



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## J U D G E M E N T

On Behalf of the Republic of Latvia

Riga, 4 October 2010

Case No. 2010-15-01

The Constitutional Court of the Republic of Latvia, composed of the Chairman of the Court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Vineta Muižniece and Viktors Skudra,

having regard to a constitutional complaint of “Yelverton Investment B.V.” (hereinafter in the text – the Applicant),

according to Article 85 of the Satversme (Constitution) of the Republic of Latvia, Article 16 1<sup>st</sup> indent, Article 17 (1), 11<sup>th</sup> indent, and Article 28.<sup>1</sup> of the Constitutional Court Law,

on 21 September 2010 in writing examined the case

**“On Compliance of Section 141 Paragraph 1 of the Civil Procedure Law insofar as It Establishes the Right to Submit an Ancillary Complaint Regarding a Decision Satisfying an Application on Securing of a Claim with Article 91 and Article 92 of the Satversme”.**

### The Facts

1. On 14. October 1998, the Saeima [Parliament] of the Republic of Latvia (hereinafter – the Saeima) adopted the Civil Procedure Law (hereinafter also referred to as the CPL) that came into effect on 1 March 1999.

**1.1.** Before October 2006, norms of Chapter 19 of the CPL “Securing Claims” provided for the right of the defendant to submit an ancillary complaint for a decision satisfying an application for the securing of a claim. Section 146 Para 1 of the CPL established: “It is possible to submit an ancillary complaint for all decisions regarding the securing of a claim, except for issues established in Section 145 Para 2 of this Law”. Section 145 Para 2 of the CPL regulated a situation when a decision regarding the securing of a claim was adopted prior to bringing an action, whilst no action was brought within the term established by the court.

**1.2.** By law of 7 September 2006 adopted by the Saeima “Amendments to the Civil Procedure Law” that came into effect on 11 October 2006, substantial amendments were introduced into Chapter 19 of the CPL. Section 148, Section 139, Section 140, Section 141 and Section 142 of the CPL obtained new wording, whilst Section 144, Section 145 and Section 146 of the CPL were crossed out. The new wording of Section 141 of the CPL provided that ancillary complaints can be submitted:

1) in regard to the decisions that secure losses which the defendant may suffer because of the claim enforcement;

2) in regard to a decision that replaces the specified means of securing a claim with other means;

3) in regard to a decision by means of which the court that has adopted a decision regarding the securing of a claim repeals the decision regarding the securing of a claim or leaves it unchanged.

After coming into effect of the above mentioned amendments, the defendant was denied the right to submit an ancillary complaint in regard to a decision satisfying an application for the securing of a claim. The defendant could protect his or her rights based on Section 140 Para 5 of the CPL by lodging an application regarding revoking of a decision before the court that adopted the decision regarding the securing of a claim. In case if the court refused to satisfy the application, the defendant, pursuant to Section 141 Para 1 of the CPL, could submit an ancillary complaint regarding the court decision.

The above mentioned procedure was also preserved in the law of 14 December 2005 of the Saeima “Amendments to the Civil Procedure Law” that establish a new wording of Section 141 Para 1 of the CPL: “An ancillary complaint may be submitted in regard to the decisions referred to in Section 140, Paragraphs two, three

and five of this Law and the decision with which the application for the securing of evidence is refused.”

**1.3.** On 5 February 2009, the Saeima adopted the Law “Amendments to the Civil Procedure Law” that took effect on 1 March 2009. This law introduced substantial amendments into Chapter 19 of the CPL and the entire Civil Procedure Law. According to the above mentioned amendments, Section 140 Para 5 obtained the following wording: “The securing of a claim may be revoked by the same court on the basis of an application by the parties.” However, Section 141 Para 1 of the CPL obtained the following wording: “An ancillary complaint may be submitted in regard to the decisions referred to in Section 140 and the decisions rejecting the securing of a claim. In case referred to in Section 140 Para 2 of this Law, an ancillary complaint can be submitted by a court decision insofar as it commits the plaintiff to securing losses.”

According to such wording of the Law, the defendant was now denied the right to submit an ancillary complaint also in regard to a decision rejecting revocation of the securing of a claim.

**1.4.** In the judgment of 30 March 2010 by the Constitutional Court in the case No. 2009-85-01 that came into effect on 2 April 2010 it was ruled that up to the moment when the Saeima introduces amendments into the normative regulatory framework, the wording of Section 141 Para 1 of the CPL of 14 December 2006 shall be effective insofar as it grants the defendant the right to submit an ancillary complaint regarding the decision refusing to revoke the securing of a claim.

**2. The Applicant** holds that Section 141 Para 1 of the CPL insofar as it does not grant the right to submit an ancillary complaint in regard to a decision satisfying an application for the securing of a claim (hereinafter – the Contested Norm) does not comply with Article 91 and Article 92 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

**2.1.** The Applicant indicates that the Contested Norm does not ensure procedural equality of persons involved in a civil law procedure because the defendant is denied the right to lodge an ancillary complaint before a court of a higher instance in regard to a decision satisfying an application for the securing of a claim. Such decision has a

negative influence on the right of the defendant to defend him or herself before the court; likewise, it deteriorates position of the defendant at legal proceedings.

The Applicant emphasizes that, when submitting a claim regarding the securing of a claim, the plaintiff does not have the duty to present evidence proving unlawful activities by the defendant. However, when deciding on the securing of a claim, the court is not committed to making in-depth analysis of the claim and to assess whether the claim has ever been satisfied. To decide the issue regarding the securing of a claim, it is sufficient for the plaintiff to submit a well-grounded application wherein his subjective opinion is presented stating the reasons why execution of a judgment is difficult or impossible. The Contested Norm permits the court to adopt a decision that is not subject to appeal without assessing evidence and based only on statements presented by only one party, whilst the opinion of the other participant of the case can be left unheard. This results in substantial restriction of the rights of the other case participant, which does not comply with the right to a fair court established in Article 92 of the Satversme.

**2.2.** The Applicant maintains that the Contested Norm does not have a legitimate objective and it breaches the principle of proportionality.

The Applicant indicates that the probable aim of the Contested Norm is to prevent any delay of legal proceedings. If the defendant is denied the right to submit an ancillary complaint then it is not clear why such right has been conferred to the plaintiff. The Applicant is of the view that procedural balance is of a greater importance than procedural economy.

If a court decision is unfavourable for the defendant and the claim is secured, the Contested Norm prohibits the defendant to submit an ancillary complaint regarding a decision satisfying an application for the securing of a claim. In such event, the only option for the defendant is to address the court that secured the claim by asking it to revoke the above mentioned decision. In the application regarding revoking of the securing of a claim, the defendant can only try to prove that circumstances that once underlied the securing of a claim have changed. Notwithstanding, the plaintiff also has the right to appeal against decisions unfavourable to him by submitting an ancillary complaint.

The Applicant indicates that the defendant has the right to object against such decision only according to appellate procedure; however, such mechanism is regarded as

ineffective and unequal to the extent of the rights conferred to the plaintiff because, when examining a case on its merits, an appellate court does not verify lawfulness and admissibility of the securing of a claim. Consequently, the Contested Norm does not comply with Article 91 of the Satversme because it does not ensure procedural equality of both parties of legal proceedings.

**2.3.** The Applicant indicates that the plaintiff does not have to pay state duty for lodging of an application regarding securing of a claim before the court. It should also be taken into account that the amount of the state tax is not commensurate with the amount of losses incurred by the defendant. By means of the securing of a claim, the court immediately interferes with the property status of the defendant and restricts his or her rights. The fact that the plaintiff pays state tax could not serve as grounds for satisfying an application regarding the securing of a claim. The court can commit the plaintiff to compensate losses incurred by the defendant in case if the application regarding securing of a claim is satisfied; however, this is not mandatory. In the result of this, the defendant is legally less protected if compared to the plaintiff.

**3.** In the resolution of 3 March 2010 on initiating a case, the Constitutional Court Panel ruled that it is not necessary to summon the institution that adopted the contested act, **the Saeima**, to submit a reply because the Court has already received its reply regarding the facts of the case and legal justification thereof in the case No. 2009-85-01 “On Compliance of Section 141 Paragraph 1 of the Civil Procedure Law insofar as It Provides for the Right to Submit an Ancillary Complaint Regarding Securing of a Claim with Article 91, Article 92 and Article 105 of the Satversme of the Republic of Latvia”.

In the reply in the case No. 2009-85-01, the Saeima has indicated that the Contested Norm does comply with Article 91 and Article 92 of the Satversme.

The court may satisfy applications on securing of a claim only if it complies with certain criteria, the plaintiff has presented evidence, and the court has made sure that, in case if the claim is not secured, the plaintiff would not be satisfied even if the judgment is favourable to him or her. The aim of the Contested Norm is to ensure faster settlement of disputes by eliminating the possibility to delay court proceedings and to reduce workload of courts.

The Saeima indicates that the Civil Procedure Law guarantees equality of parties when deciding the issue of securing a claim. Both parties are conferred the right to present their evidence and arguments when the court decides on the securing of a claim or repealing of the securing of a claim. After having received a plaintiff's application and evidence, the court of the first instance may decide on cancelling or amending of the security of a claim due to changes of circumstances. Moreover, in such a case both parties are conferred the right to present their opinion.

### **The Constitutional Court has established:**

4. In the judgment of 30 March 2010 in the case No. 2009-85-01, the Court ruled: "Section 141 Para 1 of the CPL insofar as it does not grant the right to submit an ancillary complaint in regard to a decision satisfying an application for the securing of a claim or the decision rejecting an application regarding revoking of the security of the claim does not comply with Article 92 of the Satversme.

In the above mentioned judgment, the Constitutional Court also concluded that the rights of the defendant conferred thereto by Section 140 Paragraph 5 of the CPL, namely, the right to submit an application before a court regarding cancelling of the security of a claim satisfying an application for securing a claim, is not equal to the right to submit an ancillary complaint. Consequently, the plaintiff and the defendant in court proceedings where the court decides on the securing a claim enjoy unequal conditions, in the result of which equality of procedural rights pertaining to the content of the right to a fair trial is restricted (*see: Judgment of 30 March 2010 by the Constitutional Court in the case No. 2009-85-01, Para 13*).

Section 141 Para 1 of the CPL has a legitimate aim, i.e. to speed up adjudication of cases and make proceedings more effective, as well as to eliminate the possibility to relay court proceedings and reduce workload of courts. The Constitutional Court has established that the Saeima has executed proper assessment when selecting the most lenient measure for reaching of the legitimate aim; however, this does not ensure balance between procedural economy and equality of procedural rights. Consequently, the benefit gained by the society from the Contested Norm, insofar as it does not confer the

defendant the right to submit an ancillary complaint regarding the decision satisfying an application for securing a claim or a decision rejecting an application on cancelling of the security of the claim, is lesser than the detriment caused to the rights and legal interests of a person (*see: Judgment of 30 March 2010 by the Constitutional Court in the case No. 2009-85-01, Para 16 and 20*).

The Court also indicated that that a judge, when deciding on securing of a claim, should assess evidence for circumstances that would make execution of a possible judgment problematic or impossible (*see: Judgment of 30 March 2010 by the Constitutional Court in the case No. 2009-85-01, Para 20.2*).

The facts and legal justification thereof presented in the constitutional complaint of the Applicant are similar to the facts and legal justification thereof examined in the frameworks of the case No. 2009-85-01. In the judgment of 30 March 2010, the Court has already assessed arguments of the Applicant regarding compliance of the Contested Norm with Article 92 of the Satversme.

**5.** The Applicant asked to assess compliance of the Contested Norm also with Article 91 of the Satversme. However, it is not necessary for the Constitutional Court to assess compliance of the Contested Norm with the above mentioned Article of the Satversme because in the judgment of 30 March 2010 in the case No. 2009-85-01 the Court has already established non-conformity with Article 92 of the Satversme.

**6.** Article 32 (3) of the Constitutional Court law provides that a legal norm (act) that the Constitutional Court has declared as non-compliant with the norm of a higher legal force, shall be regarded as not in effect from the day of publication of the Constitutional Court judgment, if the Constitutional Court has not determined otherwise.

In the judgment of 30 March 2010 in the case No. 2009-85-01, the Constitutional Court has already recognized the Contested Norm as null and void as from the date of adoption thereof in relation to the applicants of the particular case, namely, the joint stock company "TOPMAR HOLDINGS" and Vitālijs Grinčišins.

Consequently, it is necessary to establish whether the Contested Norm shall be recognized as null and void as from the date of adoption thereof also in relation to the Applicant.

**6.1.** The Constitutional Court has reiterated that a constitutional complaint can be submitted in case if, first, infringement of the fundamental rights is direct, concrete, and the contested norm affects the applicant and, second, infringement exist at the time when an application is submitted (*see, e.g.: Judgment of 20 May 2002 by the Constitutional Court in the case No. 2002-01-03, and decision on termination of legal proceedings of 11 November 2002 in the case no. 2002-07-03*), or if there are circumstances that require “immediate” adjudication of a case (*see, e.g.: Judgment of 22 February 2002 by the Constitutional Court in the case No. 2001-06-03, Para 2.4 of the concluding part*).

It follows from the case materials, that the Applicant is a private limited liability company with the registered seat in the Kingdom of the Netherlands (*see, pp.30 of the case materials*). By the decision of 18 November 2009, the Riga City Zemgale Regional Court partially satisfied the application regarding the securing of a claim by mortgaging a part of JSC “Ventbunkers” capital shares owned by the Applicant and by prohibiting him to exercise the rights of a shareholder (*see, pp.24 of the case materials*).

**6.2.** Pursuant to the effective regulation, the defendant has the right to submit an ancillary complaint for the following court decision regarding the securing of a claim:

1) in regard to a decision that replaces the specified means of securing a claim with other means;

2) up to the moment when the Saeima would introduce amendments into the normative regulatory framework – in regard to a decision by means of which the court has refused to repeal the securing of a claim;

3) in regard to a decision that commit the plaintiff to secure losses.

Consequently, the Applicant is denied the possibility to submit an ancillary complaint in regard to a court decision that is unfavourable to him and that partially satisfied the application regarding the securing of a claim. In the judgment of 30 March 2010 in the case No. 2009-85-01, the Constitutional Court has already concluded that the effective legal regulatory framework prohibiting the defendant to appeal against the decision satisfying an application of securing of a claim or the decision rejecting an application regarding cancelling of the security of a claim does not balance two substantial and mutually related elements of Article 92 of the Satversme, notably, procedural economy and equality of procedural rights. Taking into account the fact that the Applicant is in a similar legal situation if compared to the applicants in the case No.

2009-85-01, it is necessary to ensure protection of the rights of the Applicant up to the time when the Saeima would introduce proper amendments into the normative regulatory framework.

Consequently, as to the Applicant, the Contested Norm shall be recognized as null and void as from the date of adoption thereof for him to be able, in the case of necessity, to appeal against a court decision unfavourable to him without waiting for amendments to be introduced into the normative regulatory framework.

### **The Constitutional Court**

Based on Article 30 – 32 of the Constitutional Court Law

**h o l d s :**

**Taking into account the judgment of 30 March 2010 by the Constitutional Court in the case No. 2009-85-01, Section 141 Para 1 of the Civil Procedure Law insofar as it does not grant the right to submit an ancillary complaint in regard to a decision satisfying an application for the securing of a claim as null and void, in relation to the applicant “Yelverton Investment B.V.” as from the date of adoption thereof.**

The Judgment is final and not subject to appeal.

The Judgment shall come into force on the date of publishing of it.

Presiding Judge

G. Kūtris