Judgement
on Behalf of the Republic of Latvia
in Case No. 2014-09-01,
28 November 2014, Riga

The Constitutional Court of the Republic of Latvia, comprised of: the chairperson of the court sitting Aldis Laviņš, Justices Kaspars Balodis, Kristīne Krūma, Gunārs Kusiņš, Uldis Ķinis and Sanita Osipova,

having regard to a constitutional complaint submitted by limited liability company "HIPOTĒKU BANKAS NEKUSTAMĀ ĪPAŠUMA AĢENTŪRA",

with the participation of the authorised representatives of the submitter of the constitutional complaint – sworn attorneys Mārtiņš Aljēns, Uģis Zeltiņš and Arnis Ešenvalds,

the authorised representative of the institution that adopted the contested act, – the Saeima of the Republic of Latvia, Daina Ose, legal advisor of the Legal Bureau of the Saeima,

with Elīna Kursiša as the secretary of the court sitting,

on the basis of Article 85 of the Satversme, Para 1 of Section 16 and Para 11 of Section 17(1) of the Constitutional Court Law,

on 21 and 29 October 2014 in Riga examined in open court sitting Case

"On Compliance of Section 495(1) of the Civil Procedure Law with the first sentence in Article 92 of the Satversme of the Republic of Latvia".

The Facts

1. On 14 October 1998 the Saeima adopted the Civil Procedure Law, which entered into force on 1 March 1999. Section 495(1) of the Law provides that an arbitration court determines jurisdiction regarding a dispute, even in cases where one of

the parties contests the existence or the validity of an agreement (hereinafter – the contested norm). Pursuant with the contested norm, the arbitration court itself decides, whether the dispute is subject to adjudication by the arbitration court (hereinafter – the principle of the arbitration court jurisdiction).

2. The limited liability company "HIPOTĒKU BANKAS NEKUSTAMĀ ĪPAŠUMA AĢENTŪRA" (since 1 October 2014 – limited liability company Hiponia") (hereinafter – the Applicant) has requested the Constitutional Court to examine the compliance of the contested norm with the first sentence of Article 92 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

The Applicant has been the defendant in two proceedings in the Latvian Arbitration Court (*Latvijas šķīrējtiesa*). However, the Latvian Arbitration Court allegedly did not have the right to adjudicate the cases initiated against the Applicant, because the dispute had not been subject to adjudication by the Latvian Arbitration Court. I.e., the Applicant holds that the agreement of 20 December 2011, on the basis of which the arbitration court had recognised that the cases fell within its jurisdiction, should be recognised as being a forged document, since it had never concluded this kind of an agreement.

In the legal proceedings before the arbitration court the Applicant had requested the Latvian Arbitration Court to require the original of the agreement of 20 December 2011 and to order an expert-examination of it. However, the arbitration court rejected this request.

The Applicant turned to a court of general jurisdiction requesting recognising the forged arbitration court agreement as being invalid. However, the court of general jurisdiction had found that the claim regarding the validity of the arbitration court agreement could not be subject to be examined by a court of general jurisdiction, except for cases envisaged in law. The Department of Civil Cases of the Supreme Court had also recognised this finding as being valid. Thus, the contested norm allegedly restricts a person's fundamental right by denying a person the possibility to contest the validity of an arbitration court agreement even in the presence of valid suspicion that this agreement might be forged.

Allegedly, it is not doubted that the restriction to the fundamental right established by the contested norm has been defined in law. Likewise, the restriction to

the fundamental right has a legitimate aim – ensuring fast adjudication of disputes. I.e., the contested norm comprises the principle of the arbitration court jurisdiction recognised internationally, according to which an arbitration court itself decides on the jurisdiction of the dispute. However, the legislator, prohibiting from contesting the jurisdiction of an arbitration court at a court of general jurisdiction, allegedly has not chosen a measure that would restrict a person's right in the most lenient way possible.

The principle of the jurisdiction of an arbitration court may not be understood in a way that would grant to an arbitration court an exclusive right to decide on the issue of the jurisdiction of a dispute for adjudication by an arbitration court. This principle is linked to the idea that an arbitration court may adopt decisions that are fair and protect the interests of the parties to the case. However, allegedly, the true aim of this principle is not to leave the issue of the jurisdiction of a dispute only at the discretion of arbitration courts. I.e., this principle not only does not exclude a person's right to turn to a court of general jurisdiction, but also – quite on the contrary – respects this right.

The public benefit from fast proceedings before the arbitration court cannot counterbalance the damage inflicted upon a person's rights. The contested norm is said to not only cause a situation when a person is forced to resign with having a dispute adjudicated by an arbitration court, but also possibilities for abusing the institution of arbitration court.

The Applicant also notes that the regulation of the Civil Procedure Law on issuing a writ of execution in connection with an arbitration court award does not ensure an effective protection of a person's fundamental rights. I.e., in the stage of issuing a writ of execution, a court of general jurisdiction has the obligation to verify only whether any of the grounds defined in Section 536(1) of the Civil Procedure Law to refuse issuing a writ of execution exists. This verification allegedly does not entail examination of whether the arbitration court agreement is valid – pursuant to Para 3 of Section 536(1) of the Civil Procedure Law one of the grounds when a judge may refuse issuing a writ of execution is that "the arbitration court agreement, pursuant to the law applying thereto, has been set aside or declared null and void".

Thus, issuing a writ of execution may be refused, if the arbitration court agreement has already been set aside or declared null and void, but the judge cannot

examine this issue when deciding on the application for issuing a writ of execution for the enforcement of the arbitration court award.

The Applicant upholds the opinion expressed by the Saeima that in some cases the possibility to contest an arbitration court agreement at a court of general jurisdiction could be abused, for example, to delay the arbitration court proceedings or the enforcement of the arbitration court award. However, this fact does not justify such legal regulation that denies a person the right to contest at a court of general jurisdiction the existence or validity of an arbitration court agreement. The legislator could prevent abuse of the right to contest the arbitration court agreement at a court of general jurisdiction. For example, it could be possible to include in the law a special legal regulation, pursuant to which the decision on the jurisdiction of a dispute to be adjudicated by an arbitration court could be subject to the judicial control by a court of general jurisdiction.

At the court sitting, the authorised representative of the Applicant, sworn attorney Mārtiņš Aljēns noted additionally that the source of the principle of arbitration court jurisdiction is not the agreement of the parties, but either a national or an international law. The fact that the arbitration court is the first to decide on its own jurisdiction is said to follow not from the arbitration court agreement, but from the legal norm, the aim of which is to ensure that the proceedings before the arbitration court are not delayed.

The principle of arbitration court jurisdiction allegedly does not exclude the possibility that also a court of general jurisdiction adjudicates the issue of the jurisdiction of the dispute. Quite to the contrary – the aforementioned principle is said to mean only that the arbitration court has the priority in deciding on questions regarded the arbitration court's jurisdiction over a dispute.

The regulation of the Civil Procedure Law, which applies to issuing a writ of execution for compulsory enforcement of the arbitration court award, allegedly is not appropriate in order for a judge to make a comprehensive and unbiased assessment of the validity of the arbitration court agreement. The parties in this procedure do not have the possibility to use all means for proving that are envisaged by law, for example, witnesses' evidence.

The legislator has the jurisdiction to adopt such legal regulation that would impact the effectiveness of the proceedings before the arbitration court to the least extent possible. It would be possible to envisage in the law a special procedure for contesting the arbitration court agreement. For example, the respective cases could be examined by the appellate instance court, the ruling of which would be final or could be appealed against only to the cassation instance court.

Allegedly it does not follow from the principle of arbitration court jurisdiction that the issue of jurisdiction of a dispute would fall only within the exclusive jurisdiction of an arbitration court. The arbitration court, allegedly, has only the priority in deciding on the jurisdiction of a dispute; however, it should not be the only one deciding on this issue. The State has the obligation to ensure to a person the right to contest before a court of general jurisdiction the decision by an arbitration court on the jurisdiction of a dispute. If the arbitration court agreement is contested, than the subject matter of the dispute is whether a person had, indeed, waived his or her right to have the case heard before a court of general jurisdiction.

3. The Institution, which adopted the contested act, – the Saeima – holds that the contested norm complies with the first sentence of Article 92 of the Satversme.

The right to a fair court is said to be ensured, essentially, also in the proceedings before an arbitration court, and these proceedings are said to be one of the ways, in which a person can protect his or her infringed rights or lawful interests.

It is contended that a person's right to choose adjudication of a dispute by an arbitration court follows from the dispositive principle. This means that a person may not only waive the judicial protection, but also any other form of rights protection. If a person, expressing his or her free will, waives the protection of his or her subjective rights in court and selects another form of rights protection allowed by law, then a restriction on the fundamental rights enshrined in Article 92 of the Satversme cannot be identified.

The Saeima upholds the Applicant's view that the contested norm envisages the principle of arbitration court jurisdiction. It is contended that this principle does not mean that an arbitration court has the right to decide, whether the dispute is subject to being adjudicated by an arbitration court. The contested norm is said to be aimed at

decreasing the workload of courts of general jurisdiction, to limit the possibilities of the parties to delay the proceedings before the arbitration court and to ensure fast resolution of a dispute between parties. It is maintained that the contested norm protects the right of other persons to a fair court, because it ensures faster and more effective hearing of disputes.

Allegedly, the contested norm is appropriate for reaching the legitimate aim, since it clearly provides: turning to a court of general jurisdiction regarding the existence or the validity of an arbitration court agreement is inadmissible. Pursuant to the contested norm, the arbitration court itself decides on these issues. The Saeima is said to have a broad discretion in defining the regulation regarding the proceedings before the arbitration court. Whereas the courts of general jurisdiction control the operations of the arbitration courts in the procedure of issuing a writ of execution.

More extensive involvement of a court of general jurisdiction in controlling the judgement by the arbitration court would give a person possibilities to abuse this right and to delay the proceedings before the arbitration court. Moreover, considering the pace of legal proceedings in the state courts of all instances, it is clear that one of the most important advantages of the arbitration court proceedings – fast adjudication of a dispute – would be lost. Thus, the benefit to society ensured by the contested norm, i.e., effective functioning of arbitration courts, is said to exceed the restrictions to the rights of some persons caused by the contested norm.

If the contested norm were to be recognised as being incompatible with the first sentence of Article 92 of the Satversme, the defendants would be able to always submit a claim to a court of general jurisdiction, contesting the arbitration court agreement. If the procedure before the arbitration court were to be suspended until a court of general jurisdiction had heard the dispute regarding the validity of arbitration court agreement, the arbitration court proceedings would become meaningless.

During the court sitting, the authorised representative of the Saeima Daina Ose additionally noted that the Saeima, respecting the wish of society to use methods of alternative dispute resolution in solving contentions and disputes, had adopted the Law on Arbitration Courts and the Law on Mediations. These laws are going to ensure high quality resolution of every dispute.

The Law on Arbitration Courts envisages special pre-requisites for establishing an arbitration court and for improving the quality of the arbitration court proceedings.

As regards a person, who wants to fulfil the duties of an arbitrator, the legislator has set the requirements of an impeccable reputations, professional or academic higher education, qualification of a lawyer and at least three years long practical experience, gained while working as a faculty member at an institution of higher education in the speciality of legal science or another position in legal speciality.

During the process of adopting the Law on Arbitration Courts, the Legal Affairs Committee of the Saeima had debated the principle of the arbitration court jurisdiction. All those participating in the discussions had agreed that the current procedure, which envisaged the control over the jurisdiction of an arbitration court at the stage of issuing a writ of execution was sufficient for ensuring a fair outcome.

If a court of general jurisdiction had the right to decide on the validity of arbitration court agreement after the arbitration court itself had decided on it, a party to a dispute would be simultaneously involved in two legal proceedings. This could lead to legal uncertainty and a possibility to delay the enforcement of the arbitration court award.

The control of arbitration courts by courts of general jurisdiction is concentrated in the stage of issuing a writ of execution, i.e., after the case has been heard in the arbitration court proceedings on its merits and the compulsory enforcement of its award is necessary. In this stage of legal proceedings, the legality of the arbitration court proceedings is verified, *inter alia*, also the independence and impartiality of the arbitration court. Likewise, the judge, upon issuing a writ of execution for compulsory enforcement of the arbitration court award, has the right to assess the validity of the arbitration court agreement.

The representative of the Saeima, referring to statistical data, also noted that the mechanism for controlling rulings by arbitration courts, selected by the Saeima, which functioned at the stage of issuing a writ of execution, had justified itself, by significantly relieving the workload of courts of general jurisdiction. In those instances, when an assessment of the quality of the arbitration court judgement by the court of general jurisdiction is needed, it is provided during the stage of issuing a writ of execution.

4. The summoned person – **the Ministry of Justice** – notes that the contested norm complies with the first sentence of Article 92 of the Satversme.

The speed of hearing a dispute is said to be one of the advantages of the arbitration proceedings, and the arbitration court agreement is the basis for the arbitration court jurisdiction. Therefore the right of an arbitration court to decide on its jurisdiction is inseparably linked with its right to decide on the validity or invalidity of the arbitration court agreement. If a possibility existed to hear the issue of the validity of arbitration court agreement at a court of general jurisdiction, a person could evade fulfilling his or her liabilities.

It is contended that the State is not responsible for violations of fundamental rights committed in arbitration proceedings; however, the State has the obligation to ensure measures of protection against violations of procedural law committed during the arbitration proceedings. Therefore, Section 536 of the Civil Procedure Law defines those cases, when a court of general jurisdiction does not recognise the outcome of the arbitration court proceedings.

If a party to the arbitration proceedings raises objections, pointing to the invalidity of the arbitration court agreement or even to possible forgery, the arbitration court has the duty to decide on the validity of the objections expressed, *inter alia*, to decide on the submitted request to commission an expert-examination. If a court of general jurisdiction establishes that an arbitration court has not taken a decision with regard to a request submitted by a party to commission an expert-examination, it may decide, whether the fact that no decision has been taken with regard to the request could be recognised as being such violation of the arbitration court proceedings, which could be the grounds for refusing to issue a writ of execution.

Para 2 of Section 534(1) of the Civil Procedure Law provides that a document that certifies a written agreement by the parties to transfer the dispute for hearing by an arbitration court or a true copy of it, certified by a notary, must be appended to the application for issuing a writ of execution. The submission of the aforementioned documents gives the court a possibility to verify the existence of the arbitration court clause. If the document referred to in Para 2 of Section 534(1) of the Civil Procedure Law were not appended to the application, the judge would adopt a decision on leaving the application not proceeded with and setting the term for eliminating deficiencies. If, within the set term, a person has not submitted the missing documents, a judge adopts a decision on refusal to accept the application and returns it to the applicant.

A court of general jurisdiction, in adopting a decision on compulsory enforcement of the arbitration court award, is said to have the duty to assess, whether the arbitration court, in adopting its ruling, has not exceeded the limits of its jurisdiction. If a party to the case, pursuant to Para 4 of Section 534^1 (2) of the Civil Procedure Law, points in the explanation to, for example, possible forgery of the arbitration court agreement, then the court of general jurisdiction has the right to request from the arbitration court all necessary materials of the case or the whole case to verify the existence of facts noted in the explanation. Likewise, a court of general jurisdiction has the right to require from the arbitration court the original copy of the agreement for forwarding it for expert-examination prior to issuing a writ of execution. Hence, the regulation of the Civil Procedure Law, which is currently in force, is said to envisage an effective mechanism for controlling arbitration proceedings by a court of general jurisdiction and to ensure a person's right to a fair court.

In the presence of valid suspicion regarding a criminal offence linked with possible forgery of the agreement, the person has the right to submit an application to an institution of investigation. Section 371(1) of the Criminal Procedure Law imposes a duty upon the official, who is authorised to conduct criminal proceedings, to initiate criminal proceedings, within the limits of his or her jurisdiction, in connection with any cause referred to in Section 369 of the Criminal Procedure Law. Whereas taking the decision regarding issuing a writ of execution, in such a case, must be suspended until the final ruling in the criminal proceedings enters into force.

During the court sitting the authorised representative of the Ministry for Justice Inita Ilgaža, the director of the Judiciary Policy Department, noted in addition that the right of a court of general jurisdiction to assess the jurisdiction of an arbitration court would lead to a situation, where the arbitration court proceedings would not be so fast anymore. I.e., all parties to arbitration court proceedings would have the possibility to turn to a court of general jurisdiction, submitting objections with regard to the validity of the arbitration court agreement.

The regulation on the control of the legality of the arbitration court award in the stage of issuing a writ of execution that is currently in force is said to protect a person's right to a fair court. If significant procedural breaches have been committed in the arbitration court proceedings, then the court applies Para 6 of Section 536(1) of the Civil Procedure Law and refuses issuing of a writ of execution. If one of the parties considers

that the arbitration court agreement has been forged, then during the process of issuing a writ of execution it could inform the court about the considerations pointing to significant breaches committed in the arbitration court proceedings.

It is contended that the means for proving and the possibilities of proving do not differ considerably in the proceedings in an arbitration court and the legal proceedings in a court of general jurisdiction, and both are based upon adversarial principle. Hence, the ruling adopted by an arbitration court depends upon the activity and initiative of each party.

At the time of drafting the Law on Arbitration Courts, many experts had indicated that the rights of a party to turn to a court of general jurisdiction and contest the jurisdiction of an arbitration court would be a threat to reaching the aims of the arbitration court proceedings. Thus the arbitration court proceedings would not be so fast anymore, since any of the parties would be able to delay it. Therefore the regulation included in the contested norm was retained in the Law on Arbitration Courts.

5. The summoned person – **the Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) – holds that the contested norm, insofar it does not allow legal proceedings before a court of general jurisdiction regarding the existence or validity of an arbitration court agreement in a case, where a person has not expressed a wish to conclude an arbitration court agreement, is incompatible with the first sentence of Article 92 of the Satversme.

The State, recognising such types of alternative dispute resolution as arbitration court, should set the same requirements for regulating its activities as with regard to the state judicial power, i.e. – impartiality of the court and a fair ruling. Likewise, the mechanism that the State uses to control the arbitration court awards should ensure that the State by its actions would recognise only such arbitration court proceedings, where the fairness and impartiality have been complied with.

In Latvia an arbitration court award is not subject to appeal, and in order for it to be enforced it is necessary to request a court of general jurisdiction to issue a writ of execution. Thus, the control over an arbitration court is concentrated only in the stage of issuing a writ of execution.

The Ombudsman underscores that significant deficiencies can be identified in the legal regulation on arbitration court, which allow unfair legal proceedings. Moreover,

the rights granted to a court of general jurisdiction to rectify errors made by an arbitration court are insufficient.

During the court sitting, the authorised representative of the Ombudsman Santa Tivaņenkova noted additionally that also the Ombudsman's Bureau receives complaints form persons regarding actions by the arbitration courts. Quite frequently a situation is encountered, where a person had not known altogether that arbitration court proceedings had take place and had found out about it only when enforcement had been turned against them.

Allegedly, the regulation of Section 536(1) of the Civil Procedure Law is not sufficient for courts of general jurisdiction to control the independence and impartiality of the arbitration court proceedings. This regulation leads to a situation were courts of general jurisdiction legalise arbitration court awards and issue a writ of execution even in those cases, when in the proceedings before the arbitration court the original of the agreement has not been presented and it has not been verified, whether the parties have freely expressed their wish to enter into an agreement like this. The Civil Procedure Law allows a situation, where an arbitration court is passing judgements, which only formally comply with legal requirements, but in fact are based upon invalid documents. Moreover, such arbitration court awards remain valid even if a court of general jurisdiction refuses issuing a writ of execution.

6. The summoned person – **the Latvian Chamber of Commerce and Industry** – notes that the contested norm complies with the first sentence of Article 92 of the Satversme. The contested norm is said to operate in the field of private law, where the dispositive principle applies – the contracting parties have the right to choose themselves the procedural means for protecting their rights.

The arbitration court agreement is a civil law agreement, to which all norms regarding the validity of a transaction apply. Therefore, a forged arbitration court agreement has no legal force. Whereas it is the obligation of an arbitration court to verify, whether the arbitration court agreement is valid. If an arbitration court refuses to examine the issue of the validity of the arbitration agreement or possible forgery, then the person, in accordance with the Civil Procedure Law, has the right to protect his or her fundamental rights at the stage of issuing a writ of execution.

During the court sitting the authorised representative of the Latvian Chamber of Commerce and Industry Edmunds Stankevičs noted in addition that the arbitrators of arbitration courts should be highly qualified lawyers, who fulfil their duties with integrity and do not succumb to any influence. This means that both a court of general jurisdiction and an arbitration court with regard to similar actual and legal facts should adopt a similar ruling. An arbitrator of an arbitration court should be able to establish that an arbitration court agreement has been forged or is invalid due to other reasons already within the limits of the authorisation granted to him or her by law. Therefore turning to a court of general jurisdiction regarding this issue is said to be unnecessary.

7. The summoned person – **the Latvian Arbitration Court (*Latvijas šķīrējtiesa*)** – notes that the contested norm complies with the first sentence of Article 92 of the Satversme. The contested norm comprises the principle of arbitration court jurisdiction, which envisages that the arbitration court itself has the right to rule on its jurisdiction, even if the existence or the validity of an arbitration court agreement is contested. In accordance with this principle an arbitration court should not suspend hearing of a case and wait until a court of general jurisdiction has examined the issue of an arbitration court's jurisdiction over a dispute.

If an arbitration court did not have the right to rule on its jurisdiction, it would not have the possibilities to abide by the terms set out in Section 493(4) of the Civil Procedure Law. Moreover, a party to the arbitration court proceedings, acting in bad faith, would be given a possibility to evade the binding force an arbitration court agreement envisaged by law.

Allegedly, the principle of free evaluation of evidence is applied in the arbitration court proceedings, which envisages that no evidence has a prior established force. The arbitration court itself examines all evidence existing in the case in their interconnection and also examines the applicability and admissibility of evidence. Any fact that is significant in a case before an arbitration court is to be considered as having been proven when following verification of applicable and admissible evidence present in the case, all reasonable doubt, whether the respective circumstance could be different, is excluded.

8. The summoned person – **Dr. iur. Inga Kačevska** – notes that in the international sources of arbitration court law the principle of the arbitration court jurisdiction is understood as follows: if any of the parties contests the force of the arbitration court agreement, then the panel of the arbitration court may not only establish its jurisdiction and continue hearing the dispute, but also make a judgement on merits of the case. Thus, the arbitration court is the first that examines the issue of its jurisdiction. However, the principle of arbitration court jurisdiction does not deny the parties the right to turn to a court of general jurisdiction to contest the validity of an arbitration court award.

A situation, where a decision by an arbitration court on its jurisdiction may not be contested before a court of general jurisdiction, is unacceptable. I.e., in such a case the party has no other legal remedies at his or her disposal to prove that the arbitration court does not have the jurisdiction. Moreover, such cases when an arbitration court relinquishes its jurisdiction are very rare in practice, and in Latvia arbitration court proceedings are not always used in good faith.

Control by a court of general jurisdiction over an arbitration court is necessary to increase the trust of merchants in arbitration courts. The court should verify, whether the arbitration court award has been made on the basis of a legal arbitration court agreement and whether the arbitration court, in deciding on jurisdiction, has not exceeded the limits of its jurisdiction.

Upon receiving an application regarding compulsory enforcement of an arbitration court award, the court of general jurisdiction should verify, whether the original of the arbitration court agreement has been appended. Even though the Civil Procedure Law does not envisage such grounds for refusing to issue a writ of execution as the lack of the original copy of arbitration court agreement, nevertheless this issue should be examined in interconnection with a party's objections regarding the validity of an arbitration court award.

The Civil Procedure Law does not regulate what happens with an arbitration court award, if a writ of execution is not issued regarding it. Section 537 of the Civil Procedure Law enumerates those cases, when a dispute must be repeatedly heard by an arbitration court, if a decision on refusing to issue a writ of executions has entered into force. However, an arbitration court award cannot become invalid automatically. Even if a writ of execution has not been issued in Latvia, an interested party may try to achieve

enforcing the arbitration court award in another state. Hence, the legislator should also establish a procedure according to which an arbitration court award is revoked or recognised as being invalid.

Inga Kačevska draws the attention of the Constitutional Court to the fact that UNICTRAL Model Law on International Commercial Arbitration of 1985 (hereinafter – the Model Law) should be fully implemented in Latvia.

The Model Law effectively functions in other countries, extensive commentaries to it have been elaborated; likewise, extensive case law on the application of each Article is available. This would help to resolve many currently relevant issues in connection with arbitration courts.

During the court hearing the summoned person additionally noted that the fastness of the arbitration proceedings for a long time already was not assessed as a positive feature of the arbitration proceedings. A person's right to a fair court should be seen as being more important than the speed of arbitration proceedings. It should also be assessed higher than the principle of procedural economy.

Significant improvements are needed in the activities of arbitration court, in particular with regard to the control by courts of general jurisdiction over the activities of arbitration courts. Allegedly, the Law on Arbitration Courts adopted by the Saeima is not improving the situation.

9. The authorised representative of the summoned person – **limited liability company "Resort Management"** (hereinafter – *Resort Management*) – sworn attorney Aleksandrs Kazačkovs noted at the court hearing that the Latvian Arbitration Court, in resolving the dispute between the Applicant and *Resort Management*, had acted in compliance with law. The Latvian Arbitration Court, using the means for proving that it had at its disposal, had established, which officials of the aforementioned merchants had been authorised to conclude an agreement on dispute resolution before an arbitration court. Allegedly, the fact that the Latvian Arbitration Court had resolved the dispute legally is confirmed also by the fact that a court of general jurisdiction issued a writ of execution for compulsory enforcement of the award made by Latvian Arbitration Court.

The statements that the arbitrator of the Latvian Arbitration Court had been in a conflict of interest situation, when adjudicating the dispute between the Applicant and *Resort Management*, are said to be unfounded. I.e., it should be taken into consideration

that Latvia "is, for all that, a small country", and in particular that the representatives of legal profession know one another. A conflict of interest cannot be general, and for it to occur, "a direct connection and direct influence by a particular person" should be present.

The Constitutional Court, in deciding on the decision by a court by general jurisdiction to suspend issuing a writ of execution, should have heard the opinion of *Resort Management*. Since the Constitutional Court had not heard it, the merchant could suffer loses in the future.

The Applicant by its actions has, allegedly, driven *Resort Management* to insolvency. Because of this reason the law office "A. Kazačkovs and partners" allowed *Resort Management* "to take a credit from the law office" and granted the possibility to pay for the provided legal services later. At the same time Aleksandrs Kazačkovs admitted that the State Police had initiated criminal procedure in connection with possible forgery of the agreement of 20 December 2011.

10. The summoned person – **Dr. habil. iur. Professor Kalvis Torgāns** – noted at the court hearing that the principle of arbitration court jurisdiction that is included in the contested norm was internationally recognised and that Latvia should transpose it without reservations. Indeed, some problems could be identified in the activities of arbitration courts. For example, an arbitration court may not interview witnesses, the rules of procedure of arbitration courts are not being controlled, and the parties to the case may waive the part of reasoning in the arbitration court award. Likewise, discrepancies in the interpretation of legal norms can be found. However, the situation referred to in the constitutional complaint does not pertain to these issues.

A situation like this, where a case goes to an arbitration court, even one party to the case has not agreed to it, should not occur at all. However, in the case under review, the Applicant with the mediation of its representative had expressed the wish to have the case examined by an arbitration court. Possibly, it can be maintained that the expression of this could be contested; however, it cannot be asserted that in the case under review there had been no expression of will at all.

Upon entering into an agreement, the parties to it have two options. Firstly, the parties to the agreement can decide that a dispute would be heard by a court of general jurisdiction. These judicial proceedings are rather lengthy, and the Civil Procedure Law

provides a detailed regulation on it. Secondly, the parties to the agreement may agree to have the dispute heard by an arbitration court. In such a case, the parties to the agreement have the obligation to study, before entering into the agreement, what the proceedings before an arbitration court are and what kind of restrictions it imposes. One of these restrictions denies the party the right to discontinue the proceedings before the arbitration court and "search for a better court", as well as the right to appeal against the arbitration court award.

The State controls the arbitration court procedure, for example, sets the requirements with regard to the education of arbitrators, regulates issues, which cannot be adjudicated by an arbitration court, safeguarding the main principles of legal proceedings and providing that the legality of an arbitration court award is controlled during the stage of issuing a writ of execution.

The restrictions to the right to a fair court can be justified by the need to promote the principle of procedural economy at courts of general jurisdiction. Whereas if the Applicant's constitutional complaint were satisfied, many persons would submit an application to courts of general jurisdiction, noting that the arbitration court agreement had been concluded without the expression of will. Thus, the number of cases at courts of general jurisdiction would grow, however, the courts would recognise that a person had not expressed the will to conclude an arbitration court agreement only in few cases.

Kalvis Torgāns admitted that the term set in the Civil Procedure Law, within which a judge had to adopt a decision on issuing a writ of execution, was too short. Therefore the judge lacked the time to study the application in-depth and adopted the decision "as formally as possibly". The summoned person also noted that there was an "anti-constitutional lacuna" in Section 536 of the Civil Procedure Law with regard to the party's right to contest an arbitration court award that must not be enforced immediately.

11. The summoned persons – **sworn attorney Jānis Lapsa** – during the court hearing noted that the Judgement of 17 January 2005 by the Constitutional Court in Case No. 2004-01-01 had introduced significant changes in the control over activities of arbitration courts. Following this Judgement the legislator introduced amendments to Section 536 of the Civil Procedure Law, which imposed the obligation upon a judge of a court of general jurisdiction to examine absolutely all circumstances to establish,

whether the arbitration court proceedings had complied with Part D of the Civil Procedure Law. Following the adoption of these amendments a judge of a court of general jurisdiction has extensive rights to decide on issuing or not issuing a writ of execution in connection with an arbitration court award.

It would be possible to adjudicate the case under examination without touching upon the issue of the constitutionality of the contested norm. I.e., the contested norm allegedly envisages only that the arbitration court is the first to decide on its jurisdiction; however, this norm does not prohibit a court of general jurisdiction to examine the validity of an arbitration court agreement. Hence, the case under examination could be solved by granting another interpretation to the contested norm.

The summoned person admitted that the Supreme Court has established a stable judicature with regard to interpretation and application of the contested norm. However, in some cases the district (municipal) courts, as well as regional courts do not abide by this judicature of the Supreme Court and decide on the issue of the validity of arbitration court agreement according to their own judgement. Therefore the rulings by courts of general jurisdiction with regard to the interpretation of the contested norm vary.

The enforcement of an arbitration court award is not limited to the process of issuing a writ of execution. The enforcement is controlled also in those cases, where the Prosecutor General submits a protest against a court ruling by which the matter of issuing a writ of execution is decided, as well as in those cases where a court of general jurisdiction does not comply with the judicature of the Supreme Court with regard to the application of the contested norm.

12. Witness Gints Liepaskalns, a board member of *Resort Management* from 9 February 2010 to 22 May 2013, testified at the court hearing that he knew Jānis Bērziņš, since they both had worked at the Ministry of Justice. The agreement of 20 December 2011 had been concluded upon the initiative of Gints Liepaskalns. The agreement had been drafted by Gints Liepaskalns himself, and it was signed at Jānis Bērziņš office at his workplace.

The witness had chosen the Latvian Arbitration Court because it had been the only one, with which "some kind of practice" had evolved. An agreement on having disputes adjudicated by an arbitration court is usually included in contracts, which, to the witnesses' mind, are complex or linked with significant input or major investments.

After concluding the agreement of 20 December 2011, the original copy had been kept at the ice hall's director's office. Whereas in the period from 12 July 2013 to 24 July 2013 it, most probably, had been destroyed by the employees of the security company employed by the Applicant. However, the witness admitted that in the act of 24 July 2013 on the transfer of documents *Resort Management* certified that the Applicant had received all documents present at the ice hall in full.

The witness also noted that a number of copies of the agreement of 20 December 2011 had been made and certified by a notary, since they had been concerned regarding the meeting of liabilities envisaged in the contract.

13. Witness Jānis Bērziņš, the Applicant's board member in the period from 29 May 2010 until 29 December 2011, testified at the court hearing that the agreement of 20 December 2011 had been entered into upon the initiative of Gints Liepaskalns. The said agreement had been drafted by Gints Liepaskalns and Jānis Bērziņš had signed it at his office at the workplace. After signing the agreement he had left it either with the secretary or his deputy – Mārtiņš Muižnieks.

The Applicant had had a document that regulated the procedure for the flow of documents in the said company, and this procedure, by signing the agreement of 20 December 2011, most probably, had been complied with. The witness, in the capacity of the Applicant's board member, allegedly, did not enter into any other contracts containing an agreement on having a case adjudicated by an arbitration court. In answering to the Court's question, whether the agreement of 20 December 2011 had been properly approved before it was signed the witness noted that he remembered "approvals on this document". However, the witness was unable to say, which persons had approved this document.

Entering into an agreement on having a dispute adjudicated by an arbitration court was said to be a generally adopted practice among merchants, since an agreement of this kind ensured faster and more effective adjudication of disputes of economic nature. Likewise, a person, who handles the property or financial resources of the State, has the right to conclude an agreement on dispute resolution by an arbitration court.

The witness did not provide clear answers to a number of questions put the Court, because he could not remember many important actual circumstances connected with entering into the agreement of 20 December 2011.

The Findings

14. In the case under review the regulation of the Civil Procedure Law, which denies a person the right to turn to a court of general jurisdiction to dispute the competence of an arbitration court to decide on the jurisdiction of a civil law dispute in a particular case, when a person has not agreed to having the case adjudicated by an arbitration court, is disputed.

14.1. The Constitutional Court has recognised that an arbitration court does not belong to the system of judicial power, which is established in the Satversme and the law "On Judicial Power".

A person's right to agree to enter into an arbitration court agreement follows from the dispositive principle. If an arbitration court agreement is concluded, a person's free will is expressed in the form of a legal transaction, and the criterion of the admissibility of a voluntary restriction to fundamental rights is applied. Substituting a person's freely expressed will by an assessment of the reasonability of such actions is neither the task of the legislator, nor that of the Constitutional Court.

Even though the State is not responsible for the arbitration court proceedings and a person, through freely expressed will, may voluntarily waive the possibility to have a particular civil law dispute adjudicated by a court of general jurisdiction, nevertheless a person's freedom to waive the fundamental rights guaranteed in the Satversme extends only insofar it is compatible with the basic principles of a legal system of a judicial and democratic state.

The first sentence of Article 92 of the Satversme envisages both the obligation of the State to establish an effective legal regulation that would ensure the possibility to eliminate essential procedural violations that have occurred in the arbitration court proceedings, as well as the obligation to not recognise the outcome of such arbitration court proceedings, where such violations have occurred (*see Judgement of 17 January 2005 by the Constitutional Court in Case No. 2004-10-01, Para 5, 8 and 9*).

14.2. Moreover, in establishing the content of the fundamental rights established in the Satversme, Latvia's international commitments in the field of human rights must be taken into consideration (*see, for example, Judgement of 20 December 2010 by the*

Constitutional Court in Case No. 2010-44-01, Para 8.1). The Constitutional Court has already interpreted Article 92 of the Satversme with regard to the field of arbitration courts in interconnection with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) (*see Judgement of 17 January 2005 by the Constitutional Court in Case No. 2004-10-01, Para 7.1*). Thus, the findings included in the rulings by the European Court of Human Rights (hereinafter – ECHR) on Article 6 of the Convention with regard to arbitration court are to be used in determining the content of the first sentence in Article 92 of the Satversme.

With regard to arbitration court ECHR has noted that Article 6 of the Convention does not prohibit from establishing arbitration courts for resolving disputes of commercial nature between private persons (*see ECHR Judgement of 28 October 2010 in Case "Suda v. the Czech Republic", Application No. 1643/06, Para 48, and Judgement of 3 April 2008 in Case "Regent Company v. Ukraine", Application No. 773/03, Para 54*). A person has the right to waive the right to have the case heard by a court of general jurisdiction, and Article 6 of the Convention allows such freely expressed waiver (*see ECHR Decision of 23 February 1999 in Case "Suovaniemi and Others v. Finland", Application No. 31737/96*).

ECHR has also recognised that the choice to transfer the dispute for hearing by an arbitration court should be free, compatible with law and unequivocal. If disputes are heard by an arbitration court on the basis of law, not on the basis of the parties' free will, then the arbitration court proceedings should comply with all requirements of Article 6 of the Convention (*see ECHR Judgement of 28 October 2010 in Case "Suda v. the Czech Republic", Application No. 1643/06, Para 48 and 49*). Thus, in those cases, where parties have freely chosen to transfer the dispute for hearing by an arbitration court, it is being presumed that in the arbitration court proceedings they waive the rights included in Article 6 of the Convention.

The State carries no responsibility for the fairness of case adjudication by arbitration courts; however, in those cases, where a court of general jurisdiction controls the arbitration court proceedings, it should verify, whether the legal proceedings before the arbitration court have been fair (*see Decision of 2 December 1991 by European Commission on Human Rights in Case "Jakob BOSS Söhne KG v. Germany", Application No. 18479/91*).

The State control over the functioning of arbitration courts may have twofold manifestations: firstly, the State may provide that an arbitration court should be established and that it should function in compliance with the requirements of Article 6 of the Convention; secondly, the State may envisage that the functioning of arbitration courts is controlled by a court, which has been established and functions in compliance with Article 6 of the Convention.

Thus, the obligation of the State to create a legal mechanism for examining, whether a person has voluntarily waived the right to a fair court follows from the first sentence of Article 92 of the Satversme and international documents binding upon Latvia.

15. The Applicant notes in the constitutional complaint that the contested norm denies its right to turn to a court of general jurisdiction and contest the jurisdiction of the arbitration court. I.e., the Latvian Arbitration Court heard the case on the basis of such arbitration court agreement, with regard to validity of which reasonable doubts existed; however, courts of general jurisdiction, on the basis of the contested norm, refused to examine the issue of the arbitration court jurisdiction.

Whereas the Saeima notes in its written reply that the contested norm comprised the principle of the arbitration court jurisdiction, which should be regarded as one of the basic principles in the international arbitration law. Allegedly, this principle means that only and solely the arbitration court has the right to decide on all issues pertaining to its jurisdiction.

During the court hearing the parties to the case and the summoned persons noted that principle of the arbitration court's jurisdiction was included in a number of sources of international law (*see, for example, transcript of the Constitutional Court sitting of 21 and 29 October 2014 in Case Materials, Vol. 5, pp. 10, 41, 70, 86 and 138*). However, the opinions expressed regarding the content of the principle of arbitration court jurisdiction diverged.

The Applicant's representative, the representative of the Ombudsman, Inga Kačevska and Jānis Lapsa noted that this principle did not deny courts of general jurisdiction the right to assess the competence of an arbitration court (*see, for example, transcript of the Constitutional Court sitting of 21 and 29 October 2014 in Case*

materials, Vol. 5, pp. 85, 138, 140, 167, 168 and 183). Whereas the representative of the Saeima and the representative of the Ministry of Justice noted that this principle should be understood in the way that a person had not right to turn to a court of general jurisdiction and request the court to assess the jurisdiction of an arbitration court (*see, for example, transcript of the Constitutional Court sitting of 21 October 2014 in Case materials, Vol. 5, pp. 27, 29 and 74*).

In view of the fact that the parties to the case and the summoned persons expressed divergent opinions on the principle of arbitration court jurisdiction, the Constitutional Court must first and foremost establish, what kind of content is granted to the principle of arbitration court jurisdiction in the sources of legal regulation on arbitration courts.

15.1. The Constitutional Court notes that legal proceedings before an arbitration court is to be recognised as an effective way, in which persons can resolve their civil law disputes. The legal proceedings before an arbitration court gain particular relevance in case, where the disputes of parties to commercial legal relationships should be resolved in due time and, thus, civil law circulation should be sped up. Therefore, the arbitration court procedure is of great importance in the legal system of Latvia, and the legal regulation of this field should be based both upon international legal acts binding upon Latvia and upon other binding legal acts – the principles of international law.

15.2. The second and the third part of Article VI of the European Convention on International Commercial Arbitration envisages that a court of general jurisdiction may decide on the jurisdiction of an arbitration court if the arbitration court agreement is non-existent or null and void, or has lapsed. In the scope of the aforementioned Convention the term "invalid arbitration agreement" means an agreement that has been invalid already from the moment of its drafting, for example, in the absence of the parties' will to conclude an agreement or if a party is incapacitated (*see Hascher D.T. European Convention on International Commercial Arbitration of 1961: Commentary. Yearbook Commercial Arbitration, Vol. XXXVI, 2011, p. 524*).

The aforementioned Convention also envisages that a court of general jurisdiction, before an arbitration court has adjudicated the case on its merits, decides on the issue of the validity of an arbitration agreement only in particular cases, i.e., if well-founded and significant reasons exist. Moreover, also in such a case a court of general jurisdiction may only conduct a *prima facia* examination of the validity of the

arbitration agreement. Whereas after the arbitration court has passed its ruling, a court of general jurisdiction has the right to assess the arbitration agreement in full [*see Fouchard Gaillard Goldman On International Commercial Arbitration. Gaillard E., Savage J. (Eds.) The Hague: Kluwer Law International, 1999, p. 408*].

15.3. The principle of arbitration court jurisdiction is not included *expressis verbis* in The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is binding upon Latvia. However, this Convention does not exclude the right of a court of general jurisdiction to examine the arbitration court jurisdiction. Only in examining the jurisdiction of an arbitration court, the principle of chronology must be complied with – the arbitration court should be the first to decide on its jurisdiction, unless a court of general jurisdiction has not established before that that the arbitration agreement is invalid, has lost its force and cannot be implemented (*see ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges. The Hague: International Council for Commercial Arbitration, 2011, p. 39*).

An arbitration agreement cannot be implemented in those cases where it has been invalid from the very beginning, has been concluded without expressed will of the parties, for example, without due authorisations, by duress, fraud or excessive influence (*see Berg A. J. van den. New York Convention of 1958: Annotated List of Topics. Yearbook Commercial Arbitration, 2013, p. 25*).

15.4. The Constitutional Court has also recognised that the Model Law is a standard of legal regulation used throughout the world (*see Judgement of 17 January 2005 by the Constitutional Court in Case No. 2004-10-01, Para 9.1*). The Model Law was elaborated with the aim of creating clear and comprehensive rules that would comprise fair and modern standards of international arbitration, which, as general legal principles, would be applicable in various legal and economic systems existing in the world. It is also noted in the annotation to the draft "Law on Arbitration Courts" that the Model Law was used to improve the Latvian legal regulation on arbitration (*see annotation to the draft law No. 1039/Lp11 "Law on Arbitration Courts" submitted to the Saeima on 27 December 2013*).

Article 8 of the Model Law (with amendments of 2006) clearly defines those instances, when a court of general jurisdiction may not transfer a dispute to an arbitration court, i.e.: if the arbitration agreement is null and void, inoperative or incapable of being performed, as well as if the jurisdiction of arbitration court is

incompatible with public order or imperative legal norms. An arbitration court is invalid, if it has been forged, as well as if it has been concluded as the result of fraud, deception or unlawful activities (*see UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration. New York: United Nations, 2012, pp. 40, 41*).

It is likewise recognised that in accordance with Article 8 of the Model Law the legislator has a broad discretion in deciding on who is the first to assess the validity of an arbitration agreement – the arbitration court itself or a State court. In any case, where the State court examines the validity of an arbitration agreement, it has full right to decide on this issue and it also will always have "the right to the final word". Whereas in those cases, when the arbitration court is the first to decide on its jurisdiction, the party, which is dissatisfied with such decision by the arbitration court, may request a State court to adopt a final decision in this matter [*see Brekoulakis S. L., Shore L. United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. In: Mistelis L. A. (Ed.) Concise International Arbitration. Alphen aan den Rijn: Kluwer Law International, 2010, pp. 601, 602, 614*].

It can be concluded from Article 8 and Article 16 of the Model Law that an arbitration court is not the only one having the right to decide on the validity of an arbitration court agreement. A court of general jurisdiction also holds this right.

15.5. The Constitutional Court has repeatedly recognised that the legal regulation of other countries cannot be applied directly when dealing with particular issues in the Latvian legal system, except for cases provided by law. The different legal, social, political, historical and systemic context should always be taken into account when conducting comparative law analysis (*see, for example, Judgement of 8 June 2007 by the Constitutional Court in Case No. 2007-01-01, Para 24.1, and Judgement of 3 June 2009 in Case No. 2008-43-0106, Para 10.6*).

However, if a systematic analysis of the legal regulation on a particular issue in other countries may lead to a sufficiently unequivocal conclusion regarding harmonization of national law or a uniform standard in this issue, the results gained from surveying the legal regulation or practice in other countries may serve as a proposal for resolving a particular problem or as a general principle of law. This applies also to the legal regulation in the field of arbitration courts and its application in practice.

In many countries the comparative doctrine of the regulation on arbitration notes that the decisions by an arbitration court regarding the existence of an arbitration agreement is most closely linked to the jurisdiction of an arbitration court and is subject to control by a State court. In those cases when the arbitration court jurisdiction is contested, the State court has the final word in deciding on this issue. I.e., the issue, whether a valid arbitration agreement exists and whether the hearing of the dispute by a State court has been waived voluntarily, "cannot be left in charge of arbitrators or other private persons." Predominantly the national laws on arbitration courts envisage the possibility to contest the decision by an arbitration court on its jurisdiction in case, where a valid arbitration agreement is absent [*see Sanders P. Arbitration. In: Cappelletti M. (Ed.) International Encyclopedia of Comparative Law. Vol. XVI: Civil Procedure. Mohr Siebeck, Nijhoff: Tübingen, Leiden, 2014, pp. 63, 126*].

Thus, the principle of arbitration court jurisdiction does not exclude the possibility that the jurisdiction of an arbitration court is examined by a court of general jurisdiction.

16. It follows from the written reply by the Saeima, as well as from the points made by the representative of the Saeima during the court hearing that the contested norm denied a person the right to turn to a court of general jurisdiction, requesting to adjudicate the issue of an arbitration court jurisdiction.

The legislator's intention is also confirmed by the rulings made by courts of general jurisdiction, which recognise, referring to the contested norm: the request regarding the validity of an arbitration agreement cannot be a subject of review at a court of general jurisdiction, except for cases, when restrictions to concluding an arbitration court have been envisaged, i.e., in labour, consumer, competition, lease of residential premises and other legal relationships (*see Decision of 31 January 2014 by the Supreme Court Department of Civil Cases in Case No. SKC-1627/2014, Para 5.2, Case Materials, Vol. 1, p118).*

The Supreme Court has noted that the issue of the validity of arbitration agreement cannot be a subject for examination by a court of general jurisdiction also in those cases when a lower instance court establishes that an arbitration agreement is invalid. For example, the Panel of Civil Cases of Kurzeme Regional Court by the Judgement of 10 June 1011 recognised an arbitration agreement concluded by the

parties as being invalid. The Kurzeme Regional Court, on the basis of experts' opinion and witnesses' testimonies, found that the arbitration agreement had not been signed by the person indicated in the copy of the contested agreement. Moreover, the Court paid special attention to the fact that it did not have at its disposal the original copy of the arbitration agreement (*see Judgement of 10 June 2011 by the Panel of Civil Cases of Kurzeme Regional Court in Case No. C40108906, reasoning*).

Whereas the Supreme Court Department of Civil Cases by Decision of 30 January 2013 revoked the aforementioned judgement by Kurzeme Regional Court and terminated legal proceedings in the case. The Supreme Court Department of Civil Cases recognised in its decision that an arbitration court itself decided on all issues pertaining to the jurisdiction of the case. The issue of the arbitration court's jurisdiction over the dispute, as well as the issue of the validity of an arbitration agreement should be resolved in the concrete arbitration proceedings, not at a court of general jurisdiction (*see Judgement of 30 January 2013 by the Supreme Court Department of Civil Cases in Case No. SKC – 20/2013, Para 10.2 and Para 10.3*).

The Constitutional Court has recognised that the Supreme Court has an important role in the interpretation and application of legal norms in a way that is compatible with the Satversme. The courts of general jurisdiction are the ones that have the best knowledge of the actual and legal facts of the case, which testify to the existence of such rights or interests of a person that should be protected (*see Judgement of 6 June 2012 by the Constitutional Court in Case No. 2011-21-01, Para 12*).

The Constitutional Court has no grounds to question the considerations of the Supreme Court that the contested norm does not grant to a person the right to turn to a court of general jurisdiction to contest an arbitration court jurisdiction.

Hence, the Constitutional Court must examine, whether the restriction on fundamental rights included in the contested norm is compatible with the right to a fair court.

17. The Constitutional Court has recognised that the concept of "a fair court" referred to in Article 92 of the Satversme comprises two aspects, i.e., "a fair court" as an independent institution of the judicial power, which adjudicates the case; and "a fair court" as due procedure, compatible with a judicial state, in which the case is examined. The first aspect of this concept should be interpreted in interconnection with Chapter VI

of the Satversme, the second – in interconnection with the principle of a judicial state, which follows from Article 1 of the Satversme (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 2 of the Findings).*

Both aspects – the institutional, which means that a court should be fair; and the procedural, which envisages that everyone should have a free access to a court – are inseparably connected; the fairness of a court would be meaningless if accessibility was not ensured, and *vice versa* – the accessibility of a court would be unnecessary, if the fairness of a court was not ensured (*see Judgement of 14 March 2006 by the Constitutional Court in Case No. 2005-18-01, Para 8.*). Thus, the court's possibilities to restitute justice in each particular case are inseparable linked with the totality of procedural and substantive law adopted by the legislator, in compliance with which the particular case is adjudicated.

Article 92 of the Satversme defines an important fundamental duty of a judicial state – to establish a legal procedure with the help of which all persons could effectively protect their rights (*see Judgement of 6 June 2012 by the Constitutional Court in Case No. 2011-21-01, Para 7*).

The Satversme does not directly envisage cases where the right to a fair court could be restricted; however, this right cannot be considered to be absolute (*see Judgement of 4 January 2005 by the Constitutional Court in Case No. 2004-16-01, Para 7.1*). The Satversme is a united whole, and the norms that it comprises should be interpreted in a systemic way. An assumption that particular fundamental rights cannot be imposed any restrictions at all would collide with the fundamental rights of other persons, guaranteed in the Satversme, as well as with other norms of the Satversme (*see Judgement of 22 October 2002 by the Constitutional Court in Case No. 2002-04-03, Para 2 of the Findings).*

The right to a fair court may be restricted; however, it must be verified, whether the restriction can be justified, i.e., whether 1) it has been established by law; 2) it has a legitimate aim; 3) it is proportional (*see, for example, Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-04-01, Para 1.2 of the Findings).*

18. During the hearing of the case the parties to it and the summoned persons expressed divergent opinions on whether the restriction to the fundamental right that followed from the contested norm had been, indeed, established by law.

The Applicant's representative and the Ombudsman's representative noted during the court sitting that the restriction to the Applicant's fundamental right had been established by law (*see transcript of the Constitutional Court sitting of 21 October 2014 in Case Materials, Vol. 5, pp. 9 and 85).* Whereas the summoned persons Inga Kačevska and Jānis Lapsa noted that the restriction to the Applicant's fundamental right followed from the way the contested norm was interpreted and applied by courts of general jurisdiction. I.e., the contested norm could be interpreted and applied also differently, not prohibiting a court of general jurisdiction from deciding on the arbitration court jurisdiction. Moreover, this interpretation of the contested norm is allegedly proven also by some rulings by courts of general jurisdiction (*see transcript of the Constitutional Court sitting of 29 October 2014 in Case Materials, Vol. 5, pp. 140, 167 and 168*).

The Constitutional Court has recognised that the legislator's obligation to envisage clearly in legal norms a procedure that would create clear and secure conviction by an individual regarding the possibilities to protect his or her fundamental rights follows from Article 92 of the Satversme in interconnection with Article 90 (*see Judgement of 24 October 2013 by the Constitutional Court in Case No. 2012-23-01, Para 14.4*).

In some cases a court of general jurisdiction has decided on the validity of an arbitration agreement, as well as has recognises an arbitration court agreement as being invalid as of the date when it was concluded. For example, the Riga City Latgale Suburb Court in its judgement of 23 February 2010 concluded that, in view of the plaintiff's age and condition of health, she had been unable to understand her actions, the significance of it, and to manage it. Thus, the Court recognised the arbitration agreement concluded by the plaintiff as being invalid as of the moment when it was concluded. The legality of the judgement was verified neither in appellate, nor cassation proceedings (*see Judgement of 23 February 2010 by the Riga City Latgale Suburb Court in Civil Case No. C29526804/C21/10, and the Judgement of 23 October 2013 by the Riga City Vidzeme Suburb Court in Case No. 3-12/0280/6*).

On the one hand, the judgement by the Riga City Latgale Suburb Court might be indicative of the rights of a general jurisdiction court to assess the validity of an arbitration agreement and, if it has been recognised as being invalid, to refuse issuing a writ of execution. However, on the other hand, the ruling of the aforementioned

judgment collides with the interpretation of the contested norm provided by the Supreme Court.

The Constitutional Court notes that the judicature of the Supreme Court with regard to the right of a court of general jurisdiction to assess the validity of an arbitration agreement is clear – a court of general jurisdiction does not have this right. This interpretation of the contested norm also complies with the legislator's intent in including the contested norm in the Civil Procedure Law.

Thus, the restriction to fundamental rights included in the contested norm was established by law.

19. Any restriction on fundamental rights should be founded on facts and arguments regarding its necessity, i.e., the restriction must be established due to important interests – for a legitimate aim (*see, for example, Judgement of 22 December 2005 by the Constitutional Court in Case No. 2005-19-01, Para 9*).

The Saeima holds that the restriction on fundamental rights set out in the contested norm has a legitimate aim in the meaning of Article 116 of the Satversme: to decrease the workload of general jurisdiction courts, to limit the possibilities for parties to delay the arbitration procedure and to ensure fast resolution of the parties' dispute. At the court hearing the Applicant's representative expressed a similar opinion; i.e., maintaining that the legitimate aim of the restriction to the fundamental right was to facilitate the effectiveness of the legal proceedings before a court of general jurisdiction (*see transcript of the Constitutional Court sitting of 21 October 2014 in Case Materials, Vol. 5, pp. 9 and 26).*

The Constitutional Court has recognised that dispute resolution by an arbitration court ensures decrease in the workload of courts of general jurisdiction and ensures fast and effective hearing of disputes. The following are among the advantages of an arbitration procedure – comparatively faster course of it, professional specialisation of arbitrators, finality of the ruling, possibility to agree upon a procedure that differs from the procedure before a court of general jurisdiction, as well as confidentiality (*see Judgement of 17 January 2005 by the Constitutional Court in Case No. 2004-10-01, Para 8*). Decreasing the workload of courts and facilitation of procedural economy can be a legitimate aim of the restriction to fundamental rights, and in such an instance the restriction is established for the cause referred to in Article 116 of the Satversme – for

the protection of other persons' rights (*see Judgement of 7 October 2010 by the Constitutional Court in Case No. 2010-01-01, Para 12.2*).

Thus, the contested norm has a legitimate aim – protection of other persons' rights.

20. The Constitutional Court has found that upon establishing the legitimate aim of the restriction to fundamental rights the compliance of this restriction with the principle of proportionality must be examined and, thus, it must establish,

first, whether the measures used by the legislator are appropriate for reaching the legitimate aim, i.e., whether the legitimate aim of the restriction can be reached by the contested norm;

secondly, whether such action is necessary, i.e., whether the aim cannot be reached by other measures, less restrictive upon the rights and lawful interests of a person;

thirdly, whether the legislator's action is appropriate, i.e., whether the benefit gained by society exceeds the damage caused to a person's right and lawful interest.

If it is recognised that the restriction established by the contested norm is incompatible with even one of these criteria, then the restriction is also incompatible with the principle of proportionality and is unlawful (*see, for example, Judgement of 19 March 2002 by the Constitutional Court in Case No. 2001-12-01, Para 3.1. of the Findings).*

20.1. The prohibition to turn to a court of general jurisdiction to contest the validity of an arbitration agreement established by the contested norm was included in the Civil Procedure Law with the aim of preventing increase in the workload of general jurisdiction courts. I.e., a court of general jurisdiction, on the basis of the contested norm, refuses to accept a statement of claim and does not examine an issue pertaining to an arbitration court jurisdiction.

Thus, the measures chosen by the legislator are appropriate for reaching the legitimate aim.

20.2. The restriction established by the contested norm is necessary if no other means exist that would be as effective and the selection of which would to a lesser extent restrict persons' fundamental rights. In assessing, whether the legitimate aim can be reached also by other means, the Constitutional Court underscores that a more lenient

measure is not just any other measure, but a measure that would allow reaching the legitimate aim in at least the same quality (*see Judgement of 13 May 2005 by the Constitutional Court in Case No. 2004-18-0106, Para 19 of the Findings*).

At the same time the Constitutional Court has the jurisdiction to verify, whether alternative measures do not exist that would restrict persons' fundamental rights established in the Satversme to a lesser extent (*see, for example, Judgement of 15 April 2009 by the Constitutional Court in Case No. 2008-36-01, Para 15*).

20.2.1. The Applicant holds that a more lenient measure exists that would allow reaching the legitimate aim and would restrict a person's rights to a lesser extent. I.e., an alternative measure would be granting to a person the right to turn to a court of general court to contest the jurisdiction of an arbitration court to hear the particular case (*see Case Materials, Vol. 1, p. 9).*

Whereas the Saeima notes that this could not be regarded as an alternative measure, as it would create additional workload to courts of general jurisdiction (*see Case Materials, Vol. 1, pp. 140 and 141*).

The information provided by the Ministry of Justice shows that annual statistical data regarding the cases examined and judgments adopted by the independent arbitration courts registered in Latvia is not accumulated in centralised way in Latvia. The courts of general jurisdiction annually receive approximately 1500 to 2150 applications regarding compulsory enforcement of decisions by arbitration courts: 2145 applications – in 2011, 1895 – in 2012 and 1519 – in 2013 (*see Case Materials, Vol. 2, 180*). However, the data provided by the Ministry of Justice do not cover those cases, where a compulsory enforcement of the judgement is not necessary or the judgement by the arbitration court has been implemented voluntarily.

The argument noted by the Saeima and the Ministry of Justice could be upheld, i.e., that granting to a person the right to turn to a court of general jurisdiction and contest the jurisdiction of the arbitration court could increase the workload of courts. However, this argument *per se* cannot serve as grounds for depriving a person substantially of his or rights. I.e., the aim chosen by the legislator – decreasing the workload of the courts of general jurisdiction, thus speeding up other legal proceedings – may not threaten such fundamental rights of a person that he or she has not voluntarily waived. In the case under review, where the necessity to facilitate the speed of legal

proceedings collides with the need to support rights that are essential for a person, the protection of the rights that are essential for a person should be given priority.

Moreover, the actual facts of the case under review give grounds for questioning the argument that the regulation on controlling the arbitration court proceedings that is currently in force does not increase the workload of general jurisdiction courts. I.e., courts of general jurisdiction in three different instances have adopted in total six different decisions pertaining to the jurisdiction of the Latvian Arbitration Court and the enforcement of its award.

Initially the Applicant turned to the Riga City Vidzeme Suburb Court, contesting the validity of agreement of 20 December 2011. After the district court refused to accept the Applicant's statement of claim, an auxiliary complaint regarding this decision by the court was submitted to the Riga Regional Court. The decision by the Riga Regional Court, in its turn, was appealed to the Supreme Court Department of Civil Cases, which did not revoke the decision by the Riga Regional Court.

During the stage of issuing a writ of execution, the Riga City Vidzeme Suburb Court first of all rejected the application by *Resort Management* regarding issuing of a writ of execution. *Resort Management* submitted an auxiliary complaint regarding this decision by the district court to the Riga Regional Court, which revoked the decision by the Riga Vidzeme Suburb Court. Finally, the Riga City Vidzeme Suburb Court, repeatedly examining the application by *Resort Management* regarding issuing a writ of execution decided to satisfy this application.

Moreover, the Supreme Court and the Prosecutor's General Office have become involved in the process of compulsory enforcement of the ruling adopted by the Latvian Arbitration Court. I.e., on the basis of a protest submitted by the Chief Prosecutor of the Department for the Protection of Rights of Persons and State of the Prosecutor's General Office, on 22 September 2014 the Supreme Court Department of Civil Cases has initiated cassation legal proceedings, has suspended the enforcement of the decision of 3 June 2014 by the Riga City Vidzeme Suburb Court and decided to adjudicate in written procedure the case regarding revoking of it (*see Case Materials, Vol. 4, pp. 166 –169, 181 and 182*).

Hence, the Constitutional Court recognises that an increase in the workload of the court of general jurisdiction cannot be used to justify a general prohibition to the arbitration court jurisdiction at a court.

20.2.2. At the court hearing the representative of the Saeima, as well as a number of summoned persons noted that the first part of Section 536 of the Civil Procedure Law envisaged a judge's right to refuse issuing a writ of execution if the arbitration court, in adjudicating a civil law dispute, has exceeded its jurisdiction.

However, the opinions of representative of the Saeima and the summoned persons differed as to the exact paragraph in the first part of Section 536 of the Civil Procedure Law, which granted this right to a judge. The representative of the Saeima held that this right of the judge was established by Para 6 and Para 7 of Section 536(1) of the Civil Procedure Law. Kalvis Torgāns referred to Para 6 of Section 536(1) of the Civil Procedure Law. The representative of the Ministry of Justice pointed to Para 1 of Section 536(1) of the Civil Procedure Law, underscoring that the Ministry's "competence is not to tell the court about correct application of law. Whereas the representative of *Resort Management* referred to Para 1, Para 2 and Para 3 of Section 536(1) of the Civil Procedure Law (*see transcript of the Constitutional Court sitting of 21 and 29 October 2014 in Case Materials, Vol. 5, pp. 44, 72, 128, 151 and 164*).

The representatives of the Applicant and the Ombudsman, in their turn, noted that none of the paragraphs in the first part of Section 536 of the Civil Procedure Law envisaged a judge's right to refuse issuing a writ of execution if an arbitration court had adjudicated the particular case on the basis of an invalid arbitration agreement (*see transcript of the Constitutional Court sitting of 21 and 29 October 2014 in Case Materials, Vol. 5, pp. 11, 87, 92, 184 – 187*).

The Constitutional Court notes that the opinion of the parties to the case and the summoned persons regarding the content of the contested norms *per se* is not decisive in establishing the legal consequences of the respective norm, because a legal norm cannot be understood outside the practice of its application and the legal system, where it functions (*see, for example, Judgement of 23 November 2006 by the Constitutional Court in Case No. 2006-03-0106, Para 24.5, and Judgement of 28 June 2013 in Case No. 2012-26-03, Para 12.1*).

The Ministry of Justice has submitted to the Constitutional Court a survey of the case law regarding the application of Section 536(1) of the Civil Procedure Law in courts of general jurisdiction in the period from 1 January 2013 to 30 June 2014. During this period Para 1-7 of Section 536(1) have been used as the grounds for refusing issuing a writ of execution in connection with an arbitration court award slightly over

200 times. The following circumstances are the most frequently noted as the grounds for refusal to issue a writ of execution: an arbitration court has adjudicated a dispute with a person, against who an insolvency proceedings or legal protection process; the arbitration clause in accordance with the Consumer Rights Protection Law should be recognised as being an unfair contractual provision; the judgement by the arbitration court is not reasoned; late payment interest payments for a period prior to the enforcement of the judgement have been collected by an arbitration court award; a party was not duly informed about the arbitration procedure; or it could not provide its explanations due to other reasons, which significantly influenced the arbitration procedure (*see Case Materials, Vol. 3, p. 65 – 68*).

It follows from the aforementioned survey of case law that a judge of a general jurisdiction court refuses issuing a writ of execution only in those cases, where the arbitration court has breached the restrictions on its jurisdiction that laws define *expressis verbis.* The legislator has established such cases, for example, in Para1-8 of Section 487(1) of the Civil Procedure Law and Para 7 of Section 6(3) of the Consumer Rights Protection Law.

However, it does not follow from the survey of case law prepared by the Ministry of Justice that a judge of a general jurisdiction court, when deciding on issuing a writ of execution, would have the obligation to examine the arbitration court jurisdiction also in other cases, to which the restrictions on the jurisdiction of an arbitration court, which laws define *expressis verbis*, do not apply. Neither the representative of the Saeima could provide such examples from the case law during the examination of the case (*see transcript of the 21 October 2014 sitting of the Constitutional Court, Case Materials, Vol. 5, p. 45*).

Thus, the practice of applying Section 536 of the Civil Procedure Law does not show that this norm would impose an obligation upon a judge to examine the arbitration court jurisdiction on all occasions and, if the limits have been breached, refuse issuing a writ of execution.

20.2.3. The representative of the Saeima noted during the court hearing that the Civil Procedure Law granted to the parties to a case the right to point to possible violations of the arbitration procedure, *inter alia*, violations of jurisdiction, during the procedure of enforcing the arbitration court award (*see transcript of the 21 October 2014 sitting of the Constitutional Court, Case Materials, Vol. 5, p. 29).*

Whereas the Applicant's representative underscored that a court of general jurisdiction, when deciding on issuing a writ of execution in connection with an arbitration court award, did not ensure an effective protection of a person's fundamental rights, since during this stage of the procedure the parties to the case had limited possibilities to submit evidence, the procedure took place in the absence of the parties to a case and the law defined only a term of 15 days for submitting written explanations (*see transcript of the 21 October 2014 sitting of the Constitutional Court, Case Materials, Vol. 5, pp. 11 and 17*).

Section 534^1 (1) of the Civil Procedure Law envisages: when a court has received an application regarding issuing a writ of execution, the application is immediately forwarded to other parties to the case by registered mail, establishing a term for submitting written explanations, which is at least 10 days and no longer than 15 days as of the date of forwarding the application. Whereas Para 3 and Para 4 of the second part of this Section provide that a party to the case notes in the explanations the evidence that confirms his or her objections or reasoning, as well as the law these are based on, and also requests regarding accepting or requiring of evidence.

The Ministry of Justice notes in connection with the aforementioned norms: if any of the parties to the case contests the legality of an arbitration court award, a court of general jurisdiction has the right to require from the arbitration institute the case materials that are necessary for examining the presence of the facts noted in the explanation, as well as to require the original copy of the arbitration agreement to forward it for expert-examination (*see Case Materials, Vol. 2, p. 179*).

At the same time the Applicant's opinion can be upheld, i.e., that Part D of the Civil Procedure Law does envisage the obligation of a general jurisdiction court to always examine the jurisdiction of an arbitration court and in case of doubt, for example, require the original copy of the arbitration agreement or to commission an expert-examination. The Applicant in the explanations regarding the application by *Resort Management* on issuing a writ of execution for enforcing the Latvian Arbitration Court award and in additional explanations repeatedly drew the attention of the court to the possible invalidity of the arbitration agreement (*see Case Materials, Vol.1, pp. 170 – 184*). However, the court, ruling on the compulsory enforcement of the award by the Latvian Arbitration Court, only established that the agreement on having the dispute adjudicated by the Latvian Arbitration Court was valid (*see Decisions of 3 June 2014 by*

Riga City Vidzeme Suburb Court in Case No. 3-12/0080/12, Case Materials Vol. 2, p. 28).

The Ministry of Justice has also noted that if an investigatory institution has initiated criminal proceedings, for example, with regard to possible forgery of the arbitration agreement, "deciding on the matter of issuing a writ of execution [..] must be suspended until the final decision in criminal proceedings has been adopted" (*see Case Materials, Vol. 2, p. 179*). This interpretation of the Civil Procedure Law norms is included, for example, in the decision of 20 May 2014 by the Riga City Latgale Suburb Court. It recognises that issuing a writ of execution should be refused and that the Court takes into account the defendant's objections, i.e., that it had not signed the loan agreement and has submitted an application to the police requesting initiation of criminal proceedings in connection with forgery of a signature (*see Decision of 20 May 2014 by the Riga City Latgale Suburb Court in Case No. 3-12/0067*).

Whereas in deciding on the issue of compulsory enforcement of the award by the Latvian Arbitration Court, the court noted that, irrespectively of the criminal proceedings initiated by the State Police regarding a forgery of the agreement of 20 December 2011, there were no legal grounds to doubt its validity. In the presence of this circumstance, the court satisfied the application by *Resort Management* regarding issuing a writ of execution for compulsory enforcement of the award by the Latvian Arbitration Court (*see: Decision of 3 June 2014 by the Riga City Vidzeme Suburb Court in Case No. 3-12/0080/12, Case Materials, Vol. 2, p. 28).*

The aforementioned leads to the conclusion that the case law regarding the case of issuing a writ of execution, when a criminal procedure regarding a possible forgery of an arbitration agreement has been initiated, is inconsistent.

The Constitutional Court has repeatedly underscored that a uniform case law is important from the perspective of the right to a fair court. Courts have the obligation to adjudicate similar cases similarly, but different cases – differently, on the basis of the principle of equality. In the absence of measures that would ensure a consistent case law, the State violates a person's right to a fair court (*see Judgement of 7 October 2010 by the Constitutional Court in Case No. 2010-01-01, Para 15.3*).

20.2.4. The Constitutional Court also notes that the first sentence of Article 92 of the Satversme envisages a person's subjective right to turn to court and to protect his or her rights that have been violated. If a person has not consented to having a case

adjudicated by an arbitration court, than the arbitration procedure and its potential outcome, undoubtedly can significantly infringe upon the person's rights. On such occasions a persons should have the right to turn to court for direct and indirect protection of his or her rights, irrespectively of other persons' will or actions.

Section 533(2) of the Civil Procedure Law provides that the party interested in having an award of a permanent arbitration court enforced in Latvia is entitled to apply to the district (city) court with an application for issue of a writ of execution. Whereas as regards a person, upon who the award by an arbitration court has imposed an obligation to be fulfilled, the law grants no rights to turn to court in connection with the arbitration procedure. This person may only express his or her explanations regarding an already submitted application for issue of a writ of execution. Hence, a person's right to a court protection in a case, for example, when a significant procedural violation had been committed in the arbitration procedure, depends on whether and when the interested party decides to turn to court with an application for a compulsory enforcement of the award by the arbitration court.

Moreover, in those cases when the enforcement of the award by the arbitration court is not necessary, a person, upon which it has imposed an obligation or who was denied some rights, has not possibility whatsoever to request a court of general jurisdiction to eliminate violations made in the arbitration court procedure. However, such awards by an arbitration court may have a significant impact upon a person's rights. Likewise, the award by the Latvian Arbitration Court, by which more than half a million lats was collected from the Applicant in favour of *Resort Management*, which was substantiated, *inter alia*, by the part of reasoning in an award previously adopted by the Latvian Arbitration Court, the enforcement of which was not necessary (*see Case Materials, Vol. 1, p. 93*).

20.2.5. In examining the Applicant's argument that the procedure of issuing a writ of execution in connection with the arbitration court award takes place in the absence of the parties to the case, it must be taken into consideration that a person's right to be heard during legal proceedings is one of the most important procedural safeguards that follow from the first sentence in Article 92 of the Satversme. The Constitutional Court notes that these safeguards comprise, for example, the right to receive full information on the opinion expressed by the opposite party, the evidence and facts collected, as well as the right to a reasoned ruling by the court. The right to be

heard must be ensured at least in writing (*see Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-03-01, Para 6.1 of the Findings).*

However, the first sentence in Article 92 of the Satversme does not grant to a person an absolute fundamental right to oral legal proceedings, and the organising of such proceedings in all cases would create an unnecessary workload for the court. Oral proceedings should be envisaged only in those cases, when issues that either legally or technically complicated must be heard by court. Likewise, ECHR has also recognised that Article 6 of the Convention does not envisage a person's absolute right to oral proceedings and that such proceedings should be held only when examining special issues (*see, for example, ECHR Judgement of 12 November 2002 in Case "Döry v. Sweden", Application No. 28394/95, Para 37, and Judgement of 23 November 2006 in Case "Jussila v. Finland", Application No. 73053/01, Para 41*).

In individual cases, for example, if the case pertains to complex legal issues, the parties to the case should be granted the right to request to be heard orally. The fact that the Civil Procedure Law does not envisage the right of a party to the case to be heard also orally in the procedure of issuing a writ of execution in connection with an arbitration court award may make it difficult for a person to object against a compulsory enforcement of an arbitration court award.

A number of summoned persons drew the Court's attention also to the fact that both the term envisaged by Section 534^1 (1) of the Civil Procedure Law for submitting a written explanation, and the term defined in Section 535(1), within which a judge adopts a decision on issuing a writ of execution, were too short and threatened an effective control over an arbitration court award. For example, Inga Kačevksa noted that the term for submitting written explanations on the application for issuing a writ of execution was excessively short in those cases, when a party to the case has a foreign domicile (*see Case Materials, Vol. 3, p. 62*). Kalvis Torgāns, in his turn, recognised that due to the term established by the Civil Procedure Law, a judge has no time to consider the application in-depth and adopts the decisions on issuing a writ of execution or on refusing to issue a writ of execution "as formally as possible" (*see transcript of the 29 October 2014 sitting of the Constitutional Court, Case Materials, Vol. 5, p 165*).

The Constitutional Court upholds the opinion expressed by the summoned persons and notes that the aforementioned terms established by the Civil Procedure Law are too short.

Thus, the regulation on the procedure of compulsory enforcement of an arbitration court award included in the Civil Procedure Law is not appropriate for examining the jurisdiction of an arbitration court in all cases.

20.2.6. During the court hearing the representative of the Saeima, as well as a number of summoned persons noted that the Applicant could have defend its right to a fair court not by contesting the jurisdiction of the arbitration court at a court of general jurisdiction, but by other means. For example, the Applicant had had the right to submit a counter-claim to the arbitration court; submit a claim for compensating of losses against the member of the board, who had signed the respective agreement on having a case adjudicated by an arbitration court; to contest the board member's right to enter into an agreement on having a dispute examined by an arbitration court; to turn to police or the prosecutor's office requesting initiation of criminal proceedings in connection with forgery of documents; to turn to the Prosecutor General with request to submit a protest against the judge's decision, which satisfied the request to issue a writ of execution; to record procedural violations committed in the legal proceedings before an arbitration court and note these during the stage of issuing a writ of execution (*see, for example see transcript of the 21 and 29 October 2014 sitting of the Constitutional Court, Case Materials, Vol. 5, pp. 37, 157, 192 and 193*).

The Constitutional Court recognises that all the aforementioned possibilities are not directly aimed at contesting the jurisdiction of an arbitration court. Hence, these solutions are not alternative measures that would be less restrictive upon persons' fundamental rights.

20.2.7. The Saeima and the Ministry of Justice holds that the granting to a person the right to contest the arbitration court jurisdiction at a court of general jurisdiction would unfoundedly delay arbitration procedure.

The Constitutional Court notes that submitting a claim to a court of general jurisdiction requesting recognising an arbitration agreement as being invalid would not influence the arbitration procedure – an arbitration procedure that had already been initiated could continue, but in case, where the arbitration procedure has not been initiated yet, it could be initiated parallel to the legal proceedings before a court of general jurisdiction.

The first part of Article 8 of the Model Law also provides that the court, where proceedings have been initiated with regard to a dispute subject to an arbitration court, should order the parties to turn to arbitration court, unless it decides that the arbitration agreement is invalid or is incapable of being performed. Whereas the second part of Article 8 of the Model Law envisages that in case where such proceedings take place at a State court, the arbitration proceedings may be initiated or continued, and that the award can be made parallel to the proceedings taking place before a State court.

The regulation included in the second part of Article 8 of the Model Law may increase the number of such cases, where an arbitration court and a court of general jurisdiction adopt mutually inconsistent rulings. However, such regulation is justifiable, since it both decreases the possibilities of the parties to the case to delay arbitration proceedings, as well as the motivation of the parties to arbitration proceedings to turn to a State court regarding issues that according to the arbitration agreement are subject to examination by the arbitration court (*see Brekoulakis S. L., Shore L., p. 604*).

Thus, the legitimate aim of the restriction on the fundamental right included in the contested norm can be reached by other measures, less restrictive upon a person's rights and lawful interests.

21. Pursuant to Para11 of Section 31 of the Constitutional Court Law the Court must define the date as of which the contested norm (act) becomes invalid.

The legislator, in Section 32(3) of the Constitutional Court Law, has granted to the Constitutional Court a broad discretion to decide on the date, as of which a legal norm, which has been recognised as being incompatible with a legal norm of higher legal force, becomes invalid. To recognise the contested norm as being invalid not from the date when the judgement is published, but as of another date, the Constitutional Court must substantiate its opinion.

The Constitutional Court has already recognised that in deciding on the date, as of which the contested norm (act) becomes invalid, it must be taken into consideration that its task is to prevent the violation of applicants' fundamental rights to the extent possible (*see, Judgement of 16 December 2005 by the Constitutional Court Law in Case No. 2005-12-0103, Para 25*).

In the case under examination the contested norm was applied against the Applicant by a court of general jurisdiction. The consequences of applying the contested

norm was issuing a writ of execution for compulsory enforcement of award by the Latvian Arbitration Court, as well as enforcement activities commenced by a bailiff.

Hence, to eliminate the adverse consequences caused by the contested norm, with regard to the Applicant the contested norm must be recognised as being invalid as of the moment the violation of fundamental rights occurred.

22. As the materials of the case under review show, the Applicant had been the defendant in two legal proceedings before the Latvian Arbitration Court. During the first legal proceedings the Latvian Arbitration Court adopted an award, recognising, *inter alia*, that two articles in the agreement entered into by the Applicant and *Resort Management* were invalid (*see Case Materials, Vol. 1, pp. 36 – 49*).

The Applicant's representative noted at the court hearing that the enforcement of the aforementioned award by the arbitration court was not necessary. Therefore no judicial control over this award by the arbitration court was necessary. Both the representative of the Ministry of Justice and Kalvis Torgāns evaluated it as "a possible legal lacuna" or as "an anti-constitutional [legal] lacuna" (*see, for example, transcript of the 21 and 29 October 2014 sitting of the Constitutional Court, Case Materials, Vol. 5, pp. 83 and 151*).

The Constitutional Court has noted already in its Judgement of 17 January 2005 in Case No. 2004-10-01 that the Civil Procedure Law did not contain norms defining the procedure for contesting an award by an arbitration court, even if issuing a writ of execution is not requested (*see Judgement of 17 January 2005 by the Constitutional Court in Case No. 2004-10-01, Para 10*).

The aforementioned regulation is included neither in the Civil Procedure law, nor in the Law on Arbitration Courts.

In some cases, in order to have the award by an arbitration court enforced, there is no need to turn to a court of general jurisdiction and request issuing a writ of execution, and there may be also situations, where the award by an arbitration court is to be recognised or enforced in a foreign state. Likewise, the Civil Procedure Law does not provide what happens with the award by an arbitration court if a court of general jurisdiction has refused to issue a writ of execution for its compulsory enforcement. In such a case a person has no legal remedies for defence against, possibly, unlawful award

by an arbitration court, which, in fact, remains in force, and a party to the case my repeatedly try to achieve its enforcement, for example, in a foreign state.

Taking into consideration, *inter alia*, the problems in the functioning of arbitration courts that were noted by the summoned persons and the lack of regulation on issuing a writ of execution, an internationally accepted institute for contesting an award by an arbitration court would be of particular importance in Latvia. Therefore, the Constitutional Court repeatedly draws the attention of the Saeima to the need to define the grounds and procedure for contesting an award by an arbitration court.

23. At the court hearing both the parties to the case and the summoned persons repeatedly noted that on 11 September 2014 the Saeima had adopted the Law on Arbitration Courts, which envisaged that it would enter into force on 1 January 2015. Section 24(1) of this law provides: "The panel of the arbitration court decides on the jurisdiction of the arbitration court over the civil law dispute, *inter alia*, the validity of the arbitration agreement. The issue of the arbitration court's jurisdiction over the dispute may be decided by the panel of the arbitration court at any stage of the arbitration proceedings."

Whereas pursuant to Section 9 of the law of 11 September 2014 "Amendments to the Civil Procedure Law", Chapters 61, 62, 63, 64 and 65 are deleted from the Civil Procedure Law, i.e., also the chapter that comprises the contested norm. Pursuant to Section 19 of the law of 11 September 2014 "Amendments to the Civil Procedure Law", Chapters 61, 62, 63, 64 and 65 of the Civil Procedure Law will become invalid on 1 January 2015.

Thus, the legislator has envisaged that on 1 January 2015 the contested norm will be replaced by another legal norm included in the Law on Arbitration Courts, having the same legal consequences as the contested norm.

The first part of Section 24 of the Law on Arbitration Courts has not been contested before the Constitutional Court. Therefore the Constitutional Court must examine, whether the broadening of the claim in the case is necessary and admissible and whether the issue of compatibility of Section 24(1) of the Law on Arbitration Courts with the first sentence of Article 92 of the Satversme should be examined.

The Constitutional Court has repeatedly found that, abiding by certain criteria, first and foremost "the concept of close connection", in certain cases the limits of a

claim in an already initiated case may be broadened. To establish, whether in the particular case the limits of the claim could be and should be broadened, it must be, first of all, be established, whether the norm, with regard to which the claim is broadened, is so closely linked to the norm, which is *expressis verbis* contested in the case, that its examination is possible within the framework of the same grounds or is necessary for adjudicating the particular case, and, secondly, whether the broadening of the limits of the claim is necessary for abiding by the principles of the legal proceedings before the Constitutional Court (*see, for example, Judgement of 3 April 2008 by the Constitutional Court in Case No. 2007-23-01, Para 17, and Judgement of 20 October 2011 in Case No. 2010-72-01, Para 15*).

The compliance of Section 24 (1) of the Law on Arbitration Courts with the Satversme is closely connected with the claim regarding the compliance of the contested norm with the Satversme, since, after entering into force this norm would create for persons identical legal consequences, incompatible with the Satversme, as the contested norm. Therefore, from the point of view of procedural economy of proceedings before the Constitutional Court, broadening of the claim in the case under review would be expedient. Moreover, the principle of a judicial state requires the Constitutional Court, in compliance with its jurisdiction, to ensure the existence of such system of law that would, to the extent possible. prevent legal regulation incompatible with the Satversme or other legal norms of higher legal force.

The representative of the Saeima noted at the court hearing that Section 24 (1) of the Law on Arbitration Courts maintained, essentially, legal regulation identical to the contested norm (*see transcript of the 21 October 2014 sitting of the Constitutional Court, Case Materials, Vol. 5, p. 28*). Likewise, the opinion provided by the Ministry of Justice also leads to the conclusion that the Law on Arbitration Courts comprises the same legal regulation as the contested norm, and it envisages the right of an arbitration court to decide on its jurisdiction over a dispute, *inter alia*, on the validity of an arbitration agreement (*see Case Materials, Vol. 2, p. 182, and the transcript of the 21 October 2014 sitting of the Constitutional Court, Case Materials, Vol. 5, p. 70*).

The aforementioned norm and the contested norm have been adopted on the basis of the same understanding of the legislator regarding its discretion in the field of control over the functioning of arbitration courts, and the findings included in this judgement regarding the contested norm are applicable also to Section 24(1) of the Law

on Arbitration Courts. Therefore, both these norms can be recognised as being incompatible with the first sentence of Article 92 of the Satversme in the framework of the same reasoning.

Therefore the Constitutional Court recognises that Section 24(1) of the Law on Arbitration Courts, to the extent it denies a person the right to contest an arbitration court jurisdiction at a court of general jurisdiction, is incompatible with the first sentence of Article 92 of the Satversme.

The Substantive Part

Pursuant to Section 30 – 32 of the Constitutional Court Law the Constitutional Court

held:

1. To recognise Section 495(1) of the Civil Procedure Law, insofar it prohibits from contesting the jurisdiction of an arbitration court at a court of general jurisdiction, as being incompatible with Article 92 of the Satversme.

2. As regards the submitter of the constitutional complaint – the limited liability company "HIPOTĒKU BANKAS NEKUSTAMĀ ĪPAŠUMA AĢENTŪRA" (at present – limited liability company "Hiponia") – to recognise Section 495(1) of the Civil Procedure Law, to the extent it prohibits from contesting the jurisdiction of an arbitration court at a court of general jurisdiction, as being incompatible with Article 92 of the Satversme of the Republic of Latvia and invalid as of the moment when the party's, who submitted the constitutional complaint, fundamental rights were violated.

3. To recognise Section 24(1) of the Law on Arbitration Courts, insofar it prohibits from contesting the jurisdiction of an arbitration court at a court of general jurisdiction, as being incompatible with Article 92 of the Satversme of the Republic of Latvia.

The Judgement is final and not subject to appeal

The Judgement was pronounced in Riga on 24 November 2014.

The Judgement enters into force on the date of its pronouncement.

Chairperson of the court sitting A. Laviņš