



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

J U D G E M E N T

On Behalf of the Republic of Latvia

Riga, 24 November 2010

Case No. 2010-08-01

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 constitutional complaints of Mr. Genādijs Gončarovs and Ms. Ināra Sīle and that of Ms. Svetlana Tropika and Mr. Indulis Brodiņš (hereinafter – the Applicants),

with the secretary of the hearing of the Court, Ms. Līva Rozentāle,

with the participation of Mr. Indulis Brodiņš and a representative of the Applicants Ms. Baiba Didrihsone, and

with the participation of Mr. Gunārs Kusiņš, a representative of an institution that passed the contested act, the Saeima [Parliament],

according to Article 85 of the Satversme [Constitution] of the Republic of Latvia, Article 16 1st indent, Article 17 (1), 11th indent and Article 19² of the Constitutional Court Law,

on 19 and 26 October 2010, in Riga, in a public hearing, examined the case

“On Compliance of the Words “or the Pledgee Who has the Right to Sell the Pledge on the Open Market” of Section 396 (1) and the Words “but if the Application has been Submitted by a Pledgee – also a True Copy of the Pledge Agreement, Evidence Regarding Warning of the Debtor, unless it Does not Follow from the Document Itself or the Law that such Warning is Required”, the Words „without Notifying the Applicant and the Debtor thereof” of Section 397 (1) and the Words „or by a Debtor of a Pledgee and the Pledgee has the Right to sell the Immovable Property on the Open Market” of Section 397 (2) Indent 1 of the Civil Procedure Law with Article 92 of the Satversme of the Republic of Latvia”.

The Facts

1. Chapter 49 of the Civil Procedure Law regulates voluntary sale of immovable property at auction through a court. Pursuant to Section 396 (1) of the Civil Procedure Law, an application regarding voluntary sale of immovable property at auction through a court may be submitted by the owner or the pledgee who has the right to sell the pledge on the open market.

Section 396 (2) of the Civil Procedure Law provides that appended to the application for voluntary sale of immovable property at auction through a court shall be the conditions of sale and a certified print-out from the relevant part of the Land Register, which specifies the entries and endorsements in force, but if the application has been submitted by a pledgee – also a true copy of the pledge agreement, evidence regarding warning of the debtor, unless it does not follow from the document itself or the law that such warning is required.

Section 397 (1) of the Civil Procedure Law provides that an application regarding voluntary sale of immovable property at auction shall be adjudicated by a judge sitting alone within a period of seven days from the day of submission of the application, on the basis of the submitted application and documents attached thereto, and without notifying the applicant and the debtor thereof.

However, Section 397 (2) Indent 1 of the Civil Procedure Law establishes that The judge shall take a decision to permit the sale at auction having ascertained that the immovable property is owned by the submitter of the application or by a debtor of a pledgee and the pledgee has the right to sell the immovable property on the open market.

In the present case, compliance of the words “or the pledgee who has the right to sell the pledge on the open market” of Section 396 (1) and the words “but if the application has been submitted by a pledgee – also a true copy of the pledge agreement, evidence regarding warning of the debtor, unless it does not follow from the document itself or the law that such warning is required”, the words „without notifying the applicant and the debtor thereof” of Section 397 (1) and the words „or by a debtor of a pledgee and the pledgee has the right to sell the immovable property on the open market” of Section 397 (2) Indent 1 of the Civil Procedure Law (hereinafter – the Contested Norms) with Article 92 of the Satversme of the Republic of Latvia (hereinafter – the Satversme) has been contested.

2. The Applicants hold that the Contested Norms, insofar as they apply to the right of a pledgee to submit an application regarding voluntary sale of immovable property at auction, do not comply with Article 92 of the Satversme because a debtor is granted no procedural guarantees in this procedure. The Norms fail to establish the duty of debtors to warn by thus denying the right of a debtor to be notified on an application and denying the right to submit evidence and explanations, to influence establishment of the initial price of immovable property to be sold at auction, and to appeal against an adopted decision, or to otherwise influence execution thereof.

The term for execution of liabilities of the Applicants established in the pledge agreement and registered in the Lend register has not yet set in, and norms of the Civil Procedure Law permit the Court to assess whether provisions, according to which liabilities should be fulfilled before the date indicated in the public register, have set in. However, a court decision is not based on information available in public registers and documents substantiating their entries. Court assessment regarding setting in of the conditions that confer a pledgee the right to sell immovable property at voluntary auction is based merely on unilateral statements of a pledgee, for instance, statements regarding

payment schedule of payment of principal amount of credit or that of interest, as well as regarding the fact that they have failed to observe the schedule. A debtor is denied the possibility to raise his or her objections and submit evidence regarding, for instance, the fact that credit payment has been executed within the credit payment term. Consequently, the procedure for proving setting in of the above mentioned provisions contradicts principles of legal procedures, namely, the principle of equality of the parties and that of competition.

In order to make court proceedings more effective, the State has the right to establish procedural restrictions; however, these must be proportional and aimed at reaching of a legitimate aim. If restrictions have been established, but no fair decision has been adopted at the proceedings according to one of the parties, then it requires a certain procedure, according to which infringed rights could be protected. At present, if contested norms are applied before the term of fulfilment of liabilities, they constitute a non-proportional restriction because setting in of conditions, due to which the right to sell immovable property at a voluntary auction has been conferred, has not been properly proven. This restriction might cause considerable detriment to a pledgor, namely, he or she can lose property without reason in proceedings, where he or she had no procedural rights. Moreover, Section 396 (2) of the Civil Procedure Law permits a situation that a debtor is not notified on submitting such application.

Chapter 49 of the Civil Procedure Law neither provides a possibility to raise a claim of reverse execution pursuant to Section 406 of the Civil Procedure Law in relation to decisions regarding undisputed compulsory execution. An applicant is guaranteed neither the right to submit an appeal or an ancillary complaint, nor the right to raise objections against an application of a pledgee.

The Applicants emphasize that the pledge right regulated in the Civil Law might only confer a creditor the right to satisfy its claim for funds obtained in the result of sale of collateral. However, the Contested Norms also establish the right of a pledgee to sell collateral before the term of execution of liabilities disregarding the fact whether circumstances, under which pre-term recovery of liabilities is possible, have been proved.

An application of a pledgee regarding voluntary sale of immovable property at auction might be submitted due to a mistake of a borrower or in a result of internal

miscommunication. Such situation could be prevented if a debtor would be given the possibility to express his or her opinion on a submitted application.

Section 1657 of the Civil Law provides that a court may release the debtor from consequential losses due to default also in other cases where the debtor cannot be considered at fault due to lack of care, recklessness or negligence, or if performance did not occur due to *force majeure*. The Contested Norms does not give the debtor a possibility to exercise the right to ask the court to release him or her from consequential losses due to default.

The rights of a debtor are also infringed by the fact that, pursuant to Section 398 (1) of the Civil Procedure Law, the immovable property shall be listed and evaluated only if requested by the person on the basis of whose application the sale is taking place. Consequently, a borrower can establish inadequately low starting price for an auction, whilst the debtor has no possibilities to influence the price.

Consequently, the Contested Norms do not comply with the fundamental principles of a democratic State, they infringe the basic right of a person to a fair case adjudication, as well as threaten the basic right of a person to property and, in certain cases – that to home.

At the Court hearing the Applicants concretized that the Contested Norms infringe the right to a fair court, first, by establishing that a debtor should not be notified on an application submitted by a pledgee regarding voluntary sale of immovable property at auction through a court. Second, a debtor is not given the possibility to submit explanations or raise objections before the court in relation to the above mentioned application of a pledgee. Third, a court decision cannot be appealed against according to cassation procedure, by submitting an ancillary complaint, or by raising a claim of reverse execution.

The Applicants hold that the Contested Norms do not reach the legitimate aim because they do not ensure fast and effective case adjudication; rather, they infringe the principle of procedural economy; therefore new proceedings are launched in case of a dispute.

The contested aim could be reached by other measures that would restrict the rights of a person at a lesser extent. First, it is possible to give a debtor the possibility to express

his or her opinion before a decision is adopted. Second. A debtor could be conferred the right to submit an ancillary complaint regarding judge's decision. Third, it is possible to establish an institution permitting to raise a claim of reverse execution, like it is established in Section 406 of the Civil Procedure Law.

3. The institution that adopted the contested act, **the Saeima** does not share the opinion of the Applicant and holds that the Contested Norms do comply with Article 92 of the Satversme.

The rights included in this section, namely, the right to a fair court cannot be applied as a tool for delaying legal proceedings. Refusal from accelerated forms of debt recovery procedure that are characteristic to civil proceedings would delay legal proceedings and would infringe interests of a creditor without reason.

The legitimate aim of the Contested Norms is to serve for interests of civil proceedings, namely, to allow the Parties to agree on application of these norms for more effective resolving of property issues. This approach complies with the legitimate aims referred to in Article 116 of the Satversme, namely, protection of the rights of other persons and welfare of the society.

Pursuant to the Civil Law, the aim of the pledge right is to protect a creditor. One of the most substantial component of the pledge right is the right of the creditor to sell pledged property. Should a creditor be denied the possibility to gain benefit from pledged property, then the aim of pledge institution would not be reached and the property right would have no sense.

When establishing the pledge right by means of an agreement, a creditor and a pledgor can agree on special provisions on sale of pledged property in case if the pledgor has failed to fulfil its liabilities in relation to the creditor in due time. The pledgor can enable the creditor to sell pledged property on the open market. As to sale of pledged property, the expression "to sell on the open market" has always been interpreted as voluntary public sale, i.e. voluntary auction through a court. Consequently, the creditor, when lodging an application before a court regarding sale of immovable property through a court, implements his or her right to sell immovable property according to the procedure agreed upon with the pledgor.

Due to this agreement, when examining an application regarding voluntary sale of immovable property at auction, a court has to investigate whether the pledgor has entitled the creditor to sell pledged property on the open market. The court does not have to assess objections of the pledgor regarding sale of pledged property because he has already expressed his non-consent regarding the sale by concluding the respective agreement. Consequently, the court does not have to involve a pledgor when deciding on a particular application.

Assessment of immovable property is not a pre-condition for submitting an application regarding voluntary sale of immovable property at auction through a court. Consequently, a pledgee can establish the initial price of auction based on the assessment of immovable property or criteria known to him or her. However, it should be taken into account that a pledgee, when establishing the initial price of auction, acts as an agent of a debtor, which determines restrictive provisions regarding his or her actions. A pledgee cannot establish such initial price of auction that would be considerably lower than value of pledged property since this might contradict the principle of good faith enshrined in Section 1 of the Civil Law.

The Saeima also draws attention to the fact that the Contested Norms could be applied to agreements, to which mechanisms for protection of consumer rights would apply. Section 6 (11) of the Consumer Rights Protection Law establishes that upon resolving a dispute or carrying out other procedural actions arising from the contract entered into between a manufacturer, seller or service provider and a consumer, the court shall evaluate the terms of the contract and for the resolution of the dispute shall not apply the unfair terms provided for in the contract in relation to the consumer.

At the Court hearing, the Saeima representative indicated that during case examination it has not been established that the Contested Norms would pertain to the scope of Article 92 of the Satversme.

The Saeima representative also indicated that opinions of the Applicants prove that they want to be granted the possibility to contest actions of a creditor rather than to submit more documents for judge's evaluation. However, this possibility has already been established in the Civil Procedure Law.

The opinion that a judge cannot apply the Civil Procedure Law in conjunction with the Consumer Rights Protection Law is ungrounded. Such interpretation contradicts the principle of separation of powers, as well as those of the rule of law and legal security. The Consumer Rights Protection Law contains imperative norms, and a judge has the duty to comply with them.

4. The summoned persons, **the Ministry of Justice** holds that the Contested Norms do comply with Article 92 of the Satversme.

When examining an application regarding voluntary sale of immovable property at auction, the court has to make sure whether all documents referred to in Section 396 of the Civil Procedure Law have been attached to the application; the court does not have the duty to verify their content by exceeding limits established in Section 397 of the Civil Procedure Law. If the right to sell immovable property on the open market have been conferred with a condition, then a judge has to assess it unless the condition follows from a mortgage (pledge) agreement.

When investigating whether there exist or not legitimate obstacles for the sale of immovable property under conditions established in the application, a judge has to ascertain that none of the conditions for the sale of immovable property are in conflict with normative acts and that these conditions are precise and explicit. Moreover, conditions of voluntary sale cannot contradict provisions of the Civil Procedure Law regarding directing of recovery against immovable property; neither can it infringe the stipulated rights of a pledgor. If provisions of a pledge agreement include conditions that do not comply with the Consumer Rights Protection Law and directly affect the content of consumer rights, this might serve as an obstacle for the sale of immovable property. Likewise, inadequately low auction price could also be regarded as an obstacle for the above mentioned procedure.

The right conferred to debtors in Section 1657 of the Civil Law, namely, the right to ask a court to release him or her from consequential losses, shall be exercised according to procedure by a court action.

The right to participate in examination of an application and raise objections against it is incompatible with the legal institute of pledge. The special procedure for establishing

the pledge right and simplified provisions for exercise of the pledge right following from it would no more ensure fast and effective regulation of civil relations.

Mutual analysis of norms of the Civil Law and the Civil Procedure Law allows concluding that, in a procedure regarding voluntary sale of immovable property at auction, it is not possible to review issues related with provisions of the liabilities or execution thereof. Such claims shall be reviewed according to a procedure by a court action, which implies exercise of the right to ask application of stipulated measures for securing a claim, including suspension of execution of a decision to sell immovable property by auction.

The Contested Norms do comply with 5 April 1993 Council Directive No. 93/13/EEC on terms in consumer contracts because a judge, when adopting a decision regarding voluntary sale of immovable property by auction through a court, has to assess fairness of a respective provision and compliance thereof with requirements of the Consumer Rights Protection Law.

At the Court hearing, the Ministry of Justice also indicated that Chapter 49 of the Civil Procedure Law must be considered in conjunction with the regulatory framework regarding the legal institute of pledge established in the Civil Law. The aim of the pledge right is to protect interests of creditors in cases when a debtor or pledgor has failed to fulfil their liabilities. If a pledgee would be denied the right to resort to the pledged property for satisfaction in case of default, the sense of the legal institute of pledge would change.

The pledge right is established in an agreement based on the principle of voluntary participation. The above mentioned agreement serves as basis for the duty of the court to investigate whether a pledgor has granted creditor the right to sell pledged property on the open market; moreover in cases of this category, the court does not have to assess posterior objections of a pledgor regarding sale of pledged property.

As to the fact that the Civil Procedure Law does not exclude cases when a debtor is not warned, the Ministry of Justice indicated that this is admissible only if it has been clearly indicated in the agreement that no warning is required. Moreover, norms of the Civil Procedure Law have been elaboration for application to general situation with the

purpose to regulate different life situations, and they apply to all debtors that might be both, natural and legal persons.

The fact that the Civil Procedure Law has failed to give a debtor the possibility to receive assessment of property has occurred because a pledgee, whom a debtor has committed to selling pledged property on the open market, is responsible for the sale thereof acting as an authorized person. The Civil Procedure Law provides for obligatory assessment in cases of compulsory execution thereof by a bailiff who does not have a special duty to act as debtor's authorised person. Moreover, the sale at auction *per se* shall be recognized as the most objective way of pricing.

5. The summoned person – the Consumer Right Protection Centre – informs that it has received complaints on different cases related with application of the Contested Norms.

According to the Consumer Right Protection Centre, terms of agreement that permit not notifying a consumer on the fact that an application on voluntary sale of immovable property at auction has been submitted, shall be regarded as unfair pursuant to the Consumer Rights Protection Law. Such terms deny the consumer as the weakest contractor, equal possibilities to protect his or her rights. Moreover, issuing of a warning does not require from a pledgee any substantial material investments, and it increases possibility of the consumer to protect his or her lawful interests in the case of necessity.

When assessing compliance of the Contested Norms with Article 92 of the Satversme, it is necessary to take into account the fact that the court examines an application based solely on documents submitted by the pledgee. Thus a pledgor (consumer) is denied the possibility to submit evidence and protect his or her legal interests.

The Contested Norms shall also be regarded as non-compliant with Article 92 of the Satversme when interpreted in conjunction with Section 396 (3) of the Civil Procedure Law that permits a pledgee to freely determine the starting price of auction, as well as the kind and procedure for the highest price by ignoring property interests of the pledgor and other circumstances. These norms ensure protection only of a pledgee and may cause substantial losses to a pledgor (consumer).

Chapter 49 of the Civil Procedure Law does not provide, at any stage of legal proceedings, the right of a consumer to object to validity of a claim referred to in an application and to provide comments on compliance of information with the facts of the case. Likewise, it follows from Chapter 49 of the Civil Procedure Law that auction, even if it has not been grounded on its merits, cannot be suspended, provided that the application complies with the terms of 396 of the Civil Procedure Law.

According to the Consumer Right Protection Centre, the Contested Norms do not comply with 5 April 1993 Council Directive No. 93/13/EEC on terms in consumer contracts. Norms included in Chapter 49 of the Civil Procedure Law do not give a consumer the possibility to raise objections and submit his or her opinion; however, it establishes only formal criteria for an application of a pledgee regarding voluntary sale of immovable property at auction through a court. Consequently, the Contested Norms prohibit the court to protect rights of consumers based on the initiative of the latter.

At a Court hearing, a representative of the Consumer Right Protection Centre indicated that the Contested Norms shall be regarded as compliant with Article 92 of the Satversme only if the court, when adopting a decision, observes what has been established in the Consumer Rights Protection Law and the above mentioned Council Directive.

The Court needs to have all documents at its disposal allowing assessing whether a particular person is a consumer and whether unfair terms are included into a pledge agreement or a loan agreement. Consequently, when assessing an application regarding voluntary sale of immovable property, the Court also has to take into account agreements related with a pledge agreement, for instance, a loan agreement. If the above mentioned documents have not been enclosed to the application, then the Court cannot objectively assess all related documents and therefore it cannot satisfy such application.

Moreover, Chapter 49 of the Civil Procedure Law should be concretized by establishing provisions that, as to their content, would be similar to those included in Section 405 (4) of the Civil Procedure Law. The above mentioned norm establishes that a judge rejects an application in case if he or she acknowledges that the application is ungrounded or the amount of contractual fine referred therein is not proportional with the main debt, or an act to be executed includes unfair contractual terms that infringe the

rights of consumers. Likewise, Chapter 49 of the Civil Procedure Law should be supplemented by including therein such norms that, as to their content, would be similar to Section 406 of the same law, as well as by extending the list of documents to be submitted in relation to consumers, as referred to in Section 396 (2) of the Law.

6. The summoned person – **the Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) indicates that compliance of the Contested Norms with Article 92 of the Satversme shall be assessed in the following light – whether parties of proceedings are ensured equal possibilities, namely, whether a reasonable possibility to present facts of the case has been ensured in order not to cause less favourable circumstances for one litigant if compared to the other. Parties of legal proceedings must be ensured equal status. The right to a fair court ensures a litigant the possibility to be notified on all evidence submitted and notices made, as well as to express his or her opinion in relation to them.

Section 396 and 397 of the Civil Procedure Law does not ensure parties equal possibilities. Normative regulatory framework that does not establish an obligatory duty of warning permits situation when a pledgor cannot fulfil his or her liability before terms of voluntary sale are approved by the court. Likewise, the Contested Norms do not guarantee determination of a fair initial price of auction and they might cause substantial detriment to property interests of a pledgor. The present regulatory framework permits that a pledgee can reduce initial price of auction without any control, and the court is committed to assessing compliance of the initial price with the interest of a pledgor to pay his or her debt.

The principle of voluntary participation indicated in Chapter 49 of the Civil Procedure Law is also contestable because voluntary consent of a pledgor to unilateral pricing is not approved by a court.

Consequently, the present wording of Section 396 and 397 of the Civil Procedure Law does not testify that a fair decision can be taken based on the current procedural regulatory framework.

At the Court hearing, a representative of the Ombudsman office concretized that, according to the Ombudsman, the Contested Norms should not be fully excluded from

the Civil Procedure Law; rather, they should be supplemented in a way to ensure compliance thereof with the Satversme.

7. The Civil Case Department of the Senate of the Supreme Court (hereinafter – the Senate) generally shares the opinion of the Saeima. Additionally, the Senate refers to Section 1326 of the Civil Law, which, in case if payments on a claim by a pledgee are divided between several time periods, then the pledge may be sold as soon as there is default in regard to any of such time periods, provided that the opposite has not been directly agreed. Applications regarding voluntary sale of immovable property at auction through a court are mainly based on the above mentioned norm.

When deciding on satisfying an application, a judge has to investigate, pursuant to Section 397 (2) of the Civil Procedure Law, whether the parties have agreed on voluntary sale of pledged property at auction through a court and whether the right of a pledgee to sell the pledged property in case if default of any payment term has been established. When examining an application in accordance with the procedure established in Chapter 49 of the Civil Procedure Law, norms of this chapter does not confer a judge the authority and duty to investigate whether default has occurred. A judge does not have the possibility to act so also because the list of documents to be appended to the application, as established in Section 396 (2) of the Civil Procedure Law neither provides that information of delayed payments should also be furnished. Such information should be included in warning that a pledgee sends to a pledgor before addressing a court; however, the law does not requires it.

When assessing an application on voluntary sale of immovable property at auction, a judge adopts a decision based solely on documents submitted to him because it is clearly indicated in Section 397 of the Civil Procedure Law – “without notifying the application and the debtor thereof”. This denies a judge the possibility to hear opinion of the debtor. If this would be permitted, then according to the principle of competition the creditor should also be conferred the right to express his or her opinion. In fact, this would mean cancelling of the present litigation procedure.

It is not possible to submit an appeal of cassation complaint because a decision of a district court cannot be regarded as a judgment adopted in the result of legal proceedings.

This means that, if a case has not been reviewed at a first instance court and no court decision has been adopted in the frameworks of a contradictory process, there is no legal basis for proceeding litigation in further court instances.

The Senate recognized that notification in case of undisputed compulsory execution of liabilities, as well as in case of voluntary sale of immovable property at auction through a court, is a substantial guarantee for protection of rights of debtors. It ensures that a debtor is informed on actions to be taken and gives him or her possibility to fulfil his liabilities within the term established by a creditor. Such notification could serve as grounds for launching negotiations with the creditor with the purpose to achieve respective agreement. However, it should be admitted that the present wording of the law does not regards such notification procedure as necessary in case if the parties have agreed on it when concluding an agreement.

If uncontested compulsory execution of liabilities is implemented based on immovable property public mortgage and commercial pledge, as established in Section 400 of the Civil Procedure Law, and if in case of undisputed compulsory execution of liabilities the possibility to bring an action against the creditor to dispute the claim is established in Section 406 of the Civil Law, it would only be reasonable if such right would also be ensured to a pledgor in Chapter 49 of the Civil Procedure Law.

8. The summoned person – Dr. iur. Jānis Rozenfelds, Head of the Civil Law Department of the University of Latvia indicated at the Court hearing that, pursuant to Section 396 (2) of the Civil Procedure law, an application with one document appended, namely, a true copy of a pledge agreement shall be the condition for launching procedure for voluntary sale of immovable property at auction. Moreover, existence of pledge is certified by one document only – a record in the Land Register, from which it follows that the respective immovable property is mortgaged. Moreover, the Land Register must also contain a sum related with the pledge. The court does have the right to assess the above mentioned issues.

However, the fact of mortgage existence does not permit establishing whether mortgage debt still exists. Mortgage repayment after extinguishing the debt is performed based on an application of a pledgee, namely his or her request to make registration in the

respective land register. If a pledgee fails to do it, however, the pledgor has the right to bring an action regarding making of such registration in a land registry, namely, repayment of mortgage. It can only be non-property claim because a plaintiff does not request recovery of a debt; he or she rather asks establishing that no debt exists. Therefore a plaintiff cannot thus achieve suspension of a voluntary sale already decided by a judge. There are not many property claims, based on which the procedure of voluntary auction could be suspended.

The aim to ensure faster case adjudication cannot, in fact, be legitimate. For instance, the aim to implement the principle of procedural economy can be regarded as legitimate. However, instruments to be applied in case of a dispute are related with greater expenditure of resources because, in fact, it is suggested to initiate new legal proceedings. This, however, involves greater dissipation of court resources.

The fact that sale of immovable property at auction is executed though court serves as a guarantee for a pledgor. In this light, the legitimate aim is to prevent conflict of interests that objectively exists between a pledgor as a person who is interested in selling pledged property as soon as possible and a pledgee who also acts as a representative of a pledgor. There is no reason to believe that the Contested Norms in their present wording do reach the second mentioned legitimate objective.

Norms of the civil procedure cannot be interpreted in an extensive manner; they are meant for the very action established. In the beginning of the Civil Procedure Law, the principle of equality of persons and competition of parties is indicated; it means not only that every person has the right to appear before the court and express his or her opinion, but also that a judge does not have the right to perform additional investigation on his or her own initiative. A judge has the duty to investigate only documents submitted, which in this case is a mortgage agreement.

The only duty of a judge according to the law is to verify whether there exists any lawful prohibition to sell immovable property. Such lawful prohibition also is prohibition by the court to expropriate immovable property. However, no contractual prohibition has such effect, and expropriation executed contrary to contractual prohibition would remain in force. Moreover, also court prohibition would cause the consequence of invalidity of expropriation only in case it if would be registered in the Land Register.

9. The summoned person – the Association of Latvian Commercial Banks indicated at the Court hearing that the aim of the contested legal institute is to provide additional protection guarantees for a debtor. It establishes procedural framework for implementation of the legal institute of pledge established in the Civil Law, and the same amount of rights that apply to proceedings based on court action cannot apply thereto

Article 92 of the Satversme does not commit the State to establish a possibility, in all cases, to appeal against a decision that is unfavourable for any of participants of legal proceedings. The State can establish the extent of the right to appeal in accordance with its legal system and to exclude cases of certain categories from the appellate court system. Likewise, a court does not always have the duty to hear opinions and objections of the parties.

As to the legitimate aim of the restriction, the case under review is about effective rather than fast court proceedings. The aim is to establish procedure, according to which a creditor can launch sale of pledged property without bringing an action according to general procedure. Likewise, the legitimate aim is to exclude those cases from the general procedure of legal proceedings that, first, contain no dispute and, second, in which contractual parties have not agreed on any special procedure.

Measures selected are appropriate because, in the case under review, the particular category of undisputed cases is provided with a special legal proceeding. There do not exist any more lenient mechanisms because there are no other parallel instruments. Measures selected are appropriate because the legislator has ensured other instruments, by means of which a debtor can effectively protect his or her rights and also to preserve the basic tasks of the legal institute of pledge right, namely, the right of a creditor to sell his or her pledged property in a fast and effective manner.

The pledge right has been created with the purpose to protect interests of creditors. If a creditor loans money, a debtor has the duty to ensure that the money is repaid in due time and respective amount. If repayment is problematic, a creditor should be given the possibility to regain loaned funds in the most effective way possible.

The right of a creditor to sell pledged property on the open market and simplified procedure thereof follows from the legal institute of the pledge right enshrined in the Civil Law rather than from norms of the Civil Procedure Law. The Civil Procedure Law

only concretizes procedure, according to which sale of pledged property on the open market is executed. Moreover, this is about a pre-agreed sale mechanism that as such cannot be an object of dispute. Therefore ensuring of the pledge right shall be assessed as voluntary civil agreement by the parties. However, the right of creditors cannot be unlimited. Therefore the legislator has restricted the right of the creditor to expropriate immovable property by providing that it must be sold voluntarily at auction through a court.

The regulatory framework that has been included in the Civil Procedure Law is more advantageous for a debtor if compared to the one established in case of sale of other pledged property. For instance, if pledged property is shares, then a creditor can sell them according to a simplified procedure, without any instruments protecting the rights disregarding value of the property. Consequently, as to immovable property as pledged property, certain lapse from the principle of protection of creditors' rights to ensure observance of interests of a debtor has been established.

The Association of Latvian Commercial Banks mentioned several instruments that debtors can use to protect their rights. First, a debtor can extinguish his or her debt. Pursuant to the Civil Law, a creditor has the duty to accept debt repayment at any stage of proceedings before the concerned immovable property is sold.

Second, a debtor has the right to bring an action against a creditor according to proceedings by a court action and ask to secure this action by postponing of execution procedure. Any claim related with contractual liabilities, i.e. a dispute on its merits may always have property character.

Third, a debtor has the right to bring an action against a creditor regarding indemnification of losses in case if pledged property has been expropriated on unlawful basis. And, fourth, he or she can require indemnification of losses even if pledge has been sold for an inadequately low price because a pledgee is responsible for the sale of pledged property acting as a responsible person.

Fifth, a debtor has the right to ask submitting protest against a judge's decision. Sixth, a debtor has the right to submit complaint regarding actions of a bailiff, including the case if a debt-collector or abider has acted in a malicious manner. The seventh

instrument is the possibility of a debtor to submit an ancillary complaint regarding a decision of a regional court confirming an auction act.

The Constitutional Court establishes

10. The Applicants ask to recognize the Contested Norms as non-compliant with Article 92 of the Satversme.

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 a right to commensurate compensation. Everyone has a right to the assistance of counsel.”

Although the claim applies to compliance of the Contested Norms with Article 92 of the Satversme in general, it still follows from the application that, in fact, compliance of the above mentioned norms with the first sentence of Article 92 of the Satversme that provides “Everyone has the right to defend his or her rights and lawful interests in a fair court” is contested.

It has been established in the case-law of the Constitutional Court that the notion “a fair court”, mentioned in Section 92 of the Satversme, includes two aspects, namely, “a fair court” as an independent institution of the judicial power, which reviews a case and “a fair court” as an adequate process, complying with the law-governed state, under which the case is being adjudicated. In the first aspect this notion shall be interpreted as read together with Chapter VI of the Satversme; in the second – as interpreted together with the principle of a law-governed state, which follows from Section 1 of the Satversme (*sk. Judgment of 5 March 2002 by the Constitutional Court in case No. 2001-10-01, Para 2 of the concluding part, and judgment of 20 December 2006 in the case No. 2006-12-01, Para 9.3*).

A fair court as a judicial procedure adequate for a law-governed State includes several mutually related rights. It includes, for instance, the right to access to courts, the

principle of equality and competition of parties, the right to be heard, the right to a motivated court judgment, the right to appeal. (*see: Judgment of 5 November 2008 by the Constitutional Court in the case No. 2008-04-01, Para 8.2, and Judgment of 17 May 2010 in the case No. 2009-93-01, Para 8.3*).

11. At the Court hearing, the Saeima's representative asked to terminate proceedings in the present case because the contested legal institute of procedural rights, namely, the procedure, according to which an application regarding voluntary sale of immovable property at auction through a court is reviewed, does not pertain to the content of Article 92 of the Satversme. Consequently, the fundamental rights of the Applicants established in the Satversme are not infringed. This request of the Saeima shall be rejected.

On 17 May 2010, the Constitutional Court adopted a decision in the case No. 2009-93-01, wherein it analysed a comparable legal institute, which is undisputed compulsory execution of liabilities. The Constitutional Court concluded that cases of this category differ from cases to be examined in proceedings by way of claim by the fact that in the first, there is no dispute regarding the rights. Consequently, the aim of execution of obligations on a no contestation basis is to establish a simplified and accelerated procedure of debt recovery rather than to settle disputes regarding the rights (*see: Para 9.1 of the Judgment*).

Likewise, the contested legal institute of the present case, which is voluntary sale of immovable property at auction through a court, also establishes procedure, according to which disputes on the rights shall be settled. In cases when an application is submitted by a pledgee, it regulates procedure, according to which the pledge right shall be exercised. Consequently, not all elements that pertain to the content of the right to a fair court shall be applied to this procedure.

The legislator has also acknowledged that it is necessary to review the above mentioned procedural issues at the court. Therefore separate elements of the right to a fair court shall be applied to adoption of such decision even if the legislator had the right to determine another procedure. For instance, when examining such applications, the court

has to comply with the requirements on the legal institute of an independent judicial power. Likewise, this regulatory framework when considered in conjunction with other instruments enshrined in the Civil Procedure Law must ensure procedural justice, as well as the possibility to review disputed issues in an appropriate procedure that would include all elements of the right to a fair court.

Consequently, Article 92 of the Satversme includes not only cases when disputes on the rights are settled, but also cases when other issues that the legislator determined to be reviewed at the court are reviewed. As to cases of such categories, the content of Article 92 of the Satversme differs. Likewise, the extent of the elements that are not subject to restrictions, i.e. the core of these rights, differ.

Consequently, the legal institute regulated in Chapter 49 of the Civil Procedure Law, i.e. voluntary sale of immovable property at auction through a court, pertains to the content of Article 92 of the Satversme and therefore proceedings in the present case shall be continued.

12. The representative of the Association of Latvian Commercial Banks also holds that that proceedings in the present case should be terminated insofar as the case is initiated regarding the words of Section 396 (2) of the Civil Procedure Law “but if the application has been submitted by a pledgee – also a true copy of the pledge agreement, evidence regarding warning of the debtor, unless it does not follow from the document itself or the law that such warning is not required”. The Association of Latvian Commercial Banks indicates that all Applicants have been notified; therefore this norm could not have caused infringement of the rights established in the Satversme.

The Applicants ask the Constitutional Court assess the extent of procedural guarantees of a debtor in cases when the application on voluntary sale of immovable property at auction referred to in Chapter 49 of the Satversme is submitted by a pledgee. Since the above mentioned legal institute has been applied to the Applicants, the Contested Norms could infringe their fundamental rights established in Article 92 of the Satversme. Therefore, proceedings in the present case shall be continued at full extent.

13. The Contested Norms shall be considered in conjunction with the regulatory framework on the pledge right included in the Civil Law. Section 1278 of the Civil Law provides that a pledge right is such right in regard to property of another (Section 841) as on the basis of which the property secures the claim of a creditor so that the creditor is able to receive from the property payment for such claim. Whilst Section 1319 of the Civil Law provides that a pledgee who has not been satisfied by a debtor within the time provided for, may resort to the pledged property for satisfaction and, for this purpose, take all the necessary steps for its sale. Moreover, pursuant to Section 1326 of the Civil Law, if payments on a claim by a pledgee are divided between several time periods, then the pledge may be sold as soon as there is default in regard to any of such time periods, provided it has not been directly agreed that there is not to be a sale until there has also been default in regard to the last, or the second, or the third, etc. time period.

Consequently, the core of the pledge right is to confer a creditor the right to sell pledged property in case of a default by a debtor. Section 1321 of the Civil Law provides that pledged property may only be sold by way of auction through a court. Consequently, as to a certain pledged property, namely, immovable property, the Civil Law establishes a special procedure of sale of pledged property, i.e. sale at auction through a court. Such special procedure of sale of pledged property shall be regarded as guarantee for protection of the rights of a debtor. It has been established in the law that this principle is based on procedural considerations with the purpose to prevent conflict of interests which is objectively inherent to a pledgee when selling pledged property (*see: Rozenfelds J., Lietu tiesības. Rīga: Zvaigzne ABC, 2000, pp. 212*). Chapter 49 of the Civil Procedure Law establishes procedural order of the sale.

As to the procedure, according to which immovable property as pledged property shall be sold at auction through a court, the general procedure by a court action cannot be applied thereto. A person is denied the right to participate in this process, raise objections, provide evidence, as well as to appeal against a decision adopted. When assessing whether such procedure has been reasonably established and whether the effective procedural regulatory framework is fair, the Constitutional Court must investigate whether it has been with the purpose to reach a legitimate aim and whether interests of persons and the society have been balanced in a reasonable manner.

14. The Contested Norms are included in the Civil Procedure Law. In the present case, there is no dispute whether this law was adopted and proclaimed according to the procedure established in the Satversme and the Saeima Rules of Procedure. Consequently, the restriction has been established by law.

15. When assessing whether the restriction of the fundamental rights is reasonable, it is necessary to establish whether it has a legitimate aim.

It has been indicated in the White Paper of the European Communities regarding integration of EU mortgage credit markets: “The Commission considers that Member States should improve the efficiency of their forced sales and land registration procedures. These factors raise the cost of doing business for mortgage lenders, increase the uncertainty for investors about the quality of the underlying security and elevate refinancing costs, reducing the efficiency of existing providers and deterring new market entrants” [*White Paper of the European Communities regarding integration of EU mortgage credit markets, Brussels, 18.12.2007, COM(2007) 807, Para 4.2*].

In addition to the aforesaid, the Constitutional Court has also concluded that the objective to ensure faster and more efficient adjudication of cases by thus reducing workload of courts can be regarded as a legitimate objective in the case of restriction of rights established in Article 92 of the Satversme (*see: Judgment of 5 November 2008 by the Constitutional Court in the case No. 2008-04-01, Para 13.2*).

The contested regulatory framework of the Civil Procedure Law is aimed at ensuring the effectiveness of exercise of the pledge right. As the Constitutional Court has already concluded in its case-law, an accelerated debt recovery ensures the possibility of creditors to fulfil their obligations with other clients, as well as to plan their economic and financial activities. Thus adjudication of civil cases is accelerated by facilitating protection of the rights and interests of other persons (*see: Judgment of 17 May 2010 in the judgment in the case No. 2009-93-01, Para 12.2*). Moreover, when applying simplified procedure of decision-taking, workload of courts is reduced, and this gives other persons prospect of fast case adjudication. This, however, ensures proportional use of court resources and ensures observance of the principle of procedural economy, namely, it facilitates efficiency of legal proceedings.

Consequently, the restriction of the fundamental rights has a legitimate objective, which is fast and effective sale of pledged property, ensuring of effectiveness of legal proceedings and protection of the rights of other persons.

16. In order to assess whether the restriction of the fundamental rights is proportional, the Court has to investigate: 1) whether measures selected for reaching of the legitimate objective are aimed at reaching of the aim; 2) whether there exist other (more lenient) measures that would restrict the fundamental rights of a person at a lesser extent; and 3) whether the benefit gained by the society is greater than detriment caused to the rights and legal interests of a person.

17. Section 397 (1) of the Civil Procedure Law provides that an application regarding voluntary sale of immovable property at auction shall be adjudicated by a judge sitting alone within a period of seven days from the day of submission of the application, on the basis of the submitted application and documents attached thereto, and without notifying the applicant and the debtor thereof. The second part of the Section provides that the judge shall take a decision to permit the sale at auction having ascertained that: 1) the immovable property is owned by the submitter of the application or by a debtor of a pledgee and the pledgee has the right to sell the immovable property on the open market; and 2) there is no lawful impediment to the sale of this immovable property with the conditions set out in the application.

Consequently, the judge takes the decision regarding the sale of immovable property at auction within a short term and in writing; moreover, he or she takes into consideration only those documents that are submitted by a pledgee. A pledgor or an owner of the immovable property is not given the possibility to raise objections, submit evidence or appeal against a decision adopted. Consequently, the procedure, according to which a decision regarding the voluntary sale of immovable property at auction, does not provide the possibility to review disputed issues in the frameworks of the same procedure. The judge does not have the duty to assess possible contradictions in opinions of the parties; he or she rather has to ascertain, based on the documents submitted, the facts referred to in Section 397 (2) of the Civil Procedure Law.

Consequently, although the duty to sell pledged property, i.e. immovable property at auction through a court is aimed at protection of the rights of a debtor, a simplified procedure is established in respect to a judge's decision-making. Restriction of procedural possibilities of a debtor in this case facilitates effectiveness of the decision-making process.

Consequently, measures selected are appropriate for reaching of the legitimate aim.

18. The Applicant Mr. Indulis Brodiņš indicated at the Court hearing that the aim of the Contested Norm could be reached by other measures that would restrict the rights of a person at a lesser extent. First, it is possible to give a debtor the possibility to express his or her opinion before a decision is adopted. Thus a judge could establish whether a dispute exists between the parties and, in case if a debtor would raise no objections, the judge could permit the sale at auction. Second, the right to submit an ancillary complaint regarding a judge's decision could also be regarded as a more lenient measure. Such complaint could be reviewed within a reasonable timeframe that would not impede adjudication of civil cases. Third, as to a judge's decision, it would be possible to establish a legal institute similar to the one established in Section 406 of the Civil Procedure Law in relation to contesting uncontested compulsory execution of liabilities. This would give a person the possibility to address a court within six months by raising objections against validity of the claim by also requesting suspension of execution of the court judgment or, in case if the decision has already been executed, to adopt a decision regarding securing of a claim (*see: Transcript of the Court hearing, Case materials, Vol. 3, pp. 147, 158*).

When assessing whether the legitimate aim may be reached in a more lenient way, the Constitutional Court takes into consideration that a more lenient means are not any means, but only such by which the aim may be reached in the same quality (*see: Judgment of 13 May 2005 by the Constitutional Court in the case No. 2004-18-0106, Para 19*).

18.1. When settling an issue regarding voluntary sale of immovable property at auction, clarifying opinion of a debtor would considerably change the meaning of the

particular legal institute. The effective procedural regulatory framework provides that a judge has the duty to verify whether a pledgee has the right to sell a particular immovable property and whether there is any lawful impediment to the sale of this immovable property. When deciding whether to permit the sale of property at auction, the judge does not settle disputes.

As the Saeima has already indicated, when voluntarily selling pledged property at auction, a pledgee exercises the rights, which he or she and the debtor or a pledgor have voluntarily agreed upon in an agreement. If a judge would have to hear objections of the pledgor and assess documents submitted by the latter, then the judge would also have the duty to settle disputes between the parties. Disputable issues should be settled according to a procedure by a court action by observing all principles related thereto. Under such circumstances, the present procedural institute that provides only for the duty of a judge to validate the right of a pledgee to sell pledged property would lose its meaning. Therefore, when applying the aforesaid measure that would restrict the rights of a debtor at a lesser extent, the legitimate aim would not be reached.

However, if a judge would not assess objections of a debtor on the merits but would only establish their existence and permit the sale at auction only if a debtor does not object, the right of a pledgee to sell pledged property would be restricted in a non-proportional way. A debtor could easily achieve suspension of the sale of immovable property and, until disputed issues would be assessed on the merits, the sale of property would be postponed for an indefinite period of time. By applying this measure, the legitimate objective could not be reached at the same quality.

18.2. The Applicant indicates that restriction of fundamental rights would be lesser if an ancillary complaint could be submitted in relation to a judge's decision.

The effective normative regulation provides that all kinds of objections that a debtor would raise against the sale of immovable property at auction announced by the pledgee, like, disputes on basic obligation, disputes on the right to sell pledged property, disputes regarding price of immovable property, shall be solved at a court in a procedure by a court action. Such procedure is based on the principle of equality and competition of the parties; judgments of a court are not subject to appeal, and all other elements to a fair court fully apply to the procedure.

In fact, the Applicants asks to review all or part of these issue based on an ancillary complaint rather than by applying the procedure by a court action. Therefore this suggestion shall be evaluated as an alternative for the effective procedure by a court action. It can be admitted that examination of certain issues in the frameworks of ancillary complaints would indeed facilitate access of persons to a court due to its low state tax; moreover, if compared with the legal proceedings by a court action, settlement of disputes would be accelerated. However, when reviewing disputable issues only in the frameworks of ancillary complaint, procedural guarantees of participants of the case would be considerably restricted. Consequently, the Constitutional Court cannot conclude that the above mentioned measure would ensure a more extensive protection of the rights of a person if compared with the effective regulatory framework.

The Constitutional Court has already indicated in its case-law that, when assessing measures that would restrict the rights of a person at a lesser extent, it is necessary to taken into account the freedom of action of the legislator in selecting the most appropriate mechanism. The Constitutional Court cannot substitute choice of the legislator by an opinion of the first regarding the most appropriate solution (*see: Judgment of 30 March 2009 by the Constitutional Court in the case No. 2009-85-01, Para 19*). It is necessary to admit that, in order to ensure procedural economy, the legislator has the right to establish that the court would assess certain kind of objections of a debtor in the frameworks of an ancillary complaint rather than in legal proceedings by a court action. Still, the legislator has selected another mechanism to protect the rights of a debtor and assess his or her objections. Under such conditions, it cannot be concluded that the legislator would have the duty to envisage review of disputable issues particularly in the frameworks of an ancillary complaint.

18.3. Similar consideration can also be applied to the suggestion to create a legal institute, which would directly envisage the right of a debtor to bring an action against a pledgee, like it is established in Section 406 of the Civil Procedure Law. Creation of such legal institute also includes aspects that are not favourable for a debtor. For instance, Section 406 of the Civil Procedure Law restricts the right of a person to bring an action by establishing the term of six months and provides a list of objects of the action.

According to the effective normative regulatory framework, a debtor has the right to address a court according to the procedure by a court action regarding disputes related

with the basic claim, exercise of the pledge right, indemnification of losses and other issues. This right to demand are not restricted by any specific term. Moreover, a pledgor still has the right to ask the court to decide on securing of a claim by suspending execution of a decision regarding voluntary sale of immovable property at auction.

It shall be recognized that including, into Chapter 49 of the Civil Procedure Law, of a norm similar to Section 406 of the Civil Procedure Law as to its content, would imply certain advantages. For instance, a pledgor would thus be informed on the procedure, according to which he or she could protect the rights. Moreover, in case if such regulatory framework would be in force, there would be a closer link between a decision regarding voluntary sale of immovable property at auction and a subsequent court judgment regarding, for instance, groundlessness of claim of a pledgee.

However, as to the above mentioned suggestion, the Constitutional Court concludes that, based on its freedom of action, the legislator has selected other procedural mechanisms for a defendant to protection his rights. It cannot be ascertained that the measure referred to by the Applicant would be much beneficial for a person, which would then obligate the legislator to apply it.

Consequently, it cannot be concluded that there exist other measures that would restrict the rights of a person at a lesser extent, and therefore the Contested Norms shall be recognized as indispensable for reaching the legitimate objective.

19. In order to establish whether the benefit gained by the society is greater than the detriment caused to rights and legal interests of a person, the Contested Norms must be assessed in conjunction with other instruments for protection of the rights of a debtor enshrined in the Civil Procedure Law; likewise the Court will analyse the content of the Contested Norms in a broader manner.

19.1. As it has already been indicated in Para 13 of the present judgment, the procedure establishing sale of pledged property, i.e. immovable property, at auction only through court shall be regarded as a guarantee for protection of the rights of a pledgor. Chapter 49 of the Civil Procedure Law ensures that pledged immovable property would not be sold at auction unless an independent and objective judge would ascertain that the

pledgee does have the right to sell immovable property and that there are no lawful impediments for the sale of property.

Participants of the case and summoned person have expressed different points of view regarding the limits of investigation to be performed by a judge when deciding on permitting to sell immovable property at auction. The Constitutional Court holds that thorough examination of issues referred to in Section 397 (2) of the Civil Procedure Law serves as a substantial element of protection of the rights of a debtor.

Section 387 (2) (1) of the Civil Procedure law provides that the judge shall take a decision to permit the sale at auction having ascertained that the immovable property is owned by the submitter of the application or by a debtor of a pledgee and the pledgee has the right to sell the immovable property on the open market. Consequently, documents submitted should convince the judge that a pledgee does have the right to sell immovable property.

Pursuant of Section 1289 (3) of the Civil Law, if a condition or period is specified not for the claim but only for the pledge right itself, then the pledge right comes into effect only from such time as when the condition or the time period come into effect. Therefore pledge agreement as such does not prove that a pledgee has been conferred the right to sell the immovable property. It can be concluded from the documents submitted to the Constitutional Court that the right to sell immovable property on the open market are often related with occurrence of such conditions as delay of payment term, material breaches of a loan agreement, emerging of the right to unilaterally cancel an agreement, etc. In such cases, a judge has to investigate whether a particular condition referred to in a pledge agreement has occurred and the pledge right has come into effect. If the documents submitted do not prove that the conditions referred to in a pledge agreement have emerged (for instance, a pledgor has delayed payment term for the period indicated in the agreement), the judge does not have the right to satisfy an application regarding voluntary sale of immovable property at auction. Although Section 396 (2) of the Civil Procedure Law provides a list of documents that must be appended to an application of a pledgee regarding voluntary sale of immovable property at auction, this does not release a pledgee from the duty to prove that he has been granted the right to sell the pledge.

However, Section 397 (2) of the Civil Procedure Law provides the duty of the judge to investigate whether there exists any lawful impediment to the sale of this immovable property with the conditions set out in the application. The judge has to assess not only prohibition laid down in the application or registered in the Land Register, but also other cases when sale of immovable property might contradict the law.

For instance, the decision to reject an application on voluntary sale of immovable property at auction shall be recognized as grounded in case of sale provisions enclosed to the application do not comply with requirements of the Civil Law and those of the Civil Procedure Law. Section 398 of the Civil Procedure Law provides that the sale at auction shall be performed by a bailiff in accordance with the procedures prescribed in this Law for the execution of court judgments. Therefore conditions of sale should comply, among the rest, with requirements of chapter 73 of the Civil Procedure Law unless it is otherwise prescribed in Chapter 49 of the same Law.

Likewise, when adopting a decision regarding sale of immovable property at auction, the judge has to investigate whether imperative norms of the Consumer Rights Protection Law have not been breached. This duty of the judge follows from Section 6 (11) of the Consumer Rights Protection Law that provides the following: “Upon resolving a dispute or carrying out other procedural actions arising from the contract entered into between a manufacturer, seller or service provider and a consumer, the court shall evaluate the terms of the contract and for the resolution of the dispute shall not apply the unfair terms provided for in the contract in relation to the consumer.”

Consequently, in cases when a pledgor is a consumer, the court has to ascertain that an application regarding voluntary sale of immovable property at auction is not based on such conditions that shall be regarded as unfair and shall not be applied pursuant to the Consumer Rights Protection Law.

19.2. The Applicants indicate that the Contested Norms would infringe their rights even if they did not provide the possibility to submit an appeal of a cassation complaint. As it has been reasonably indicated by the Senate, the contested legal institute is incompatible with appeal of cassation complaint because a judge’s decision to allow the sale at auction cannot be regarded as the one adopted by a court in the result of adjudication. Since the case has not been reviewed at the court of first instance and no

court decision has been adopted in the framework of a contradictory procedure, there is no reason to continue legal proceedings in further court instances.

However, it shall be recognized that a debtor should have the right to achieve examination of disputable issues by a court. Although Chapter 49 of the Civil Procedure Law as such does not establish procedural order, according to which a pledgor can raise his or her objections regarding ungrounded application of a pledgee, this means that such procedure does not follow from the Civil Procedure Law. Namely, the Civil Procedure Law establishes that, in case of a dispute, a pledgor shall have the duty to address the court according to procedure by a court action.

It should first of all be indicated that, pursuant to Section 1283 of the Civil Law, a pledge right, as an ancillary right, is in regard to its effect dependent on the effect of the claim. Consequently, in case if a debtor holds that immovable property has been sold without reason due to the fact that he or she does not accept the claim regarding pledged property, the debtor has the duty to address the court by asking to recognize the claim as ungrounded. Such claim shall be regarded as property claim, and each person shall have the right to request securing of a claim pursuant to Chapter 19 of the Civil Procedure Law, including the right to request making an entry in the Land Register regarding prohibition to sell immovable property owned by the applicant or to suspend execution of the decision to voluntarily sell immovable property on the open market in case if such decision has already been adopted.

However, in case if a person recognizes the claim regarding the pledge but fails to recognize lawfulness and validity of exercise of the pledge right, he or she can address a court according to procedure by a court action. An example of such practice has been appended to the case materials of the Constitutional Court, namely, a debtor had addressed a court by asking to recognize cancelling, by a pledgee, agreements of the parties and the application regarding voluntary sale of immovable property at auction as ungrounded. The Court considered it as property claim and decided on securing of the claim, namely, it suspended execution of the decision to sell immovable property at auction (*see: Case materials, Vol. 3, pp. 62*).

Likewise, based on the procedure by a court action, a debtor can exercise the rights established in Section 1657 of the Civil Law, namely, the right to ask to release the

debtor from consequential losses due to default also in other cases where the debtor cannot be considered at fault due to lack of care, recklessness or negligence, or if performance did not occur due to *force majeure*.

If the decision regarding voluntary sale of immovable property at auction has already been adopted, whilst the court recognizes in its subsequent decision that there is no claim regarding the pledge, then the latter decision shall not be executable. Likewise, in cases when a court establishes that a pledgee has not been conferred the right to sell pledged property or if there are lawful impediments to such sale, or a debtor shall be released from consequential losses pursuant to Section 1657 of the Civil Law, the decision regarding the sale of immovable property at auction shall not be executed.

However, in cases when immovable property has already been sold without reason, the pledgor shall have the right to bring an action against a pledgee to indemnify losses. Pursuant to Section 1320 of the Civil Law, if a purchaser had knowledge that the acts of the pledgee were contrary to law, the debtor has the right to demand that the sold property be returned.

19.3. The Applicants are of the view that the Contested Norms do not comply with Article 92 of the Satversme because they prohibit them requesting assessment of immovable property and permits that this is the pledgee who determines non-proportionally low auction price.

Section 398 (1) of the Civil Procedure Law provides that the immovable property shall be listed and evaluated only if requested by the person on the basis of whose application the sale is taking place. Consequently, in case if an application regarding voluntary sale of immovable property at auction has been submitted by a pledgee, owner of the immovable property does not have the possibility to ask evaluation of it.

However, pursuant to Section 1328 of the Civil Law, a pledgee shall be liable for the sale as an authorized person. Therefore a pledgee must indemnify all losses incurred to a debtor in the result of inactivity of the first. This also applies to cases when, in the result of actions of the pledgee, immovable property is sold for a price that has caused losses to the pledgor. However, if immovable property is sold by malevolence and the purchaser has participated in malicious actions of the pledgee, the debtor shall have the

right to request returning the sold property by reimbursing the purchaser the purchase sum and interest.

Moreover, in case if sales provisions establish non-proportionally low initial auction price, the court shall have the right to recognize it as lawful impediment for the sale of immovable property for the price indicated in the application unless the court concludes that such sales provisions is incompatible with the principle of good faith enshrined in Article 1 of the Civil Law (*see, e.g.: Judgment of 4 October 2006 by the Civil Case Department of the Senate of the Supreme Court in the case No. SKC-540*).

19.4. The Applicants also indicate that they cannot properly protect their rights by applying the above described mechanisms, namely, by addressing the court according to procedure by a court action because access to the court is restricted by the high state tax. Although the Civil Procedure Law allows asking the court to release a person from payment of the state tax, formally this is the pledgor who owns property, which makes the court concluding that such economic status of a person proves that he or she is capable of paying the state tax.

Section 43 (4) of the Civil Procedure Law provides the right of every person to ask the court to fully or partially release him or her from paying court expenses taking into account economic status of the natural person. The Constitutional Court has already emphasized in its case-law that courts of general jurisdiction should thoroughly assess arguments of plaintiffs regarding reduction of the state tax or release from it (*see: Judgment of 17 May 2010 by the Constitutional Court in the case No. 2009-93-01, Para 13.4*).

In order not to infringe the right to a fair court guaranteed to a person by Article 92 of the Satversme, a court of general jurisdiction has to assess possibilities of a plaintiff to address a court to protect his or her rights and legal interests. By referring to the fact that a person owns immovable property, the court of general jurisdiction has to make sure that the right of a person to access to court is not hence limited.

19.5. Section 396 (2) of the Civil Procedure Law provides that appended to the application for voluntary sale of immovable property at auction through the court shall evidence regarding warning of the debtor, unless it does not follow from the document itself or the law that such warning is required. Consequently, the Civil Procedure Law

permits that immovable property is sold voluntarily at auction even if the debtor has not been warned on lodging of such application before the court.

The Constitutional Court has already emphasized that warning of a debtor is a substantial guarantee of his or her right protection because applications are examined by the court without presence of case participants and by earning the parties on legal proceeding. If a debtor is warned on subjecting of obligations to the procedure of compulsory execution, he or she may present objections to a creditor and to negotiate on terms of execution of obligations. He or she also has the right to address the court in accordance with the procedures for court proceedings by way of action with a view to protect his or her rights in case if a dispute exists (*see: Judgment of 17 May 2010 by the Constitutional Court in the case No. 2009-93-01, Para 12.3.2*).

Refusal to receive warning might considerably restrict the right of a debtor to a fair court. If the debtor is not warned on the intention of the pledgee to submit an application regarding voluntary sale of immovable property at auction, he or she cannot draw attention of the creditor to possible objections or mistakes; neither can he or she ask to solve a particular issue by means of negotiation. Likewise, the right of the debtor to apply mechanisms established in the Civil Procedure Law to solve disputes is impeded, which restricts his or her possibility to effectively exercise the right to a fair court in proceedings, wherein the principle of equality and competition of the parties is ensured.

The Consumer Rights Protection law also restricts cases permitting not to warn a consumer on cancelling of an agreement is allowed by establishing that in certain cases such provisions shall be regarded as unfair and inapplicable (*see: Section 6 (3) (8) of the Consumer Rights Protection Law*).

Consequently, receipt of warning shall be regarded as a considerable guarantee for protection of the rights of a debtor, therefore he or she cannot reject it by concluding a lawful transaction.

It should also be indicated that establishment of obligatory notification would not affect the effective legal institute of voluntary sale of immovable property at auction through a court. The duty of a pledgee is to warn the debtor on lodging of an application before the court would not require substantial material investments by the latter.

Consequently, Section 396 (2) of the Civil Procedure Law, insofar as it permits that no evidence on warning of the debtor are submitted, unless it does not follow from the document itself or the law that such warning is required, does not provide a reasonable balance between interests of the debtor and pledgee, as well as interests of the society. Therefore the above mentioned part of the norm does not pertain to the scope of Article 92 of the Satversme.

19.6. In addition to the above mentioned mechanisms, representatives of the Saeima and the Association of Latvian Commercial Banks have drawn attention to other instruments included into the Civil Procedure Law that could be regarded as guarantee for protection of the rights of the debtor.

First, a person has the right to ask the officials referred to in Section 483 of the Civil Procedure Law to submit protest against a decision permitting sale of immovable property at auction if, when adopting this decision, substantial breaches of material and procedural legal norms have been committed. Second, Section 617 (2) of the Civil Procedure Law establishes the right of the interested parties to submit a complaint regarding bailiff's actions, which provide the basis for requesting that an auction is declared invalid. And third, pursuant to Section 613 (6) of the Civil Procedure Law, it is possible to submit an ancillary complaint regarding a decision of the regional court on approval of auction.

Although a debtor cannot protect his interests by applying the above mentioned mechanisms in case of a dispute on the merits, they still broaden procedural possibilities of a debtor in civil proceedings. These instruments are also aimed at selling immovable property at auction according to a lawful procedure.

Consequently, the Contested Norms establish a proportional restriction of the fundamental rights because detriment caused to a person is lesser than the benefit gained by the society.

20. Pursuant to Article 31 (11) of the Constitutional Court Law, the Constitutional Court shall determine the moment with which it shall cease to be in force, if the Court has judged that a norm does not comply with the norm of a higher legal force.

It can be concluded from the case materials that all Applicants have been notified on the fact that an application regarding voluntary sale of immovable property at auction through court has been lodged before the court. Therefore it is not necessary for the protection of the fundamental rights of the Applicants for the norm, which permits not submitting evidence regarding warning of the debtor, to lose its force with retroactive effect.

The Constitutional Court is currently preparing several cases having the same object of claim as the one of the present case. In some of the cases, persons who submitted constitutional complaints have not been warned on lodging, before a court, an application regarding voluntary sale of immovable property by auction. However, in case if the Contested Norm would become null and void with retroactive effect, the infringement of the fundamental rights of the applicants would not be eliminated. Therefore there is no reason to declare the Contested Norms as null and void with retroactive effect.

The Constitutional Court has taken into consideration the fact that the norm that allows not submitting evidence on warning of the debtor regulates actions of pledgees. Therefore it is necessary to establish reasonable term, within which they would have the possibility to learn about the new legal regulatory framework.

21. By 5 March 2010 decision of assignment sitting of the Constitutional Court, execution of the 16 November 2009 decision of a judge of the Riga City Centre Court in the Case No. .12-2232/8, 2009 was suspended until the judgment of the Constitutional Court would come into force. This decision of a judge of the Centre Court permitted Ms. Ināra Sīle to sell immovable property owned by her at auction through a court.

However, the 14 April 2010 decision of the Second Panel of the Constitutional Court regarding initiation of a case suspended the 18 March 2010 decision of a judge of the Riga District Court in the case No. 3-12/1296 on voluntary sale of immovable property owned by Mr. Indulis Brodiņš at auction through a court.

Consequently, there is no reason to suspend execution of the two above mentioned decisions of district court judges along with coming into effect of the present judgment.

The Constitutional Court

Based on Articles 30 – 32 of the Constitutional Court Law,

h o l d s :

1) the words “the document itself or” of Section 396 (2) of the Civil procedure Law do not comply with Article 92 of the Satversme of the Republic of Latvia; therefore they shall be null and void as from 10 December 2010;

2) the words “or the pledgee who has the right to sell the pledge on the open market” of Section 396 (1) of the Civil Procedure Law, the words “but if the application has been submitted by a pledgee – also a true copy of the pledge agreement, evidence regarding warning of the debtor, unless it does not follow from the law that such warning is required” of Section 396 (2) of the Civil Procedure Law, the words “without notifying the applicant and the debtor thereof” of Section 397 of the Civil Procedure Law, and words “or by a debtor of a pledgee and the pledgee has the right to sell the immovable property on the open market” of Section 397 (2) (1) of the Civil Procedure Law do comply with Article 92 of the Satversme of the republic of Latvia.

The Judgment is final and not subject to appeal.

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

Presiding Judge

G. Kūtris