Judgement of the European Court of Human Rights of 2 October 2018 in Case "Mutu*

and Pechstein v. Switzerland", Application No. 40575/10, et al, Paragraphs 121-123, and Judgement of 20 May 2021 in Case "Beg S.P.A. v. Italy", Application No. 5312/11, Paragraphs 136-143).

Thus, the first sentence of Article 92 of the Constitution also contains, inter alia, the obligation of the state to establish such a legal framework which would ensure at least minimum legal protection. Similarly, the Constitutional Court has also previously recognised that the state is obliged to provide the parties to the arbitral proceedings with an opportunity to remedy significant procedural violations that have occurred in the arbitral proceedings, and it is also obliged not to recognise the result of the arbitral proceedings in which such violations have occurred *(cf. Paragraph 14 of the Judgement of the Constitutional Court of 28 November 2014 in Case No. 2014-09-01*). In other words, the state is also obliged to ensure supervision of the arbitral proceedings, providing the person with the possibility to protect his or her infringed rights. This obligation of the state is a prerequisite for ensuring that the functioning of the legal system of Latvia as a democratic state governed by the rule of law is not jeopardised by a person's waiver to hear a dispute in a national court.

9.3. An award for the recovery of money has been rendered against the Applicant in a permanent court of arbitration established in Latvia and recognition and enforcement of that award is sought in the Russian Federation. The Applicant believes that its right to a fair trial has been violated, since it is not possible to file an application before the Latvian courts for the revocation of the arbitral award in question, even though the arbitral proceedings allegedly contain serious violations.

As the Saeima has rightly pointed out, the scope of the first sentence of Article 92 of the Constitution does not include an abstract interest of a person to appeal against an arbitral award, i.e., to have its legal validity verified specifically in the appeal or cassation procedure. However, the person has the right to state supervision of the arbitral proceedings (*see Paragraph 9.2 of this Judgement*). The Constitutional Court has already recognised that in Latvia the supervision of arbitral proceedings is concentrated at the stage of issuing the writ of execution for the arbitral award, which is regulated by the contested provisions *(cf. Paragraph 9.1 of the Judgement of the Constitutional Court of 17 January 2005 in Case No. 2004-10-01*). Moreover, if a

person has not consented to arbitration, the right to apply to court for protection of the rights infringed shall be ensured *(cf. Paragraph 20.2.4 of the Judgement of the Constitutional Court of 28 November 2014 in Case No. 2014-09-01*).

The Applicant considers that the infringement of the right to a fair trial, included in the first sentence of Article 92 of the Constitution, is caused by the fact that the Latvian legal system does not provide for the possibility to challenge the award of a permanent arbitration court established in Latvia in the event that significant procedural infringements have occurred in the arbitral proceedings. Thus, in cases where the issuance of the writ of execution of the arbitral award is not necessary or possible in Latvia, including in the case of the Applicant, where the arbitral award is to be recognised and enforced abroad, the person has no possibility to protect his or her violated rights. As it follows from the case file, the Applicant objects to the fact that the mechanism of supervision of the arbitral proceedings provided for in the contested provisions is not sufficient and considers that the state has thus failed to fulfil its obligation to ensure supervision of the arbitral proceedings. Since the Applicant has become a party to the arbitral proceedings and the arbitral tribunal has rendered an award against it, the Applicant has found itself in a situation to which the obligation of the state to ensure supervision of the arbitral proceedings contained in the first sentence of Article 92 of the Constitution applies.

It follows from the case-law of the Constitutional Court: if Article 92 of the Constitution contains an obligation of the State to take specific measures for the implementation of the right to a fair trial, then this provision simultaneously also includes the fundamental right of a person to fulfil the respective obligation*(cf. Paragraph 12.1 of the Decision of 30 December 2020 of the Constitutional Court on Termination of Proceedings in Case No. 2020-08-01*). In particular, since the state is under an obligation to supervise the arbitral proceedings, the Applicant has a fundamental right, namely, the right to have the arbitral proceedings supervised by the State, as well as the right to require the state to fulfil that obligation. Otherwise, both the obligations of the state and the fundamental rights of the individual concerned would become illusory. The contested provisions affect fundamental rights of the Applicant which fall within the scope of the first sentence of Article 92 of the

Constitution, and, in the present case, the infringement of the fundamental rights of the Applicant is to be established.

The proceedings should therefore continue.

10. If the first sentence of Article 92 of the Constitution contains an obligation of the legislator to take measures to implement the right to a fair trial, the Constitutional Court assesses whether the legislator has fulfilled this obligation. Moreover, if this obligation provides for the elaboration and adoption of a regulation with specific content, the Constitutional Court assesses whether the legislator has duly fulfilled its obligation *(cf. Paragraph 11 of the Judgement of the Constitutional Court of 23 February 2022 in Case No. 2021-22-01*).

Taking into account the circumstances of the case under examination and the content of the legislator's obligation included in the first sentence of Article 92 of the Constitution, the Constitutional Court must ascertain whether:

1) the legislator has taken measures to supervise the arbitration proceedings;

2) these measures have been taken properly, i.e., in accordance with the general principles of law and other provisions of the Constitution.

11. It follows from the case-law of the Constitutional Court that the state control over the functioning of the courts of arbitration may take two forms: first, the state may stipulate that a court of arbitration should be established and function in accordance with the requirements of the first sentence of Article 92 of the Constitution; second, the state may provide for that the functioning of courts of arbitration is controlled by a court established and functioning in accordance with the first sentence of Article 92 of the Constitution *(cf. Paragraph 14.2 of the Judgement of the Constitutional Court of 28 November 2014 in Case No. 2014-09-01*). Furthermore, the court's control over the functioning of the court of arbitration is linked to the requirements stipulated by the state and applicable to the functioning of the courts of arbitration.

11.1. In Latvia, the Arbitration Law provides for the procedure of establishment of courts of arbitration and the basic principles of their functioning in order to ensure efficient and fair adjudication of civil disputes. It specifies the requirements to be

observed both in the functioning of the courts of arbitration generally and in each specific arbitration proceedings.

According to Section 3, Paragraph Two of the Arbitration Law, an arbitration court shall examine civil legal disputes on the basis of an agreement between the parties, insofar as it is not in contradiction with the Constitution of the Republic of Latvia, this Law, as well as other laws and regulations. This provision reflects the requirement arising from the right to a fair trial that the existence of an arbitration agreement is a prerequisite for arbitral proceedings. Moreover, the choice to refer a dispute to arbitration must be free, in accordance with the law and unambiguous *(see Paragraph 9.2 of this Judgement*). In order to ensure compliance with these requirements, a person must first have the right to seek revocation of an arbitration agreement or declaration thereof null and void by bringing an action in a court of general jurisdiction.

11.2. If the court of arbitration has not yet rendered an award but the arbitration agreement has been revoked or declared null and void in accordance with the law, the arbitral proceedings cannot be commenced, but pending proceedings cannot continue, as there is no legal basis for such proceedings. Whereas, if the court of arbitration has already rendered an award, but the arbitration agreement is declared null and void, the arbitral award in question is not formally revoked. However, pursuant to Section 536, Paragraph One, Clause 3 of the Civil Procedure Law, the judge shall refuse to issue a writ of execution for enforcement of an arbitral award if the arbitration agreement has been revoked or declared null and void in accordance with the procedure established by law. This means that, if the arbitration agreement is annulled or declared null and void, the state prevents from enforcing the arbitral award.

According to Section 42, Paragraph One of the Arbitration Law, in arbitral proceedings, no evidence, including other arbitral awards, shall have any predetermined effect binding on the composition of the arbitration panel. Moreover, given that courts of arbitration do not belong to the judicial system, their judgements are not subject to Section 16, Paragraph Four of the Law On Judicial Power, more specifically, arbitral awards do not have a generally binding legal force equivalent to the law *(see also Paragraph 7 of the Senate Judgement of 22 February 2022 in Case*

No. A420315616, SKA-24/2022). In contrast, a judgement of acourtof general jurisdiction declaring an arbitration agreement null and void has a generally binding legal effect equivalent to law. This means that an arbitral award rendered by a court of arbitration on the basis of an invalid or revoked arbitration agreement is not evidence of the settlement of the legal relations between the parties to the arbitration in question in other arbitral proceedings.

Thus, in a case where an arbitration agreement has been revoked or declared null and void, the procedural violations that may have occurred in the arbitral proceedings in question cannot affect the outcome of those proceedings, since the state prohibits the enforcement of the arbitral award.

11.3. The Applicant has indicated that the proceedings for the revocation of the arbitration agreement could take even several years. Similarly, the invited person *Dr. iur*. Lauris Rasnačs drew attention to the risk that the proceedings in question would not have ended when the writ of execution for the enforcement of the arbitral award would have already been issued. However, duration of the proceedings per se does not mean that the supervision of the arbitral proceedings provided within proceedings for the revocation of an arbitration agreement is ineffective.

In cases where an action for revocation or annulment of an arbitration agreement has been brought and there are grounds to believe that the claimant's rights are being or may be infringed before the decision enters into force, and where it is necessary to prevent possible substantial damage, temporary protection may be applied pursuant to Section 137, Paragraph Two of the Civil Procedure Law. Temporary protection may also be granted in cases where, pending the entry of the decision into force, an interim settlement of the disputed relationship must be determined if this is necessary to prevent the claimant from suffering substantial damage. The purpose of this legal institute is to ensure the protection of the rights and legitimate interests of a person pending the final decision enters into force *(see the initial impact assessment report (annotation) of draft law No. 599/Lp13 "Amendments to the Civil Procedure Law"). Available at: saeima.lv*).

According to Section 138^{1}, Paragraph One, Clause 4 of the Civil Procedure Law, one of the temporary remedies is the stay of the enforcement action. This temporary

remedy may also be applied in cases where the enforcement of the arbitral award pending the entry of the decision of the court of general jurisdiction into force would affect the rights of the claimant, thereby causing substantial damage thereto. Moreover, whether the writ of execution has already been received and lodged by the collector and the enforcement file has already been opened is irrelevant. Even if the writ of execution has not yet been submitted by the collector for enforcement, it may be possible to establish that the debtor's interests are exposed to a sufficiently specific and substantial risk of harm that would be realised by the enforcement of the arbitral award. The court may apply Section 138^{1}, Paragraph One, Clauses 3 and 4 of the Civil Procedure Law cumulatively not only by suspending the enforcement actions, but also by prohibiting the defendant from taking certain actions, including submission of the writ of execution to the bailiff for enforcement. However, in cases where the arbitral award is not enforceable involuntarily, it is possible to apply the temporary remedies referred to in Section 138^{1}, Paragraph One, Clauses 3 and 5 of the Civil Procedure Law: prohibition of the defendant from performing certain acts or obligation of the defendant to perform certain acts within a certain time limit, as well as interim settlement of the disputed relations.

Consequently, in cases where an arbitration agreement has been revoked or declared null and void, the legislator has taken measures to supervise the arbitration proceedings.

12. In addition to the requirement of the existence of an arbitration agreement referred to in Paragraph 11.1 of this Judgement, the legislator has also established other requirements in the Arbitration Law aimed at ensuring efficient and fair settlement of civil disputes by courts of arbitration. When determining these requirements, it should be ensured that the functioning of legal system of Latvia as a democratic state governed by the rule of law is not jeopardised.

Firstly, Chapter II of the Arbitration Law stipulates specific procedure for the establishment of courts of arbitration aimed at ensuring the transparency and legality of courts of arbitration. Secondly, Section 5 of this Law specifies the matters which

may not be arbitrated and which may only be heard by national courts. Thirdly, Sections 14 and 15 of the Arbitration Law set out certain requirements that a person must meet in order to be an arbitrator. These requirements are aimed at ensuring that the arbitrator is a reasonable, properly educated and financially independent person, whose reputation is impeccable and who has not committed any criminal offences. In addition, Sections 16 and 17 of the Arbitration Law provide for specific legal institutions aimed at ensuring the independence and impartiality of the arbitrator: rejection of the arbitrator and recusal of the arbitrator. Fourthly, pursuant to Sections 21 and 26, Paragraph One of the Arbitration Law, the parties are free to determine the arbitration procedure within the framework of this Law, and the arbitration shall be conducted in accordance with the provisions of the arbitration agreement, the arbitration rules, laws and regulations and general principles of law. Fifthly, Section 31 of the Arbitration Law regulates the manner in which the court of arbitration contacts the parties, for example, to notify the commencement of arbitral proceedings pursuant to Section 36 of the Arbitration Law or to notify the appointment of an arbitrator pursuant to Section 30 and the arbitration rules. All these requirements are aimed at ensuring that the arbitration proceedings and its outcome comply with the principle of fairness.

According to Section 48, Paragraph One of the Arbitration Law, a party shall have the right to object if any provision of this Law, the arbitration rules or the parties' agreement has been violated or has not been complied with. However, according to the third paragraph of the said Section, validity of the objections shall be decided by the composition of the arbitration panel in question, and there shall be no state supervision other than the existence of the right to object per se during the arbitral proceedings. The court of general jurisdiction shall verify compliance with the above requirements when deciding whether to issue a writ of execution.

Section 58, Paragraph One of the Arbitration Law stipulates that an arbitral award shall be binding on the parties and voluntarily executed within the time limit specified therein. However, if the arbitral award is enforceable in Latvia, but is not voluntarily complied with, pursuant to the second paragraph of the said Section, the interested party is entitled to apply to the district (city) court in accordance with the

procedure established by the Civil Procedure Law for the issue of a writ of execution for involuntary enforcement of the arbitral award.

Enforcement of an arbitral award in Latvia is regulated by Chapter 66 of the Civil Procedure Law. Section 536, Paragraph One of this Law sets out the grounds for refusal to issue a writ of execution for involuntary enforcement of an arbitral award. They reflect, inter alia, those breaches of the arbitration proceedings that are so serious that the state will not recognise the result of the arbitral proceedings. Such grounds include, for example, lack of competence of the court of arbitration, non-compliance of the arbitrator with the requirements of the Arbitration Law, as well as unequal involvement of the parties both in individual processes, such as the appointment of the arbitrator, and in the arbitral proceedings as a whole. The Constitutional Court takes into account that these grounds for refusal are also stipulated in the New York Convention, which regulates the recognition and enforcement of foreign arbitral awards and to which Latvia and the Russian Federation are also parties, in particular, in Article V, Paragraph One of the said Convention, and are accordingly recognised by the international community.

If issued of the writ of execution is refused, then, according to Section 537 of the Civil Procedure Law, the civil dispute in question shall be settled by the court according to general procedure or referred to arbitration, depending on the reason for refusal of issue of the writ of execution. If one of the grounds for refusal of the issue of a writ of execution stipulated in Section 536, Paragraph One of the Civil Procedure Law exists, the legislator has recognised that the procedural violations in the arbitral proceedings in question are so serious that the arbitral award in question may not be enforced. Thus, by deciding on the issue of an enforcement order, the courtof general jurisdiction ensures that the requirements of the Arbitration Law are involuntarily applied, and, consequently, that the functioning of the legal system of Latvia as a democratic state governed by the rule of law is not jeopardised.

So, in cases where enforcement of an arbitral award requires recourse to a court of general jurisdiction for the issue of a writ of execution, the legislator has taken measures to supervise the arbitral proceedings.

13. The conclusions of the Constitutional Court in Paragraphs 11 and 12 of this Judgement allow to recognise that the legislator has taken measures to supervise the arbitral proceedings. Namely, the mechanism established by the legislator for the supervision of arbitration covers cases where an arbitration agreement has been revoked or declared null and void and cases where, where enforcement of the arbitral award requires recourse to a court of general jurisdiction for the issue of a writ of execution.

Thus, the Constitutional Court must ascertain whether the mechanism established by the legislator for the supervision of arbitral proceedings complies with the general principles of law and other provisions of the Constitution.

14. The Constitutional Court has already recognised that the need to ensure, inter alia, equality of the parties, independence and impartiality of arbitrators and the possibility for the parties to be heard in the arbitral proceedings is aimed at ensuring that these proceedings are fair, i.e., that they comply with the principle of fairness *(see Paragraph 9.1 of this Judgement*). The principle of fairness is respected if the supervisory measures taken by the legislator to supervise the arbitral proceedings apply to all arbitral proceedings and to the objections of the parties to those proceedings to substantive procedural violations that have occurred in those proceedings.

14.1. The Constitutional Court recognises that there may be situations where, despite procedural violations, the arbitral proceedings have resulted in an award, the enforcement of which requires recourse to a court of general jurisdiction for the issue of a writ of execution, but the interested party fails to do so.

14.1.1. These situations may be related to the fact that the legislator has given the interested party a relatively long period of time to perform the actions necessary for the enforcement of the arbitral award in Latvia, including recourse to a court of general jurisdiction for the issue of a writ of execution for the enforcement of the arbitral award.

According to Section 546 of the Civil Procedure Law, an executive document may be submitted for enforcement within 10 years from the date of entry of the court's or judge's decision into force, unless other limitation periods are stipulated by law. Upon the expiry of the limitation period, the interested party loses the right to apply for

enforcement of the relevant ruling *(see Paragraph 6.2 of the Decision of the Senate of 16 April 2019 in Case No. SKC-*835/2019*(C20330105)*). Taking into account the fact that, according to Section 539, Paragraph One, Clause 5 of the Civil Procedure Law, arbitral awards are to be enforced in accordance with the procedure for enforcement of court judgements provided for in this Law and that no different limitation period for enforcement of arbitral awards is provided for in the laws and regulations, the aforementioned 10-year period shall also apply to enforcement of arbitral awards. In this respect, the Constitutional Court takes into account that recourse to a court of general jurisdiction for the issue of a writ of execution for the enforcement of an arbitral award in Latvia is a prerequisite for the enforcement of that award and it would become meaningless if the interested party could not submit the relevant writ of execution for enforcement. It follows that an application for the issue of a writ of execution to enforce an arbitral award in Latvia must be filed before the limitation period for enforcement has expired. In particular, an arbitral award may be enforced involuntarily if, firstly, it has entered into force and, secondly, the interested party has applied to a court of general jurisdiction for the issue of a writ of execution to enforce the arbitral award in Latvia in order to be able to submit the received writ of execution to the bailiff within ten years from the date on which the arbitral award has entered into force. This means that, within this period, when implementing its private autonomy, the interested party may choose whether and when to submit the aforementioned application to a court of general jurisdiction.

As long as the interested party has not applied to the court of general jurisdiction for the issue of a writ of execution for the enforcement of the arbitral award in Latvia, the person against whom the arbitral award was rendered (hereinafter also referred to as - the debtor) has no possibility to object to the progress of the arbitral proceedings and the material procedural violations committed therein, and thus a legally uncertain situation is allowed (*see also opinion of* Dr. iur. *Lauris Rasnačs, volume 6 of the case file, p. 142*). However, the principle of legal certainty imposes an obligation on the state to ensure the stability of legal relations*(see, for example, Paragraph 7 of the Judgement of the Constitutional Court of 9 January 2014 in Case No. 2013-08-01*). The requirement of fairness of the court proceedings provides for that a person is able to

defend his/her rights within a reasonable period of time, and thus introduces legal clarity and certainty in legal relations *(see Paragraph 13.3.2 of the Judgement of the Constitutional Court of 1 November 2012 in Case No. 2012-06-01*). Otherwise, a person will not be able to plan his/her life or activities with certainty *(cf. Paragraph 12 of the Judgement of the Constitutional Court of 2 November 2020 in Case No. 2020-14-01*). Thus, according to the principle of legal certainty, the state must ensure that recourse to a national court removes uncertainties and resolves disputes related thereto in a person's legal relations within a reasonable period of time. Since a person can prevent such uncertainties and resolve disputes related thereto also in arbitration, and since one of the main advantages of arbitral proceedings is its speed and finality, the above legal certainty requirements are moreover applicable also to the outcome of the arbitral proceedings. In the present case, this means that the principle of legal certainty requires for a person to be able to object to substantive procedural violations in the arbitral proceedings within a reasonable period of time through the supervisory mechanism established by the state for supervision of the arbitral proceedings. However, in cases where the arbitral proceedings, despite procedural violations, have resulted in an award, the enforcement of which requires a writ of execution, but the interested party has not applied to a court of general jurisdiction for a writ of execution to enforce the arbitral award in Latvia, the debtor has no such possibility.

The Constitutional Court also takes into account that the legal uncertainty existing in the above-mentioned situation may negatively affect the legal position of the debtor *(cf. Paragraph 12.1 of the Decision of the Constitutional Court of 30 December 2020 on Termination of Proceedings in Case No. 2020-08-01*). For example, pursuant to Section 12, Paragraph Four, Clause 2 of the Law on Extrajudicial Recovery of Debt, a debt recovery service provider is entitled to establish a debt history database including information on the debtor and its debt, inter alia, where the debtor has objected in writing to the existence or amount of the debt, but the arbitral tribunal has upheld the creditor's or debt recovery service provider's claim for the fulfilment of the debt obligation and the award has entered into legal force. Since, according to the third paragraph of the said Section, the purpose of the debt history database is to provide information to a third party to enable it to assess the ability of a natural person to meet

payment obligations, the impossibility for the debtor to object to the arbitral proceedings before a court of general jurisdiction in Latvia may significantly jeopardise his interests.

Thus, the situation where the arbitral proceedings, despite procedural violations, have resulted in an award, the enforcement of which requires a writ of execution, but the interested party has not applied to the court of general jurisdiction for the issue of a writ of execution to enforce the arbitral award in Latvia, and where the debtor has no possibility to object to substantial violations in the arbitral proceedings within the framework of the state supervisory mechanism, is contrary to the principle of legal certainty.

14.1.2. Situations where the interested party has not applied to a court of general jurisdiction for the issue of a writ of execution may also be related to the fact that the debtor or its assets are not located in Latvia and, accordingly, the arbitral award is recognisable and enforceable abroad. In this respect, the materials of the case express the opinion that the recognition and enforcement of an arbitral award may be requested abroad, as is the case of the Applicant, and that in such cases the existing supervision of arbitral proceedings in Latvia is not sufficient *(see the application and the opinion of the Ombudsman in the case file, volume 1, p. 21 and volume 3, p. 39*).

The Constitutional Court has already recognised that in cases where an arbitral award is to be recognised and enforced abroad, the debtor has no legal means of defence against a possibly unlawful arbitral award *(see Paragraph 22 of the Judgement of the Constitutional Court of 28 November 2014 in Case No. 2014-09-01*). In such cases, the debtor cannot object in Latvia to the violations in the arbitral proceedings, as the interested party will not apply to a court of general jurisdiction for a writ of execution to enforce the arbitral award. Moreover, the Constitutional Court draws attention to the fact that the recognition and enforcement of arbitral awards abroad is regulated by the New York Convention, Article III of which stipulates that the recognition and enforcement proceedings in foreign countries take place in accordance with the procedural law of the respective foreign state. Although Article V of the New York Convention stipulates cases reflecting, inter alia, substantive procedural violations in arbitral proceedings which may lead a foreign court to refuse recognition and

enforcement of the arbitral award in question, this provision gives the foreign court the right, but not the obligation, to do so. This means that prevention of the substantive procedural violations in an arbitral proceedings may depend on whether the state in question is a democratic state governed by rule of law and protects fundamental rights. The state of Latvia cannot ensure that in all cases, when an arbitral award is recognised and enforced abroad, effective supervision of the arbitral proceedings will indeed be carried out.

14.2. The Constitutional Court recognises that, in some cases, in order to enforce an arbitral award, it is not necessary at all to apply to a court of general jurisdiction with an application for the issue of a writ of execution, for example, if the arbitral award establishes the content of an unclear provision of a contract. Even in such cases, there may have been significant procedural violations in the arbitral proceedings, but the party against whom the arbitral award was rendered has absolutely no means of claiming from the state to supervise the arbitral proceedings and the violations that may have occurred. The Constitutional Court has already drawn the legislator's attention to this deficiency in the regulation of Latvian courts of arbitration *(see Paragraph 22 of the Judgement of the Constitutional Court of 28 November 2014 in Case No. 2014-09-01*). In a situation where the Constitutional Court has already drawn the legislator's attention to the deficiencies of the legal framework on the supervision of arbitral proceedings, the legislator's failure to introduce an effective mechanism for the supervision of arbitral proceedings for a long period of time undermines the public trust not only in arbitral proceedings, but also in the state and the law itself.

In light of the above, the mechanism for supervision of arbitral proceedings established by the legislator does not cover cases where the interested party does not apply to the court of general jurisdiction for enforcement of the arbitral award for a prolonged period of time, where the arbitral award is recognised and enforceable abroad or where it is not necessary to apply to the court of general jurisdiction for the issue of a writ of execution to enforce the arbitral award. Thus, the measures taken by the legislator to supervise arbitral proceedings do not cover all the arbitral proceedings and the objections of the parties to the substantive procedural violations that have

occurred in those proceedings and, in this respect, are not in conformity with the principle of fairness.

Consequently, the contested provisions, insofar as they do not provide for supervision of the arbitral proceedings in cases where the interested party has persistently failed to apply to a court of general jurisdiction for enforcement of the arbitral award, where the arbitral award is to be recognised and enforceable abroad or where enforcement of the arbitral award does not require a recourse to a court of general jurisdiction for the issue of a writ of execution, are incompatible with the first sentence of Article 92 of the Constitution.

15. In accordance with Section 32, Paragraph Three of the Constitutional Court Law, a legal provision that the Constitutional Court has declared as not conforming to the norm of a higher legal force shall be regarded as not in effect from the day of publication of the Constitutional Court judgement, unless the Constitutional Court has determined otherwise. Pursuant to Section 31, Paragraph 11 of the Constitutional Court Law, the court may indicate in its judgement the moment from which the contested legal provision declared incompatible with the provision of higher legal force ceases to have effect.

By exercising the power conferred by the aforementioned provision, the Constitutional Court, in cases initiated upon a constitutional complaint, must, as far as possible, prevent the infringement of a person's fundamental rights. At the same time, the court must also ensure that the situation that might arise from the moment when the contested provision loses its force does not lead to new infringements of the fundamental rights established in the Constitution and does not cause significant damage to the public interests *(see, e.g., Paragraph 15 of the Judgement of the Constitutional Court of 12 November 2020 in Case No. 2020-33-01*).

The Constitutional Court has already recognised that the state has a certain freedom of action in determining the regulation of arbitral proceedings *(see Paragraph 9.1 of the Judgement of the Constitutional Court of 17 January 2005 in Case No. 2004-10-01*). This means that, when deciding on supervisory mechanisms of the arbitral proceedings, the legislator may need to take into account legal and political

arguments. The Constitutional Court, in its turn, assesses a matter falling within its competence insofar as it is possible to apply legal arguments thereto, separating them from legal and political arguments *(see, for example, Paragraph 13.4 of the Decision of the Constitutional Court of 19 December 2012 on Termination of Proceedings in Case No. 2012-03-01*).

In order to adopt a legal framework that ensures that arbitral proceedings are supervised also in cases where the interested party does not apply to a court of general jurisdiction for enforcement of the arbitral award for a prolonged period of time, where the arbitral award is to be recognised and enforceable abroad or where enforcement of the arbitral award does not require an application to a court of general jurisdiction for a writ of execution, the legislator may need to conduct an in-depth and complex study. Namely, the legislator, taking into account legal and political arguments, may need to decide, inter alia, on the most appropriate mechanism for supervision of the arbitral proceedings, the moment from which its use is to be commenced, temporary remedies of a person's rights during its use, as well as the need to ensure judicial control over the state's supervision process of the arbitral proceedings. Furthermore, the legislator should take into account that the supervision of arbitral proceedings by national courts must not be unpredictable and excessively intrusive, since arbitration is based on the will of the parties to the dispute *(see also*: *Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, para. 17. Available at: uncitral.un.org*). In view of the above, the legislator needs a reasonable time to develop this legal framework. As long as such a regulation is not adopted, the Applicant also has no possibility to object before the Latvian courts to the alleged material procedural violations that may have occurred in the arbitral proceedings in question.

Substantive Part

On the basis of Sections 30-32 of the Constitutional Court Law, the Constitution Court

decided:

To declare Sections 534, 534[1], 535, 536 and 537 of the Civil Procedure Law, insofar as they do not provide for supervision of arbitral proceedings in cases where the interested party does not apply to a court of general jurisdiction for enforcement of the arbitral award for a prolonged period of time, where the arbitral award is to be recognised and enforceable abroad or where it is not necessary to apply to a court of general jurisdiction for the issue of a writ of execution for the enforcement of the arbitral award, incompatible with Article 92 of the Constitution of the Republic of Latvia as of 1 March 2024.

The Judgement is final and not subject to appeal.

The Judgement shall enter into force as of the date of its publication.

Chairperson of the Court Hearing Aldis Laviņš