LTD "METALINVEST"
V. THE PARLIAMENT OF GEORGIA

N1/1/543 Batumi, January 29, 2014

Composition of the Board:

Konstantine Vardzelashvili – Chairman of the Hearing;
Vakhtang Gvaramia – Member;
Ketevan Eremadze – Member;
Maia Kopaleishvili – Member, Judge Rapporteur.

Secretary of the Hearing:

Ana Revazishvili.

Title of the Case:

Ltd "Metalinvest" v. the Parliament of Georgia

Subject of the Dispute:

Constitutionality of paragraph 4 of Article 9 of the law of Georgia "On Entrepreneurs" with respect to paragraph 1 of article 21 of the Constitution of Georgia.

Participants of the Hearing:

Representative of the Claimant - Anzor Chochishvili. Representative of the Parliament of Georgia - Zurab Dekanoidze and Tamar Meskhia.

I
Descriptive Part

1. On September 21, 2012 a constitutional claim (Registration N543) was lodged to the Constitutional Court of Georgia by Ltd "Metalinvest". On September 26, 2012 the constitutional claim was assigned to the First Board of the Constitutional Court of Georgia for ruling on admission of the case for consideration on merits.

2. For the purpose of ruling on admission of the case for consideration on merits, on April 4, 2013 with the Ruling N1-3/1/543 the First Board of the Constitutional Court of Georgia handed the constitutional claim N543 to the Plenum of the Constitutional Court of Georgia, as the First Board considered, that its legal position was different of that (those) expressed in the past decision(s) of the Constitutional Court of Georgia.

3. On April 10, 2013 with Recording Notice N3/1/543 the Plenum of the Constitutional Court of Georgia declared the constitutional claim admissible and handed the case for consideration on merits to the First Board.

4. The oral hearing on merit was held on June 10, 2013 by the first Board of the constitutional court.

5. The legal basis for submission of the constitutional claim is: subparagraph "f" of paragraph 1 of article 89 of the Constitution of Georgia, subparagraph "a" of paragraph 1 of article 19 and subparagraph "a" of paragraph 1 of article 39 of the organic law of Georgia "On the Constitutional Court of Georgia".

6. The claimant disputes the constitutionality of article 9 paragraph 4 of the law of Georgia "On Entrepreneurs" with respect to paragraph 1 of article 21 of the Constitution of Georgia.

7. According to the disputed provision, "If at the moment of signing the agreement a contracting party was aware of the restrictions on the powers of business entity's manager, the represented business entity may declare the transaction void within eighteen months from the date of conclusion of the agreement. The same rule shall apply, if the authorised representative and the contracting party were acting together with the intent to cause damage to the business entity represented by the representative."

8. According to article 21 paragraph 1 of the Constitution of Georgia, "the right to own and inherit property shall be recognised and inviolable. Abolition of the universal right to ownership, acquisition, alienation, or inheritance of property shall be inadmissible."

9. The Claimant considers that with the force of the disputed provision the property right protected by the article 21 paragraph 1 of the Constitution is directly and immediately violated. The former Director of ltd "Metalinvest" sold the property of the company without having relevant authorisation for doing so. The representatives of the company found out about this agreement after two years of its conclusion. Due to exhaustion of the statute of limitation established by the disputed provision, the current representatives of the ltd "Metalinvest" are unable to demand the agreement concluded by the unauthorised director to be declared void.

10. The Claimant party notes that current wording of the disputed provision allows persons with limited authorisation for selling movable and immovable property to sell the company partially or fully without the will of the owner if they can manage to keep the voidable agreement unpublicised, which makes the property right guaranteed by the Constitution null. According to the Claimant owner entrepreneurial entity is unable to declare the voidable agreement void since the moment the owner became aware about the conclusion of such agreement or should have become aware of it, which contradicts the first paragraph of article 21 of the Constitution.

11. The Claimant contemplates that since the agreement is part of civil law relationship, the disputed provision of the Law of Georgia "On Entrepreneurs" is completely unnecessary. The Claimant points out that according to article 130 of the Civil Code, the statute of limitation starts from the moment the claim arises. The moment when the claim arises is the time when a person became aware or should have become aware of the violation of his or her right. Such prescription is fully in line with the universally recognised constitutional principle of protec-

tion and inviolability of the property right. Therefore, the regulation prescribed by the disputed provision is contrary to the existing law and violates the property right of the entrepreneurial subject guaranteed by the Constitution.

12. The Claimant additionally underlines that the disputed provision is contrary not only to the Constitution of Georgia, but article 1 of the Protocol 1 of the European Convention of Human Rights, which guarantees a human right to use the property without any interference.

13. Based on all above mentioned the Claimant considers that the disputed provision should be declared unconstitutional with respect to the first paragraph of article 21 of the Constitution of Georgia.

14. The Respondent explains that the property right is not absolute and the intervention into the right by the disputed provision is made for ensuring civil turnover stability and the sustainability of state economy.

15. The Respondent considers that establishing 18-months period for declaring agreement void and counting this period from the moment of conclusion of the agreement ensures right to property and the stability of civil legal relations. Additionally the disputed provision encourages the shareholders towards constant control and engagement in the activities of the company, ensuring the viability of the business entity. In turn the strength of the business entities is the guarantee for stable development of state economy.

16. In addition, the Respondent considers that the disputed provision does not impose an unreasonable burden to business entities in line with the legitimate aims of the interference with the right.

17. The Respondent believes that the profit making goal of entrepreneurial activities, having repeated and organised manner ensures high engagement of the shareholders of the entity in its everyday business, which is an important tool for controlling the actions of the Director. The shareholders have relevant legal tools for control of the business entities as well. Specifically, certain provisions of the Law "On Entrepreneurs" ensures the right of shareholders to be informed regarding the activities carried out by the business entity and therefore by those carried out by the managers. Shareholders are authorised to receive documents reflecting the activities of the entity, including those regarding the agreements which have been concluded by the business entity.

18. The Respondent also notes that the right to be informed regarding the activities of the business entity and the engagement in them is transformed into the duty to control the activities of the entity. Therefore in case this transformed duty of the shareholders is carried out properly the chance, that during the period of 18 months prescribed by the disputed provision the shareholders did not become aware of an agreement, is very low.

19. The Respondent additionally notes that when the agreements in the name of the business entity are registered in the Public Registry, the authorisation of the representing person to conclude an agreement on transfer of property is verified by the relevant extract of the registry. Therefore registration of an agreement

by an unauthorised person cannot take place in the Public Registry, which is an additional tool to prevent conclusion of the agreements by unauthorised persons.

20. Based on above mentioned the Respondent believes that when the disputed provision interferes with the right the balance between private and public interests is protected, consequently the disputed provision is fully in compliance with the first paragraph of Article 21 of the Constitution of Georgia.

21. In the current case two *amicus curiae* were delivered by two groups of Master Students from the Ivane Javakhishvili Tbilisi State University, one of which considers that the disputed provision is in compliance with the first paragraph of Article 21 of the Constitution of Georgia, while the other supports the constitutional claim.

22. The first group believes that the constitutional claim should not be upheld, since the interference with the right is proportionate with the legitimate aim of the disputed provision to ensure the stability of civil turnover. The shareholders of business entity have sufficient tools for controlling its activities. Therefore the chances of not discovering the voidable basis of an agreement within 18 months of its conclusion are minimal and hence the statute of limitation is not an unreasonable burden on business entity. Moreover the abuse of power by the director is punishable by relevant criminal law provisions, granting additional protection to the business entities from damaging agreements. Based on above mentioned the disputed provision is in compliance with the statements of Article 21 of the Constitution.

23. According to the second group unequivocal statement that the disputed provision ensures stability of civil turnover is incorrect. Moreover the disputed regulation cannot be considered as necessary and inevitable tool for achieving legitimate aims. Also the intervention in the right of the entrepreneurial entity could be deemed appropriate and proportionate if the statute of limitation commenced not from the conclusion of the agreement, but from the date when the entrepreneurial entity became aware of the voidable basis of the agreement. Based on above mentioned the second group of *amicus curiae* considers that the disputed provision contradicts article 21 of the Constitution of Georgia.

II
Reasoning Part

1. The first paragraph of article 21 of the Constitution of Georgia reinforces the universal right of ownership, acquisition, transfer and inheritance of property. It should be noted that the existence of a democratic society depends greatly on the existence of property as a natural right. “The right to property is the natural right without of which the existence of a democratic society is impossible. The right to property serves to be not only an elementary basis for the existence of an individual but it also ensures his/her freedom, the adequate realization of his/her skills and opportunities and helps an individual lead life on his/her own

responsibility. All this logically determines private initiatives of an individual in the economic field thereby promoting the development of economic relations, free entrepreneurship and market economy, also normal, stable civil circulation" (Constitutional Court of Georgia Judgment N1/2/384 of July 2, 2007 on the case "The Georgian Citizens – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v The Parliament of Georgia", II-5).

2. "…without exaggeration it can be stated that it is in property where a human is manifested as an entrepreneur. …The property of private actors albeit the functional implications, whether it is used for entrepreneurial activity or not is the subject of the protection afforded by Article 21 of the Constitution of Georgia. Property is protected unconditionally irrespective its values and social implications." (Constitutional Court of Georgia Judgment N1/2/411 of December 19, 2008 on the case "LTD "Russenergoservice", LTD "Patara Kakhi", JSC "Gorgota", Givi Abalaki's Individual Company "Farmer" and LTD "Energia" v. the Parliament of Georgia and the Ministry of Energy of Georgia", II-23).

3. "…property is the institute, which renders economic foundation of the state. Protection of property is not common in the totalitarian states and it is vitally important in the social, democratic and rule of law states to guarantee constitutional-legal entrenchment of the institute of property on one hand, and to provide the owner, as the subject with remedies for its protection and guarantees for its promotion and security." (Constitutional Court of Georgia Judgment N2/1-370,382,390,402,405 of May 18, 2007 on the case "Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia and Others and Public Defender of Georgia v. The Parliament of Georgia", II-6).

4. Property is not an absolute and illimitable right. The legislator is allowed to establish provisions, while following the constitutional norms and principles, which can define the content and scope of property. "Property has great social significance. The owner is part of the community and he is entitled not merely to receive certain goods from it, but he is also obliged to use his property for the goal of well-being of the community. An owner shall realize that beyond his own interests, he lives in the realm of other interests, from which he is not isolated and where reasonable balance of interests shall be stricken. The legislator is authorized against this background and in accordance with constitutional-legal norms and principles to adopt norms, which determine the substance and scope of property. Property is the right that shall be defined by the legislator. The greater the social significance of an object of property due to its nature and qualities, the greater the importance of the definition of this right by the legislator." (Constitutional Court of Georgia Judgment N2/1-370,382,390,402,405 of May 18 2007 on the case "Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia and Others and Public Defender of Georgia v. The Parliament of Georgia", II-8).

5. Simultaneously the legislation associated to the use or disposal of property should be in conformity with the standards established by article 21 of the Constitution. It is unacceptable to offer the regulation of the content of

the right to property that will harm the essence of the right and undermine the existence of the right.

6. In order to determine whether article 9 paragraph 4 of the Law "On Entrepreneurship" violates the right guaranteed by the article 21 of the Constitution, apart from defining the scope of the constitutional provision, the content of the disputed provision needs to be analysed as well.

7. According to the disputed provision, "If at the moment of signing the agreement a contracting party was aware of the restrictions on the powers of business entity's manager, the represented business entity may declare the transaction void within eighteen months from the date of signing the agreement. The same rule shall apply, if the authorised representative and the contracting party were acting together with the intent to cause damage to the business entity represented by the representative."

8. The disputed norm establishes statute of limitation during which the business entity can request the agreement concluded with the party to become void in the event when the authority of manager was limited and the party was aware of this. According to second sentence of the disputed norm the same statute of limitation applies in case the party and the representing person were acting together with the intent to cause damage to the business entity.

9. The Claimant stresses out that the disputed provision unreasonably interferes with his right, since the business entity does not have any legal tool to protect the property from being disposed against his will. Specifically, according to the argument of the Claimant the disputed provision takes away the business entity's ability to demand the agreement regarding the assets of the entity made by manager with limited authorisation to be void, since the fact of conclusion of such agreement was unknown to him (the business entity) and it became known after 18-months period from conclusion was expired.

10. The Claimant considers that the statute of limitation should commence not from the moment of conclusion of an agreement, but according to the regulation prescribed by article 130 of the Civil Code – from the moment of arising of civil claim, since such a moment is when a person found out or should have found out about the violation of right.

11. Within this dispute the Court discusses and examines the constitutionality of the rule established by the disputed provision only in the event when manager/representing person has limited authority. Additionally, the Court notes that according to the disputed provision the limitation of the powers of manager/representing person and the knowledge of such limitation by the party of the agreement are cumulative prerequisites to demand the agreement to be declared void. This is why in order to decide the constitutional dispute it is principal to determine in which case it can be considered that a party was aware of the limited authority and in which case the right to demand declaring the agreement void arises for the business entity.

12. Since the disputed provision relates to agreements with third parties, it

is significant that the provision concerns the relations where the person authorised to represent the business entity is involved in the name of such entity. The representing authority can be exercised by the manager (for instance, the director), as well as by other specially tasked person. Namely the person acting in the name of a business entity in the relationship within the scope of the first sentence of the disputed provision is not a person that is fully unauthorised, which would have no managerial or representing power, but a person authorised for management of the entity with limited managerial powers.

13. The Law of Georgia "On Entrepreneurs" permits limiting the powers of a director. For instance, article 9^1 paragraph 5 enlists the competence of shareholder meeting indicating in subparagraph "e" that the competence of shareholders meeting is to undertake obligations, which independently or wholly exceed 50% of the value of the company assets.

14. The division of competences between director and other corporate governance bodies prescribed by the law of Georgia "On Entrepreneurs" is largely dispositive. The competence of the director is defined by the Corporate By-Laws as well as the law. For instance, according to the article 9 paragraph 7 of the law of Georgia "On Entrepreneurs" apart from the law the relations with person(s) holding managerial/representing power is regulated by the corporate charter and the contracts between the corporation and such person(s); article 47 paragraph 3 of the same law sets the possibility for the partners of the limited liability company to define the competence of the director with the Charter. Additionally article 55 paragraph "e" of the same law allows the steering committee of joint stock Company to set the scope of director's authority.

15. It is important to underline that according to article 5 paragraphs "h", "i" and "j" of the law of Georgia "On Entrepreneurs" the person responsible for representation of the business entity is registered in the entrepreneurial registry. This serves the goal of informing third parties. Third parties, counterparts are able to have the information regarding the representatives of different business entities.

16. It is also notable that according to article 7 paragraph 4 subparagraph "b" of the instruction approved by the order N241 of Minister of Justice of Georgia dated December 31, 2009 "On Registration of Entrepreneurs and Non-Entrepreneurial (Non-Commercial) Legal Entities", the extract from the Registry of Entrepreneurs and Non-Entrepreneurial (Non-Commercial) Legal Entities reflects the "information regarding persons authorised for representation, as well as the limitation of their authorities if such exists". Although mentioned order provides the possibility to register limited authority in the registry, this on the one hand cannot exhaust the full information of limited authority and on the other hand does not necessarily mean that the counterparty know exact scope of the limitation of the powers.

17 The act of bad faith of a director of the company is in itself a natural, unavoidable risk of any business entity. The Law of Georgia "On Entrepreneurs" includes different provisions as an insurance from such risk, for instance, ac-

cording to article 9 paragraph 5 of the law except with consent of the partners director may not conduct the same activities as the company is engaged in (conflict of interest).

18. At the same time, article 3 paragraph 10 of the Law of Georgia "On Entrepreneurs" stipulates that each partner has the right to obtain a copy of the annual report and all publications of the company. In addition, any partner may check the correctness of the annual report and may familiarise himself/herself with the company documents personally or through an auditor, and may request clarifications from the enterprise bodies upon submitting the annual report, but prior to its approval. Moreover the above mentioned law allows widening the control tools for the shareholder, which needs to be reflected in the Charter.

19. Agreement with a business entity should not always be related to a risk, that director's authority might be limited. Third party that enters into civil-law relationship with the business entity is not obliged to check the internal corporate documents of the enterprise. Third parties should be allowed to consider that the director has the right to conclude the agreements in the name of the entity without additional scrutiny and retrieval of documents. Efficient civil turnover would have been impossible if all counterparts were required to be familiarised with internal procedures of specific enterprises and division of powers between enterprise organs. Such approach would hinder easy and efficient conclusion of agreements and would significantly increase the parties' costs of transaction.

20. It has to be also mentioned that the laws regulating the activities of a business entity cover the agreements between enterprises where a party of the agreement is a resident of foreign state. Moreover the scope of the disputed provision encompasses agreement, which is concluded between business entity (represented by the representative) and an individual. As a rule factual scrutiny of representative's authority is limited for counterparty, since retrieving and/or verification of such information can be associated with number of hardships. Therefore binding counterparty with the obligation to verify publicly available information, including the charter of the enterprise, would obstruct commercial relationships and would complicate foreseeing the results of such relationships.

21. In consequence of above mentioned the agreement concluded with participation of a manager/representative of a business entity, ordinarily should be equated with the agreement concluded within the authority of representative. Counterparty acting in good faith cannot be bound by the duty to clarify whether the representative truly holds the authorisation to conclude specific agreements. Therefore, derived from the interests of civil turnover, with the goal to protect the interests of a counterparty acting in good faith, there has to be a presumption that the counterparty was not aware of limited authority until proven otherwise.

22. Although the law allows the entrepreneur to indicate the limitations of authority of managing person in the entrepreneurial registry, the extract from the registry is not sufficient to establish the scope of the authority of the representative.

23. As it was mentioned the authority of a manager/representative can be

limited by the decision of an entrepreneur generally (for instance based on the subject of an agreement or its volume) as well with regards to specific agreement. In the event when the extract from the registry does not include information regarding the limitation of authority, the powers of manager/representative can generally be limited by a charter or a decision of the enterprise (shareholders) regarding to specific agreement. Therefore in order to verify the authority the counterparty will be forced to get acquainted with internal procedures and division of powers of the enterprise, he or she will have to inspect the Corporate Charter or request the assurance, certificate that the representative is authorised to conclude specific agreement.

24. The fact that limitation of authority is given in the extract of the registry or in the charter and that the charter is publicly available through the registration in the Entrepreneurial Registry does not convey in itself that the counterparty "was aware" of the limitations. Albeit the law allows the entrepreneur to make the decision on limiting the authority of a manger/representative public (by registering it in the Entrepreneurial Registry or by publishing the Charter) "being aware" of limited authority of the representative, which can in future be a ground for voiding the agreement, conveys not the accessibility of the information but factual awareness of it, the holding of this information by the counterparty at the moment of conclusion of the agreement. The provision does not contain events, when the counterparty "could have been aware" of the limited authority.

25. The existence of awareness element stands for protecting counterparty acting in good faith. Specifically if we consider that the agreement can be questionable, in the event when the counterparty should have been aware of the limitations of the authority, counterparty, for its own insurance, will be obliged to verify the internal corporate documents of the enterprise and possible cases of limitations of director's powers. Such consideration would remove the foundation of stable civil turnover and would unduly complicate conclusion of civil agreements.

26. Within this dispute it is impossible to exhaustively define all the circumstances and prerequisites when counterparty can be considered informed. Moreover the Constitutional Court defines that word "was aware" in the disputed provision applies to the circumstances, when counterparty was informed regarding the limited authority. For instance, such a circumstance could be when a party was given notice/information directly from the enterprise (its shareholders) regarding the limitations of managerial/representative authority. If the counterparty enters into agreement despite such notice, the agreement can be declared void.

27. It is noteworthy that according to the article 9 paragraph 4 of the Law of Georgia "On Entrepreneurs" declaring the agreement void within 18 months of its conclusion is possible based on the above mentioned conditions. The constitutionality of the disputed provision is questioned due to limiting such possibility with 18 month period.

28. It is considerable that the disputed provision is set out in the norm

defining management and representation (article 9) and when discussing its content attention should be drawn to the concept of corporate governance, since it is impossible to reason about managerial and representative powers or limitations thereof without taking into account the elements of corporate governance and its basic principles.

29. Relationship between corporation (enterprise) and its managers includes wide and various duties of managers towards the corporation. An important element of corporate governance is the existence of functional control system of the shareholders (or the body authorised to control, for instance, steering committee) towards the managers, to ensure that he managers do not abuse trusted assets, the risk of which is real. Corporate governance is a system of different but interlinked elements and it includes the elements of responsibility for the managerial organs as a result of violations found through control. It should also be noted that the main goal for managerial responsibility is protecting the assets of the enterprise and avoiding the damages; however the freedom of the activity for managers should not be unduly restricted.

30. The duties of the director towards the shareholders, as well as statutory or contractual limitations of his or her authority are those very tools, which give the shareholder a possibility to control the activities of the director and hence those of the enterprise. However, as in any other representation, the risk persists that representative will act within his or her own interests and not those of the represented. Completely eliminating such risk with the law can be an impossible goal and the parties should contractually define in each specific context how they insure these risks.

31. In the instant case the disputed provision is limiting the corporate governance system and establishes the closing period regarding the agreement concluded by the corporate governance body with limited authority.

32. The Court considers that the regulation prescribed by the disputed provision constitutes an interference with the property right protected by article 21 of the Constitution, since the enterprise – the owner has limited possibility to dispose the property based on the real intent and demand the agreement that disposed the property against his or her intent to be void.

33. The interference is unconstitutional if it is not in line with the demands set out by article 21 of the Constitution. According to the definition of the Constitutional Court of Georgia, the requirement of the second paragraph of article 21 is "maintaining the essence of the property even in the process of such restriction: the essence of property right must not be violated. The right to property, which is a right that can be defined by the legislator, should not, as a result of legislator's definition of its essence and boundaries, become a right, which will depend mostly on legislative regulation. In sum, loss of the essence of the field protected by a right must be avoided." (Constitutional Court of Georgia Judgment N3/1/512 of June 26, 2012 on the case "Citizen of Denmark Heike Cronqvist vs. the Parliament of Georgia", II-57).

34. According to the case-law of the Constitutional Court, the requirement of the Constitution is to limit the right to property only by using narrowly tailored restrictions in the event when there is pressing social need. "In order to restrict constitutional right to property, it is necessary to regulate the order of restriction imposed for pressing social need. Only pressing social need gives constitutional-legal legitimacy to restricting property rights. At the same time, the legislator must be very clear in outlining the components of public interest in each of the cases of limiting property rights. Only this approach makes it possible to strike a balance in proportionality. It is impermissible to limit the right more than it is necessary in each particular case for the public interest." (Constitutional Court of Georgia Judgment N3/1/512 of June 26 2012 on the case "Citizen of Denmark Heike Cronqvist vs. the Parliament of Georgia", II-58).

35. In the instant case the Constitutional Court should evaluate whether there is a relevant value, substantial interest that would condition limiting the demand for agreement to be declared void with 18-months period. Specifically, it needs to be established whether there is a pressing social need that conditions statute of limitation of 18 months in the circumstances described above.

36. The Respondent points out that annulling the established period would breach the stability of civil turnover and civil-law relationships, which in its turn will negatively reflect on the economic stability of the state on one hand and on public tranquillity on the other hand.

37. The Court shares respondent's opinion that stability of civil turnover and protection of a counterparty acting in good faith are legitimate aims conditioned by the pressing social need, which generally can be considered to be the justification for limiting constitutional right to property. The Court also agrees with the Respondent that in general by establishing statute of limitation the disputed norm protects the interests of counterparty acting in good faith from unfounded claims that could take place if this period did not exist.

38. In the Case of "Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili vs. the Parliament of Georgia" the Constitutional Court stated, that "…When the long time has elapsed from the event, which had produced disputed circumstances, there is a high probability that the evidences that were available before, could be lost or altered, also the memory of the witnesses will fade, testimonies of which the court should found its decision, the number of supposed, unreliable evidences will increase. As a result, there will be mostly likely created the soil for not-objective assessment of the factual circumstances of the case. The statute of limitation is an attempt to protect the parties to the case from such risks" (Constitutional Court of Georgia, Judgment N3/1/531 of November 5, 2013 on the case "Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili vs. The Parliament of Georgia", II-21). At the same time, the longer the period passed after the occurrence, the higher the risk for the legal interest of a person to be violated.

39. "The above-mentioned risks, in an individual case, may turn out to

pose more menace for the Respondent. Resumption of the disputed after the long time passed makes them facing the need for anew search for evidences that can confirm the relevance of their position, which, as we have already mentioned, can be difficult or even impossible – the evidences could not naturally exist anymore or could be inappropriate. Consequently, the Respondent is possible to be unable to defend his/her rights due to absence of authentic evidences. Thus, one of the objectives of the statute of limitation is to defend the interests of a party to the case from becoming a part of the process, in which defense of the position is complicated or impossible because of outdated state of the requirement" (Constitutional Court of Georgia Judgment N3/1/531 of November 5, 2013 on the case "Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili vs. The Parliament of Georgia", II-22).

40. Although the disputed provision has a legitimate aim, it is not in itself enough to establish the constitutionality of the disputed provision. For such consideration logical link between statutory regulation and the aim to be achieved should exist. Additionally the limitation prescribed by the disputed provision should be proportionate and there should be a fair balance between the right limited and counterweighing interest.

41. On the one hand the legislator should not prescribe the unduly long statute of limitation, which would create the possibility for any agreement to become disputable and even a party acting in good faith would be deprived of protection. On the other hand the statute of limitation should not be unreasonable, obviously short excluding the possibility for protecting the legitimate interests of an involved party.

42. It is noteworthy that the disputed provision gives important safeguard for the interests of a party acting in good faith. With the element of awareness an agreement cannot be void even when the director lacked the power to enter into the agreement in the name of the enterprise (had limited authority), but the counterparty was acting in good faith in relation with this fact.

43. At the same time, the entrepreneur should not be disproportionately restricted in the right of demanding the agreement to be declared void for the goal of protecting its rights, if the limitation of the representative's authority was clear and it was unequivocally known to the counterpart that the representative was not authorised to conclude the agreement.

44. When analysing the constitutionality of the disputed provision, it needs to be established whether the existence of statute of limitation is justified in the event when the business entity lost the ability to demand voiding the agreement due to unfaithful and wrongful activities of the manager/representative and the counterparty.

45. Although counterparty is not obliged to verify the charter and internal corporate documents and establish whether the powers of the director are unlimited or not, in the event when he or she unequivocally becomes aware (for instance from the notice of business entity (shareholder)) of the limitations and

still enters the agreement, counterparty will not be considered as a party acting in good faith.

46. The disputed provision might serve the legitimate aim – simplifying conclusion of agreements and excluding the doubt for every contract, in this case, when the period for the agreement to be declared void is only 18 months, the disputed norm puts on disproportionately heavy burden on the business entity.

47. As it was mentioned above, an enterprise (shareholder) has the ability (and even the obligation) to conduct due oversight on the representative. Distributing the risk derived from appointing manager/representative to the party acting in good faith would be essentially wrong and would threaten the stability of civil turnover. However in order to ensure such stability legislator should not impose unreasonable, heavy burden on a business entity either.

48. In the Case of "Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili vs. The Parliament of Georgia" the Constitutional Court stated, that "statute of limitation foreseen by the disputed norm would have violated the fair balance between the interests to the detriment of the interested persons, if it were so distinctly unreasonably short, short-term that it objectively turned out to be insufficient for persons fairly-disposed towards use and protection of the right, by which, they would have been imposed disproportionately heavy burden"(Constitutional Court of Georgia Judgment N3/1/531 of November 5, 2013 on the case "Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili vs. The Parliament of Georgia", II-34). The Court considered that "5 years can be regarded as minimum, but objective, sufficient, reasonable, foreseeable timeframe for the interested person to apply the possibility of recognizing the decision as invalidated and, respectively, of maintaining the balance between the interests" (Constitutional Court of Georgia Judgment N3/1/531 of November 5, 2013 on the case "Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili vs. The Parliament of Georgia", II-34).

49. In the above mentioned case the subject of assessment was a statute of limitation of five years prescribed by the Code of Civil Procedures, which commenced not from the emergence of disputable circumstances (or agreement) but from the court decision that was in force. As for the 18-months period prescribed by the disputed provision, it commences from the moment of concluding the agreement. It should be noted that the court judgment is announced publicly and the chance that a person will become aware of its existence is probably higher than with the conclusion of specific agreement.

50. The Constitutional Court considers that it is unjustifiable to restrict declaring the agreement void within such short statute of limitation in the event, when despite the due oversight from the entrepreneur (shareholder) over the activities of manager/representative and notifying the counterparty regarding the limitations on authority, the conclusion of an agreement by the act of bad faith (and possibly unlawful) is hidden and inaccessible to the entrepreneur.

51. The Constitutional Court does not exclude the appropriateness of

prescribing statute of limitation generally for voiding an agreement. However in the instant case the statute of limitation set out by the disputed provision is obviously short, since there is high probability that the business entity will not notice about changes in the legal status of its assets.

52. Additionally the circumstance that the counterparty was aware of the limitation of authority of manager/representative should not always be the grounds for voiding an agreement after the statute of limitation lapsed.

53. If the authority of manager/representative is limited generally or regarding to specific agreement, including in the case when a concluded agreement goes beyond the scope of enterprise's activities, entrepreneur (shareholder) should be allowed to demand the agreement to be void if it can be proven that conclusion of the agreement was unknown to him/her. It is unjustified to demand voiding an agreement only due to the reason that the counterparty was aware of limitations. Such right should arise for an entrepreneur only in the event, when it is proven that despite the existence of oversight tools over the activities of manager/representative, the information regarding the agreement was not known to the entrepreneur.

54. When appointing a manager/representative an entrepreneur should comprehend the risk which follows such decision. Limiting such risks is possible through establishing effective oversight tools. Lack of oversight tools in the enterprise or inadequate involvement of an entrepreneur (shareholder) in the activities of the enterprise should exclude the right to make claims towards third party.

55. Actions described in the disputed provision can in certain occasions include criminal acts as well. For instance, if an agreement is concluded by offering the director money, securities, other asset or costly services or any other unlawful benefit. Such act includes signs of a crime prescribed by article 221 of the Criminal Code – Commercial Bribery.

56. In the instant case it is not clear what public interest is served by transforming an agreement that is based on a crime into the lawful agreement.

57. In the existing Constitutional Legal regime it would be unjustified for article 21 of the Constitution to protect an asset which was obtained through criminal means. The Court has stated in one of its previous judgments regarding this issue that the Article 21 protects property which entails lawful owner. Unlawful property does not fall within the ambit of the Article 21, since in this event the existence of property right as such is under question. "The fact of the lawful purchase of property determines the lawfulness of the right to property. This is the circumstance that has considerable importance for the existence of the right to lawful property." (Constitutional Court of Georgia Judgment N1/2/384 of July 2, 2007 on the case "The Georgian Citizens – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v The Parliament of Georgia", II-14).

58. Thus the benefit obtained by an agreement concluded by a party through criminal means is neither a value protected by the right to property nor any other

interest that can be used as counterweight for restricting the right to property of a business entity.

59. The Constitutional Court defines that in the event, when the disputed provision is associated with voiding agreements concluded through criminal means, it does not stand as a guarantee for protecting counterparts acting in good faith. With such normative content the disputed provision is associated only with such cases, when a criminal responsibility of certain person arises. In such cases the interest of protecting counterparts acting in good faith is excluded, since when the criminal responsibility of a person arises based on concluded an agreement using illegal means with a business entity it is *per se* presumed that there is a party acting in bad faith.

60. Considering that statute of limitations exists for crimes as well, parties acting in good faith are protected from unjustified claims and complaints after long period of time.

61. The Constitutional Court defines that in the instant case the subject of the dispute is not the statute of limitation of imposing punishment for specific crimes. However the circumstance that within the statute of limitation period for crimes the assets obtained through criminal means are somewhat "legitimised" creates risks that the right to property of a business entity will be unjustly restricted. In the cases when the statute of limitation for a crime has not lapsed persons' criminal responsibility arises and the disputed provision creates a barrier for a business entity to reinstate its original condition, return the asset or the benefit that was lost due to criminal agreement.

62. Therefore the Court states that there is no legitimate aim that the disputed provision could serve in the event when it is related to the agreement concluded through criminal means.

63. Based on all abovementioned the Constitutional Court considers that on the one hand the disputed provision does not provide for a proportionate mean to achieve legitimate goals, since it does not create fair balance and therefore is disproportionate even when there are no signs of a crime and the interests of stability of civil turnover are considered as legitimate aims. On the other hand when there are signs of criminal act, there is no pressing social need which would justify limiting the property right. Therefore the Constitutional Court considers that the disputed norm, article 9 paragraph 4 of the Law "On Entrepreneurs" is unconstitutional with respect to article 21 paragraph one of the Constitution of Georgia.

III
Ruling Part

Based on subparagraph "f" of the paragraph 1 of article 89 and paragraph 2 of article 89 of the Constitution of Georgia, subparagraph "e" of the paragraph 1 of article 19, paragraph 2 of article 21, paragraph 1 of article 23, paragraph 3 of article 25, paragraph 5 of article 27, subparagraph "a" of paragraph 1 of

article 39, paragraphs 2, 4, 7, 8 of article 43 of the organic law of Georgia "On The Constitutional Court of Georgia", paragraphs 1 and 2 of article 7, articles 30, 31, 32 and 33 of the Law of Georgia "On Constitutional legal Proceeding"

The Constitutional Court
H o l d s:

1. The constitutional claim N543 of Ltd "Metalinvest" v. the Parliament of Georgia shall be upheld. The wording "within eighteen months after the date of signing the agreement" of paragraph 4 of article 9 of the Law of Georgia "On Entrepreneurs" shall be declared unconstitutional with respect to the first paragraph of article 21 of the Constitution of Georgia.

2. Unconstitutional provision shall be declared invalid from the moment of publishing this decision.

3. The judgment is final and is not subject to appeal or review.

4. A copy of the judgment shall be sent to: the parties, the President, the Government and the Supreme Court of Georgia.

5. The judgment shall be published in the "Legislative Herald of Georgia" within the period of 15 days.

Members of the Board:

Konstantine Vardzelashvili
Vakhtang Gvaramia
Ketevan Eremadze
Maia Kopaleishvili