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**ANALYSIS OF THE IMPACT OF
THE DECISIONS OF THE CONSTITUTIONAL COURT OF MONTENEGRO ON THE
SYSTEM OF ORDINARY COURTS WITH A PARTICULAR FOCUS ON THE
RELATIONSHIP BETWEEN THE CONSTITUTIONAL COURT OF MONTENEGRO
AND THE SUPREME COURT OF MONTENEGRO**

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ABBREVIATIONS

ECtHR	- European Court of Human Rights
FL	- Family Law (OGRM 1/2007; OGM 53/2016)
CM	- Constitution of Montenegro
ECHR	- Convention for the Protection of Human Rights and Fundamental Freedoms
LO	- Law on Obligations (OG SFRY 29/79, 39/85 and 57/89; OGM 31/93)
LO 08	- Law on Obligations (OGM 47/2008, 4/2011-other law and 22/2017)
LCCM (LCC)	- Law on the Constitutional Court of Montenegro (OGRM 11/15)
CCM (CC)	- Constitutional Court of Montenegro (Constitutional Court)
SCM (SC)	- Supreme Court of Montenegro (Supreme Court)
LFPR	- Law on Foundations of Property Law Relations (OG SFRY 6/80 and 36/90; OGM 29/96) and the Law on Ownership Rights (OGM 19/2009)

I. INTRODUCTORY REMARKS

The Analysis of the impact of the decisions of the Constitutional Court on the system of ordinary courts of Montenegro was implemented within the framework of the project “*Fighting ill-treatment and impunity and enhancing the application of the ECtHR case-law on national level ‘FILL’*” funded by the European Union and the Council of Europe, and implemented by the Council of Europe within the Horizontal Facility for the Western Balkans and Turkey. This activity is implemented with a view to reinforcing the judiciary dialogue and harmonising the approach to the implementation of the standards related to human rights at the national level.

Under the project, it was envisaged to address decisions of the Montenegrin courts against which the parties submitted constitutional complaint, the decisions of the Constitutional Court of Montenegro adopted by that Court upon constitutional complaints, and the decisions of the Montenegrin courts adopted by those courts after the Constitutional Court repealed their decisions and remanded cases for a retrial.

During the work on the project, it was decided that due to a large number of judicial decisions concerning which, in 2017, the Constitutional Court decided on constitutional complaints and also because of the limited period in which the project was to be implemented, the results of the work would be processed in two ways.

A general overview of the results of the analysis of the decisions that were to be examined within the project is given in tables showing separately the decisions of the Constitutional Court and separately those of the Supreme Court, structured according to the type of violated rights and freedoms guaranteed by the Constitution and the ECHR, the manner in which those rights and freedoms were violated and the decisions rendered after the adoption of the decisions of the Constitutional Court, taking account of the time in which the decisions in question were adopted. The general overview does not contain a tabular overview of the legal positions of principle of the Supreme Court Bench adopted according to the decisions of the Constitutional Court since data on such positions have not been obtained. See specific tables annexed to this report.

The focus of this analysis is on the repealing decisions adopted by the Constitutional Court in 2017 and the decisions adopted by the Supreme Court in that year, which were made available to the authors of this analysis by these courts. These decisions have been processed in sets where each set consists of three decisions:

- ✓ the decision of the Montenegrin court against which the constitutional complaint was filed,
- ✓ the decision of the Constitutional Court rendered by the court upon the constitutional complaint against that decision; and
- ✓ the decision adopted by the Montenegrin court on the basis of such decision of the Constitutional Court.

The mentioned sets will be identified according to the number of the decision of the Constitutional Court, indicating the numbers of decisions of the courts in Montenegro against which the constitutional complaint was filed and the numbers of the decisions of those courts rendered by those courts following the decision of the Constitutional Court. This approach was applied fully in respect of three legal matters, while for the remaining fourteen legal matters the analysis is presented more concisely, both in terms of substance and form (see *infra* under IV).

In the analysis of the examined decisions, the authors made an effort to indicate the essential reasons for which the Constitutional Court overturned the decision of the Supreme Court challenged by the constitutional complaint and how the Supreme Court acted subsequently, especially in view of the provision of Article 77 paragraph 2 of the LCC which stipulates that the competent authority to which the case is sent back for a retrial shall respect the legal reasoning of

the Constitutional Court stated in the decision. Embarking on a critical assessment of correctness of certain decisions of the Constitutional Court and the Supreme Court would go beyond the task of this analysis and the aim it pursues.

Prior to the presentation of the results of the analysis of the decisions made in certain legal matters, this report presents the constitutional and legal premises for the determination of the relationship between the courts of Montenegro and the Constitutional Court of Montenegro (see *infra* under II).

The final considerations of the analysis of certain decisions (see *infra* under III) are set out below in Section IV of this report.

The abbreviations of the legislation and bodies cited in this report are listed at the beginning of this report.

II. CONSTITUTIONAL AND LEGAL BASES FOR DETERMINATION OF THE RELATIONSHIP BETWEEN MONTENEGRIN COURTS AND THE CONSTITUTIONAL COURT OF MONTENEGRO

1. Introduction

The constitutional and legal basis for determination of the relationship between the Constitutional Court of Montenegro (hereinafter referred to as the “Constitutional Court”) and the Supreme Court of Montenegro (hereinafter referred to as the “Supreme Court”) is enshrined in the provisions of the Constitution of Montenegro on the status of those two state authorities (see *infra* under II.2 and II.3) and in the provisions of the Law on the Constitutional Court of Montenegro regulating procedures before the Constitutional Court and in particular those relating to the constitutional complaint (see *infra* under II.4).

The provisions of the Constitution of Montenegro on personal rights and freedoms (Articles 26 to 44 of the CM), on political rights and freedoms (Articles 45 to 57 of the CM), on economic, social and cultural rights and freedoms (Articles 58 to 78 of the CM) and special minority rights (Articles 79 to 81 of the CM) are also especially important for the discussion of the relationship between the Constitutional Court and the Supreme Court. Among those provisions, particularly important regarding the subject of this report, confirmed also by the decisions of the Constitutional Court and Supreme Court which have been discussed for the purpose of this report are the provisions related to legal protection – the provision of Article 32 of the CM according to which everyone shall have the right to a fair and public trial within a reasonable time before an independent and impartial court established by law and the provision of Article 29 of the CM according to which everyone shall have the right to legal remedy against the decision ruling on his right or legally based interest.

Special importance for determination of the relationship between the Constitutional Court and the Supreme Court rests also with the provisions of Article 1 paragraph 1 of the CM according to which Montenegro is, *inter alia*, a State of social justice, based on the rule of law, and the provision of Article 11 of the CM on the division of power, according to which the judicial power shall be exercised by the courts while the constitutionality and legality shall be protected by the Constitutional Court.

2. Constitutional provisions on the status of the Constitutional Court of Montenegro

In the CM, the legal status of the Constitutional Court is defined, in addition to the above-mentioned provision of Article 11, by provisions of Articles 149 to 154 as well. As for the mentioned provisions, the following provisions are directly relevant for the subject-matter of this project:

- the provisions of Article 149 on the jurisdiction of the Constitutional Court according to which the Constitutional Court is competent to decide, *inter alia*, on the constitutional complaint for violation of human rights and freedoms guaranteed by the Constitution, after all effective legal remedies have been exhausted (item 3) and on the conflict of jurisdiction between the courts and other authorities etc. (item 5), and

- the provisions of Article 151 on the decision of the Constitutional Court, which prescribe that, *inter alia*, the decision of the Constitutional Court shall be published and that it shall be binding and enforceable (paragraphs 2 and 3).

3. Constitutional provisions on the status of judicial power in Montenegro

In the CM, the legal status of the judicial power (court) is defined by the provisions of Articles 118 to 128. As for the mentioned provisions, the following provisions are directly relevant for the subject-matter of this project:

- Article 118 on the principles of the judiciary, according to which the court shall be autonomous and independent, shall rule on the basis of the Constitution, laws and ratified and published international agreements (paragraphs 1 and 2) and

- Article 124 on the Supreme Court, according to which the Supreme Court shall be the highest court in Montenegro (paragraph 1) and shall ensure uniform application of laws by the courts (paragraph 2).

4. Institute of constitutional complaint as regulated in the law

The proceedings before the Constitutional Court and legal effect of its decisions are regulated by the so-called common provisions (Articles 30 to 53 of the LCC), the provisions on the proceedings for the assessment of conformity of laws with the Constitution etc. (Articles 54 to 66 of the LCC; provisions on the so-called abstract control of constitutionality and legality), and the provisions on the constitutional complaint (Articles 68 to 78 of the LCC). As for the above-mentioned provisions, some of the so-called common provisions and some of the provisions regulating proceedings on the constitutional complaint are relevant to the subject-matter of this project.

As regards the so-called common provisions, the following provisions are directly relevant to the subject-matter of this project:

- the provisions of Article 33 of the LCC according to which the Constitutional Court shall submit, *inter alia*, a copy of the constitutional complaint to participants in the proceedings and shall set a period of time for them to submit the required documents, data and information, as well as a reply or opinion with regard to the allegations and the evidence contained in these submissions (paragraph 1), whereas, notwithstanding the above, the Constitutional Court shall not submit those submissions for reply or opinion if it finds that the procedural requirements for initiating or conducting the proceedings have not been met (paragraph 2);

- the provisions of Article 48 of the LCC according to which the Constitutional Court shall, by a decision, *inter alia*, accept a constitutional complaint for violation of human rights and freedoms guaranteed by the Constitution (item 3) or reject such complaint (item 10);

- the provisions of Article 51 of the LCC according to which the decisions on constitutional complaints and the rulings relevant to the protection of the constitutionality and legality may be published in the *Official Gazette of Montenegro* (paragraph 2), while the decisions and rulings of the Constitutional Court shall be published on the website of that Court in accordance with its Rules of Procedure (paragraph 3).

As regards the specific provisions concerning the proceedings on the constitutional complaint, the following provisions are directly relevant to the subject-matter of this project:

- the provision of Article 70 of the LCC according to which the participants in the proceedings conducted upon a constitutional complaint shall be the applicant submitting the constitutional complaint referred to in Article 68 paragraph 1 of the LCC and a state authority, state administration body, local self-government body, a legal person or another entity exercising public powers, against whose act or action or inaction the constitutional complaint was submitted;

- the provision of Article 74 of the LCC according to which the constitutional complaint shall also be submitted to other persons whose rights or obligations would be directly affected by a decision of the Constitutional Court to accept a constitutional complaint and according to which these persons shall have the right to declare on the constitutional complaint within the period of time determined by the Constitutional Court;

- the provision of Article 76 paragraph 1 of the LCC according to which, when the Constitutional Court determines that a human right or freedom guaranteed by the Constitution has been violated by the challenged individual act, the Constitutional Court shall accept the

constitutional complaint and repeal that act, in whole or partially, remanding the case for a retrial to the body that has adopted the repealed act;

- the provision of Article 76 paragraph 2 of the LCC according to which, in the event that during the procedure of decision-making on the constitutional complaint the legal effect of the individual act that is the subject-matter of the constitutional complaint has ceased and that the Constitutional Court has determined that this act violated a human right or freedom guaranteed by the Constitution, the Constitutional Court shall render a decision accepting the constitutional complaint and shall determine the manner of providing just satisfaction to the applicant who submitted the constitutional complaint for the suffered violation of a human right or freedom guaranteed by the Constitution;

- the provision of Article 77 paragraph 1 of the LCC according to which where the Constitutional Court repealed an individual act and sent the case back for a retrial, the competent authority shall immediately, but no later than 30 days following the date of receipt of the decision of the Constitutional Court, process the case; and

- the provision of Article 77 paragraph 2 of the LCC according to which the competent authority to which the case was sent back for a retrial shall respect the legal reasoning of the Constitutional Court stated in the decision and shall decide in the repeated proceedings within a reasonable time;

- the provision of Article 78 of the LCC according to which the decision of the Constitutional Court accepting a constitutional complaint shall have legal effect from the date of service of that decision on the participants in the proceedings, in accordance with the Rules of Procedure;

- the provision of Article 39 paragraph 2 of the LCC according to which the Constitutional Court shall render a decision in each case no later than 18 months from the date of initiating the proceedings before that Court, unless otherwise provided by the law.

III.

OVERVIEW AND ANALYSIS OF THE DECISIONS OF THE SUPREME COURT AND DECISIONS OF THE CONSTITUTIONAL COURT RENDERED IN CERTAIN LEGAL MATTERS

1. Introduction

The analysis presented below covers the decisions rendered by the Constitutional Court in 2017, the decisions of the Supreme Court which were repealed by those decisions of the Constitutional Court and the decisions rendered by the Supreme Court following such decisions of the Constitutional Court. All these decisions were made available to the authors of this Analysis by the above-mentioned Courts. Furthermore, these decisions have been discussed in sets consisting of three decisions - the decision of the Montenegrin court against which the constitutional complaint was filed, the decision of the Constitutional Court rendered by the Constitutional Court upon the constitutional complaint against that decision and the decision rendered by the Montenegrin court on the basis of such decision of the Constitutional Court. The mentioned sets will be identified by the number of the decision of the Constitutional Court, indicating also the numbers of decisions of the Montenegrin courts against which the constitutional complaint was filed, and the numbers of the decisions rendered by those courts following the decision of the Constitutional Court.

2. Decision of the Constitutional Court Už-III br. 50/14 of 31 March 2017

- Judgment of the Supreme Court of Montenegro Rev. br. 1046/13 of 12 November 2013
- Decision of the Supreme Court of Montenegro Rev. br. 12/17 of 8 November 2017

2.1. Judgment of the Supreme Court Rev. br. 1046/13 of 12 November 2013

Judgment of the Supreme Court of Montenegro Rev. br. 1046/13 of 12 November 2013 rejected as unfounded the application for revision submitted by the plaintiff against the judgment of the High Court in Podgorica Gž-br. 2245/13 of 10 June 2013.

In this case (according to the reasoning of the judgment of the Supreme Court), the first-instance court accepted the plaintiff's claim and established that the plaintiff has the right of joint property in relation to the second respondent (the plaintiff's spouse) and the first respondent (the bank), regarding the apartment on which the second respondent created a mortgage in favour of the bank as a collateral for the loan granted by that bank to the son of the plaintiff and the second respondent and found that the mortgage agreement was null and void, while the second-instance court reversed the afore-mentioned judgment of the first-instance court in the part by which that judgment found that the mortgage agreement was null and void.

When deciding on the revision of the judgment of the second-instance court, the Supreme Court found that the application for revision was unfounded. The Supreme Court based such decision on the following findings: the plaintiff and the second respondent had been married since 1977 and in the course of duration of their marital union, they purchased the apartment in question by their joint labour and funds in 1992; - a mortgage agreement was concluded in 2008 between the first respondent as mortgage creditor and the second respondent as mortgage debtor; - the mortgage was created as a collateral for the main and secondary claim of the mortgage creditor against the debtor (a legal entity) based on a loan agreement concluded between the son of the plaintiff and the second respondent, as the executive director, and the first respondent; - the loan beneficiary

defaulted on the loan repayment, which was the reason to initiate an out-of-court settlement procedure.

Having found also that the first-instance court adopted the plaintiff's claim that the contested mortgage agreement was null and void, providing the reasoning that under Article 290 of the Family Law (OGRM 1/07; FL) the second respondent could not dispose with his share in the undivided joint property or encumber it with a legal transaction *inter vivos* without the plaintiff's consent, and that the second-instance court made a conclusion to the contrary on the basis of the same facts that, namely, the mortgage agreement was legally valid, that there was no reason for it to be null and void, which is why it reversed the judgment of the first-instance court and rejected the claim as unfounded, the Supreme Court concluded that the second-instance court acted correctly by making the decision as set out above.

The Supreme Court based its decision on the following:

- a view that, although the provision of Article 290 of the FL stipulates that a spouse may not dispose with his/her share in the undivided joint property and he/she cannot place legal encumbrances on the property *inter vivos*, and as it had been found that the plaintiff and the second respondent had been in a harmonious marriage since 1977, that they lived in a common household with their son who raised a loan as an owner and executive director of a legal person, the second-instance court's conclusion that the plaintiff had known and must have known of the encumbrance i.e. creation of mortgage on the apartment concerned which was a joint property of the plaintiff and the second respondent as a collateral for the loan taken by their son and that she consented to it was quite logical and the only correct conclusion the court could make, and

- a view that the consent of a spouse can be given in writing or verbally, including in the form of tacit consent as in this particular case, just as it was held by the second-instance court.

2.2. Decision of the Constitutional Court Už-III br. 50/14 of 31 March 2017

The plaintiff submitted a constitutional complaint against the decision of the Supreme Court referred to under 2.1 in which she, essentially, stated that the claim was based on the fact that the second respondent could not conclude a mortgage agreement without the consent of his wife who is the applicant submitting the constitutional complaint because the apartment had been purchased with the spouses' joint funds during the marital union and, thus, constituted joint property; that, relying on the provision of Article 289 paragraph 2 and Article 290 of the FL, the first-instance court found that the second respondent could not encumber the apartment concerned with a mortgage without his wife's consent, for which reason it found that the mortgage agreement was null and void, and that, as opposed to that, the second-instance court and the Supreme Court reversed the first-instance judgment having found that the applicant submitting the constitutional complaint had consented to the conclusion of the mortgage agreement; that the Supreme Court had taken a different view in an identical factual and legal matter (Rev. br. 1057/09 of 21 October 2009); that the position taken by the Supreme Court in the contested judgment transferred the responsibility for the failure of the bank onto the applicant; that, in the course of the proceedings, the respondent bank did not contest the fact that the applicant had not been informed that the mortgage agreement had been concluded, nor was her consent requested; that the bank was obliged to act with due professional care and examine whether the apartment in question was a separate or joint property, and only thereafter to proceed with the conclusion of the mortgage agreement; that the Supreme Court departed from the previous established case-law without good reason and reasoning, having thereby created legal uncertainty and, thus, called into question the legal provisions regulating the joint property of the spouses; that the Supreme Court did not adjudicate properly on the reasons for revision and that the applicant was unlawfully deprived of her right of ownership of the apartment in question, proposing to accept the constitutional complaint, repeal the contested decision of the Supreme Court and to remand the case for a retrial.

In this particular legal matter upon the constitutional complaint, the Constitutional Court requested the response of the Supreme Court and obtained the case files of the first-instance court.

The Constitutional Court found that the following was legally relevant for decision-making in this particular case:

- the provision of Article 32 of the CM according to which everyone shall have the right to a fair and public trial within a reasonable time before an independent and impartial court established by law,

- the provision of Article 6 § 1 of the ECHR according to which, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law,

- the provision of Article 290 of FL 07 according to which a spouse may not dispose with his/her share in the undivided joint property and he/she cannot place legal encumbrances on the property *inter vivos*,

- the provision of Article 291 of FL 07 according to which joint property, during marriage, shall be managed and disposed of jointly and by mutual consent of both spouses.

Proceeding from the allegations made in the constitutional complaint and applicable constitutional and ECHR rights, the Constitutional Court examined the contested decision of the Supreme Court from the aspect of the above-mentioned provisions of Article 32 of the CM and Article 6 § 1 of the ECHR.

Having noted that one of the basic aspects of the right to a fair trial was the right to a reasoned decision, that the reasoning of the decision constituted a guarantee against judicial arbitrariness, that the right to a reasoned judicial decision implied a positive obligation of the courts to state in their judgments the reasons that guided them when they adopted those decisions, the Constitutional Court held that “the lack of relevant and sufficient reasons for assessments made in the decision is the first and the most important indication of arbitrary judicial decision-making”.

Furthermore, in view of the fact that the European Court of Human Rights and the Constitutional Court “pointed out in numerous decisions that the domestic courts have a certain margin of appreciation as to which arguments and evidence they will accept in a particular case, but that they also have the obligation to state reasons for their decision by providing clear and comprehensible reasons on which the decision was based” and that the unfettered evaluation of the evidence “is a power of the court prescribed by law, which includes an obligation to clearly and duly explain such evaluation”, the Constitutional Court stressed, providing data on a number of such decisions, without conveying their specific content, that “the extent of the obligation of the court to state in a written statement of reasons of its decision the reasons which guided it when it adopted that decision always depends on the particular circumstances of each case”. Moreover, the Constitutional Court warned that, on the other hand, “in the ECtHR case-law, the reasons stated in the statement of reasons of the decision will, generally, be deemed relevant if they clearly indicate that the courts did not make their assessments in an unreasonable manner in a particular case. In short, the reasons stated in the written statement of reasons of the decision must include all relevant aspects of the case considered which could have affected the final decision of the court (principle of relevance)”.

As regards the above decision of the Supreme Court, the Constitutional Court found that the observations made in the reasoning of the decision of the Supreme Court that “(...) quite logical and the only correct conclusion that the plaintiff knew and must have known about (...) creating mortgage on the apartment (...), and that the consent of the other spouse can (...) be tacit consent, as in this particular case...” “suggest that the reasoning of the challenged decision is not sufficiently substantiated and clear, because it cannot be seen based on what the Supreme Court drew conclusions in this dispute. Such an approach of the revision court is added weight by the fact that the first-instance judgment described in detail the procedure for individual assessment of the evidence, establishing interrelationships between them and inferring that there was evidence that the applicant had not been aware that the disputed mortgage agreement had been concluded and that, accordingly, she had not consented to it, which is why it was assessed that the applicant's husband had concluded the mortgage agreement contrary to the provisions of Articles 290 and 291 of the Family Law”. Therefore, the Constitutional Court pointed out that “the obligation of the courts

in the second-instance proceedings and in the revision proceedings is to state, in the reasoning of the judgments, the reasons on the basis of which the courts consider that a fact has been proven or not proven, and the manner in which such a conclusion has been made”.

In line with the above-mentioned, the Constitutional Court “made an observation” “that the Supreme Court did not refer to evidence that could support the Court’s final assessment that the mortgage agreement in question is a valid legal transaction anywhere in the disputed judgment”, that the Supreme Court, in the opinion of the Constitutional Court, “did not fulfil its obligation to carefully examine all evidence and arguments of the parties to the proceedings related to the disputed mortgage agreement for the apartment, and, consequently, to apply the relevant provisions of the Family Law, and to provide clear and comprehensible reasons for its decision. Therefore, the conclusions inferred in the statement of reasons of the disputed judgment, according to this Court, do not meet the requirements of Article 32 of the Constitution and Article 6 § 1 of the Convention”.

In this connection, the Constitutional Court stated its position that “as long as the final judgment does not provide sufficient and relevant reasons that guided the court when making its decision, which could lead us to believe that the court really examined the case and responded to all substantive allegations of the parties, it cannot be considered that such judgment meets the general requirements arising from the right to a fair trial guaranteed by the Constitution and the Convention”.

Having in mind the above, the Constitutional Court concluded that “the disputed decision of the Supreme Court violated the applicant’s right to a reasoned judicial decision” and that as it found “a violation of the right to a fair trial under Article 32 of the Constitution and Article 6 § 1 of the Convention, in the above described part of this Decision, the Constitutional Court did not examine the applicant’s allegations concerning a possible violation of other constitutional rights referred to in the constitutional complaint”.

2.3. Judgment of the Supreme Court of Montenegro UŽ-Rev. Br. 12/17 of 8 November 2017

In the judgment rendered upon the decision of the Constitutional Court cited under 2.2, the Supreme Court once again rejected the application for revision filed against the judgment of the High Court in Podgorica Gž. br. 2245/13 of 10 June 2013 as unfounded, however, it substantively supplemented the reasons stated in the Judgment Rev. br. 1046/13 of 12 November 2013 (see *supra* under 2.1).

In the new judgment, the Supreme Court first of all essentially recapped the decisions of the first-instance and second-instance courts, its decision of 12 November 2013, and especially the decision of the Constitutional Court UŽ-III-br- 54/14 of 31 March 2017 and reasons for which the Constitutional Court repealed its previous decision adopted in this legal matter.

Noting that in the proceedings “which preceded the adoption of the challenged judgment, and on the basis of the presented evidence, which was correctly assessed within the meaning of Article 9 of the LCP”, the facts that it stated in its previous repealed judgment were established (see *supra* under 2.1), and taking into account legal reasons stated by the Constitutional Court in the decision repealing its previous decision, the Supreme Court expressed its view, while citing the provisions of Article 32 of the CM and Article 6 § 1 of the ECHR, but also having regard to the provision of Article 77 of LCC which prescribes that the competent authority shall be bound by the legal reasons the Constitutional Court stated in the decision, that “it found in the retrial that the plaintiff’s application for revision was unfounded”.

Namely, taking the view that it is not disputable that the courts have a margin of appreciation as to which arguments and evidence will be accepted in a particular case and that they have an obligation to state reasons for their decision by providing clear and comprehensible reasons on which they based such decision, while referring to the relevant decisions of the ECtHR, the Supreme Court pointed out that it assessed as well that “the conclusion of the court of second instance that the mortgage agreement was legally valid is correct, on the grounds that the plaintiff had to be aware of the conclusion of the disputed agreement and had to have consented to it, as she

had been in a harmonious marriage with the second respondent since 1977, that it was a collateral for the loan taken by their son with whom they lived in the common family household”.

The Supreme Court based such position on the following excerpt:

- that “under Article 289 (2) of the Family Law (...) in case of fiction, as in case of the joint property of the spouses, it shall be considered that the entry was made in the names of both spouses even if the entry was made in the name of only one of them, unless the entry was made on the basis of a written agreement entered into by and between spouses, and it was necessary to make annotation in the real estate cadastre on the joint ownership of the property and manner of management and disposal and to make clear to third parties that it is a jointly-owned thing”, and

- that, otherwise, there would be no purpose of the main principle of a real estate cadastre - the principle of reliability – that no one can bear harmful consequences due to relying on the faithfulness and reliability of data on real estate registered in the real estate cadastre, in accordance with the provision of Article 10 of the Law on State Surveying and Cadastre of Immovable Property (...) which prescribes that the data on immovable property registered in the real estate cadastre shall be deemed to be accurate and that no one can incur adverse consequences in immovable property transactions and other relations in which such data is used.

Furthermore, the Supreme Court also took a view as regards the repealing decision of the Constitutional Court in which it was underlined that it was not clear from the contested decision on the basis of which evidence the Supreme Court drew the conclusion that the plaintiff knew and had to know of the mortgage on the apartment concerned and that thereby she gave tacit consent to create a mortgage, and it provided the following arguments:

- that the provision of “Article 291 of the Family Law lays down that the joint property, during the marriage, shall be managed and disposed of jointly and by mutual consent of both spouses”,

- that, accordingly, “even with regard to a third person, it is assumed that in a situation where a joint property is disposed with by one spouse, it shall be deemed that he/she is doing that with the consent of the other spouse with whom he/she is in a harmonious marital relationship, and in particular when the property is registered in the name of the spouse disposing with such property”,

- that in a “harmonious marital relationships tacit consent is acceptable (...) just as the explicit consent”, which means that “the other spouse” i.e. “the plaintiff has the burden of rebutting the presumption of consent in the case concerned, for which she did not provide evidence”,

- that, if “*a priori* allegations of the plaintiff that she did not give consent to the mentioned disposal of the joint property by her husband were accepted, that (...) could result in the abuse of the rights, especially at the time when there was no notarial service in Montenegro as was the period in which the agreement concerned was made”.

On the basis of the aforesaid, the Supreme Court concluded:

- “that the sued bank neither knew nor had to know that it was a jointly owned immovable property since there is no such entry in the public registers”,

- that, since, on the other hand, “marriage as a community of life is based on mutual respect, understanding and assistance, it would mean that the existence of a mortgage registered in the public registers accessible to all interested persons could not have remained unknown to the plaintiff and that there existed also her tacit consent to create the mortgage”,

- that “opposite point of view would also lead (...) to the conclusion that in the given situation the mortgage creditor would have to undertake investigation of the family status of the mortgage debtor, which would be contrary to the above-mentioned provisions of the law on the rules on mortgage and the registration of rights and encumbrances on real estate”.

Finally, the Supreme Court noted that providing additional reasons rectified the violation indicated in the repealed decision of the Constitutional Court.

2.4. Concluding observations about the decisions discussed

2.4.1. Entities allowed to participate in proceedings before the Constitutional Court

It cannot be inferred for certain from the decision of the Constitutional Court (see *supra* under 2.2) that the court asked the first and second respondents to declare on the constitutional complain.

2.4.2. *The problem of earlier case-law of the Supreme Court*

Neither the Constitutional Court nor the Supreme Court specifically addressed the claim of the applicant who submitted the constitutional complaint that in an earlier case the Supreme Court had taken a substantially different legal position in a factually and legally corresponding legal matter, so that the legal implications of such “departure” from the previous case-law have not been considered either.

2.4.3. *Duration of the proceedings*

The proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around two years and eight months, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around six months. For more details on the reasons for the length of the proceedings before the mentioned courts see *infra* under IV.7.

2.4.4. *On discussed decisions*

The decisions of the Supreme Court and the Constitutional Court discussed above deal with two exceptionally important interrelated legal issues. The first one concerns the legal status of the joint property of spouses, especially the real estate which is registered in the real estate cadastre, and the second one relates to implications of the circumstance that only one spouse is registered in the cadastre as the owner of the real estate that the spouses acquired during marriage with joint labour and funds.

In the first decision of the Supreme Court, when dealing with the mentioned two issues, the focus was apparently placed on the “factual” presumption that a spouse who was not registered in the cadastre as a co-owner of the jointly-owned real estate had given tacit consent that the other spouse may dispose of that immovable property; especially in the case of a “harmonious” marriage lasting for many years in which the spouse registered in the cadastre allowed the mortgage to be created on the jointly-owned apartment as a collateral for a loan granted to a legal entity “owned” by their son who lived with his parents. It is a presumption that would be accorded the relevance of a sort of (judicial) legal presumption, i.e. the relevance which is referred to in some legal systems as the so-called *prima facie* evidence, by the adoption of a relevant legal opinion of principle by the Supreme Court accompanied by the established case-law.¹ That presumption would also be related to the issue of the distribution of the burden of proof, namely, the assumptions that would have to be met to rebut such presumption.

In its repealing decision, the Constitutional Court criticised the Supreme Court for not providing sufficient reasons for the factual and legal positions taken in its decision challenged by the constitutional complaint and that the decision it rendered did not state reasons in the way it had to. However, the Constitutional Court did not engage in specific explanation of its assessment in the statement of reasons of its decision, but rather settled for fairly general, mainly “standardised”

¹ As regards the institute of *prima facie* evidence compare DIKA, *Građansko parnično pravo, Utvrđivanje činjenica*, Volume VII, 2018, § 19, pp. 146 to 158.

statements (formulas) about the deficiencies in the statement of reasons. The arguments stated in the decision of the Constitutional Court are rather similar to those stated in the decisions of the higher courts repealing the decisions of the lower courts on the grounds of the deficiencies due to which they cannot be examined (Article 367 paragraph 2 item 15 of the LCP). The Constitutional Court did not take a stance with regard to the view of the Supreme Court that, in this particular case, the unregistered spouse gave tacit consent to the registered spouse to create mortgage on the jointly-owned immovable property in favour of a legal entity "owned" by their son. The Constitutional Court did not specify in its decision the differences between the view of the first-instance court, on the one hand, and the views of the second-instance court and the Supreme Court, on the other hand, with regard to the determined substance of the factual basis of the dispute and in what sense the "unfettered evaluation" of the evidence in the case at hand was insufficiently substantiated and to which facts it actually related, namely, whether it was unfettered evaluation of the evidence as a method of forming a conclusion on the existence of a fact or a finding derived on the basis of established facts as to whether the applicant of the constitutional complaint knew or had to know of the mortgage agreement and whether she had given her tacit consent to its conclusion, and, in this connection, which of the parties was to bear the burden of proof in respect of certain facts.

In its new decision in which it ruled the same as in the repealed decision, the Supreme Court explained in more detail the view it took in that decision, i.e. the position on the existence of the presumption of tacit consent of the unregistered spouse if there was no annotation of joint ownership in the cadastre, invoking, *inter alia*, the principle of the reliability of the cadastre of immovable property and the relevance of that principle to legal certainty. The Supreme Court also took the view that the applicant who submitted the constitutional complaint failed to produce evidence that would rebut the presumed consent, which is, in fact, a view that she bore the burden of proof that the unregistered spouse had not given the consent that the registered spouse may dispose with the immovable property in question, including also the burden of proof that the bank which granted the loan knew that the property in question was a joint property. It also warned of possible abuse of joint property rights in cases where only one spouse is registered in the cadastre and the problems that could occur for the banks that grant loans if they would have to check each property as to whether it is jointly owned and who is authorised to dispose with it. Having accepted the existence of the aforementioned presumption of tacit consent and the relevance of the principle of reliability of the cadastre as a public register, the Supreme Court took a certain legal view on the legal regime of joint ownership of the spouses over the immovable properties registered in the cadastre, underlining thereby also the implicit relevance of the annotation of joint ownership in that public register, which should be taken – although that was not explicitly stated – as expression of the principle of good faith and honesty in legal transactions.

It could also be noted that the Constitutional Court, by its repealing decision, prompted the Supreme Court to give more complete reasoning for its original decision and to elaborate further legal arguments for the legal positions on which that decision was based, although, perhaps, the repealed decision already led to the conclusion that in the case at hand both the second-instance court and the Supreme Court based their decision on the assumption that the unregistered spouse, who allowed that only the other spouse be registered as the owner of the immovable property in the cadastre, gave tacit consent that the registered spouse may dispose with the immovable property on behalf of both spouses, which would require the Constitutional Court to declare whether the legal view of the Supreme Court adversely affected the unregistered spouse's right of joint ownership of immovable property registered in the cadastre. By taking a position on this issue, the Constitutional Court would determine the content of the new decision of the Supreme Court. Since that did not happen, the Constitutional Court may have an opportunity to express its opinion on this issue when a new constitutional complaint is submitted against a new decision of the Supreme Court. Regarding the mentioned assumption on which the second-instance court and the Supreme Court relied in their repealed decisions, the decision of the Constitutional Court did not specify whether the deficiencies in the reasoning of those decisions concerned unfettered evaluation as a method of determining the

facts having the significance of the so-called *presumptive basis* for the application of the aforementioned assumption, i.e. the finding that the applicant knew of the mortgage agreement, or the conclusion about the so-called *presumed fact* – the conclusion that the applicant submitting the constitutional complaint, who knew of the mortgage agreement (presumptive basis), gave her tacit consent to the conclusion of that agreement.

3. Decision of the Constitutional Court of Montenegro UŽ-III br. 385/13 of 27 September 2016

- Violation of the right to a fair trial in the part relating to access to a court whose essence and legitimate aim consist of access to a legal remedy

3.1. Ruling of the Supreme Court of Montenegro Rev. br. 156/13 of 13 March 2013

By the mentioned ruling, the application for revision was dismissed as inadmissible.

In this particular case, the first-instance judgment rejected the plaintiff's claim to order the respondent to pay her the amount of EUR 10,000.00 in respect of damages for certain immovable property. This judgment was upheld by the judgment of the second-instance court upon the plaintiff's appeal.

The plaintiff filed an application for revision against the second-instance judgment in a timely manner.

The Supreme Court found that the application for revision was inadmissible referring to the provision of Article 397 (2) of the LCP according to which the revision shall not be allowed in property disputes where the statement of claim relates to an amount of money, surrender of an item etc. if the value of the disputed matter in the contested part of a final and enforceable judgment does not exceed EUR 10,000.00. Since the value of the disputed matter in the contested part of the final and enforceable judgment was EUR 10,000.00 and did not exceed the applicable value for the admissibility of revision, this legal remedy was dismissed as inadmissible. In doing so, the Supreme Court found that the circumstance that at the hearing held on 13 May 2009 the plaintiff set the value of the dispute at the amount of EUR 20,000.00 and that that value was stated in the contested decision was not relevant, since it was not a question of non-pecuniary claim, but a pecuniary claim, so that the monetary amount which was the subject of the claim was the value of the subject-matter of the dispute.

3.2. Decision of the Constitutional Court of Montenegro UŽ-III br. 385/13 of 6 March 2017

The mentioned decision of the Constitutional Court accepted the constitutional complaint and repealed the ruling of the Supreme Court and remanded the case for a retrial to that court.

The constitutional complaint was filed for the violation of the right referred to in Article 32 of the CM and Article 6 § 1 of the ECHR. The constitutional complaint, *inter alia*, stated that: the provision of Article 397 (2) of the LCP laying down the value of the disputed matter (census) as a precondition for applying for revision to the Supreme Court, is unlawful and unconstitutional; that in the particular case the Supreme Court failed to take into account that at the hearing held on 13 May 2009 the plaintiff (the applicant who submitted the constitutional complaint) set the value of the dispute at the amount of EUR 20,000.00 and that that value was stated in the first-instance and second-instance judgments; that the mentioned provision of the LCP was not properly interpreted and that it was misapplied by the Supreme Court. Hence, it was proposed that the constitutional complaint be accepted, the contested ruling of the Supreme Court be repealed and that the case be remanded for a retrial.

For the purpose of conducting the proceedings before the Constitutional Court, the Court obtained the case files from the Basic Court in Ulcinj.

Taking the view that the facts relevant to the Constitutional Court are only the facts pertinent to the determination of the violation of constitutional law, the Constitutional Court determined as such the following facts: the subject-matter of the dispute which preceded the proceedings before the Constitutional Court was the claim of the plaintiff (the applicant who submitted the constitutional complaint) to impose an obligation on the respondent to pay her compensation in the amount of EUR 10,000.00; the plaintiff's claim was rejected as unfounded by the first-instance judgment; the plaintiff's appeal was rejected as unfounded and the first-instance judgment was upheld by the second-instance judgment; the Supreme Court dismissed the application for revision as inadmissible; the provisions of Article 32 of the CM, Article 6 § 1 of the ECHR and Article 397(1) of the LCP were relevant for making a decision in that particular case.

After the "consideration of the case files and the allegations made in the constitutional complaint", the Constitutional Court found that "the contested ruling of the Supreme Court violated the applicant's right to a fair trial in the part relating to access to a court guaranteed by the provision" of Article 32 of the CM and Article 6 § 1 of the ECHR, providing the following reasons:

- the right to a court "is not an absolute right but subject to limitations that must not impair the essence of the right and its legitimate aim, which is access to a legal remedy", and that, according to the case-law of the ECtHR, those limitations will only be compatible with Article 6 § 1 of the ECHR if they are in accordance with the relevant domestic legislation, pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued;

- the Supreme Court, by the contested ruling, dismissed the plaintiff's application for revision as inadmissible referring to the amended provision of Article 397(2) of the LCP;

- by examining the case files the Constitutional Court found that at the preliminary hearing held before the Basic Court on 13 May 2009 the court adopted a ruling setting the value of the claim in question at a monetary amount of EUR 20,000.00; the same value was also specified in the first-instance and second-instance judgments; it is a value that undoubtedly exceeds the monetary amount for the application for revision to be admissible in this particular case; therefore, the applicant submitting the constitutional complaint had legitimate expectation that the resolution of her dispute would be completed before the revision court, as the lower courts had set the value of the claim in question at EUR 20,000.00;

- according to the Constitutional Court, judicial proceedings must be conducted in accordance with the constitutional principle of the rule of law as the highest value of the constitutional order of Montenegro, namely, their conduct must not be equated with a requirement of the legality of the actions of state authorities, but must include a requirement that legal consequences must be appropriate to the legitimate expectations of the parties in each particular case, fulfilling thereby also the principle of fair procedure provided in Article 32 of the CM or Article 6 § 1 of the ECHR; the Constitutional Court held that such expectations undoubtedly included the expectation that the dispute would be resolved by applying legal standards which were in force at the time when the dispute had been initiated;

- accordingly, the Constitutional Court assessed that there had been a violation of the applicant's right of access to the Supreme Court, and consequently a violation of the right to a fair trial enshrined in Article 32 of the CM and Article 6 § 1 of the ECHR.

3.3. Ruling of the Supreme Court of Montenegro Rev. br. 1/17 of 5 July 2017

By the mentioned ruling, the application for revision was again dismissed as inadmissible.

Following summarized recapitulation of the decision of the first-instance and second-instance courts and its first decision on the dismissal of the application for revision, the Supreme Court specifically referred to the decision of the Constitutional Court which repealed its previous ruling, stressing:

- that the Constitutional Court held that, in view of the circumstance that at the preliminary hearing held on 13 May 2009 the court adopted a ruling setting the value of the claim in question at a monetary amount of EUR 20,000.00 while the same value was also specified in the cases at lower

instances as the value of the subject-matter of the dispute, where that value undoubtedly exceeds the monetary amount for the application for revision to be admissible; that, therefore, the applicant submitting the constitutional complaint had legitimate expectation that the resolution of her dispute would be completed before the revision court, for which reason the Court found that the contested ruling violated the right to a fair trial in the part relating to the access to a court guaranteed by the provision of Article 32 of the CM and Article 6 § 1 of the ECHR;

- that the provision of Article 397(2) of the LCP provided that “(...) the application for revision shall be inadmissible in property-related disputes where the statement of claim relates to an amount of money, surrender of an item or performance of another action, if the value of the disputed matter in the contested part of a final and enforceable judgment does not exceed EUR 10,000.00”;

- that, in any case, only the value of the main claim shall be taken as the value of the disputed matter in property-related disputes (Article 31 paragraph 2 of the LCP), while the disputed matter in the contested part of the final and enforceable judgment within the meaning of Article 397 paragraph 2 of the LCP means a main claim, i.e. the part of that claim on which the court decided by the judgment contested by the filed application for revision;

- that the Supreme Court, considering that in the legal matter in question the plaintiff set her claim at a monetary amount of EUR 10,000.00 which was decided by the first-instance court in the operative part of a final and enforceable judgment and that the monetary census for the application for revision to be admissible is an amount in excess of EUR 10,000.00, held that the application for revision in question was not admissible with reference to the provision of Article 397 paragraph 2 of the LCP;

- that “the relevant amount for the assessment of admissibility of the application for revision in disputes that deal with the monetary amount is the value of the main claim decided by the part of the decision of the court challenged by the application for revision, which in this particular case coincides with the amount of the submitted pecuniary claim”; that, therefore, for any right expected by the applicant upon the lawsuit submitted (both in procedural and substantive terms) to be legitimately expected in the spirit of the ECHR standards it must be based on the claim she submitted and the facts on which the claim is based;

- that the purpose of Article 397 paragraph 2 of the LCP is to explicitly determine the access by the parties to the Supreme Court as the highest court in Montenegro in litigations completed by final and enforceable judgments where a pecuniary claim is the subject-matter of the dispute, linking the assessment of admissibility of the application for revision as extraordinary legal remedy to the monetary amount which has been decided by the part of the judgment against which the application for revision is filed, where the party has legal interest in using that legal remedy; that, thereby, the LCP has different approaches to assessment of admissibility of the applications for revision in litigations where the subject-matter of the dispute is a pecuniary claim and in those where the subject-matter of the dispute is a non-pecuniary claim;

- that provided that the applicant requested, by the finally submitted statement of claim, the amount of EUR 10,000.00 which was decided by the first-instance court by the judgment that became *res judicata* with the contested judgment, it cannot be considered that the plaintiff had legitimate expectation that the decision in this dispute would be finalised before the revision court merely because of omission (oversight) the court made at the hearing held on 13 May 2009 by adopting a ruling whereby it set the value of the claim in question contrary to the rule established by an imperative legal norm;

- that, therefore, the Supreme Court considers that by dismissing the application for revision under the particular circumstances of the case it cannot be considered that the plaintiff’s right of access to the Supreme Court, as a standard for the right to a fair trial within the meaning of Article 32 of the CM and Article 6 § 1 of the ECHR, has been violated;

- that the correctness of the decision of the Supreme Court is suggested by the position expressed by the ECtHR in the judgment *Garžičić v. Montenegro* (no. 17931/07 of 21 September 2010, § 32) in which it reminded that the “right to a court” is not absolute but is subject to limitations permitted by implication, in particular where the “conditions of admissibility of an appeal are

concerned” since by its very nature it calls for regulation by a State, which enjoys a certain margin of appreciation in this regard (*García v. Spain*, no. 38695/97, § 36, *ECHR 2000-II*, and *Mortier v. France*, no. 42195/98, § 33, 31 July 2001), referring also to some additional decisions of that Court;

- that, nonetheless, these limitations must not restrict or reduce the individual’s access in such a way or to such an extent as to impair the very essence of the right; that, moreover, these limitations will only be compatible with Article 6 § 1 of the ECHR if they are in accordance with the domestic legislation, pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued (*Guérin v. France*, 29 July 1998, § 37);

- that “this particular case concerns a limitation laid down by an imperative norm of the national procedural law” – Article 397 paragraph 2 of the LCP, “which is clear, accessible and applied through consistent case-law of the Supreme Court over a longer period of time”;

- that the mentioned “limitation did not call into question the essence of the right of access to a court, since the plaintiff in this particular case was allowed access to a court at two levels of jurisdiction - until the proceedings were concluded by a final and enforceable decision”; that in such a way the courts also respected the rights of the parties to a legal remedy provided in Article 20 of the CM;

- that decision-making by the Supreme Court “in a uniform way - by dismissing the application for revision before the revision court - achieves the equality of the parties before the law and in the proceedings before the revision court, which contributes to legal certainty of citizens and, thus, to the respect for the rule of law”;

- that the “optimum expectation of the parties (...) is that the court will decide on their rights by the means allowed”;

- that engaging of the “Supreme Court in the assessment and decision-making on the plaintiff’s application for revision which is inadmissible under the law could (...) lead to violation of the rights of the opposing party, since the Supreme Court could amend or repeal a decision that has become formally and substantively final and enforceable, which would undermine the principle of legal certainty.

3.4. Concluding observations about the decisions discussed

3.4.1. Entities allowed to participate in proceedings before the Constitutional Court

It cannot be inferred for certain from the decision of the Constitutional Court (see *supra* under 3.2) that the court asked the respondent to declare on the constitutional complain.

3.4.2. Duration of the proceedings

The proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the circumstance that the Constitutional Court transmitted its decision to the Supreme Court enclosed to its letter dated 6 March 2017, including also the time needed for the drafting and service of decisions) a little less than four years, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around five months.

3.4.3. On discussed decisions

The discussed decisions of the Supreme Court and the Constitutional Court imply two problem complexes. The first of these complexes concerns the determination of the value of the claim in question and the Supreme Court being bound by the (wrong) decision of the first-instance court by which that value was determined when assessing the admissibility of the application for revision, as well as that it is possible that the party may have legitimate expectation of the right to a certain remedy (legal remedy) based on such a decision. The second one concerns the stance of the

Supreme Court with regard to the decision of the Constitutional Court, i.e. the Supreme Court being bound by the legal position expressed in the repealing decision of the Constitutional Court.

As to the former problem complex mentioned, the Constitutional Court took the view that, when the first-instance court determined the value of the claim by a ruling, the party was given legitimate expectation of the right to a legal remedy, including the application for revision if its admissibility is conditional on such determination, and that the Supreme Court is also bound by such determination. However, the Supreme Court has been of the opinion that: it cannot be bound by a wrong decision of the first-instance court on the determination of the value of the claim in question, especially when that decision was adopted in the case in which the first-instance court had no authority to make such a decision, i.e. in the case where the claim relates to a monetary amount and in which the amount itself is relevant for determination of the value of the claim; that the party cannot rely on such a decision of the first-instance court for legitimate expectation; that a different approach to the problem at issue would depart from the established case-law of the Supreme Court; that such an approach would violate the right of the opposing party as the Supreme Court could repeal or amend a final and enforceable decision upon revision.

Comparing the arguments provided by the Constitutional Court and the Supreme Court in support of their decisions, one gets the impression that the legal position of the Supreme Court is based on the provision regulating the institute of determination of the value of the subject-matter of the dispute in the LCP (*arg. a contrario* ex Article 36 paragraphs 1 and 2 of the LCP) and the interpretation attributed to it in the Yugoslav and post-Yugoslav doctrine and case-law, which sets forth that, where the claim relates to a monetary amount the monetary amount is relevant for determination of the value of the subject-matter of the dispute, while the plaintiff and/or the court are authorised to determine the value of the subject-matter of the dispute only in those cases where the claim does not relate to a monetary amount.²

As regards the latter problem complex, it can be noted that in the decision it adopted after the Constitutional Court repealed its previous decision dismissing the application for revision, the Supreme Court maintained its legal position taken in that decision. It is precisely for this reason that the question arises as to whether such a decision of the Supreme Court is in accordance with the provision of Article 77 paragraph 2 of the Law on the Constitutional Court of Montenegro (OGM 11/2016; LCC), according to which, in the repeated procedure, the competent authority whose decision was repealed by the Constitutional Court on a constitutional complaint shall respect the legal reasoning of the Constitutional Court stated in the decision and shall decide in the repeated proceedings within a reasonable time.

As for the discussed decision of the Constitutional Court, special attention should be paid to two relatively abstractly formulated and insufficiently specified views of that court according to which the courts should, when applying laws and other sources of law, take into account the requirements whose fulfilment would exceed the immediate content of those sources of law, i.e. which would impose interpretation which could, depending on the understanding of those views, lead to the elimination of application of certain legal norms *in concreto* because those norms are contrary to the Constitution and the ECHR.

The first of these views is that the right of access to a court is “not an absolute right but is subject to limitations which must not undermine the essence of the right and its legitimate aim, which is access to a legal remedy”, and that these limitations, according to the case-law of the ECtHR, will be compatible with Article 6 § 1 of the ECHR only if they are in accordance with the relevant domestic laws and other regulations, if they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued. When taking up this view, a question remains as to whether the courts are expected to apply the law and other

² Compare TRIVA-DIKA, *Građansko parnično procesno pravo*, 7th ed., 2004, § 52, pp. 265 to 269, DIKA, *Građansko parnično pravo, Tužba*, Volume VI, 2009, § 10, pp. 93 to 111; POZNIĆ, B.-RAKIĆ-VODINELIĆ, V., *Građansko procesno pravo*, 17th ed., 2015, pp. 126-128.

sources of law by taking account not only of them, of what they require, but also not to apply them if they assess *in concreto* that according to their standard meaning they do not allow a legitimate aim to be achieved and if there is no reasonable relationship of proportionality between the means that these sources allow and offer and the aim pursued. Namely, the question arises as to whether the Constitutional Court considers that the courts are obliged, when applying the laws and other secondary legislation, to take into account the identified additional requirements only when interpreting these sources of law or that they are also obliged not to apply or upgrade those sources, depart from their standard meaning when that is necessary to meet those requirements. At the implementing and operational level, this issue implies also the question whether the courts are expected, in cases when they encounter such interpretative dilemmas, to stay the proceedings and request the opinion of the Constitutional Court which would previously conduct the procedure of abstract control of laws or other sources of law or, in the particular case, give its legal (prior) opinion, or to make decision themselves concerning interpretation of those sources of law which would eliminate *in concreto* the application of a law or another source of law, i.e. to actually cross the standard boundaries of the so-called *exceptio illegalitatis*.

And the second of these views, according to which the court proceedings "must (...) be conducted in accordance with the constitutional principle of the rule of law, as the highest value of the constitutional order of Montenegro, that their conduct must not be equated to the requirement of the legality of the conduct of a State authority, but must include a requirement according to which the legal consequences must be appropriate to the legitimate expectations of the parties in each particular case, thereby also enforcing the principle of a fair trial set out in Article 32 of the CM and Article 6 § 1 of the ECHR", that "the Constitutional Court holds that such expectations undoubtedly include the expectation that the dispute will be resolved by applying legal standards which were applicable at the time of initiating the proceedings concerning such dispute", also leads to interpretative dilemmas pointed out with regard to the first mentioned view. Certain additional dilemmas regarding this view could relate to the preconditions that need to be fulfilled for some expectation to become legitimate and in particular whether an expectation based on a (wrong) decision of the first-instance court can be considered to be a legitimate expectation where it is not clear whether that decision has become final.

These are the views whose elaboration in terms of principles and casuistry would require the Constitutional Court to set specific and clear criteria that the courts would adhere to when interpreting and applying laws and other sources of law in individual cases.

As regards the case at hand, it could be said that the difference in views between the Constitutional Court and the Supreme Court is reduced to whether the Supreme Court is bound by the decision of the first-instance court with regard to determination of the value of the subject-matter of the dispute when assessing whether the application for revision is admissible, where such decision was made in the cases in which, in the opinion of the Supreme Court, the first-instance court was not authorised to make such a decision, and, in fact, it comes down to the question whether the parties can obtain legitimate expectations of certain remedies based on such decisions of the first-instance court, or, more generally, which preconditions must be fulfilled for such expectations to be obtained. In this regard, a question also arises with regard to the existence of legitimate expectations of the adverse party and the relationship between those expectations.

4. Decision of the Constitutional Court UŽ-III br. 626/14 of 26 June 2017

- Decision of the Supreme Court of Montenegro Rev. br.-330/14 of 11 June 2014
- Decision of the Supreme Court of Montenegro Rev. br. 13/17 of 6 December 2017

4.1. Decision of the Supreme Court Rev. br.-330/14 of 11 June 2014

This decision reversed the judgments of the second-instance and first-instance courts and rejected a claim seeking to establish that each plaintiff is a co-owner of one third of a certain immovable property.

In this legal matter, the second-instance court, proceeding from the evidence adduced before the first-instance court which the second-instance court repeated and supplementary findings of an expert witness of geodetic profession which were presented before that court (Article 252 paragraph 3 of the LCP), rejected the appeal by the judgment contested by the application for revision and upheld the judgment rendered in the first instance, having concluded as follows: on the basis of a contract for purchase and sale, i.e. by a legal transaction against consideration, the plaintiffs have acquired the right of co-use to the land for regular use to which a third party was registered as a beneficiary after the urbanisation carried out in 1981; the plaintiffs as registered co-owners of the properties which had been previously registered in the seller's name were honest acquirers from 24 September 1983 as the date of purchase until 2005 when the second respondent began to carry out construction works; furthermore, the plaintiffs could not lose real rights to these properties by the fact that during the presentation of the cadastral data in 2004, the disputed part of the immovable property was transferred to the first respondent, without legal grounds.

The Supreme Court, however, took the view that the substantive law was misapplied in this legal matter, because, under the provision of Article 59 of the Law on Spatial Development and Construction of Structures (Official Gazette of Montenegro 51/2008; LSDCS), an owner of the cadastral parcel shall be obliged to sustain the changes of the building lot boundaries in accordance with the allotment plan, for which reason, taking into account the aforementioned legal provision and "in view of the fact that it has been determined beyond any doubt that urbanisation of the wider area of Ulcinj had been carried out in the period from 1972 to 1981 and that the lot concerned was divided into four lots, while according to the urban plan for Pinješ 1, two building lots were formed, of which the plaintiffs received building lot no. 74 and the second respondent received building lot no. 73 which includes a disputed land having the area of 61m²", "the plaintiffs must sustain the changes according to the mentioned planning document, so that they cannot claim the right of ownership over this part", which is why their claim was unfounded, hence, it accepted the application for revision and reversed the judgments of the lower courts.

4.2. Decision of the Constitutional Court UŽ-III br. 626/14 of 31 March 2017

By this decision, the Constitutional Court adopted the constitutional complaint of the plaintiff from the contentious civil proceedings and repealed the judgment of the Supreme Court mentioned under 4.1. and remanded the case for a retrial.

According to the position of the Constitutional Court, the following is legally relevant for decision making in this particular case:

- the provisions of Article 32 of the CM (see *supra* under 2.2) and Article 58 of the CM guaranteeing the right of ownership and that no one shall be deprived of or restricted in the right of ownership, unless when so required by the public interest, with just compensation,

- the provisions of Article 6 § 1 of the ECHR (see *supra* under 2.2) and Article 1 of Protocol No. 1 to the Convention, according to which every natural or legal person is entitled to the peaceful enjoyment of his possessions and 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, whereas the preceding provisions shall not 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,

- the provisions of Article 20 of the Law on Foundations of Property Law Relations (Official Gazette of the Socialist Federal Republic of Yugoslavia 6/80 and 36/90, Official Gazette of the Federal Republic of Yugoslavia 29/96; LFPR) which was in force in the period concerned, according to which the right of ownership shall be acquired by operation of law, by a legal transaction and by

inheritance, as well as by the decision of a State authority, in the manner and under the conditions prescribed by law;

- the provisions of Article 37 of the LFPR according to which an owner of an individually singled out thing (property) may request, by an action brought before the court, its return from a person in its actual possession, while the owner shall have to prove his/her right of ownership of the property whose return is sought and that the property concerned is actually in the dominion of the respondent, whereas such rights shall not fall under the statute of limitations;

- the provision of Article 59 of the LSDCS according to which an owner of the cadastral parcel shall be obliged to sustain the changes in the building lot boundaries in accordance with the land allotment plan.

When examining the constitutional complaint, the Constitutional Court's starting points were that:

- the judicial proceedings must be conducted in accordance with the constitutional principle of the rule of law as the highest value of the constitutional order of Montenegro and, for that reason, the interpretation of the relevant law in each particular case must not result from its arbitrary and indiscriminate application, but must comply with the requirements of the right to a fair trial enshrined in Article 32 of the CM and Article 6 § 1 of the ECHR;

- the applicant stated in its constitutional complaint that, due to errors of fact and arbitrary application of the substantive law, his right to a fair trial which guaranteed the protection against arbitrariness in the decision-making of the courts and other state bodies had been violated;

- the Constitutional Court consistently indicated that it was not competent to review the facts and the application of the law by ordinary courts, except in cases where decisions of the lower courts violated constitutional rights, for example, in the case where an ordinary court misinterpreted or misapplied a constitutional right or disregarded it, if the application of the law was arbitrary or discriminatory or if the procedural rights were violated;

- nevertheless, the Constitutional Court held that, in certain situations which primarily depend on the constitutional reasons stated in the constitutional complaint, there were grounds to examine, in the proceedings on the constitutional complaint, the violations of the rights under Article 32 of the CM and Article 6 § 1 of the ECHR from the aspect of the application of the substantive law, referring to and citing decisions of the ECtHR under which the fairness of the proceedings is assessed on the basis of the proceedings as a whole, that the principle of a fair trial also requires the court to refer to a particular legal norm since the legal basis for the judgment must not be arbitrary, i.e. outside the specific case, and the apparent arbitrariness in the application of the relevant provisions can never lead to a fair trial;

- each individual act of the competent authority deciding on the rights and obligations of the parties in a particular proceedings must be adopted in accordance with the purpose of the relevant law applicable to that case and, if the body adopting the individual act (a court) brings the established facts under a piece of legislation that cannot be applied to such established facts, because it misinterpreted the purpose of the law (wrong subsumption, bringing the facts under a wrong legal norm as a logical operation), it is an infringement of the substantive law;

- it assessed that in this particular case the provisions of Article 20 and Article 37 of the LFPR, since the applicant proved that he had acquired the right of co-ownership of the disputed properties on the basis of a legal transaction against consideration and that the provision of Article 59 of the LSDCS was applied arbitrarily to the established facts in the proceedings before the Supreme Court, which is in particular indicated by the fact that the matters related to the right of ownership and other real rights to immovable property, as well as the manner of acquisition, protection and termination of those rights, are regulated by the LFPR, which, as *lex specialis*, must be applied to the factual basis of the case;

- in accordance with the above-mentioned, it has found that the Supreme Court, by the contested decision, violated the applicant's right to a fair trial guaranteed by the provision of Article 32 of the CM and Article 6 § 1 of the ECHR;

- when considering whether there has also been a breach of Article 1 of Protocol No. 1 to the Convention, the first step is to examine whether the applicant had “property” within the meaning of Article 1 of the Protocol at all;

- according to the consistent case-law of the ECtHR and jurisprudence of the Constitutional Court itself, the “possessions” within the meaning of Article 1 of the Protocol may be “existing possessions” or “goods” with regard to which the applicant has “legitimate expectation” that he will use them, while the “legitimate expectation” of any “possessions” or “goods” according to that point of view must be based on a legal provision or legal act which has a valid legal basis and which affects property rights;

- in the present case the “legitimate expectation” of the applicant was to determine his right of co-ownership of the disputed immovable property which is based on the provisions of Articles 20 and 37 of the LFPR and which constitutes “possessions” within the meaning of Article 1 of Protocol No. 1;

- according to the assessment of the Constitutional Court, by the contested judgment which reversed lower-instance judgments and rejected the claim as unfounded, the applicant was deprived of property within the meaning of the provisions of Article 58 of the CM and Article 1 of the Protocol and, in that connection, the Court was to establish: a) whether deprivation of property was provided for by law; b) whether deprivation served a legitimate aim in the public interest and c) whether deprivation was proportionate to that aim, i.e. whether it struck a fair balance between the applicant’s rights and the general public interest;

- in relation to the issue of legality, the Constitutional Court found that depriving the applicant of his property was not provided for in the provision of Article 59 of the LSDCS referred to by the Supreme Court in the contested judgment, since the mentioned provision did not provide for the termination of the owner’s right of ownership on the basis of the land allotment plan but only prescribed the obligation of the owner of the cadastral parcel to comply with the planning commitments in respect of the alteration of the boundaries of the building lot, which was why depriving the applicant of his property was based on incorrect and arbitrary application of the relevant substantive legislation to the established facts and the applicant was deprived of the acquired right of ownership he was entitled to under the LFPR which, as *lex specialis*, had priority and had to be applied to this specific case.

For the reasons stated above, the Constitutional Court concluded that the impugned judgment of the Supreme Court violated the applicant’s right enshrined in Article 58 of the CM and Article 1 of Protocol No. 1 to the Convention.

4.3. Ruling of the Supreme Court Uš-Rev. br. 13/17 of 6 December 2017

By the said ruling, the Supreme Court accepted the application for revision, repealed the judgment of the second-instance court and sent the case back to that court for a retrial.

In the statement of reasons of that ruling, the Supreme Court, first of all, essentially recapped the content of the first-instance and second-instance decisions, as well as of its reversing decision, and also of the decision of the Constitutional Court which repealed that decision. Further in the statement of reasons, the Supreme Court stated that, following a decision of the Constitutional Court, in the repeated proceedings it examined judgments of the lower courts within the limits of the application for revision that was filed, having due regard *ex officio* to the proper application of substantive law and a substantial violation of provisions of the civil procedure it takes account of, pursuant to the provision of Article 401 of the LCP, and found that the application for revision was well-founded.

The Supreme Court substantiated its decision by the following findings:

- the subject-matter of the dispute is the plaintiffs’ claim seeking to establish that each plaintiff is a co-owner of one third of a certain cadastral parcel within the limits described in the operative part of the first-instance judgment;

- the plaintiffs based their claim on the allegation that the former owners of that parcel made a purchase from the previous owner on the basis of the purchase contract concluded in 1982 and that the disputed part of the land, without any legal basis, was merged with another parcel registered in the name of the first respondent and to which the second respondent had the right of use;

- the first respondent challenged the claim, pointing out, *inter alia*, that the person who sold the disputed parcel to the plaintiffs was not the owner but only the user of the land it gave him to use;

- the second respondent challenged the claim, pointing out that he acquired the right of ownership to the land claimed by the plaintiffs, together with the house that existed on that land, on the basis of a contract for purchase and sale concluded in 1988 with a third party, and that he had been in possession of that land as part of his parcel since 1987;

- according to the established facts, the parcel from which the disputed part was singled out had been registered as the ownership of the person who later sold it to the plaintiffs until 1981 when the urbanisation of a wider area of the town was implemented and the parcel in question was divided into four parcels; on the basis of such state of possession, the previous owner sold to each of the plaintiffs one third of the family residential building and the right of use to four parcels, with regard to which a geodetic expert could not find the differences that occurred in their respective surface areas in relation to the previous state of affairs;

- on the basis of such established facts, unlike the first-instance court which found that the plaintiffs acquired the right of ownership of the disputed immovable property on the basis of a legal transaction within the meaning of Articles 20 and 37 of the LFPR, the second-instance court concluded that by legal transaction against consideration the plaintiffs acquired the right of use that had been previously registered in the seller's name, that they had been honest acquirers since the date of the purchase as from which they had been in uninterrupted possession until almost immediately before the lawsuit was filed in 2005, when the second respondent began to carry out construction works;

- the second-instance court held that by the fact that in 2004 during construction a part of that immovable property (disputed) passed onto the first respondent without legal grounds the plaintiffs did not lose real rights to this immovable property;

- as for the legal basis of the original seller as a holder of a larger surface area than the one he received for use from the first respondent (the municipality) in 1971, by applying the burden of proof, the second-instance court concluded that the plaintiffs had purchased the properties which were registered in the name of that seller;

- this court, "when accepting the claim, kept (...) in mind that" the seller "had obtained a permit in order to build a residential building and that the first respondent had granted him the permit in 1971, that he built a house, hence by buying the residential building the plaintiffs acquired the right of use of the land in respect of which" the seller "was registered after the urbanisation in 1971";

- the second-instance court also held that at the time when the building permit was granted in 1971 the municipalities were the holders of the administrative power to dispose with socially-owned land and not legal owners, and that granting the property in question to the legal predecessor of the plaintiffs for use could not be regarded as disposal by an owner because the municipalities were not owners, and after that the first respondent did not acquire any real rights over that property on any legal grounds.

- in the repeated proceedings, the Supreme Court took into consideration the Constitutional Court's reasons for repeal, but "since it has been found that the land in question (of the plaintiffs and respondents) is a built-up construction land, as are the building lots on which structures have been built, a view that" the LFPR "must be applied to this particular case as *lex specialis* cannot (...) be accepted as a correct";

- since the disputed cadastral parcel was construction land, the Law on Construction Land (OGM 28/80, 20/86; LCL) which was in force at the time of conclusion of legal transactions of the

plaintiffs and the second respondent, was *lex specialis* in relation to the LFPR, and, thus, the LCL was to be applied for the ruling in the legal matter in question to be lawful;

- under the LCL the right of ownership could not exist and the proprietors of the buildings had the right of use to that land within the boundaries of the building lots set out in the urban plan;

- without amending the urban plan, it is not possible to change the boundaries of the building lots to the detriment of the neighbouring building lots;

- according to the provision of Article 3 paragraph 2 of the LCL, the right of ownership of construction land could not have existed during the period of validity of that Law, while the relevant provisions of that Law stipulated the procedure for and manner of transfer of rights to urban construction land;

- only after the entry into force of the 2000 Law on Construction Land, under the provisions on the sale of urban construction land (contractual transfer of rights), the construction land could be owned by the State or privately owned.

For the above reasons, the Supreme Court took the view that the judgments of the lower courts were based on the misapplication of the substantive law and that the reasons regarding the decisive facts were not complete, while the reasons stated were contradictory to the contents of the documents and evidence presented and were mutually conflicting, which constituted a substantial violation of the provisions on the civil procedure indicated justifiably in the revision.

4.4. Concluding observations about the decisions discussed

4.4.1. Entities allowed to participate in proceedings before the Constitutional Court

It cannot be inferred for certain from the decision of the Constitutional Court (see *supra* under 4.2) that the Court asked the first and the second respondents to declare on the constitutional complaint.

4.4.2. Duration of the proceedings

The proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around two years and six months, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around five months.

4.4.3. On discussed decisions

The legal matter discussed herein on which the Supreme Court and the Constitutional Court had the opportunity to decide concerns, in particular, the legal regime of the land that became the construction land under the legal system that was in force during a former State and also the rights that could be acquired on that land at that time, taking into account the changes that occurred in this legal regime.

The Supreme Court based its two revision decisions, one that was adopted prior to the decision of the Constitutional Court and the other that was adopted after the Constitutional Court repealed the first decision upon a constitutional complaint, on different grounds related to substantive law. The Supreme Court found the legal basis for its first (reversing) decision in Article 59 of the Law on Spatial Development and Construction of Structures, while in its second decision by which it accepted the application for revision and repealed the second-instance decision and sent the case back for a retrial, it found that the relevant laws were actually the laws on construction land

adopted in 1980 (1986) and 2000, which, as special laws, should have been applied instead of the LFPR as the basic law on real rights.

Taking the view that the Supreme Court arbitrarily applied the substantive law when it adopted its first revision decision and thereby violated the provision of Article 32 of the CM and Article 6 § 1 of the ECHR on the right to a fair trial, the Constitutional Court expressed its opinion that the LFPR should have been applied as *lex specialis* for the adjudication of the dispute, and, to that end, it gave instructions to the second-instance court on the relevant law to be applied in the retrial.

In this legal matter, in its second repealing revision decision, the Supreme Court took a view that did not conform to the legal position of the Constitutional Court stated in its decision by which it repealed the Supreme Court's first reversing revision judgment. Such view of the Supreme Court may raise a question whether that judgment is in accordance with the provision of Article 77 paragraph 2 of the LCC according to which, in the repeated proceedings, the competent authority whose decision was repealed shall be obliged to respect the legal reasoning of the Constitutional Court in the decision. However, notwithstanding the meaning of the provision of Article 77 paragraph 2 of the LCC, it could be noted that, in the case at hand, legal views of all courts which participated in the resolution of the legal matter in question should be reviewed again and that the legal premises for the adoption of a new decision on merits should be redefined on the basis of an in-depth legal analysis of the issues it involves.

Notwithstanding the foregoing, the Constitutional Court's decision may imply the view of that Court that, in principle, any application of the substantive law, regardless of whether it concerns *in concreto* a "substantive law" right guaranteed by the constitutional law or the Convention could be sanctioned as a violation of the right to a fair trial if it is classified as an arbitrary or discriminatory application of that right. It is in relation to this view that it is exceptionally important to emphasize the relevance of the measure under which the Constitutional Court will use such powers in practice.

5. Decision of the Constitutional Court of Montenegro number U-III br. 379/16 and 382/16 of 7 December 2017

- Judgment of the Supreme Court of Montenegro number Rev. br. 1352/15 of 26 February 2016

- Judgment of the Supreme Court of Montenegro Už. Rev. br. 2/18 of 28 February 2018

5.1. General overview of the case

In this case, the judgment of the second-instance court rejected the appeals of the parties and upheld the first-instance judgment by partially granting and partially refusing the claim for non-pecuniary damages against Montenegro due to unauthorized deprivation of liberty of the plaintiff.

Upon applications for revision by both parties, the Supreme Court accepted, by the Judgment Rev. br. 1352/15 of 26 February 2016, the application for revision filed by the respondent and reversed the contested judgments in the part in which they had partially granted the claim and rejected the claim as unfounded.

Deciding on the constitutional complaint filed by the plaintiff, the Constitutional Court accepted the complaint by the Decision U-III br.379/16 and 382/16 of 27 December 2017 and repealed the Judgment Rev. br. 1352/15 of 26 February 2016 of the Supreme Court and sent the case back to that court for a retrial. Proceeding on the position of principle that in a procedural situation where a higher court in the appeal proceedings (revision proceedings), by its decision, reverses the decision of a lower court, there is a stronger obligation to provide more detailed, clearer and more precise reasons for its decision, the Constitutional Court found that the said judgment of the Supreme Court, which was the subject-matter of the constitutional complaint, violated Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, that the right to a fair trial has been violated because the reasons for which the plaintiff did not have the status of a

person deprived of his liberty without legal grounds were not stated, although a final and enforceable judgment of the Appellate Court had been rendered by which he was acquitted of all charges, why it assessed the plaintiff's actions as unlawful conduct which led to deprivation of his liberty, as well as the manner in which the Court came to such a conclusion.

In the retrial, bearing in mind the repealing decision of the Constitutional Court, the Supreme Court reversed the judgments of the first-instance and second-instance courts in the part in which they had partially granted the claim and it rejected the claim in that part as well, substantiating its decision by a considerably more e statement of reasons. Essentially, the Supreme Court found the grounds for its reversing decision in the provision of Article 502 paragraph 3 of the Criminal Procedure Code (Official Gazette of Montenegro 57/09 and 49/10) which was in force in the period concerned, according to which a person who caused deprivation of his/her own liberty, i.e. detention, by illicit acts shall not be entitled to compensation for damages. Namely, since the plaintiff was at large from 13 August 2006 until 28 November 2008, because of which he was ordered to be detained which was later extended due to the risk of fleeing, he caused ordering of detention by his illicit acts. Therefore, within the meaning of the cited legal provision, according to the view of the Supreme Court, although he had been acquitted of charges he was not entitled to compensation for non-pecuniary damages and for that reason the respondent's application for revision should have been accepted, both judgments should have been reversed and the claim rejected as unfounded, while the plaintiff's application for revision should have been also rejected as unfounded.

5.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this case as well, the Constitutional Court repealed the first judgment which the Supreme Court, as the revision court, rendered for violation of Article 6 § 1 of the ECHR, namely, for violation of the right to a fair trial because the reasons for its adoption were not stated clearly and precisely in the statement of reasons of that judgment.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around one year and eight months, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around one month.

6. Decision of the Constitutional Court Už-III br. 101/14 and 288/14 of 18 May 2017

- Judgment of the Supreme Court Rev. br. 699/13 of 20 November 2013
- Ruling of the Supreme Court Už-Rev. br. 7/17 of 5 December 2017

6.1. General overview of the case

In this legal matter, the first-instance judgment rejected the claim of the plaintiff (a natural person) against a municipality as the respondent, regarding the compensation for a particular cadastral parcel including the fees for the construction of water supply system and for the connection to the water supply system. The second-instance court upheld that judgment by rejecting the appeal lodged against it.

Deciding on the revision, the Supreme Court rejected the application for revision as unfounded by its Judgment Rev. br. 699/13 of 20 November 2013.

Deciding on the constitutional complaint of the plaintiff against the mentioned judgment of the Supreme Court, the Constitutional Court of Montenegro adopted the Decision Už-III br. 101/14

and 288/14 of 18 May 2017 by which it adopted the constitutional complaint, repealed the judgment of the Supreme Court of Montenegro and sent the case back to the Supreme Court for a retrial.

Having examined the allegations of the constitutional complaint and the decisions of the courts, while relying on the decisions of the ECtHR according to which arbitrariness in the application of the relevant legislation cannot lead to a fair trial, the Constitutional Court found that: the applicant's (plaintiff's) right to a fair trial referred to in Article 32 of the Constitution and Article 6 § 1 of the ECHR was violated; the courts acted arbitrarily in the application of the relevant positive legislation and the human rights and freedoms guaranteed by the Constitution were violated; the decision-making of the courts in the particular case was based on excessive formalism with respect to the interpretation and application of the applicable procedural law, which must not result from arbitrary and indiscriminate application thereof.

Pursuant to the decision of the Constitutional Court, which repealed the Supreme Court's judgment and remanded the case for a retrial, the Supreme Court examined, in the retrial, the judgments of the lower courts within the limits of the application for revision that was filed, having due regard *ex officio* to the proper application of substantive law and a substantial violation of provisions of the civil procedure it takes account of pursuant to Article 401 of the LCP and found that the plaintiff's application for revision was well-founded, having taken the view that the lower courts had misapplied the substantive law and, therefore, did not properly establish the facts, for which reason it repealed those decisions and remanded the case for a retrial. It is particularly important to mention a part of the statement of reasons of the decision of the Supreme Court in which it found that the respondent municipality acted contrary to the principles of good faith and honesty and prohibition of abuse of rights (Articles 12 and 13 of the LO - OG SFRY 29/78, 39/85 and 57/89, OGM 31/93) which are also enshrined in the provisions of Articles 4 and 6 of the LO (OGM 47/08) because it had not concluded a contract with the plaintiff, although it was obliged to conclude a contract that would regulate mutual rights and obligations related to the sale of immovable property (a socially-owned land plot).

6.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this case, the Constitutional Court repealed the first judgment adopted by the Supreme Court, as a revision court, for violation of the provisions of Article 32 of the CM and Article 6 § 1 of the ECHR, having found that the courts acted arbitrarily in the application of the relevant positive legislation and that the human rights and freedoms guaranteed by the Constitution were violated, and also that the decision-making of the courts in the particular case was based on excessive formalism with respect to the interpretation and application of the applicable procedural law which must not result from arbitrary and indiscriminate application thereof. According to the Constitutional Court's decision, the Supreme Court substantially revised its concept of the dispute in terms of substantive law, however, it repealed the decisions of lower courts because the facts had not been properly established due to misapplication of the substantive law.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around two years and six months, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around five months.

7. Decision of the Constitutional Court Už III br. 237/15 of 14 February 2017

- Judgment of the Supreme Court Rev. br. 683/14 of 2 December 2014
- Judgment of the Supreme Court Už. Rev. br. 8/17 of 7 November 2017

7.1. General overview of the case

In this legal matter, deciding on the complaint filed by a natural person against the respondent State of Montenegro, the first-instance court accepted the claim and found that the plaintiff is a holder of the right of use to a certain ideal portion of a certain cadastral parcel. Deciding on the plaintiff's appeal, the second-instance court reversed the first-instance judgment for misapplication of the substantive law and rejected the claim. The Supreme Court, by the Judgment Rev. br. 683/14 of 2 December 2014, rejected the application for revision against the second-instance judgment.

The mentioned rejecting judgment of the Supreme Court was repealed by the Decision Už. III br. 237/15 of 14 February 2017 of the Constitutional Court. The Constitutional Court took the view that it resulted from the provision of Article 30 of the Law on the Coastal Zone (OGR 14/92; LCZ) that the owners of land in the coastal zone, until they were exempted, had a legal right of use under the same conditions as before and that the plaintiff was not obliged to conclude a contract on the use of the coastal zone with the public enterprise managing the coastal zone. In the meantime, a legal position of principle was adopted by the Supreme Court Bench on 27 May 2015, namely, that the owners of the land in the coastal zone, which had been acquired in a legally valid manner before the date of entry into force of the Law on the Coastal Zone and registered as private property in the land registers or other registers of real estate records, had a legal right of use of the coastal zone, under the same conditions, in accordance with the spatial and/or urban plan, until it was exempted, so that they were not obliged to conclude a contract on the use of the coastal zone with the public enterprise managing the coastal zone.

In the retrial, taking into account the position of the Constitutional Court, the amended legal position of principle of the Supreme Court of Montenegro, and the wording of Article 30 of the LCZ which was misinterpreted by the second-instance court and, in the repealing decision, by this court as well, it has been concluded that the first-instance court applied the substantive law correctly when it granted the plaintiff's claim and the Supreme Court, by the Judgment Už. Rev. br. 8/17 of 7 November 2017, reversed the judgment of the second-instance court, rejected the respondent's appeal as unfounded and upheld the Judgment P. br. 836/12/07 of the Basic Court in Kotor.

7.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this case, the Constitutional Court repealed the first judgment adopted by the Supreme Court as a revision court for violation of the provisions of Article 32 of the CM and Article 6 § 1 of the ECHR (arbitrary acting of courts in the application of the relevant positive legislation and insufficient reasoning) and the right to peaceful enjoyment of possessions guaranteed by the Constitution and Protocol No. 1 to the Convention. According to the Constitutional Court's decision, the Supreme Court substantially revised its concept of the dispute in terms of substantive law, however, it repealed the decisions of lower courts because the facts had not been properly established due to misapplication of the substantive law.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around two years, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around four months.

8. Decision of the Constitutional Court Už-III br. 721/15 of 14 February 2017

- Judgment of the Supreme Court Rev. br. 204/15 of 2 April 2015
- Judgment of the Supreme Court UŽ-Rev. br. 10/17 of 24 October 2017

8.1. General overview of the case

In this legal matter, the second-instance judgment dismissed the appeal lodged against the first-instance judgment which granted the plaintiff's claim and rejected the respondent's counterclaim.

By the Judgment Rev. br. 204/15 of 2 April 2015, the Supreme Court accepted the application for revision filed by the respondent and reversed the second-instance and the first-instance judgments by rejecting the claim requesting the surrender into possession of a certain cadastral parcel as unfounded, and granted counterclaim requesting that it be determined that the respondent is the holder of the right of ownership of the mentioned immovable property.

Deciding on the constitutional complaint, the Constitutional Court, by the Decision UŽ-III br. 721/15 of 14 February 2017, accepted the constitutional complaint and repealed the judgment of the Supreme Court Rev. br. 204/15 of 2 April 2015 and remanded the case to the same court for a retrial, having found that in the case at hand the arbitrary application of Article 28 paragraph 4 of the LFPR led to the violation of the rights of the applicant submitting the constitutional complaint (the plaintiff) to a fair trial guaranteed by Article 32 of the Constitution of Montenegro and Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and that the violation of the right to a fair trial was also caused by the failure of the court to provide reasons for its decision as "in a situation where a higher court, in the appeal proceedings, by its decision, reverses the decision of a lower court, there is a stronger obligation of the higher court to provide more detailed, clearer and more precise reasons for its decision".

Taking into account the legal reasons provided by the Constitutional Court of Montenegro in the above-mentioned repealing decision, the Supreme Court found that the respondent's application for revision was unfounded, because, essentially, it did not find that the contested decisions were based on misapplication of the substantive law, on the grounds that: the respondent (the counterclaimant) did not prove that he had acquired the ownership of the disputed immovable property through extraordinary adverse possession, which requires a certain degree of eligibility and the passage of time which is longer when compared to the ordinary adverse possession; an honest possessor is the possessor who justifiably believes that he/she is the owner; in accordance with Article 72 paragraph 2 of the LFPR, possession shall be deemed honest if the possessor is not or may not be aware of the fact that the thing in his/her possession is not his/her; therefore, dishonest possession, no matter how long it lasts, cannot lead to acquisition of ownership rights either by ordinary, or even by extraordinary adverse possession.

8.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this legal matter, the Constitutional Court repealed the judgment of the Supreme Court Rev. br. 204/15 of 2 April 2015 and remanded the case to the same court for a retrial, having found that in the case at hand the arbitrary application of Article 28 paragraph 4 of the LFPR led to the violation of the rights of the applicant who submitted the constitutional complaint (the plaintiff) to a fair trial guaranteed by Article 32 of the Constitution of Montenegro and Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and that the violation of the right to a fair trial was also caused by the failure of the court to provide reasons for its decision as "in a situation where a higher court, in the appeal proceedings, by its decision, reverses the decision of a lower court, there is a stronger obligation of the higher court to provide more detailed, clearer and more precise reasons for its decision".

In line with the Constitutional Court's decision, the Supreme Court corrected its interpretation of the relevant legal provisions from the repealed decision and it based the new

decision by which it rejected the application for revision as unfounded on a substantially different statement of reasons.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around one year and ten months, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around seven months.

9. Decision of the Constitutional Court UŽ.III br. 539/15 of 9 May 2017

- Judgment of the Supreme Court Rev. br. 770/17 of 26 February 2015
- Judgment of the Supreme Court UŽ. Rev. br. 14/17 of 21 November 2017

9.1. General overview of the case

In this case, the first-instance court found that the plaintiff (a natural person) is the holder of the right of use of certain cadastral parcels and ordered the respondent State of Montenegro to acknowledge that finding and to allow the registration of the plaintiff's mentioned right at the Real Estate Administration of Montenegro, Regional Unit of Kotor. Upon appeal lodged against that judgment, the second-instance court reversed the first-instance judgment in the way that it rejected the plaintiff's claim as a whole as unfounded.

Deciding on the revision, the Supreme Court, by the Judgment Rev. br. 770/17 of 26 February 2015 rejected the application for revision as unfounded.

Deciding on the plaintiff's constitutional complaint, the Constitutional Court, by the Decision UŽ. III br. 539/15 of 9 May 2017, accepted the complaint and repealed the judgment of the Supreme Court of Montenegro and returned the case to that court for a retrial.

In the retrial, the Supreme Court, by the Judgment UŽ. Rev. br. 14/17 of 21 November 2017, accepted the application for revision and reversed the judgment of the second-instance court for misapplication of the substantive law, rejected the respondent's appeal as unfounded and upheld the first-instance judgment.

The Supreme Court based that decision on the following findings: that the plaintiff's correct application for revision and the Constitutional Court's decision pointed out the misapplication of the substantive law; that it followed from the files at hand that the plaintiff was a legal successor of the late Vukašin Vukotić, who had been granted approval to construct and repair a quay (*pona*) on the basis of a purchase contract, and that by the decision on succession the plaintiff was declared a successor to the whole disputed property, while the disputed parcel was recorded as a socially-owned property by the decision of the Republican Agency for Geodetic Affairs in 1996; that according to a geodetic expertise, it had been established that the land plot in question corresponded to the part of the disputed cadastral parcel which was registered as an ownership of the respondent and as having a sea surface area of 11m² under the currently valid cadastral survey; that it also followed that the cadastral parcel in question was deemed a coastal zone or a quay, and that, on the spot, a part of the sea surface area of 11m² was a part of the quay and not the sea surface.

Starting from such findings, the Supreme Court took the view that: the first-instance court correctly accepted the plaintiff's claim as a whole and found that he was the holder of the right of use of the disputed immovable property, which the respondent was obliged to acknowledge and allow its registration at the competent authority; that the provision of Article 30 of the Law on the Coastal Zone (OGRM 14/92, 27/94 and OGM 51/08, 21/09 and 40/11; LCZ) stipulates that the owners of the land in the maritime domain, which has been acquired in a legally valid manner before the date of entry into force of the LCZ and registered as private property in the land registers or other registers of real estate records, shall be entitled to a compensation under the expropriation legislation in the event of its exemption and shall have a pre-emptive right of use of the coastal zone

under the same conditions as until then, in accordance with the spatial and/or urban plan; therefore, the plaintiff had a legal right of use of the coastal zone (the disputed quay) since he proved that he and his legal predecessors had acquired the right of ownership in a legally valid manner before entry into force of the LCZ and that that right was registered as private property in the land registers or other registers of real estate records; that since it had not been proven that the procedure for expropriation of the disputed land had been carried out, in view of the undisputed fact that the plaintiff acquired the right of ownership of the disputed immovable property by succession before the entry into force of the LCZ, the plaintiff was not obliged to conclude a contract on the use of the coastal zone with the public enterprise managing the coastal zone, due to which the plaintiff's claim was to be granted as a whole, which was in accordance with the legal position of principle of the Supreme Court of 27 May 2015.

9.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this case, the Constitutional Court repealed the first judgment rendered by the Supreme Court on the revision, for violation of the provisions of Article 32 of the CM and Article 6 § 1 of the ECHR (arbitrary acting of courts in the application of the relevant positive legislation and insufficient reasoning) and the right to peaceful enjoyment of possessions guaranteed by the Constitution and Protocol No. 1 to the Convention. In line with the Constitutional Court's decision, the Supreme Court reversed the judgment of the second-instance court as it held, proceeding on the facts established during the proceedings, that it was based on misapplication of the substantive law, for which it stated the reasons in its new judgment.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) just over two years, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around five months. For more details on the reasons therefor see *infra* under IV.7.

10. Decision of the Constitutional Court UŽ-III br. 746/14 of 26 July 2017

- Decision of the Supreme Court Rev. br. 755/14 of 22 October 2014
- Decision of the Supreme Court UŽ. Rev. br. 15/17 of 5 December 2017

10.1. General overview of the case

In this legal matter, the judgment of the second-instance court rejected the plaintiff's appeal as unfounded and upheld the judgment of the first-instance court that rejected the claim requesting that the respondent be ordered to reinstate the plaintiff in the post corresponding to his educational background, knowledge and skills, and that the respondent be ordered to pay the plaintiff the total amount of unpaid earnings for the specified period with the accompanying interest.

The Supreme Court rejected, by the Judgment Rev. br. 755/14 of 22 October 2014, the application for revision of the above-mentioned second-instance decision as unfounded.

Deciding on the constitutional complaint lodged by the plaintiff against the above-mentioned judgment of the Supreme Court, the Constitutional Court of Montenegro adopted the Decision UŽ-III br. 746/14 of 26 July 2017 which accepted the constitutional complaint, repealed the judgment of the Supreme Court of Montenegro which was challenged by the complaint and decided to remand the case to the Supreme Court for a retrial. Namely, the Constitutional Court found that the applicant's right to a fair trial before an impartial tribunal, guaranteed by Article 32 of the Constitution and Article 6 § 1 of the ECHR, had been violated, as the two members of the panel of the second-instance court who, in the same legal matter, participated in the adoption of the ruling of that court which repealed the judgment of the first-instance court and remanded the case to the

first-instance court for a retrial, after they, for the needs of the Supreme Court, participated also as members of the panel in the adoption of the challenged judgment of the Supreme Court by which the plaintiff's application for revision was rejected as unfounded.

In its repealing decision, the Constitutional Court referred to the case-law of the ECtHR, according to which "the existence of the rules on the recusal of judges in the relevant law is an attempt to ensure impartiality by eliminating causes that could result in such a suspicion", and "the existence of impartiality, within the meaning of Article 6 § 1 of the ECHR, according to the case-law of the Court must (...) be evaluated according to a subjective and objective test", pointing out that in "this particular case, the applicant (plaintiff) (...) challenged judicial bias under an objective principle".

Pursuant to the decision of the Constitutional Court that repealed its judgment and remanded the case for a retrial, the Supreme Court, in the retrial, this time in different composition, examined the judgments of the lower courts within the limits of the application for revision that was filed, having due regard *ex officio* to the application of substantive law and a substantial violation of procedural provisions it takes account of (Article 401 of the LCP), accepted that legal remedy as well-founded, repealed the second-instance and first-instance judgments and remanded the case to the first-instance court for a retrial.

10.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this legal matter, the Constitutional Court repealed the Supreme Court's judgment for violating the party's right to a trial before an impartial tribunal referred to in Article 6 § 2 of the ECHR (Article 32 of the CM). It is interesting that the Supreme Court found in the retrial that the application for revision, which had been rejected by its previous repealed decision, was well-founded and repealed the decisions of the lower courts and remanded the case to the first-instance court for a retrial.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around two and a half years, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted four months.

11. Decision of the Constitutional Court Už-III br. 238/17 of 31 July 2017

- Judgment of the Supreme Court Rev. br. 110/17 of 16 February 2017
- Ruling of the Supreme Court Už. Rev. br. 16/17 of 5 December 2017

11.1. General overview of the case

In this legal case, the second-instance court partially rejected the appeal as unfounded and upheld the judgment of the first-instance court by which that court regulated the exercise of the parental right, ordered the payment of the child support and contacts of the parents with their minor child, while it partially repealed that judgment and dismissed the lawsuit.

Deciding on the application for revision, by the Judgment Rev. br. 110/17 of 16 February 2017, in the first paragraph, the Supreme Court rejected as unfounded the application filed by the respondent (the counterclaimant) for revision of the decision of the second-instance court, which decided on the exercise of the parental right and set the amount of contribution for the support of the minor child, while in the second paragraph it repealed the second-instance judgment

in the operative part concerning the maintenance of contacts of the respondent (the counterclaimant) with a minor child.

Deciding on the constitutional complaint of the respondent (the counterclaimant) against the judgment of the Supreme Court Rev. br. 110/17 of 16 February 2017, the Constitutional Court adopted the Decision UŽ-III br. 238/17 of 31 July 2017 which accepted that complaint, repealed the challenged judgment of the Supreme Court and decided that the case be remanded to that court for a retrial.

The Constitutional Court based its decision on the following findings: the applicant's right to a fair trial was violated and indiscriminate and arbitrary application of the substantive law affected adversely the mentioned guaranteed constitutional right; the applicant submitting the constitutional complaint alleged that her right to a fair trial was violated by the fact that the courts engaged a team of expert witnesses, in which a person who was not listed in the list of court expert witnesses participated as a member of the team which issued the findings and opinion, calling into question thereby legal validity of the expert team's findings and opinion in the proceedings before the ordinary courts; the Supreme Court, in the statement of reasons of the impugned judgment, did not respond to the allegations stated in the application for revision as to whether the members of the expert team were authorised to participate in the dispute at hand, and whether one of the members of the expert team was listed in the list of permanent forensic experts; in the particular case, there has been a violation of Article 6 § 1 of the ECHR, because according to the case-law of the ECtHR, domestic courts are obliged to explain their judgments and specifically to state the reasons on which their decisions are based, if the legal issue is essentially related to the outcome of the case, while adding that the domestic courts have a margin of appreciation as to which arguments and evidence they will accept in a particular case, but are also obliged to provide clear and comprehensible reasons on which they based their decision.

Proceeding on the principle that the judicial decision must have the reasons on which it is based and that it must have a statement of reasons, the Constitutional Court took the view that the statement of reasons of the decision of the Supreme Court did not show clear and certain reasons based on which the court decided to uphold the decision of the lower court. That deficiency, in the opinion of the Constitutional Court, indicates arbitrary application of the substantive law and, hence, violation of Article 6 § 1 of the ECHR. The Constitutional Court came to such conclusion by analysing the challenged judgment of the Supreme Court, relevant legislation, and linking them to the criteria in Article 6 § 1 of the ECHR, and a number of elements inherent in the fair administration of justice, and noted that, in the case at hand, the relevant law (the provisions of Article 361 of the Family Law, Article 245 paragraph 2 of the LCP and Article 16 paragraph 1 of the Law on Court Experts) was misapplied.

According to the aforementioned decision of the Constitutional Court, the Supreme Court, in the repeated proceedings, accepted the respondent's application for revision as well-founded and repealed the judgments of the lower courts, bearing in mind the imperative obligation of the body whose legal act was repealed by the Constitutional Court to respect the legal reasons of the Constitutional Court stated in the decision, which results from the provision of Article 77 of the Law on the Constitutional Court.

In its ruling repealing the decisions of the lower courts, the Supreme Court, although it acted in line with the provision of Article 77 paragraph 2 of the LCC according to which the body whose decision was repealed by the Constitutional Court is obliged, in the repeated procedure, to respect the legal reasons of the Constitutional Court stated in the repealing decision, stated the reasons on the grounds of which it considered that the lower courts and the Supreme Court itself correctly determined the facts and properly applied the substantive law in the case at hand.

After noting that in this legal matter the plaintiff (the counter-respondent) had requested that the exercise of the parental right over a minor child be entrusted to him and that the contribution for the support and personal contact of the child with the mother be regulated in the manner agreed to by the parties during the proceedings before the first-instance court, and that the respondent (the counterclaimant) in the countercomplaint requested to entrust the exercise of the

parental right to her, while the father would be allowed to contact the child outside Belgrade several days a month if the court determined so and that he can freely come to Montenegro. The Supreme Court stated in the reasoning of its repealing decision:

- that the first-instance court, complying with the principle set out in Article 9 of the LCP, on the basis of a conscientious and careful evaluation of each piece of evidence individually and of all evidence together, and on the basis of the results of the entire proceedings, decided on its own which facts shall be considered as proved, and especially guided by the interests of a minor child, and ruled to entrust the exercise of the parental right over a minor child to the plaintiff (the father) with whom the minor child will also reside;

- that the court based its decision on the findings and expert opinion of the forensic expert team, especially taking into account the protection of the rights of the child;

- that, in this dispute for the exercise of the parental right, two custodial bodies have given expert opinions due to different places of residence of the parents – PI Social Work Centre of Herceg Novi and the Social Work Centre of the Municipality of Belgrade – Zemun Department;

- that the first-instance court, because those findings and expert opinions were not consistent and because of the inability to make them consistent, requested the finding and expert opinion from another expert team, in which one of the members was a doctor who was not listed in the list of court expert witnesses;

- that the first-instance court, in the reasons for the judgment, gave clear and sufficient reasons on which it based its decision, and in particular the reasons why one of the members of the expert team was an expert not listed in the list of court expert witnesses, which, as the Constitutional Court held, led to misapplication of the provision of Article 361 of the Family Law and called into question the legal validity of the findings and opinion of the expert team in the proceedings;

- that the second-instance court, accepting in entirety the facts determined and the legal conclusion of the first-instance court, responded to the allegations stated in the appeal which it considered decisive for resolving the dispute, and responded in detail to the allegation stated in the appeal that a member of the team, the mentioned doctor, was not listed in the list of court expert witnesses and provided clear reasons justifying the participation of this expert in the expert team, referring to the court's power set out in Article 318 of the Family Law that in the proceedings related to family relations the court may determine the facts not disputed by the parties and may independently examine the facts that none of the parties presented;

- that the Supreme Court concluded that both lower courts correctly applied the substantive law to a correctly determined facts in the dispute and gave clear and sufficient reasons in the decisions on which they had based their decisions, and that the Supreme Court, in its decision, responded to allegations made by the respondent in the application for revision, while as regards the allegation that one of the members of the expert team was not listed in the list of court expert witnesses it accepted in the entirety the reasons provided in the lower-instance judgments as detailed and clear, without the obligation to explain them again in its decision.

- that the Supreme Court considered that the principle of the best interest of the child required that, when making decisions or conducting procedures that affected the child, or children as a group, the criterion of welfare of the child should be borne in mind;

- that, in the provisions of the Family Law, the interest of the child is an unspecified but determinable legal concept, which implies a requirement to recognize a particular need of the child and to satisfy it in the best possible way;

- that the ECtHR, applying the relevant provisions of the ECHR with the relevant Protocols, in its decisions relating to the right to family life, which, *inter alia*, entails parental rights and the custody right, stressed the obligation of the State to enable parents to participate in the proceedings deciding on custody of the child, to the extent that will provide them necessary protection of their interests, referring to the relevant decisions of that Court;

- that, also, when deciding on the exercise of parental rights, the State must establish a fair balance between the interests of the child and the parent, with particular importance accorded to

the best interest of the child, which, depending on the child's nature and maturity, can prevail over the interest of the parents, referring to the decisions of the ECtHR;

- that Article 32 of the CM guarantees everyone respect for his/her family life and Article 8 of the ECHR guarantees respect for family life, and that the basic purpose of this constitutional and ECHR guarantee is to protect individuals from the unjustifiable interference of the State with their right to family life;

- in the case at hand, the Social Work Centres of Herceg Novi and the Municipality of Belgrade have submitted to the court of first instance expert opinions regarding entrusting of the minor child for the upbringing and care and suggestions concerning the minor child in which they expressed opposite opinions (that the minor child should continue to live with the father, that is, with the mother) and maintaining regular contact with the other parent with whom the child does not live;

- that, as it was not possible to make the expert opinions regarding entrusting of the minor child for the upbringing and care submitted by the Social Work Centres of Herceg Novi and the Municipality of Belgrade consistent, the first-instance court determined that the team of expert witnesses should make an expertise, where that team in addition to two other members included also the mentioned expert, a master of science in psychology, although she was not listed in the list of court experts;

- that according to the explanation made by one of the members of the expert team, in view of the fact that there is no child psychologist and that there is no specialisation for a child psychologist in Montenegro, the mentioned master of science in psychology joined the team to achieve comprehensiveness of the findings because she works as a psychologist at the Children's Centre;

- that the Supreme Court found that, in accordance with Article 217 paragraphs 2 and 3 of the LCP, the presentation of evidence includes all facts that are important for rendering the decision, while the court shall determine which of the proposed evidence will be presented for the purpose of establishing decisive facts; that expert witnesses are means of evidence and that the motion for the presentation of evidence by expert evaluation may be made by the parties in a complaint, statement of defence, submissions (including those made at the hearing), that expert witnesses have the right to make objections to the findings, to ask other expert witness questions and request explanation from another expert witness for the purpose of fully clarifying the facts relevant to the adoption of a lawful decision;

- that, furthermore, according to Article 244 of the LCP, the parties are allowed to influence the choice of the expert witness only to some extent before a court decides which person to designate as an expert witness;

- that, however, the court may also designate a person as an expert witness contrary to the intention of the parties because it is not bound by their proposal, and this is because the expert witness is a person who assists the court in expert matters;

- that an expert evaluation is carried out by one expert witness, and when the court finds that the expert evaluation is complex, it can designate more expert witnesses;

- that it is obvious from the aforementioned legal provisions that there are no so-called collective expert evaluations, even when several persons participate in the process of expert evaluation;

- that the expert witnesses are predominantly designated from among permanent court experts for a specific type of expert evaluation, in accordance with Article 245 paragraph 2 of the LCP, but that, contrary to the legal position expressed by the Constitutional Court in the mentioned decision, it considered that the list containing the names of the permanent court experts had a merely instructive and not binding character to the court as the experts are designated primarily from among permanent court experts for a specific type of expert evaluation, but the court is not bound by the list of court experts and may, if necessary, designate another person as an expert witness;

- that it considered that the party was obliged to file a request for disqualification of an expert witness as soon as the party learns of grounds for disqualification and at the latest before the commencement of the presentation of the evidence by expert evaluation and that the party was obliged to indicate the circumstances on which he/she grounded the request for disqualification, in accordance with Article 247 paragraphs 2 and 3 of the LCP, but that in this particular dispute the parties did not file requests for the disqualification of any expert witness, which would be unfounded, in the opinion of this court;

- that the Constitutional Court, in its decision by which it accepted the constitutional complaint submitted by the respondent (the counterclaimant), noted that the statement of reasons for the Judgment of the Supreme Court Rev. br. 110/17 of 16 February 2017 did not contain clear and certain reasons based on which the Supreme Court decided to uphold the second-instance judgment and that such deficiency in the situation at hand, in the opinion of the Constitutional Court, indicates arbitrary application of the substantive law and, hence, violation of Article 6 § 1 of the ECHR; that the Constitutional Court came to such conclusion by analysing the challenged judgment of the Supreme Court and the relevant legislation, and by linking them to the criteria set out in Article 6 § 1 of the ECHR and a number of elements inherent in the fair administration of justice, and noted that, in the case at hand, the relevant law (the provisions of Article 361 of the Family Law, Article 245 paragraph 2 of the LCP and Article 16 paragraph 1 of the Law on Court Experts) was misapplied;

- that the Supreme Court, taking into account the fact that the Constitutional Court repealed its decision and sent the case back for a retrial, while respecting the legal reasoning of the Constitutional Court stated in the decision, in the repeated procedure, accepted the application for revision filed by the respondent (the counterclaimant), repealed the contested and first-instance judgment and sent the case back to the first-instance court for a retrial;

- that, in the repeated proceedings, in order to rectify the deficiencies referred to in the decision of the Constitutional Court, the first-instance court will again adduce the expert evaluation evidence taking into consideration the remarks made in the repealing decision of the Constitutional Court in the context of the specific circumstances of the case and observance of the legal provisions on the conduct of expert evaluation in disputes in the given field, following which it will adopt a new decision in the case at hand by assessing the evidence previously adduced and the evidence that will be adduced in the repeated proceedings, on the basis of the results of the entire procedure, by correct application of the substantive law.

11.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this legal matter, the Constitutional Court took the view that in this case the applicant's right to a fair trial was violated and that arbitrary and indiscriminate application of the substantive law affected adversely that right guaranteed by the Constitution, that, according to the allegation of the applicant, her right to a fair trial was violated by the fact that the courts engaged an expert team of court expert witnesses, in which a person who was not in the list of court expert witnesses participated as a member of the team in issuing the findings and opinion, thus calling into question the legal validity of the findings and opinion of the expert team in the proceedings before the ordinary courts but also because the Supreme Court, in the reasoning of the challenged judgment, did not respond to the allegations made in the application for revision as to whether the members of the expert team were authorised to participate in the dispute in question and whether one of the members of the expert team was listed in the list of permanent court experts. The Supreme Court, complying with the decision of the Constitutional Court and the reasons for repealing its decision, repealed the decisions of the lower courts and remanded the case to the first-instance court for a retrial in order to rectify in that trial the defects indicated by the Constitutional Court. However, in its decision, the Supreme Court stated the reasons on the grounds of which it considered that the positions taken by the Constitutional Court in its decision were not rules, i.e. that there was no

reason to repeal the decision of the Supreme Court. It seems that difference in the views of the Constitutional Court and the Supreme Court concerns the admissibility of a person who was not listed in the list of permanent court experts to participate in the team of experts or in general as an expert witness. With regard to these differences in views, it will be sufficient to note that the Constitutional Court limited itself to providing general statements in the reasoning of its decision, while the Supreme Court factually and legally endeavoured to present arguments for its different understanding of the case.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) probably less than five months, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around four months.

12. Decision of the Constitutional Court Už-III. br. 491/15 of 29 May 2017

- Judgment of the Supreme Court Rev. br. 193/15 of 22 April 2015
- Judgment of the Supreme Court Už-Rev. br. 18/17 of 8 November 2017

12.1. General overview of the case

In the legal matter of the plaintiff (Old Royal Capital Cetinje) against certain natural persons, the judgment of the second-instance court rejected the plaintiff's appeal as unfounded and upheld the judgment of the first-instance court rejecting the plaintiff's request to establish that the contracts for purchase and sale entered into by and between the plaintiff and the respondents were null and void and, consequently, did not produce legal effect.

The Supreme Court, by the Judgment Rev. br. 193/15 of 22 April 2015, accepted the application for revision and reversed the judgments of the lower courts by granting the aforementioned request of the plaintiff seeking to establish that the mentioned contracts for purchase and sale were null and void and, consequently, that they did not produce legal effect, having found that the contracts in question were absolutely null and void within the meaning of Article 103 paragraph 1 of the LO.

The Constitutional Court, by the Decision Už-III br. 491/15 of 29 May 2017, accepted the constitutional complaint and repealed the above-mentioned judgment of the Supreme Court and remanded the case to that court for a retrial, having found that the challenged decision violated the right to a fair trial guaranteed by the provision of Article 32 of the Constitution and Article 6 § 1 of the ECHR of the applicants submitting the constitutional complaint (the respondents) because in the view of that Court, the challenged judgment is not based on an interpretation acceptable from the aspect of the constitutional law and the application of the relevant substantive law to the facts established in the court proceedings, citing the decision of the Supreme Court Rev. br. 1090/09 of 5 November 2009 and positions taken in that judgment which can also apply *mutatis mutandis* to this case.

In the proceedings that it conducted after repeal of its first revising judgment, the Supreme Court again came to the conclusion that the plaintiff's application for revision was well-founded, relying on the findings that:

- in the proceedings that preceded the adoption of the contested judgment and on the basis of the evidence presented, which was properly evaluated within the meaning of Article 9 of the LCP, it has been found that the Assembly of the Old Royal Capital Cetinje, at the session held on 6 October 2006, adopted the Decision on the sale of real estate outside the GUP, which covered the sale of certain immovable property;

- the plaintiff conducted an open bidding procedure, in which the plaintiff's Commission selected the respondents as the best bidders, with which the plaintiff concluded the contracts for purchase and sale of the properties in question on 8 March 2007;

- in addition to the above, it has been found in the proceedings that the Assembly of the Old Royal Capital Cetinje, at its session held on 22 June 2007, adopted the decision which repealed the Decision on the sale of real estate outside the GUP of 6 October 2006, and on the basis of the findings and opinion of the geodetic expert witness it was determined that the real estate, which was the subject-matter of the disputed contracts for purchase and sale, was located in the area of Karuč which was part of the zone of the National Park "Skadar Lake";

- the subject-matter of the dispute in this legal matter is the plaintiff's request for the determination of the nullity of the contracts for purchase and sale, which the parties concluded on 8 March 2007, where the plaintiff based its request on the allegation that the disputed contract disposed with the real estate which constitutes a part of the National Park "Skadar Lake", which is a natural resource and a resource of the general interest, that is a State-owned property which it could not dispose with;

- the lower courts rejected the request as unfounded, with reference to the provision of Article 103 paragraph 2 of the LO, which was in force at the time of occurrence of the disputed relationship, which stipulates that should entering into a particular contract be prohibited to one party only, the contract shall remain valid, unless otherwise provided by law for the specific case, while the party violating the statutory prohibition shall suffer corresponding consequences;

- however, the plaintiff's application for revision pointed out justifiably that the contested judgments were adopted through misapplication of the substantive law;

- contrary to the view of the Constitutional Court, the Supreme Court did not apply the relevant provisions of the LO arbitrarily and indiscriminately to the detriment of the respondents (the applicants submitting the constitutional complaint) and, in that context, the position expressed in the Decision of the Supreme Court of Montenegro Rev. br. 1090/09 of 5 November 2009 should not be invoked, namely, the plaintiff cannot invoke nullity which the plaintiff caused itself, hence the contract remains in force with the consequences the plaintiff is obliged to incur in the application of Article 103 paragraph 2 of the LO;

- this was a case in which the request related to the determination of nullity of the contract on the granting for temporary use of non-built-up construction land, in contravention of the provisions of Article 24 of the Law on Construction Land in conjunction with Article 10 of the Law on State Property of Montenegro (LSPM) which stipulates that the transfer of such land shall be done on the basis of public tenders or bids collected upon public invitation according to the procedure previously prescribed by the Government of Montenegro;

- contrary to the view of the Constitutional Court that the contested contracts were legally valid, although the plaintiff disposed with the property in contravention of Article 24 of the Law on National Parks (LNP) in conjunction with Article 10 of the LSPM, with reference to Article 103 paragraph 2 of the LO - according to the Supreme Court's view those contracts are absolutely null and void within the meaning of Article 103 paragraph 1 of the LO, which do not produce legal effect.

- namely, subject-matters of all three contested contracts for purchase and sale are properties located in the area of Karuč, within the boundaries of the National Park "Skadar Lake", in accordance with Article 2 of the Law on National Parks, which according to Article 1 of that Law is an area of exceptional and multiple natural values which have ecological, economic, scientific, aesthetic, cultural, educational and recreational functions, which in accordance with Article 7 item 1 of the LSPM is natural wealth and state-owned property which is according to Article 24 of the LNP managed by a public enterprise;

- the land in the national parks may, in accordance with Article 25 of the LNP, be given for temporary and permanent use for the purpose of construction of tourist, health, infrastructural and other facilities or the installation of temporary facilities, in accordance with a spatial plan or detailed urban plan, and that the mentioned public enterprise, by a special act which is subject to the consent

of the Government, shall determine the manner, conditions and period of giving the national park assets for use;

- since under Article 9 paragraph 1 of the LSPM the Government or the competent body of a local self-government unit decides on disposal with a State-owned property, unless it is stipulated by the law that another body shall decide thereon, and since the decision on the sale of real estate outside the GUP of 6 October 2006, which is a part of the National Park "Skadar Lake", natural wealth and a State-owned property, was adopted by the Assembly of the Old Royal Capital Cetinje, which disposed with the disputed immovable property in contravention of Articles 24 and 25 of the LNP, such disposal has been contrary to the imperative legislation which is why the concluded contracts for purchase and sale are absolutely null and void within the meaning of Article 103 paragraph 1 of the LO;

- since in view of the above, the provision of Article 103 paragraph 2 of the LO could not be applied, the judgments of lower courts should have been reversed, as stated in the operative part of the judgment.

12.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this legal matter, the Constitutional Court took the view that in this case the contested decision of the Supreme Court violated the right to a fair trial guaranteed by the provision of Article 32 of the Constitution and Article 6 § 1 of the ECHR of the applicants submitting the constitutional complaint (the respondents) as, in the view of that Court, the challenged judgment is not based on an interpretation acceptable from the aspect of the constitutional law and the application of the relevant substantive law to the facts established in the court proceedings.

On the other hand, the Supreme Court, in its new judgment which again accepted the application for revision and reversed decisions of lower courts, made an effort to present the arguments on the grounds of which it had made such decision, debating with the view of the Constitutional Court and not paying particular attention to the provision of Article 77 paragraph 2 of the LCC according to which it was obliged to respect the legal reasoning of that court in the repeated proceedings.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around two years, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around five months.

13. Decision of the Constitutional Court UŽ-III br. 127/15 of 26 May 2017

- Judgment of the Supreme Court Rev. br. 1048/14 of 2 December 2014

- Judgment of the Supreme Court UŽ. Rev. br. 19/17 of 24 October 2017

13.1. General overview of the case

In this legal matter, the Supreme Court, by the Judgment Rev. br. 1048/14 of 2 December 2014, accepted the application for revision and reversed the judgments of lower courts, granted the plaintiffs' request and found that the property registered in the name of the testator constituted a separate property of the plaintiffs' mother.

The Constitutional Court, however, upon the constitutional complaint of the respondents, by Decision UŽ-III br. 127/15 of 26 May 2015, repealed the above-mentioned judgment of the Supreme Court having found that it had violated the respondents' right to a reasoned judicial decision as part of the right to a fair trial, since the challenged judgment did not provide sufficient and relevant

reasons that guided the court when making its decision, which is related to the position of this court expressed in the earlier reversing decision, violating thereby the provisions of Article 32 of the CM and Article 6 § 1 of the ECHR.

In the statement of reasons of its new reversing judgment, the Supreme Court first referred to its previous decision repealed by the Constitutional Court, stating:

- that, according to the documents presented before the court, in the probate proceedings after the death of Mirko Marjanović, the plaintiffs contested that the property identified in more detail in the operative part of the first-instance judgment was his estate, so that the plaintiffs were, by a ruling, referred to a litigation;

- that the plaintiffs, by the motion made in the submission dated 30 August 2012, requested to determine that the disputed property was a separate property of the late wife of the testator and the plaintiffs' mother, as the respondents were the testator's children and grandchildren from his first marriage;

- that it was not disputed that in the contract for the purchase of the property dated 27 November 1969 the testator was identified as buyer, however, it had been determined based on the evidence presented that the money for the purchase of that property had been lent to the plaintiffs' mother by her brothers, and that, several years later, her brother told her that she did not have to return the borrowed money as that was her share of inheritance from their father;

- that, based on this finding, the lower courts concluded that the money given for the purchase of the disputed property had not been given only to the plaintiffs' mother, but also to her husband, the testator, and that thus it was not a separate property of the plaintiffs' mother;

- that the Supreme Court held that the above-mentioned conclusion of the lower courts was not correct;

- that according to Article 285 of the Family Law (OGM 1/07; FL), applicable in the case at hand under the provision of Article 379 of the same Law, spouses may have separate and joint property and that the provision of Article 286 paragraph 1 of the FL stipulates that separate property shall consist of the property that a spouse acquired before entering into the marriage and of the property that the spouse acquired during the marriage by inheritance, gift or other forms of obtaining property without consideration, and that according to the provision of Article 288 of the FL joint property shall consist of the property that spouses gained by their labour during marriage and of the income from that property;

- that the lower courts found that the disputed property had been acquired during the marriage of the plaintiffs' parents in the way that the funds for the purchase thereof had been given by their mother's brothers as her right to inheritance after their father's death;

- that the lower courts, given that the separate property is the property acquired during marriage by inheritance, gift or other forms of acquiring property without consideration, incorrectly applied the substantive law to the established facts when they decided as mentioned above and, therefore, the Supreme Court, by its previous decision, reversed the judgments of lower courts and granted the claim.

The Supreme Court pointed out in the retrial:

- that in the repeated proceedings it bore in mind the repealing decision of the Constitutional Court of Montenegro Už III br. 127/15 of 26 May 2017, and the view of the ECtHR made in the judgment *Van de Hurk v. The Netherlands* (of 19 April 1994, Series A no. 288, p. 20, § 61) according to which "Article 6 para. 1 (art. 6-1) obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument", which was reiterated in the *Ruiz Torija v. Spain* judgment (18390/91, 1994, § 29) "that Article 6 para. 1 (art. 6-1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument", that "[t]he extent to which this duty to give reasons applies may vary according to the nature of the decision", that "[i]t is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments";

- that by responding precisely to new allegations made in the application for revision it proceeded from the provisions of the FL that are clear: the joint property shall consist of the property that spouses gained by their labour during marriage and of income from that property;
- that this means that the joint property consists of all the real rights and claims that the spouses earned by labour during their life together, as well as the property-related obligations they assumed for the needs of their common household, the so-called matrimonial property;
- that it arises from the legal definition of the concept of joint property that two conditions need to be met for its creation, which must exist cumulatively: 1. the existence of marital union and 2. the labour of spouses, which means that the joint property is acquired, as a rule, by labour and only during the life together of the spouses;
- that separate property is the property that a spouse holds at the time of getting married and the property acquired during the marital union by any lawful means other than labour;
- that, accordingly, separate property is any property that the spouses brought into marriage and any property that they have acquired for themselves personally without labour during the marital union;
- that during marriage, separate property may be acquired by inheritance, gift or other forms of acquiring property without consideration; that, therefore, all that one of the spouses receives as a gift, inheritance (on the basis of a will or the law), legacy, debt relief or in another manner without consideration falls within his/her separate property;
- that, in the case at hand, it had been established beyond any doubt that the money for the purchase of the property in question was given to the plaintiffs' mother by her brother in person; that this was established on the basis of the evidence presented, first of all on the basis of the testimony of this witness who testified several (four) times before the first-instance court;
- that the conclusion of the lower courts that the property in question was not a separate property but the joint property of the plaintiffs' mother and the testator has no basis in the aforementioned legal provisions or in legal theory;
- that the property received as a gift or as inheritance from the father, under inheritance law, cannot have the nature of assets acquired by joint labour i.e. joint property;
- that, furthermore, the fact that the mentioned witness stated in his first testimony at the main hearing held on 26 October 2010 that he had given the funds to his sister to help her cannot be construed as it had been construed by the lower courts – that this was a joint property, because the funds had been given ultimately not as a gift but as her share in inheritance, while she herself accepted the size of donation as voluntarily determined by her brother;
- that, essentially, the donation in question, herein referred to as a gift, represents valorisation of the respondent's right of inheritance after her father's death and was given to her as her share in inheritance she was entitled to, and the fact that she used those funds to address her family's needs does not bring those funds under the scope of the joint property;
- that, in the mentioned legal situation where the funds were obtained on the basis of the personal inalienable right – the right to inheritance, the donor's intention may not have the relevance of a decisive factor in determining the nature of the donation and the future intended use of that donation;
- that, finally, in the presented circumstances of the case, in the situation when a dispute arises as to whether that is a joint or separate property, such donation (a gift or share in inheritance) is considered to be separate property.

13.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this legal matter, the Constitutional Court took the view that in this case the contested decision of the Supreme Court had violated the applicants' (the respondents') right to a reasoned judicial decision as part of the right to a fair trial, since the contested judgment did not provide sufficient and relevant reasons that guided the court when making its decision, which is related to

the position of this court expressed in the earlier reversing decision, violating thereby the provisions of Article 32 of the CM and Article 6 § 1 of the ECHR.

On the other hand, the Supreme Court, in its new judgment which again accepted the application for revision and reversed decisions of lower courts, made an effort to present the arguments on the grounds of which it had made such decision, debating with the view of the Constitutional Court, while referring also to the case-law of the ECtHR and not paying particular attention to the provision of Article 77 paragraph 2 of the LCC according to which it was obliged to respect the legal reasoning of that court in the repeated proceedings.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around two years and three months, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around four months.

14. Decision of the Constitutional Court Už-III br. 175/15 of 26 May 2017

- Judgment of the Supreme Court Rev. br. 8/15 of 29 January 2015
- Judgment of the Supreme Court Už. Rev. br. 20/17 of 24 October 2017

14.1. General overview of the case

In this legal matter, the judgment of the first-instance court partially granted the claims made by the plaintiff in the lawsuit and found that she was a co-owner of certain properties, while it imposed the obligation on the respondents to allow registration of that right at the Real Estate Administration, and it was also found that the mortgage agreement regarding those properties concluded between the plaintiff's husband, a certain business legal entity and a bank was void, while the plaintiff's request to determine nullity of the loan agreement where that loan was secured by the mentioned mortgage was rejected due to the absence of legal interest. The second-instance court rejected the appeal of the respondent bank and partly upheld the first-instance judgment in the part in which it determined the plaintiff's co-ownership of certain immovable property, while it reversed that judgment in the part in which it was found that she was a co-owner of other properties as well and in the part that determined nullity of the mortgage agreement, and rejected the related claim.

By its Judgment Rev. br. 8/15 of 29 January 2015, the Supreme Court rejected the application for revision as unfounded providing the following reasons for such decision:

- the violation of provisions on the civil procedure referred to in Article 367 paragraph 2 item 15 of the LCP, which is referred to in the application for revision, was not substantial, since the contested judgment contains the reasons for all decisive facts and those reasons correspond to the state of affairs resulting from the case files, so that the judgment has no defects due to which it cannot be examined and the allegations made in the application for revision that the impugned judgment is based on the misapplication of the substantive law are also unfounded;

- according to the state of affairs resulting from the case files, on 17 January 2011, the second respondent, as a borrower, concluded a long-term loan agreement with the third respondent, on the basis of which the funds amounting to € 2,853,000.00 were made available to the borrower, with a repayment period of 120 months; as a collateral for the repayment of the loan, the first and second respondents concluded the Mortgage Agreement with the third respondent on the same day; the subject-matter of that agreement referred to certain immovable properties registered as the ownership of the second respondent and some registered as the ownership of the first respondent;

- the plaintiff, who had been married to the first respondent since 1996, claimed that the properties that were the subject-matter of the mortgage agreement were acquired during their marital union and that they constituted their matrimonial property, and requested in the lawsuit that

this be determined and that, on that basis, she was a co-owner of the properties in question to the extent of 1/2 and that the respondents were obliged to acknowledge that, and that, consequently to that finding, it be determined that the mortgage agreement is void and that the mortgage be discharged at the Real Estate Administration;

- the first-instance judgment granted this plaintiff's claim because the first-instance court, based on the fact that the properties in question were registered in the real estate cadastre as a sole ownership of the first respondent or the second respondent (the company founded and owned by the first respondent), and since the first respondent did not dispute the allegation that those properties were the joint property of himself and his wife, it concluded that the properties in question were acquired during the marital union of the plaintiff and the first respondent and that, in accordance with the provision of Article 288 of the FL, they constituted their joint property, which was why the first-instance judgment in the first paragraph determined that the plaintiff is a co-owner of the real estate in question to the extent of 1/2, while in the second paragraph of the same judgment, it found that the mortgage agreement was null and void since the first respondent, contrary to the provision of Article 283 of the FL, disposed with the joint property without the plaintiff's consent, which is why that agreement did not produce legal effect;

- the second-instance court rejected the third respondent's appeal and upheld the first-instance judgment in the operative part under the first paragraph which found that the plaintiff was, on the basis of acquisition during the marital union with the first respondent, a co-owner to the extent of 1/2 of certain properties registered in the name of the first respondent, in the part in which the second-instance judgment was not challenged by the application for revision; that this judgment in the part in which the first-instance judgment was reversed by rejecting the request of the plaintiff to determine that, on the same basis, she was a co-owner in the ideal share of 1/2 of some other properties registered in the name of the respondent company, as well as in the part in which the plaintiff's request to determine the nullity of the mortgage agreement was rejected;

- the second-instance court was of the opinion that on the basis of acquisition during marriage the plaintiff could not have acquired the rights of ownership or management over the respondent company, in whose name the property entered in the Real Estate Folio No. 92 of the Cadastral Municipality Donji Štoj was registered, while the conclusion that the plaintiff's request to determine the nullity of the mortgage agreement was unfounded was explained by the view that, pursuant to the provision of Article 292 paragraph 1 of the FL, the consent of one spouse to the other spouse to dispose with the joint property or part of it does not have to be given in written form, but may be given verbally and tacitly, and the spouse who claims that the consent did not exist should prove that, which the plaintiff did not prove in the particular case since she could not remain unaware of the fact that her husband (the first respondent) was raising a loan (borrowing money), in view of the fact that the plaintiff did not refute that the relations of the spouses had not been distorted at the time of conclusion of the mortgage agreement and that their relationship had been and still was harmonious, on the basis of which it could be concluded that the first respondent had had tacit consent to dispose of the joint property;

- the revision court fully concurred to the view and findings of the second-instance court;

- the immovable property registered as the ownership of the second respondent (legal entity), which are the collateral for the claims of the respondent bank under the mortgage agreement, is owned by that legal entity as a one-member company which was founded, according to the Central Registry of the Commercial Court, with a share of 100%, by the plaintiff's husband who was authorised, as a chief executive officer, under the company's articles of association, to dispose of the assets, i.e. the plaintiff's consent was not required for the conclusion of the mortgage agreement, since she could not acquire ownership and management rights over the company based on acquisition during marriage; namely, in case of a limited liability company, as in this particular case, whose founder is only one spouse, the other spouse can only obtain compensation corresponding to his/her contribution to the acquisition of the joint property that was contributed as a founding stake in the company; therefore, the second-instance court made a correct conclusion when it held that the plaintiff's request to determine that she is a co-owner in an ideal share of 1/2

of the immovable property registered in the name of the second respondent (a legal person) was unfounded;

- the immovable property registered in the name of the first respondent at the time of the conclusion of the mortgage agreement, which was also a collateral for the claims of the respondent bank under the long-term loan agreement concluded with the second respondent, was at the time of the conclusion of the agreement jointly owned by the plaintiff and the first respondent as they had been acquired as matrimonial property; according to Article 289 of the FL, which was applicable at the time of the occurrence of the disputed relationship, rights of spouses regarding joint property shall be registered in the register of immovable property and other appropriate registers in the names of both spouses as their joint property without determining the ownership over the parts of it, while if only one spouse is entered in the register of immovable property and other appropriate registers as the owner of the joint property, it shall be considered that the entry was made on behalf of both spouses, provided that the entry was not made on the basis of a written agreement made between the spouses; Article 290 of the FL stipulates that a spouse may not dispose of his/her share in the undivided joint property and he/she cannot place legal encumbrances on the property *inter vivos* (the same is stipulated in Article 283 of the FL, OGRM 7/89, to which the first-instance court referred); the plaintiff relied on this legal provision for her claim to determine the nullity of the mortgage agreement, namely, that the respondent had disposed of the joint property without her consent;

- the joint property, during the marriage, shall be managed and disposed of jointly and by mutual consent of both spouses (Article 291 of the FL), while according to the provision of Article 292 of the FL, spouses may agree that the management and disposal of all or part of the property is to be performed by one of them; the cited legal provision does not prescribe that the consent of a spouse to disposal of a joint property or part thereof by another spouse must be given in written form, from which it follows that this consent may also be given orally and as tacit consent, and the case-law provides that that the spouse who claims that this consent did not exist needs to prove that (judgments in the cases of the Supreme Court of Montenegro Rev. br. 342/13, Rev. br. 597/12...); in the case at hand the plaintiff did not prove that; on the contrary, it follows from the established facts that the relations of the spouses were not distorted at the time of the conclusion of the mortgage agreement, and they were and are still harmonious, inferring that the first respondent had the plaintiff's tacit consent dispose of the joint property;

- the first respondent's testimony that the plaintiff was not aware of the mortgage agreement and that she did not give any consent to conclude that agreement cannot be accepted as relevant, because it is in this respondent's interest that the plaintiff succeed in the dispute, and, on the other hand, his actions towards the respondent bank were not honest, as he did not inform the bank of the fact that the property in question was a joint property, since it was mentioned in the agreement that the properties concerned were sole ownership of the first respondent to the extent of 1/1;

- the fact that the plaintiff had an opportunity (and the right) to record annotation in the real estate cadastre regarding the joint ownership of the property and the manner of managing and disposal of the joint property and to make the third parties clearly aware that this was a jointly owned property is also an argument in favour of the respondent bank, as an honest party; otherwise, the provision of Article 10 of the Law on State Surveying and Cadastre of Immovable Property (OGM 29/07) according to which the data on immovable property and rights thereon, registered in accordance with that Law, shall be deemed to be accurate and no one can incur adverse consequences in immovable property transactions and other relations in which such data are used, would lose its purpose;

- based on the afore-mentioned, the respondent bank did not know nor could have known that the immovable property concerned was a jointly owned property because there was no such entry in the public registers, while on the occasion of conclusion of the mortgage agreement the first respondent stated that he was the owner of the real estate concerned to the extent of 1/1, as registered in the real estate cadastre.

The Decision of the Constitutional Court UŽ-III br. 175/15 of 26 May 2017 accepted the plaintiff's constitutional complaint and repealed the Judgment Rev. br. 8/15 of 29 January 2015 of the Supreme Court on the grounds that the repealed judgment did not contain clear and sufficient reasons that led the Supreme Court to decide to uphold the second-instance judgment in the part in which it was decided that the mortgage agreement in question was a valid legal transaction, while taking into account the statement of the plaintiff's husband who confirmed the plaintiff's allegations that she had not been aware of the mortgage agreement and had not given any consent to conclude that agreement, and that, on the occasion of conclusion of the agreement, the respondent bank did not obtain from the first respondent's wife (the plaintiff) evidence of her consent to create mortgage on the joint property.

In the Judgment UŽ. Rev. br. 20/17 of 24 October 2017 adopted after the Constitutional Court repealed its previous judgment, the Supreme Court pointed out:

- that when it adopted the new judgment it had in mind the repealing decision of the Constitutional Court of Montenegro UŽ-III br. 175/15 of 26 May 2017 and also the view expressed by the ECtHR that "the reasoning of the second-instance judgment does not always have to be the same as that at first instance, especially when the first-instance reasoning was very exhaustive and the second-instance court accepted its arguments (Garcia Ruiz v. Spain judgment, § 29, 29 January 1999), but that, in such reduced reasoning, the court must clearly show that it has in fact assessed all the important issues raised in the appeal (Helle v. Finland judgment of 19 December 1997", § 60);

- that the afore-mentioned case-law of the ECtHR was also applicable to the relationship between the second-instance court and the Supreme Court in the legal matter in question, so that the Supreme Court, upon strong arguments of the second-instance court in the contested decision, giving additional reasons by which it assessed all important issues raised in the application for revision, concluded that the application for revision was unfounded having due regard to the repealing decision of the Constitutional Court in the legal matter at hand;

- that, with regard to the assessment made by the Constitutional Court that the reasoning of the contested judgment of the Supreme Court is not acceptable from the aspect of the constitutional law in the part stating that the plaintiff was to bear the burden of proof that she had not been aware of and had not given oral or tacit consent to the conclusion of the mortgage agreement in question, it should be pointed out, as to the burden of proof, that this is a view in the case-law of Montenegro (Rev. br. 597/12; Rev. 342/13; Rev. 202/14) and in the neighbouring countries (Supreme Court of Cassation of Serbia – Rev. br. 1918/15), and that this view was also present in the case-law of the Supreme Courts of the former Yugoslavia (Supreme Court of Serbia – Rev. br. 870/89);

- that such view is present in the legal theory as well (*Family Law* of the authors Marina Janjić-Komar, Ph.D., Radoje Korać, Ph.D. and Zoran Ponjavić, Ph.D., DOO Nomos Belgrade, 1996, p. 366);

- that, since there are no grounds on which the application for revision was filed and in the absence of the grounds the revision court is observing *ex officio*, it was decided to reject the application for revision as unfounded.

14.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this legal matter, the Constitutional Court accepted the constitutional complaint of the plaintiff and repealed the Judgment of the Supreme Court Rev. br. 8/15 of 29 January 2015 on the grounds that the repealed judgment did not contain clear and sufficient reasons that led the Supreme Court to decide to uphold the second-instance judgment in the part in which it was decided that the mortgage agreement in question was a valid legal transaction, while taking into account the statement of the plaintiff's husband who confirmed the plaintiff's allegations that she had not been aware of the mortgage agreement and had not given any consent to conclude the agreement, and that when the agreement was concluded the respondent bank did not obtain from the first respondent's wife (the plaintiff) evidence of her consent to create mortgage on the joint property.

Such position of the Constitutional Court should be linked to its view that the reasoning of the contested judgment of the Supreme Court is not acceptable from the aspect of the constitutional law in the part stating that the plaintiff was to bear the burden of proof that she had not been aware of and had not given oral or tacit consent to the conclusion of mortgage agreement in question.

On the other hand, the Supreme Court, in its new judgment which again rejected the application for revision, made an effort to present the arguments on the grounds of which it had made such decision, stating the reasons why it did not accept the legal view of the Constitutional Court while it did not pay particular attention to the provision of Article 77 paragraph 2 of the LCC according to which it was obliged to respect the legal reasoning of that court in the repeated proceedings.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around two years and two or three months, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around four months.

15. Decision of the Constitutional Court Už. III br. 48/15 of 27 September 2017

- Judgment of the Supreme Court Rev. br. 688/14 of 22 October 2014
- Ruling of the Supreme Court Už. Rev. br. 21/17 of 22 December 2017

15.1. General overview of the case

In this legal matter, the first-instance judgment found, essentially, in a dispute between certain natural persons as plaintiffs and Montenegro and the Municipality of Bar as respondents that one of the plaintiffs was the owner of some immovable properties and that the plaintiff's legal predecessors as testators were the owners of other immovable properties. Deciding on the appeals filed by the parties, the second-instance court rejected the respondents' appeal and upheld the first-instance judgment in the part in which it ruled on the main requests, while it reversed the ruling on costs stated in the first-instance decision and ordered that the respondents, jointly and severally, reimburse the plaintiffs for the costs of the proceedings in the amount of EUR 15,410.00.

Deciding on the respondents' application for revision, by Judgment Rev. br. 688/14 of 22 October 2014, the Supreme Court rejected the application for revision as unfounded and decided that each party would bear its own costs of the revision proceedings.

Deciding on the constitutional complaint filed by some of the plaintiffs against the decision on the costs of the revision proceedings stated in the afore-mentioned judgment of the Supreme Court, the Constitutional Court accepted the complaint, quashed the judgment and sent the case back to the Supreme Court for a retrial. Namely, while examining the merits of the constitutional complaint, the Constitutional Court found that the applicants' right to a reasoned judicial decision guaranteed by the Constitution (Article 32 of the CM) and the right protected by Article 6 § 1 of the ECHR was violated, since, when deciding on the costs of the revision proceedings, the contested judgment stated: "that, according to Article 163 paragraph 1 in conjunction with Article 153 paragraph 1 of the LCP, it has been decided that each party shall bear its own costs of the revision proceedings"; that, therefore, the revision court decided on the basis of the afore-mentioned provisions which stipulate that, when deciding on the costs that are to be reimbursed to the party, the court shall take into account only the costs necessary for conducting the litigation and, when deciding which costs have been necessary and the amount thereof, the court shall thoroughly evaluate all circumstances. In doing so, the Constitutional Court noted that each individual act of a state body must be reasoned in the procedure for its adoption, which ensures the fundamental fairness of the procedure conducted, that the applicants who submitted the constitutional complaint stated in their response to the application for revision a request to be reimbursed the costs of the

revision proceedings incurred in the amount of EUR 500 for submitting the response, and that in the case files there is a payment slip by which one of the plaintiffs paid EUR 330 as a fee for the response to the application for revision, through the Montenegrin Post, on 16 January 2015; that the guarantees for the right to a reasoned judicial decision, in the opinion of the Constitutional Court, required the Supreme Court to state, in the reasoning of the judgment, the reasons why the plaintiffs were not awarded the costs of the revision proceedings and not just to casually state the above, and that, therefore, that Court considered that the disputed judgment did not state the reasons in the way that met the standards on the right referred to in Article 32 of the CM and Article 6 § 1 of the ECHR, established by the jurisprudence of the Constitutional Law and the case-law of the ECtHR, and that the position of the Supreme Court on the costs of the revision proceedings was indiscriminate and arbitrary.

The Supreme Court, in accordance with the decision of the Constitutional Court which repealed its above-mentioned judgment, made the same decision in the repeated procedure as in the previous ruling in the part of the decision on the costs of the revision proceedings and rejected the request for their reimbursement, pointing out that:

- it was true that the plaintiffs, through their attorney, submitted response to the respondents' application for revision in a timely manner in which they requested reimbursement for the costs of the revision proceedings, but that, in the opinion of the Supreme Court, that request was unfounded;

- according to the provision of Article 153 paragraph 1 of the LCP when deciding on the costs that are to be reimbursed to the party, the court shall take into account only the costs necessary for conducting the litigation and, when deciding which costs have been necessary and the amount thereof, the court shall thoroughly evaluate all circumstances;

- the Supreme Court assessed that the costs related to the response to the application for revision were not indispensable, i.e. those costs were not necessary for conducting this litigation, since the response did not contain allegations that had an impact on the decision on revision, hence, the costs occasioned by such response cannot be considered as necessary for conducting the proceedings;

- namely, the response reiterated the allegations made during the proceedings and challenged the judgments of the lower courts because of the infringements of substantial procedural provisions, which the court was obliged to evaluate and it had done so, so that the mentioned legal action, although provided for in the LCP, but not mandatory, did not need to be taken as it did not bring anything new.

15.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this legal matter, the Constitutional Court found that the applicants' right to a reasoned judicial decision guaranteed by Article 32 of the Constitution and the right protected by Article 6 § 1 of the ECHR was violated, since, when deciding on the costs of the revision proceedings, the contested judgment stated: "that, according to Article 163 paragraph 1 in conjunction with Article 153 paragraph 1 of the LCP, it has been decided that each party shall bear its own costs of the revision proceedings"; that, therefore, the revision court decided on the basis of the aforementioned provisions which stipulate that, when deciding on the costs that are to be reimbursed to the party, the court shall take into account only the costs necessary for conducting the litigation and, when deciding which costs have been necessary and the amount thereof, the court shall thoroughly evaluate all circumstances. The Constitutional Court made such conclusion relying on the premise that any individual act of a State body must be reasoned in the procedure for its adoption, which ensures the fundamental fairness of the procedure conducted, that the applicants who submitted the constitutional complaint stated in their response to the application for revision a request to be reimbursed the costs of the revision proceedings incurred for submitting a response to the application for revision; that the guarantees for the right to a reasoned judicial decision, in the

opinion of the Constitutional Court, required the Supreme Court to state, in the reasoning for the judgment, the reasons why the plaintiffs were not awarded the costs of the revision proceedings and not just to casually state the above, and that, therefore, that Court considered that the disputed judgment did not contain reasons in the way that met the standards on the right referred to in Article 32 of the CM and Article 6 § 1 of the ECHR, established by the jurisprudence of the Constitutional Law and the case-law of the ECtHR, and that the position of the Supreme Court on the costs of the revision proceedings was indiscriminate and arbitrary.

By the Ruling Už. Rev. br. 21/17 of 22 December 2017, the Supreme Court again rejected the plaintiffs' request for reimbursement of the costs incurred for response to the application for revision, but "in accordance with the decision of the Constitutional Court" it provided additional reasons for such a decision. Since its previous ruling on the costs of the proceedings was repealed because the Constitutional Court considered that it did not contain reasons in the way that met the standards on the right referred to in Article 32 of the CM and Article 6 § 1 of the ECHR, it can be regarded that the Supreme Court acted, at least on a formal level, in accordance with the provision of Article 77 paragraph 2 of the LCC.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around two years and nine months, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted just over two months.

16. Decision of the Constitutional Court Už-III br. 39/14 of 29 November 2017

- Ruling of the Supreme Court Rev. br. 195/14 of 18 February 2014
- Ruling of the Supreme Court Už. Rev. br. 22/17 of 13 February 2018

16.1. General overview of the case

In this legal matter, in which natural persons participated as the parties, the judgment of the first-instance court rejected the primary request to remove a certain structure from a certain property, restore the land to its original condition and surrender it to the possession of the plaintiffs, while it accepted conditional (and subsidiary) request to pay the plaintiffs, each of them, an appropriate amount based on the market value of the cadastral parcel in question. Upon the respondent's appeal, the court of second instance reversed the first-instance judgment in the part accepting the conditional request and rejected that request.

By the Ruling Rev. br. 195/14 of 18 February 2014, the application for revision was dismissed as inadmissible because the Supreme Court took the view that the plaintiffs in the dispute at hand were co-litigants referred to in Article 197 of the LCP and that, within the meaning of Article 201 of the same Law, each co-litigant was an independent party in the litigation, and that, for the assessment of the admissibility of the application for revision, individual value of the claim of each co-litigant was to be taken into account and not the sum of all the claims, and since the value of the contested part of the final judgment amounted individually for all plaintiffs (co-litigants) EUR 3,756.67 at maximum, which did not exceed the relevant value of the subject-matter of the dispute for the admissibility of the application for revision, the application for revision was found inadmissible.

The mentioned ruling of the Supreme Court was repealed by the Decision Už-III br. 39/14 of 29 November 2017 of the Constitutional Court of Montenegro and the case was sent back for a retrial and for repeated proceedings on the application for revision because the Constitutional Court found:

- that the application for revision in the case at hand was admissible, based on the provision of Article 33 paragraph 1 of the LCP, which stipulates that if one complaint against the same

respondent includes several claims based on the same factual and legal basis the value shall be determined according to the sum of values of all claims, and the fact that the plaintiffs have indicated in the complaint that the value of the dispute amounted to € 11,270.00, that the case concerned a potential joinder of the claims of the same co-litigants in which case the court deliberates and decides on a conditional claim if the primary claim is unfounded, and that the primary claim was non-pecuniary, while the plaintiffs indicated in the complaint that the value of the dispute amounted to more than € 10,000.00 which exceeded the relevant value for assessing the admissibility of the application for revision;

- that the dismissal of the application for revision in this particular case resulted in a violation of the plaintiffs' right of access to the Supreme Court, and, consequently, also violation of the right to a fair trial set out in the provision of Article 32 of the CM and Article 6 § 1 of the ECHR.

Bearing in mind the provision of Article 77 paragraph 2 of the LCC according to which the competent authority shall respect the legal reasoning of the Constitutional Court stated in the decision and legal reasons from the repealing decision of that Court, the Supreme Court held in the repeated proceedings that the application for revision is admissible and, having found that the application for revision was also well-founded, repealed the judgment of the second-instance court and sent the case back to that court for a retrial by the Ruling Už. Rev. br. 22/17 of 13 February 2018, stating:

- that according to established facts, the plaintiffs were co-owners of a certain cadastral parcel, and that they acquired their ownership rights on the basis of the decision of a State body (the decision of the Commission for Restitution and Indemnification); that the land in question had been expropriated in 1952 from the plaintiffs' legal predecessor and had been registered in the cadastre as a State-owned land until 2009 when it was registered as the property owned by the plaintiffs; that on that land, in the period from 1997 to 2001, the respondent illegally built a structure – a family residential building having a surface area (at foundation) of 57 m²;

- that it was sought in the complaint that the respondent be ordered to remove the structure from the mentioned cadastral parcel owned by the plaintiffs, to restore the land to its original condition and to hand it over to the plaintiffs' possession, and that a conditional request was also made in the complaint, namely, that the respondent be ordered to pay them, if the court finds that the first request (primary) is unfounded, the market value of the land on which the family residential building was built, with a land plot;

- that the request was based on the provisions of Article 42 of the Law on Ownership Rights (Official Gazette of Montenegro 19/09), i.e. Article 25 of the Law on Foundations of Property Law Relations (LFPR) which was applicable at the time of construction of the building;

- that the first-instance judgment rejected the primary request on the grounds that it was filed upon the expiry of a period of three years from the day the construction was finished (Article 25 paragraph 4 in conjunction with paragraph 1 of the LFPR), while it accepted the conditional claim;

- that, namely, on the basis of the finding that the respondent knew that he was building on the land of another, and that, as dishonest developer, he could not acquire the right of ownership by adverse possession or by building on the land of another, the first-instance court, referring to the provision of Article 25 paragraph 4 of the LFPR (upon the expiry of a period of three years from the day the construction of the building was finished, the owner may claim payment of the market value of the land), ordered the respondent to pay the plaintiffs the market value of the built-up land, considering that in this situation the general limitation period of 10 years was to be applied to claims;

- that, deciding on the respondent's appeal, the second-instance court reversed the first-instance judgment and rejected the conditional claim as it found that at the time of construction of the building by the respondent, the plaintiffs were not legal owners, since the construction was carried out at the time when the land in question was a State-owned property, so that at the time of construction the developer (the respondent) could not have been in a substantive law relationship with the plaintiffs (the persons to whom the land was returned in the restitution procedure), but that the institute of building on the land of another could be used;

- that the view of the second-instance court was in fact that the respondent lacked the real capacity to be sued in the case in question;
- that in the opinion of the Supreme Court, the view stated by the second-instance court cannot be accepted as correct, since in situations where the court rejects the primary claim stated in the complaint as unfounded, and accepts the conditional request, the respondent is entitled to lodge an appeal against the decision that granted the conditional request, but that, in such case, the decision on the primary claim would not become effective either;
- that in this situation, when examining the decision on the primary claim upon the appeal, the second-instance court acted as if the plaintiffs had lodged an appeal as well;
- that the plaintiffs are the owners of the contested land and that they may request, by filing a complaint, the possessor of the land (the respondent) to return that land, pursuant to Article 37 paragraph 1 of the LFPR or Article 112 paragraph 1 of the Law on Ownership Rights which is now in force;
- that it should be borne in mind that the building on the disputed land was built illegally on a State-owned (socially-owned) land, without a building permit, so that the ownership of that land cannot be acquired, thus, the respondent did not become the owner of the land by building on the land of another, thus, the reasons of the first-instance court that the respondent lost the right to file a request for restoring the land to the previous condition and its surrender to possession cannot be accepted,;
- that the above-stated would mean that the plaintiffs as owners had the right to request the respondent as possessor to surrender the land in question to their possession, but that, nevertheless, the first-instance court correctly decided when it rejected the primary request, because, in the opinion of the Supreme Court, Article 8 of the ECHR may apply here;
- that, namely, in the case at hand, the respondent had built a residential building, intending to use it as a dwelling for his family, and used it in that way in the period from 2001 to 2009, and that the mentioned building was the respondent's home within the meaning of the above-cited provision of the Convention, where according to the ECtHR case-law, the question of classification of whether a structure is a home within the meaning of Article 8 of the ECHR "is a matter of fact independent of the question of the lawfulness of the occupation under domestic law" (Yordanova and others v. Bulgaria, no. 25446/06, § 103, ECtHR, 24 April 2012);
- that the Supreme Court, proceeding on the views of the ECtHR, while taking into consideration the value of the constructed object, the value of the built-up land, the financial situation of the respondent, the fact that the restoration to the previous condition would require demolition of the building, and that the authorities had tolerated illegal construction of the building from 1997 to 2001, when the building was completed, and after that, until 2009, when the land was returned to the plaintiffs in the procedure for restitution of property rights and indemnification, held that demolition of the residential building in question would constitute a violation of the respondent's right to a home;
- that, on the other hand, by stating the conditional claim, in addition to the primary claim, the plaintiffs made the choice and accepted that, if the court rejected the main claim, the court would deliberate and decide on the claim requesting payment of the market value of the land;
- that the Supreme Court is of the view that the plaintiffs are entitled to be paid the value of the land when the return of the land to possession is not possible, or is not justified for other reasons; that it followed from the above that the second-instance court wrongly concluded that there was no substantive law relationship between the respondent and the plaintiffs as the plaintiffs were not owners of the land at the time of construction; that, on the contrary, the respondent is a participant in the substantive law relationship which gave rise to the dispute in question, since the plaintiffs as legal owners of the disputed land whom the respondent, by illegally constructed building, deprived of the right to exercise actual dominion over that land and to dispose with it and thus, contrary to the law, deprived of the ownership rights, since such land occupation can be paralleled to its seizure, which is why they are entitled to compensation in the amount of market value, which they can only receive from the respondent;

- that due to misapplication of the substantive law (that the respondent was not in a substantive law relationship with the plaintiffs), the second-instance court did not assess the allegations of decisive importance stated in the appeal (the appeal challenged, apart from the legal basis, correctness of determination of the amount of compensation), the conditions had not been met for this court to reverse the contested judgment, hence, the second-instance judgment was repealed;

- that, in the repeated proceedings, the second-instance court will take a new decision on the respondent's appeal taking into consideration the remarks made in the ruling of the revision court.

16.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this legal matter, the Constitutional Court repealed the ruling of the Supreme Court, by which that court dismissed the application for revision as it found that, in that particular case, the application for revision was inadmissible, and that the Supreme Court incorrectly determined the value of the subject-matter of the dispute, for failing to take into account the provision of Article 33 paragraph 1 of the LCP, which stipulates that if one complaint against the same respondent includes several claims based on the same factual and legal basis the value shall be determined according to the sum of values of all claims, and the fact that the plaintiffs have indicated in the complaint that the value of the dispute amounted to € 11,270.00, that the case concerned a potential joinder of the claims of the same co-litigants in which case the court deliberates and decides on a conditional claim if the primary claim is unfounded, and that the primary claim was non-pecuniary, and that the plaintiffs indicated in the complaint that the value of the dispute amounted to more than € 10,000.00, which exceeded the relevant value for assessing the admissibility of the application for revision. Due to incorrectly determined value of the subject-matter of the dispute, the Constitutional Court has held that, in this particular case, there has been a violation of the plaintiffs' right of access to the Supreme Court, and, consequently, also violation of the right to a fair trial set out in the provision of Article 32 of the CM and Article 6 § 1 of the ECHR.

Complying with the provision of Article 77 paragraph 2 of the LCC, the Supreme Court found in the repeated proceedings that the application for revision was not only admissible but also well-founded and, thus, it repealed the second-instance judgment and sent the case back to the second-instance court for repeated proceedings.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around three years and six months, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted around two months.

17. Decision of the Constitutional Court UŽ. III br. 897/15 of 15 November 2017

- Judgment of the Supreme Court Rev. br. 489/15 of 24 June 2015
- Judgment of the Supreme Court UŽ. Rev. 24/17 of 18 January 2018

17.1. General overview of the case

In this legal matter, between the plaintiffs who are natural persons and the respondent State of Montenegro (the Ministry of Defence), for compensation for non-pecuniary damage, the first-instance court granted the plaintiffs' claim and ordered the respondent to pay each of the plaintiffs a

respective amount. The second-instance court rejected the respondent's appeal and upheld the first-instance judgment.

By its Judgment Rev. br. 489/15 of 24 June 2015, the Supreme Court partially accepted the respondent's application for revision and reversed the judgments of the lower courts by rejecting as unfounded the claim that the respondent pay € 5,000 to the first plaintiff (in addition to € 15,000) and € 5,000 to the second plaintiff (in addition to € 10,000).

Deciding on the plaintiffs' constitutional complaint, by the Decision Už. III br. 897/15 of 15 November 2017, the Constitutional Court of Montenegro accepted the complaint and repealed the mentioned judgment of the Supreme Court and sent the case back to that court for a retrial, having found that:

- the distinctiveness of the legal position taken in the reversing revision decision is reflected in the fact that the reasons for this type of judgment must clearly and unambiguously indicate what the wrong assessment of the second-instance court with regard to the disputed legal issue was, the aim of which is to inform the party to the proceedings and to clarify to that party the reasons for which the second-instance judgment is being reversed to the detriment of that party;

- the Constitutional Court, starting from such state of affairs, determined the obligation of the Supreme Court to repeat the procedure in relation to the applicants of the constitutional complaint in order to ensure the legal certainty of the objective legal order of Montenegro and to secure the consistency of its case-law ("visibility of justice").

Having assumed that the Constitutional Court based the grounds for accepting the constitutional complaint, according to reasoning of its decision, on the violation of the right to legal certainty and the right to a reasoned judicial decision enshrined in Article 32 of the CM and Article 6 § 1 of the ECHR with regard to the right to a fair trial, while respecting the legal reasons set out in that decision, the Supreme Court examined the contested judgment, in the retrial, within the limits of the application for revision that was filed, having due regard *ex officio* to the application of the substantive law and substantial violation of provisions of the civil procedure it takes account of, within the meaning of Article 401 of the LCP, and, thus, found that the respondent's application for revision was unfounded, for which reason it rejected it.

The Supreme Court based its new decision on the findings that:

- contrary to the allegations referred to in the application for revision, the second-instance court, in accordance with Article 389 paragraph 1 of the LCP, in the contested judgment, assessed all allegations of the respondent's appeal that were of decisive importance and provided full and correct reasons therefor which were in line with the operative part of the judgment, thus, there was no substantial violation of provisions of the civil procedure referred to in Article 367 paragraph 2 item 15 of the LCP;

- the application for revision unjustifiably challenges proper application of the substantive law;

- given that it has been established undoubtedly that while discharging his regular tasks and work duties – a training flight by a helicopter owned by the respondent, on 2 September 2011, the plaintiffs' son and brother lost his life, while according to the report of the expert team of the French company "Eurocopter" the accident was not the result of a mistake by the crew in any kind of threat to flight safety, the lower courts concluded correctly that there was liability on the part of the respondent in accordance with the provision of Article 169 in conjunction with Articles 167 and 168 and Article 208 paragraphs 1 and 2 of the LO 08;

- the courts, when assessing the amount of non-pecuniary damage, took into account all circumstances of the case referred to in Article 207 of the LO 08 on which the amount of compensation depends, and in particular the intensity and duration of psychological pain and suffering that the plaintiffs, as injured parties, in view of the degree of kinship, have suffered due to the death of their son and brother, respectively, and at the discretion of the judge within the meaning of Article 220 of the LCP, correctly awarded the amounts stated in the operative part of the first-instance judgment. The amounts awarded constitute an adequate satisfaction for the plaintiffs' suffering due to the death of a close person in accordance with the case-law in the case with

identical facts (Judgment of the Supreme Court of Montenegro Rev. br. 640/15 of 9 June 2015 rendered concerning the same helicopter accident);

- the lower courts provided full and correct reasons for their decisions, which covered also the relevant allegations made in the application for revision, and the Court accepted those reasons and referred the applicant to those reasons;

- thus, the allegations made in the application for revision that the amount of compensation for damages was excessive were unfounded.

17.2. Summary of the decision of the Constitutional Court and decisions of the Supreme Court

In this legal matter, the Constitutional Court accepted the constitutional complaint and repealed the judgment of the Supreme Court and sent the case back to that court for a retrial, having found that the judgment did not meet the requirement that the reasons in such type of judgment must clearly and unambiguously indicate what the wrong assessment of the second-instance court with regard to the disputed legal issue was, the aim of which is to inform the party to the proceedings and to be clear to that party for which reason the second-instance judgment is being reversed to the detriment of that party, and having determined the obligation of the Supreme Court to repeat the procedure in relation to the applicants of the constitutional complaint in order to ensure the legal certainty of the objective legal order of Montenegro and to secure the consistency of its case-law (“visibility of justice”). The Constitutional Court actually repealed the judgment of the Supreme Court because it considered that the right to legal certainty and the right to a reasoned judicial decision enshrined in Article 32 of the CM and Article 6 § 1 of the ECHR with regard to the right to a fair trial was violated in the revision proceedings.

Complying with the legal reasons set out in the decision of the Constitutional Court, the Supreme Court examined the contested judgment, in the retrial, within the limits of the application for revision that was filed, having due regard *ex officio* to the application of the substantive law and substantial violation of provisions of the civil procedure it takes account of, within the meaning of Article 401 of the LCP, and found that the respondent’s application for revision was unfounded, for which reason it rejected it.

In this legal matter, the proceedings on the constitutional complaint lasted (counting approximately according to the dates indicated on the discussed decisions as the dates of their adoption and taking into account the time needed for drafting and service of those decisions, and the deadlines for filing appropriate legal remedies) around two years and three months, while the proceedings before the Supreme Court after the adoption of the repealing decision of the Constitutional Court lasted less than two months.

IV. FINAL FINDINGS AND OBSERVATIONS

1. Introduction

Based on the analysed decisions, one may conclude that in the vast majority of cases the Constitutional Court repealed the decisions of the Supreme Court referring to violations of the provision of Article 32 of the CM and/or Article 6 § 1 of the ECHR. Moreover, most of those cases concerned the right to a fair trial enshrined in the above-cited provisions, while one case only concerned the right to an impartial court. In some cases, the Constitutional Court found the reason for repeal in violation of property rights (Article 58 of the CM, Article 1 of Protocol No. 1 to the ECHR).

As for the right to a fair trial, the majority of the repealing decisions takes as a reason the violation of the right to a reasoned decision, which is often associated with an arbitrary trial. The reason for the adoption of some of those decisions is a violation of the right of a free access to court.

The final findings regarding certain types of violations based on which the Constitutional Court repealed the decisions of the Supreme Court will be specifically presented below, including the suggestions of possible manner to overcome some of the problems that have occurred in practice. Finally, a short overview will be presented regarding application in practice of the provisions of Article 74 of the LCC on the persons to be informed of the proceedings on the constitutional complaint and the provisions of Article 77 paragraph 2 of the LCC on the obligation to respect the decisions of the Constitutional Court. In the end, we will make an attempt to give some closing observations.

2. Violation of the right to a fair trial

2.1. Violation of the right to a reasoned decision

In a large majority of legal matters discussed in this analysis, the Constitutional Court repealed the judgments of the Supreme Court for violation of the right to a fair trial or, more specifically, the right to adequate reasoning.

In that regard, the Constitutional Court pointed out in the statements of reasons for its repealing decisions that there had been a violation of the provisions of Article 32 of the CM and Article 6 § 1 of the ECHR:

- since the courts acted arbitrarily in the application of the relevant positive legislation and since the human rights and freedoms guaranteed by the Constitution were violated, and also the decision-making of the courts in the particular case was based on excessive formalism with respect to the interpretation and application of the applicable procedural law, which must not result from arbitrary and indiscriminate application thereof. According to the Constitutional Court's decision, the Supreme Court substantially revised its concept of the dispute in terms of substantive law, however, it repealed the decisions of lower courts because the facts had not been properly established due to misapplication of the substantive law (see *supra* under III.6);

- because the Court found that in the case at hand the arbitrary application of Article 28 paragraph 4 of the LFPR led to the violation of the rights of the applicant submitting the constitutional complaint (who was the plaintiff in the proceedings before the ordinary courts) to a fair trial guaranteed by Article 32 of the Constitution of Montenegro and Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and that the violation of the right to a fair trial was also caused by the failure of the court to provide reasons for its decision as "in a situation where in the appeal proceedings a higher court, by its decision, reverses the decision of a lower court, there is a stronger obligation of the higher court to provide more detailed, clearer

and more precise reasons for its decision". In line with the Constitutional Court's decision, the Supreme Court corrected its interpretation of the relevant legal provisions set out in the repealed decision and it provided substantially different reasons for the new decision by which it rejected the application for revision as unfounded (see *supra* under III.8);

- because in this case the applicant's right to a fair trial was violated as the arbitrary and indiscriminate application of the substantive law affected adversely that right guaranteed by the Constitution, but also by the fact that the courts engaged an expert team of court expert witnesses, in which a person who was not listed in the list of court expert witnesses participated as a member of the team in issuing findings and opinion, thus calling into question the legal validity of the findings and opinion given by the expert team in the proceedings before the ordinary courts and also because the Supreme Court, in the reasoning of the challenged judgment, did not respond to the allegations made in the application for revision as to whether the members of the expert team were authorised to participate in the dispute in question and whether one of the members of the expert team was listed in the list of permanent court experts. The Supreme Court, complying with the mentioned decision of the Constitutional Court and the reasons stated therein for repealing its decision, repealed the decisions of the lower courts and remanded the case to the first-instance court for a retrial in order to rectify in that trial the defects indicated by the Constitutional Court. However, in that decision, the Supreme Court stated the reasons on the grounds of which it considered that the views taken by the Constitutional Court in its decision were not rules, i.e. that there was no reason to repeal the decision of the Supreme Court. It seems that difference in the views of the Constitutional Court and the Supreme Court concerns, essentially, the admissibility of a person who was not listed in the list of permanent court experts to participate in the team of experts or in general as an expert witness in the proceedings. As regards these differences in views, it will be sufficient to note that the Constitutional Court limited itself to providing general statements in the reasoning of its decision, while the Supreme Court factually and legally endeavoured to present arguments for its different understanding of the case (see *supra* under III.11);

- since the right of the applicants (who were respondents in the first-instance proceedings) to a fair trial guaranteed by the provision of Article 32 of the CM and Article 6 § 1 of the ECHR was violated by the contested judgment of the Supreme Court as the contested judgment was not based on an interpretation acceptable from the aspect of the constitutional law and the application of the relevant substantive law to the facts established in the court proceedings. On the other hand, the Supreme Court, in its new judgment which again accepted the application for revision and reversed decisions of lower courts, made an effort to present the arguments on the grounds of which it had made such decision, debating with the view of the Constitutional Court and not paying particular attention to the provision of Article 77 paragraph 2 of the LCC according to which it was obliged to respect the legal reasoning of that court in the repeated proceedings (see *supra* under III.12);

- since the contested decision of the Supreme Court had violated the right of the applicants (respondents in the first-instance proceedings) to a reasoned judicial decision as part of the right to a fair trial, as the contested judgment did not provide sufficient and relevant reasons that guided the court when making its decision, which is related to the position of this court expressed in the earlier reversing decision, violating thereby the provisions of Article 32 of the CM and Article 6 § 1 of the ECHR. On the other hand, in its new judgment which again accepted the application for revision and reversed decisions of lower courts, the Supreme Court made an effort to present the arguments on the grounds of which it had made such decision, debating with the view of the Constitutional Court, while referring to the case-law of the ECtHR and not paying particular attention to the provision of Article 77 paragraph 2 of the LCC according to which it was obliged to respect the legal reasoning of that court in the repeated proceedings (see *supra* under III.13);

- since the Constitutional Court held that the repealed judgment did not meet the requirement that the reasons in such type of judgment must clearly and unambiguously indicate what the wrong assessment of the second-instance court with regard to the disputed legal issue was with a view to informing the party to the proceedings and making clear to that party for which reasons the second-instance judgment was being reversed to the detriment of that party, having

determined also the obligation of the Supreme Court to repeat the procedure in relation to the applicants who submitted the constitutional complaint in order to ensure legal certainty of the objective legal order of Montenegro and to secure the consistency of its case-law (“visibility of justice”). The Constitutional Court actually repealed the judgment of the Supreme Court because it considered that the right to legal certainty and the right to a reasoned judicial decision enshrined in Article 32 of the CM and Article 6 § 1 of the ECHR concerning the right to a fair trial was violated in the revision proceedings (see *supra* under III.17).

2.2. Violation of the right of access to the Supreme Court (right to a revision)

In the two cases discussed, the question of the right to access to the Supreme Court was raised as an aspect of the right to a fair trial in relation to the value criterion for the admissibility of the application for revision.

In one of those cases (Ruling of the Supreme Court Rev. br. 1/17 of 5 July 2017, Decision of the Constitutional Court Už-III br. 385/13 of 6 March 2017, Ruling of the Supreme Court Rev. br. 156/13 of 13 March 2013; see *supra* under III.3), the Constitutional Court took the view that in a dispute in which the claim concerned a monetary amount the value of which was below the threshold for the admissibility of the application for revision, the circumstance that the first-instance court, in a separate ruling, determined that the value of the subject-matter of the dispute was twice higher and above such threshold made a sufficient basis for the party to have legitimate expectation of a revision. The Supreme Court, however, found that incorrect decision of the first-instance court determining the value of the subject-matter of the dispute that the first-instance court was not authorised to adopt, as in the dispute in question the value was to be determined by the monetary amount whose payment had been sought, was without prejudice to its right to evaluate whether the preconditions for the revision are met *in concreto*.

In the other legal matter, the Constitutional Court repealed the ruling of the Supreme Court by which that court dismissed the application for revision as it found that, in that particular case, the application for revision was admissible and that the Supreme Court incorrectly determined the value of the subject-matter of the dispute because it failed to take into account the provision of Article 33 paragraph 1 of the LCP which stipulates that if one lawsuit against the same respondent includes several claims based on the same factual and legal basis the value shall be determined according to the sum of values of all claims, and the facts that the plaintiffs had indicated in the complaint that the value of the dispute amounted to € 11,270.00, that the case involved a potential joinder of the claims of the same co-litigants in which case the court deliberates and decides on a conditional claim if the primary claim is unfounded, that the primary claim was non-pecuniary and that the plaintiffs indicated in the lawsuit that the value of the dispute amounted to more than € 10,000.00 exceeding thus the relevant value for assessing the admissibility of revision. Due to incorrectly determined value of the subject-matter of the dispute, the Constitutional Court considers that, in this particular case, there has been a violation of the plaintiffs’ right of access to the Supreme Court, and, consequently, violation of the right to a fair trial set out in the provision of Article 32 of the CM and Article 6 § 1 of the ECHR. Complying with the provision of Article 77 paragraph 2 of the LCC, the Supreme Court found in the repeated proceedings that the application for revision was not only admissible but also well-founded and, thus, it repealed the second-instance judgment and sent the case back to the second-instance court for repeated proceedings. (See *supra* under III.16.)

2.3. Concluding remarks on the violation of the right to a fair trial

In the cases in which the Constitutional Court sanctioned decisions of the lower courts, referring to a violation of the right to a fair trial or, more specifically, the right to a reasoned decision, the following questions, *inter alia*, could be raised:

- Whether in such cases it is sufficient that the Constitutional Court refer generally to the provisions of Article 32 of the CM and Article 6 § 1 of the ECHR, using appropriate standardised

formulas, or its decision should be specified in the way that it can be identified explicitly in that decision what the failures in the reasoning relate to? For instance, where there are differing views of the first-instance court and of higher courts with regard to determination of the facts, should the decision of the Constitutional Court specify and clearly state why are the views of the higher courts considered to be insufficiently reasoned?

- To what extent does the Constitutional Court need to specify its view that the results obtained in determination of certain facts by applying unfettered evaluation of evidence have not been supported by specific and convincing reasons, which can be considered to amount to an arbitrary trial? In any event, the specified assessment of the Constitutional Court with regard to the determination of the facts by the courts and clearly stated reasons why it may be considered that the determination of a certain fact or taking of some other view has not been sufficiently reasoned can constitute the casuistic basis for the development and stabilisation of the practice of not only the courts but also of the Constitutional Court.

- Whether the right to a fair trial, which includes the right to a reasoned decision where such reasoning will contain relevant and sufficient reasons for the assessments made in the decision, as defence against arbitrary decision-making by the courts, imposes certain duties on the Constitutional Court: the duty to give relevant and sufficient reasons for the assessment that the repealed court decision does not contain sufficient reasoning, that its decision must not give the impression of arbitrary decision-making which will be cloaked in a form of general and insufficiently precise wording. The question is to what extent elaborated and specific reasoning of the decisions of the Constitutional Court should enable, on the one hand, the courts to rectify, in repeated proceedings, the defects indicated in the decisions of the Constitutional Court, and, on the other hand, forming of a casuistically developed case-law that should be taken into account not only by the courts during the trial in individual cases but also by the Constitutional Court itself when deciding on a constitutional complaint? The standards for trials and reasoning of court decisions and decisions of the Constitutional Court developed in practice could certainly have a decisive role in bringing additional level of legal certainty in the provision of judicial protection and would significantly contribute to reducing the number of repealing decisions and have a deterrent effect on the attempts to use the institute of constitutional complaint superfluously. Thus, those standards would also have positive effects on the general social and economic climate in the country.

- Whether and to what extent it is necessary that the views of the Constitutional Court on the legitimate expectations specifically determine which general and which specific preconditions should be fulfilled to be able to assess whether, in the particular case, such expectation exists and, in particular, whether the parties can have such expectations on the basis of incorrect decisions of the lower courts.

- Whether, in principle, any application of the substantive law, even if *in concreto* it does not concern a "substantive" right guaranteed by the Constitution or the ECHR, may be sanctioned as a violation of the right to a fair trial if it is found to be an arbitrary or discriminatory application of that right, for instance in the case when the Constitutional Court finds, upon a constitutional complaint, that the courts interpreted certain legal provisions in a manner that does not correspond to the interpretation of that Court. It is precisely in relation to this issue that a particularly important question arises regarding the substance and scope of the powers assigned to the Constitutional Court by the LCC in the proceedings on a constitutional complaint and, in that connection, the extent to which it may and should use those powers in practice. The answer to this question is related to the answer to the question on the extent to which the Constitutional Court may and should take over the role of the highest judicial instance, namely, whether it should (factually and legally) act as a court of fourth instance, e.g. in contentious cases. This answer will also largely depend on the quality of scrutinised decisions, on the assessment by the Constitutional Court on whether its extended intervention is required in order to achieve correct and uniform application of the law in individual cases. In any case, the standards developed by the ECtHR could be useful here. In a number of its decisions by which it rejected the constitutional complaint, the Constitutional Court emphasized that it was not a court of fourth instance and that it was not its task to check every instance of application

of the substantive law, but only those violations of that law that may constitute violation of human rights and fundamental freedoms guaranteed by the Constitution and the ECHR.

It could be noted that certain generality, brevity and even reduction of the statement of reasons for the adoption of the revising decisions and also of the decisions of the Constitutional Court, especially in cases that would require proper legal studies, would not fulfil the tasks whose fulfilment might be expected of them. The Constitutional Court should be able, as shown by some comparative experiences, to request drafting of relevant expert studies and it should have necessary funds available for that purpose. Such funds would actually be insignificant when compared to the increase in the general level of quality of the protection provided by the Constitutional Court and legal certainty that would be thus achieved. Such funds would also be exceptionally important for the promotion of an authority of the Constitutional Court in relation to the Supreme Court and other courts.

3. Violation of the right to an impartial judge

In this legal matter, the Constitutional Court repealed the Supreme Court's judgment for violating the party's right to a trial before an impartial tribunal referred to in Article 6 § 2 of the ECHR (Article 32 of the CM) because the judge who had participated in the proceedings before the lower court participated also in the proceedings before the revision court. It is interesting that in this case, in the retrial, the Supreme Court found that the application for revision, which had been rejected by its previous repealed decision, was well-founded and repealed the decisions of the lower courts and remanded the case to the first-instance court for a retrial. (See *supra* under III.10.)

4. Violation of the property right guaranteed by the Constitution and the ECHR

As to the decisions that were discussed in this analysis, it seems that the decisions of the Supreme Court and of the Constitutional Court relating to the joint property of spouses, consisting of immovable property, where only one of the spouses was registered in the cadastre, are particularly important. In four different legal cases, the Supreme Court took different legal views following the repealing decisions of the Constitutional Court. In three cases it did not accept the legal reasons from the repealing decisions of the Constitutional Court, and in one case it did.

In the first legal matter (Decision of the Constitutional Court Už-III br. 50/14 of 31 March 2017, Judgment of the Supreme Court Rev. br. 1046/13 of 12 November 2013, Judgment of the Supreme Court Rev. br. 12/17 of 8 November 2017, see *supra* under III.2), the Supreme Court took the view that a spouse who was not registered in the cadastre as an owner or who did not at least obtain annotation in the real estate cadastre on the joint ownership of the property does not act conscientiously, that the third parties (including the banks) are entitled to invoke the principle of reliability of public registers and that the spouse who is not registered cannot request determination of nullity of the contract by which the registered spouse created mortgage on the immovable property and that the registered mortgage was valid. This position was complemented by a view on tacit consent to disposal, that is, on the presumed knowledge and the presumed consent of the unregistered spouse to encumbering the immovable property with a mortgage. In the repealing decision, in the conclusion, the Constitutional Court made a stance that "as long as the final judgment does not provide sufficient and relevant reasons that guided the court when making its decision which could lead us to believe that the court really examined the case and responded to all substantive allegations of the parties, it cannot be considered that such judgment meets the general requirements arising from the right to a fair trial guaranteed by the Constitution and the Convention". In the repeated proceedings, the Supreme Court did not accept the position taken by the Constitutional Court in its repealing decision and made the same adjudication as in the previous decision which had been repealed by the Constitutional Court, however, it provided additional arguments for the legal position it took: it invoked, *inter alia*, the principle of reliability of public records.

In the second legal case (Judgment of the Supreme Court Rev. br. 683/14 of 2 December 2014; Decision of the Constitutional Court Už. III br. 237/15 of 14 February 2017; Judgment of the Supreme Court Už. Rev. br. 8/17 of 7 November 2017, see *supra* under III.7), the Constitutional Court repealed the first judgment rendered by the Supreme Court as a revision court for violation of the provisions of Article 32 of the CM and Article 6 § 1 of the ECHR (arbitrary acting of courts in the application of the relevant positive legislation and insufficient reasoning), and the right to peaceful enjoyment of possessions guaranteed by the Constitution of Montenegro and Protocol No. 1 to the ECHR. Following the Constitutional Court's decision, the Supreme Court substantially revised its concept of the dispute in terms of substantive law, however, it repealed the decisions of lower courts because the facts had not been properly established due to misapplication of the substantive law.

In the third case (Judgment of the Supreme Court Rev. br. 770/17 of 26 February 2015; Decision of the Constitutional Court Už. III br. 539/15 of 9 May 2017; Judgment of the Supreme Court Už. Rev. br. 14/17 of 21 November 2017, see *supra* under III.9), the Constitutional Court repealed the first judgment rendered by the Supreme Court on the application for revision, for violation of the provisions of Article 32 of the CM and Article 6 § 1 of the ECHR (arbitrary acting of courts in the application of the relevant positive legislation and insufficient reasoning) and the right to peaceful enjoyment of possessions guaranteed by the Constitution and Protocol No. 1 to the Convention. Following the Constitutional Court's decision, the Supreme Court reversed the judgment of the second-instance court as it held, proceeding on the facts established during the proceedings, that it was based on misapplication of the substantive law for which it stated the reasons in its new judgment.

In the fourth case (Judgment of the Supreme Court Rev. br. 8/15 of 29 January 2015, Decision of the Constitutional Court Už-III br. 175/15 of 26 May 2017; Judgment of the Supreme Court Už. Rev. br. 20/17 of 24 October 2017, see *supra* under III.14), the Constitutional Court accepted the constitutional complaint of the applicant (plaintiff in the first-instance proceedings) and repealed the Judgment of the Supreme Court Rev. br. 8/15 of 29 January 2015 on the grounds that the repealed judgment did not contain clear and sufficient reasons that led the Supreme Court to decide to uphold the second-instance judgment in the part by which it was decided that the mortgage agreement in question was a valid legal transaction, while taking into account the statement of the plaintiff's husband who confirmed the plaintiff's allegations that she had not been aware of the mortgage agreement and had not given any consent to conclude the agreement, and that when the agreement was concluded the respondent bank did not obtain from the first respondent's wife (the plaintiff) evidence of her consent to create mortgage on the joint property. Such position of the Constitutional Court should be linked to its view that the reasoning for the contested judgment of the Supreme Court is not acceptable from the aspect of the constitutional law in the part stating that the plaintiff was to bear the burden of proof that she had not been aware of and had not given oral or tacit consent to the conclusion of mortgage agreement. On the other hand, the Supreme Court, in its new judgment which again rejected the application for revision, made an effort to present the arguments on the grounds of which it had made such decision, stating the reasons why it did not accept the legal view of the Constitutional Court while it did not pay particular attention to the provision of Article 77 paragraph 2 of the LCC according to which it was obliged to respect the legal reasoning of that court in the repeated proceedings.

The problem addressed in the above-mentioned four legal matters and which appears to be very present in relation to the joint property of the spouses concerning immovable property registered in the cadastre only in the name of one of the spouses, which is shown also by what appear to be directly contradictory views of the Constitutional Court and of the Supreme Court, should be overcome either by bringing in line the views of those courts, perhaps at some joint expert meetings, by commissioning joint expert studies etc. or by amending laws that would for instance undoubtedly solve the question as to whether the principle of reliability of public records is applicable or not in the case of joint property. Such amendments should also provide for a transitional regime and specify a period within which unregistered spouses would be obliged to

register their rights to the joint immovable property which is registered only in the name of the other spouse, where upon the expiry of that period, the principle of reliability of public records would apply. The principle of reliability would apply to new entries in the real estate cadastre. All this, of course, is appropriate unless a view is taken that the principle of reliability is already applicable *de lege lata*.

The Constitutional Court could use its powers as a court of the so-called *abstract control of constitutionality and legality* and request the legislator to regulate by a law the legal issue that raises the above-mentioned controversies in practice and actually calls into question legal certainty.

It should be constantly reiterated that the problem discussed is exceptionally important, on the one hand, from the aspect of legal certainty, facilitation and reducing the cost of legal transactions, credit activities and, ultimately, economic development, and, on the other hand, from the aspect of protection of the rights of an unregistered spouse whose position is also to a large extent dependent on the remnants of the patriarchal tradition.

Regarding the discussed position of the Constitutional Court, the question can also be raised as to the extent to which this court should control the correctness of the determination of the facts and the application of the substantive law (when that does not concern the so-called substantive law rights and freedoms guaranteed by the Constitution) in certain cases, namely, if the reasoning should be such that, according to the criteria of the Constitutional Court, it is considered to be complete and satisfactory in factual and legal terms, or it can be considered that a trial is arbitrary only when the reasoning has flaws that reasonably support such a conclusion. In this regard, a question arises as to whether the Supreme Court should reproduce in the entirety everything that the lower courts already addressed or it is sufficient to note what has been established beyond doubt in the proceedings conducted before the lower courts.

5. Application of provisions of Article 74 of the LCC on informing certain authorities and/or persons about the constitutional complaint

According to Article 74 of the LCC, the constitutional complaint shall be transmitted, in addition to the participants in the proceedings that are actually the bodies and persons whose decision is challenged by that complaint (Article 70 of the LCC, see *supra* under II.3, 4), to other persons whose rights or obligations would be directly affected by a decision of the Constitutional Court accepting a constitutional complaint and those persons have the right to declare on the constitutional complaint within the period of time determined by the Constitutional Court.

In the reviewed decisions of the Constitutional Court there is no information as to whether the constitutional complaints were transmitted to those other persons for the purpose of declaring on the constitutional complaint, which would include e.g. the adverse party from the civil contentious proceedings in which the decision of the Supreme Court contested by the constitutional complaint was rendered. It is regularly noted in those decisions that the constitutional complaint was transmitted to the participants in the proceedings, i.e. to the body or person who adopted the contested decision, but not to those other persons.

If the above remarks correspond to the actual state of affairs, it should be expected that the existing practice will change. Otherwise, one could raise an objection that the very body obliged to protect the right to a fair trial guaranteed by the Constitution and the Convention violates itself that right in the proceedings on a constitutional complaint. Such practice is also in direct contravention of the cited provision of Article 74 of the LCC.

6. On the legal force of the repealing decisions of the Constitutional Court

According to Article 77 paragraph 2 of the LCC, the competent authority to which the case was sent back for a retrial shall respect the legal reasoning of the Constitutional Court stated in the decision and shall decide in the repeated proceedings within a reasonable time. The problem concerning the meaning of the above provision is raised both on a theoretical level and on a practical

level. This problem is caused by the fact that, in some cases, in the retrial, the Supreme Court ruled the same as in the repealed decision, not accepting actually the legal reasons from the decision of the Constitutional Court which repealed its previous decision and providing new reasoning or supplementing the reasons it had stated in that decision.

The problem is essentially a dilemma whether the provision of Article 77 paragraph 2 of the LCC means that the body to whom the case was sent back for a retrial is bound by the legal view expressed in the repealing decision of the Constitutional Court in the sense that it must decide in the repeated proceedings in accordance with those reasons or it only means that these reasons must be taken into account when making decision in the repeated proceedings but that it does not have to base its decision on those reasons, while providing the reasons why it did not accept that view.

The identified problem and its possible solutions should be linked to the meaning of Article 118 paragraph 2 of the CM, according to which the court shall rule on the basis of the Constitution, laws and ratified and published international agreements. Namely, in respect of this provision, a question can be also raised whether it means that the court cannot be bound by a decision of the Constitutional Court in the sense that it is obliged to apply a legal view stated in that decision because a decision of the Constitutional Court is not listed among the sources of law on the basis of which the courts shall rule, or, perhaps, it should be understood in the sense that the court must apply the Constitution and laws in accordance with the meaning accorded to them by the Constitutional Court in decisions rendered on the constitutional complaint, namely, that it is obliged to rule on the basis of the Constitution and laws in the manner as interpreted by the Constitutional Court.

It can be concluded from a number of decisions of the Supreme Court that this court chose the solution for the identified problems according to which it is obliged to take into account in the repeated proceedings the legal reasons stated in the repealing decision of the Constitutional Court but that it is not bound by them, whereas in the cases in which it would depart from those reasons, it would be obliged to make valid arguments therefor. On the other hand, the obligation to comply with the legal reasons stated by the Constitutional Court is supported especially by the provisions of the CM and the LCC stipulating the power of that court to perform abstract control of constitutionality and legality, but also by the fact that under a constitutional complaint it provides protection for the rights and freedoms guaranteed by the Constitution and the ECHR that have been violated. The provisions of Article 151 of the CM which stipulates that, *inter alia*, the decision of the Constitutional Court is published and that it is binding and enforceable (paragraphs 2 and 3) should also be added to the provisions discussed above.

Strictly according to the LCC, the question of the courts “being bound” by the legal reasons stated in a repealing decision of the Constitutional Court is raised only with regard to the legal matter in which the repealed and repealing decisions were adopted. Legal reasons from the repealing decision of the Constitutional Court could have effect in other cases as well, by the authority of their substance and by the authority of the court that adopted the decision and the general need to ensure uniform application of the law and legal certainty and, thus, the rule of law. These reasons do not have the legal force of formal precedents.

The problem of the courts “being bound” by the repealing decisions of the Constitutional Court gets its special meaning in view of the fact that the Constitutional Court has only cassation powers under the constitutional complaint, that it cannot reverse the contested decision but only repeal it. Therefore, *de lege ferenda*, solutions that would prevent or overcome “blockades” that could occur if the Supreme Court maintained its views which would not coincide with the views of the Constitutional Court should be considered. The approach to finding these solutions should be free from “rivalry” of certain decision-making actors and should take into account that the ultimate goal of the administration of justice is correct and uniform application of the law in the proceedings conducted in a fair manner, so that the “misunderstanding” between judicial instances does not affect those for whom the courts, including the Constitutional Court, exist, i.e. the legal subjects.

In a series of decisions, the Supreme Court showed explicit willingness to follow, in accordance with the provision of Article 77 paragraph 2 of the LCC, in the repeated proceedings, the

legal reasoning stated in the repealing decision of the Constitutional Court (e.g. Ruling of the Supreme Court Už. Rev. br. 22/17 of 13 February 2018, see *supra* under 16; Judgment of the Supreme Court Už. Rev. 24/17 of 18 January 2018, see *supra* under III.17)

7. Conducting repeated proceedings in a case within a reasonable time

According to the provision of Article 77 paragraph 2 of the LCC, the competent authority to which the case was sent back for a retrial shall respect the legal reasoning of the Constitutional Court stated in the decision and shall decide in the repeated proceedings within a reasonable time.

Based on the analysis of the decisions covered by this report, it can be concluded that the Supreme Court decided in the repeated proceedings relatively quickly, in some cases practically immediately – within two to six or seven months. On the other hand, the Constitutional Court took more time, around two years on average, to decide on a constitutional complaint, which should be explained by the number of cases pending before that court, but also by more complex nature of the proceedings conducted before the Constitutional Court. As for the proceedings before the courts, a comparative analysis of the length of the proceedings before those courts and before the Constitutional Court should also take into account the time it took the Supreme Court to render the decision on revision which was contested by the constitutional complaint.

8. Concluding observations

In a number of cases, in its decisions adopted in the repeated proceedings, even when it ruled the same as in repealed decisions or even when it did not accept the legal reasoning stated in the repealing decisions, induced by those decisions, the Supreme Court provided additional reasons for such decisions which can be considered to contribute to the general improvement of the content of judicial decisions. Taking into account the views of the Constitutional Court regarding the requirements that their decisions should meet to be considered as decisions complying with Article 32 of the CM and/or Article 6 § 1 of the ECHR, it should be expected that the courts, in particular the Supreme Court, will make efforts to substantiate their decisions by more elaborate reasoning. However, the fact that the repealing decisions of the Constitutional Court, especially when referring to violations of various aspects of the right to a fair trial, are sometimes relatively general so that one cannot always conclude with certainty why a decision *in concreto* does not satisfy the requirements which, in the view of the Constitutional Court, arise from the mentioned provisions of the Constitution and the Convention, might be a limiting factor. Developing a more specific casuistry in this regard could play an important role in stabilising the practice and reducing the cases in which the Constitutional Court would need to intervene using its cassation powers, i.e. the power only to repeal the impugned decision on a constitutional complaint found to be well-founded and to send the case back for a retrial.

In practice, some problems might, possibly, be caused by the view of the Constitutional Court that certain cases in which there has been a violation of the substantive law which in itself does not have the meaning of violation of a “substantive” right or freedom stipulated in the constitutional law could be classified as cases in which, according to the assessment of that court, the contested judgment is not based on an interpretation acceptable from the aspect of the constitutional law and on the application of the relevant substantive law to the facts established in the court proceedings (compare, e.g. Decision Už-III br. 491/15 of 29 May 2017, see *supra* under III.12), namely, a violation of the right to a fair trial. In fact, in line with the standards developed in this respect by the ECtHR, efforts should be made to set the limits the Constitutional Court should observe when scrutinising the application of substantive and procedural law or determination of the facts. Providing appropriate reasoning for the decisions of the Constitutional Court could certainly significantly contribute to this. Namely, that court should not become a court of fourth instance, i.e. the highest judicial instance, which the Constitutional Court confirmed in a number of its decisions by which it rejected the constitutional complaint, emphasizing that it was not its role to check if the facts have

been determined correctly, insofar as the failures in the reasoning for the factual premises of judicial decisions cannot qualify as denied reasoning or provided that they do not indicate arbitrariness in adjudication, since if they could thus qualify, it would be a violation of the right to a fair trial for the violation of which the Constitutional Court is obliged to repeal the decision that is contested by a constitutional complaint.