THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF LATVIA

JUDGEMENT
ON BEHALF OF THE REPUBLIC OF LATVIA
in Case No. 2012-13-01
14 May 2013, Riga

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

with the secretary of the court sitting Elīna Kursiša,

having regard to a constitutional complaint submitted by limited liability companies "IAG", "IAG Industrieanlagen GmbH", "Yelverton Investment B.V." and "Yelverton Investments B.V." (hereinafter – the Applicants),

with the participation of the Applicants' representatives – sworn attorneys-at-law Daimārs Škutāns and Oskars Jonāns, as well as

legal advisor to the Saeima Legal Bureau Jānis Pleps,

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

on 16 April 2013 in Riga at an open court sitting examined the case

"On Compliance of Section 483 insofar as it Establishes the Right of the Chairperson of the Senate Department of Civil Cases so Submit a Protest with Article 92 of the Satversme of Republic of Latvia"

The Facts

1. On 1 March 1999 the Civil Procedure Law adopted by the Saeima on 14 October 1998 (hereinafter also – CPL) entered into force. Its Chapter 60 regulates re-adjudicating cases in connection with breach of significant substantive or procedural norms of law.

Section 483 of CPL in the wording of the law of 14 October 1998 (hereinafter – the contested norm) provided:

"A protest regarding a court adjudication that has come into effect may be submitted to the Senate by the Chief Justice of the Supreme Court, Chairperson of the Senate Department of Civil Cases or the Prosecutor General, provided that not more than 10 years have elapsed since the adjudication came into effect."

On 29 November 2012 the Saeima adopted the law "Amendments to Civil Procedure Law", which entered into force on 1 January 2013. In accordance with this law the words in CPL Section 483 "the Chief Justice of the Supreme Court, Chairperson of the Senate Department of Civil Cases or the Prosecutor General" have been replaced by words "the Prosecutor General or the senior prosecutor of the Department for the Protection of the Rights of Individuals and State of the Office of the Prosecutor General."

Thus, the current wording of CPL Section 483 provides:

"A protest regarding a court adjudication that has entered into effect may be submitted to the Senate by the Prosecutor General or the senior prosecutor of the Department for the Protection of the Rights of Individuals and State of the Office of the Prosecutor General, provided that not more than 10 years have elapsed since the adjudication entered into effect."

Simultaneously with amending the contested norm, the Saeima added to CPL Transitional Provisions Para 63 in the following wording:

"A complaint submitted to the relevant official until the day when amendments to Section 483 of this Law come into force shall be adjudicated according to the provisions that were in force on the day when the complaint was submitted."

2. The applicants – limited liability companies "IAG", "IAG Industrieanlagen GmbH", "Yelverton Investment B.V." and **"Yelverton Investments B.V."** – request the Constitutional Court to recognise CPL Section 483 as being incompatible with Article 92 of the Satversme of the Republic of Latvia (hereinafter – Satversme), insofar it envisage the right of the Chairperson of the Senate Department of Civil Cases to submit a protest against a judgement of a first instance court that has come into effect, which infringes upon the rights of persons, who have not been parties to the case.

The Applicants hold that the contested norm is incompatible with Article 92 of the Satversme, since a state official – the Chairperson of the Senate Department of Civil Cases, who submits a protest against a court adjudication, which has entered into effect, at the same time also prescribes the procedure for examining this protest, i.e., decides on the senators to take part in the assignment meeting and the date and time of examining the case. Moreover, the Chairperson of the Senate Department of Civil Cases already by submitting a protest expresses the opinion that the adjudication, which has entered into effect, is unlawful. This opinion could exert a pressure upon the senators, but that would be inadmissible. The adversarial principle in civil procedure demands an equal possibility of both parties to influence the outcome of the case by their arguments and available procedural tools, however, the party submitting the protest has greater possibilities to achieve the desirable result. The contested norm allegedly fails to ensure procedural equality, which is an inalienable part of the right to a fair court and is incompatible with Article 92 of the Satversme.

A the court sitting **the Applicants' representatives** – **sworn attorneys-at law Daimārs Škutāns and Oskars Jonāns** maintained the claim. They noted, by referring to the case law of the European Court of Human Rights (hereinafter – ECHR), that the institute of protest included in the contested norm essentially was incompatible with the rights to a fair court, guaranteed in Article 92 of the Satversme, since it served as the grounds for revoking court adjudications, which had already entered into effect. In accordance with the case law of ECHR, it should be recognised that the right of certain officials to turn against a court adjudication, which has come into effect, in this way collides with the right to a fair court. Moreover, even the Chief Justice of the Supreme Court has noted that officials of the Supreme Court should not submit protests.

At the court sitting the Applicants' representatives emphasized: even though the contested norm had been amended, significant considerations existed in the case that defined the need to continue legal proceedings. Moreover, the violation of the Applicants' fundamental rights could be eliminated only by a judgement with retroactive force. Therefore the Applicants request recognising the contested norm as being invalid as of the moment of its adoption or as of the moment when it was applied to the Applicants. Even though the contested norm has become invalid as of 1 January 2013, Para 63 in the Transitional Provisions of CPL (hereinafter – the Transitional Provisions) envisages that a complaint submitted to the relevant officials must be adjudicated according to the provisions that had been in force on the day when the complaint was submitted. The Applicants hold that these amendments to CPL have not eliminated the violation of fundamental rights, since the contested norm continues to be valid with regard to the Applicants.

The amendments to the contested norm cannot eliminate the negative consequences it has caused. In this case a judgement by the Constitutional Court is the only means by which the Applicants may ensure the protection of their rights that have been violated.

The Applicants note that at the moment of submitting the constitutional complaint they had no way of knowing the content of Para 63 of the Transitional Provisions. Hence, the Applicants request the Constitutional Court to recognise as being incompatible with Article 92 of the Satversme and invalid also Para 63 of the Transitional Provisions. Otherwise the violation of the Applicants' rights would be eliminated only seemingly. It is exactly Para 63 of the Transitional Provisions, which allegedly allows continuing the procedure, which is against the Applicants' interests, even though the contested norm is no longer in force.

At the same time the Applicants' do not deny that due application of Para 63 of the Transitional Provisions, i.e., examining the protest in cassation legal proceedings in full composition of the Senate Department of Civil Cases could eliminate the violation of their fundamental rights.

3. The Institution, which adopted the contested act, – Saeima – requests the Constitutional Court to terminate legal proceedings in the case, on the grounds that on

1 January 2013 CPL Section 483, in the contested wording, became invalid. Moreover, the protest submitted in connection with revoking a judgement favourable for the Applicants, has not yet been examined on its merits.

The representative of the Saeima – legal advisor of the Saeima Legal Bureau Jānis Pleps noted that the contested norm was no longer in force in the wording, in which it had been contested. The contested norm had been amended with the aim of making law policy improvements to the regulation, i.e., to develop the civil procedural regulation, not because it should have been considered as being anti-constitutional. To decide on the retroactive force of the norm, first of all its compliance with Article 92 of the Satversme should be examined. The Saeima holds that the contested norm complies with the first sentence of Article 92 of the Satversme.

J.Pleps noted that the contested norm was a norm of competence. Allegedly it grants to certain officials the competence to submit a protest. A protest in the civil procedural regulation cannot be equated with the examination of cases in the process of judicial supervision. The legal regulation of Latvia, in difference to the process of supervising protests examined in ECHR cases referred to by the Applicant, envisages certain grounds for submitting a protest, specific categories of cases, a narrow range of persons, who can submit a protest, as well as a term for submitting a protest. The judgements by ECHR in the cases referred to allegedly are not applicable to the Latvian legal regulation regarding a protest submitted by the Chairperson of the Senate Department of Civil Cases, since the facts of the cases have been different.

The Saeima emphasizes that the right to a fair court is not absolute and that in certain instances it can be restricted. The case does not contain a dispute regarding the fact, whether the possibility to review an adjudication, which has entered into force, has been established by law. The contested norm allegedly has a legitimate aim – to protect the rights of other persons and a democratic state. The principle of justice requires establishing a procedure allowing to review an unlawful adjudication, which has entered into force. Allegedly, the process of a fair court is meaningless, if it could result in the adoption of an unfair judgement. The procedure included in the contested norm allegedly is appropriate for reaching the legitimate aim.

J. Pleps noted that the solution offered by the Applicants – to initiate repeated examination of a court adjudication, which has entered into force, upon receiving

applications from persons involved in the case, not the protests submitted by the respective officials – cannot be considered to be a more lenient measure, as it would create a considerable burden upon the Senate Department of Civil Cases. Whereas the Chairperson of the Department of Civil Cases, by submitting a protest, acts as a "filter", channelling to the assignment sitting of the Senate in the form of a protest only those applications of persons, which comply with legal requirements. Moreover, this assignment sitting is only one more filter, which ensures that only truly founded protests regarding significant violations of persons' right are subject to examination in the cassation procedure.

The Saeima also rejects the Applicant's argument that the procedure for submitting and examining a protest at the Department of Civil Cases is incompatible with the criteria of a fair court. Pursuant to Article 83 of the Satversme judges (also senators) are independent and subject only to law. The independence of judges is not external, but also internal, i.e., independence from the organisational structures of the court. The independence of judges is always presumed, it is ensured by the procedure for appointing judges to their office, moreover, it is especially guaranteed by the high qualification requirements set for the Senators and the specificity of the Senate's work. CPL Section 464(1) envisages that the cases that the Senate has received are examined in the procedure set by the Chairperson of the Senate Department of Civil Cases. This procedure has been regulated by an internal regulatory enactment and is based upon principles established in law, *inter alia*, random or automatic allocation of cases. Moreover, the parties have the right to express their doubts regarding impartiality of the court by motioning to recuse a judge.

J.Pleps noted that Para 63 of the Transitional Provisions was a norm that regulated already initiated legal relationship, i.e., it applied to the complaints that the Supreme Court had received, but which yet had not been examined. The regulation included in Para 63 of the Transitional Provisions aims to safeguard legal certainty and the already acquired rights, ensuring to persons access to court and, thus, protecting the rights that Article 92 of the Satversme guarantees to all persons. It envisages that the submitted complaints will be examined. Moreover, the Senate has the possibility to apply Para 63 of the Transitional provisions in compliance with Article 92 of the Satversme.

4. The summoned person – the Ministry of Justice, referring to Para 2 of Section 29(1) of the Constitutional Court Law, requests termination of legal proceedings in the case, since the contested norm has become invalid.

The representative of the Ministry of Justice – **Laila Medina, Deputy State Secretary in Law Policy Matters**, at the court sitting noted that Para 63 of the Transitional Provisions had been included in the Civil Procedure Law upon the request by the Office of the Prosecutor General and ensured that the complaints received prior to the moment when the amendments came into force would be examined in accordance with the previous regulation (the one that was in force at the moment when the complaint was received). It is also linked with resources, since the necessary funding was allocated to the Office of the Prosecutor General only from 1 January 2013. When Para 63 of the Transitional Provisions was adopted, the issue of abiding by the principle of procedural economy had been discussed and it had been recognised that transferring the submitted complaints to the Office of the Prosecutor General would not be effective.

Whereas recognising the contested norm as being invalid retroactively would significantly violate the legal certainty and the right to a fair court of persons involved in cassation legal proceedings. A new examination of such cases, which could be achieved by submitting an application to the Prosecutor General, requesting him to decide once again on submitting a protest, would significantly prolong the examination of the cases that have been already initiated.

L. Medina expressed the opinion that the institute of protest, regulated in the Civil Procedure Law, complied with the criteria proposed by ECHR. A protest should be recognised as a measure that ensures effective and fast legal proceedings in those cases, which, according to the legislator's decision, are to be heard only in one instance. Allegedly, a protest is a mechanism, which can be used, if necessary, to eliminate serious errors made by courts.

The Ministry of Justice is of the opinion that submitting and examination of a protest in the cassation instance complies with the criteria of an impartial court. The procedure for allocating cases is established by the Chairperson of the Senate Department of Civil Cases. It should be considered an organisational issue, which,

owing to judges' independence and the guarantees established for it, has no direct influence upon judges' decision as to its substance. Moreover, the Chairperson of the Senate Department of Civil Cases allegedly fulfils a "filter" function, verifying, whether the objections expressed by persons comply with legal requirements. This does not mean that the opinion of the person submitting the protest is automatically upheld or complied with. Hence, the bias of the court allegedly is only seeming, not actual.

5. The summoned person – the Ombudsman of the Republic of Latvia (hereinafter – the Ombudsman) – holds that the contested norm is incompatible with Article 92 of the Satversme.

The representative of the Ombudsman, legal advisor of the Ombudsman's Department of Civic and Political Rights Santa Tivaņenkova noted during the court sitting that the procedure envisaged in the contested norm for submitting a protest did not comply with the criteria of an impartial court. Firstly, the same issue is examined repeatedly within the framework of the same court instance – initially the Chairperson of the Senate Department of Civil Cases examines and, following it, submits in the form of a protest for examination to the Senate Department of Civil Cases. Thus, both the decision on submitting a protest and the examination of this protest on its merits occur in the Senate Department of Civil Cases. Secondly, the organisation of work in the Senate Department of Civil Cases allegedly depends upon the Chairperson, who defines the procedure for examining the protest both at the assignment sitting and at the Senate sitting.

S. Tivaņenkova noted that upon amending the contested norm the legal relationships that had evolved on the basis of it should have been regulated. However, this regulation should have been of the kind to exclude even perceived impartiality of the court, i.e., all protests should be transferred to the Prosecutor General who, if necessary, could turn to the Senate Department of Civil Cases.

6. The summoned person – *Mg. iur.* Mārcis Krūmiņš, lecturer at the University of Latvia Faculty of Law, member of the working group for drafting amendments to the Civil Procedure Law at the Ministry of Justice, noted that the

institute of protest should be examined in interconnection with the whole system of courts and all legal remedies of civil procedural law. Allegedly, it significantly differs from legal proceedings in the procedure of judicial review, which had been typical of the Soviet system of law. Therefore, when referring to the case law of ECHR and the legal regulation in other states, all facts of the case should be meticulously examined and the particularities of Latvia's legal regulation should be taken into consideration. Allegedly, the contested norm complies with Article 92 of the Satversme, as its aim is the protection of third persons in civil procedure. Moreover, a protest can be submitted only in cases and within a term defined in law. Likewise, the procedure for examining protests also allegedly complies with the criteria of an impartial court, since the office of the Chairperson of the Senate Department of Civil Cases is organisational and has no impact upon administering justice in a particular case in the courtroom. Whereas the Senators are independent and subject only to law. Therefore, allegedly there are no grounds to consider that the Chairperson of the Senate Department of Civil Cases could in any way influence the Senators, who examine the protest in cassation procedure.

7. The summoned person – ***Mg. iur.*** **Martins Osis, PhD student at the Faculty of Law, University of Latvia, –** noted that the contested norm had a legitimate aim – to strengthen the rule of law and ensure the right to a fair court. Allegedly, it comprises a mechanism, which, under certain conditions, allows protecting persons' right to a fair court, established in the first sentence of Article 92 of the Satversme, even if a judgement proclaimed in the case has already entered into force. Thus, the contested norm does not restrict anyone's right to a fair court, but, quite on the contrary, allows effective protection of persons' right to a fair court if an unlawful adjudication has been made. The right to submit a protest, in its turn, has been delegated to particular officials with the aim of decreasing the burden of the court system. It functions as a filter. Certain officials, qualified specialists in their fields, upon receiving an application from a private person, examine its compatibility with substantial and procedural legal norms and take a qualified decision on submitting a protest. Whereas the assignment sitting is said to be the second filter in this mechanism, which decides the issue on initiating cassation legal proceedings. And

only afterwards the Senate examines the particular issue on its merits in the cassation instance.

This procedure is said to comply also with the criteria set for an impartial court. The provisions of the law "On Judicial Power" define the qualification, length of service, experience and other qualitative and quantitative properties that are required in order to become a candidate for the office of a Supreme Court Judge. Judges are independent and subject only to law. Moreover, a certain procedure for allocating cases exists, based upon certain principles and ensuring allocation of cases in accordance with the principle of randomness.

Whereas Para 63 of the Transitional Provisions only sets out the procedure for examining those complaints that have already been submitted. Allegedly, nothing would change if such a norm did not exist, since nevertheless all procedural actions must be conducted in accordance with the regulation that was in force at the time of hearing, unless the legislator has provided otherwise. In this case the legislator has envisaged in the Transitional Provisions that until the date when the amendments enter into effect, the examination of the received complaints in the stage of initiating a case is determined by the previous regulation. Para 63 of the Transitional Provisions is not to be applied to the examination of complaints that have already been submitted by the Senate on their merits. M.Osis holds that the contested norm and Para 63 of the Transitional Provisions comply with Article 92 of the Satversme.

The Findings

8. The contested norm became invalid on 1 January 2013.

The Saeima has requested termination of legal proceedings in the case under examination. Whereas the Applicants have requested continuation of legal proceedings and examination of the contested norm in interconnection with Para 63 of the Transitional Provisions, as well as granting retroactive force to the judgement.

Para 2 of Section 29(1) of the Constitutional Court Law provides that legal proceedings in a case may be terminated before a judgement is pronounced by the decision of the Constitutional Court if the contested legal norm has become invalid.

In interpreting Para 2 of Section 29(1) of the Constitutional Court Law, it must be taken into consideration that this norm is aimed at ensuring economy of proceedings before the Constitutional Court and that the Constitutional Court would not have to pass judgements in cases, where the dispute no longer exists (*see, for example, Judgement of 12 February 2008 by the Constitutional Court in Case No. 2007-15-01, Para 4).*

The fact that the contested norm has become invalid *per se* will not always be the grounds for terminating the case. I.e., to pass a decision on terminating legal proceedings, it is not always sufficient to establish that the grounds envisaged in Para 2 of Section 29(1) of the Constitutional Court Law exist. The law envisages the right to the Constitutional Court to terminate legal proceedings, but not an obligation to do so. The Constitutional Court must assess, whether any considerations exist pointing to the need to continue legal proceedings (*see, Judgement of 11 January 2011 by the Constitutional Court in Case No. 2010-40-03, Para 6*).

Thus, when considering the issue of terminating legal proceedings in the case, the Constitutional Court must take into consideration the need to safeguard the fundamental rights of persons established in the Satversme and to eliminate all negative consequences that have occurred for persons in connection with the contested norm.

9. The legislator has established by Para 63 of the Transitional provisions that the legal relationships that follow from the contested norm are to be maintained. Therefore the Applicants request the Constitutional Court to examine also the compliance of Para 63 of the Transitional Provisions with Article 92 of the Satversme, thus expanding the scope of the claim in the case under examination.

The Constitutional Court has repeatedly concluded that in particular instances the scope of the claim in a case, which has already been initiated, may be expanded (*see, for example, Judgement of 19 December 2007 by the Constitutional Court in Case No. 2007-13-03, Para 6, and Judgement of 17 January 2008 in Case No. 2007-11-03, Para 18*).

The Constitutional Court may expand the scope of the claim by abiding with certain criteria, first and foremost, the concept of "close connection". To conclude,

whether in a particular instance the scope of the claim can and should be expanded, it must be established, whether, firstly, the norms with the regard to which the scope of the claim is being expanded, are so closely connected with the norms that are *expressis verbis* contested in the case that they can be examined with the framework of the same grounds or is necessary for adjudicating the particular case, and, secondly, whether the expanding of the scope of the claim is necessary in order to comply with the principles of the judicial proceedings before the Constitutional Court (*see, for example, Judgement of 3 April 2008 by the Constitutional Court in Case No. 2007-23-01, Para 17, Judgement of 25 November 2010 in Case No. 2010-06-01, Para 17.1, and Judgement of 20 October 2011 in Case No. 2010-72-01, Para 15).*

The request to examine the compatibility of Para 63 of the Transitional Provisions with the Satversme is closely connected with the claim regarding the compatibility of the contested norm with the Satversme, since it sets out the procedure for applying the contested norm to a certain group of persons.

10. The case does not contain a dispute regarding the fact that the contested norm itself has infringed upon the Applicants' rights. The legislator has already amended this norm, envisaging that in the future (as of 1 January 2013) the Chief Justice of the Supreme Court and the Chairperson of the Senate Department of Civil Cases would no longer have the right to submit protests.

The constitutional complaint is an individual legal remedy. Thus, in order to expand the scope of the claim, as requested by the Applicants, and to examine also the compatibility of Para 63 of the Transitional Provisions with Article 92 of the Satversme, it must be established, whether the aforementioned norm has violated the Applicants' fundamental rights established by the Satversme.

Section 3 of the Civil Procedure Law defines the force of legal norms that regulate judicial proceedings in time. By abiding the principle enshrined in this Section, as well as the theory of procedural activities recognised in the science of civil procedure *(see: Bukovskis V. Civilprocesa mācību grāmata. Rīga: Autora izdevums, 1933, p. 129),* legal proceeding in civil cases are conducted in accordance with the civil procedural regulation, which is in force at the time of examining the case, conducting some procedural activities or enforcing the court ruling, irrespectively of

the time, when the legal dispute arose and the civil case was initiated, as well as the stage of civil procedure it has reached. However, the legislator may grant to a law retroactive force with regard to some procedural activities (*see.: Civilprocesa likuma komentāri. I daļa. Autoru kolektīvs prof. K. Torgāna zinātniskajā redakcijā. Rīga: Tiesu namu aģentūra, 2011, p. 23).*

This an exemption to the general principle on the force of civil procedural regulation is the one applicable to Para 63 of the Transitional Provisions, which provides that all complaints, which have already been received by the Supreme Court, shall be examined by the official, who has been the addressee of the complaint (in accordance with the previous regulation), and not those officials, who may examine complaints and submit protests in accordance with the new regulation. The Supreme Court has also noted that by 1 January 2013 it had on its records 58 applications requesting to submit a protests, which, in accordance with Para 63 of the Transitional Provisions, are to be examined in accordance with the contested norm (*see Case Materials, Vol.1, p. 193*).

The case materials and the explanations provided by the Applicants confirm that a protest against a court judgement favourable for the Applicants was submitted on 23 March 2012. A case has been initiated on the basis of this protest, which currently has been transferred for adjudication, i.e., it has entered that stage of a civil procedure, to which CPL rules on initiating a case can no longer be applied. Thus, the Applicants do not belong to that circle of persons, to whom Para 63 of the Transitional Provisions would apply.

Thus, Para 63 of the Transitional Provisions does not affect the Applicants and cannot cause an infringement of their fundamental rights established by Article 92 of the Satversme. Pursuant to Section19^2 (1) of the Constitutional Court Law, a constitutional complaint may be submitted only if the contested norm, which, possibly, is incompatible with a legal norm of higher legal force, affects the person himself or herself. Therefore the Applicants' request to expand the scope of the claim included in the constitutional complaint by including into it also Para 63 of the Transitional Provisions is incompatible with the requirements defined in Section19^2 (1) of the Constitutional Court Law and must be rejected.

Thus, legal proceedings in the case under examination must be continued without expanding the scope of the claim and examining only the compatibility of the contested norm with Article 92 of the Satversme.

11. Section 483 of the Civil Procedure Law (in the wording that was in force until 1 January 2013) provided that a protest regarding a court adjudication that had come into effect could be submitted by the Chief Justice of the Supreme Court, the Chairperson of the Senate Department of Civil Cases or the Prosecutor General, provided that not more than ten years had elapsed since the adjudication had come into effect. On 9 June 2012 the Panel of the Constitutional Court initiated a case "On the Compliance of Section 483 of the Civil Procedure Law, insofar it Establishes the Right of the Chairperson of the Senate Department of Civil Cases to Submit a Protest with Article 92 of the Satversme." It is noted in Para 6.4 of the decision on initiating the case that the application does not contain legal substantiation why the form of appealing against an adjudication, which has come into effect, a protest, established in Section 484 of the Civil Procedure Law, and its grounds were incompatible with Article 92 of the Satversme.

Thus, in the framework of the case under examination only those arguments provided by the Applicant, which can be attributed to the subject matter of the case, should be examined, i.e., it must be established, whether the right of the Chairperson of the Senate Department of Civil Cases to submit a protest and simultaneously define the procedure for examining this protest by the Senate Department of Civil Cases complies with Article 92 of the Satversme.

12. Article 92 of the Satversme provides: "Everyone has the right to defend his or her rights and lawful interests in a fair court. Everyone shall be presumed innocent until his or her guilt has been established in accordance with law. Everyone, where his or her rights are violated without basis, has the right to commensurate compensation. Everyone has a right to the assistance of counsel." Even though the application contains a claim regarding the compliance of the contested norm with the whole Article 92 of the Satversme, it nevertheless follows from the legal substantiation provided at the court sitting that the compatibility of the contested norm with the first

sentence of Article 92 of the Satversme is contested, i.e., "everyone has the right to defend his or her rights and lawful interests in a fair court."

12.1. The finding that the term "a fair court" contains two aspects: a fair court as an independent institution of the judicial power, which adjudicates the case, and a fair court as a due procedure for examining the case, compatible with a judicial state, has been embedded in the case law of the Constitutional Court. With regard to the first aspect this concept must be examined in interconnection with Chapter 6 of the Satversme, whereas with regard to the second – in interconnection with the principle of a judicial state, which follows from Article 1 of the Satversme (*see, for example, Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 2 of the Findings, and Judgement of 20 December 2006 in Case No. 2006-12-01, Para 9.3).* The Constitutional Court has emphasized that the concept of a fair court is not complete without safeguards for the impartiality of the court, which are recognised as one of the elements in Article 92 of the Satversme (*see, Judgement of 20 June 2002 by the Constitutional Court in Case No. 2001-17-0106, Para 2 of the Findings, and Judgement of 15 February 2005 in Case No.2004-19-01, Para 6.3*).

Thus, the right to a fair court guaranteed in Article 92 of the Satversme contains also the right to the impartiality of the court.

13. The Applicants hold that the contested norm infringes upon the right to the impartiality of the court, whereas the Saeima and some of the summoned persons express the opinion that this right is not violated. Thus, the Constitutional Court will determine the content of the concept "an impartial court".

13.1. A finding has become embedded in the case law of the Constitutional Court that it follows from Article 89 of the Satversme, which sets out that the State recognises and protects fundamental human rights in accordance with the Satversme, laws and international agreements binding upon Latvia, that the State has an obligation to take into consideration the international commitments in the field of human rights. The constitutional legislator had the aim to ensure harmony between the human rights included in the Satversme and the international norms of human rights (*see, for*

example, Judgement of 30 August 2000 by the Constitutional Court in Case No. 2000-03-01, Para 5 of the Findings).

The international human right provisions and the practice of their application on the level of constitutional law serve as a means of interpretation to determine the content and scope of the fundamental rights and the principle of a judicial state, insofar it does not lead to decreasing or limiting the fundamental rights included in the Satversme (*see, for example, Judgement of 13 May 2005 by the Constitutional Court in Case No. 2004-18-0106, Para 5 of the Findings*). Thus, if it follows from the norms of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) and their interpretation that certain human rights, enshrined in the Convention, cover the particular situation, then it usually also falls within the scope of the respective fundamental rights embedded in the Satversme. Whereas, if the human rights enshrined in the Convention do not cover the particular situation, this fact *per se* does not mean that the situation does not fall within the scope of the fundamental rights enshrined in the Satversme. In such an instance the Constitutional Court must verify, whether no circumstances exist pointing to the fact that the Satversme envisages higher level of protection for fundamental rights (*see Judgement of 19 October 2011 by the Constitutional Court in Case No. 2010-71-01, Para 12.1).*

13.2. Article 6 of the Convention provides: "In the determination of his civil rights and obligations [..], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." ECHR in its judgements has repeatedly analysed the right to an impartial court and has revealed its content.

In accordance with the case law of ECHR, the requirement regarding the impartiality of court has two aspects – the subjective and the objective one. Firstly, the court must be subjectively impartial, i.e., none of the judges may be personally biased. The subjective and personal neutrality is presumed, unless evidence exists to the contrary. Secondly, the court must be neutral from the objective vantage point. This means that sufficient guarantees must be provided to exclude any doubts by the parties to the case or the society regarding impartiality of the court (*more extensively see Judgement of 24 February 1993 by ECHR in Case "Fey v. Austria", Application No.*

14396/88, Para 28 – 30, and Judgement of 4 April 2000 in Case "Academy Trading Ltd. and Others v. Greece", Application No. 30342/96, Para 43).

14. In the framework of the case under examination the impartiality of the court in its subjective aspect is not questioned. The Applicants express the opinion that the procedure, in which the Chairperson of the Senate Department of Civil Cases submits a protest and examines it, causes doubts about the impartiality of the court, since the Chairperson of the Senate Department of Civil Cases, upon submitting a protest against a court adjudication that has entered into effect, simultaneously also determines the procedure for examining this protest, i.e., the participants of the assignment sitting, as well as the Senators who are going to examine the case on its merits. Moreover, the Chairperson of the Senate Department of Civil Cases, already at the moment of submitting the protest expresses the opinion that the particular adjudication that has entered into force is unlawful.

Thus, the examination of the contested norm with regard to the impartiality of court must cover its objective aspect.

14.1. In analysing the impartiality of a court in its objective aspect, it must be established, whether verifiable facts exist, which might cause doubts about the impartiality of the court. In this connection even a semblance could be of certain importance. However, semblance cannot be verified by looking at the procedure only from the point of view of the parties to the case. It must be assessed, whether doubts about the impartiality of the court have objective grounds, since in a democratic state courts should enjoy the trust of the parties to the case and also that of the whole society (*see, for example, Judgement of 4 April 2000 by ECHR in Case "Academy Trading Ltd. and Others v. Greece", Application No. 30342/96, Para 45).* I.e., in assessing the neutrality of a court, the impression that the society forms by observing it from aside, is also of importance. To establish that the objective neutrality has been infringed, it is sufficient that conditions pointing to the risk of potential threats to neutrality exist (*see Grabenwarter C. Europäische Menschenrechts konvention. München: C. H. Beck, 2005, p. 303).*

In the course of examining the case, the parties to the case have expressed opposing opinions on whether the regulation included in the contested norm complies

with the understanding of what an impartial court is. The representative of the Saeima J.Pleps emphasized at the court hearing that the contested norm had been amended to make law policy improvements to the civil procedural regulation and not because it had violated persons' right to a fair court (*see Case Materials, Vol. 2, p. 177*).

However, it follows both from the case materials and the opinions expressed during the court sitting that the contested norm was amended with the aim to eliminate any doubts about the impartiality of the court. This was confirmed by the letter of 22 December 2011 of the Ministry of Justice No. 1-11/5101 to the Saeima Legal Affairs Committee regarding the proposals for the draft law "Amendments to the Civil Procedure Law". It is noted in the letter that the amendments should be introduced to the contested norm in order to "release the Chairperson of the Senate Department of the Civil cases from the function of submitting a protest, since the protest is submitted and examined by the judges of the same court, who, to a certain extent, are linked with the arguments expressed in the protest." It is also emphasized that "the obligation of a court to initiate cases collides with the function of administering justice" (*Case Materials, Vol.2., p. 45).* The Supreme Court itself has also repeatedly expressed a similar opinion, noting that the protests are examined by Senators, who to a certain extent are organisationally subordinated to the person submitting the protest – the Chairperson of the Senate Department in Civil Cases (*see, for example, Letter of 28 November 2011 of the Supreme Court No. 10.1/3-2951 regarding amendments to Section 483 of the Civil Procedure Law, Vol. 2, pp. 34 –35).* The Supreme Court itself proposed amendments to the contested norm to foster public trust in courts and to prevent ungrounded complaints (*see Opinion of the Supreme Court on the Case, Vol.1, p. 192*).

Thus, the contested norm in interconnection with the right of the person submitting the protest to determine, which judges will be involved in examining the protest, may cause doubts regarding the impartiality of the court.

14.2. To establish, whether persons' right to an impartial court have been violated, it must be verified, whether the doubts regarding the impartiality of the court are well-founded.

14.2.1. The Applicants note that the Chairperson of the Senate Department of Civil Cases himself prescribes the procedure for examining the protests that have been

submitted, i.e., he can freely decide, which of the judges or a panel of judges will examine the particular protest.

The arguments of the Saeima that the procedure of examining the protests at the Senate does not differ from the one for examining cassation complaints.

The procedure for examining incoming cases is regulated by internal regulatory enactment "The Plan for Allocating Cases in the Senate Department of Civil Cases" (*see Case Materials, Vol.2, pp. 194 –196)*, which is approved by the Chief Justice of the Supreme Court for each calendar year. This regulatory enactment regulates the procedure for allocating and examining cases that are to be adjudicated by the Department of Civil Cases. It is based on certain criteria. Therefor the cases in the Senate Department of Civil Cases could not be allocated only in accordance with the Chairperson's opinion. Therefore the Applicant's opinion that the Chairperson has the discretion to select Senators, who are going to examine the said protest, is ungrounded.

14.2.2. The Applicants bring to the Court's attention the fact that the Chairperson of the Senate Department of Civil Cases, upon submitting a protest, expresses an opinion regarding unlawfulness of the adjudication made by a first instance court, which, to a certain extent, could influence the Senators, who examine the protest. A similar opinion is expressed also by the Ombudsman. The substantiation for amending the contested norm also relies upon this argument.

Article 83 of the Satversme provides: "Judges shall be independent and subject only to the law". The independence of judges and the court, established in this constitutional norm, is one of the fundamental principles of a democratic and judicial state. It is the objective of the judicial power to ensure that in administering justice the constitution of the State, laws and other regulatory enactments were implemented, the principle of the rule of law was abided by and human rights and freedoms were protected (*see Judgement of 18 October 2007 by the Constitutional Court in Case No. 2007-03-01, Para 26*). The institutional guarantees for the impartiality of courts and judges is to be found in the provisions in the Satversme that judges are subject only to law (Article 83 of the Satversme), that judges are appointed to the office upon a decision by the legislator (Article 84 of the Satversme) and the irrevocability of judges from office (Article 84 of the Satversme). Thus, both the Satversme and the law

“On Judicial Power”, which contains the requirements set for judges, envisage certain guarantees for ensuring the independence of judges.

14.2.3. The argument of the Saeima – that the Chairperson of the Senate Department of Civil Cases fulfils only the function of a filter, by transferring in a form of a protest the applications submitted by persons regarding significant violations of substantial or procedural norms – is ungrounded. The regulation of the civil procedure allowed the Chairperson of the Senate Department of Civil Cases to submit protests also upon his or her own initiative or add own grounds to the complaint submitted by persons. In fact, in a situation like this the Chairperson of the Senate Department of Civil Cases assumed the functions of a party to the case (cassator), since the arguments expressed in the protest become the subject matter of the cassation legal proceedings, the dispute regarding it is examined by the Senate.

Also ECHR in a similar case, examining the issue regarding the right of the Chairperson of the Department of Criminal Cases of the Supreme Court of the Republic of Lithuania to submit a protest and prescribe the procedure for examining it, established that the right to an impartial court, established in Article 6 of the Convention, had been violated. ECHR noted that, upon submitting a protest, the Chairperson of the Department, in fact, assumed the functions of the counsel for the prosecution. Even though the Chairperson was not part of the panel of judges that examined the protest, he selected the reporting judge and the department members from the Department of Criminal Cases that he headed. Therefore it could not be asserted that objectively sufficient guarantees were in place, excluding any substantiated doubts as to the absence of inappropriate pressure (*see Judgement of 10 October 200 by ECHR on Case “Daktaras v. Lithuania”, Application No. 42095/98, Para 35 – 38).*

The case under examination as to many facts of the case is in many ways similar to the case adjudicated by ECHR. As ECHR concluded that a situation like this was incompatible with the right to an impartial court, also the rights of the Chairperson of the Senate Department of Civil Cases to submit a protest may collide with the right to an impartial court envisaged in Article 6 of the Convention.

The contested norm allows the Senate to examine cases that it has initiated itself. This kind of regulation is incompatible with the principle of a fair court. “Justice

may exist only if a distance exists between the court and the parties, the judge and the dispute" *(Latvijas Republikas Satversmes komentāri. VI nodaļa. Tiesa. VII nodaļa. Valsts kontrole. Autoru kolektīvs prof. R. Baloža vadībā. Rīga: Latvijas Vēstnesis, 2013, p. 62).* Hence, if the Chairperson of the Senate Department of Civil Cases exercises the aforementioned right, it could give rise to doubts in society regarding the impartiality of the court.

At the court sitting counter-arguments to these doubts were expressed. Thus, for example, it was said that even if the Chairperson of the Senate Department of Civil Cases, upon submitting a protest expressed his attitude towards the submitted complaint (application), this allegedly did not mean that his opinion would *a priori* make the judges uphold the arguments noted in the protest. The practice also shows that the Chairperson's protests can be rejected (*see Case Materials, Vol.1, p. 198).* However, as it was already noted, the right to a fair court demands that even a semblance of impartiality of the court must be prevented. The contested norm causes such semblance and, thus, is incompatible with the right to an impartial court.

Thus, the contested norm is incompatible with the first sentence of Article 92 of the Satversme.

15. In view of the fact that the contested norm has become invalid, there is no need for the Constitutional Court to declare it invalid. However, the Applicants have requested to declare the contested norm invalid as of another date – as of the date when it was adopted or applied.

Hence, the Constitutional Court must consider, whether any facts exist in the case allowing to declare the contested norm invalid with regard to the Applicants as of the date of its adoption.

15.1. The Saeima and a number of the summoned persons noted that the granting of retroactive force to the judgement would infringe upon the legal certainty of other persons involved in the particular civil case and their rights to a fair court. In such a case the restriction upon the fundamental rights of the aforementioned persons could exceed the possible (perceived) doubts about the impartiality of the court.

In practice protests predominantly are submitted in connection with such violations of law, which are detected not by the officials referred to in law (CPL Section 483), but by those persons, whose interests are affected by an adjudication, which has entered into force (*see Case Materials, Vol.1, p. 198*). When such a person identifies a violation, it has the right to submit a reasoned application to certain officials and request them to submit a protest regarding a particular court ruling.

Protest is an institution of civil procedure that has the aim to achieve re-examination of the case, in circumstances defined by the law. CPL identifies a number of factors as the legal grounds for submitting a protest: 1) breach of substantive or procedural norms of law in cases, which have only been adjudicated in a first instance court, if the court adjudication has entered into force and has not been appealed pursuant to procedures laid down in law due to reasons independent of the participants in the matter; 2) breach of substantive or procedural norms of law in cases, which have only been adjudicated in a first instance court and the court adjudication, which affects the rights of State or local government institutions, has entered into force; 3) breach of substantive or procedural norms of law, which have only been adjudicated in a first instance court and the adjudication, which affects not the rights of parties to the case, but of other persons, has come into force.

The submitting of a protest cannot be equalled to the right to turn to court; moreover, neither can it be considered to be an appeal. Therefore, submitting of a protest is not to be linked with the right of a private person to turn to court or to appeal against its rulings. Submitting a protest, i.e., a procedural document is a form of procedural activities, which differs form the regular procedure of judicial proceedings and is to be considered an exception, where *res juridicata* may be re-examined due to certain considerations. The legitimate aim of the protest is to make exercising the right to a fair court more effective, to supervise the correctness of applying procedural and substantive norms (*see: Osis M. Īpašs protests civilprocesā. Jurista Vārds, 2009. gada 10. novembris, Nr. 45).* Thus, only if cassation legal proceedings are initiated on the basis of a protest the rights of parties to the case to a fair court arise, and, thus, also legal certainty that the particular case will be examined in accordance with the legal regulation that is in force.

Thus, the Constitutional Court must balance the interests of two parties – on the one hand, the Applicants' right to an impartial court and, on the other hand, the need to safeguard the rights of other persons to a fair court and legal certainty.

15.2. In the examination of any case the outcome is important – a fair judgement, which is an inalienable element of a fair court. If the Constitutional Court were to decide that the contested norm should be recognised as being invalid with regard to the Applicants as of the date of its adoption, then the case, which has been initiated regarding the court adjudication favourable to Applicants in the cassation instance should be terminated. This would significantly infringe upon the rights of those persons, who had had turned to the Chairperson of the Senate Department of Civil Cases, requesting to submit a protest against the respective adjudication. The only possibility for the aforementioned persons to protect their rights would be to turn to the Prosecutor General and request submitting of a protest. However, the assignment sitting of the Senate has already recognised the protest as being well-founded and has initiated cassation legal proceedings, thus a protest submitted by the Prosecutor General could lead to the same situation as the present one. Moreover, this procedure would require additional time and that would postpone the examination of the particular case on its merits at the Senate Department of Civil Cases.

Thus, recognising the contested norm as being invalid as of the date of its adoption could significantly infringe upon the fundamental rights of other persons.

15.3. The Constitutional Court must ensure that the violation of the Applicant's fundamental rights, caused by applying the anti-constitutional court, is eliminated to the extent possible.

Para 12 of Section 31 of the Constitutional Court Law provides that a judgement by the Constitutional Court may contain "other rulings by the Court". Thus, the Constitutional Court has the right to regulate also those issues that are important to ensure that after the contested norm has been recognised as being invalid new violations of the fundamental rights established in the Satversme would not occur and that taking the contested norms "out of circulations" would not cause disturbances to

the legal regulation (*see Judgement of 16 December 2005 by the Constitutional Court in Case No. 2005-12-0103, Para 25*).

Since the case that has been initiated in the cassation legal proceedings on the basis of the protest submitted by the Chairperson of the Senate Department of Civil Cases has not yet been adjudicated, infringement upon the Applicants' fundamental rights can be prevented by applying the norms of CPL in compliance with the first sentence of Article 92 of the Satversme. To prevent even seeming doubts regarding the impartiality of the court, the case initiated in the cassation legal proceedings should be examined in an expanded composition of the court – by at least seven Senators. The Applicants also agree that examination of the case by full composition of the court could prevent violation of their fundamental rights (*see Case Materials, Vol.2, p.171).*

The Substantive Part

Pursuant to Para 3 and Para 6 of Section 29(1) and Sections 30 - 32 of the Constitutional Court Law, the Constitutional Court

held:

1) **to recognise Section 483 of the Civil Procedure Law insofar as it establishes the right of the Chairperson of the Senate Department of Civil Cases to submit a protest (in the wording, which was in force until 1 January 2013) incompatible with the first sentence of Article 92 of the Satversme of the Republic of Latvia;**
2) **the cases, which have been initiated following a protest submitted by the Chairperson of the Senate Department of Civil Cases, shall be heard by an expanded composition of the Senate, ensuring to persons the right to an impartial court guaranteed by Article 92 of the Satversme.**

The Judgement is final and not subject to appeal.

The Judgement comes into force on the day of its pronouncement.

Chairperson of the Court Sitting G. Kūtris