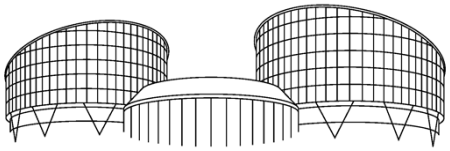

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MADŽAROVIĆ AND OTHERS v. MONTENEGRO

(Applications nos. 54839/17 and 71093/17)

JUDGMENT

Art 34 • Victim • "Access to court" complaint in respect of proceedings to which applicants had never been parties • Nevertheless no risk of diverging opinions as to the proceedings at issue, the applicants being the sole shareholders of the company concerned • Compatibility *ratione personae*

Art 6 § 1 (civil) • Access to court • Domestic court accepted withdrawal of a company's appeal upon decision of a new director whose appointment was knowingly challenged and subsequently • Loss of the possibility of using a remedy which the applicants had reasonably believed to be available • Disproportionate hindrance

STRASBOURG

5 May 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Madžarović and Others v. Montenegro,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Robert Spano, *President,*
Marko Bošnjak,
Egidijus Kūris,
Ivana Jelić,
Arnfinn Bårdsen,
Saadet Yüksel,
Peeter Roosma, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 17 March 2020,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 54839/17 and 71093/17) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Mihailo Madžarović (the first applicant), and two companies, Zetmont d.o.o. (the second applicant) and Bermont d.o.o. (the third applicant) on 25 July 2017 and 11 September 2017 respectively. The first applicant is a Slovenian national, and the second and third applicants are companies registered in Montenegro.

2. The applicants were represented by Mr R. Završek, a lawyer practising in Ljubljana, Slovenia. The Montenegrin Government ("the Government") were represented by their Agent, Ms V. Pavličić.

3. The applicants alleged, in particular, that their right of access to a court had been breached, and that they had been unlawfully deprived of their property.

4. On 13 December 2018 the Government were given notice of the complaints concerning access to court and deprivation of property, and the remainder of the applications was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. Notified under Article 36 § 1 of the Convention and Rule 44 § 1 (a) of the Rules of Court of their right to intervene in the present case, the Government of Slovenia expressed no wish to do so.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background information

6. The first applicant was born in 1949 and lives in Ljubljana, Slovenia. The second and third applicants were founded in Montenegro in 2000.

7. The first applicant is the sole founder, executive director and owner of the second and third applicants. The second and third applicants were the founders and, at the relevant time, the sole shareholders of company T. The first applicant was a legal representative (*zakonski zastupnik*) of the second and third applicants, and company T.

8. On 28 December 2006 company T. ("the debtor") took a loan of 7,500,000 euros (EUR) from Hypo Alpe-Adria-Bank International AG ("the creditor"), which was based in Austria. The loan agreement provided that the bank, as the creditor, had the right to unilaterally terminate the loan agreement before the expiry of the envisaged time-limit for repayment of the debt in the event that the debtor was more than thirty days late in paying the interest owed and/or an instalment. The creditor was also entitled to seek repayment by virtue of a pledge (*da pristupi realizaciji sredstava obezbeđenja i naplati svoja potraživanja*).

B. Application no. 54839/17

9. In November 2011 the debtor, represented by the first applicant, concluded three contracts of pledge (*ugovor o zalozi*) with the creditor, thereby securing the bank loan by a specified number of its shares which it held in another entity (the Joint Investment Fund "Trend", hereafter "the Fund").

10. On 10 October 2013, following an application on the part of the creditor to that effect, the Commercial Court (*Privredni sud*) in Podgorica established that the debtor had not honoured its obligations, and that the outstanding debt was EUR 3,459,273.81 in total (the main debt being EUR 3,254,604.59, and the rest of the sum made up of interest and costs). It further established that there were three legally valid contracts of pledge of November 2011, and it ordered the seizure and transfer (*pljenidbom i predajom*) of the shares specified therein to the creditor. In doing so, it relied on section 20 of the Pledge Act. The court noted that the first applicant, as the debtor's legal representative, had sought that the hearing be adjourned so that the debtor and the creditor could establish the exact amount of the debt, "which undoubtedly existed in respect of the main debt, but ... the interest had not been properly calculated".

11. On 25 November 2013 this decision was rectified in respect of the date when the said shares had been registered in the Central Depository Agency (*Centralna Depozitarna Agencija* – hereinafter "the CDA") in Podgorica and the number of shares, so that they corresponded to the number of shares specified in the contracts of pledge.

12. The debtor appealed against both decisions on 2 and 24 December 2013 respectively. It submitted, in substance, that the court had not referred to any of the provisions of the Enforcement Act, only to the Pledge Act, that it had not had seen any of the originals of the contracts of pledge, and that the total debt had remained "legally undefined", in particular given that the courts had had no mechanisms to establish the accuracy of the calculated interest. The appeals were substantially the same, and neither of them challenged the rectifications specified in the decision of 25 November 2013.

13. On 9 January 2014 the creditor sold the transferred shares to a company called O.B.

14. On 16 January 2014 the debtor's new Board of Directors issued a decision on changes to the company officers. I.P. was appointed the new executive director, replacing the first applicant. On 20 January 2014 the Tax Administration – Companies Central Registry (*Centralni registar privrednih subjekata* – hereinafter the "CRPS") issued a decision to register these changes. The applicants appealed against this decision.

15. On 5 February 2014 I.P., on behalf of the debtor, withdrew the debtor's appeal lodged against the decision of 25 November 2013 and cancelled the power of attorney previously given to a lawyer by the first applicant. On the same date the applicants informed the court that they had appealed against the decision of 20 January 2014 on I.P.'s registration as the debtor's executive director and that, pursuant to section 225 of the General Administrative Procedure Act, an appeal had suspensive effect.

16. Between 5 and 18 February 2014 the applicants addressed the Commercial Court and the Court of Appeal on several occasions, submitting that I.P. did not have standing to withdraw the debtor's appeal and urging that it be examined on the merits.

17. On 18 February 2014 the Court of Appeal (*Apelacioni sud*) dismissed the debtor's appeal against the decision of 10 October 2013. The court found that the parties had concluded three contracts of pledge and that the debtor had failed to meet the obligations arising from the bank loan, which had been secured by the pledges. In doing so the court relied on section 20 of the Pledge Act. It also found that the pledges had been lawful and duly registered. It was further noted that following an enforcement application on the part of the creditor, a hearing had been held only in order to establish if the pledge had been in order (*perfektuirana*) and if the debtor had failed to meet its obligations. It was up to the debtor to prove the opposite. The court observed that the debtor had not denied the creditor's allegations but had rather asked for additional time to meet them. The court

further considered that the debtor's submissions as regards the exact amount of the debt were irrelevant at this stage of the proceedings, given the undisputed fact that the debtor had failed to meet the obligations arising from the loan agreement secured by the pledges. The debtor's submission that the court had not seen any of the originals of the submitted evidence was adjudged to be unfounded, given that the authenticity thereof had not been disputed. The court considered other submissions but found them to be irrelevant (*bez uticaja na donošenje drugačije odluke*).

18. The same day the debtor's appeal against the decision of 25 November 2013 was rejected as having been withdrawn.

19. On 7 March 2014 the Ministry of Finance annulled (*poništava*) the decision of 20 January 2014 (see paragraph 14 above) as the applicants had not been allowed to take part in the proceedings. On 23 April 2014 the CRPS terminated (*obustavlja*) the proceedings on company officers registration in the debtor owing to O.B.'s withdrawal of its request in that regard.

20. On 17 April 2014 the first applicant lodged a constitutional appeal on behalf of the debtor. He complained, in substance, of a lack of access to court given that an unauthorised person had withdrawn the appeal, a lack of an effective legal remedy, and a deprivation of property caused primarily "by abuses on the part of [the creditor's] officials ... enabled by unlawful actions on the part of the courts".

21. On 18 November 2016 the Constitutional Court dismissed the constitutional appeal. As regards access to court, the court held, *inter alia*, that the debtor had withdrawn its appeal on 5 February 2014 and at the same time had cancelled the power of attorney previously given to a lawyer, and that thus the appeal had been duly rejected (*nedozovljena*). As regards an effective domestic remedy the court found that the debtor had had at its disposal legal remedies which it had used. It also held that the proceedings in their entirety had been fair. The court did not deal with the debtor's property rights. This decision was served on the first applicant on 6 February 2017.

C. Application no. 71093/17

22. In July 2010 the debtor, represented by the first applicant, concluded a contract of pledge with the creditor, thereby securing the bank loan by a specified number of its shares in the Fund.

23. On 8 November 2013, following an application by the creditor to that effect, the Commercial Court ordered the transfer of these shares to the creditor. Relying on section 20 of the Pledge Act the court found that the pledge was in order, and that the debtor had failed to meet the obligations arising from the loan agreement. The court noted that the first applicant, as the legal representative of the debtor, had acknowledged that the debtor had

been late with payments, that it had made no payments as of May 2013, and that he had disputed the amount of interest calculated by the creditor, which had also increased the amount of the principal (*iznos glavnice*). The decision specified that an appeal did not have suspensive effect (*žalba ne odlaže izvršenje*).

24. On 26 November 2013 this decision was rectified in respect of the exact debtor's name and certain registration codes.

25. The debtor appealed against both decisions on 2 and 24 December 2013 respectively.

26. On 9 January 2014 the creditor sold the transferred shares to the company O.B. This was followed by the registration of the changes of the company officers in the debtor on 20 January 2014, a decision against which the applicants appealed (see paragraph 14 above).

27. On 5 February 2014 I.P. filed a submission with the Commercial Court, withdrawing the debtor's appeal against that court's decision of 8 November 2013, and cancelling the power of attorney previously given to a lawyer by the first applicant.

28. Between 5 and 18 February 2014 the debtor and the applicants lodged several submissions with the Commercial Court and the Court of Appeal maintaining that I.P. did not have standing to withdraw the debtor's appeal and urging it to rule on the merits. At the same time, they informed the courts that they had appealed against the decision of 20 January 2014.

29. On 18 February 2014 the Court of Appeal rejected the debtor's appeal against the decision of 8 November 2013 as having been withdrawn. The same day it dismissed the appeal lodged against the decision of 26 November 2013, considering that the decision had been duly rectified in accordance with the relevant provisions of the Civil Procedure Act. It considered that it could not examine the rest of the submissions contained therein, as in substance they related to the decision of 8 November 2013.

30. On 7 March 2014 the Ministry of Finance annulled the decision of 20 January 2014. On 23 April 2014 the CRPS terminated the proceedings on company officers registration in the debtor owing to O.B.'s withdrawal of its request in that regard.

31. On 17 April 2014 the first applicant lodged a constitutional appeal on behalf of the debtor. It complained, in substance, of a lack of access to court given that an unauthorised person had withdrawn the appeal, lack of an effective domestic remedy and a deprivation of property caused by all these irregularities.

32. On 15 November 2016 the Constitutional Court dismissed the constitutional appeal. It found no violation of Article 13 as it had been found that the debtor had withdrawn its appeal on 5 February 2014 and had cancelled the power of attorney previously given to a lawyer, and that the appeal had been duly rejected. The court further found that the debtor had had at its disposal legal remedies which it had used. It also held that the

proceedings in their entirety had been fair. The court did not deal with the debtor's property rights. This decision was served on the first applicant on 13 March 2017.

D. Other relevant facts

33. On 16 July 2013 the creditor informed the debtor that it was unilaterally cancelling the bank loan as the latter had not been paying the instalments due, despite warnings and the additional time granted to it.

34. On 14 January 2014 the Commercial Court ordered the CDA to stay processing the transaction (*da zastane sa postupkom saldiranja prodaje*) until the applicants' appeals were decided on. The same day the CDA transferred the shares to the buyer – it apparently received the court decision only after the transfer had already been completed. On 17 January 2014 the Securities Commission (*Komisija za hartije od vrijednosti*) issued a decision temporarily forbidding the buyer to dispose of the shares at issue (*zabranila je raspolaganje akcijama*), and the creditor to dispose of the proceeds obtained by the sale. On 26 February 2014 the Securities Commission found that company O.B. had unlawfully obtained the shares. Notably, in order to purchase more than 10% of shares it was necessary to obtain the prior consent of the Securities Commission, which had not been done in this case. O.B. was thus ordered to dispose of the shares beyond 10%.

35. On 28 January 2014 the debtor filed additional observations on its appeals (*dopuna i pojašnjenje žalbe*).

36. On 29 January 2014 the Commercial Court dismissed an application for rectifying irregularities (*zahtjev za otklanjanje nepravilnosti*) on the part of the debtor in the above proceedings. The debtor lodged objections (*prigovor*) against these decisions. They were dismissed by the Commercial Court on 21 July 2014 and 19 January 2015 respectively.

37. On 24 March 2014 the applicants lodged appeals on points of law (*revizija*), which were rejected by the Supreme Court on 16 May 2014 on the grounds that section 36 of the Enforcement Act provided for no appeal on points of law in the enforcement proceedings (*u postupku izvršenja i obezbjeđenja*).

38. On 29 April 2014 the CRPS issued a decision removing the first applicant as the debtor's legal representative and registering Lj.A. instead. It would appear that, following appeals by the applicants in that regard, the procedure of registering Lj.A. in CRPS had not been finalised by June 2019.

39. On 19 February 2016 the Commercial Court stayed the proceedings (*prekida se postupak*) involving the debtor and another bank until the Ministry of Finance had terminated the proceedings relating to the changes of the debtor's name and its company officers, which had taken place in November 2014. The court held that that decision was to resolve who was

authorised to represent the debtor. The Commercial Court's decision was upheld by the Court of Appeal on 5 May 2016.

II. RELEVANT DOMESTIC LAW

A. Constitution of Montenegro 2007 (*Ustav Crne Gore*, published in the Official Gazette of Montenegro - OGM - no. 01/07)

40. Article 20 provides that everyone is entitled to a legal remedy against a decision on his or her rights or a legally based interest.

B. Pledge Act (*Zakon o zalozi kao sredstvu obezbjeđenja potraživanja*, published in the Official Gazette of the Republic of Montenegro - OG RM - no. 038/02, and OGM nos. 001/14 and 014/14)

41. Section 20 of this Act provides, *inter alia*, that the pledgee (*zalogoprimac*) is entitled to get the possession of the object of the pledge when the debtor fails to fulfil his or her obligations. In such a case the pledgee is entitled to seek an enforcement order from the competent court on the basis of which the object of the pledge will be seized and given to him or her. The contract of pledge is an enforcement title (*izvršna isprava*). Following an application by the pledgee the court will hold a hearing in which it will establish only if the contractual pledge is in order and if the debtor failed to fulfil his or her obligations arising from the contract that was secured by the pledge. If the pledgee claims that these two conditions have been met it is up to the debtor to prove the opposite.

42. If it decides in favour of the pledgee the court will issue a decision in which it will, *inter alia*, order that the object of the pledge be taken from the debtor and given to the pledgee.

43. The court must decide within three days on the pledgee's application. It is possible to lodge an appeal against a decision allowing the pledgee's application within eight days. The appeal does not have suspensive effect with regard to the execution of the enforcement decision.

44. Section 20 further provides, *inter alia*, that after having lawfully obtained possession, the pledgee can sell, lease or in another way dispose of the object of the pledge. This can be done through a public competition (*javnim nadmetanjem*) or through a direct arrangement (*neposrednom pogodbom*). The pledgee has to inform the debtor of the time and place of the sale. The debtor can retrieve the property which is the object of the pledge when he or she pays all the debts secured by the pledge and reasonable costs. This can be done until the pledgee has disposed of the object of the pledge. If the pledgee has acted contrary to this statute the court can, pursuant to the debtor's application to that effect, restrict or prohibit disposal of the object of the pledge (*ograničiti pravo ili zabraniti*

raspolaganje). If the pledgee has already disposed of it, the debtor has the right to seek compensation from the pledgee for any loss caused by the pledgee's non-compliance with these provisions (*ima pravo da se naplati od zalogoprimca za svaki gubitak prouzrokovan neispunjenjem uslova iz odredaba ove glave*).

C. Companies Act (*Zakon o privrednim društvima*, published in OG RM no. 006/02, and OGM nos. 017/07, 080/08, 040/10, 036/11, and 040/11)

45. Section 28(1)(3) of Companies Act provides that a joint stock company (*akcionarsko društvo*) must transmit to the CRPS documents and data relating to appointments and dismissals, and persons authorised to represent the company in relation to third parties.

46. Section 28(6) provides that there must be no inconsistencies between what is published (*objavljeno*) and what has been transmitted to the CRPS. If there is such an inconsistency the text in the CRPS's possession is the valid one. The published text cannot be taken as valid in respect of third persons who trusted the text in the CRPS's possession. Third persons can consider the published text as a valid one unless the relevant company can prove that they knew of the text transmitted to the CRPS.

47. Section 86(8) provides that the registration in the CRPS is done on the basis of the decision on registration. Section 86(11) provides for an appeal against the decision of the Tax Administration, which can be lodged with the Ministry of Finance.

48. Section 88 provides that the CRPS must ensure that the data contained in its index and other data in its database are identical to those transmitted to it for registration and that it must be assured for the public that these two sets of data are identical (*može pouzdati u njihovu istovjetnost*). Registration is only a confirmation that the articles of association (*osnivačkoj dokumentaciji*), on the basis of which the registration has been done, contain the data required by this Act. Registration is not a guarantee of the accuracy (*nije potvrda istinitosti*) of the data contained in the articles of association. Individuals doing business with registered companies bear the risk of establishing the accuracy of the data contained in its register.

D. General Administrative Procedure Act (*Zakon o opštem upravnom postupku*; published in the OG RM no. 60/03, and OGM nos. 073/10 and 032/11)

49. This Act was in force until 1 January 2016.

50. Section 225(1) thereof provided that a decision could not be executed during the period in which an appeal could be lodged or while the appeal was pending.

51. Section 262(1) provided that by annulling a decision (*poništavanjem rješenja*) all the legal consequences caused thereby were also annulled. Quashing the decision (*ukidanjem*) did not annul the legal consequences already caused, but ensured that there were no further legal consequences.

E. Civil Procedure Act (*Zakon o parničnom postupku*; published in the OG RM nos. 022/04, 028/05 and 076/06, and OGM nos. 073/10, 047/15, 048/15, 051/17, 075/17, and 062/18)

52. Section 79 provides that during the entire proceedings the court must, on its own motion, ensure that the person appearing as a party can be a party to the proceedings, that he or she has standing to sue (*parnično sposobno*), that a party who does not have standing to sue (*parnično nesposobnu stranku*) is represented by his or her legal representative, and that any legal representative has a special power of attorney when needed.

53. Section 371(3) provides that an appeal is inadmissible (*nedozvoljena*) if it was lodged by a person who is not authorised to lodge an appeal or a person who has withdrawn an appeal or a person who has lodged an appeal has no legal interest to lodge an appeal.

54. Section 394 provides that an appeal submitted in time suspends the execution of a decision (*zadržava izvršenje rješenja*), unless otherwise provided by this Act.

55. Section 455 provides that in commercial disputes (*u privrednim sporovima*) the provisions of this Act must be applied, unless otherwise specified.

F. Enforcement Act 2011 (*Zakon o izvršenju i obezbjeđenju*; published in the OGM nos. 036/11, 028/14, 020/15, 022/17, 076/17, and 025/19)

56. Section 14 provides that the Civil Procedure Act applies to enforcement proceedings unless provided otherwise by this or another Act.

57. Section 36 provides that no appeals on points of law are allowed against a final decision (*protiv pravnosnažnog rješenja*) in enforcement proceedings.

58. Section 49 provides that a debtor can lodge an objection against an enforcement order, which does not delay the execution of the order, unless otherwise specified.

59. Section 61 provides that the enforcement ordered on the basis of an enforceable title (*na osnovu izvršne isprave*) can be executed before the relevant enforcement decision becomes final, unless otherwise specified.

60. Section 139(6) provides that sections 90-101 of this Act are applied to estimations and sale of shares and the creditor's reimbursement (*namirenje*) from the proceeds thus obtained. In particular, section 93 provides that the sale can be undertaken only after the enforcement decision is final, except in cases when the debtor proposes or agrees that the sale can be undertaken beforehand or if the object of sale can quickly deteriorate or there is a risk that its value can significantly decrease.

G. Property Act (*Zakon o svojinsko-pravnim odnosima*; published in OGM no. 019/09)

61. Section 276 provides that a contractual provision providing that an object of the pledge will become the property of the pledgee if his claim has not been paid when due, as well that in that case the pledgee can sell it for a price agreed in advance or keep it for her or himself, is null (*ništava je*). If the object of the pledge has an already set price, the contract parties can agree that the creditor can sell the object of the pledge for the agreed price or, for the same price, keep it for himself.

62. Section 283 provides, *inter alia*, that if the creditor's claim was not paid when due, the creditor can request the court to sell the object at public auction (*na javnoj prodaji*), or for a current price (*po tekućoj cijeni*), when the object has a market or stock-exchange price.

63. Section 284 provides that when a guarantor is a company, the contract of pledge can provide that the pledgee has the right to sell the object of the pledge at a public out-of-court sale (*na vansudskoj javnoj prodaji*) if his claim has not been paid when due.

H. Obligations Act (*Zakon o obligacionim odnosima*; published in OGM nos. 047/08, 004/11 and 022/17)

64. Sections 148 and 149 set out the different grounds for claiming compensation for both pecuniary and non-pecuniary damage. In particular, section 148(1) provides that whosoever causes somebody else damage is liable to pay compensation, unless he or she can prove that the damage caused was not his or her fault.

65. Sections 192-99 set out details regarding compensation in respect of pecuniary damage.

THE LAW

I. JOINDER OF THE APPLICATIONS

66. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

67. The applicants complained under Articles 6 and 13 of the Convention that they had been deprived of access to a court and an effective domestic remedy given that the appeals against the decisions of 8 and 25 November 2013 had been rejected after having been withdrawn by a person who had never been the debtor's lawful representative. The Court considers that this complaint falls to be examined under Article 6 § 1 only (see *Sukhorubchenko v. Russia*, no. 69315/01, § 60, 10 February 2005; *mutatis mutandis*, *Assanidze v. Georgia* [GC], no. 71503/01, § 187, ECHR 2004-II; and *Popov v. Moldova (no. 1)*, no. 74153/01, § 58, 18 January 2005), the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

68. The Government contested the applicants' complaint.

A. Admissibility

1. Compatibility ratione personae *(relating to both applications)*

69. The Government submitted that the applications were incompatible *ratione personae* as none of the applicants had been parties to the proceedings before the Commercial Court or the Court of Appeal. Also, the contracts of pledge had been concluded with the debtor, and all the relevant proceedings concerned the debtor's rights.

70. The applicants maintained that the application was compatible *ratione personae* as the first applicant was the sole owner of the debtor through the second and third applicants, and managed its shares. As all the losses directly affected them all they all had victim status.

71. The Court reiterates that the relevant principles in this regard are set out in, for example, *Ankarcrona v. Sweden* ((dec.), no. 35178/97, 27 June 2000).

72. Turning to the present case, the Court notes that the first applicant is the sole owner of the second and third applicants, who were jointly the debtor's sole owners at the relevant time (see paragraph 7 above). Consequently, and contrary to what the situation was in, for example, *Agrotexim and Others v. Greece* (24 October 1995, § 65, Series A no. 330-A, where the applicant companies owned only about half of the shares in the company in question), there was no risk of differences of opinion among shareholders or between shareholders and a board of directors as to the reality of infringements of the rights protected under the Convention and its Protocols or concerning the most appropriate way of reacting to such infringements (see *Ankarcrona* (dec.), cited above).

73. Having regard to the absence of competing interests which could create difficulties, and in the light of the circumstances of the case as a whole, the Court considers that the applicants were so closely identified with the debtor that it would be artificial to distinguish between them in this context, and that even though the party to the domestic proceedings was the debtor only, the applicants can also reasonably claim to be a victim within the meaning of Article 34 of the Convention (see *KIPS DOO and Drekalović v. Montenegro*, no. 28766/06, § 87, 26 June 2018; *Vujović and Lipa D.O.O. v. Montenegro*, no. 18912/15, §§ 29-30, 20 February 2018; *Kin-Stib and Majkić v. Serbia*, no. 12312/05, § 74, 20 April 2010; *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey*, no. 16163/90, § 21, 31 July 2003; and *Ankarcrona* (dec.), cited above). The Government's objection in this regard must therefore be dismissed.

2. Other grounds for inadmissibility

(a) Application no. 54839/17

74. The Government contested the applicants' complaint. In particular, the Court of Appeal had ruled on the merits of the first appeal, which had related to the main decision. Therefore, there had been no violation of the right of access to court. The fact that the court had not ruled on the appeal against the decision rectifying obvious errors in writing was of no relevance in that regard. In any event, that appeal had been withdrawn by I.P., who had been an authorised person to do so at the time, and therefore accordingly rejected by the Court of Appeal pursuant to the Civil Procedure Act.

75. The applicants reaffirmed their complaint. The rectifying decision had been an integral part of the main one, and thus could not be considered separately. In addition, the rectifying decision had not dealt with technical issues only but with substantial errors given that it had changed the object of the enforcement (*promjena predmeta izvršenja*). Moreover, the procedure of I.P.'s appointment could not have legal effect as, firstly, it had never been finalised, and, secondly, it had lacked the necessary consent of the Securities Commission.

76. The relevant principles with respect to the right of access to a court are set out in a long line of case-law such as *Golder v. the United Kingdom* (21 February 1975, § 36, Series A no. 18), *Baka v. Hungary* ([GC], no. 20261/12, § 120, 23 June 2016) and *Lupeni Greek Catholic Parish and Others v. Romania* ([GC], no. 76943/11, §§ 84-90, 29 November 2016).

77. In particular, the Convention does not compel the Contracting States to set up courts of appeal in civil cases. However, where such courts do exist, the guarantees of Article 6 must be complied with by, *inter alia*, ensuring to litigants effective access to the courts for the determination of their "civil rights and obligations" (see, among many other authorities,

Levages Prestations Services v. France, 23 October 1996, § 44, *Reports of Judgments and Decisions* 1996-V, and *Poitrimol v. France*, 23 November 1993, §§ 13-15, Series A no. 277-A).

78. The right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (ibid., § 230; see also *Cordova v. Italy (no. 1)*, no. 40877/98, § 54, ECHR 2003-I; the recapitulation of the relevant principles in *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B; and *Lupeni Greek Catholic Parish and Others*, cited above, § 89).

79. Turning to the present case, the Court notes that there were two Commercial Court decisions: the first one ordering the transfer of the shares to the creditor, and the second decision rectifying the first one. The debtor appealed against both of them. While the applicants submitted that the rectifying decision had dealt with substantial errors of the first one and could not be considered separately, the Court notes that the debtor's second appeal did not challenge any of the rectifications contained in the second decision (see paragraph 12 *in fine* above), but substantially related to the main decision of 10 October 2013. Regardless of the fact that I.P. had withdrawn the debtor's second appeal, it must be noted that the Court of Appeal did examine on the merits the debtor's first appeal and dismissed it, giving a reasoned decision (see paragraph 17 above). As the two appeals were substantially the same, and in fact related to the contents of the first decision, the court thus addressed all the arguments, including those from the second appeal too. In other words, the limitation applied in respect of the second appeal did not restrict the applicants' access to a court in such a way or to such an extent that the very essence of the right was impaired. Accordingly, the Court considers that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

(b) Application no. 71093/17

80. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits (application no. 71093/17)

1. The parties' submissions

(a) The applicants

81. The applicants reaffirmed their complaint.

82. In particular, the first applicant stated that he could not have ceased to be the debtor's legitimate representative until the decision on I.P.'s registration had become final. As the procedure for the latter's appointment had never been finalised, it could not have had legal effect. Also, his appointment could not have had legal effect as of the day when the debtor's new owner had issued a decision in that regard as it had lacked the necessary consent of the Securities Commission. Regardless of that fact, the courts had accepted that I.P. had been the debtor's lawful representative and had accepted his withdrawal of the appeal relating to the transfer of shares, and his cancellation of the power of attorney, thus denying the applicants' access to court.

83. They furthermore argued that mere registration in the CRPS did not guarantee the accuracy of the data contained therein. It was also inaccurate that the annulment of registration in the CRPS had only future effect. Notably, the General Administrative Procedure Act clearly provided that by annulling the decision all the legal effects thereof had been annulled too.

84. Lastly, the same courts had acted differently in the same situation, as in another dispute involving the debtor they had stayed the proceedings until the appeals relating to who its legal representative had been, had been ruled on.

(b) The Government

85. The Government contested the applicants' complaint.

86. In particular, the appeal had been withdrawn by I.P., who, according to the CRPS decision on the changes in the debtor's company officers, had been the debtor's executive director at the time. As the appeal had been withdrawn by an authorised person it had been accordingly rejected by the Court of Appeal pursuant to the Civil Procedure Act (see paragraph 53 above).

87. The Court of Appeal was not obliged to verify on its own motion the authenticity of the CRPS data submitted to it, given that any excerpt (*izvod*) from the CRPS was a public document (*javna isprava*), the legitimacy of

which could be contested only in administrative proceedings. In any event, the subject matter before the Court of Appeal was not to decide on the credibility of the excerpt, but on the appeals lodged against the Commercial Court decisions.

88. They further submitted that the status of a person authorised to represent the company had not been acquired at the time of the registration, but at the time of the appointment. The registration only served to inform the third parties of the relevant changes. Lastly, the annulment of the registration, which was valid only for the future, and not retroactively (*ništavost upisa*), did not mean that the underlying contract related to it was null and void too.

2. The Court's assessment

(a) The relevant principles

89. As noted above, the relevant principles with respect to the right of access to a court are set out in, for example, *Golder* (§ 36), *Baka* (§ 120) and *Lupeni Greek Catholic Parish and Others* (§§ 84-90; all cited above) (see paragraphs 76-78 above).

(b) The Court's assessment

90. The Court observes that in the present case there were also two decisions of the Commercial Court: the main one, ordering the transfer of the shares, and the second one, rectifying the main one. The debtor appealed against both of them, the two appeals being substantially the same, and both relating in substance to the main decision. While these appeals were pending, the creditor sold the transferred shares to a third party, the company O.B. Following this sale and O.B.'s request in that regard, the CRPS issued a decision registering the new company officers in the debtor, including a new executive director, I.P.

91. I.P. had withdrawn the debtor's appeal against the main decision, and the Court of Appeal rejected the appeal. While the court examined on the merits the second appeal, which had not been withdrawn, it limited itself to finding that the rectification had been duly done pursuant to the relevant provisions of the Civil Procedure Act. It explicitly held that it could not examine the rest of the debtor's submissions as in substance they related to the main decision. In other words, the Court of Appeal never examined on the merits the debtor's arguments relating to the main decision, either those from the first appeal or from the second one.

92. The Court reiterates that the right of access to a court as enshrined in Article 6 implies, among other things, the possibility for a person whose civil rights have been interfered with to bring proceedings directly and independently (see *Capital Bank AD v. Bulgaria*, no. 49429/99, § 118, ECHR 2005-XII (extracts)). It also observes that Article 20 of the

Constitution provides that everyone is entitled to a legal remedy against a decision on their rights or a legally based interest (see paragraph 40 above). Section 20(9) of the Pledge Act provides that an appeal can be lodged against the enforcement decision issued in the proceedings relating to a pledge (see paragraph 43 above). The Court notes in this regard that the applicants had a legally based interest given that the Commercial Court's decision affected both them and the debtor. In addition, the appeals were duly submitted while the debtor was still represented by the first applicant, and before I.P. was registered. While the Court notes that it is unclear how the sale of shares owned by the debtor in the Fund led to the changes of the debtor's Board of Directors, it nevertheless observes that this was the case.

93. As regards I.P.'s registration the Court notes that the applicants appealed against this decision and informed the domestic courts that they had done so. It also notes in this regard that the national legislation provided that an appeal had suspensive effect with regard to the execution of the impugned decision (see paragraph 50 above). Furthermore, after the Court of Appeal rejected the appeal as inadmissible, the Ministry of Finance, in response to the applicants' appeal, annulled the decision on the new company officers registration, including I.P.'s registration. It is noted in this regard that pursuant to the relevant legislation, and contrary to the Government's submission, the annulment has retroactive effect (see paragraph 51 above). Eventually, the proceedings in this connection were stayed as O.B. had withdrawn its request for registration. Therefore, the decision on I.P.'s appointment had indeed never become final as it had never been upheld by a second-instance body. In addition, the Securities Commission itself found that O.B.'s purchase of more than 10% of the shares had not been in accordance with the law as it had lacked that Commission's consent.

94. The Court lastly observes that in a subsequent case involving the debtor the same domestic courts did indeed stay the proceedings until it was established who the debtor's legal representative was (see paragraph 39 above).

95. In view of the above, the Court has serious doubts as to whether the impugned limitation was lawful. Even assuming, however, that it was, the Government offered no argument whatsoever as regards the aim thereof or as to the proportionality between the means employed and the aim pursued, whatever it might have been. The Court therefore considers that the applicants' loss of the possibility of using a remedy which they had reasonably believed to be available amounted to a disproportionate hindrance (see, *mutatis mutandis*, *Maširević v. Serbia*, no. 30671/08, § 50, 11 February 2014, and *Vujović and Lipa D.O.O.*, cited above, § 44). There has accordingly been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

96. The applicants complained that by the execution of the non-final decisions in their case and by the subsequent sale of the shares they had been deprived of their property.

97. The Court considers that this complaint should be examined under Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

98. The Government contested the applicants' complaint.

A. The parties' submissions

1. The Government

99. In addition to the objections relating to compatibility *ratione personae* (see paragraph 69 above), the Government also submitted that the bank loan agreement, duly signed by the applicants, had clearly provided that the creditor had had the right to unilaterally terminate it before the expiration of the envisaged period in the event that the debtor had been more than thirty days late in making a payment, which was exactly what had happened in the present case. The applicants had been aware that in failing to fulfil their contractual obligations, the object of the pledge could be seized and given to the pledgee, in this case the creditor. The relevant legislation was formulated with sufficient precision for the applicants to foresee this. There could be no violation of Article 1 of Protocol No. 1 if the confiscation of property had occurred owing to the applicants' own failure to comply with the legal provisions and obligations arising out of the loan agreement.

2. The applicants

100. The applicants submitted that section 20 of the Pledge Act provided that the courts could seize and transfer the objects of the pledge to the creditor's possession (*državinu*), which is what the courts had ordered.

101. They maintained that the Government had failed to establish a fair balance between the measures applied and the aim sought to be achieved. It had been possible to enforce only to the extent necessary to cover the loan,

thus protecting the principle of proportionality. The debtor had contested the existence of the debt and its amount, but the courts had failed to note its amount in their decisions. As the result, the applicants' property in its entirety had been sold for only EUR 3.5 million, thus making the applicants bear a disproportionate burden, which had not been in the public interest.

102. They further submitted that section 276 of the Property Act – the application of which was provided for by the contracts of pledge – explicitly prohibited the object of the pledge becoming the property of the creditor, even when the loan had not been paid. The same Act did not allow for an out-of-court sale, unless it was provided for by the contract of pledge, which had not been the case. The Act provided for a court-ordered sale, which was precisely defined and regulated by the Enforcement Act (section 93).

103. Contrary to the court decision to stay the transfer of ownership the CDA had proceeded with it, on the excuse that it had received the decision only after the transfer had been already completed. In addition, the CDA had transferred the shares even before the court had issued the rectifying decisions.

B. The Courts' assessment

1. *Compatibility* ratione personae *(relating to both applications)*

104. For the reasons set out above (see paragraphs 72-73 above) the Court considers that the complaint is compatible *ratione personae* and that the Government's objection in that regard must be dismissed.

2. *Application no. 54839/17*

105. The relevant principles in this regard are set out, *mutatis mutandis*, in *Zagrebačka banka d.d. v. Croatia* (no. 39544/05, § 250, 12 December 2013, and the authorities cited therein) and *Kuchař and Štis v. the Czech Republic* ((dec.), no. 37527/97, 21 October 1998). In particular, the mere fact that the State, through its judicial system, provided a forum for the determination of a private-law dispute does not give rise to interference by the State with property rights under Article 1 of Protocol No. 1. The State may be held responsible for losses caused by such determinations if court decisions are not given in accordance with domestic law or if they are flawed by arbitrariness or manifest unreasonableness contrary to Article 1 of Protocol No. 1 (see, for example, *Vulakh and Others v. Russia*, no. 33468/03, § 44, 10 January 2012). However, the Court's jurisdiction to verify that domestic law has been correctly interpreted and applied is limited and it is not its function to take the place of the national courts. Rather, its role is to ensure that the decisions of those courts are not arbitrary or otherwise manifestly unreasonable (see, for example, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 43, ECHR 2007-I).

106. The Court further reiterates that in all States Parties to the Convention the legislation governing private-law relations between individuals, including legal persons, includes rules which determine the effects of these legal relations with respect to property and, in some cases, compel a person to surrender a possession to another. This type of rule cannot in principle be considered contrary to Article 1 of Protocol No. 1 unless a person has been arbitrarily and unjustly deprived of property in favour of another (see *Zagrebačka banka d.d.*, cited above, § 251, and the authorities cited therein).

107. Turning to the present case, the Court firstly notes that the enforcement proceedings instituted by the creditor resulted in the seizure and transfer of the debtor's shares to the creditor. Those enforcement proceedings were conducted on the basis of three contracts of pledge as the valid enforcement title (see paragraph 9 above). By those contracts the debtor and the applicants explicitly accepted that should the debtor fail to honour the debt to the creditor, the creditor was entitled to the shares specified in the contracts. The Court further observes that the existence and contents of the contracts of pledge had never been disputed by either party.

108. It is further noted that the debtor was indeed behind in paying back the loan. Notably, during the proceedings before the domestic courts the first applicant, as the debtor's legal representative at the time, acknowledged the main debt and disagreed only with the calculated interest (see paragraphs 10 and 17 above).

109. The Court also takes note that the contracts of pledge were concluded by the applicants of their own free will, and that they accepted the terms and thereby guaranteed the bank loan with the shares specified therein. In addition, section 20 of the Pledge Act provides details in cases when the main contract has been breached and the pledge activated (see paragraphs 41-44 above). In particular, in such a case the pledgee has the right to address the courts and seek the object of the pledge. While the same section allows for an appeal against an enforcement decision given by the courts, it also explicitly provides that lodging an appeal does not have suspensive effect as regards the execution of the decision. Therefore, the fact that the State-run agency transferred the object of the pledge to the creditor – in this case the debtor's shares – while the debtor's appeals in this regard were still pending, was neither unforeseeable nor unlawful. It was also not disproportionate, given that the applicants themselves had agreed to the pledge in the first place and the corollary that the debtor's shares might be transferred to the creditor. The Court, therefore, finds no indication that those decisions were based on arbitrary or manifestly unreasonable considerations or that they were unlawful under the domestic law.

110. The Court further notes that the debtor, and hence the applicants, had an opportunity to appeal against the Commercial Court's decision of 10 October 2013, of which they availed themselves. The mere fact that the

outcome of the appeal was not favourable for them does not mean that the State did not comply with its positive obligation under Article 1 of Protocol No. 1 to the Convention (see *Zagrebačka banka d.d.*, cited above, § 274), as it is an obligation of means, not of result.

111. Once the shares had been transferred it was the creditor who had disposed of them further, and not the respondent State. It is noted in this regard that section 20 of the Pledge Act provides that after lawfully obtaining the object of the pledge the pledgee can, *inter alia*, sell it (see paragraph 44 above). However, quite apart from this section, the Court notes that if the applicants had considered that the creditor's sale of the shares had been unlawful and/or had caused them damage, they could have lodged a civil claim pursuant to the relevant provisions of the Obligations Act (see paragraph 64-65 above), thereby seeking compensation from the creditor. However, the applicants did not submit any evidence that they had instituted such proceedings.

112. In the light of the foregoing considerations, the Court finds that the applicants' complaint under Article 1 of Protocol No. 1 to the Convention is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

3. Application no. 71093/17

113. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

114. However, having regard to its finding under Article 6 § 1 of the Convention and its finding that the applicants were unduly prevented from obtaining a judicial determination of their appeal concerning the transfer of the shares to the creditor, the Court considers that it cannot speculate as to what the situation would have been had the applicants had effective access to a court. Consequently, it does not consider it necessary to rule on the applicants' complaint based on Article 1 of Protocol No. 1 (see *Chakalova-Ilieva v. Bulgaria*, no. 53071/08, § 47, 6 October 2016, and the authorities cited therein, as well as *Vujović and Lipa D.O.O.*, cited above, § 48).

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

115. The Court notes that, after the communication of the case to the respondent Government, the applicants repeated another complaint initially made, notably that no appeal had been allowed against the conclusions of the Commercial Court of 5 and 27 December 2013.

116. The Court reiterates that on 13 December 2018 some of the applicants' complaints were communicated to the Government, whereas the remainder of the application, including the complaint specified above, was

declared inadmissible (see paragraph 4 above). That being so, the Court no longer has jurisdiction to examine it (see *KIPS DOO and Drekalović*, cited above, § 139).

117. In their observations the applicants complained for the first time that: (a) the Court of Appeal had not taken into account their additional observations of the appeals (see paragraph 35 above); (b) they had never been served with decisions on the objections (*prigovore*) they had submitted (see paragraph 36 above); and (c) of inequality of arms and not having right to present evidence in the above enforcement proceedings.

118. The Court observes that these complaints were not included in the initial applications, but were raised in the applicants' observations of July 2019. The Court considers, therefore, that it is not appropriate to take these matters up in the context of the present applications (see *Stanka Mirković and Others v. Montenegro*, nos. 33781/15 and 3 others, § 66, 7 March 2017; *Mugoša v. Montenegro*, no. 76522/12, § 71, 21 June 2016; *Melnik v. Ukraine*, no. 72286/01, §§ 61-63, 28 March 2006; and *Nuray Şen v. Turkey (no. 2)*, no. 25354/94, § 200, 30 March 2004).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

119. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

120. The applicants claimed EUR 11,860,140 in respect of pecuniary damage, together with the interest as of 9 January 2014 until the day of payment. They also claimed EUR 60,000 in respect of non-pecuniary damage.

121. The Government contested the applicants' claim. In particular, the alleged pecuniary damage had been the result of the procedure for which the applicants had to bear sole responsibility.

122. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicants jointly EUR 3,600 in respect of non-pecuniary damage.

B. Costs and expenses

123. The applicants also claimed EUR 70,000 for the costs and expenses. They submitted no specification or any invoices in that regard.

124. The Government contested this claim as too high and, in any event, as unsubstantiated, given that the applicants had failed to provide any evidence in this regard.

125. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the applicants' claim as unsubstantiated.

C. Default interest

126. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* application no. 54839/17 inadmissible;

3. *Declares* application no. 71093/17 admissible;

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

5. *Holds* that there is no need to examine the complaint under Article 1 of Protocol No. 1 to the Convention;

6. *Holds*
   (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,600 (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 5 May 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Robert Spano
Registrar	President