JUDGE OF THE CONSTITUTIONAL COURT

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Judge of the Constitutional Court
Jānis Neimanis

SEPARATE OPINION

Riga, 6 March 2023

in case No. 2022-03-01

"On Compliance of Sections 534, 534.[1], 535, 536 and 537 of the Civil Procedure Law to the first sentence of Section 92 of the Constitution of the Republic of Latvia".

On 23 February 2023, the Constitutional Court adopted a judgement in Case No 2022-03-01 "On Compliance of Sections 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" (hereinafter - the Judgement), initiated upon a constitutional complaint.

I consider that the proceedings in this case should have been dismissed.

According to Section 19.[2] (2) of the Constitutional Court Law, a constitutional complaint (application) may be submitted only if all possibilities to defend the said right through general legal remedies (complaint to a higher institution or a higher official, complaint or application to a court of general jurisdiction, etc.) have been exhausted or have not been available. Thus, in accordance with Section 19.[2] (2) of the Constitutional Court Law, the applicant of a constitutional complaint must first use the general remedies, if such exist and are effective.

The Constitutional Court itself has also repeatedly emphasised in its case-law that the applicant of a constitutional complaint must comply with the principle of subsidiarity. Namely, before applying to the Constitutional Court, a person must exhaust the real and effective possibilities to defend his or her infringed fundamental rights by means of general legal remedies. The purpose of this principle is to ensure that the court, when examining the merits of a case, uses the legal methods at its disposal to achieve a result that is consistent with the Constitution. Thus, a constitutional complaint is primarily an additional mechanism for the protection of fundamental rights of a person in cases when it is not possible to prevent the infringement of fundamental rights by other legal remedies*(see, for example, Paragraph 15.1 of the Decision of the Constitutional Court of 7 October 2019 on Termination of Proceedings in Case No 2018-19-03*).

In the present case, the applicant alleged in his complaint that he had not concluded an arbitration agreement and had suffered fraud. In such cases, there are general remedies in Latvia, both civil and criminal. In the present case, the applicant of the constitutional complaint had also started to use them. In particular, the applicant invoked the appropriate general remedy - an action for annulment of the arbitration agreement. By decision of 7 May 2021, the Court of General Jurisdiction brought civil case No C30523121. The claim of the applicant of the constitutional complainant is still pending before the court.

An action for annulment of an arbitration agreement is an effective remedy. This is also recognised by the Constitutional Court itself in Paragraph 11.3 of the Judgement.

The applicant should therefore have used the ordinary legal remedies in the first place, since they existed and were effective. The Constitutional Court examined the case, although the application (constitutional complaint) was inadmissible. This means that the decision of the Council on initiating the case, which recognised that the applicant had exhausted all possibilities to defend his rights by means of general legal remedies, did not comply with 19.^{2}(2) of the Constitutional Court Law and there existed a ground for termination of the proceedings specified in Section 29(1)(3) of that Law.

The Constitutional Court Law provides for the possibility to terminate legal proceedings, but not the obligation to do so *(see, for example, Paragraph 13.1 of the Decision of the Constitutional Court of 18 February 2022 on termination of proceedings in Case No. 2021-10-03*). However, in situations where the applicant of the constitutional complaint had real and effective remedies at his disposal, but the case was initiated before the Constitutional Court, the Constitutional Court has so far

terminated the proceedings *(see, for example, the Decision of the Constitutional Court of 7 October 2019 on Termination of Proceedings in Case No 2018-19-03*).

The Constitutional Court has recognised that it is obliged to comply with the findings expressed in its rulings due to the requirements of stability, continuity, rule of law and equality of the legal system *(see Paragraph 17.2 of the judgement of the Constitutional Court of 10 February 2017 in Case No 2016-06-01*). This thesis is also applicable to the application of the Constitutional Court Law. Namely, the need to ensure the stability, continuity, rule of law and equality of the legal system requires that the requirements of the Constitutional Court Law be applied similarly in similar situations. In the specific case, the Judgement should have indicated for what reasons the Constitutional Court in the case under review departed from its previous case-law and did not terminate the proceedings, but the Judgement does not contain such reasoning. Such a situation is unacceptable in a democratic state governed by the rule of law, as it may create an impression in society that the Constitutional Court has acted arbitrarily, thereby undermining public confidence in the judiciary.

Judge* J. Neimanis

**The document is signed with a secure electronic signature and contains a time stamp.*