



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, January 17, 2005

JUDGMENT in the name of the Republic of Latvia

in case No. 2004-10-01

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš as well as the justices Romāns Apsītis, Aija Branta, Ilma Čepāne, Juris Jelāgins, Gunārs Kūtris and Andrejs Lēpse

on the basis of the claim by the Limited Liability Company "Asmers"

under Article 85 of the Republic of Latvia Satversme (Constitution) as well as Articles 16 (Item 1), 17 (Item 11 of the first Part) and 28¹

on December 21, 2004 at the Court session in written proceedings reviewed the case

"On the Compliance of Section 132 (Item 3 of the First Part) and Section 223 (Item 6) of the Civil Procedure Law with Article 92 of the Republic of Latvia Satversme (Constitution).

The establishing part

1. Section 132 (Item 3 of the first Part) and Item 6 of Section 223 (henceforth – the impugned norms) determine that a judge shall refuse to accept a statement of a claim and terminates proceedings in a matter if "the parties have, in accordance with procedures set out by law, agreed to transfer of the dispute for it to be adjudicated by an arbitration court".
2. The submitter of the case – Limited Liability Company "Asmers" (henceforth – the submitter) requests the court to assess the conformity

of the impugned norms with Article 92 of the Republic of Latvia Satversme (henceforth – the Satversme).

The submitter holds that violation of the rights, guaranteed in Article 92 of the Satversme, has taken place in connection with the review of a dispute at the Arbitration Court of the Chamber of Industry and Commerce, in which the company participated in the proceedings as a defendant against the Stock Company "RBS Skals". The dispute of the parties was adjudicated by the Arbitration Court, to execute a clause of the Arbitration Court, incorporated in the agreement on designing and construction.

The submitter holds that the arbitral award was groundless, however did not manage to successfully object to the issuance of the writ of execution.

In his constitutional claim the submitter points out that, first of all, in the understanding of the Satversme and the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth – the Convention) adjudication of a matter by an Arbitrary Court cannot be compared with a fair and open adjudication of a matter by the independent and impartial court and secondly – in a democratic and law-based state abjuration from human rights, guaranteed by the Satversme, which are included in an agreement is not binding for a legal subject.

The submitter asks to pay attention to the essential difference in the regulation on the courts of general jurisdiction and arbitrary courts: it is not determined that the judgment of the arbitrary court shall be lawful, well-grounded and substantiated. If the above requirement were advanced and, moreover, "if the law shall determine that a certain State judicial institution – in accordance with the law - experiences the right of verifying the lawfulness and substantiation of the arbitration court judgment", then to the mind of the submitter arbitration courts could exist.

3. The institution, which has passed the impugned norms – the Saeima in its written reply points out that the norms are not contradicting Article 92 of the Satversme.

The Saeima holds that the impugned norms have a legitimate aim, namely – they lessen the work load of the courts: if there were no impugned norms and such institutions as the arbitrary courts, then the disputes, adjudicated by them, should have to be reviewed in courts, and that would cause overwork. In another paragraph of the written reply the Saeima – as the advantage of the impugned norms- mentions the possibility of entrusting the duty of review of the dispute to persons,

which by the viewpoint of the parties are appropriate for it, besides then the proceedings may be completed in a comparatively short period of time.

The Saeima also analyzes the agreement nature of the arbitration court clause, concluding that the impugned norms ensure maintaining of the balance of the parties, as it does not allow the possibility for any of them to unilaterally withdraw from the agreed mechanism of the dispute solution. The Saeima stresses that the Civil Procedure Law protects the participants in a matter from too long periods of arbitration court proceedings, as in cases, established in Section 493, it is permissible to withdraw from the arbitration court agreement.

In the same way the Saeima draws attention to the restrictions in transferring disputes of several categories for adjudication by the arbitration court and to the competence of the arbitrary court to take a decision on jurisdiction.

Finally, the Saeima points out that the rights of persons are protected during the stage of issuing the writ of execution, when in accordance with Section 536 of the Civil Procedure Law, it is not issued if the dispute is not within the jurisdiction of an arbitrary court.

4. The Constitutional Court asked the State Human Rights Bureau (henceforth - SHRB), the Centre for Consumer Protection (henceforth – CCP), the Competition Board (henceforth – CB) and the Associate Professor of the Latvian University Faculty of Law Dr.iur. Jānis Rozenbergs to express their viewpoints.

- 4.1. SHRB points out that even though it has no conceptual objection to the existence of arbitration courts, the impugned norms are unconformable with Article 92 of the Satversme ” as there have not been determined sufficiently extensive restrictions to the process of concluding arbitration court agreements, besides adequate control over the activities of arbitration courts has not been ensured either”.

SHRB stresses that the right of access to the court is just one of the elements, which puts into shape the contents of Article 92 of the Satversme , Article 6 of the Convention and Article 14 of the International Covenant on Civil and Political Rights (henceforth – the Covenant). A person may decline from the right of access to the court, however, that does not mean refusal also from all the other rights, protected by the above norm, e.g. the right to adjudicate the case in the presence of the person, equality of the parties, validity of the judgment, independence and impartiality of the courts.

It is acknowledged in the letter that the Latvian legal acts do not envisage mandatory adjudication of a matter by the arbitration court, however SHRB in its letter points out that there does not always exist equality presumed in civil rights. Therefore "in the legal systems of democratic states there usually are norms, the aim of which is to protect the economically weakest or inexperienced party in the process of concluding agreements". SHRB points to the norms, which protect employees and consumers against imposition of arbitration court agreements, however, it also draws the attention to the lack of the above protection in the Law "On Room Rental" as well as the uncertain protection against the abuse of dominant position incorporated in Section 13 of the Competition Law. In aggregate SHRB holds that at the moment there are not enough restrictions for the conclusion of arbitration court agreements.

When commenting upon the procedure for the issuance of writs of execution, SHRB points to two shortcomings of the existing regulation: the term for submission of the objections is too short and the Civil Procedure Law does not establish the feasibility of disclaiming the issuance of the writ of execution in case if the arbitration court has violated the substantive legal norms.

- 4.2. CCP points out that the arbitration court clause is a frequent occurrence in consumer agreements – at least in those, which happen to be in its proceedings. CCP also stresses that with the help of its unfair provisions of the agreement, including arbitration court clauses, may be deleted from the consumer agreements; thus, in such a way the rights, envisaged in the Law on Consumer Protection, are secured.
- 4.3. CB points out that prohibition of the abuse of dominant position, formulated in Section 13 of the Competition Law might refer also to imposition of the arbitration court clause on the participants of a particular market. Besides, several of the participants of the market may be in dominant position. However, CB stresses that there is a necessity for assessing every particular case
- 4.4. Dr. iur. J.Rozenbergs holds that the impugned norms do not restrict the rights, fixed in Article 92 of the Satversme. It is also pointed out in the letter that "concluding of an arbitration court agreement, as well as any other transaction, is connected with a certain risk", therefore the bitterness about its outcome is no reason to regard the agreement as unjust. However, Dr.iur. J.Rozenbergs acknowledges that the right of a person to appeal against the issuance of writ of execution is not satisfactory, because, first of all, the request to issue

the writ if execution is adjudicated without the presence of the parties and, secondly, the decision on the issuance of the writ of execution cannot be appealed against.

The concluding part

5. Arbitration courts do not belong to the system of judicial power, which has been determined in Chapter VI of the Satversme and in the Law "On Judicial Power". As the Constitutional Court has already resolved, the institution, which has not been created under the procedure envisaged in these normative acts does not comply with the designation "court", included in Article 92 of the Satversme (*see the Constitutional Court April 23, 2003 Judgment in case No. 2002-20-0103, Item 5 of the concluding part*). Thus the above designation shall not be attributed to arbitration courts.
6. The impugned norms determine that a judge shall refuse to accept the statement and the court terminates proceedings in a matter, if the parties, in accordance with the procedures set out by law, agree to transfer of the dispute for it to be adjudicated by an arbitration court. **Thus from the contents of the norms follows that, when challenging their conformity with Article 92 of the Satversme, the submitter has considered them to be unconformable with concrete rights, guaranteed in the Article, namely, the right of access to a court.**

The first sentence of Article 92 of the Satversme, in accordance with which "everyone has the right to defend their rights and lawful interests in fair court" incorporates both – the substantial and the procedural norm. In other words, everyone has the right to accessibility to court and the court process shall be fair. As the Constitutional Court has already earlier pointed out, the substantial and procedural aspects of the right to a fair court are inseparably connected: the fairness of the court process would be of no use if the accessibility to the court were not provided and, vice versa, accessibility to court would be unnecessary if the fairness of the process were not provided (*see the Constitutional Court June 27, 2003 Judgment in case No. 2003-04-01; Item 1.1 of the concluding part*).

7. Fundamental rights, guaranteed in Chapter VIII of the Satversme, restriction of which is directly anticipated, are enumerated in Article 116 of the Satversme; however the right to a fair court is not among them. However, as the Constitutional Court has repeatedly pointed out, it does not follow from Article 116 that the rights, guaranteed in Article 92, are absolute.

- 7.1. The Constitutional Court has already declared that the contents of Article 92 of the Satversme shall be interpreted as being read in conjunction with Article 89, which establishes: "The State shall recognize and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia". From this Article it can be seen that the aim of the legislator has not been to oppose the norms on human rights, incorporated in the Satversme to the international norms of human rights, quite to the contrary – it has been to reach mutual harmony of the norms (*see the Constitutional Court June 27, 2003 Judgment in case No. 2003-04-01; Item 1 of the concluding part*). In cases, when there is doubt about the contents of the norms, incorporated in the Satversme, they should be interpreted in accordance with the interpretation used in international practice of application of norms on human rights (*see the Constitutional Court August 30, 2000 Judgment in case No. 2000-03-01, Item 5 of the concluding part; and October 22, 2002 Judgment in case No. 2002-04-03, Item 1 of the concluding Part*).

Article 6 of the Convention determines: "In the determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

The European Court of Human Rights (henceforth – ECHR) in the case "Golder v. the United Kingdom" concludes that the first part of Article 6 of the Convention incorporates also the right of access to the courts, however, it stressed that this right is not absolute (*see Golder v. United Kingdom [1975] ECHR 1, para.38*). Later in the case "Deweere v. Belgium", ECHR specifies that a waiver of right of access to the courts is frequently encountered in the Contracting States' legal systems, notably in the shape of arbitration clauses in contracts. If it has been made on free will, does not offend against Article 6 of the Convention, the waiver has "undeniable advantages for the individual concerned as well as for the administration of justice" (*Deweere v. Belgium [1980] ECHR 1, para.49*). Besides, ECHR points out that as concerns the issue on the right of waiver from the right of addressing a court, it agrees with the viewpoint of the European Commission for Human Rights in case "X v. Allemagne" (*see: X c. Allemagne, n^o 1197/61*): in conformity with the assessment of the Commission waiver shall be regarded as having taken place on free will even then, if a person has been able to avoid the conclusion of an arbitration court agreement as he has chosen not to connect himself with an agreement, into which an arbitration court clause is incorporated.

Besides, according to the viewpoint of the European Council Committee of Ministers, solution of disputes in the arbitration courts is not only permissible, it is also desirable. Recommendation IV of September 16, 1986 Recommendation No. R (86) 12 "Measures to prevent and reduce the excessive workload in the courts" expresses the viewpoint that the governments of the Member States are requested to weigh the possibility of "taking steps by suitable means and in appropriate cases to make the arbitration more easily accessible and more effective as a substitute measure for judicial proceedings" (Measures to prevent and reduce the excessive workload in the courts, Council of Europe, 1987, p.6).

- 7.2. However, as the Constitutional Court has pointed out earlier, when interpreting the norms - inter alia also Article 92 - of the Satversme, in accordance with the international practice of application of human rights norms, one should ascertain whether the legislator has not included more extensive rights in the norm than those determined by international documents (*see the Constitutional Court January 17, 2002 Judgment in case No. 2001-08-01*).

The Constitutional Court has repeatedly concluded: the Satversme is a single whole and norms, incorporated into it, shall be interpreted systemically (*see the Constitutional Court October 22, 2002 Judgment in case No. 2002-04-03, Item 2 of the concluding part and November 26, 2002 Judgment in case No. 2002-09-01, Item 1 of the concluding part*). Presumption that it is not allowed to determine for every particular person any limitations to rights envisaged in Article 92 of the Satversme, would come into collision both with the fundamental rights of other persons, fixed in the Satversme, and other norms of the Satversme (*see Item 8.1 of this Judgment as well as the above Constitutional Court November 26, 2002 Judgment in case No. 2002-09-01 and June 27, 2003 Judgment in case No. 2003-04-01, Item 1.1 of the concluding part*).

Besides, Article 86 of the Satversme determines "decisions in court proceedings may be made only by bodies upon whom jurisdiction regarding such has been conferred by law, and only in accordance with procedures provided for by law". When interpreting Article 86 of the Satversme as being read in conjunction with Article 92 and taking into consideration the words "only in accordance with procedures provided for by law", it can be concluded that the right to a fair court may be restricted if the restriction – as the ECHR has concluded with regard to the rights, anticipated in the first Part of Article 6 of the Convention – is determined by law, if the restriction has a legitimate aim and if the restriction is proportionate to the legitimate aim (*see Judgment in case Fayed v. United Kingdom*

[1994] ECHR 27, para.65 as well as the Constitutional Court June 27, 2003 Judgment in case No. 2003-04-01, Item 1.2 of the concluding part).

The Constitutional Court does not agree with the statement of the submitter that voluntary restriction of the right cannot be binding on the person. The submitter substantiates the viewpoint only by instances: to his mind an agreement by which the person undertakes limitation of e.g. passive election rights, the right to unite in trade unions as well as the freedom of the religion cannot be in effect. From the above he deduces that "in the same way the agreement by which the person relinquishes his human rights, [...] guaranteed in Article 92 of the Satversme, cannot be in effect". The above argumentation is not satisfactory as the used examples seem to be essentially different from the issue to be reviewed in the matter – i.e. the conformity of the impugned norms with the right to a fair court, fixed in the Satversme. The submitter has not explained whether and why similarities could be found. In this case it is not the obligation of the Constitutional Court to elaborate a general theory on the admissibility of voluntary restriction of the fundamental rights, but just to assess the necessity of the impugned norms and their proportionality, therefore it is enough to point out that the precondition of such restrictions is the necessity of existence of legitimate interests.

7.3. Thus, the right to a fair court, determined in Article 92 of the Satversme neither taken separately nor in the context with the international human rights norms, is not absolute and may be restricted.

8. When making the decision on the compliance of the impugned norms with Article 92 of the Satversme, one has to agree to the statement, cited above (see Item 7.1. of this Judgment) that they secure undeniable advantages for the person and the judicial system.

8.1. From the right to property, guaranteed in the Satversme, follows also the right to freely use it, for example, when concluding civil agreements. This principle of civil freedom would be restricted if the parties did not have the possibility to agree on the acceptable for them contents of the agreement, inter alia envisaging adjudication of the disputes in arbitration court just to make use of the advantages of such a solution. The European Commission of Human Rights has also pointed out: " Insofar as arbitration is based on agreements between the parties to the dispute, [a restriction on the right of access to courts] is a natural consequence of their right to regulate their mutual relations as they see fit (*Axelsson v. Sweden, No.*

11960/86). It has been recognized by the legal science that dispositivity is one of the manifestations of human rights, which are necessary for implementation of personal freedom (*see: Jayme, E. Menschenrechte und Theorie des Internationalen Privatrechts, Jahreshft 1991/1992 der Internationalen Juristenvereinigung Osnabrück, Osnabrück, 1992, p. 25*). Therefore absolutism of the right to a fair court would be at variance with other constitutional rights and it would create disproportion of the fundamental rights, fixed in the Satversme.

- 8.2. The impugned norms secure civil freedom as the agreement of the parties on the adjudication of the dispute at the arbitration court would not be possible in its traditional and internationally adopted interpretation, if the proceedings in the court of general jurisdiction, when reviewing the matter on its merit, would be allowed, even though the parties had agreed on adjudication of the dispute at an arbitration court. Legal literature always stresses that one of the advantages of the process of arbitration court is its comparatively quicker course (*see: e.g. Bukovskis, V. The Textbook on Civil Procedure, author's publication, Riga, 1933, p. 570*), possibly also lower payment and professional specialization of the arbitration court judges, finality of the decision, the possibility to agree on the process, which differs from the proceedings of the court of general jurisdiction as well as its confidentiality (*see, e.g.: Sutton, D.St.J., Gill, J. Russell on Arbitration, 22nd. Edition, Sweet & Maxwell, 2003, pp. 7-10; Redfern, A., Hunter, M. Law and Practice of International Commercial Arbitration, 3rd. edition, Sweet & Maxwell, 1999, pp. 23-30*). The Constitutional Court rejects the argument of the submitter, that non-existence of such requirements, which –by the viewpoint of the submitter - would determine that the judgment has to be based on substantive and procedural legal norms of Latvia shall be regarded as the shortcoming of the arbitration court procedural regulation. Quite to the contrary – one of the advantages of the process is the possibility of reaching the agreement that the arbitration court will solve the dispute as a conciliator (an *amiable compositeur*), in accordance with "the fair and the best" (*ex aequo et bono*) or on the basis of the traditions of international commerce (*lex mercatoria*). Empiric research have established that the businessmen pay a great attention to the possibility of effective, quick and convenient implementation of arbitral awards as well as to the absence of appeals on the merit of the matter (*see: Bührling – Uhle, Ch. Arbitration and Mediation in International Business: Designing Procedures for Effective Conflict Management, Kluwer Law International, 1996, pp.136 -137*). Also in the interpretation of the above Recommendation the Committee of Ministers points out that the speed of the arbitration court activity, its professional

specification and the comparatively less formal process are among its undeniable advantages (pp.15 – 16).

- 8.3. Adjudication of disputes by the arbitration courts also lessens the work-load of the courts of general jurisdiction (*see Recommendation as well as the Decision of the European Human Rights Commission in case Axelsson v. Sweden, No. 11960/86*). The private law nature of the arbitral award and proceedings excludes the possibility of making accurate registration of the reviewed matters. However, even the statistics in regard to coercive measures of implementation shows that their number is not insignificant. As the Saeima has pointed out in its written reply, according to the data provided by the Ministry of Justice, in 2003 almost four thousand claims on implementation of the legal measure of constraint in regard to arbitral decisions and only 49 of them have been rejected.
- 8.4. **Thus, the impugned norms have a legitimate aim, namely, it secures quick and effective review of matters, lessens the work-load of the courts as well as provides several other advantages.**
9. Taking into consideration that the aim of fundamental rights fixed in the Satversme is the protection of the interests of a person; the Constitutional Court acknowledges that the free will, which in case of conclusion of arbitral agreement has been expressed in the form of civil transaction, is an adequate criterion for permissibility of restriction of fundamental rights. If the interests of other persons, protected by the law are not violated, it is neither the obligation of the legislator, nor that of the Constitutional Court to substitute the expression of the will of a person by its assessment on the desirable model of activity and its reasonability.

However, when assessing the proportionality of the restriction of access to court, following from the impugned norms, one should remember, that the restriction itself is restricted. Regardless of the will of a person, the legislator has in certain cases and in a certain manner forbidden to restrict the rights, guaranteed in the Satversme. First of all, freedom to waiver from the rights, guaranteed in Article 92 of the Satversme, reach only as far as it does not become incompatible with the fundamental principles of the State legal system. Therefore, when assessing the proportionality of the impugned norms, it shall be established whether its applicability is regulated in such a way that its limit is not violated (see Item 9.1 of this Judgment). Secondly, the amount to which a person restricts its fundamental rights when concluding an arbitral agreement, is diminished by the arbitration court procedural regulation (see Item 9.2 of this Judgment). Thirdly, regulation of separate sectors establishes

protection against imposing of the arbitral agreement on the weakest or less experienced party of the transaction (see Item 9.3 of this Judgment).

- 9.1. As has been mentioned above, the right access to courts, included in Article 92 of the Satversme may be restricted (see Item 7.3 of this Judgment) and in case of concluding an arbitral agreement this restriction has a legitimate aim (see Item 8.4 of this Judgment). However, the right to a fair court, guaranteed in Article 92 of the Satversme, does not incorporate only the right of access to courts, therefore it does not follow from the above, that concluding of an arbitral agreement shall be regarded as waiver from all the rights, guaranteed by the norm. The institutions, supervising the Convention, have stressed the same (*see: X c. Allemagne; R c. la Suisse, n^o 10881/84; see also: Deweer v. Belgium, para.49; Nordström-Janžon and Nordström-Lehtinen v. The Netherlands, No. 28101/95*). In the matter "Albert and Le Compte v. Belgium" ECHR with *obiter dictum* even pointed out that the nature of some of the rights, safeguarded by Article 6 is so fundamental and important in a democratic society as to exclude a waiver of the entitlement to exercise them even by a free and influenced by nobody expression of will (*see: Albert and Le Compte v. Belgium [1983]ECHR 1, para. 35*).

Even though the institutions of the European Council in their practice have not divided the rights, guaranteed in Article 6, into voluntary restricted and not to be restricted rights, the legal science concludes that at least the rights to equality of parties, independence of courts and the right to be heard as well as the right to a fair court belong to the second group (*see e.g.: Briner, R., von Schlabrendorff, F. Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration; in: Briner, R., Fortier, L.Y., Berger, K. P., Bredow, J. (eds) Law of International Business and Dispute Settlement in the 21st. Century; Carl Heymanns Verlag, 2001,p. 92-95; Petrochilos, g. Procedural Law in International Arbitration, Oxford University Press, 2004, pp. 130-131; Jaksic, A. Arbitration and Human Rights, Peter Lang, 2002,pp. 56, 249*). These rights are especially vital because they are necessary for the protection of human dignity and rule of law (*see: Briner & von Schlabrendorff, p. 97; Jaksic, p.218*). Article 1 of the Satversme as well as the protection of human dignity, determined in Article 95 requires similar consideration, defining those procedural rights, which demand especially forceful protection.

It cannot be denied that the above rights are extensively authorized. They are guaranteed by all – the Convention, Article 14 (the first Part) of the Covenant and the norm, incorporated in Article 10 of the

Universal Declaration of Human Rights, which has the status of the norm of customary international law. Protection of these rights is determined also in the UNCITRAL Model Law on International Commercial Arbitration (*see* : *UNCITRAL Model Law on International Commercial Arbitration*; <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>; henceforth – the Model Law). The Model Law, even though invented as the model for the solution of international commercial disputes, has become the world standard of normative regulation of temporary arbitration courts (*see: Redfern & Hunter, p. 342*).

The above *dictum* of the ECHR matter "Albert and Le Compte v. Belgium", in accordance with which it is not possible to waive several procedural rights even on free will, is partly related to the viewpoint of the submitter, that a contracted restriction of rights guaranteed in Article 92 of the Satversme, cannot be binding on a person. However, even in regard to the above special protection of the procedural rights, such a categorical formulation would be inaccurate and incompatible with the essence of the arbitration court procedure. The Constitutional Court stresses, that the case law of many other states also holds that the person has waived, e.g., the right to hearing, if it has ignored the arbitral process or the right to impartial tribunal, if it has not in due time objected to partiality of the arbitration court judge (*see: Jaksic, pp. 238, 256 -276; Briner & von Sclabrendorf, pp. 94-95*). Arbitral agreement would be of no sense if any of the parties might choose not using his/her procedural rights, so that –later- when referring to the inalienability he/she could object to execution of the arbitral award. Regardless of the above conclusion in matter "Albert and Le Compte v. Belgium", in the decision on acceptability of the matter "Sovaniemi v. Finland" ECHR pointed out that in the particular circumstances of the case the submitter, not objecting against the partiality of the arbitrator, had unequivocally waived the right to impartial court (*see: Suovaniemi v. Finland, No. 31737/96*). The state does not have the obligation to avert every violation of the procedural rights, but to secure the possibility to avert it (*see: Petrochilos, p. 164*). Taking into consideration the importance of these rights in a democratic society, the standard of permissibility of the restrictions shall be very high (*see De Wilde, Ooms and Versyp v. Belgium [1971] ECHR 1, para. 65; Deweer v. Belgium, para. 49*). First of all restriction of the rights cannot follow just from concluding an arbitration court agreement. Secondly, it shall always be presumed that the person has not restricted the rights, with an exception of the time when the activity of him/her does not unequivocally confirm it. Thirdly, restriction may be in effect insofar as the particular rights are not deprived on

their merit (*see: Waite and Kennedy v. Germany [1999] ECHR 13, para.59*).

The above forcefully protected rights "enter" the process of the Arbitration Court via Section 536 (Item 3 of the first Paragraph) of the Civil Procedure Law, which determines: "A judge shall refuse to issue a writ of execution, if the party against whom the execution of an arbitration court award is requested, submits evidence that the arbitration court was not established or the arbitration court procedure did not take place in accordance with the provisions of the arbitration court agreement or of Part D of this Law". Within Part D are included norms, envisaging objectivity and independence of the arbitrators (Paragraph 3 of Section 497), equality of parties (Section 505) and the right to be heard (Section 518). In the same way the Constitutional Court draws attention to Section 530 (Item 5 of the second Paragraph), which determines –unless the parties have not agreed otherwise, the reasons for judgment shall be set out in the judgment of the arbitration court. Therefore groundless is the viewpoint, expressed in the constitutional claim that the judgment of the arbitration court shall not be motivated. Lack of motivation as well as prohibition of the above rights, when the parties had not wanted them, may serve as the reason for the refusal to issue a writ of execution.

In accordance with the general principle the state is not responsible for violations of the fundamental rights in arbitration court proceedings. When taking the decision on the admissibility of such claims, which are connected with arbitration courts, the European Commission of Human Rights has repeatedly pointed out that "activities of arbitrators cannot cause state responsibility unless the state courts are not requested to interfere in the above activities" (*R c. la Suisse; Jakob Boss Söhne KG v. Germany, No 18479/91; see also e.g. Heinz Schiebler KG v. Germany, No. 18805/91*). However, the state has the obligation, first of all, to ensure measures of protection against the above violations of the procedural rights and, secondly, not to authorize the result of such proceedings of the arbitration court. In difference from the greatest number of states, in Latvia both the above obligations merge, as the law does not envisage the possibility to raise objection to the arbitrator or request abrogation of the arbitral award. Therefore the control of arbitration courts is concentrated on the stage of issuance of the writ of execution. One may doubt whether such a solution is optimal, as well as whether it is necessary to resign from the model of control of arbitration courts, which is well-known and well- accepted in the world, however, the state has extensive freedom of action in determining the regulation on the arbitration court procedure. Control during the process of issuance of writs of execution may be

regarded as a well- enough measure for ensurance of the observation of at least the fundamental rights. However, when issuing the writ of execution, which has been made by not taking into consideration the fundamental rights, both – Article 92 of the Satversme and international obligations of the State to implement human rights are violated. According to customary international law, State responsibility is generated if and to the extent that a state acknowledges and adopts the conduct in question as its own, which - when executed by the State – would be unlawful. This principle is codified in Draft Articles on Responsibility of States for Internationally Wrongful Acts, elaborated by International Law Commission (*see: Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, UN Doc A/56/10 [2001] Ch IV. E.1, p.43*), which have been unanimously authorized by the UN General Assembly. Not going deep into the issue on horizontal applicability of international human rights norms. i.e., applicability in relations between subjects of private law, the Constitutional Court concurs that state assumes responsibility even if the adopted and acknowledged conduct has been “lawful so far as the original actor was concerned, or the actor has been a private party, whose conduct in the relevant aspect was not regulated by international law” (*see: Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, UN Doc A/56/10 [2001] Ch. IV. E. 2, p.122*). Therefore, when issuing the writ of execution, the state becomes liable for the violations of human rights, which have taken place during the arbitration court proceedings.

Thus, also the courts of general jurisdiction have the obligation, following from Satversme and international human rights norms, to refuse issuance of the writ of execution, if the fundamental rights, from the use of which the person has not waived have not been observed in the arbitration court procedure and the Laws of the Civil Procedure Law establish the possibility to realize the obligation.

- 9.2. The impugned norms shall be read in conjunction with other norms of the Civil Procedure Law, which restrict the range of matters to be adjudicated by arbitration court, as well as envisage involvement of the court in solution of such disputes, which – in accordance with the agreement - are subject to arbitration court.

Section 487 (Items 1-3 and 5) determines certain disputes, which may not be referred to for the resolution to arbitration courts, as “the parties are not absolute proprietors and managers” and “publicly-legal elements are distinguishable” (*Bukovskis V., p. 570*). In accordance with the agreement nature of the arbitration court proceedings, Item 4 of the above Section protects persons, who are

not a party to the arbitration court agreement from determination of rights and obligations by the arbitration court. In its turn, Section 493 (the fourth Part) protects the person from undue delay of solving the dispute, establishing cases, in which the party has the right to unilaterally withdraw from the arbitration court agreement, namely, the composition of the arbitration court has not been established, or no procedural activities have been performed for more than four months or if within a period of one year from the initiation of the arbitration court procedure the arbitration court has not completed the examination of the matter. Finally, Section 536 envisages the obligation of the court to refuse to issue a writ of execution on the arbitration court agreement if during the period of its making violations of procedural or substantive norms have been permitted.

The regulation of the arbitration court procedure by the greatest number of other states, inter alia, Austria, Belgium, France, Italy, the Netherlands, Switzerland and Germany as well as the Model Law for repeal of arbitration court agreements (Article 34) and for the refusal of recognition and execution (Article 36) envisage motives, which are similar with the content of Section 536 of the Civil Procedure Law. One should note that the Model Law establishes also other cases, under which the state courts may participate in the arbitration court procedure, however, interference expresses itself either as the assistance of procedural nature or secures procedural guarantees, which- even though in a different form- on their merit are accessible in accordance with Section 536 of the Civil Procedure Law on the refusal to issue a writ of execution.

When assessing the envisaged by law relations between the courts of general jurisdiction and arbitration courts, it shall be taken into consideration that for reaching the aims of the arbitration court proceedings (see Item 8.2 of this Judgment) it is important to restrict interference in them. Being guided by this viewpoint (*see: Explanatory Notes by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, para 14;*

<http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>),

Article 5 has been incorporated in the Model Law, which determines:” in matters governed by this Law, no court shall intervene except where so provided by this Law”. It can be also read in legal literature that ”towards the end of the twentieth century [...] has come the increasing independence of the arbitral process” (*Redfern & Hunter, pp. 341-342*). Comparing the regulation of the arbitration court procedure of other states, the cited above generalization characterizes the existing situation, as the normative acts, regulating the arbitration court procedure in the above states, great uniformity can be noticed in regard to the cause, allowing to

intervene in arbitral proceedings, apply for the setting aside of the arbitral award or contest the application for its recognition and enforcement.

9.3. Besides the labour (see Item 9.3.1 of this Judgment), consumer (see Item 9.3.2 of this Judgment) and competition (see Item 9.3.3 of this Judgment) Laws envisage special restrictions in regard to arbitration court agreements.

9.3.1. Labour Law is the section in which it is held that one party of the agreement – the employee is in a weaker economical situation, therefore the possibility to "impose" an arbitration court agreement on him is averted. Section 30 of the Labour Law determines: "Individual disputes regarding rights between an employee and an employer, if they have not been settled within an undertaking, shall be settled in court". The norm has been repeated more precisely in Section 4 (Part four) of the Labour Dispute Law: "An individual dispute on rights shall not be adjudicated in an arbitration court".

9.3.2. Similar considerations protect also the consumers. In compliance with Article 6 (Item 7 of the third Part) of the Consumer Protection Law the requirement which "envisages adjudication of the dispute only in the arbitration court" shall be considered as an unjust term of the agreement. In accordance with Item 8 of this Article "on the basis of the claim by the consumer, unfair terms shall be declared as invalid". The Constitutional Court points out that the protection of consumers, secured by this Law, is more extensive as it is sometimes held, as, e.g., crediting (leasing) and most of all renting agreements can be regarded as consumer contracts. Activities, carried out in conformity with them, comply with the definition of service, incorporated in Article 1 (Item 2) of the above Law: the result of (un-materialistic) work, for example, the possibility to receive an economic valuable (credit) for purchase of merchandise or the possibility to reside in an apartment; and this job is carried out in the framework of entrepreneurial or professional activities. In the same way it has to be taken into consideration that the cited norms of the Consumer Protection Law on unfair contract terms are enforced by the provisions of Article 3 of Council Directive 93/13/EEC on unfair terms in consumer contracts (*see: Official Journal, L 95, 21/04/1993, pp.29-34*). When interpreting the restrictions determined in the Directive to bind the consumer with a jurisdiction clause, the European Court of Justice has pointed out that the potential unfairness and validity of such a clause shall be assessed by the court of its own motion, for – just because of different reasons- the consumer may appear at the court, within the jurisdiction of which the matter shall be in accordance with the law and not in another

court; the particular norms shall avert problems of similar nature (*see: matters C-240-244/98, Océano Grupo Editorial SA v. Roció Murciano Quintero*[2000] ECR I-4491, paras. 26, 29). The Constitutional Court holds that the courts of general jurisdiction of Latvia shall also act in the similar manner and, when necessary, and in accordance with Section 536 (Item 1 of the first Paragraph) refuse issuing a writ of execution. The arbitration courts - of their own motion – shall assess the validity of the arbitral clause, included in the consumer contract. If they announce a judgment, which proves to be unrealizable for the State courts, as concerns the parties of the matter, they may be responsible for excessive process.

- 9.3.3. In his constitutional claim the submitter indirectly maintains, that an arbitral clause may be included in contracts not so much as the result of the agreement of parties, but by one party making use of the hold of the market. The Constitutional Court points out that under normal competition conditions anybody may choose what contract terms should be offered and what – accepted. Thus the "invisible hand" of the market shall influence the contents of the concluded contracts. In case, when the economical position of one or several market participants allows imposing such terms of the contract, to which in other circumstances the other participants of the transaction would not agree, protection shall be found in the norms of the Competition Law.

Section 13 (Item 4) of the Competition Law determines: "Any market participant, who is in a dominant position is prohibited from abusing such dominant position in any manner in the territory of Latvia. Abuse of dominant position may also occur as [...] direct or indirect imposition of unfair trading provisions". In its letter to the Constitutional Court the Competition Board points out that "incorporation of discriminating terms in the arbitral clause and violation of prohibition to abuse dominant position may be qualified in accordance with the legal structure of the general clause of Section 13, but the arbitral clause may be qualified as a term of abuse of the transaction [...]. The same can be attributed to item 5 of Section 13, which determines that application of unequal provisions in equivalent contracts with other market participants, creating for them, in terms of competition, disadvantageous conditions shall be regarded as prohibited". In the same way the Competition Board points out that the above norms may be applied, when no market participant is in a dominant position, but some of the participants form the so-called collective dominance or a common dominating position. Offer of several equal contract provisions, inter alia, also the arbitral clauses, in themselves does not testify about it, but, when assessing the peculiarities of particular situations, for example, the

possibility of the market participants to act independently from the competitors and existence of economic or other ties, it is possible to establish a common domineering position. The Constitutional Court holds that the merchants compete with all the provisions of the offered contracts taken together and therefore the arbitral clause in the understanding of the Competition Law shall be regarded as "the trade provisions". Therefore in cases, when the parties of the matter make reference to the arbitral clause, imposed under the hold of market, the court, when assessing whether the Competition Law has not been violated, shall do it in the framework of the procedure of issuance of a writ of execution.

- 9.4. As has been mentioned earlier (see Item 8.2 of this Judgment) it is not possible to link the arbitration court procedure with the possibility to adjudicate the particular case on its merit by the court of general jurisdiction, as the impugned norms prohibit it. Besides, the impugned norms, even though they limit the right of a person of access to the court, do not secure the validity of the arbitration court agreement. Even exclusion of such norms from the Civil Procedure Law would not prohibit agreeing on adjudication of the existing or future dispute at the arbitration court; it would not make the already concluded arbitral contracts invalid either. Therefore there does not exist a less embarrassing alternative for reaching the identified legitimate aims. In the same way the Constitutional Court concludes that the rate of the restriction to address the court, determined by the impugned norms, is diminished by the valid regulation of the civil procedure and other legal sectors. **Therefore the impugned norms are proportionate to the aim.**

10. Simultaneously the Constitutional Court notices several existing problems of the arbitration court proceedings, which have lately been emphasized in Latvian legal science and practice (*see, e.g.: Torgāns K. Arbitration Courts in Latvia: radical changes are needed. Word of the Lawyer; January 11, 2005, No. 1, pp.1-3*).

From the viewpoint of protection of fundamental rights the most essential stage of the arbitration court procedure is the issuance of a writ of execution. And in this stage the conformity of the judgment and the procedure with the law is controlled. Both – SHRB and Dr.iur. J.Rozenbergs in their letters to the Constitutional Court have expressed concern about the too short term for stating objections against issuance of a writ of execution, prohibition to appeal against the decision on issuance of a writ of execution and taking the decision on this issue without a court session. Therefore the Constitutional Court draws the attention of the Saeima to the fact, that in the adopted in the second reading draft Law "Amendments to the Civil Procedure Law"

(http://www.saeima.lv/bi8/lasa?dd=LP0968_2) there still is not envisaged the procedure of issuing writs of execution, which complies with the guarantees enshrined in Article 92 of the Satversme and Article 6 of the Convention; inter alia the right to appeal against the decision on issuance of a writ of execution. In the framework of the issuance process of a writ of execution person's civil rights and obligations are determined; and this process shall comply with the requirements, included in Article 92 of the Satversme and Article 6 of the Convention. However, the Constitutional Court has not been requested to assess the norms, which allow issuance of a writ of execution on the basis of an arbitral award.

At the moment in the Civil Procedure Law and the draft of the amendments to it there are no norms, which determine the procedure for setting aside the arbitration court judgment, even if the issuance of a writ of execution is not requested. Taking into consideration the frequently expressed criticism on the performance of the arbitration courts and *prima facie* noticeable faults in the regulation of the issuance of a writ of execution, the accepted in the world institute for contesting the arbitration court judgment in Latvia, would be of especially great importance.

At the same time it is necessary to completely exercise the supervision of the arbitration court activities, envisaged in the existing normative regulation. When issuing a writ of execution the State courts shall determine high standards (requirements) in regard to legality of the arbitration court procedure, including independence and impartiality. In this connection the Constitutional Court remarks that in accordance with the practice of ECHR the lack of independence and impartiality can be observed not only in cases, when it has been established, but also in cases when doubt about the existence of independence and impartiality is well-grounded (*see: Delcourt v. Belgium [1970] ECHR 1, Para.31; Piersack v. Belgium [1982] ECHR 6, para.30*). The structure of the arbitrary court, previous relations of the arbitrators with the parties as well as other factors may serve as the reason for such doubt. Making reference to the above on the harmony of interpretation Latvian and international human rights norms (see Item 7.1 of this Judgment), the Constitutional Court holds that such an approach can be used when applying the notions of impartiality and independence, included in the Civil Procedure Law.

The substantive part

On the basis of Articles 30-32 of the Constitutional Court Law the Constitutional Court

hereby rules:

to declare Section 132 (Item 3 of the first Part) and Item 6 of Section 223 of the Civil Procedure Law as conformable with Article 92 of the Republic of Latvia Satversme.

The Judgment is final and allowing of no appeal.

The Judgment takes effect as of the day of its publishing.

The Chairman of the Court session

Aivars Endziņš