REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, 17 December 2021
Ref. no.:AGJ 1918/21

*This translation is unofficial and serves for informational purposes only.*

# JUDGMENT

in

**case no. KI84/21**

Applicant

**Kosovo Telecom J.S.C.**

**Constitutional review of Decision CML. No. 12/20 of the Supreme Court of Kosovo, of 20 January 2021**

**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

## Applicant

1. The Referral is submitted by Kosovo Telecom J.S.C., represented by Sebahedin Ramaxhiku and Gazmend Nushi (hereinafter: the Applicant).

## Challenged decision

2. The Applicant challenges Decision CML. No. 12/20 of the Supreme Court of Kosovo [hereinafter: the Supreme Court] of 20 January 2021, in conjunction with Decision Ac. No. 3610/20 of the Court of Appeals of Kosovo [hereinafter: the Court of Appeals] of 8 October 2020, and Decision PPP. No. 1486/19 of the Basic Court in Prishtina [hereinafter: the Basic Court] of 6 July 2020.

## Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Decision of the Supreme Court, which allegedly violates the Applicant's rights, guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

4. The Applicant has also requested the imposition of the interim measure in order to immediately suspend the implementation of the enforcement against the Applicant according to the Enforcement Order [P. No. 491/19] of 15 July 2019 of the Private Enforcement Agent Ilir Mulhaxha (hereinafter: Private Enforcement Agent), and Decision [PPP. No. 1486/19] of 6 July 2020, of the Basic Court; Decision Ac. No. 3610/20 of the Court of Appeals of Kosovo of 8 October 2020; and Decision CML. No. 12/20 of the Supreme Court of Kosovo, of 20 January 2021.

## Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## Proceedings before the Constitutional Court

6. On 6 May 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 26 June 2021.

8. On 18 May 2021, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

9. On 21 May 2021, the Court notified the Applicant about the registration of the Referral. On the same date, a copy of the Referral was sent to the Supreme Court of Kosovo.

10. On the same date, the Court notified Company "Dardafon.net" L.L.C (hereinafter: company "Dardafon") about the registration of the Referral, in capacity of the interested party, and the Private Enforcement Agent, and notified them that they can submit their comments, if any, to the Court, within the deadline of 7 (seven) days, from the day of receipt of the letter.

11. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

12. On 2 June 2021, company "Dardafon" submitted to the Court its response regarding the Referral.

13. On 26 June 2021, pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

14. On 14 July 2021, the Court notified the Applicant and the Supreme Court regarding the comments submitted by company "Dardafon".

15. On 16 July 2021, the Court requested information from the Applicant regarding the Applicant's assertion that the Ministry of Economy has shown readiness to provide its assistance in resolving the issue related to the execution of the decision that is the subject of the dispute before the Court.

16. On 27 July 2021, the Court received the Applicant's response to the Referral notifying the Court that *"so far Telecom has not received any concrete material assistance from [the Ministry of Economy] ME regarding the execution of the Arbitral Tribunal Decision at ICC no. 2099/MHM of 09 December 2016"*.

17. On 8 September 2021, the Review Panel decided that the Referral be considered at a forthcoming session.

18. On 27 September 2021, the Court requested the Private Enforcement Agent to submit the complete case file.

19. On 7 October 2021, the Private Enforcement Agent submitted to the Court the complete case file.

20. On 24 November 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

21. On the same date, the Court unanimously decided that the Referral is admissible and: *i)* by a majority of votes, that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the European Convention on Human Rights; *ii)* by a majority of votes, declared invalid Decision CML. No. 12/20 of the Supreme Court of Kosovo of 20 January 2021 and Decision Ac. No. 3610/20 of the Court of Appeals of 8 October 2020; *iii)* by a majority of votes, remanded Decision Ac. No. 3610/20 of the Court of Appeals, of 8 October 2020, for reconsideration in accordance with the Judgment of this Court, and iv) unanimously, rejected the request for interim measure.

## Summary of facts

22. The Court notes that the Applicant regarding this case also addressed the Court with Referral KI179/20, in connection with which the Court rendered the Resolution on Inadmissibility of 27 January 2021, Applicant *Kosovo Telecom J.S.C.* (hereinafter: case KI179/20). In case KI179/20, the Court unanimously decided that the Referral is inadmissible on constitutional basis because it is premature as provided by Article 113 paragraph 7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure. This is because the Court found that in relation to the Applicant's case, in parallel with the Applicant's Referral submitted to the Constitutional Court, the court proceedings were being conducted before the Supreme Court, which had not yet rendered a decision on the request for protection of legality against Decision [Ac. No. 3610/20] of the Court of Appeals and Decision [PPP. No. 1486/19] of the Basic Court, filed by the Office of the Chief State Prosecutor. Therefore, the Court also, in accordance with Article 27 paragraph 1 of the Law and Rule 57 paragraph (1) of the Rules of Procedure, decided that the request for interim measure should be rejected because it could no longer be the subject of review.

23. In the following, the Court refers to the facts presented as in case KI179/20, followed by the new proceedings conducted after the issuance of the Court's Resolution in case KI179/20.

24. The Court recalls that three proceedings were conducted in respect of the Applicant's case:

*1)* Arbitral proceedings regarding the resolution of the dispute from the Agreement for Support Services of the Virtual Mobile Network Operator, signed between the Applicant and the company "Dardafon";
*2)* Proceedings regarding the recognition of the Decision of the Arbitral Tribunal in Kosovo after the dispute from the Agreement for Support Services of the Virtual Mobile Network Operator; and
*3)* Proceedings regarding the enforcement of the Decision of the Arbitral Tribunal regarding the dispute from the Agreement for Support Services of the Virtual Mobile Network Operator.

25. The Applicant, as in case KI179/20, specifically challenges before the Court the third proceedings, related to the enforcement proceedings of the Arbitral Tribunal Decision regarding the dispute from the Agreement for Support Services of the Virtual Mobile Network Operator. However, in the following, the Court will present the facts regarding the abovementioned three proceedings.

***1) Proceedings conducted regarding the dispute from the Agreement for Support Services of the Virtual Mobile Operator***

26. On 16 January 2009, the Applicant and the interested party - company "Dardafon" signed "Mobile Virtual Operator Support Services Agreement" (hereinafter: the MSA) on the basis of which the company "Dardafon" agreed to provide mobile services to the Applicant under a profit sharing model.

27. On 13 April 2015, following disputes between the Applicant and the company "Dardafon", regarding the implementation of the MSA, as well as after the failure of attempts to resolve disputes through conciliation, the company "Dardafon" initiated the arbitral proceedings before the Arbitral Tribunal of the International Chamber of Commerce - ICC (hereinafter: the Arbitral Tribunal).

28. The possibility of resolving disputes by arbitration was defined in the MSA signed by the Applicant and the company "Dardafon", which determined that: *"Any dispute by the parties under this Agreement shall be subject to an internal dispute settlement procedure to be agreed. If the matter cannot be settled through that procedure, either party may initiate arbitration in London, England, under the rules of the International Chamber of Commerce ("ICC"). If the parties cannot agree on a single arbitrator, then each party will appoint one arbitrator and the two arbitrators will appoint the third arbitrator. All arbitral decisions are final and cannot be challenged in court. The party initiating the arbitration shall bear the costs of such an initiative."*

29. On 9 December 2016, the Arbitral Tribunal rendered the Final Decision [No. 20990/MHM] by which: (1) The Arbitral Tribunal ordered the Applicant to immediately: (a) Allocate to the Company "Dardafon" mobile numbers required in accordance with Section 2.6.1 of the Support Agreement; b) To offer to the company "Dardafon" required 3G and 4G services in accordance with Section 2.4.1 of the Support Agreement; (2) The Arbitral Tribunal declares that in accordance with the Support Agreement, the company "Dardafon" must be delivered that amount of SIM cards as requested by the latter from time to time; (3) The Arbitral Tribunal shall order the Applicant to pay the Company "Dardafon" a contractual penalty in the total amount of € 8,785,000 plus interest rate of 8% as of 14 April 2015. This amount included the contractual penalty that is calculated up to the date of this Final Decision as follows: (a) € 1,315,000 for late delivery of required SIM cards; (b) € 3,800,000 for non-provision of required mobile numbers; (c) € 3,670,000 for non-provision of required 3G and 4G services; (4) The Arbitral Tribunal shall order the Applicant to pay to the Company "Dardafon" for the damage in the name of loss of profits in the total amount of € 17,315,000 plus interest rate of 8% as of 14 April 2015; (5) The Arbitral Tribunal shall order the Applicant to pay the

Company "Dardafon" the contractual penalty of € 5,000 for each case of further delay calculated in days from the date of issuance of this decision until the fulfillment by the Respondent of Orders 1) a) and b) above, but only if and to the extent that the total amount of these penalties exceeds the amount of € 17,315,000 under Order 4, above; 6) All other claims for compensation are rejected; 7) The Applicant is obliged to pay the company "Dardafon" the amount of 75% of the costs incurred in this arbitral proceeding, with the exception of the costs incurred by the internal staff of the company "Dardafon", namely the amount of 972,121.22 € and 534,000.00 USD.

### *2) Proceedings related to the recognition of the decision of the Arbitral Tribunal*

30. On 7 March 2017, the company "Dardafon" submitted to the Basic Court in Prishtina - Department for Economic Matters (hereinafter: the Basic Court) a proposal for the recognition and execution of the Final Decision [No. 20990/MHM] of 9 December 2016, of the Arbitral Tribunal.

31. On 24 May 2017, between the Applicant and the company "Dardafon" an Agreement was reached for the Execution of the Final Decision [No. 20990/MHM] of 9 December 2016, of the Arbitral Tribunal.

32. On 2 June 2017, the company "Dardafon" withdrew the proposal for the recognition and execution of the Final Decision of the Arbitral Tribunal, based on the agreement reached. Consequently, on 19 June 2017, the Basic Court by the Decision [IV. C. 118/17] found the withdrawal of the proposal for the recognition and final execution of the Decision of the Arbitral Tribunal.

33. On 27 April 2018, the company "Dardafon" by letter [01–1562/18] notified the Applicant about the termination of the Agreement for the Execution of the Final Decision of the Arbitral Tribunal, based on the inadequate implementation of this Agreement set forth in Article 8.3 thereof. Also, the company "Dardafon" states that based on Article 8.3 of this Agreement, in case of termination of the Agreement by the company "Dardafon", the provisions of the Final Decision [no.20990/MHM] of 9 December 2016, of the Arbitral Tribunal shall be effective.

34. On 16 July 2018, the company "Dardafon" submitted to the Basic Court the Proposal for the recognition and execution of the Final Decision [20990/MHM] of 9 December 2016, of the Arbitral Tribunal.

35. On 11 February 2019, the Basic Court by the Decision [IV. C. No. 388/18] decided to: (i) recognize and declare enforceable the decision of the Arbitral Tribunal, at the International Chamber of Commerce (ICC), ICC case, No. 20990/MHM, Place of Arbitration: London, England, The final decision of 9 December 2016, in the legal case in DARDAFON.NET LLC, [...], as claimant and Kosovo Telecom j.s.c. (former PTK j.s.c.) [...] as the respondent, in entirety, as in the enacting clause of the abovementioned Decision; (ii) The Applicant is obliged to pay the costs of the proceedings for the recognition and execution of the decision of the Arbitral Tribunal to the company "Dardafon" in the amount of 2.150.00 €.

36. On 19 February 2019, the Applicant filed an appeal with the Court of Appeals against the abovementioned Decision of the Basic Court, on the grounds of (i) erroneous application of the substantive law, proposing that the appealed Decision be annulled and the case be remanded to the first instance court for retrial.

37. On 1 April 2019, the Court of Appeals by Decision [Ae. No. 88/2019] dismissed as inadmissible the Applicant's appeal filed against the Decision [IV. C. No. 388/18] of 11 February 2019, of the Basic Court. Consequently, this Decision became final and enforceable.

### *3) Proceedings conducted regarding the enforcement of the Decision of the Arbitral Tribunal, which proceedings is challenged before the Court by the Applicant*

38. On 8 July 2019, the company "Dardafon" submitted the Proposal for Enforcement of the final Decision [No. 20990/MHM] of 9 December 2016, of the Arbitral Tribunal of the Chamber of Commerce and Industry in Paris.

39. On 15 July 2019, the Private Enforcement Agent issued the Enforcement Order [P. No. 491/19] by which it allowed the enforcement proposed by the company "Dardafon", based on the enforcement document, namely the final Decision of the Arbitration [No. 20990/MHM] of 9 December 2016, in the amount of *"25,000,000.00 euro (for confirmation from the financial expertise after the calculation of the interest)"*.

40. On 18 July 2019, the Applicant filed Objection against Enforcement Order [P. No. 491/19] with the proposal that: (i) the Objection of the Applicant be approved in entirety as grounded; and (ii) to annul the Enforcement Order [P. No. 491/19] of 15 July 2019, of the Private Enforcement Agent; (iii) to reject the Proposal for Enforcement of the Company "Dardafon". In his objection, the Applicant alleged that (i) the document on the basis of which the Enforcement Order was issued has no executive title and has no features of enforceability, in accordance with Article 71.1.1 of Law No. 04/L-139 on Enforcement Procedure (hereinafter: LEP); (ii) by a public document or a document certified in accordance with the law, the parties have agreed not to request enforcement on the basis of the enforcement document, in accordance with Article 71.1.1.3 of the LEP; and (iii) requested from the Basic Court to hold a public hearing based on article 73 of the LEP.

41. On 24 July 2019, the company "Dardafon" filed a response to the debtor's objection stating that the debtor's claims filed in the objection are not based on law and that the enforcement order is challenged on unjustified legal basis and in order to prolong the enforcement proceedings.

42. On 22 June 2020, a hearing to review the validity of the debtor's objection within the Basic Court was held, in which case the latter issued a Conclusion obliging the company "Dardafon" to submit to the Basic Court within (three) 3 days a submission for the specification of the proposal for enforcement and that regarding the total amount of the main debt.

43. On 25 June 2020, the company "Dardafon" submitted the supplementation to the proposal (the supplementation to the proposal was registered with the Basic Court on 29 June 2020), specifying the exact amount of the total debt, requesting to oblige the Applicant to pay on behalf of the debt the total amount of € 24,684,003.15, with an interest rate of 8% per year which would be calculated from 8 July 2019 until the final payment. The company "Dardafon" also submitted a Report of the Legal Auditor, regarding the calculation of the abovementioned amount and evidence regarding the payments made to the Applicant. In the abovementioned report of the auditor it was established that *"The total amount of the remaining obligation is subject to verification and ascertainment through expertise assigned by the private enforcement agent during the calculation of interest ordered by the Final Arbitration Decision".*

44. On 6 July 2020, the Basic Court by the Decision [PPP. No. 1486/19]: (i) approved as partially grounded the Applicant's objection, regarding the amount of € 315,996.85, thus repealing the Enforcement Order [P. No. 491/2019] of 15 July 2019, in relation to this amount issued by the Private Enforcement Agent; and (ii) rejected the Applicant's objection regarding the amount of € 24,684,003.15 as ungrounded, and for this part the Enforcement Order [P. No. 491/2019] of 15 July 2019, issued by the Private Enforcement Agent, remains effective.

45. On 7 July 2020, the Applicant submitted the Declaration on the Completion of the Enforcement Proposal of the company "Dardafon", mentioned above, requesting, *inter alia*, that the Applicant's Objection be approved as grounded, while the proposal for enforcement be considered withdrawn. The Applicant stated that he opposes the Creditor's Complaint [Dardafon Company], both formally and materially. From the formal point of view, the Applicant considered that the submission submitted on 29 June 2020 by the creditor was submitted with a delay of 4 days, therefore requested that the proposal for enforcement be considered withdrawn. With regard to the material objection, the Applicant considered that the Conclusion of the Basic Court of 22 June 2020, does not find the provisions of the LEP grounded and represents an excess of authority giving the Creditor the opportunity to deviate the value of the enforcement for which he already received the Enforcement Order. The Applicant regarding the new value € 24,684,003.15, challenged the latter with the reasoning that (i) it does not appear in the final Decision of the Arbitration Tribunal of ICC 20990/MHM of 9 December 2016; (ii) it does not appear in the Creditor's Enforcement Proposal of 15 July 2019; (iii) for this value no enforcement order was issued P. No. 491/19 of 15 July 2019; and (iv) for this value the debtor's objection has not been filed.

46. On 9 July 2020, the company "Dardafon" by the letter requests the Applicant to fulfill the debt voluntarily by 10 July 2020.

47. On 9 and 10 July 2020, the Applicant, by the submissions, requests the enforcement authority to postpone the enforcement until the case is decided by the Court of Appeals, a request which was rejected by the company "Dardafon", which requested from the enforcement authority to act in accordance with the Decision [PPP. No. 1486/19] of the Basic Court, as the legal requirements for

such a request have not been met and the debtor has not deposited any evidence or guarantee.

48. On 10 July 2020, the Applicant filed an appeal with the Court of Appeals against the Decision [PPP. No. 1486/19] of 6 July 2020, of the Basic Court in the rejecting part of the Enforcement, namely against its point (ii), due to violation of the provisions of the enforcement procedure and erroneous application of substantive law, with the proposal to approve the appeal of the debtor as grounded and to annul the abovementioned Decision of the Basic Court. The Applicant alleged before the Court of Appeals that the Basic Court, *inter alia*, did not take into account the Applicant's submission as, according to it, the Decision [PPP. No. 1486/19] of the Basic Court was ready the day before, namely on 6 July 2020, without considering the Applicant's position on the specification of the Enforcement Proposal of the company "Dardafon" and other accompanying documents, and thus violating the legal provisions and denying the Applicant's right to state about the claims of the company "Dardafon", in accordance with Article 182.2 (i) of the Law No. 03/l-006 on the Contested Procedure (hereinafter: LCP), especially when it comes to new allegations and documents.

49. The Applicant also raised the issue of admissibility of the Specification of the Enforcement Proposal as it considered that the submission submitted on 29 June 2020 by the creditor was submitted with a delay of 4 days, therefore, requested that the enforcement proposal be considered withdrawn.

50. On an unspecified date, the company "Dardafon" filed a response to the appeal, challenging the Applicant's appealing allegations, with the proposal that the Court of Appeals considers this appeal inadmissible, or reject the latter in its entirety as ungrounded.

51. On 14 July 2020, the Private Enforcement Agent, by the Conclusion [P. No. 491/19] rejected the Applicant's request for postponement of enforcement as ungrounded.

52. On 15 July 2020, the Private Enforcement Agent by the Order [P. No. 491/19] ordered the Commercial Banks in Kosovo: PCB, RBKO, BKT, NLB, BPB, TEB, Banka Ekonomike, IsBank, ZiraatBank, that within the deadline of twenty four (24) hours after the receipt of this order, to provide the private enforcement agent with the data (i) whether the Applicant has an account in these banks; and (ii) if the latter has funds in the bank account to block the funds in the name of the principal debt, legal interest, costs of contested proceedings and enforcement costs in the total amount of 26,789,532.62 euro.

53. On 20 July 2020, the third party - namely the Applicant's Shareholder (Government of Kosovo, Ministry of Economy and Environment, Policy and Monitoring Unit of Publicly Owned Enterprises) submitted a request for suspension of actions taken by the enforcement authority as well as the postponement of the enforcement procedure.

54. On 20 July 2020, following the request of the enforcement agent addressed to the company "Dardafon" to declare regarding the request of the third person,

namely the Government of Kosovo, the latter opposes this request for postponement of the enforcement as it has no legal support, and that requires the enforcement authority to reject it as ungrounded.

55. On 21 July 2020, the Private Enforcement Agent, by the Conclusion [P. No. 491/19] rejected as ungrounded the request of the third person, the Shareholder Government of Kosovo-Ministry of Economy and Environment, Policy and Monitoring Unit of Publicly Owned Enterprises to postpone the enforcement procedure.

56. On 21 July 2020, the Private Enforcement Agent, through the Transfer Order [P. No. 491/19] obliged Raiffeisen Bank, to execute from the Applicant, within (60) minutes after receiving this order, the main debt, legal interest, costs of the enforcement procedure, costs of the contested procedure and the implementation of efficiency of the Enforcement Office, in the following values: Total: 26,789,532.62 euro.

57. On 29 July 2020, the Applicant and the company "Dardafon" in the presence of the Applicant's shareholder in the capacity of guarantor, reached an agreement for the temporary release of current bank accounts.

58. On the same date, the Private Enforcement Agent by order [P. No. 491/19] obliged the commercial banks in Kosovo to unblock the Applicant's bank account, as a result of the creation of new circumstances, namely the reaching of an agreement between the Applicant and company "Dardafon".

59. On 8 October 2020, the Court of Appeals by Decision [Ac. No. 3610/20] rejected the Applicant's appeal as ungrounded, and upheld the Decision [PPP. No. 1486/19] of 6 July 2020, of the Basic Court. The Court of Appeals considered that the Court of First Instance has rendered a fair decision based on the evidence found in the case file. The Court of Appeals was based on Article 21 of the LEP and 22 of the LEP, which define the enforcement documents and based on this the Court of Appeals considered that the enforcement is allowed based on the final Decision of the Arbitration, ICC No. 20990/MHM of 9 December 2016, recognized by the Decision of the Basic Court IV. C. No. 388/18 of 11 February 2018, which document meets the requirements according to the provisions of the LEP. Regarding the Applicant's allegation that the final arbitral award does not possess the enforcement clause, the Court of Appeals stated that according to the LEP, as enforcement documents are provided the decisions of foreign arbitral tribunals and settlements within these courts, which have been accepted for enforcement in the territory of Kosovo.

60. Regarding the allegation for the Agreement for the execution of the final decision of the Arbitration, signed between the company "Dardafon" and the Applicant on 14 May 2017, which has the status of an enforcement document because it represents a Notarial Deed, which cannot be separated from the creditor, the Court of Appeals clarified that with this notary deed, the Agreement on the execution of the final decision of the Arbitration was certified and taking into account that the Applicant was not able to pay and fulfill the obligations arising from the decision of the Arbitration and based on

Article 8.3 of the Agreement, the Applicant has agreed that in case of failure to fulfill the obligations under item 1.6 of the Agreement, the company "Dardafon" may terminate this agreement and automatically enter into force the provisions of the final decision of the Arbitration.

61. As to the Applicant's allegation that with the specification requested by the creditor, a new enforcement value has been created, and that such value is not contained even in the decision of Arbitration 20990/MHM, the Court stated that in this decision, namely in item 3, is set the value of 8,785,000 euro, plus interest of 8% since 14 April 2015, then in item 4, is set the value of 17, 315,000 euro, plus interest of 8% since 14 April 2015 Also in item 5 is defined the contractual penalty of 5000 euro, for each case of delay from item 1, a) and b), while in item 7, the value of 972,121.22 euro and the value of 534,000.00 USD. Regarding these values, the Court of Appeals stated that the specification of the debt was made in accordance with the decision of the Arbitration, as well as the payments made by the Applicant. Therefore, the Court of Appeals stated that *"With regard to the Applicant's claims for the amount of debt, the private enforcement agent must, during the enforcement procedure, calculate the interest and the contractual penalty specified in the enforcement document, until the fulfillment of the obligation in full based on the provision of article 43, paragraph 3 of the LEP" [...].* The Judgment of the Court of Appeals did not contain a specific reasoning regarding the Applicant's allegation that the Basic Court denied the Applicant's right to state about the claims of the company "Dardafon", regarding the specification of the debt.

62. On 3 November 2020, the Applicant addressed the Office of the Chief State Prosecutor with a proposal to initiate a request for protection of legality in the Supreme Court against the Decision [PPP. No. 1486/19] of the Basic Court and the Decision [Ac. No. 3610/20] of the Court of Appeals. The Applicant in his request stated that regarding the submission submitted by the creditor, and the decision issued on 6 July 2020, by the Basic Court by Decision PPP. No. 1486/19, it was denied the right to state about this submission and the new value of the enforcement that differed from his initial request. Regarding the latter, the Applicant stated that the new value of the request was not the subject of the enforcement proposal and in this regard no enforcement order was issued by the private enforcement agent. The Applicant also considered that the expertise of 22 June 2020 prepared by the auditor as well as the considerable number of invoices and debit notes, had not been submitted earlier and in this evidence, the Applicant was not enabled to declare. The Applicant considers that the Basic Court should schedule a new hearing, through which the Applicant would have the opportunity to declare the value of the proposal. Therefore, the Applicant considered that the two lower courts have violated his legal and constitutional rights, because they have not given the Applicant the opportunity to review the case, as without receiving the position of the Applicant regarding the specification of the order for enforcement, the decision of the Basic Court was issued.

63. On 10 November 2020, the Office of the Chief State Prosecutor filed a request for protection of legality [KMLC. No. 152/2020] with the Supreme Court against the Decision [PPP. No. 1486/19] of the Basic Court and the Decision [Ac. No. 3610/20] of the Court of Appeals. The Office of the Chief State

Prosecutor was based on Article 247, paragraph 1 point a) of the LCP, stating that the Applicant in the request for protection of legality, did not have the opportunity to state in writing or at the hearing about the specified proposal for enforcement, and based on Article 5 item 5.1 of the LCP, the court should have enabled the Applicant to state on the allegations presented in the submission of the company "Dardafon".

64. On 18 December 2020, in the office of Private Enforcement Agent I.M. a hearing was held convened by the Applicant and the company "Dardafon", regarding the debt in the amount of 17,281,141, 98 euro, which is reflected in the Minutes of this hearing, signed by the representatives of the company "Dardafon" and Applicants, the following Conclusion was issued:

*1. The agreement reached between the parties for the payment of the debt and expenses specified above is approved and this agreement will enter into force after its signing.*
*2. The debtor is obliged to pay the monthly debt installments in the amount of € 749,973.60 according to the amortization plan of the payments specified above (from 15 January 2021).*
*3. The debtor is obliged to pay the monthly installments of expenses in the amount of € 10,619.62 for each month according to the payments specified as above (from 15 January 2021).*
*4. In case of failure of the agreement by the debtor in the fulfillment of the obligations of the debt installments and the expenses according to the dynamics of payments, the creditor's request for the complete fulfillment of the debt, default interest and expenses will be acted upon.*

*A copy of this agreement is delivered to both parties"*

65. On 20 January 2021 the Supreme Court held a hearing in which the Applicant and the company "Dardafon" were present. At this hearing the creditor [company "Dardafon"], considered that with regard to the allegation that the debtor [Applicant], was not given the opportunity to declare, does not stand. According to the creditor, it did not calculate the interest on his request for enforcement. The creditor stated that on 25 June 2020, it also calculated the interest along with the certification of an auditor. The creditor consequently considered that the Applicant did not challenge the respective submission. The creditor at the hearing also considered that the debtor and the prosecutor had never considered that the interest rates were erroneously calculated and therefore considered that there was no need for a separate hearing. The Applicant, on the other hand, stated at this hearing, in which case he reiterated his allegations as in the request for protection of legality, stating that it was not given the opportunity to make a statement regarding the creditor's submission, as it had accepted submissions on 6 July 2020 while the response related to those submissions was submitted on 7 July 2020, however, the Basic Court issued its decision on the case on 6 July 2020, without waiting for the Applicant's response, and moreover without holding hearing. Therefore, the Applicant stated that the regular courts have violated the principle of adversarial proceedings and equality of arms.
66. On 20 January 2021, the Supreme Court, by Decision CML. No. 12/20, rejected as ungrounded the request for protection of legality of the State Prosecutor.

The Supreme Court noted that with regard to the case raised by the State Prosecutor, the Applicant was not given the opportunity for clarification regarding the allegations filed on 29 June 2020, and in the attached expertise of F.P. The Supreme Court initially referred to Article 247 paragraph 1 of the LCP, which sets out the conditions for filing a request for protection of legality, and considered the allegation of holding a hearing ungrounded. The Supreme Court further reasoned that in the enforcement proceedings when deciding on the objection as a means of challenging, the court has the discretion to assess the need to hold a hearing. The Supreme Court stated that Article 247 paragraph 1 of the LCP refers to the case when the court of first instance rendered the judgment without a main hearing.

67. The Supreme Court, stating that it assesses the Applicant's allegation in the spirit of the provision of Article 247 paragraph 1 of the LCP and taking into account the specifics of the enforcement procedure, stated that the lower instance courts did not violate the rights of the Applicant. In this case, the Supreme Court stressed that the issuance of a judgment without a main hearing as a violation refers to cases where it is necessary to obtain evidence to establish substantive facts and thus denied such a possibility to the parties, while in the enforcement procedure the causes of objection are mainly assessed without holding the hearing. However in this case, the Supreme Court considered that the Basic Court in objection after holding a hearing has consumed any possible violations related to the allegations of holding the hearing. Furthermore, the Supreme Court emphasized that holding a hearing is a legal possibility that the court considers in cases where it accepts in consideration and decides the objection of the party if the nature of the objections is such that implies clarification of some allegations that occur after hearing the parties. Therefore, the Supreme Court considered that it does not mean that the court in the enforcement procedure will schedule several hearings and in this way to take into consideration the issues that have been consumed in the procedure of issuing the enforcement document.

68. The Supreme Court considered that the nature of the allegations made by the state prosecutor were such that they could be made by the debtor [the applicant], in the procedure of correcting irregularities of the enforcement agent, and according to the Supreme Court, the first instance court has rightly assessed the allegations that have referred to the admissibility of the enforcement, including the suitability of the enforcement document and all other allegations as defined by the LEP.

69. The Supreme Court further reasoned that the State Prosecutor's allegation for giving the possibility of a statement regarding the creditor's submission and the expertise of F.P. is ungrounded and without influence on the decision otherwise because *"neither by the submission nor by the alleged expertise has the content of the loan/request specified in the enforcement document been changed, which has previously passed the recognition procedure. Thus, if the debtor has assessed that with the referred expertise any irregularities have been made in the implementing enforcement procedure, he has had the opportunity to request in a special procedure from the court the correction of irregularities, otherwise in the case of the hearing summoned by the Supreme Court on 20.01.2021, no substantial claim has been made, explanations of*

*how the submission and the expertise influenced the change of the loan assigned by the enforcement document.*

*Obtaining an expertise in the enforcement procedure is common especially when it is necessary to calculate a periodically adjudicated claim, or even interests and other successive claims, but the standard in practice means that such an expertise can not be obtained in the phase before the execution is allowed, but can be taken after the stage of enforcement permit is completed. The fact that the Creditor has submitted an expertise has not affected the legality of the procedure because the enforcement body after the enforcement order has become final, has taken the evidence for the calculation of claims and thus the impact of the expertise submitted by the creditor does not have any impact."*

**Applicant's allegations**

70. The Applicant alleges that the challenged decision of the Supreme Court violates his rights guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments] and 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

71. The Applicant reiterates that on 22 June 2020, in the hearing held regarding the validity of the Applicant's Objection, the Basic Court issued '*Conclusion*' whereby it obliged the company "Dardafon" to submit the submission for specification of the proposal for enforcement within 3 (three) days.

72. According to the Applicant, this submission was submitted by the company "Dardafon" on 29 June 2020, which the Applicant received on 6 July 2020. According to the Applicant, on 7 July 2020, the latter filed "Statement on the Creditor's Submissions (company "Dardafon")".

73. Therefore, according to the allegation, before the Applicant declared himself, or according to it, at the same time when the Applicant received the Specification of the Proposal for Enforcement of the company "Dardafon" on 6 July 2020, the Basic Court had already prepared and rendered the Decision [PPP. No. 1486/19], denying it the legal right to declare about the Submission of the company "Dardafon" for the Specification of the Proposal for Enforcement and the new value of the enforcement which differed from the initial value, which means that it was a new Request.

74. According to the Applicant, the new value of the proposal of the company "Dardafon" according to the Submission of 6 July 2020, (i) was not a subject of his initial Proposal for Enforcement; (ii) regarding this value no Enforcement Order was issued by the Private Enforcement Agent; and (iii) in relation to this value the Debtor's Objection was not made nor was the hearing of 22 June 2020 scheduled.

75. Further, the Applicant states that in addition to the new Proposal and the new value of the enforcement, the Submission of the company "Dardafon" also contained a "Financial Expertise" of 22 June 2020, prepared by Auditor F.P

and a significant number of invoices and debit notes which were never submitted at any earlier stage of the procedure and that the company "Dardafon" has never been notified about them.

76. Regarding this point, the Applicant refers to Article 5 paragraph 1, Article 7 paragraph 3 and Article 357 paragraph 2 of the LCP, which according to it, are applied in the enforcement procedure and underlines the following *"The Basic Court in Prishtina has decided regarding the debtor's objection to hold a court hearing, at the moment when the creditor, before the court hearing was over, has changed the Proposal, the value of the Proposal and at the moment when he has submitted new evidence which he had not submitted. until then and were never seen by the Debtor, the Court was obliged to schedule a new hearing in order to give the Debtor the opportunity to state about these issues and changed circumstances".*

77. Therefore, according to the Applicant, these legal violations were also among his main allegations in the appeal filed with the Court of Appeals on 10 July 2020, and the Proposal for Protection of Legality and the Hearing at the Panel of the Supreme Court of 20 January 2021. According to the Applicant, neither the Court of Appeals nor the Supreme Court elaborated on this allegation.

78. According to the Applicant, the regular courts set a precedent by which the court decision became final without enabling the party to the proceedings to state regarding the claims of the other party. Consequently, the Applicant alleges that the regular courts have violated the provisions of the procedure and Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, namely *"essential elements of the notion of "fair trial" [...] a) the principle of adversarial proceedings; b) the principle of "equality of arms"; and c) the right to a reasoned decision".*

79. According to the Applicant, the regular courts have the responsibility to give each party (i) the opportunity to be present and heard; and (ii) be given the opportunity to present their case in such a manner as not be put at a disadvantage *vis-à-vis* the other party. Regarding this point, the Applicant refers to the cases of the European Court of Human Rights (hereinafter: ECtHR), (i) *Keçmar and Others v. Czech Republic,* Judgment of 3 March 2000*; (ii) Condron and Others v. the United Kingdom,* Judgment of 2 May 2000*;* and *(iii) VanOrshoven v. Belgium,* Judgment of 25 June 1997.

80. Therefore, the Applicant requests the Court to render a Judgment by which: (i) the Referral is declared admissible; (ii) to find that there has been a violation of Article 31 (Right to Fair and Impartial Trial) of the Constitution, in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights; (iii) to declare the Judgment [CML. No. 12/20] of the Supreme Court of Kosovo of 20 January 2021 invalid and to remand the latter for reconsideration; (iv) To order the Supreme Court to notify the Constitutional Court about the measures taken in connection with the implementation of this Judgment; (vi) To declare that this Judgment is effective immediately.

**Request for interim measure**

81. In addition, the Applicant requests the imposition of an interim measure to postpone the enforcement process as the implementation of the enforcement would cause (i) irreparable damage to the Applicant and would (ii) violate the state and national interests, setting from the nature of Telecom activity, which, in the event of enforcement, would go bankrupt due to the extremely high value of the obligation.

82. The Applicant states that due to the blocking of bank accounts, where bankruptcy was at risk, the Applicant was forced to sign *"Debt execution agreement in enforcement proceedings"* with the company "Dardafon", and according to the Applicant, the only reason for signing this agreement is the de-blocking of bank accounts to avoid bankruptcy.

83. The Applicant also states that with the continuation of the execution procedure, there is a real risk that the activity of Telekom will be extinguished, producing unprecedented negative consequences in the wellbeing and functioning of all its subscribers, especially in the functioning and activity of state and security bodies in the form of disabling communication in the performance of their duties, as one of the main segments of their activity.

84. Consequently, the Applicant states that based on the premise of endangering the public interest, risk of causing irreparable damage and the fact that its shareholder - the Ministry of Economy and Environment has shown willingness to offer its assistance in resolving of this issue, in order to prevent these risks, submits a request for the imposition of an interim measure in accordance with Article 27 of the Law on the Constitutional Court. While through the letter of 27 July 2021, the Applicant clarified that *"so far Telecom has not received any concrete material assistance from [Ministry of Economy] ME regarding the execution of the Arbitral Tribunal Decision at ICC no. 20990/MHM of 09 December 2016."*

85. Finally, regarding the imposition of an interim measure, the Applicant requests the Court to render a Decision on the imposition of an interim measure, by which: (i) the interim measure is approved for the duration until a decision on merits is rendered on the case; (ii) The further implementation of the enforcement against the Applicant is immediately suspended, according to the Enforcement Order [P. No. 491/19] of 15 July 2019, issued by the Private Enforcement Agent Ilir Mulhaxha and Decision [PPP. No. 1486/19] of 6 July 2020, of the Basic Court; Decision [Ac. No. 3610/20] of the Court of Appeals of 8 October 2020; Decision CML. No. 12/20 of the Supreme Court of Kosovo, of 20 January 2021 as well as the Agreement for execution of the debt in the enforcement procedure no. 01-156/09 of 17 November 2020 concluded between the company "Dardafon" and the Applicant (iii) The Private Enforcement Agent is ordered to notify the Constitutional Court about the measures taken in connection with the implementation of this Decision; (iv) This Decision shall be notified to the parties, the Applicant and the company "Dardafon".

## Comments of company "Dardafon"

86. Company "Dardafon", in its response to the Referral states that the Applicant's Referral is inadmissible because:
- the Applicant's Referral does not contain the name of the person who signed it, so it is not clear that it submitted the Referral to the Court, therefore the Referral was not submitted by the authorized person;
- The Applicant has not attached any evidence regarding his allegation that the Supreme Court has violated its constitutional rights;
- the decision of the Supreme Court is reasoned and that the Constitutional Court is not an instance *"revisionist and does not examine whether a court has decided a case correctly or not"*. The Applicant has enjoyed all rights before the Supreme Court;
- The Constitutional Court has no substantive jurisdiction to consider whether the First Instance Court in the Enforcement Procedure should organize an additional hearing to decide on a creditor's request to reduce the credit request;
- in the Applicant's case the legal remedies have not been exhausted as the Applicant complains about the amount of the enforcement but in order to request a change in the payment that was made incorrectly the Applicant had to file a lawsuit for unjust enrichment, which the Applicant has not done;
- It is unclear what the Applicant wants to achieve through this procedure as regarding the debt the agreement was signed for the execution of the decision of the Basic Court, on 18 December 2020, therefore, it is clearly indicated the intention to misuse legal remedies;
- The Referral is also ungrounded as the Decision of the Supreme Court does not in any way violate its fundamental constitutional rights as it only considers that the Supreme Court has committed a legal violation and that the Basic Court was not obliged to hold a hearing;
- the Applicant has not proved by any evidence that the calculation of the enforcement amount was done incorrectly;
- the reasons on which the Applicant is referred to for the issuance of the interim measure are not legal as the decision for enforcement is based on a final court decision.

## Relevant constitutional and legal provisions

### Constitution of the Republic of Kosovo

### Article 31
### [Right to Fair and Impartial Trial]

*1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*
*2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.*

*[...]*

**European Convention on Human Rights**

**Article 6**
**(Right to a fair trial)**

*1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
*[...]*

**LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE SUPPLEMENTED AND AMENDED BY LAW NO. 05/L-118 ON AMENDING AND SUPPLEMENTING LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE**

Article 3
Enforcement Authority and Decisions

*[...]*
*5. Conclusion shall be issued for implementation of some actions and to conduct the procedure.*

*6. Against conclusion as per paragraph 5. of Article 3 of the Law, no legal remedy is allowed.*

Article 17
Application of the provisions of other laws

*The provisions of the Law on Contested Procedure shall be accordingly are applied in the enforcement procedure, unless this law or any other law provides otherwise.*

Article 43
Enforcement decision and writ

*[...]*
*3. If the enforcement decision or writ assigns the payment of interest, the enforcement body shall calculate the expenses of the enforcement creditor, except if the collection of interest is to be done from the deposited money in bank account the bank shall make calculations at the expense of the debtor. In cases when the calculation is made by the bank, the enforcement body is obliged to mark in the writ of enforcement the degree of exact interest, the precise guidelines for calculating the time of the interest, and*

*all other details necessary for the banks to enable calculation interest correctly. If in the writ of enforcement there are insufficient information, unclear or incomplete regarding the calculation of interest, the enforcement body is obliged to meet the writ of enforcement at the request of banks."*

Article 73
Decision on objection

*1. Court may decide on the objection out of court session. Alternatively, the court may schedule a public hearing if in the court's view it is necessary for a full understanding of the validity of the objection. The court shall notify all parties of the public hearing. If the court chooses to hold a public hearing, the hearing shall be held within five (5) days after the responses to the objection were required to be received by the court.*

*1a. The Court shall decide on the objection within a deadline of thirty (30) days from the date of receipt of objection.*

*2. The decision on objection shall be issued by a single judge.*

*3. Through the decision, the objection may be accepted, refused as untimely, or rejected as incomplete or not permitted.*

*4. In case of approval of objection, and depending on circumstances of the case, the Court completes the enforcement in entirety or partially, and shall annul any actions taken.*

Article 77
Appeals against the decision on the objection

*1. Against the decision on objection parties have the right on appeal*
*2. The appeal against the decision on objection shall be filed through the first instance court for the second instance court within seven (7) days from the day of acceptance.*
*3. Copy of the appeal shall be submitted to opposing party and other participants who may present response to the appeal within three (3) days.*
*4. Following receiving the response to appeal or following the deadline for response, the case with all submissions shall be sent to the second instance court within three (3) days. Regarding the appeal, the second instance court shall decide within fifteen (15) days.*
*5. The appeal on the decision on the objection does not halt the executive procedure unless guarantees have been provided for the full amount of the credit as described under Article 78 of this law.*
*6. In the event the debtor as appealing party is successful in its appeal, and if its assets have been enforced against upon pursuant to the enforcement decision, he may seek counter-enforcement under the provisions on counter enforcement of this law.*

*Article 79*
*Complaints against irregularities during the conduct of enforcement*

*1. A party or another participant in the procedure may file a complaint with a court concerning irregularities committed by the enforcement body during the conduct of enforcement procedure. The present delivery is made by a written submission to the competent court within seven (7) days of the alleged irregularity.*
*2. Upon request from paragraph 1 of this Article, if the submitter has proposed this, the court issues decision within three (3) days from the day of delivery of submission.*
*3. Against the decision provided in paragraph 2 of this Article, parties or other participants in the procedure are entitled to appeal. The provisions of article 77 of this Law on appeal against the decision are applicable.*

**LAW No. 03 / L-006 ON CONTESTED PROCEDURE**

Article 5

*5.1 The court shall enable each party to make a statement on the claims and allegations submitted by the contentious party.*
*5.2 Only for the cases determined by this law, the court has the power to settle the claim for which the contentious party was not enabled to make a statement.*

*Reasons on which the verdict could be strike*
*Article 181*

*181.1 The verdict can strike:*
*a) due to the violation of provisions of contestation procedures;*
*b) due to a wrong ascertainment or partial ascertainment of the factual state;*
*c) due to the wrong application of the material rights.*
*181.2 Decision based on confession and decision based on withdrawal from the charges can take place due to the violation of provisions of contestation procedures, or due to the confession statement, respectively withdrawal from statement of claim made by mistake or under violent impact or seduction.*

*Article 182*
*182.1 Basic violation of provisions of contested procedures exists in case when the court during the procedure didn't apply or wrong application of any of the provisions of this law, while this has or will impact a rightful legal decision.*

*182.2 2 Basic violation of provisions of contested procedures exists always:*
*[...]*
*h) if it's contrary to the provisions of this law, the court has issued a decision based on confession of the party, disobedience, absence, withdrawal from the claim or without holding of the main hearing;*

*i) if any of the parties through illegal activity, especially by not offering the opportunity for a hearing in the court;*

*[...]*

*n) if the decision has leaks due to which it' can't be examined, especially if the disposition of the decision is not understandable or contradictory in itself with the reasoning of the verdict, or when the verdict has no reason or which gives no justification for the final facts, or which reasoning are unclear, contradictory, or if in the final facts there are contradictions between what is said in the verdict, the main document or the procedural records and of the document or the minutes of proceeding;*
*o) if the verdict overpass the claim for charges.*
*[...].*

Decisions of the second instance court over complaint
Article 195

*195.1 The complaint court in the college session or based on the case evaluation done directly in front of it can:*
*a) disregard the complaint that arrives after the deadline, it's incomplete or illegal;*
*b) disregard the case and reject the claim;*
*c) can disregard the decision and return the case for re-trial in the court of the first instance;*
*d) reject the complaint as an un-based one and verify the decision reached;*
*e) change the decision of the first instance.*

*195.2 The court of the second instance is not linked to the proposal submitted in the complaint.*

*[...]*

*Article 247*

*247.1 The public prosecutor may raise the request for protection of legality:*

*a) for basic violence of provisions of contested procedure, if the violence has to do with territorial competencies, if the court of the first instance has issued a verdict without main proceeding, while it was its duty to held a main proceeding, if decided for the request, on which the contest is continuing, or if is in contradiction with the law, the public is excluded from the main proceeding;*
*b) for wrong application of the material right.*
*[...]*

*Article 357*

*357.1 The party that proposes an expertise has to state why that expertise is needed for as well as its goal. The person for an expertise should also be proposed.*
*357.2 The opponent party should be given a chance to say its opinion regarding proposed expertise.*
*357.3 If the involved parties can not bring a decision regarding the person who will conduct the expertise, or regarding the object or volume, then the court will decide about it.*

**Admissibility of the Referral**

87. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, further specified in the Law and foreseen in the Rules of Procedure.

88. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

*"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
*[...]*
*7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

89. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes:

*"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."*

90. In this regard, the Court notes that the Applicant has the right to file a constitutional complaint, invoking the alleged violations of its fundamental rights and freedoms, which apply to individuals and legal entities. (See Court case No. KI41/09, Applicant *AAB-RIINVEST University L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14; KI35/18, Applicant "*Bayerische Versicherungsverbrand*", Judgment of 11 December 2019, paragraph 40, and KI227/19, Applicant N.T. "*Spahia Petrol*", Judgment of 20 December 2020, paragraph 37).

91. The Court also reviews whether the Applicants have fulfilled the admissibility requirements as required by Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

*Article 47*
*[Individual Requests]*

*"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and*

*freedoms guaranteed by the Constitution are violated by a public authority.*

*2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

*Article 48*
*[Accuracy of the Referral]*

*"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*

*Article 49*
*[Deadlines]*

*"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision...".*

92. With regard to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party, which challenges an act of a public authority, namely the Decision [CML. No. 12/20] of 20 January 2020 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicant also clarified the fundamental rights and freedoms it alleges to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

93. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure and that the latter cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. The Court also notes that the Referral is not manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure, therefore it must be declared admissible and its merits must be reviewed.

**Merits of the Referral**

94. The Court recalls that the Applicant challenges the Decision [CML. No. 12/20] of 20 January 2020 of the Supreme Court, which rejected as ungrounded the request for protection of legality of the State Prosecutor against the Decision [Ac. No. 3610/20] of 8 October 2020 of the Court of Appeals, which had rejected as ungrounded the Applicant's appeal and upheld the Decision [PPP. No. 1486/19] of the Basic Court.

95. The Court recalls that the Applicant's Referral relates to the enforcement proceedings conducted against the Applicant in connection with the enforcement of the decision of the Arbitration Tribunal [ICC no. 20990/MHM] mentioned above. In this regard, acting at the request of the company "Dardafon" private enforcement agent Ilir Mulhaxha, issued the Enforcmement

Order [P. No. 491/19] of 15 July 2019, which ordered the enforcement of the final decision of the Arbitration Tribunal and other procedural costs. Against the Enforcement Order [P. No. 491/2019], the Applicant on 18 July 2019 filed an Objection with the Basic Court, where the latter on 22 June 2020 held a hearing in which it issued a Conclusion which obliged the company "Dardafon" that within the desdline of (three) 3 days to submit to the Basic Court a submission for the specification of the enforcement proposal regarding the total amount of the main debt. On 25 June 2020 (*registered in the Basic Court on 29 June 2020*), the company "Dardafon" submitted the Supplementation of the Enforcement Proposal to the Basic Court in the total amount of 24,684,003.15 euro, adding the legal interest. The company "Dardafon" also submitted a Report of the Legal Auditor, regarding the calculation of the above amount and evidence regarding the payments made to the Applicant. The Applicant states that he received the above mentioned documents on 6 July 2020. On 7 July 2020, the Applicant states that he submitted the Declaration in the Supplementation of the Enforcement Proposal of the company "Dardafon", mentioned above, requesting, *inter alia*, that the Objection of the Applicant be approved as grounded while the proposal for enforcement to be considered withdrawn. However, on 6 July 2020, the Basic Court by Decision [PPP. No. 1486/19] partially approved the objection regarding the amount of 315,99.85 euro and rejected the objection of the Applicant regarding the amount of 24,684,003.15 euro as ungrounded, and in connection with this amount, decided that the Enforcement Order P. No. 491/2019 remains in force.

96. The Applicant against the Decision of the Basic Court [PPP. No. 1486/19] of 6 July 2020 filed an appeal with the Court of Appeals on the grounds of violation of the provisions of the enforcement procedure and erroneous application of the substantive law, with the proposal that the Court of Appeals approves the Applicant's appeal and annuls Decision PPP. No. 1486/19 of the Basic Court of 6 July 2020, and remands the case for retrial to the Basic Court. The Applicant alleged that on 22 June 2020 regarding the review of the Objection submitted by the Applicant, the Court rendered a Conclusion which obliged the company "Dardafon" to specify the proposal for enforcement within (3) three days. On 6 July 2020, the Applicant stated that it had received the submission of the company "Dardafon" - Specification of the Proposal for Enforcement. The Applicant alleged that in addition to the Specification of the Enforcement Proposal, the company "Dardafon" submitted a financial expertise, which was not ordered by the courts, as well as a significant number of invoices and debit notes and which were never submitted to the Applicant for the purpose of eventual declaration about the findings in this expertise and declaration about invoices and debit notes. The Applicant on 7 July 2020, stated that he had submitted the "*Declaration on the Creditor's Submission*" for the Specification of the Enforcement Proposal. The Applicant alleged before the Court of Appeals that the Basic Court, *inter alia*, did not take into account at all the Applicant's submission as, according to it, the Decision [PPP. No. 1486/19] of the Basic Court was ready the day before, thus on 6 July 2020, without reviewing the Applicant's position regarding the Specification of the Enforcement Proposal of the company "Dardafon" and other accompanying documents, and thus violating the legal provisions and denying the Applicant the right to state about the allegations of the "Dardafon" company, in accordance with Article 182.2 (i) of the LCP, especially when it comes to new

allegations and documents. The Court of Appeals by Decision [Ac. No. 3610/20] of 8 October 2020, rejected as unfounded the Applicant's appeal and upheld the Decision [PPP. No. 1486/19]of the Basic Court. Following the Applicant's proposal, the State Prosecutor's Office filed a request for protection of legality with the Supreme Court, in which case the latter rejected the request. Among other things, the Supreme Court reasoned that holding the hearing was not a legal obligation for the Basic Court and in this case it was not necessary to hold an additional court hearing after receiving the specification for the enforcement proposal of the "Dardafon" company. The Supreme Court also stated that the fact that the company "Dardafon" submitted an expertise when it specified the amount of the debt, did not affect the legality of the procedure, especially when the parties signed an agreement for the fulfillment of the obligation with installments.

97. The Applicant alleges before the Constitutional Court that: a) The Basic Court in Decision [PPP. No. 1486/19], denied the Applicant the legal right guaranteed by Articles 5 (1) and 357 (2) of LCP to declare regarding the submission of the company "Dardafon" for the Specification of the Enforcement Proposal and additional documents and evidence submitted (expertise and debit notes invoices) after, according to him, the Decision of the Basic Court [PPP. No. 1486/19] was ready one day before the Applicant submitted his response; and b) The Basic Court, contrary to the law, did not hold a court hearing in order to give the Applicant the opportunity to state his opinion on the new proposal and the new evidence presented by the company "Dardafon".

98. In view of the above, the Applicant alleges that the regular courts have violated the provisions of the procedure and Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, namely *"essential elements of the notion of "fair trial" [...] a) the principle of adversarial proceedings; b) the principle of "equality of arms"; and c) the right to a reasoned decision".*

99. Therefore, the Court will examine the Applicant's allegations of (i) violation of the adversarial principle and of equality of arms, continuing with the allegation of (ii) failure to hold a hearing. The Court is based on case law of the ECtHR, in accordance with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

## *I. ALLEGATIONS RELATED TO THE ADVERSARIAL PRINCIPLE AND EQUALITY OF ARMS*

### *i) General principles for adversarial principle and equality of arms*

100. The Court initially explains that the principle of *"equality of arms"* is an element of a broader concept of a fair trial that requires a *"fair balance between the parties"* where each party must be afforded a reasonable opportunity to present his/her case – under conditions that do not place him at a substantial disadvantage *vis-à-vis* the other party (see the case of the ECtHR *Yvon v. France*, Judgment of 24 July 2003, paragraph 31, and the case of the ECtHR *Dombo Beheer B.V. v. the Netherlands*, Judgment of 27 October 1993,

paragraph 33; see *mutatis mutandis*, also the case of Court KI31/17, Applicant *Shefqet Berisha*, Judgment of 30 May 2017, paragraph 70).

101. On the other hand, the principle of adversarial proceedings implies that the parties to the proceedings should be aware of and have the opportunity to comment on and challenge the allegations and evidence presented during the main trial (see, *inter alia*, the ECtHR cases, *Brandstetter v. Austria*, no. 11170/84, Judgment of 29 August 1991; *Venneulen v. Belgium*, no. 19075/91, Judgment of 20 February 1996, KI193/19, Applicant *Salih Mekaj,* Judgment of 17 December 2020, paragraph 47).

102. Referring to the ECtHR case law, the Court emphasizes that the principle of equality of arms and the principle of adversarial proceedings are closely linked and in many cases the ECtHR has dealt with them altogether (see, *inter alia*, the ECtHR cases, *Rowe and Dawis v. the United Kingdom*, no. 18990/91; Judgment of 2000, *Jasper v. the United Kingdom*, no. 27052/95, Judgment of 2000; *Zahirovic v. Croatia*, no. 58590/, Judgment of 25 July 2013 KI193/19, Applicant *Salih Mekaj,* cited above, paragraph 48).

103. The requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to civil as well as to criminal cases (see case of Court KI10/14, Applicant, *Joint Stock Company Raiffeisen Bank Kosova J.S.C.*, Judgment of 20 May 2014, paragraph 42; and case of Court KI31/17, Applicant *Shefqet Berisha,* cited above, paragraph 71).

104. The ECtHR stated that under the principle of "equality of arms", it is inadmissible for a party to a proceeding to submit observations or comments before the regular courts, which are intended to influence the decision-making of the court, without the knowledge of the other party and without giving the other party the opportunity to respond to them. It is up to the party involved in the proceedings to then assess whether the remarks or comments submitted by the other party deserve a response. (see case of the ECtHR *APEH Üldözötteinek Szövetsége and others v. Hungary*, Judgment of 5 January 2011, paragraph 42; see also case of the ECtHR *Guigue and SGEN-CFDT v. France*, Decision of 13 July 2000).

105. Therefore, according to the case law of the ECtHR, the principle of "equality of arms" is violated when the complaint of the opposing party has not been communicated to the Applicant and he has not been informed about such a complaint by any other means (see the case of ECtHR *Beer v. Austria*, Judgment of 6 February 2001, paragraph 19; see also the case of ECtHR *Andersena* v. Latvia, Judgment of 19 September 2019, paragraph 87). Similarly, the ECtHR found a violation of this principle where only one of the two key witnesses was allowed to testify (see *Dombo Beheer B.V. v. The Netherlands*, cited above, *paragraphs 34 and 35).*

106. The ECtHR also found a violation of the principle of "equality of arms" due to the position of the General Prosecutor in the proceedings before the Court of Audit, which, unlike the parties to the proceedings, the Prosecutor General was present at the hearing, was informed in advance of the opinion of the Judge Rapporteur, participated fully in the debates and had the opportunity to

express his views orally without being challenged by the litigants, and this lack of balance was highlighted by the fact that the hearing was not public. This for the ECtHR raised the issue of imbalance between the parties to the proceedings (see case of ECHR *Martinie v. France*, Judgment of 12 April 2006, paragraph 50).

107. The ECtHR had also found a violation of the principle of "equality of arms" in the case of *Yvon v. France* when the Commissioner of the Government participated in the court proceedings to determine the amount of the expropriation, together with the expropriation authority against the other party whose property was subject to expropriation. The ECtHR found in this case that the expropriated party faced not only the expropriation authority but also the Government Commissioner, where the latter enjoyed significant advantages as regards access to documents in relation to the expropriated party. In addition, the Government Commissioner, who is simultaneously both an expert and a party to the proceedings, occupied a dominant position in the proceedings and wields considerable influence with regard to the court's assessment. In the ECtHR opinion, all this creates an imbalance *vis a vis* the expropriated party that is incompatible with the principle of *"equality of arms"*. (see the case of the ECtHR *Yvon v. France*, Judgment of 24 July 2003, paragraph 37).

108. In addition, the ECtHR in case *De Haesand Gijsels v. Belgium* found a violation of the principle of "equality of arms" when the opposing party was in a position or function which favored it *vis-vis-vis* the other party, because of the possibility that only one party has access to the relevant documents which were related to the specific case. So in the case *De Haesand Gijsels v. Belgium*, two journalists of Humo magazine were fined by a civil court after in some published articles, journalists accused some judges of being biased in a case where they had decided that care for a couple's children should belong to one parent. In their lawsuits against the journalists, the judges also referred to the case file regarding the custody of the child which they themselves had handled, but the documents in the file were not accessible to journalists. Therefore, the journalists had complained to the ECtHR, *inter alia*, about the violation of the principle of "equality of arms" claiming that the published articles were based on documents which were accessible to judges but that the regular Belgian courts, despite the request of journalists, had not allowed them access, especially in the opinion of three (3) professors, with whom the journalists would prove their claims that in fact the judges were biased and had not handled the case regarding the custody of the child in the proper manner. The ECtHR, having considered the allegations of the Applicants who requested the Belgian courts access to the opinion of three (3) professors, concluded that the Belgian court rejecting the journalists'request for access to the file in which the judges in question, had placed journalists in substantially unfavorable position *vis a vis* the other party, in this case judges in their capacity as claimants. For these reasons the ECtHR found a violation of the principle of equality of arms guaranteed by Article 6 of the ECHR. (see the case of the ECtHR *De Haes and Gijsels v. Belgium*, Judgment of 24 February 1997, paragraphs 54 to 58*)*.

109. However, the ECtHR emphasized that the parties' right to a fair trial, including the principle of "equality of arms", is not absolute. States enjoy a certain

margin of appreciation in this area. However, it is for the ECtHR to determine in the last instance whether these principles have been complied with (see, *mutatis mutandis*, the ECtHR case *Regner v. Czech Republic*, Judgment of 19 September 2017, paragraph 147).

110. In this respect, the ECtHR, through its case law, has determined that an irregularity in the proceedings may, under certain conditions, be remedied at a later stage or at the same level (see the case of the ECtHR, *Helle v. Finland*, Judgment of 19 December 1997, paragraph 54) or, by a higher court (see the cases of the ECHR, *Schuler-Zgraggen v. Switzerland*, Judgment of 24 June 1993, paragraph 52; and, on the other hand, *Albert et Le Compte v. Belgium* Judgment of 10 February 1983, paragraph 36, and *Feldbrugge v. The Netherlands*, Judgment of 29 May 1986, paragraphs 45-46).

111. In the case *Helle v. Finland*, Mr. Helle had argued in his submission that he had been placed at a disadvantage for the fact that the Cathedral Chapter was asked on two occasions by the Supreme Administrative Court to give its opinion on the grounds of his appeals. The ECtHR stated that it did not agree with the statement of Mr. Helle because any possible prejudice that might have been caused to the outcome of his appeal was compensated by the fact that he was given a genuine opportunity by the Supreme Administrative Court to submit his comments on the content of the Cathedral Body's opinions. Mr. Helle used this opportunity on two occasions and in these circumstances the ECtHR found that Mr. Helle cannot claim that there was a violation of the "equality of arms" requirement inherent in the concept of a fair trial (see ECtHR case, *Helle v. Finland*, Judgment of 19 December 1997, paragraph 54).

112. In case *Schuler-Zgraggen v. Switzerland*, the ECtHR finds that the proceedings before the Appeals Board did not enable Mrs. Schuler-Zgraggen to have a complete, detailed picture of the particulars supplied to the Board. It considers, however, that the Federal Insurance Court remedied this shortcoming by requesting the Board to make all the documents available to the applicant - who was able, among other things, to make copies - and then forwarding the file to the applicant's lawyer. Therefore, the ECtHR, found that since, taken as a whole, the impugned proceedings were therefore fair, there has not been a breach of Article 6 paragraph 1 of the ECtHR (see case of the ECtHR, *Schuler-Zgraggen v. Switzerland*, Judgment of 24 June 1993, paragraph 52).

113. In contrast, in case *Albert et Le Compte v. Belgium*, the ECtHR found a violation of Article 6 paragraph 1 of the ECHR, on the grounds that the public nature of the cassation proceedings was not sufficient to remedy the defect found to exist at the disciplinary stage. The Court of Cassation does not consider the merits of the case, which means that many aspects of "disputes" (misunderstandings) related to "*civil rights and obligations*", including the examination of facts and the assessment of the proportionality between guilt and sanction, falls outside its jurisdiction (see the case of the ECtHR, *Albert et Le Compte v. Belgium*, Judgment of 10 February 1983, paragraph 36). In case *Feldbrugge v. The Netherlands*, the ECtHR found a violation due to the fact that Ms. Feldbrugge did not have the conditions for access to the two respective Boards, thus she could not challenge the merits of the decision of the

President of the Board of Appeal. Consequently, the shortcoming found in this aspect of the proceedings before the court officer could not be remedied at a later stage. *Feldbrugge v. The Netherlands*, Judgment of 29 May 1986, paragraphs 45-46).

114. Therefore, the ECtHR found in its well-established case-law that a defect at first instance may be remedied on appeal, as long as the appeal body has "full jurisdiction". According to the ECtHR, a complaint is made of alleged non-communication of documents, the concept of "full jurisdiction" involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and either to take the decision or to remit the case for a new decision by an impartial body (See the cases of the ECtHR, *M.S. v. Finland*, Judgment of 22 June 2005, paragraph 35; *Köksoy v. Turkey*, Judgment of 13 January 2021, paragraph 36; *Bacaksiz v. Turkey*, Judgment of 10 December 2019, paragraph 59).

***ii) Application of the principles elaborated above regarding the allegation that the Applicant was denied a statement regarding the submission of the company "Dardafon" for the Specification of the Enforcement Proposal and additional documents and evidence***

115. The Court recalls that the Applicant alleges that in his case the "principle of adversarial proceedings" and "equality of arms" were not respected, as he was denied a statement regarding the submission for the Specification of the Enforcement Proposal and additional documents, including an expertise which was not ordered by the courts, submitted by the company "Dardafon".

116. The Applicant alleges that he received the submission for the specification of the debt by the creditor on 6 July 2020, and the latter filed a response on 7 July 2020. Despite the fact that according to the Applicant, the Court submitted the specification of the debt and other documents, his statement regarding the submission was not accepted and reviewed by the Basic Court, because the latter had already decided on its case.

117. In this regard, the Court notes from the case file that the Basic Court rendered Decision PPP. No. 1486/19, on 6 July 202, according to the Applicant one day before the Applicant submitted his response to the Creditor's submission. The Court notes that the Basic Court notified the Applicant about the submission, but did not include its arguments in its decision. Regarding the Applicant's arguments, presented at this stage, the Court recalls that the latter complained about the Creditor's submission both formally and materially. The Applicant complained that the Specification of the Enforcement Proposal was submitted 4 days late therefore, the Proposal would have to be declared out of time. The Applicant does not raise the latter before the Constitutional Court. Regarding the objection in the material aspect, the Applicant regarding the new value € 24,684,003.15, challenged it with the reasoning that (i) it does not appear in the final Decision of the Arbitration Tribunal of ICC 20990/MHM of 9 December 2016; (ii)it dDoes not appear in the Creditor's Enforcement Proposal of 15 July 2019; (iii) for this value the enforcement order P. No. 491/19 of 15

July 2019 was not issued; and (iv) for this value the debtor's objection was not filed.

118. The Court notes that the Basic Court in its decision-making by Decision PPP. No. 1486/19, by not reviewing the Applicant's arguments regarding the Specification of the Proposal for Enforcement as well as other documents submitted by the other party in this case is problematic, taking into account its case law and of the ECtHR as well as the legal provisions of the LCP, specifically Article 5.1 which stipulates that *"The court shall enable each party to make a statement on the claims and allegations submitted by the contentious party"* and Article 357.2 of the LCP which establishes that *"The opponent party should be given a chance to say its opinion regarding proposed expertise."*

119. In this respect, according to the principles established by the case law of the Court and the ECtHR, which have been clarified above, but also according to the legislation in force, the regular courts (i) must give the parties the opportunity and (ii) must conduct a proper review of submissions, arguments and evidence presented by the parties and assess, without prejudice, whether they are relevant and weighty to its decision.

120. However, the Court also notes that after receiving the Decision of the Basic Court, the Applicant filed appeal with the Court of Appeals, specifically raising the issue of not addressing the Applicant's position regarding the Debt Specification and other documents of the opposing party regarding which the Applicant was not given the opportunity to have these allegations handled by the Basic Court, as the Judgment of the Basic Court did not mention at all the fact that the Applicant submitted its position regarding the Debt Specification and other documents of the opposing party.

121. In this context, the Court, based on the case law of the ECtHR, also recalls that defects in the first instance can be remedied in the second instance (appeal) if the appellate institution has "full jurisdiction" regarding the issue. In this regard, the Court reiterates that when an appeal is filed concerning the non-communication of documents, the concept of "full jurisdiction" includes not only the fact that the court of appeals has the right to examine the appeal, but also whether it has the jurisdiction to dismiss the impugned decision and/or make its own decision on the case or remand the case for a new decision by an impartial body (see *mutatis mutandis* the case of the ECHR, *Köksoy v. Turkey*, cited above, paragraph 36; the case of *M.S v. Finland*, cited above, paragraph 35)

122. In case *Köksoy v. Turkey,* the ECtHR stated that the fact that the documentary evidence obtained by the Court of Cassation on its own initiative was not communicated to the applicants raises a problem. Following the appeal, the Court of Cassation quashed the first-instance court's decision on appeal, and remitted the case to the latter for re-examination. The applicants did not claim that the documents and information in question relied on by the Court of Cassation were unavailable to them after they learned about their contents in the Court of Cassation's decision. Their complaint in that respect is limited to the fact that their views had not been sought by the Court of Cassation prior to

its decision on appeal. The ECtHR stated that in the remittal proceedings of the case, which differs from the present case as it has not been returned for reconsideration, the applicants had the opportunity to raise their objections to the Court of Cassation's decision. The ECtHR found that the effects of the procedural shortcoming in the appeal proceedings were remedied in the remittal stage in so far as the applicants were able to acquaint themselves with the documents and information in question after the case was remitted to the trial court for reconsideration and further by the fact that they were able to respond to them before the trial court during a hearing. Consequently, the ECtHR found that there had been no violation of Article 6 paragraph 1 because the procedural shortcoming during the Court of Cassation's appeal review did not affect the adversarial principle to such an extent as to render the proceedings as a whole unfair (See ECtHR case, *Köksoy v. Turkey*, cited above, paragraphs 37-39).

123. Therefore, based on the case law of the ECtHR, the Court will further assess whether the court reviewing the appeal, in this case the Court of Appeals, had full jurisdiction over the case, namely, whether it had the opportunity to quash the impugned decision, or make its own decision on the case or remand the case for a new decision by an impartial body, as well as decide on all issues raised by the Applicant in response to the Specification of the Proposal for Enforcement, before the Basic Court.

124. In this regard, the Court notes that based on Article 17 of the LEP, in case the LEP does not regulate certain issues, the provisions of the contested procedure apply where it is specifically stated *"The provisions of the Law on Contested Procedure shall be accordingly are applied in the enforcement procedure, unless this law or any other law provides otherwise"*.

125. In the present case, Article 77 of the LEP stipulates that the parties have the right to appeal against the decision on objection, while paragraph 2 of this article stipulates that the appeal against the first instance decision is submitted to the second instance court, in this case the Court of Appeals. Since Article 77 of the LEP does not specify further regarding the appeal, the Court based on Article 17 of the LEP, notes that the LCP as a law that applies appropriately stipulates in its article 195 that the decisions taken by the court of second instance , in the present case the Court of Appeals, are:

(i) to dismiss the complaint as delayed, incomplete or inadmissible;
(ii) to quash the impugned judgment and dismiss the claim;
(iii) to quash the impugned judgment and remand the case for retrial in the first instance court;
(iv) to reject the appeal as ungrounded and uphold the impugned judgment;
(v) to modify the judgment of the first instance.

126. Furthermore, the Court notes that: based on Article 181.1 of the LCP, the Judgment may be challenged in the Court of Appeals:
*a) due to the violation of provisions of contestation procedures;*
*b) due to a wrong ascertainment or partial ascertainment of the factual state;*

*c) due to the wrong application of the material rights."*

127. Therefore, having regard to the provision above, the Court of Appeals has jurisdiction to conduct a full judicial review of the decisions of the Basic Court on the enforcement matters, and this includes issues of violation of substantive provisions; procedural provisions; erroneous and incomplete determination of facts; as well as has the possibility to quash the challenged decision and render a decision or remand the case for a new decision by an impartial body.

128. The Court therefore concludes that the Court of Appeals had full jurisdiction to examine all matters of fact and law relating to the dispute before it, including the Applicant's views regarding the Specification of the Proposal for Enforcement, and had jurisdiction to annul the decision of the Basic Court in all aspects, including the issues of fact and law. Therefore, the Court of Appeals qualifies as a "judicial body having full jurisdiction", within the meaning of Article 6, paragraph 1, of the ECHR and Article 31 of the Constitution.

129. In this context, the Court will further assess whether the Court of Appeals has assessed the Applicant's arguments regarding the Specification of the Enforcement Proposal and other additional documents submitted by the company "Dardafon" and its allegation that the Basic Court did not give it the opportunity to respond to the specification of the debt which raises the question of the principle of equality of arms.

130. The Court first refers to the Decision of the Court of Appeals, which, as to the essential violations of the contested procedure, stated that the Decision of the Basic Court *"does not contain essential violation of the provisions of the contested procedure from Article 182, paragraph 1 and 2 of the LCP, and that the factual situation has been correctly determined, so that its legality can be assessed, violations which the second instance court investigates ex officio pursuant to Article 194 of the LCP".*

131. The Court of Appeals also noted that "*Taking into account the other appealing allegations which consist against the challenged decision, the court of second instance considers that these appealing allegations are ungrounded, because, we are not dealing with an essential violation of the provisions of [LEP] nor [LCP], which violations this court considers ex officio within the meaning of Article 194 of the LCP.[...]"*

132. Based on the reasoning of the Court of Appeals, the Court notes that the latter with regard to the allegations related to that the Basic Court in the Decision [PPP. No. 1486/19], denied the Applicant the legal right under the LCP to declare regarding the submission of the company "Dardafon" for the Specification of the Enforcement Proposal and additional documents and evidence submitted (expertise and debit notes invoices) as, according to it, the Decision [PPP. No. 1486/19] of the Basic Court was ready one day before the Applicant submitted its response, the Court of Appeals did not provide any specific response to its decision. Although it had 'full jurisdiction' over the case before it, as set out above, it had not specifically considered the allegations filed in its response to the debt specification, including the issue whether the principle of "equality of arms" has been violated in this case.

133. While the Supreme Court, regarding the impossibility of the Applicant to make statement regarding the creditor's submission and the expertise, stated that this allegation is ungrounded. Therefore, taking into account the Applicant's specific allegation related to non-reasoning of the Basic Court's decision and violation of the principle of "equality of arms" and the "principle of adversarial proceedings" as a result of not dealing with this allegation, the latter did not give a specific answer, if this procedural flaw of the Basic Court and that of the Court of Appeals resulted in a substantial violation of the procedural provisions, including the principle of "equality of arms".

134. In the circumstances of the present case, the Court notes that the issues raised by the Applicant such as the allegation that the Basic Court in the Decision [PPP. No. 1486/19], denied the Applicant a legal right under Article 5 (1) and 357 (2) of the LCP to make a statement regarding the submission of the company "Dardafon" on specification of the proposal of enforcement and additional documents and evidence submitted (expertise and debit notes invoices) as, according to it, the Decision of the Basic Court [PPP. No. 1486/19] was ready one day before the Applicant submitted his response, the Court of Appeals did not provide any specific response to its decision. Therefore, the non-correction of this procedural flaw by the Court of Appeals raises important issues of the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, which enshrines the principle of "equality of arms" as one of the basic principles of a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, having regard to the Applicant being denied the legal right under Articles 5 (1) and 357 (2) of the LCP- to declare regarding the submission of the company "Dardafon" for the specification of the enforcement proposal and additional documents and evidence submitted (expertise and invoices of debit notes), and this procedural flaw was not remedied by the Court of Appeals as neither the latter had specifically considered these allegations.

135. In this case the Applicant was placed in an unequal position in relation to the opposing party as the latter presented the Debt Specification and other supporting documents as essential issues in an enforcement procedure, as is the case here, as the monetary amount to be paid by the Applicant also depended on it, while the Applicant's response to the latter was not specifically considered by the Basic Court. The Court of Appeals did not specifically address or remedy this procedural shortcoming of the Basic Court, although this was among the main allegations of the Applicant before the Court of Appeals.

136. Also, the Supreme Court, despite the limited list of cases that the Public Prosecutor may raise before the Supreme Court by a request for protection of legality, pursuant to Article 247 of the LCP, the latter did not address this allegation of the Applicant for procedural violations, including Article 5 item 5.1 and Article 357, paragraph 2 of the LCP which stipulates that *"The opponent party should be given a chance to say its opinion regarding proposed expertise"* and in this respect this may violate the "principle of equality" of arms, guaranteed by Article 31 of the Constitution. Regarding the impossibility of the Applicant to make a statement on the debtor's submission and the expertise, the Supreme Court was satisfied with the reasoning that this

allegation is ungrounded, because, among other things, *"neither by the submission nor by the alleged expertise has the content of the loan/request specified in the enforcement document been changed, which has previously passed the recognition procedure".*

137. 1In this context, the Court reiterates that according to the principle of "equality of arms", it is inadmissible for a party to the proceedings to submit observations or comments before the regular courts, which are intended to influence the decision-making of the court, without the knowledge of the other party and without giving the other party the opportunity to respond to them. It is up to the party involved to the proceedings to then assess whether the remarks or comments submitted by the other party deserve a response. (see the case of the ECtHR *APEH Üldözötteinek Szövetsége and others v. Hungary*, Judgment of 5 January 2011, paragraph 42; see also the case of the ECtHR *Guigue and SGEN-CFDT v. France*, Decision of 13 July 2000).

138. Therefore, in the present case, taking into account the reasons above, the Court considers that the Decision of the Supreme Court of Kosovo, and the Decision of the Court of Appeals, were rendered in violation of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because they failed to remedy the procedural shortcoming that raises the issue of the principle of "equality of arms" with regard to the fact that the Basic Court in Decision [PPP. No. 1486/19] denied the Applicant the right to declare himself regarding the submission of the company "Dardafon" for the specification of the enforcement proposal and additional documents and evidence submitted (expertise which was not ordered by the courts) and debit notes invoices). This is because the Decision of the Basic Court [PPP. No. 1486/19] was ready one day before the Applicant submitted his response and for this he had not given any specific answer in its decision.

139. In this regard, in addition to other principles, importance is given to the appearance and sensitivity of the proper administration of justice. Therefore, given these procedural flaws and the importance of addressing the Applicant's substantive allegations, the Court finds that in the Applicant's case, due to this procedural flaw against the Applicant, the proceedings, viewed in its entirety, were not fair.

140. The Court also notes that this finding refers to the alleged constitutional violation. Thus, the Court confirms that the findings contained in this Judgment do not prejudge in any way the outcome of the proceedings in relation to the Applicant's case.

141. Given that the Court has just found a violation of the Applicant's right to a fair trial and the case needs to be reconsidered by the Court of Appeals, it is not necessary to address the Applicant's other allegations..

**Request for interim measure**

142. The Court recalls that the Applicant also requests the Court to render a decision imposing an interim measure in order to immediately suspend the

implementation of the enforcement against the Applicant under the Enforcement Order [P. No. 491/19] of 15 July 2019 of the Private Enforcement Agent, and Decision [PPP. No. 1486/19] of 6 July 2020, of the Basic Court; Decision Ac. No. 3610/20 of the Court of Appeals of Kosovo of 8 October 2020; and Decision CML. No. 12/20 of the Supreme Court of Kosovo, of 20 January 2021.

143. In this regard it argued that implementation of the enforcement would cause (i) irreparable harm to the Applicant; and (i) would infringe on state and national interests given the nature of Telekom's activity which, in the event of enforcement, would go bankrupt due to the extremely high value of the obligation.

144. Given that the Court declared the Referral admissible and found the violations specified in the enacting clause of this Judgment, this decision-making makes it further unnecessary to consider the request for an interim measure.

**FOR THESE REASONS**

The Constitutional Court, in accordance with Articles 21.4 and 113.7 of the Constitution, Articles 20, 27 and 47 of the Law and pursuant to Rule 59 (1) of the Rules of Procedure, on 24 November 2021

**DECIDES**

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, by majority of votes, that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE INVALID, by majority of votes, Decision CML. No. 12/20 of the Supreme Court of Kosovo, of 20 January 2021 and Decision Ac. No. 3610/20 of the Court of Appeals of 8 October 2020;

IV. TO REMAND, by majority of votes, Decision Ac. No. 3610/20 of the Court of Appeals of 8 October 2020, for reconsideration in accordance with the Judgment of this Court;

V. TO ORDER the Court of Appeals to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 15 March 2022 about the measures taken to implement the Judgment of the Court;

VI. TO REMAIN seized of the matter pending compliance with that order;

VII. TO REJECT, unanimously, the request for interim measure;

VIII. TO NOTIFY this Judgment to the Parties and, in accordance with Article 20 (4) of the Law, to publish it in the Official Gazette;

IX. This Judgment is effective immediately.

**Judge Rapporteur** **President of the Constitutional Court**

Safet Hoxha



Gresa Caka-Nimani

***This translation is unofficial and serves for informational purposes only.***