Non-Official Translation

IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF PART 5 OF ARTICLE 339 OF THE CIVIL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA AND SYSTEMICALLY INTERRELATED PART 1 OF ARTICLE 16 OF THE LAW OF THE REPUBLIC OF ARMENIA ON FINANCIAL SYSTEM MEDIATOR WITH THE INTERPRETATION PROVIDED IN LAW ENFORCEMENT PRACTICE WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATION OF "ARMECONOMBANK" OJSC

Yerevan December 8, 2020

The Constitutional Court composed of A. Dilanyan (Chairman), A. Tunyan, A. Khachartryan, E. Khundkaryan, E. Shatiryan, A. Vagharshyan,

with the participation of (in the framework of the written procedure)**:**

Applicant: "ARMECONOMBANK" Open Joint Stock Company,

Respondent: K. Movsisyan, official representative of the National Assembly, Head of the Legal Support and Service Division of the National Assembly Staff,

pursuant to Clause 1 of Article 168, Clause 8 of Part 1 of Article 169 of the Constitution, as well as Articles 22, 40, 41 and 69 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of Part 5 of Article 339 of the Civil Procedure Code of the Republic of Armenia and systemically interrelated Part 1 of Article 16 of the Law of the Republic of Armenia on Financial System Mediator with the interpretation provided in law enforcement practice with the Constitution on the basis of the application of "ARMECONOMBANK" OJSC.

The Civil Procedure Code (hereinafter – the Code**)** was adopted by the National Assembly on 9 February 2018, signed by the President of the Republic on 27 February 2018 and entered into force on 9 April 2018.

The challenged Part 5 of Article 339 of the Code, titled: "Examination of the application", stipulates:

"5. During the examination of the application, the court shall decide on availability or absence of grounds for annulment of a decision of the Financial System Mediator as prescribed by the Law of the Republic of Armenia on Financial System Mediator.

The above-mentioned Article of the Code has not been supplemented or added.

The RA Law on Financial System Mediator (hereinafter – the Law**)** was adopted by the National Assembly on 17 June 2008, signed by the President of the Republic on 12 July 2008 and entered into force on 2 August 2008.

The challenged Part 1 of Article 16 of the Law, titled: "Appealing against the decision of the Financial System Mediator", stipulates:

"1. Parties may appeal against the decision of the Financial System Mediator that has become mandatory for the parties, by addressing a competent court with an application on invalidating it in accordance with the procedure established by the Civil Procedure Code of the Republic of Armenia".

The above-mentioned article of the Law was supplemented by the RA Law HO-117-N of 9 February 2018; particularly Part 1 of Article 16 of the Law was supplemented with the words "in accordance with the procedure established by the Civil Procedure Code of the Republic of Armenia" after the words "invalidating it".

Prior to that, Part 1 of Article 16 of the Law was as follows: "1. Parties may appeal against the decision of the Financial System Mediator that has become mandatory for the parties, by addressing a competent court with an application on invalidating it".

The case was initiated on the basis of the application of "ARMECONOMBANK" OJSC submitted to the Constitutional Court on 14 May 2020.

Having examined the application, the written explanation of the respondent, as well as having analyzed the relevant norms of the Coode and the Law, other norms interrelated with the latter and other documents of the case the Constitutional Court **FOUND:**

1. Applicants' arguments

The applicant notes that prior to the adoption of the Decision DCC-1051 of the Constitutional Court dated 9 October 2012, the decisions of the Financial System Mediator were appealed by financial institutions on limited grounds, which were prescribed in Article 17 of the RA Law on Financial System Mediator. Following the adoption of this Decision, the RA courts reviewed the decisions of the Financial System Mediator on the merits and in full, until the disputed provisions came into force.

After the disputed provisions come into force, the RA courts provide the following interpretation: “After the adoption of the Decision No. DCC-1051 of the RA Constitutional Court dated 09.10.2012, the legislator regulated the proceedings on applications for annulment of the decision of the Financial System Mediator and outlined clear boundaries; therefore the proceedings on the applications under consideration are subject to implementation in accordance with the rules prescribed by the RA Civil Procedure Code, and in such conditions the decision of the Financial System Mediator is not subject to dispute”.

The applicant considers that by adopting the disputed provision of the Code, as well as amending Part 1 of Article 16 of the Law, the legislator in fact bypassed the interpretation clearly stated in the Decision DCC-1051 of the Constitutional Court, according to which, if the legal entity does not voluntarily waive the right to appeal the decisions of the Financial System Mediator in court, then the limited right to appeal the decisions of the Financial System Mediator violates the rights of a person to effective judicial protection and a fair trial.

Based on the above, the applicant requests that Part 5 of Article 339 of the Code and Part 1 of Article 16 of the Law systematically related interrelated with the latter, with the interpretation provided in law enforcement practice, are declared contradicting the Constitution and void.

2. Respondent’s arguments

Referring to a number of assessments of the Constitutional Court, as well as the European Court of Human Rights, the respondent states that the right of access to a court is not an absolute right. The respondent refers to the Recommendation No. R(86)12 of the Committee of Ministers of the Council of Europe, paragraph 3 of which encourages Member States to provide for bodies which, outside the judicial system, shall be at the disposal of the parties to solve disputes on small claims and in some specific areas of law.

The respondent states that according to the current legislation, the Mediator is an alternative independent body for ensuring the protection of persons’ rights, endowed with a sufficient degree of independence for resolving disputes. The respondent notes that the decision made by the Mediator, which has not yet become binding on the parties, can be challenged in court on the merits, if there is no written agreement between the parties regarding the voluntary waiver of the right to challenge the decisions of the Mediator. However, the disputed provision refers to a decision that has already become binding on the parties, during the examination of the application for annulment of which the court clarifies the existence or absence of the fact that the claim is out of the competence of the

Mediator, about the violation of the requirements of the procedural rules of the decision made by the Mediator and the circumstances excluding the impartiality of the Mediator.

In conclusion, the respondent finds that Part 5 of Article 339 of the Code and Part 1 of Article 16 of the Law systemically interrelated to the latter, are in conformity with the Constitution.

3. Circumstances to be ascertained within the framework of the case

- In the absence of a written agreement of the financial institution on the waiver of the right to challenge the decisions of the Financial System Mediator, does the restriction of the possibility to challenge the decisions of the Financial System Mediator in court on the merits lead to violation of the constitutional rights to effective judicial protection and a fair trial?

- Is the interpretation of the disputed norms in law enforcement practice consonant with the legal assessments expressed by the Constitutional Court in the Decision DCC-1051 of 9 October 2012?

4. Legal assessments of the Constitutional Court

4.1. According to Part 1 of Article 61 of the RA Constitution, "1. Everyone shall have the right to effective judicial protection of his or her rights and freedoms".

According to Part 1 of Article 63 of the RA Constitution, "1. Everyone shall have the right to a fair and public hearing of his case within a reasonable period by an independent and impartial court".

According to Article 74 of the RA Constitution, "The fundamental rights and freedoms shall extend also to legal persons to the extent such rights and freedoms are by their essence applicable to them".

The content of the above-mentioned constitutional provisions guaranteeing the effective protection of rights and freedoms derives from the requirements of well-known international human rights documents, such as the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, etc.

Judicial protection has a special place among the means of protection of rights, as it is carried out by a body with an independent status in the system of separation of powers. The right to judicial protection is described as one of the basic inalienable rights of a person, and at the same time, as a guarantee and means of ensuring other rights and freedoms.

The state must create the necessary guarantees for the effective realization of human rights and freedoms. The state is obliged not only to recognize, respect and protect rights and freedoms, but also

to create state legal structures that can effectively prevent and eliminate any violations, and restore the violated rights and freedoms.

According to the case law of the European Court, the right of access to justice is also an integral element of the right to a fair trial: "… Article 6 § 1 of the Convention guarantees the right to apply to court with a claim related to a person's civil rights and obligations. This provision embodies the right to apply to court, namely, the right to file a lawsuit in a civil case. However, the latter enables to enjoy the remaining guarantees under Article 6 § 1 of the Convention. Such characteristics of litigation, as fair, public and rapid, would certainly be worthless if these processes are not implemented. It is difficult to imagine the rule of law in civil justice if the right of access to a court is not guaranteed" ***(Case of KREUZ v. POLAND, application no. 28249/95, 19/06/2001)***.

In a number of decisions, the Constitutional Court has in detail referred to the issue of right of access to justice and the issue of constitutional legality of guaranteeing the rights of fair and effective trial emphasizing them as the necessary components of judicial protection and equally underlining their significance in judicial procedural spheres (criminal, civil and administrative).

In the Decision DCC-719 of 28.11.2007, the Constitutional Court in particular expressed the following legal assessment: "… submitting a claim or an application to a court is the means of legal protection by which the natural or legal person - as the bearer of fundamental rights, including the right to judicial protection – protects himself from various violations of his rights that can be committed both by public authorities and individuals. The right of a person to apply to a court is the most effective means to protect him from harassment by the authorities, which has a nature of constitutional (fundamental) right in the Republic of Armenia, like in all other legal states…"

The legal regulation of Articles 61 and 63 of the Constitution is based on the constitutional-legal principles of guaranteeing the right to judicial protection of the rights and freedoms of a person, in the context of which the Constitutional Court has expressed legal assessments in the above-mentioned decisions. These assessments also reflect the results of a comprehensive study of international legal experience.

At the same time, the ECHR expressed the legal position on restrictions on access to a court, that the state may stipulate certain terms for enjoying the right to apply to a court, "… nevertheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of

proportionality between the means employed and the aim sought to be achieved" ***(Case of Khalfaoui v. France, application no. 34791/97, 14/03/2000)***.

In a number of decisions, the Constitutional Court addressed the issue of restrictions on the access to a court. Particularly, in the Decision DCC-1477 of 24.09.2019, the Constitutional Court prescribed the following:

"-no procedural peculiarity can be interpreted as a justification for restricting the right of access to a court guaranteed by Article 63 of the Constitution;

- the access to a court (justice) may have some restrictions that should not violate the very essence of that right".

4.2. According to Part 5 of Article 339 of the Code:

"5. During the examination of the application, the court shall decide on presence or absence of grounds for annulment of a decision of the Financial System Mediator as prescribed by the Law of the Republic of Armenia on Financial System Mediator".

According to Part 1 of Article 16 of the Law:

"1. Parties may appeal against a decision of the Financial System Mediator that has become mandatory for the parties, by addressing a competent court with an application on invalidating it in accordance with the procedure established by the Civil Procedure Code of the Republic of Armenia".

According to Article 17 of the Law:

"1. A competent court shall invalidate the mandatory decision of the Financial System Mediator, if:

1) the claim is not subject to examination by the Financial System Mediator;

2) the Financial System Mediator rendered a decision in violation of procedural rules prescribed by this Law;

3) circumstances excluding the impartiality of the Financial System Mediator are revealed".

In the Decision DCC-1051 of 09.10.2012, the Constitutional Court has analyzed in detail the institution of appealing against decisions the Financial System Mediator:

The principle of liberty is one of the principles of the bodies responsible for out-of-court settlement of disputes, including the activity of ombudsmen (mediators), as prescribed by the Recommendation No. 98/257/EC of the European Commission dated 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, and the content of the principle of liberty reads as follows: the decision taken by the body concerned may be binding

on the parties only if they were informed of its binding nature in advance and specifically accepted this.

The Constitutional Court states that the legal regulations of the RA Law on Financial System Mediator on the above-mentioned issue simply envisage the free will of the Customer. The Law does not stipulate any provision that would directly refer to the Mediator's decision being "specially accepted" by the Organization, but the Law envisages a provision, according to which the Organization may enter into a written agreement with the Office of the Mediator on the waiver of the right to challenge the decisions of the Mediator (in particular, Articles 7 and 16). As the result of the free will of the Organization, the latter, in essence, is equivalent to the Client's unconditional and in writing agreeing to the Mediator's decisions, i.e. in that case **the parties voluntarily limit the possibility of full realization of their rights prescribed by Articles 18 and 19 of the RA Constitution**.

In view of the above, the Constitutional Court finds that in the event that the Organization waives the right to challenge the decisions of the Mediator in a written agreement with the Office of the Mediator, that is, **on its own free will,** then it is lawful to provide a limited opportunity to challenge the decision of the Mediator and does not cause an issue of constitutionality. And in the absence of the above-mentioned written agreement, it is not lawful to limit the grounds for challenging the decisions of the Mediator to a competent court, insofar as it does not provide for the possibility to challenge those decisions in court on the merits and leads to the blocking of the realization of the rights defined by Articles 18 and 19 of the RA Constitution. And the mentioned rights and freedoms of a person and citizen, as defined by Article 42.1 of the RA Constitution, shall apply to legal entities, insofar as those rights and freedoms are in essence applicable to them. In the framework of this case, the Constitutional Court considers it necessary to emphasize that the regulatory role of those rights and freedoms applicable to legal persons guarantees the legal possibility of effective protection not only of the rights and freedoms of legal entities, but also of the individuals included in those legal entities".

Therefore, the Constitutional Court stated that under Article 17 of the Law, restrictions on the Organization's right to apply to a court are in conformity with the Constitution only in the framework of legal regulations when the Organization has voluntarily waived the right to challenge the decisions of the Financial System Mediator in a written agreement with the Office of the Mediator, in accordance with the procedure prescribed by law.

The Constitutional Court also emphasizes that its decisions must be perceived in their structural integrity (preamble, descriptive-causal and final parts) in order to ensure the clarity of implementation

of the content, principles and features of the legal regulation proposed by those decisions, as well as the rules of objective and subjective conduct deriving from the latter. The **legal assessments** expressed in the descriptive-causal part of the decisions of the Constitutional Court are aimed at the realization of that issue, which, as a rule, contain the conclusions of the final part of the decision of the Court made as a result of the legal analysis of the subject (issues raised and the constitutional-legal disputes) of applications addressed to the Constitutional Court, and the execution of the court decision cannot be guaranteed in case of neglecting their essence and contents.

4.3. By the decision in the civil case No. YKD/5370/02/14 of the Cassation Court dated 02.12.2016, the following comment was given. "… the Cassation Court stated that in the event the Client accepts the decision of the Mediator, it becomes mandatory and the Organization may challenge that decision in court on the merits, if it has not waived the right to challenge the decisions of the Mediator in a written agreement with the Office of the Mediator; and if there is no such written agreement, the Organization may challenge the decision of the Mediator not on the merits but only on limited basis prescribed by Article 17 of the RA Law on Financial System Mediator".

After the adoption of the Decision DCC-1051 of the Constitutional Court dated 09.10.2012, the legislator made an amendment to Part 1 of Article 16 of the Law by the RA Law Ho-117-N dated 09.02.2018, according to which the mentioned Part was supplemented with the words "in accordance with the procedure established by the Civil Procedure Code of the Republic of Armenia" after the words "invalidating it", which entered into force on 09.04.2018.

After the above-mentioned amendment, the Cassation Court has not provided any legal interpretation of Part 5 of Article 339 of the Code, systemically interrelated Part 1 of Article 16, as well as Article 17 of the RA Law on Financial System Mediator, and the Civil Court of Appeal provided the following interpretation: "… Articles 337-340 of the RA Civil Procedure Code establish special norms related to the procedure for annulling the decision of the Financial System Mediator, which has become mandatory for the parties. In particular, the court examining the application for annulment of the relevant decision of the Financial System Mediator is limited only to finding out the existence or absence of grounds prescribed by the RA Law on Financial System Mediator. Therefore, the court makes a decision to annul the decision of the Financial System Mediator only if there are grounds for annulment as prescribed by law. (…)

(…) The Court of Appeal concludes that after the adoption of the Decision No. DCC-1051 of the RA Constitutional Court dated 09.10.2012, the legislator regulated the proceedings on applications for annulment of the decision of the Financial System Mediator and outlined clear boundaries;

therefore the proceedings on the applications under consideration are subject to implementation in accordance with the rules prescribed by the RA Civil Procedure Code, and in such conditions the decision of the Financial System Mediator, in essence, is not subject to dispute. The Court of Appeal considers it necessary also to mention that Part 2 of Article 337 of the RA Civil Procedure Code envisages the restriction of the possibility to challenge the decision of the Financial System Mediator in court in the event that the Organization waived the right to challenge the decisions of the Financial System Mediator in a written agreement with the Office of the Financial System Mediator, and such regulation is consonant with the Decision No. DCC-1051 of the RA Constitutional Court.

At the same time, in the absence of the above-mentioned agreement, on the basis of the new RA Civil Procedure Code and the RA Law on Financial System Mediator, the decision of the Financial System Mediator, which became obligatory for the parties, can be annulled only under the grounds prescribed by Part 1 of Article 17 of the RA Law on Financial System Mediator, and not as a result of examination on the merits of the legitimacy of the decision of the Financial System Mediator" (civil case No. YKD/2336/02/17 dated 09.10.2019).

Based on the above, the Constitutional Court notes that as a result of the amendment made by the legislator, the current regulation and its interpretation in law enforcement practice are not consonant with the assessment expressed by the Constitutional Court in the Decision DCC-1051 of the Constitutional Court dated 09.10.2012, since the Constitutional Court has clearly stated that it is not lawful to limit the grounds for challenging the decisions of the Mediator in a competent court, insofar as it does not provide for the possibility to challenge those decisions in court on the merits and leads to the blocking of the realization of the right defined by Articles 61 of the Constitution, as a result of which the legislator should have formulated the regulation in such a way as to enable the Organization to challenge the decision of the Mediator on the merits, since the whole essence of the Decision DCC-1051 was to eliminate of the existing illegal restriction under the current regulation.

At the same time, the above does not preclude the consideration of easing the workload of the courts through the use of alternative means of resolving disputes and/or introduction of out-of-court institutions and procedures in the domestic dispute resolution system due to other legitimate goals. However, this must be done in the light of the legal assessments of the European Court of Human Rights and the Constitutional Court on access to justice and a fair trial. In particular, it is the positive responsibility of the state to ensure that the restrictions applied do not restrict a person's right of access to a court to such an extent as to impair the very essence of that right. And for that purpose, it is

necessary to ensure the legitimacy of the purpose of the restriction, the reasonable proportionality between the means employed and the aim sought to be realized.

Based on the review of the case and governed by Clause 1 of Article 168, Clause 8 of Part 1 of Article 169, and Article 170 of the Constitution, as well as Articles 63, 64 and 69 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. Part 5 of Article 339 of the Civil Procedure Code is in conformity with the Constitution in the interpretation that the mentioned provision does not restrict the right of the Organization, that has not signed a written agreement with the Office of the Financial System Mediator on the waiver of the right to challenge the decisions of the Financial System Mediator, to challenge in court **on the merits** the decision that has become mandatory for the parties.

2. Part 1 of Article 16 of the RA Law on Financial System Mediator is in conformity with the Constitution.

3. Pursuant to Part 10 of Article 69 of the Constitutional Law on the Constitutional Court, the final judicial act issued in respect of the applicant shall be subject to review in the manner prescribed by law on the basis of a newly revealed circumstance, since Part 5 of Article 339 of the Civil Procedure Code was applied to the applicant in an interpretation other than prescribed in Clause 1 of this Decision.

4. Pursuant to Part 2 of Article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman **A. Dilanyan**

December 8, 2020
DCC -1571