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JUDGMENT OF THE SUPREME COURT *EN BANC*

No. of the case 3-2-1-60-10

Date of judgment 14 April 2011

Composition of court Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu

Court Case An action of Konekesko Eesti AS against Ain Kirsi for receiving 2,746,833 kroons and 44 cents and a penalty for late payment. A counterclaim of Ain Kirs for receiving 2,700,000 kroons.

Contested judgment Tallinn Circuit Court ruling of 31 March 2010 in civil matter no. 2-06-130

Appellant and type of appeal An appeal against a court ruling of Ain Kirsi

Hearing 11 January 2011, written proceeding

DECISION

- 1. To declare § 182(2)3) of the Code of Civil Procedure unconstitutional and invalid in the part it precludes grant of procedural assistance to natural persons for exemption in full or in part from payment of a state fee on an appeal if the proceeding is related to the economic or professional activity of the person requesting procedural assistance and does not concern rights not related to his or her economic or professional activity.**
- 2. To annul the Tallinn Circuit Court ruling of 31 March 2010 in civil matter no. 2-06-130 in the part that the request of Ain Kirsi for procedural assistance for payment of a state fee on an appeal was dismissed. To refer the matter in the annulled part to the same circuit court for a new hearing.**
- 3. To satisfy in part the appeal against a court ruling.**
- 4. To refund AB Järve, Otti ja Partnerid OÜ the security of 400 (four hundred) kroons (25 (twenty-five) euros and 56 cents) paid on 15 April 2010 on the appeal against a court ruling of Ain Kirsi.**

FACTS AND COURSE OF PROCEEDINGS

1. Konekesko Eesti AS (former business name Kesko Agro Eesti AS) (the plaintiff) filed on 3 January 2006 with the Pärnu County Court an action against Ain Kirsi (the defendant) requesting to order from the defendant in favour of the plaintiff 2,209,270 kroons and 97 cents. During the proceeding the plaintiff increased the claim. According to the specification of the claim filed on 10 December 2009, the plaintiff requested to order from the defendant 2,746,833 kroons and 44 cents and a penalty for late payment from 11 December 2009 until the settlement of the claims. The plaintiff claimed under a sales contract concluded between the parties on 17 January 2005 2,664,391 kroons and 84 cents (including principal debt 1,392,594 kroons and 20 cents, contractual penalty 209,189 kroons and 13 cents and penalty for late payment 1,060,608 kroons and 51 cents), under a contract for services concluded on 20 May 2005 33,327 kroons and 40 cents (including principal debt 16,992 kroons, contractual penalty 3,398 kroons and 40 cents and penalty for late payment 12,937 kroons), and under sales invoices issued to the defendant from 12 September 2005 to 19 December 2005 49,114 kroons and 20 cents. The plaintiff also requested to order from the defendant a penalty for late payment, with the daily rate of 0,05% of the principal debt, on the principal debt arising from the sales contract and the contract for services from 11 December 2009 until the settlement of the claims.

2. The defendant filed on 28 August 2007 a counterclaim requesting to order from the plaintiff in favour of himself 2,700,000 kroons for compensation for damage caused to him.

3. The Pärnu County Court satisfied the action by a judgment of 26 January 2010, ordered from the defendant in favour of the plaintiff 2,746,833 kroons and 44 cents and from 11 December 2009 until the settlement of the principal claim arising from the sales contract and the contract for services a penalty for late payment with the daily rate of 0,05% of the principal debt, and dismissed the counterclaim.

4. The defendant filed an appeal against the county court judgment requesting annulment thereof and rendering of a new judgment dismissing the action and satisfying the counterclaim. The defendant requested that he would be granted procedural assistance and that he would be exempted from the obligation to pay a state fee on the appeal.

The circuit court judgment and justifications

5. The Tallinn Circuit Court dismissed by a ruling of 31 March 2010 the defendant's request for procedural assistance and gave him a term for paying a state fee of 220,000 kroons.

6. The circuit court found that the defendant's request for procedural assistance shall be dismissed because

the proceeding is related to the defendant's economic activity. Based on the data from the commercial register, the defendant is a self-employed person whose main area of activity is grain (except rice) farming and legume farming and oil plant seed farming. It appears from the materials of the civil matter that the plaintiff's claim arises from contracts concluded with the defendant by which the plaintiff sold to the defendant various accessories, provided sowing services and gave a loan to the defendant as an entrepreneur and the defendant sold to the plaintiff grain and oil plants. So the parties have an economically uniform legal relationship and the parties have concluded the contracts to achieve a single economic objective. The basis of the defendant's counterclaim are the contracts concluded with the plaintiff, pursuant to which the plaintiff was supposed to guarantee the existence of the necessary equipment for the defendant's activity (a tractor, sale of sowing grain and fertilizer, rental of a combine harvester and construction of a drier) and to purchase the crop. The defendant allegedly caused damage thereby that the plaintiff gave him an inoperative tractor, combine harvester and drier, and failed to eliminate their deficiencies in due course, for which reason the defendant was unable to harvest the crop. Also in the appeal, the defendant confirms that the economic objective of the contracts concluded between the parties was that the defendant produces agricultural products with the help of the plaintiff and transfers the crop to the plaintiff. Thus, the presented material proves that the dispute is related to the defendant's economic activity and does not concern his rights which are not connected to his economic or professional activity. Therefore, grant of procedural assistance pursuant to § 182(2)3) of the Code of Civil Procedure (CCP) is precluded.

Proceeding in the Supreme Court

7. Ain Kirsi filed an appeal against the circuit court ruling requesting to annul the ruling and render a new ruling satisfying the defendant's request for procedural assistance.

8. The defendant found that the circuit court should not have applied § 182(2)3) of the CCP because it is contrary to the European Union law and §§ 12 and 15 of the Constitution of the Republic of Estonia.

9.-10. [Not translated.]

11. Konekesko Eesti AS contested the appeal against a court ruling and requested dismissal thereof.

12.-14. [Not translated.]

15. The Civil Chamber referred the current matter by a ruling of 9 June 2010 for the purposes of unifying and developing the case-law to the full composition of the Civil Chamber who referred the matter by a ruling of 20 October 2010 on the basis of § 19(4)3) and § 690(1) of the CCP and § 3(3) of the Constitutional Review Court Procedure Act (CRCPA) to be reviewed by the Supreme Court *en banc*.

OPINION OF THE CIVIL CHAMBER

16. The Civil Chamber found that the argument about § 182(2)3) of the CCP being in contradiction with the Council Directive 2002/8/EC of 27 January 2003 (the Directive) is unfounded because pursuant to the Directive's Article 1(2), the Directive is applied to cross-border disputes. According to Article 2(1) of the Directive, a cross-border dispute is one where the party applying for legal aid in the context of this Directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced. There is no cross-border dispute for the purposes of the Directive in this matter, and therefore the defendant's request for procedural assistance falls out of the scope of application of the Directive.

17. However, the Chamber found that it is necessary to verify the constitutionality of § 182(2)3) of the CCP.

18.-37. [Not translated.]

RELEVANT PROVISION

38. § 182(2)3) of the Code of Civil Procedure (RT I 2005, 39, 308; RT I 2010, 38, 231) provides:
"§ 182 Restrictions upon grant of procedural assistance to natural persons

[---]

(2) A natural person shall not be granted procedural assistance if:

[---]

3) the proceeding concerns the economic or professional activity of the person requesting procedural assistance and does not concern his or her rights which are not connected to his or her economic or professional activity.

[RT I 2008, 59, 330 - entry into force 01.01.2009]"

OPINION OF THE SUPREME COURT *EN BANC*

39. The Supreme Court assesses the constitutionality of § 182(2)3 of the CCP by finding first the relevant provision (I) and then the infringed fundamental right (II), after which the Supreme Court *en banc* gives an assessment on the proportionality of § 182(2)3 of the CCP (III). Then the Supreme Court *en banc* adjudicates the appeal against a court ruling of Ain Kirsi and gives an opinion on the determination of the value of the action (IV).

I

40. The relevance of a restricting or binding provision has been furnished by the Supreme Court as follows: "A provision is of decisive importance if in case of its unconstitutionality the court would decide differently than in case of its constitutionality." (As of the Supreme Court *en banc* judgment of 28 October 2002 in matter no. 3-4-1-5-02, para. 15) Regarding the relevance of procedural provisions, it is also important whether in a specific proceeding these provisions had to be applied to reach the judgment (the Supreme Court judgment of 18 June 2010 in constitutional review matter no. 3-4-1-5-10, para. 19).

41. The matter requires adjudication of an appeal against a court ruling by which the circuit court refused to grant procedural assistance to the defendant Ain Kirsi, finding that it is precluded by § 182(2)3 of the CCP. Thus, it is the relevant provision, constitutionality and validity of which the outcome of the Supreme Court judgment depends on, i.e. whether to annul or leave in force the circuit court judgment.

Pursuant to § 697 of the CCP, an appeal against a ruling can only rely on the fact that the circuit court has incorrectly applied a provision of substantive law in making the ruling or violated a provision of procedural law in making the ruling and such fact could have resulted in an incorrect court decision.

42. § 182(2)3 of the CCP provides a prohibition to grant procedural assistance to a natural person who requests it in a proceeding concerning his or her economic or professional activity and not concerning his or her rights which are not connected to his or her economic or professional activity. Thus, if the provision is constitutional, the circuit court was right not to weigh the defendant's request for procedural assistance and the appeal against the court ruling should be dismissed.

If § 182(2)3 of the CCP would be unconstitutional, the circuit court ruling should be annulled, insofar as the circuit court has justified not granting procedural assistance only by that provision and has not assessed or identified other circumstances precluding grant of procedural assistance. Therefore, if to omit from the circuit court ruling the reference to § 182(2)3 of the CCP, the circuit court ruling would basically be unfounded, which is according to § 699(1)5 of the CCP a fundamental breach of a provision of procedural law.

43. A prerequisite for a provision to be relevant is that the current proceeding does not concern the rights not connected to the economic or professional activity of the defendant A. Kirsi. Pursuant to § 182(2)3 of the CCP, a natural person shall not be granted procedural assistance if the proceeding concerns the economic or professional activity of the person requesting procedural assistance and does not concern his or her rights which are not connected to his or her economic or professional activity. § 182(2)3 of the CCP is therefore a provision that does not enable weighing of grant of procedural assistance to a natural person mentioned in the provision.

In the current matter, the circuit court has found that the claims presented both in the action and the counterclaim are based on the contracts between the parties which the defendant concluded in his economic activity as a self-employed person (see para. 6 of this judgment about the nature of the activity). The Supreme Court *en banc* concurs with this conclusion of the circuit court, and the defendant has not contested it in the appeal against a court ruling. Therefore, the first prerequisite for applying § 182(2)3) of the CCP has been fulfilled. The proceeding concerns the economic activity of the person requesting procedural assistance. Since the current action concerns the rights of the person requesting procedural assistance which are connected to his economic activity and no claims which are not connected to the defendant's economic activity have been filed and thus, they do not need to be adjudicated, the second prerequisite for applying the provision has also been fulfilled.

44. So, § 182(2)3) of the CCP is the relevant provision in adjudication of the matter for the purposes of the first sentence of § 14(2) of the CRCPA.

Due to the facts of the matter, the Supreme Court *en banc* verifies the constitutionality of § 182(2)3) of the CCP in the part it precludes grant of procedural assistance to natural persons for exemption in full or in part from payment of a state fee on an appeal if the proceeding concerns the economic or professional activity of the person requesting procedural assistance and does not concern the rights not connected to his or her economic or professional activity.

II

45. Contestation of a county court judgment in a circuit court is exercise of the right comprised in § 24(5) of the Constitution to appeal to a higher court against a court judgment made with regard to the appellant (the right to appeal). § 24(5) of the Constitution is a part of the fundamental right to judicial protection, objective of which is to ensure verification of court judgments to prevent errors and mistakes therein (see, for example, the Supreme Court judgment of 9 April 2008 in a constitutional review matter no. 3-4-1-20-07, para. 18).

46. Regarding personal scope of protection, § 24(5) of the Constitution belongs to each and every person. Since based on § 25 of the General Part of the Civil Code Act a self-employed person is not a legal person in private law, he or she can exercise his or her civil procedural rights as a natural person (the Supreme Court judgment of 28 September 2006 in civil matter no. 3-2-1-73-06, para. 10). The material scope of protection of § 24(5) of the Constitution includes, above all, the right to appeal to a higher court against a judgment of a court of first instance.

47. An infringement of the scope of protection is any adverse affecting thereof (see, for example, the Supreme Court judgment of 6 March 2002 in constitutional review matter no. 3-4-1-1-02, para. 12). In case of the fundamental right provided in § 24(5) of the Constitution, the right to appeal is infringed, above all, by prescribing a high state fee on an appeal. Prescribing grant of procedural assistance for payment of state fees expands the exercise of the right to appeal. However, the fundamental right in § 24(5) of the Constitution is infringed by the lack of an option for exemption in part or in full from payment of a state fee by means of procedural assistance, i.e. in this case not granting procedural assistance to natural persons for exemption in full or in part from payment of a state fee on an appeal if the proceeding concerns the economic or professional activity of the person requesting procedural assistance and does not concern his or her rights not connected to his or her economic or professional activity.

III

48. § 182(2)3) of the CCP is formally constitutional. The provision has been adopted in the Riigikogu by the required majority of votes and it is understandable without suspicion.

49. To verify the material constitutionality of § 182(2)3 of the CCP, the permitted goals of an infringement of § 24(5) of the Constitution caused by the provision under verification shall be determined, and the proportionality, with respect to these objectives, of not granting procedural assistance to a natural person for exemption in full or in part from payment of a state fee on an appeal in a judicial proceeding connected only to economic activity shall be assessed.

50. More specific explanations or substantial justifications about the restriction included in § 182(2)3 of the CCP on grant of procedural assistance to natural persons in proceedings concerning only their economic activity cannot be found in procedural documents of the draft legislation. According to the explanatory memorandum 208 SE of the current Code of Civil Procedure, upon grant of procedural assistance "[t]he objective is [...] to ensure the right of recourse to the courts for protection of rights also to persons who themselves lack the funds for it". According to the explanatory report of the second reading of the draft legislation of the Code of Civil Procedure, the restriction in § 182(2)3 was set considering the provisions of the State Legal Aid Act, and the objective thereof is to harmonise the latter and the provisions of the Code of Civil Procedure. Based on the explanatory memorandum 249 SE of the draft legislation of the State Legal Aid Act, state legal aid is granted, above all, in case of public interest.

51. In case procedural assistance for payment of a state fee on an appeal is not granted, a natural person participating in a proceeding only due to his or her own economic activity shall pay the state fee him- or herself. According to § 4(1) of the State Fees Act (SFA), a state fee is established based on the costs related to the performance of the act (cost principle). Therefore, the objective of a state fee is compensation in full or in part for expenses of a public-law act performed by the state (see the Supreme Court *en banc* judgment of 22 December 2000 in matter no. 3-4-1-10-00, para. 24). From § 4(2) of the SFA arises also the possibility to establish a state fee based on the purpose of an act, the benefits received as a result of the act, or material public interest and on different basis than the cost principle. As it appears from the materials of the implementation of the regulatory framework for state fees, the objectives of state fees are, above all, the need to ensure that the civil court procedural expenses would be borne by the participants, and procedural economy.

52. As the Supreme Court *en banc* found in a judgment of 12 April 2011 in matter no. 3-2-1-62-10 (para. 38), § 24(5) of the Constitution includes the right to appeal with a simple reservation by law which can be restricted for any constitutional reason.

53. The Supreme Court found in the same matter no. 3-2-1-62-10 (para. 45) that the legitimate objectives of claiming a state fee on an appeal are the participation of the participants in bearing the legal costs principle and procedural economy.

It was also found in the matter no. 3-2-1-62-10 (para. 54) that grant of procedural assistance favours in turn the right to appeal since the state has prescribed such an option for counterbalancing an infringement of the right to appeal due to establishment of state fees. Its purpose is to give, above all, to needy persons access to judicial proceedings and to protect their rights thereby.

Lack of an option to grant procedural assistance has, in the opinion of the Supreme Court *en banc*, basically the same objective as the obligation to pay a state fee on an appeal – to ensure economical use of the state budget funds considering public interests, i.e. the participation of the participants in bearing the legal costs and procedural economy.

54. In the assessment of the Supreme Court *en banc*, the participation of the participants in bearing the legal costs principle, pursuant to which in an action in civil court procedure, at least in case of monetary disputes, the state costs on administration of justice shall be borne on the account of the fees paid by the participants in the proceeding, i.e. other taxpayers need not finance that proceeding, at least in general, is a legitimate objective for the purposes of the Constitution (see also the Supreme Court *en banc* judgment in matter no. 3-2-1-62-10, para. 45).

The Supreme Court *en banc* is of the opinion that a legitimate objective is also procedural economy in order to avoid unfounded, vexatious and other similar appeals since it may result in the court system's inability to offer to persons effective legal protection within a reasonable time (see also the Supreme Court judgment of 15 December 2009 in constitutional review matter no. 3-4-1-25-09, para. 23). The result of not granting procedural assistance to a natural person for exemption from payment of a state fee on an appeal in a proceeding concerning only economic activity, i.e. of not favouring is the obligation of payment of the state fee in due course. The restriction in § 182(2)3 of the CCP can facilitate, thanks to the obligation of payment of a state fee in full, the procedural economy, above all, in two ways: by decreasing the volume of court cases in general and decreasing the volume of requests for procedural assistance, and by expediting their process.

55. The Supreme Court *en banc* is of the opinion that the regulatory framework precluding grant of procedural assistance to natural persons for exemption from payment of a state fee on an appeal in a proceeding concerning only economic activity is a suitable measure for achieving the participation of the participants in bearing the legal costs and procedural economy.

The impossibility of natural persons to receive procedural assistance for exemption from payment of a state fee on an appeal in a proceeding concerning only economic activity reduces thoughtlessly filed appeals, and in case of extensive restrictions on procedural rights it is likely that the court system upon adjudicating civil matters is more economical and faster. The obligation to pay a state fee on an appeal also ensures the participation of the participants in bearing the legal costs in an action in civil procedure.

56. The Supreme Court *en banc* is of the opinion that the regulatory framework precluding grant of procedural assistance to natural persons for exemption from payment of a state fee on an appeal in a proceeding concerning only economic activity is also a necessary measure for achieving procedural economy.

A less burdensome on persons but as effective measure for the purposes of procedural economy and participation of the participants in bearing the legal costs would not be extending grant of procedural assistance to natural persons indicated in § 182(2)3 of the CCP. The Chancellor of Justice has mentioned as a theoretical alternative also an option for exemption in full or in part from state fees (in para. 107 of the opinion) which would not ensure procedural economy or participation of the participants in bearing the legal costs as effectively as the current provision.

Procedural economy would not be ensured better in case of enabling payment of state fees in instalments either. To achieve procedural economy with regard to processing requests for procedural assistance, decrease in state fees could be a measure as effective. At the same time it would harm procedural economy from another aspect by decreasing protection against unfounded actions.

However, the preclusion of grant of procedural assistance for achieving the participation of the participants in bearing the legal costs is not a necessary measure for this reason because the same result can be achieved by enabling payment of a state fee in instalments which would be less burdensome on persons.

57. The Supreme Court *en banc* is of the opinion that the regulatory framework precluding grant of procedural assistance to natural persons for exemption from payment of a state fee on an appeal in a proceeding concerning only economic activity cannot be deemed a moderate measure for achieving procedural economy.

58. The right to appeal (§ 24(5) of the Constitution) has been restricted by state fees in order to ensure procedural economy and the participation of the participants in bearing the legal costs principle. Grant of procedural assistance in turn favours the right to appeal since the state has established the regulatory framework for state fees for counterbalancing an infringement of the right to appeal arising from the establishment of state fees to give, above all, to needy persons access to judicial proceedings and to protect

their rights thereby. Procedural assistance is not granted to every person and to the same extent, but the state has established criteria which the person has to meet to receive procedural assistance (see § 181 and the restrictions in § 182 of the CCP).

59. Due to the restriction on grant of procedural assistance in § 182(2)3) of the CCP, a natural person who wishes to file an appeal in a dispute concerning only his or her economic activity but who lacks the funds to pay the state fee cannot exercise his or her right arising from § 24(5) of the Constitution. This is a very intensive infringement which basically precludes exercise of the fundamental right in the above situation.

Greater procedural economy consist of the fact that a person wishing to file an appeal files a requests for procedural assistance less likely because satisfaction of that request is basically precluded, and in case of filing of the request, the court can dismiss it without considering other circumstances. It also decreases the workload of circuit courts and thus enables faster adjudication of other matters.

60. The restriction precluding grant of procedural assistance provided in § 182(2)3) of the CCP shall not, however, harm the constitutional right to appeal more than is justifiable by procedural economy. The abovementioned importance of increase in procedural economy is decreased if procedural economy is achieved at the expense of not hearing an action that is likely to be successful. Namely, according to § 182(2)1) of the CCP, one condition for granting procedural assistance is that there is sufficient reason to believe that the planned participation in the proceeding will be successful.

61. In the opinion of the Supreme Court *en banc*, in a situation where the general level of state fees is high and the state fee on an appeal is the same as on the action (§ 137(1) of the CCP), necessary procedural assistance shall be granted also to a natural person for exemption from payment of a state fee on an appeal in a proceeding concerning only his or her economic or professional activity.

Such an opinion is supported by the Supreme Court *en banc* judgment in matter no. 3-2-1-62-10 (para. 58) where the restriction in the Code of Civil Procedure on grant of procedural assistance for exemption in full or in part from payment of a state fee on an appeal in a civil court proceeding to Estonian legal persons in private law not meeting the criteria provided in the first sentence of § 183(1) of the CCP was declared unconstitutional and invalid. Based on the objective of procedural assistance, it is constitutional in such a situation to extend the option for granting procedural assistance for exemption from payment of a state fee on an appeal also to a natural person who requests it in a proceeding that is connected only to his or her economic or professional activity.

62. On the basis of the aforementioned, the Supreme Court *en banc* declares § 182(2)3) of the Code of Civil Procedure unconstitutional and invalid in the part it precludes grant of procedural assistance to natural persons for exemption in full or in part from payment of a state fee on an appeal if the proceeding concerns the economic or professional activity of the person requesting procedural assistance and does not concern the rights not connected to his or her economic or professional activity.

63. The Civil Chamber also raised the issue of unequal treatment, upon grant of procedural assistance, of natural persons engaged in economic and professional activity compared to other natural persons, i.e. a possible infringement of § 12(1) of the Constitution. It no longer needs to be verified.

IV

64. The circuit court justified not granting procedural assistance to the defendant only by this that § 182(2)3) of the CCP precludes grant of procedural assistance to the defendant. Since § 182(2)3) of the CCP is unconstitutional in the part it precludes grant of procedural assistance for payment of a state fee on an appeal to a natural person participating in a proceeding concerning only his or her economic activity, the circuit court should not have applied that provision upon adjudication of the matter. Therefore, the defendant's appeal against a court ruling is justified and pursuant to the first sentence of § 701(3) of the CCP, the circuit

court ruling shall be annulled. Since the circuit court has not assessed, based on § 181(1)–(3) and § 182(2)1)–2) of the CCP, the perspective of the appeal or the financial situation of the person requesting procedural assistance, the Supreme Court *en banc* itself cannot adjudicate the defendant's request for procedural assistance. Thus, the defendant's request for procedural assistance shall be referred, on the basis of the second sentence of § 701(3) of the CCP, for a new hearing to the same circuit court.

65. Due to the satisfaction in part of the appeal against a court ruling, the paid security shall be refunded pursuant to the first sentence of § 149(4) of the CCP. The defendant has notified that the security should be refunded to AB Järve, Otti ja Partnerid OÜ (former business name private limited company law office Järve, Otti & Laretei).

66. The Supreme Court *en banc* notes that the circuit court has erroneously determined the value of the appeal. The plaintiff filed the action on 3 January 2006. Pursuant to § 137(1) of the CCP, the value of a civil matter in filing an appeal against a court decision, appeal in cassation or appeal against a ruling shall be equivalent to the value of the matter in the court of first instance, taking account of the extent of the appeal. § 137(4) of the CCP, according to which in case of appeal with regard to collateral claims, the collateral claims up to the making of the judgment shall be taken into account in full in determination of the value of the appeal regardless of whether the judgment is appealed against also with regard to the principal claim, entered into force on 1 January 2009. § 137(4) of the CCP is not applicable to actions which are filed prior to the entry into force of the said provision, i.e. before 1 January 2009. It arises from § 123 of the CCP, pursuant to which the calculation of the value of a civil matter shall be based on the time of filing of the action or other petition (see, for example, the Supreme Court ruling of 29 September 2009 in civil matter no. 3-2-1-82-09, para. 10). Since the action was filed prior to the entry into force of § 137(4) of the CCP, the circuit court should not have taken account, in calculation of the value of the action, of the claim for penalty for late payment which is smaller than the principal claim.

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