



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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Judge of the Constitutional Court

Gunārs Kusiņš

SEPARATE OPINION

Riga, 9 March 2023

in case No. 2022-03-01

**“On Compliance of Sections 534, 534.<sup>1</sup>, 535, 536 and 537 of the Civil Procedure Law to the first sentence of Section 92 of the Constitution of the Republic of Latvia”.**

1. On 23 February 2023 the Constitutional Court adopted a judgement in Case No 2022-03-01 "On Compliance of Sections 534, 534.<sup>1</sup>, 535, 536 and 537 of the Civil Procedure Law to the first sentence of Section 92 of the Constitution of the Republic of Latvia" (hereinafter - the Judgement), in which it ruled to recognise Sections 534, 534.<sup>1</sup>, 535, 536 and 537 of the Civil Procedure Law (hereinafter - the contested norms), insofar as it does not provide for supervision of arbitration proceedings in cases when the interested party does not apply to a court of general jurisdiction for enforcement of an arbitral award for a prolonged period, when an arbitral award is recognised and enforceable abroad or when it is not necessary to apply to a court of general jurisdiction for enforcement of an arbitral award with an application for issuance of an enforcement order, as incompatible with the first sentence of Section 92 of the Constitution of the Republic of Latvia (hereinafter - the Constitution) and null and void as of 1 March 2024.

**I do not agree with the finding in the Judgement that the contested norms are incompatible with the first sentence of Section 92 of the Constitution, and I consider that in the given circumstances the proceedings in this case should have been terminated.**

2. The case originated in a constitutional complaint lodged by „VZAIMNĪJ KREDIT” (*общество с ограниченной ответственностью "ВЗАИМНЫЙ*

КРЕДИТ"; hereinafter - the Applicant), a limited liability company registered in the Russian Federation.

The existence of an infringement of the applicant's fundamental rights is a prerequisite for proceedings initiated on the basis of a constitutional complaint, and the Constitutional Court has recognised that a constitutional complaint is, first of all, a means which serves to protect the fundamental rights of the applicant of the specific constitutional complaint (*see Paragraph 20.2 of the Judgement of the Constitutional Court of 15 June 2006 in Case No. 2005-13-0106*).

In the case law of the Constitutional Court it has been rightly recognised that when examining a case initiated upon a constitutional complaint, significant importance is to be attached to the factual circumstances of the case in which the contested norm has infringed the fundamental rights of the applicant (*see Paragraph 12 of the judgement of the Constitutional Court of 25 October 2011 in Case No 2011-01-01*). I believe that a fact-based and substantiated conclusion on the infringement of a person's fundamental rights and the compatibility or incompatibility of the contested norm with the Constitution can be reached only if all the factual and legal circumstances are fully and accurately ascertained.

In the given situation, it follows from the case materials, including the decision of the Vidzeme District Court of the City of Riga of 9 July 2021, that an award for recovery of money was rendered against the Applicant in a permanent arbitration court established in Latvia (hereinafter also - the Arbitration Court) and recognition and enforcement of this award is sought in the Russian Federation. The applicant brought an action for annulment of the arbitral award before a court of general jurisdiction. However, the court refused to accept the submitted application for setting aside the arbitral award because the Civil Procedure Law does not provide for it, i.e. the Civil Procedure Law does not give the court of general jurisdiction the right to set aside an arbitral award.

It follows from the information available in the Court Information System that the Applicant has exercised her statutory rights and applied to the court of general jurisdiction with a claim for annulment of the arbitration agreement. By the decision of the Vidzeme District Court of the City of Riga of 7 May 2021, civil case No C30523121 was introduced on the Applicant's application. The proceedings in this case are still pending. Thus, the Applicant has exercised her right established in the first sentence of Section 92 of the Constitution to defend her rights and legal interests before a fair court.

I agree with the Judgement that the State is obliged to ensure supervision of the arbitration proceedings, however, Section 92 of the Constitution does not guarantee the right of a person to have any matter important to him or her decided by a court, including the right to review the legality of an arbitral award on appeal or in cassation.

The Constitutional Court has repeatedly assessed the legal norms regulating the enforcement of an award of a permanent arbitral tribunal established in Latvia (*see, for example, the judgement of the Constitutional Court of 17 January 2005 in Case No 2004-10-01 and the judgement of 28 November 2014 in Case No 2014-09-01*), and has recognised that control at the stage of issuing an enforcement order is considered to be a sufficient means of ensuring compliance with fundamental rights (*see Paragraph 9.1 of the judgement of the Constitutional Court of 17 January 2005 in Case No 2004-10-01*). A person also has the right to apply to a court of general jurisdiction for a declaration that the arbitration agreement is null and void, and in the present case the Applicant had exercised this right.

In assessing in Paragraph 9 of the Judgement whether the proceedings in the case should be continued, the Constitutional Court did not substantiate how, in the given factual and legal circumstances, the violation of the Applicant's fundamental rights is manifested at present, taking into account the fact that the enforcement of the arbitral award has not been requested in Latvia and that the Applicant has applied to a court of general jurisdiction with a claim for the recognition of the arbitration agreement as null and void.

I consider that the Constitutional Court, without sufficient grounds, has indicated and assessed in the Judgement such situations which, according to the legal regulation and certain factual circumstances, are theoretically possible, without providing substantiation that the Applicant is in such factual and legal circumstances (*see paragraphs 14.1 and 14.2 of the Judgement*). For example, it is clear from the case-file that the Applicant is not in a situation where the enforcement of an arbitral award does not require an application to the court of general jurisdiction for the issuance of an enforcement order. Nor is the assessment in Paragraph 11.2 of the Judgement of the situation where the arbitration agreement has been annulled or declared null and void properly reasoned.

Thus, I consider that the Constitutional Court in the case under review has not sufficiently assessed the factual circumstances of the case and has thus examined a case which, according to the specific constitutional complaint, it should not have examined at all.

**Consequently, I consider that, on the basis of Section 29(1)(6) of the Constitutional Court Law, the proceedings in the case should have been terminated.**

Justice of the Constitutional Court

Gunārs Kušņis