CHAPTER 18

# There Is Ordinary Situation and There Is Latvia's Situation

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## §18.01 INTRODUCTION: HOW LATVIA REINVENTED THE ARBITRATION WHEEL

Latvia made its first attempt to introduce modern arbitration law in 1998 when the Chapter D "Arbitration" of the Civil Procedure Law[1] was adopted. This Chapter specifically dealt with arbitration. However, unlike regulatory frameworks in the two other Baltic states (Estonia and Lithuania[2]), it was not based on the UNCITRAL Model Law.[3] The Chapter D was extremely unsuccessful. While it was in force, Latvia had numerous arbitral institutions (there were more than 200), and many of them were vaguely structured "pocket arbitrations." As a result, Latvia suffered from an extremely low level of trust in arbitration.

There was a pressing need for a reform. Finally, the new Arbitration Law of Latvia was adopted on September 11, 2014, and entered into force on January 1, 2015.[4] The new law did not fully substitute the Chapter D. The Chapter D still contains rules on

1. Civil Procedure Law (October 14, 1998), Latvijas Vēstnesis, 326/330, November 3, 1998.
2. *See*: Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (accessed April 11, 2023) and Vilija Vaitkute Pavan & Giedre Aukstuoliene, *National Report for Lithuania (2018 through 2020)*. Kluwerarbitration.com, p. 1.
3. UNCITRAL Model Law on International Commercial Arbitration (1985 with 2006 amendments), U.N. Doc. A/40/17, Annex I, 24 I.L.M. 1302 (1985).
4. Arbitration Law (January 11, 2015), Latvijas Vēstnesis, 194, October 1, 2014. Available in English: https://likumi.lv/ta/en/en/id/269189-arbitration-law (accessed April 11, 2023).

enforcement of institutional arbitral awards rendered in Latvia[5] (Articles 534-537). Notably, Article 536 of the Chapter D preserves the grounds that entitle courts to refuse to issue a writ of execution for enforcement of institutional arbitral awards. However, most other issues relevant to arbitration were transferred to the Arbitration Law.

One of the main objectives of Law was to bolster the trust in arbitration, i.e., to reduce the number of arbitral institutions and to fight with biased arbitrators and pocket arbitrations. Unfortunately, as explained below, similarly to the old regulation, the Law also suffers from numerous drawbacks, and the goal of the legislative act has not been reached. This is principally due to the fact that, just like its predecessor, it is not based on the Model Law. For example, the Model Law provisions on the court's role with respect to the constitution of the arbitral tribunal, the powers of the arbitral tribunal to order interim measures, and the setting aside procedure were not incorporated into the Law.

The aim of this chapter is to demonstrate how a reinvented arbitration wheel is not properly functioning in Latvia and, taking into consideration that the Law will be opened for new amendments in the nearest future, to make recommendations for improving the Law and, thus, facilitate the smooth operation of "the arbitration vehicle."

Before the discussion, it shall be noted: (1) that the Arbitration Law does not distinguish between domestic and international arbitration; (2) that Latvia is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards[6] and the European Convention on International Commercial Arbitration.[7]

## §18.02 ESTABLISHING AND RUNNING AN ARBITRAL INSTITUTION: DRIVING CAR WITH A SQUARE WHEEL?

The high number of registered arbitral institutions is the most distinctive feature of the Latvian arbitration.

Five years after the adoption of Chapter D of the Civil Procedure Law, in 2003, there were already eighty-six arbitral institutions, as there were no restrictive criteria for establishing an arbitral institution except a notification sent to the Ministry of Justice.[8] With amendments dated from May 10, 2004, the legislator established the Register of Arbitration Institutions under the Enterprise Register, and all arbitral institutions had to be registered in this new Register; in particular, they were obliged to submit their Rules to the Register. The aim of those amendments was to reduce the number of arbitral institutions; however, this was not reached; by December 2013,

5. Awards rendered in other states parties to the New York Convention are recognized and enforced pursuant to that Convention.
6. United Nations, Treaty Series, vol. 330, p. 3.
7. United Nations, Treaty Series, vol. 484, p. 349.
8. *See*: Ziedonis Ūdris & Inga Kačevska, *Arbitration in Latvia: Urgent Need for Statutory Reform*, 21(2) J. Int. Arbitr, 220 (2004) DOI: 10.54648/joia2004006.

already 214 arbitral institutions were registered.[9] Thus, the legislator once again decided in favor of grandiose changes; however, as explained below, the outcome generated counter-productive and undesirable results.

The legislator took a decision to delete the Chapter D from the Civil Procedure Law and draft a new separate law on arbitration. Initially, upon the advice of international and national experts, the draft Law was based on the UNCITRAL Model Law. Moreover, the first draft contained significant restrictions as to the establishment of an arbitral institution—it could only be established by a non-governmental organization (previously, limited liability companies and law firms could register the arbitration institutions) registered for at least three years, with a minimum of ten members, having a combined turnover above LVL 50 million (∼ EUR 71 million).[10] Only two arbitral institutions would have satisfied those criteria. However, after three readings in the Parliament, all those requirements vanished, and the legislator simply copied the old legal framework, adding specificities that allegedly could help to fight against the "pocket arbitrations."

Current Arbitration Law provides that a permanent (institutional) arbitration court may be established by an association (the founder of the arbitration institution) registered with the Register of Enterprises with the purpose of operating the arbitration institution (Article 2). The founder of the arbitration institution shall ensure that the arbitration institution has separate premises suited for the operation, the personnel necessary for record-keeping and receiving visitors and the maintenance of a website. On the website, the arbitration institution shall publish the information on the name and address, the procedures and office hours for receiving visitors, the costs of arbitration proceedings and the account number to which payments for arbitration proceedings shall be transferred, the rules, a list containing a minimum of ten arbitrators, specifying their given names and surnames, contact information (address of the location, telephone number, e-mail address) (Article 4), etc.

The name of the arbitration institution may not coincide with the name of the already registered legal person in any of the registers maintained by the Register of Enterprises, and it may not include any misleading information regarding the purpose of operation, type and legal form of the institution. Nevertheless, numerous institutions remained registered notwithstanding their similar or even confusing names, for example, "Baltic Region Arbitration Court," "Baltic Regional Arbitration Court," "Baltic Trade Arbitration," "Arbitration of Law of European Nation," "Supreme Arbitration," Hanza International Arbitration Court," "Hanza Arbitration Court," "Independent Arbitration Court," "Latvian First Arbitration Court," "Latvian Arbitration Court," "The Arbitration Court of the Arbitration—Consultation Center," "The

9. Legal Instruments and Practice of Arbitration in the EU 2014, Directorate General for Internal Policies, Policy Department, Citizen's Right and Constitutional Affairs, p. 104. Available at https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988(ANN01)_EN.pdf (accessed April 11, 2023).

10. Draft Law on Arbitrations for the first reading in Parliament. Available in Latvian: https://titania.saeima.lv/LIVS11/saeimalivs11.nsf/0/A182DD228B4DAF6CC2257C4E003D7B1B?OpenDocument (accessed April 11, 2023).

Mediation Court of Arbitration," Riga International Arbitration Court," "Riga Arbitration Court," "Riga Judicial District Arbitration Court," etc.[11] As one can imagine, all these names create abundant grounds for legal disputes, in particular in cases where the parties have initiated parallel arbitration proceedings in different arbitrations.[12]

Unfortunately, due to this situation, there are a few possibilities to effectively interpret a pathological clause, i.e., to interpret it in a way that enables the clause to be in force because it may lead to multiple arbitral institutions with similar names. Now, in order to avoid disagreements about which exact arbitration institution is competent to settle the dispute—e.g., in cases where parties have misspelled the name of an arbitration institution—in practice, the parties indicate the registration number of the institution in their arbitration agreement.

In this context, it shall be noted that arbitration agreements are interpreted according to the general principles of contract interpretation, i.e., to the Civil Law adopted in 1937.[13] These rules on interpretation do not always correspond to recent developments and do not suit the specifics of arbitration agreements.

## §18.03 ARBITRATION AGREEMENT: IS ELECTRONIC ENGINE OF THE DOMESTIC ARBITRATION ALWAYS EFFICIENT?

### [A] The Form of Arbitration Agreement and Arbitrability

An arbitration agreement shall be entered into in written form; however, the Arbitration Law includes a new feature—such agreement, which has been entered into by means of electronic communication by the parties, shall be recorded with a safe electronic signature (Article 12). Authors have not heard about any cases or problems with this rule as in the domestic communications, the safe electronic signature is widely used; however, it is hard to predict how Latvian courts would treat international arbitration agreement concluded by means of electronic communication without safe electronic signature.

The Law is silent on whether an arbitration agreement is concluded if it is contained in an exchange of statements of claim and defense.

An arbitration agreement may be entered into by any natural person with the capacity to act, a legal person governed by private law, or a legal person governed by public law in the private law area (Article 11). However, *inter alia,* the arbitration institution is not competent to resolve disputes where at least one of the parties is a state or local government authority (Article 5(1)(2)). Thus, the governmental or municipal institutions cannot agree on dispute settlement in arbitration in Latvia.

11. Arbitration Court Register at the Enterprise Register in Latvian https://www.ur.gov.lv/lv/registre/organizaciju/skirejtiesa/skirejtiesu-saraksts/ (accessed April 11, 2023).
12. *See*: Ziedonis Ūdris & Inga Kačevska, *Observations on the Judgment by the Riga Regional Court rendered on 19 August 2004 in the Case CA-4208/20, 2004 (Forscan Timber Export AB v. Interwood*. 2 SIAR 193 (2006).
13. The Civil Law (September 1, 1992), Valdības Vēstnesis, 41, February 20, 1937. Available in English: https://likumi.lv/ta/en/en/id/225418-civil-law (accessed April 11, 2023). The law was reintroduced in 1992 when Latvia re-gained independence from USSR.

Nevertheless, the Supreme Court clarified that the concept of "governmental institution" does not extend to companies established by the state as they are deemed to be private law legal persons capable of concluding arbitration agreements.[14]

A prohibition for state and municipal institutions to agree on arbitration in Latvia has one specific exemption resulting from the ratified European Convention on International Commercial Arbitration. When Latvia ratified the Convention in 2003, it made a reservation pursuant to Article II(2) of the Convention, excluding the application of the Convention to arbitration agreements concluded by state and municipal institutions. However, in 2013, Latvia withdrew the reservation. Withdrawal of the reservation signifies that Latvia's state and municipal institutions are bound by agreement to arbitration in Latvia, provided they fall within the scope of the Convention.

### [B] Challenge of Arbitration Agreement

The Arbitration Law provides that the arbitral tribunal shall decide on the jurisdiction of a civil legal dispute, including the validity of an arbitration agreement (Article 24(1)).[15] Referring to this provision, Latvian courts took the position that the validity of the arbitration agreement could not be contested before courts but only before tribunals. This solution was recognized as being incompatible with Satversme (The Constitution) by the Constitutional Court of the Republic of Latvia.[16] It found that the right to challenge the validity of an arbitration agreement cannot be vested exclusively to the arbitration tribunals.

In the case at hand, the applicant (respondent in the arbitration proceedings) submitted that the "Latvian Arbitration Court" rejected the respondent's request to recognize the forged arbitration agreement as being invalid, but the state court found that the claim regarding the validity of arbitration agreement fell outside the court's competence. In front of the Constitutional Court, the applicant argued that the competence-competence principle may not be understood in a way that would grant an arbitral tribunal an exclusive right to decide on the issue of the jurisdiction of arbitration. Moreover, in Latvia, there has not been a setting aside procedure yet;[17] thus, at a later stage, the respondent to the arbitration could not challenge the award.

The legislator had never introduced the court assistance in arbitration proceedings as it would create additional workload for courts; however, in the case cited above, the Constitutional Court stated that this argument per se could not serve as grounds for depriving a person substantially of his or her rights, i.e., the aim chosen by the legislator—decreasing the workload of the courts, thus speeding up other legal

14. Supreme Court's Senate, October 29, 2013, No. SPC-46/2013.
15. Previously: Art. 495(1) of the Civil Procedure Law.
16. *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*, case No. 2014-09-01, November 28, 2014. Available in English at https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2014/03/2014-09-01_Spriedums_ENG.pdf#search=2014-09-01 (accessed April 11, 2023).
17. Despite the fact that Latvia is a party to the European Convention of International Commercial Arbitration providing for set aside procedure (Art. IX).

proceedings—may not threaten such fundamental rights of a person that he or she has not voluntarily waived.[18]

Notwithstanding the judgement of the Constitutional Court, the disputed provision of the Arbitration Law was left unchanged, and the Law still does not specify at which stage of proceedings the arbitration agreement can be challenged before the court and what is the time period for such challenge. Recently, this created an avalanche of claims submitted to courts requesting an acknowledgment of invalidity of arbitration agreements, thus trying to avoid arbitration. These claims are differently motivated, for example, it is claimed that the opposing party included an arbitration agreement in the contract by using its dominant position in the market, and this arbitration agreement did not comply with fair commercial practice,[19] an arbitration agreement provided that the dispute shall be settled by an arbitration institution chosen by the claimant (no specific name was mentioned),[20] the arbitration institution was liquidated,[21] a party had no knowledge of the language in which an arbitration agreement was drafted,[22] a party did not understand the meaning of an arbitration agreement due to mental health problems, etc.[23]

It also leads to situations where one party submits the statement of claim to an arbitration institution, but the other—a claim requesting to recognize the arbitration agreement invalid to the court. Typically, in such cases, arbitration proceedings are more rapid, and only after the award is rendered, the court recognizes an arbitration agreement invalid. Nonetheless, the award remains in force as there is no set aside procedure. This absurd situation is accepted by the Supreme Court's practice. In fact, in one case, the Supreme Court ruled that the courts have competence to review the validity of the arbitration clause both before the arbitral award is rendered and also once it is rendered.[24] In another case, the Supreme Court decided that even if the award was rendered two years prior and a writ of compulsory execution was already issued, the interested party could still challenge the validity of the arbitration agreement.[25]

This situation could be cured if Latvia introduced a rule similar to that embodied in Article 16(3) UNCITRAL Model Law, giving a certain period of time for the interested party to request the court to decide on the jurisdiction of the tribunal as well as Article 34 regarding recourse against award.

### [C] Agreement on Ad Hoc Arbitration

The Arbitration Law is filled with unique and exotic features and has been rightly described as a failure that "contains serious anomalies that go against the core

18. *Ibid.*, para. 20.2.2.
19. Zemgale's District court, October 26, 2022, No. C73295922. The claim denied.
20. Riga City Pārdaugava's court, May 24, 2017, No. C31227616. The claim denied.
21. Riga District court February 4, 2019, No. C33587617. The claim satisfied. Riga City Ziemeļu court, May 18, 2017, No. 32370115. The claim satisfied.
22. Cēsis District Court, April 18, 2017, No. C30328215. The claim denied.
23. Riga City Court, May 8, 2017, No. C32244315. The claim satisfied.
24. Supreme Court's Senate September 25, 2019, No. C30474518.
25. Supreme Court's May 15, 2020 No. SPC-12/2020.

principles of arbitration."[26] One of these anomalies seems to be unmatched—the treatment of *ad hoc* arbitration. The treatment is not only unique for Western Democracies,[27] but it leaves parties who have—for some inexplicable reason—decided to agree on *ad hoc* arbitration with a Catch-22. They risk of ending up being stuck with a binding arbitration agreement and a non-enforceable award.

Currently, the Arbitration Law allows parties to agree either on institutional or *ad hoc* arbitration (Article 2(1)). However, both types of arbitration are treated differently, to say the least. The minor difference concerns provisional protection (measures). Article 139(2) of the Civil Procedure Law allows a party to request provisional protection (measures) before a national court prior to bringing an action before an arbitration tribunal, but only if the parties have agreed on institutional arbitration. The request will be rejected by the court if the parties have agreed on *ad hoc* arbitration. But this discriminatory treatment of *ad hoc* arbitration becomes trivial in comparison with the elephant in the room.

That elephant is the enforceability of *ad hoc* awards. It may be hard to believe, but the Latvian regulatory framework[28] grants forced enforceability only to institutional awards.[29] Pursuant to Article 58(1) of the Arbitration Law *ad hoc* awards are to be complied with voluntarily. Obviously, foreign *ad hoc* awards are still enforceable under the New York Convention.[30] Likewise, a local *ad hoc* is still enforceable abroad on the basis of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.[31] However, a local *ad hoc* award is only worth in Latvia so much as the losing party is willing to comply with it. This puts the winning party between a rock and a hard place—a validly concluded arbitration agreement makes the recourse to a national court inadmissible, but the award creditor might be unable to enforce its

26. Toms Krūmiņš, *Arbitration in Latvia: A Cautionary Tale?*, 34 J. Int. Arbitr. 303, 310 (2017) DOI: 10.54648/joia2017016.
27. *Ad hoc* arbitration is not legal in China. *See* Giovanni Pisacane, Lea Murphy & Calvin Zhang, *Arbitration in China: Rules & Perspectives*, 8 (Springer, 2016). The enforceability of *ad hoc* awards is disputable in Taiwan. *See* Tifanny Huang & Amber Hsu, *Taiwan*, Baker & McKenzie International Arbitration Yearbook: 2010-2012, 119-120 (2011). *See also* Agris Repšs, *Nav pamata neizdot izpildrakstu ad hoc šķīrējtiesu spriedumiem* [There Is No Justification Not to Issue an Enforcing Order for Ad Hoc Arbitral Awards], 22(824) Jurista Vārds (2014).
28. Art. 58(2) of the Arbitration Law and Art. 534(1) of the Civil Procedure Law. These provisions make it clear that the writ of execution is granted to an institutional award.
29. Ģirts Lejiņš & Eva Kalnina, *National Report for Latvia (2018 through 2023)*, in ICCA International Handbook on Commercial Arbitration, 1-43, 37 (Lise Bosman ed., Kluwer Law International 2021); Toms Krūmiņš, *Arbitration in Latvia: A Cautionary Tale?*, 34 J. Int. Arbitr. 303, 304 (2017) DOI: 10.54648/joia2017016; Inga Kačevska & Kalvis Torgāns, *533.pants* [Art. 533], in Civilprocesa Likuma Komentāri: III daļa (61.-86.nodaļas) [Commentary to Civil Procedure Law: Part III (Sections 61-86), 142-144, 142-143 (Kalvis Torgāns ed., Tiesu Namu Aģentūra, 2014).
30. Agris Repšs, *Nav pamata neizdot izpildrakstu ad hoc šķīrējtiesu spriedumiem* [There Is No Justification Not to Issue an Enforcing Order for Ad Hoc Arbitral Awards], 22(824) Jurista Vārds (2014).
31. While Art. V(1)(e) of the New York Convention provides that recognition and enforcement of a foreign award may be refused if the award has not yet become binding on the parties, ad hoc awards are binding on the parties under the Arbitration Law, they simply lack the enforcement mechanism.

award.[3233] Hence, it would be hard to rationalize the motives of parties who willingly (and knowingly) consent to *ad hoc* arbitration in Latvia.[34]

The logic behind this discriminatory regime seems hard to understand. The drafters of the Arbitration Law offered the following explanation: since the Latvian state does not determine criteria for the creation of *ad hoc* tribunals and arbitrators (e.g., no list of arbitrators), it cannot be responsible for enforcement of *ad hoc* awards![35] However, these motives behind the 2014 Arbitration Law resemble retrospective rationalization. This is due to the fact that originally, Chapter D of the Civil Procedure Law did not deprive *ad hoc* awards of enforceability. However, in 2005, the Latvian legislator amended the Chapter D, providing that enforceability is a privilege of institutional awards. In 2005, Latvia did not have a requirement for arbitration institutions to have mandatory lists of arbitrators. Making it impossible to understand what could justify the different treatment. To the best knowledge of the authors, it is, in fact, unknown what was the official justification of the decision to ill-treat *ad hoc* arbitration in 2005. Certainly, the justification used in 2014 could not have been relevant in 2005.

There is, however, a suggestion of what really happened in 2005. As one practitioner writes, the real reason behind the 2005 amendments was a lobby of arbitration institutions willing to get rid of a cheaper *ad hoc* procedure.[36] While the veracity of this explanation is hard to verify, it does sound at least plausible. And if true, it is a sad diagnosis of the mechanics behind Latvia's legislation.

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32. Toms Krūmiņš, *Arbitration in Latvia: A Cautionary Tale?*, 34 J. Int. Arbitr. 303, 310 (2017) DOI: 10.54648/joia2017016; Maija Tipaine & Līga Fjodorova, *Arbitration in Latvia: Was a Restart a Failure?* (Kluwer Arbitration Blog 2016), https://cobalt.legal/uploads/news/2514/M_Tipaine_L_Fjodorova_Arbitration_in_Latvia_Was_a_Restart_a_Failure_Kluwer_Arbitration_Blog_25_01_2016.pdf (accessed 23 Ap. 2023).
33. According to some authors, the problem of non-enforceability has been overcome via arbitration institutions taking generic names, e.g., International Arbitration (*Starptautiskā šķīrējtiesa*) or Latvian Arbitration (*Latvijas šķīrējtiesa*). In their opinion, "The existence of permanent arbitral institutions with such names allows a party to submit an initially *ad hoc* arbitration dispute to arbitration organized by a permanent arbitral institution, which subsequently allows a party to request compulsory execution of the award before national courts." Ģirts Lejiņš & Eva Kalnina,*National Report for Latvia (2018 through 2023)*, in ICCA International Handbook on Commercial Arbitration, 1-43, 3 (Lise Bosman ed., Kluwer Law International 2021). *See also* Maija Tipaine & Līga Fjodorova, *Arbitration in Latvia: Was a Restart a Failure?* (Kluwer Arbitration Blog 2016), https://cobalt.legal/uploads/news/2514/M_Tipaine_L_Fjodorova_Arbitration_in_Latvia_Was_a_Restart_a_Failure_Kluwer_Arbitration_Blog_25_01_2016.pdf (accessed April 23, 2023). This approach remains risky. The award debtor could oppose the issuance of the writ of execution on the basis that the action was commenced in an inappropriate forum. At the end of the day, local courts will know that these are no *ad hoc* tribunals.
34. Unless they expect enforcement of an eventual arbitration award to take place entirely abroad.
35. *The Draft 2015 Arbitration Law, Preliminary impact assessment report (Explanatory report)*, https://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/A182DD228B4DAF6CC2257C4E003D7B1B?OpenDocument#b (accessed April 23, 2023). *See also* Inga Kačevska & Kalvis Torgāns, *533.pants* [Art. 533], in Civilprocesa Likuma Komentāri: III daļa (61.-86.nodaļas) [Commentary to Civil Procedure Law: Part III (Sections 61-86), 142-144, 143 (Kalvis Torgāns ed., Tiesu Namu Aģentūra, 2014).
36. Ziedonis Ūdris, *Uzticību šķīrējtiesām var nodrošināt ar tiesas kontroli pār to nolēmumiem* [Trust in Arbitration Courts May Be Achieved with Court Control over Arbitral Awards], 22(824) Jurista Vārds (2014).

If true, then the discriminatory regime was preserved in 2014 for one of two reasons. One alternative—it was simply a case of path dependence when the drafters of the Arbitration Law simply preserved the existing law. Second alternative—the lobby was still there. In any case, even in 2014, the twisted arguments behind this regime were inconclusive at best. First, Articles 14 and 15 of the Arbitration Law that determine the requirements for a person to be able to serve as an arbitrator apply both to arbitrators in *ad hoc* and institutional arbitration. Thus, indeed, the only significant difference is that self-evidently *ad hoc* does not have mandatory lists of arbitrators, which is, first of all, a natural consequence of the absence of a permanent institution. And this is the difference that the authors of the 2014 Arbitration Law used to justify the discriminatory regime. A dubious argument, to say the least.

The argument becomes even weaker if we consider the facts. First, the drafters of the 2014 Arbitration Law note that there is no need to prohibit *ad hoc* arbitration as it exists in the Model Law. However, the authors of the Model Law would no doubt find it appalling to refuse forced enforcement for *ad hoc* awards. Were the drafters of the 2014 Arbitration Law actually trying to capture the philosophy behind the Model Law, they failed miserably. Second, if we were to continue the argument that the Latvian state cannot enforce awards by tribunals that are not established by the state and having mandatory lists of arbitrators, Latvia would have to denounce the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards as it requires enforcement of foreign awards, rendered by tribunals that are not subject to the Latvian *lex arbitri* with all its extravagant requirements. Luckily, this fake reasoning has not been pushed to the limits.

The scholars have rightly criticized the lack of enforcement mechanism for *ad hoc* awards. Notably, in the words of Dr. T. Krūmiņš: "by not providing a mechanism for recognition and enforcement of domestic *ad hoc* arbitral awards, there might be a violation of Article 6(1) ECHR and Article 1 of Protocol No. 1 to the ECHR."[37] An urgent reform is necessary in order to align the status of *ad hoc* with that existing in other Western democracies.

### [D] Transfer of an Arbitration Agreement

The Arbitration Law is extremely unbalanced in terms of its approaches to arbitration. On the one hand, if not for the decisions of the Constitutional Court, parties would not have been able to challenge the validity of arbitration agreements before courts. Moreover, the Arbitration Law still lacks a setting aside mechanism. The peculiarities would seem to indicate that the Latvian legislator has a very pro-arbitration mindset and unshakable trust in this method of dispute settlement. On the other hand, it has such characteristics that evidently undermine arbitration. For example, the Arbitration Law allows parties to evade the duty to comply with the arbitration agreement. The mechanism of evasion is assignment of a claim.

37. Toms Krūmiņš, *Arbitration and Human Rights*, 330 (Springer, 2020).

It is a truism that "in most jurisdictions, it is presumed that assignment of the underlying contract entails the assignment of the associated arbitration agreement."[38] Latvian court practice diverged from that opinion even prior to the adoption of the Arbitration Law.

Before 2015, arbitration in Latvia was governed by the Chapter D of the Civil Procedure Law that was silent about the effect of assignment on arbitration. However, national courts were facing a question: is the assignee bound by the arbitration agreement after the assignment? They based their answer on Article 1800 of the Latvian Civil Law that states that "if no other agreement has been made, the cession of the right to bring an action shall be considered to be the cession of the claim which is the subject-matter of the action; but only the right to claim shall be transferred to the cessionary (Article 1801), rather than the contractual relation giving rise to the rights." Following their interpretation of this provision, the assignee was not bound by the arbitration agreement since only the claim was transferred to the assignee.[39]

Historically, Article 1800 had nothing to do with arbitration. Rather, it is a twofold provision. Its first part reflects upon the practice of Roman law, where the actual assignment of a claim was not allowed, but the creditor would evade that prohibition by granting another person the right to bring legal action.[40] Article 1800, which, on the contrary, allows assignment, simply specifies that such rights to bring an action are to be treated as an actual assignment of the claim itself. The second part of the provision represents a more general principle that a person cannot exit from the contract unilaterally. Therefore, while the creditor could assign the claim, it could not "assign" the whole contract, thus freeing oneself of obligations under that contract.[41]

However, in the early 2000s, widespread understanding that Article 1800 prevented the transfer of an arbitration agreement was formed among courts. In 2015, that understanding was codified in the Arbitration Law. Currently, Article 13(4) of the Law provides that "If a claim is assigned, the right of claim shall pass to the assignee apart from the arbitration clause regarding the resolution of a civil legal dispute in an arbitration court as included in the agreement." As a result, two different acts provide that arbitration agreements do not follow the assigned claim: (1) the Latvian substantive civil law as interpreted by Latvian courts; and (2) the *lex arbitri* applicable if the arbitration takes place in Latvia.

Assignment is an often-useful escape route from unwanted arbitration. The interaction between succession and arbitration agreements is obviously way less relevant in practice. Nonetheless, the Supreme Court has likewise decided that the

38. Gary B. Born, *International Commercial Arbitration. Volume I: International Arbitration Agreements*, 1579 (3rd. ed., Wolter Kluwer, 2021).
39. Supreme Court's Senate May 12, 2004, No. SPC-28.
40. The analysis of Art. 1800 of the Latvian Civil Law in connection to arbitration agreements is discussed in a detailed manner, in: Aleksandrs Fillers, *Līgumiskās cesijas un šķīrējtiesas līguma mijiedarbība* [Interaction Between a Contractual Assignment and an Arbitration Agreement], 35(835) Jurista Vārds (2014).
41. *Ibid*.

consent to arbitrate is strictly personal and cannot be passed on to the heir even if the position of *de cujus* in the substantive contract is inherited by the heir.[42]

Overall, we can observe that in relation to assignment, the Latvian law is once again an outlier. The possibility of unilaterally escaping from arbitration might not be condemnable if the arbitration environment is so deficient. However, once the Latvian arbitration law and practice are significantly improved, assignment should not serve as an escape route to avoid arbitration. Or, to put it in other words, to simply break the promise to arbitrate the dispute by purposefully assigning claims to someone else.

## §18.04 ARBITRATORS: NO SURPRISE WHO IS DRIVING YOUR CAR!

### [A] Qualification

Previously, the Civil Procedure Law just stipulated that arbitrators shall be independent and impartial and perform their duties in good faith. However, due to systematic complaints regarding insufficient qualification and the work quality of arbitrators, the legislator amended the law. As a result, currently, in order to serve as an arbitrator, a person shall provide that she or he has an impeccable reputation, possesses a law degree, and has at least three years of practical experience (Article 14(2)). A person with criminal records or who has declared bankruptcy in the past five years cannot serve as an arbitrator (Article 15). Each arbitral institution shall submit documents to the Enterprise Register proving that arbitrators in its closed and mandatory lists (explained below) meet those requirements. However, in practice, it is a very formal review as, for example, it is not possible to verify on the basis of the submitted documents whether a lawyer has an impeccable reputation.

### [B] Mandatory Lists of Arbitrators

The Arbitration Law also introduced a new and doubtful criterion that all arbitration institutions shall maintain a closed and mandatory list of arbitrators containing a minimum of ten arbitrators (Article 4(2)). A person may not be included in lists of more than three institutions (Article 14(4)). This new requirement not only limits the party autonomy because parties cannot agree or appoint an arbitrator out of this list but also may affect the independence and impartiality of arbitrators, i.e., particularly for this research, the authors went through all the lists of arbitrators and established that out of sixty-four arbitral institutions, thirty-five had a minimal number of arbitrators—ten and seventeen institutions had arbitrators up to fifteen. Arbitrators mentioned in those lists are predominantly Latvian lawyers, often family members or lawyers from one law firm. There is no diversity in terms of nationality, religion, etc. There could be situations when a three-member tribunal cannot be established because among ten arbitrators, there is none with particular expertise in specifics of a dispute or knowledge of a foreign language or because most of them have conflicts of interests.

42. Supreme Court, November 12, 2018, No. C29564416.

A very specific provision was also included in the Arbitration Law, i.e., a person who is or during the last five years has been on the list of arbitrators of the relevant arbitration institution may not represent a party in that arbitration institution, and he or she may not be invited to render legal assistance in proceedings conducted therein (Article 32). There was an attempt to challenge this provision before the Constitutional Court, arguing that an attorney at law had never been appointed as an arbitrator in the arbitration institution; however, she was denied the right to represent the client in this arbitration institution due to her presence on the list; thus her constitutional rights were violated. However, the Constitutional Court refused to initiate the case as it did not consider that there was a violation of constitutional rights.[43]

### [C] Independence and Impartiality of Arbitrators

Article 22 of the Arbitration Law provides that an arbitrator shall perform his or her duties in good faith without being subject to any influence. An arbitrator shall be objective and independent in his or her operations and decision-making. Moreover, the Constitutional Court remarked that in accordance with the practice of ECHR, the lack of independence and impartiality can be observed not only in cases when it has been established but also in cases where doubt about the existence of independence and impartiality is well-grounded (*see*: *Delcourt v. Belgium* [1970]ECHR 1, paragraph 31; *Piersack v. Belgium* [1982] ECHR 6, paragraph 30). The structure of the arbitral institution, previous relations of the arbitrators with the parties as well as other factors may serve as the reason for such doubt.[44]

However, in practice, understanding of arbitrator's and arbitration institution's independence and impartiality differs.

The Arbitration Law contains, most likely, an exhaustive list of situations of conflicts of interests. Namely, an arbitrator is not entitled to act as arbitrator if he/she has been a representative of any of the parties, or an expert or witness in a matter *where the same parties have participated*; is in a relationship of kinship to the third degree, or relationship of affinity to the second degree, with any participant in the matter or representatives thereof; is in an employment relationship with any participant in the civil legal dispute or their representative, or if the arbitrator provides legal assistance to a or his or her spouse, or kin to the third degree, or business partner, or commercial company, which is a party to the civil legal dispute and whose participant, shareholder, member, or member of supervisory, control or executive body is this arbitrator or his or her kin to the third degree, has financial interest in the outcome of the civil legal dispute (Article 16(1)). Other possible situations are not directly considered conflicts.

43. The Constitutional Court, July 26, 2022, Application No. 118/2022.
44. On the Compliance of section 132 (Item 3 of the First Part) and section 223 (Item 6) of the Civil Procedure Law with Art. 92 of the Republic of Latvia Satversme (Constitution). Judgment in the case No. 2004-10-01, January 17, 2005, para. 10. Available in English at https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2004/05/2004-10-01_Spriedums_ENG.pdf#search=2004-10-01 (accessed April 11, 2023).

Moreover, even though the Arbitration Law states that a person who is asked to consent to their appointment as an arbitrator must disclose to the parties any circumstances, which may cause reasonable doubt as to the objectivity and independence of this person (Article 17(2)), there is no tradition in arbitrations of Latvia to fill out a written form of independence and impartiality.

The following practical examples demonstrate an awkward understanding of independence and impartiality. There are cases when a company or a bank includes the same arbitration clause in almost all commercial contracts, indicating that the dispute will be resolved by one particular arbitral institution. This institution may receive numerous cases from this claimant—a company or a bank per year, but if there are only ten arbitrators in the closed list, it means that one and the same arbitrator can be appointed many times in the disputes with the same claimant. This, definitely, is a fundamental derogation from international standards.[45] Furthermore, it is almost impossible to verify a conflict of interests of arbitrators because the arbitrators do not disclose such facts or other circumstances in writing.

Thus, the representatives of the parties shall be creative in this regard. For instance, Article 535 of the Civil Procedure Law includes a unique provision – a court may request a case or other information from an arbitration institution if it is necessary for taking the decision on issuing a writ for compulsory execution of the award. There have been instances when, at this stage of proceedings, the party asks the court to request information regarding the number of appointments of a specific arbitrator. But it must be admitted that courts do not understand all the nuances of conflicts of interests, for example, they do not see the problem of why one arbitrator cannot be appointed multiple times in a dispute with the same claimant.

In addition, it shall be added that this provision is very often used by the court *ex officio* – the courts request the case materials from arbitral institutions and review them before issuing a writ of execution. Usually, the file can show, for example, whether the parties have received correspondence from the arbitration, etc.

## §18.05 EVIDENCE AND ABSENCE OF WITNESS TESTIMONIES IN ARBITRAL PROCEEDINGS: A MYSTERIOUS PATH?

Another anomaly of the Arbitration Law concerns witness testimonies. Article 41(3) of the Law states that "[e]videntiary means in an arbitration court may consist of explanations of the parties, documentary evidence (written documents, audio recordings, video recordings, electronic data carriers, digital video discs, etc.), real evidence, and expert opinions." Thus, there are four types of evidence permissible in arbitration: "The Arbitration Law provides that admissible forms of evidence consist of: (1) statements of the parties; (2) written evidence; (3) physical evidence; and (4) expert

45. *See*: The IBA Guidelines on Conflicts of Interest in International Arbitration.

opinions."[46] Regarding this provision, it might be first asked whether the legislature really needs to make such a detailed enumeration of all evidentiary means. However, what is more important is the missing element. The list does not mention witness testimonies. And, indeed, "in principle oral witness testimony is not admissible in arbitral proceedings,"[47] and neither are testimonies of party-appointed experts.[48]

The Explanatory Report to the Arbitration Law explained that one of the main benefits of the arbitration proceedings was its speed; inadmissibility of testimonies ensured better speed.[49] The exclusion of testimonies—pursuant to the authors of the law—freed the tribunal from "unnecessary extensions of the process," e.g., from the need to deal with the situation where a witness does not attend the hearing.[50] Scholars also mention other justifications for this anomaly. Some consider that "[witness] testimony is not admissible since it is deemed that there is insufficient control over this type of evidence, especially as it cannot later be reviewed by a court when enforcing an arbitral award."[51] This statement seems rather ambivalent. It may be asked why and how courts could review other types of evidence when the Arbitration Law does not allow substantive review of an award.

Still, other authors consider that the inadmissibility can be justified by the impossibility of warning witnesses about criminal liability for a false testimony.[52] In fact, pursuant to the Explanatory Report, a party to the process could submit witness statements that are confirmed by notaries.[53] During this confirmation, the notary must warn the person about criminal liability in case of false testimony.[54] This fact gives credibility to the idea that the absence of the warning could have been the reason (or at least one of the reasons) for the absence of witness testimonies in arbitral proceedings.

Scholars have implicitly demonstrated how inadequate the Arbitration Law is. It is observed that "[i]n practice, parties often overcome this prohibition by presenting

46. Ģirts Lejiņš & Eva Kalnina, *National Report for Latvia (2018 through 2023)*, in ICCA International Handbook on Commercial Arbitration, 1-43, 21 (Lise Bosman ed., Kluwer Law International 2021).
47. *Ibid.*, 22.
48. *Ibid.*
49. *The Draft 2015 Arbitration Law, Preliminary impact assessment report (Explanatory report)*, https://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/A182DD228B4DAF6CC2257C4E003D7B1B?OpenDocument#b (accessed April 23, 2023).
50. *Ibid.*
51. Ģirts Lejiņš & Eva Kalnina, *National Report for Latvia (2018 through 2023)*, in ICCA International Handbook on Commercial Arbitration, 1-43, 22 (Lise Bosman ed., Kluwer Law International 2021).
52. Kalvis Torgāns, *521.pants* [Art. 521], in Civilprocesa Likuma Komentāri: III daļa (61.-86.nodaļas) [Commentary to Civil Procedure Law: Part III (Sections 61-86), 120-122, 120 (Kalvis Torgāns ed., Tiesu Namu Aģentūra, 2014).
53. *The Draft 2015 Arbitration Law, Preliminary impact assessment report (Explanatory report)*, https://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/A182DD228B4DAF6CC2257C4E003D7B1B?OpenDocument#b (accessed April 23, 2023).
54. Article $139^5$ (2) of the Notariate Law states: "The sworn notary shall warn the participants of the notarial deed of the criminal liability in respect of the giving of knowingly false submissions, notifications (declarations) and testimonies to the sworn notary. It shall also be indicated in the notarial deed." Notariate Law (1.09.1993), Latvijas Vēstnesis, 48, July 9, 1993.

witnesses and also party-appointed experts as party representatives who would be allowed to appear in the hearing and to give "testimony" in the form of a statement by the party."[55] The need for parties to invent such a detour serves as a colorful illustration of the fact that the Arbitration Law often complicates life for those involved in arbitration and suppresses their actual needs. Truly, the Latvian legislature works in mysterious ways.

On a more theoretical level, the exclusion of witness testimonies demonstrates a crucial misunderstanding of the Latvian legislature of the arbitration process and its core principles. It is for the parties and the tribunal to decide which evidence is admissible. In fact, the great advantage of the arbitration process is not so much that it is fast as that it is flexible. For example, parties that otherwise would be subject to traditional continental evidence rules can model arbitration procedures that mimic evidentiary rules found in common law. This option may be particularly attractive in international arbitration. Recognizing that, in principle, parties have significant control over the arbitration procedure, one Latvian practitioner states that the parties could further limit the list of admissible evidence, agreeing that "no evidence can be submitted, no expertise can be made, only written evidence can be submitted or that the process will take place without party participation, on the basis of submitted documents."[56] However, while the parties can further reduce the scope of admissible evidence, the Arbitration Law does not seem to permit its extension to cover witness and party-appointed expert testimonies.

Unfortunately, the legislature seems to be plagued by a very narrow and parochial view of arbitration. For the Latvian legislator, it is quite possible that witness testimony is valuable only if accompanied by a warning of criminal liability. Seasoned parties and arbitrators might be willing to test testimonies via direct examination and cross-examination. But arbitration in Latvia is no place for creativity. If you want to employ witnesses and party-appointed experts, then you want to arbitrate outside Latvia. At least until the Arbitration Law is thoroughly reformed.

## §18.06 SETTING ASIDE: THE MISSING WHEEL OF LATVIAN ARBITRATION?

By this moment, the reader should understand that the Arbitration Law can be characterized as a "legislative freak," containing several peculiar, incomplete and incomprehensive rules. However, it also lacks certain crucial rules that are generally considered standard for arbitration; it lacks the setting aside procedure. Of course, this does not mean that there is no recourse against an arbitration agreement and an arbitration award. There are these two forms of recourse. But they are unable to fully substitute the absence of the setting aside procedure.

55. Ģirts Lejiņš & Eva Kalnina, *National Report for Latvia (2018 through 2023)*, in ICCA International Handbook on Commercial Arbitration, 1-43, 22 (Lise Bosman ed., Kluwer Law International 2021).
56. Jurijs Ņikuļcovs, *Šķīrējtiesvedības principi* [Principles of Arbitral Adjudication], 9(1275) Jurista Vārds (2023).

It was already highlighted that parties always have recourse against the arbitration agreement. A person can at any time challenge the validity[57] of an arbitration agreement,[58] even if the tribunal has already rendered an award. Oddly enough, in such a case, a court decision rendering the arbitration agreement invalid does not retroactively invalidate the award; however, such an award can no more benefit from the writ of execution. Moreover, the award made on the basis of an invalidated arbitration agreement cannot be used as proof in future court proceedings.[59] In other words, the Latvian law completely disregards any negative effects of *competence-competence* principle.

Challenging the validity of an arbitration agreement is not an adequate substitute for a setting aside procedure. The challenge concerns only the legal basis of arbitration—the validity of the arbitration agreement—and cannot be aimed at irregularities of the arbitration procedure that have affected the arbitration award.

So, could a losing party challenge the award itself? Yes and no. For the institutional award to be enforced, the award creditor needs to receive a writ of execution from the national court. At this stage, the award debtor can challenge the issuance of the writ.

The grounds for the refusal of the writ are similar to those that are traditionally associated with the setting aside procedure. Let us just mention a few out of the seven grounds for refusal pursuant to Article 536(1) of the Civil Procedure Law: (1) the dispute is within the exclusive competence of courts; (2) the arbitration agreement has been revoked or declared null and void; (3) an arbitrator or an arbitration institution were not conforming to the legal requirements or the procedure was inappropriate; (4) tribunal went beyond the scope of the arbitration agreement, etc. Obviously, under no circumstances can the court review the award on merits.[60] More curiously, the list of the grounds for the refusal does not include the infringement of the public policy.[61] In theory, this means that courts have absolutely no control over the substance of the award. However, as we will show below, this statement is correct only in theory.

The refusal of the writ is not the same as a setting aside procedure. First of all, it is relevant only for institutional awards since *ad hoc* awards are not enforceable in Latvia. Second, it is relevant only for institutional awards that actually need enforcement. On the contrary, "[i]f an arbitral tribunal has issued a declaratory award or an

57. Invalidity, in this context, covers both original invalidity (null and void) and later annulment. Thus, for instance, also cases when the parties have concluded a termination agreement that has terminated the arbitration agreement. Se: Inga Kačevska & Kalvis Torgāns, *536.pants* [Art. 536], in Civilprocesa Likuma Komentāri: III daļa (61.-86.nodaļas) [Commentary to Civil Procedure Law: Part III (Sections 61-86), 151-163, 158 (Kalvis Torgāns ed., Tiesu Namu Aģentūra, 2014).
58. *See* above.
59. The Constitutional Court, February 23, 2023, No. 2022-03-01, para. 11.2.
60. Jurijs Ņikuļcovs, *Šķīrējtiesvedības principi* [Principles of Arbitral Adjudication], 9(1275) Jurista Vārds (2023); Inga Kačevska & Kalvis Torgāns, 536.pants [Art. 536], in Civilprocesa Likuma Komentāri: III daļa (61.-86.nodaļas) [Commentary to Civil Procedure Law: Part III (Sections 61-86), 151-163, 154 (Kalvis Torgāns ed., Tiesu Namu Aģentūra, 2014).
61. Cf., Inga Kačevska & Kalvis Torgāns, *536.pants* [Art. 536], in Civilprocesa Likuma Komentāri: III daļa (61.-86.nodaļas) [Commentary to Civil Procedure Law: Part III (Sections 61-86), 151-163, 155 (Kalvis Torgāns ed., Tiesu Namu Aģentūra, 2014).

award dismissing all claims, no enforcement is required and the affected party is left with no effective remedy to challenge the possibly defective arbitral award."[62] Third, it is relevant only for institutional awards that need enforcement in Latvia. For instance, if the award debtor is facing multiple enforcement actions in different countries outside Latvia, then the refusal of the writ is not helpful to establish that the award was set aside at the seat with the view to substantiate the refusal of enforcement abroad (Article V(1)(e) of the New York Convention).

The absence of the setting aside procedure is difficult to explain. Seemingly, the Latvian legislature has considered that the primary goal of the arbitration is to reduce court workload while the setting aside procedure would—in its logic—increase the workload.[63] The logic has been extremely flawed since the purpose of arbitration is an all-around qualitative dispute resolution mechanism that benefits parties. It cannot be reduced to speed for speed's sake.

Scholars have likewise insisted for years that "[regarding] total exclusion of setting-aside proceedings, the hypothesis is rather straightforward—a legislative approach failing to provide for the annulment mechanism arguably violates arbitrating parties' right of access to a court under Article 6(1) of the ECHR."[64] The Constitutional Court has consistently underlined the problem and every time doing it with more force. In 2005, the Court expressed doubts whether a system without a setting aside mechanism was optimal but concluded that the state could compensate for the absence of such a mechanism by exercising control over the awards during enforcement proceedings.[65] However, the Latvian legislature remained deaf to the Court's doubts. In 2014, the Constitutional Court rendered another judgment with another *obiter dictum* urging the introduction of the setting aside procedure.[66] As if in an act of spite, in 2015, the new Arbitration Law was adopted without the setting aside procedure.

2023 is expected to be the year of the revision. In February 2023, the Constitutional Court moved from *obiter dicta* to action. It finally ruled that the absence of the

62. Toms Krūmiņš, Arbitration in Latvia: A Cautionary Tale?, 34 J. Int. Arbitr. 303, 329 (2017) DOI: 10.54648/joia2017016. *See also* Inga Kačevska & Kalvis Torgāns, *537.pants* [Art. 537], in Civilprocesa Likuma Komentāri: III daļa (61.-86.nodaļas) [Commentary to Civil Procedure Law: Part III (Sections 61-86), 163-165, 164 (Kalvis Torgāns ed., Tiesu Namu Aģentūra, 2014).
63. Cf., Toms Krūmiņš, *Arbitration and Human Rights*, 330 (Springer, 2020).
64. Toms Krūmiņš, *Arbitration and Human Rights*, 316 (Springer, 2020). Other Latvia arbitration practitioners and academic also voiced criticism over the absence of the setting aside mechanism. *See* Inga Kačevska, *Ir normāla situācija, un ir Latvijas situācija* [*There Is a Normal Situation, and There Is a Latvian Situation*], 22(824) Jurista Vārds (2014), Maija Tipaine, *Šķīrējtiesu reputāciju rauj neitralitātes trūkums* [*The Reputation of Arbitration Courts Is Undermined by Lack of Neutrality*], 22(824) Jurista Vārds (2014); Ziedonis Ūdris, *Uzticību šķīrējtiesām var nodrošināt ar tiesas kontroli pār to nolēmumiem* [*Trust in Arbitration Courts May Be Achieved with Court Control over Arbitral Awards*], 22(824) Jurista Vārds (2014).
65. Constitutional Court of Latvia Case No. 2004-10-01 'On the Compliance of Section 132 (Item 3 of the First Part) and Section 223 (Item 6) of the Civil Procedure Law with Art. 92 of the Republic of Latvia Satversme (Constitution)', para. 91. Available also in English on www.satv.tiesa.gov. *See also* Toms Krūmiņš, *Arbitration and Human Rights*, 227-228 (Springer, 2020).
66. On Compliance of section 495(1) of the Civil Procedure Law with the first sentence in Art. 92 of the Satversme of the Republic of Latvia, Case No. 2014-09-01, November 28, 2014. Available in English at https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2014/03/2014-09-01_Spriedums_ENG.pdf#search=2014-09-01 (accessed April 11, 2023).

setting aside procedure was unconstitutional and requested that the legislator create that procedure.[67] However, even in the 2023 decision, the Constitutional Court found that the absence of setting aside procedure is incompatible with the Latvian Constitution only in three instances: (1) when the interested party (award creditor) does not request the writ of execution for a long time; (2) when the award is to be enforced abroad; (3) when the enforcement does not require the writ of execution. With the exception of the third criterion that covers declaratory awards, the other criteria are almost impossible to codify. For instance, when is it possible to say that the award creditor has not requested the writ of execution for a long time? How long is too long? And what is the point of postponing the setting aside procedure? Likewise, it is hard to codify the difference between awards that are to be enforced abroad and those to be enforced domestically. When the award is rendered, it might be unknown whether the award debtor has any foreign assets.

However, the decision of the Constitutional Court lays out only the dire circumstances when the setting aside procedure must be in place. In no way does it prohibit the legislator from once in a while choosing a path of wisdom and introducing a setting aside mechanism similar to that found in the Model Law. It remains to be seen which path the legislator will favor.

In regard to the review of arbitration awards, as it stands today, a few additional remarks deserve a brief discussion. First, at least in theory, the setting aside procedure must be available in Latvia for arbitration awards that fall within the scope of the European Convention on International Commercial Arbitration (Article IX).[68] However, the Civil Procedure Law does not contain a procedure for that.[69] This can be an obstacle to an actual exercise of the setting aside procedure, even in those few cases when it is mandated by international law.

Second, even though the Arbitration Law does not authorize courts to review arbitration awards on merits and even lacks the public policy clause, in practice, courts perform such review.[70] But it is done in disguise under a transparent veil of other grounds that justify the refusal of the writ of execution.

For example, in 2013, the Supreme Court decided that the court, when asked to issue a writ of execution, could refuse to do that because the tribunal had decided that the losing party was obliged to pay an unreasonably high contractual penalty.[71] The Supreme Court decision does not contain any clear justification for courts' competence to review an award on merits.

67. The Constitutional Court, February 23, 2023, No. 2022-03-01, conclusion.
68. Inga Kačevska & Kalvis Torgāns, *537.pants* [Art. 537], in Civilprocesa Likuma Komentāri: III daļa (61.-86.nodaļas) [Commentary to Civil Procedure Law: Part III (sections 61-86), 163-165, 165 (Kalvis Torgāns ed., Tiesu Namu Aģentūra, 2014).
69. *Ibid*.
70. In fact, this has been even encouraged by scholars. *See* Inga Kačevska & Kalvis Torgāns, *536.pants* [Art. 536], in Civilprocesa Likuma Komentāri: III daļa (61.-86.nodaļas) [Commentary to Civil Procedure Law: Part III (sections 61-86), 151-163, 154 (Kalvis Torgāns ed., Tiesu Namu Aģentūra, 2014). In that commentary, Prof. K. Torgāns noted that a judge is no robot that could turn a blind eye to doubts over the substantive legality of the arbitration award.
71. Supreme Court's Senate, April 18, 2013, No. SPC-14/2013.

A similar decision was rendered in 2017.[72] The Supreme Court found that the guarantor had an obligation to guarantee a debt of EUR 5,400, but the award imposed an obligation on the guarantor to pay EUR 16,594,35. The Supreme Court considered that the arbitration tribunal had failed to properly motivate (reason) its award. Hence, it could not benefit from the writ of execution.

In this decision, the Supreme Court put more effort into justifying its competence. The Arbitration Law requires that tribunals provide reasons for their award unless parties have agreed otherwise (Article 54(4)(5)). The Supreme Court used this purely procedural requirement as a gateway into substantive review of the award, stating that the tribunal has failed to provide reasons for its conclusion on the guarantor's obligations. Interestingly, if this decision is taken for its face value, there would have been no reason to refuse the writ had the parties agreed that the tribunal could adopt an award without reasons.

It is easy to see that under this very thin procedural disguise hides a simple desire to review arbitration awards, which sometimes can be understood based on their quality. The need for these detours could have been reduced while the transparency of judicial control increased, had the Civil Procedure Law allowed to refuse to issue the writ on the basis of manifest violation of public policy. The introduction of the public policy ground would have allowed courts to create transparent and honest practices for restricted substantive review of awards, i.e., when they are actually manifestly incompatible with the Latvian legal order. The absence of motivation does not reflect the gravity of the substantive error present in the award and does not allow to differentiate between those errors that prevent the issuance of the writ and those that do not.

In 2022, the Supreme Court[73] sneaked the substantive review under a different disguise. The arbitral tribunal ruled that the losing party had an obligation to provide the earnest money to the creditor. The Supreme Court considered that under the Latvian substantive law, the transfer of the earnest money could not be claimed because the agreement on the earnest money entered into force only after the actual delivery of the earnest money had been effected. Based on this consideration, the Supreme Court stated that the arbitral tribunal had decided a case that was not arbitrable—since the creditor had no right to request the earnest money under the substantive law, there simply was no infringed right and no dispute.

The latter decision is particularly appalling. Under the very thin, transparent veil of procedural justifications, the Supreme Court simply reviewed the award on substance and decided that it misapplied substantive law. The court fused together the existence of a dispute, the rights of a party to bring an action before an adjudicator and a substantive claim (right). The said award might have misapplied Latvian contract law by conferring a claim to request earnest money to a person who lacked it. However, this has absolutely nothing to do with the existence of a dispute or a right to initiate litigation. If extended *ad absurdum*, such an action could likewise be outside the

72. Supreme Court's Senate, September 15, 2017, No. SPC-20/2017.
73. Supreme Court's Senate, 20 December 2022, No. SPC-23/2022.

competence of courts due to the absence of a dispute. In practice, of course, a Latvian court would have heard such an action and, after applying Latvian substantive law to the facts of the case, decided whether the claim was to be satisfied.

These examples illustrate the inadequacy of the Latvian legal framework. The legislature has a twofold mission that it has failed to perform. On the one hand, to ensure that arbitration tribunals are not biased and plagued by conflicts of interests. On the other hand, to provide for a public policy clause that allows for substantive control in those cases where even unbiased tribunals produce unacceptable awards. Failure to perform the first task means that courts face the need to exercise excessive substantive control over awards. Failure to perform the second task means that they hide that control under other ill-fitted instruments.

## §18.07 CONCLUSIONS: HOW TO TURN THE PUMPKIN INTO CARRIAGE?

2023 is expected to be the year of the revision. Currently, the legislature is planning to supplement the Arbitration Law and finally introduce the setting aside procedure. At the end of October 2023 the Working Group at the Ministry of Justice finalized amendments to the Arbitration Law and draft will be submitted to the Parliament for three readings in the nearest future. However, the big problem remains—arbitration in Latvia has a devastating reputation. The setting aside procedure is no fairy instantly turning Cinderella into a princess or a pumpkin into a carriage. The ugliness of Latvian arbitration is here to stay without fundamental and holistic reforms of the regulatory framework. And unfortunately, it will not be attractive for international cases and arbitrators in the nearest future.

Hopefully, the legislator will also take into account other more specific amendments and, it is possible to list the principal ones. First and self-evidently, Latvia should join the concert of Western countries and ensure domestic enforceability of *ad hoc* awards. Moreover, *ad hoc* and institutional arbitration should be treated in the same manner regarding the possibility for the parties to request provisional protection (measures) before a national court. To further improve the functionality of the *ad hoc* arbitration, the Arbitration Law should contain a mechanism that allows a party to seek assistance from a national court if its counterparty creates obstacles to the appointment of the tribunal.

Second, the legislator shall delete the requirement of the mandatory arbitrators' list and allow parties to freely choose arbitrators.

Third, the Arbitration Law should provide true freedom of evidence in arbitration proceedings. There is no need for the law to list all types of evidence that the parties can use in arbitration proceedings. And most importantly, there should be nothing in the law that prevents parties from relying on testimonies by witnesses and party-appointed experts. The law should either be that the tribunal is authorized to warn witnesses and party-appointed experts about criminal liability for false testimony or, alternatively, simply leave it to the tribunal to decide how to verify these testimonies.

Fourth, it is absolutely necessary to introduce the setting aside procedure. While this development now seems inevitable as it is mandated by the Constitutional Court,

we consider that the mechanism should go beyond those circumstances mentioned in the court ruling. The setting aside procedure should not be limited to those awards that due to their nature cannot be enforced, where the award creditor seeks enforcement abroad, or where the award creditor delays domestic execution. No, the Arbitration Law reform should introduce a standard setting aside mechanism extending it to all arbitration awards.

Finally, it is also crucial to include all the standard grounds for the setting aside procedure found in the Model Law, most notably, the public policy exemption. Moreover, the manifest violation of public policy should be introduced not only as a ground for the setting aside of the award but also as a ground for refusal to issue a writ of execution of an award. In both procedures, this would allow courts to exercise very limited, yet occasionally inevitable, control over the substance of arbitration awards. And do it both openly and be subject to strict and, in fact, restrictive limits of this control that are imposed by the very concept of public policy.