

The Slovenian Constitutional Court as an Actor in Commercial Disputes

I. Introduction

This paper will explore the methods of argumentation used by the Slovenian Constitutional Court (henceforth: the Court) in the interpretation of constitutional provisions in commercial disputes. The first part explains the role and position of the Court in the Slovenian legal system, while also looking at the two most important and common procedures of constitutional control (constitutional complaint (henceforth: complaint) and assessment of constitutionality and legality (henceforth: assessment)) and their possible outcomes. The second part of the paper defines what commercial disputes are. The next, third, part presents a statistical overview of all 34 judgements of the Court in commercial disputes in the last five years. It presents the share of complaints and assessments, the share of successful and unsuccessful actions and the Acts whose provisions were most commonly attacked. The fourth part presents the results of the analysis of 11 judgements of the Court in commercial disputes. It explains, *inter alia*, which constitutional rights/provisions the petitioners relied on most commonly, what the success rates of claims of alleged violations of individual constitutional rights/provisions were, which methods of interpretation were used by the Court most frequently and which methods were the most important in the Court's reasoning. This part also provides a critical analysis of the findings. In the final part the paper provides an overview of the most important findings.

II. On the Slovenian Constitutional Court

The Court is the “highest institution for the protection of constitutionality, legality and human rights in Slovenia²”. It is independent and autonomous in relation to other state institutions. The Court has 9 judges, elected by the National Assembly for a 9-year mandate, without the possibility of renewal. Basic provisions about the functioning of the Court, its procedures and competences are included in the Slovenian Constitution, while more detailed provisions are found in the Constitutional Court Act. A president is elected for a 3-year period by the Court itself. The Court has the competence to decide in the following types of disputes:

- i. assessments (compliance of lower-level legal Acts with higher level legal Acts, e.g., of a Law with the Constitution or an executive Act with a Law),
- ii. complaints (cases of alleged violations of human rights and basic liberties by individual legal Acts, e.g., court rulings),
- iii. jurisdictional disputes (between courts and other state institutions, etc.),
- iv. impeachment procedures against the president of the republic, the prime minister, and ministers,
- v. unconstitutionality of Acts and actions of political parties and
- vi. other types of disputes (electoral disputes and disputes about referenda).

The most common procedures that are also the most relevant for this article are the procedures under i and ii.

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² Kavčič, Igor – Grad, Franc – Ustavna ureditev Slovenije. GV založba, Ljubljana, 2008, p. 336.

II. 1. Assessments

In general, parties who are actively legitimized to start assessments are divided in 2 groups. Privileged³ (different state institutions) that can demand a procedure (the Court is then obliged to give a ruling) and unprivileged (all other parties) that can propose to the Court to start a procedure, that the Court only starts if the parties show legal interest (the Act in question must directly interfere with their rights, legal interests, or legal positions). The Court can not start a procedure *ex officio* but can expand a procedure already in motion to other legal Acts (principle of connectivity). The Court can annul the unconstitutional or illegal provision with *ex nunc* or *ex tunc* effect, depending on the type of the Act and of the violation, constitute the unconstitutional or illegal nature of the Act without annulling it (while also instructing the institution that issued the Act to make the appropriate changes so that the Act will not violate the legal order) or interpret the provision in question.

II. 2. Complaints

Complaints can be filled by anyone who thinks that an individual legal Act violated their rights or liberties, but only after using all other available legal remedies. The Court has 3 senates (criminal, civil and administrative, each with 3 judges) that procedurally test the complaints. If the complaint does not fulfill the procedural criteria the competent senate discards it. If the complaint is not discarded the Court (all 9 judges) deliberates and either rejects the complaint or upholds it. In the latter case the court usually annuls the Act with either *ex tunc* or *ex nunc* effect and returns the file to the competent court. If it is necessary to remedy the consequences of a human rights violation and if possible, the Court can also decide on its own.

III. What are “Commercial disputes”

As this article will address the role of the Court in commercial disputes it is necessary to first define what commercial disputes are. The Slovenian legal theory and established legal practice differentiates between objective and subjective criteria for the definition of commercial disputes. Following the subjective criteria, a commercial dispute is a dispute where;

- i. one party is a commercial entity while the other party is either a commercial entity, local community, or the state,
- ii. a dispute between individual entrepreneurs regarding their business activities and
- iii. a dispute between an individual entrepreneur and one of the categories as listed under i. regarding business activities.

Following the objective criteria, a commercial dispute is a dispute that has a commercial content, regardless of the legal nature of the parties. In this category the following types of disputes are considered commercial;

- i. insolvency and bankruptcy procedure disputes,
- ii. competition disputes and disputes concerning the protection of copyrights,
- iii. disputes concerning the annulment of an arbitration contract or under certain conditions of an arbitration decision,

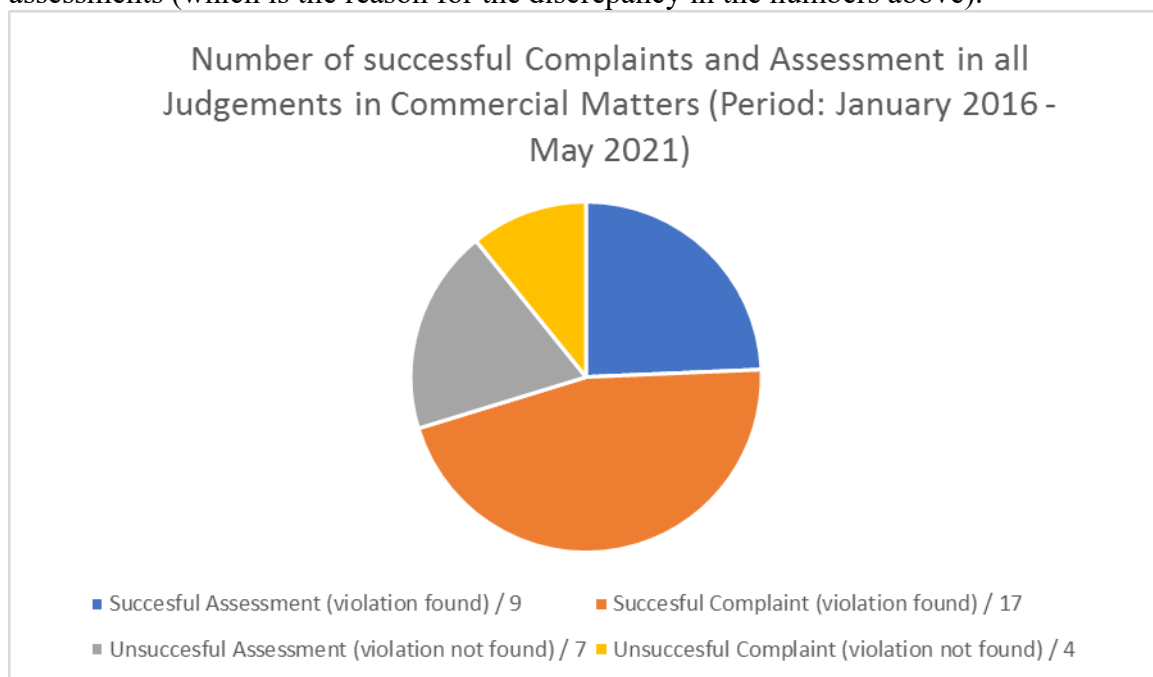
³ There are two types of privileged parties; the ones that can demand a control of constitutionality and legality of all legal acts (abstract control) and the ones that can only demand a control in connection with ongoing procedures in front of them (concrete control), these being the Information commissioner, the Central bank, courts, the State attorney general, and the Court of auditors.

- iv. disputes concerning concession contracts,
- v. disputes concerning court registries and
- vi. disputes concerning ships.

Another category of commercial disputes are commercial status disputes, which are disputes between different stakeholders in a company (e.g., between members of the supervisory board and members of the management).

IV. On the general nature of commercial disputes before the Court

According to the research guidelines, the period covered by this paper began on the 1st of January 2016 and ended on the 1st of May 2021. In this period the Court decided in the merit in 34 commercial disputes. 21 of those were complaints and 16 were assessments, with the Court also giving a ruling in the merit in 3 cases that were both complaints and assessments (which is the reason for the discrepancy in the numbers above).



Out of the 21 complaints the Court found a violation of fundamental liberties and human rights in 17 cases, the remedy in all of them being the *ex nunc* annulment of the individual Act and the return of the file in question to the first instance. In 4 complaints the Court found that there has not been a violation of basic liberties and human rights by individual legal Acts.

In the 16 cases of assessments the Court found the provision(s) of the attacked Act to be unconstitutional in 9, while the Act was deemed constitutional in 7. As for the Acts whose provisions were attacked as unconstitutional, an interesting finding can be made. In 7 cases the attacked Act was the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (ZFPPIPP), with the Court finding a violation of the Constitution in 5 of these cases. The other major group of Acts whose provisions were put in question were different Acts dealing with banking, such as the Banking Act, The Bank of Slovenia Act and the Resolution and Compulsory Winding-Up of Banks Act. Other Acts put in question were various in nature, for example the Act on the Access to Public Information, the Book-Entry Securities Act, the Consumer Loan Act, and the Act on Electronic Communications. The above leads us to the conclusion that *more than half (5 out of 9) of the assessments of the*

Court in commercial matters that found a violation of the constitution by an abstract and general provision of a legal Act were dealing with the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act. In the authors opinion the reasons for the (comparatively) high number of unconstitutional provisions of the above Act are twofold.

- i. Firstly, there has been a large number of insolvency proceedings and compulsory dissolutions during and after the recession which means that purely statistically there was also a large number of appeals to decisions of courts in these matters, some of which ended up before the Court and some of which were successful and
- ii. secondly as the insolvency and compulsory dissolution procedures in Slovenia are complicated, convoluted, and full of pitfalls for potential procedural errors to be made by courts⁴.

V. In depth analysis of the chosen judgements

V.1. Introduction

In the following section 11 judgements⁵ of the Court will be analysed in depth in accordance with the research design. The judgements were all passed in the period from the 1st of January 2016 to the 1st of May 2021. The author chose these exact judgements because they are, according to the criteria of procedure, topic and constitutional right in question, a representative sample of all judgements in commercial disputes that the Court issued in the period in question. Furthermore, the judgement U-I-295/13 was deliberately added, as it is one of the more important judgements of the Court in the last decade and handles the constitutionality of the *de facto* expropriation of owners of subordinate bonds of banks during the bank bail out in the recession. In this case the Court filed a demand for a preliminary ruling to the Court of Justice of the EU concerning the interpretation of the Commission's Banking Communication.⁶

V.2. On the constitutional provisions relied on by petitioners and on the constitutional provisions found to have been violated

Firstly, a general overview of all 34 judgements of the Court in commercial disputes shows, that the Court found the following number of violations of individual constitutional provisions; 13 violations of article 22 (equal protection of rights), 4 violations of paragraph 2 of article 14 (equality before the Law), 3 violations of paragraph 1 of article 23 (right to judicial protection), 2 violations of article 33 (right to private property and inheritance) and one violation of both article 2 (rule of Law) and article 74 (free enterprise).

A more detailed overview on the 11 judgements that were analyzed in depth reveals, that in these judgements the constitutional provisions that the applicants based their petitions on⁷ were the provision on the rule of Law (6 times), equal protection of rights (6 times), equality before the Law (5 times), right to judicial protection (4 times), right to private

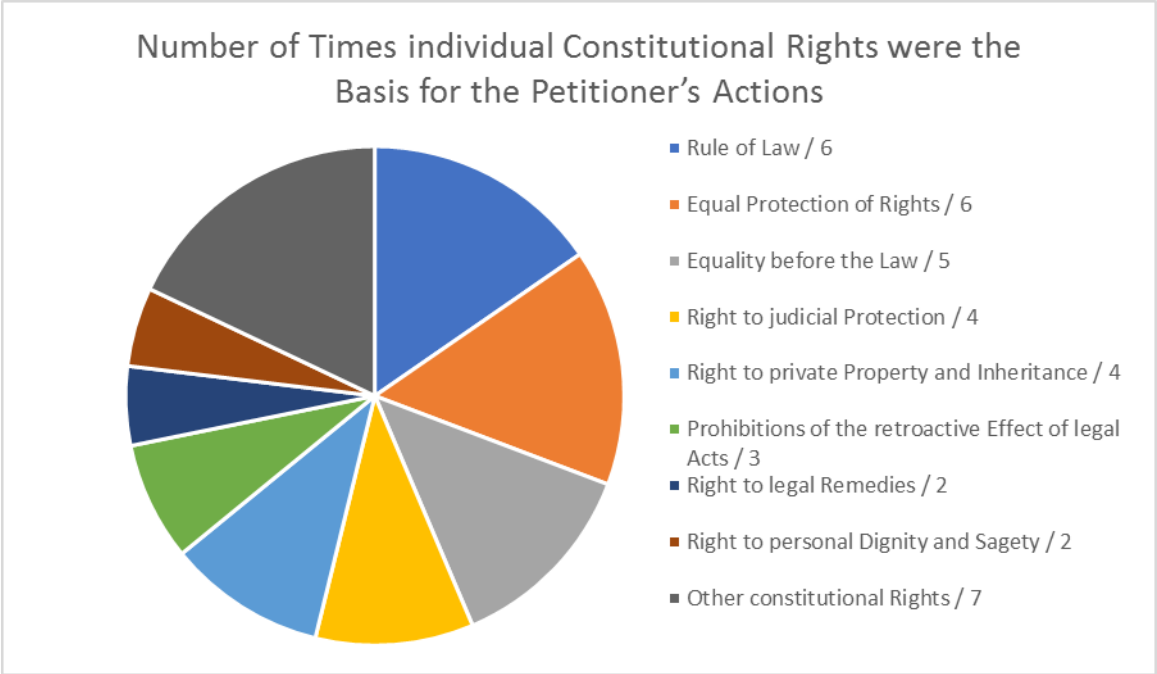
⁴ So much so that the shortfalls of insolvency procedures were recently the main topic of a prime-time television show on national television (Ekstravizor, 17.3.2021).

⁵ U-I-295/13, joined cases U-I-49/17 and U-I-98/17, U-I-27/17, Up-38/17, joined cases Up-280/16, Up-350/16, Up-745/16 and others, U-I-413/20, Up-371/19, joined cases U-I-55/16 and U-I-196/16, Up-370/17, U-I-192/16, joined cases Up-386/15 and U-I-179/15.

⁶ 2013/C 216/01.

⁷ Petitioners based each action on more than one constitutional right.

property and inheritance (4 times), prohibition of the retroactive effect of legal acts (3 times), right to legal remedies (2 times) and right to personal dignity and safety (2 times). The following constitutional provisions were one of the bases of petitions in one case: free enterprise, legislative power of the National Assembly, participation in management, independency of the Central Bank, protection of the natural and cultural heritage, finality of legal decisions, tax provisions, right to property and prohibition of expropriation.



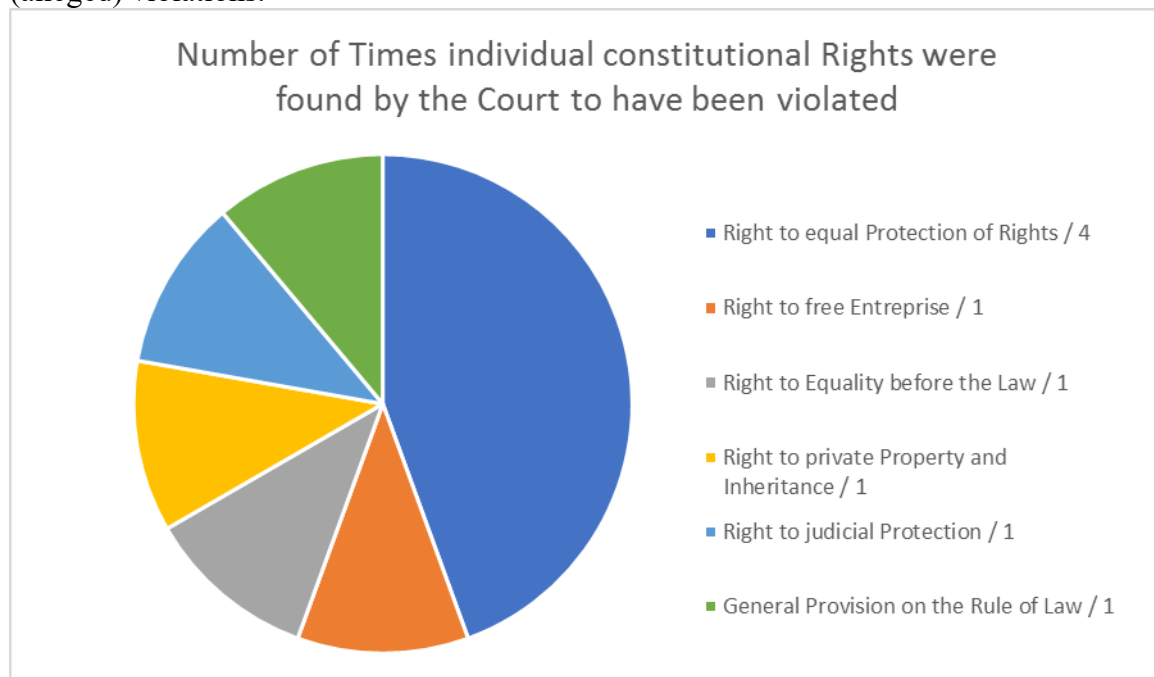
The Court ruled on all the alleged violations in only 5 of the 11 cases examined more closely, those being the three in which no violations were found⁸ and in the cases U-I-295/13 and Up-280/16 where all the alleged violations were examined, but only some of them found. In the remaining 6 cases the Court only found the violation of one constitutional provision, further stating that it does not consider it necessary to examine the remaining alleged violations, as the act was already found to be unconstitutional.

That said, the Court found 4 violations of the right to equal protection of rights and one violation the right to free enterprise, equality before the Law, the right to private property and inheritance, the right to judicial protection and a violation of the general provision that Slovenia is a state ruled by Law. Therefore, we can clearly surmise that the Court consented with the petitioners claims about violations of their right to Equal Protection of Rights in 66% of the cases and with their claims of violations of the Right to Free Enterprise in 100% of the cases. Claims of other violations were upheld in only a small percentage (with a success rate from 16,7% to 25 %). No violation of several constitutional rights/provisions⁹ was found in any case. In this regard it is interesting to point out that the prohibition of retroactivity was the basis of the petitioner's actions in three cases, but no violation of it was found by the Court in any of them. To conclude, from the point of statistical analysis it seems that it is most effective for petitioners to base their complaints in commercial disputes on the provision on equal protection of right, as it guarantees a constitutional right that is relatively broad and thus

⁸ U-I-413/20, Up-38/17, U-I-27/17.

⁹ Prohibition of the Retroactive Effect of Legal Acts, Right to Legal Remedies, Right to Personal Dignity and Safety, Legislative Power of the National Assembly, Participation in Management, Independency of the Central Bank, Protection of the Natural and Cultural Heritage, Finality of Legal Decisions, Tax provisions, Right to Property and Prohibition of Expropriation

able to be the basis of many actions. On the other hand, the right to free enterprise that is also successful from a statistical viewpoint, is much narrower and more limited to specific types of (alleged) violations.

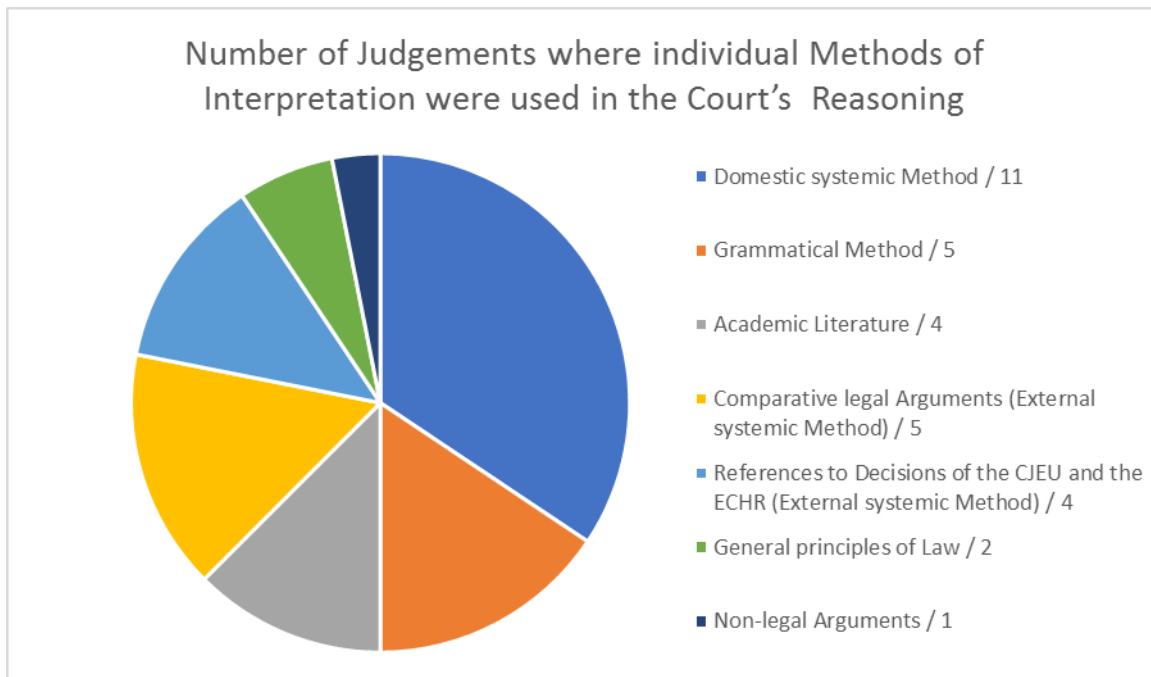


V.3. On the Methods of Interpretation used in the Judgements

When examining the methods of interpretation used by the Court for interpreting constitutional provisions in the 11 chosen judgements according to the research design, the following conclusions can be made.

V.3.1. Quantitative Analysis

Firstly, from a quantitative point of view, the by far most important method of interpretation was the domestic systemic method. Interpretation of constitutional provisions based on case Law of the Court and of established legal practice (of the Court) was used extensively in every judgement. Constitutional provisions were interpreted in relation to other constitutional provisions in two of the examined cases. The grammatical method of interpretation based on the ordinary meaning of words was used in 5 judgements, in four of them one time and in one on three occasions. Foreign and domestic academic literature was used extensively in 4 judgements (in the others not at all or only very scarcely). The following conclusions can be made about the use of the external systemic method to interpret constitutional provisions; comparative legal arguments (citing EU Law) were used in 5 judgements, furthermore, references to court decisions of non-national courts were used to interpret domestic constitutional provisions in 4 judgements, two times in three of them and once in one. The judgements used were decisions of the Court of Justice of the EU on 5 occasion and decisions of the European Court of Human Rights on two. The Court used non-legal arguments in one case and general principles of Law in two. Lastly, the Court did not use the logical and teleological method of interpretation any of the analyzed cases.



V.3.2. Qualitative Analysis

Looked from a qualitative perspective, we can conclude that the by far most important method of interpretation was the domestic systemic method. In all 11 analyzed judgements the conclusion on the (un)constitutionality of an Act could have been, according to the author's opinion, based solely on the findings obtained by this method, as the decisive reasons for the Court's decisions were almost always based on the Court's own Case Law and its established legal practice. In 4 cases the conclusions made by interpreting the Court's case Law were the decisive argument of the decision, while in the other 7 cases they were a defining one. Several examples of case Law were also used as strengthening and illustrative arguments in most judgements. The determination of the meaning of a particular constitutional provision in accordance with other constitutional provisions was used only rarely and did not contribute importantly to the Court's conclusions. It was used in case U-I-27/17 to explain, that the right to private property is not absolute, as it must be interpreted in conjunction with article 15 of the Constitution that determines when certain rights can be limited. The findings made with the domestic systemic method in this form were used as strengthening arguments.

The grammatical method of interpretation was especially important in cases where the text of the constitutional provision in question did not demand much interpretation, as it was clear in itself. For example, the Court stated in judgement U-I-295/13 that the right to private property as it is formulated in the Constitution "does not afford the duty of the state stemming from the Constitution or a right of the creditor entailing that the state should reimburse the money from private investments that transpired to be economically unsuccessful¹⁰", as such a duty of the state and the right of the creditor is not explicitly stated in the Constitution. Findings obtained via the grammatical method of interpretation were mostly used as defining arguments that lead to the Court's conclusion in conjunction with findings obtained with the domestic systemic method. The external systemic method was, by the nature of things, used in cases that had a supra-national element. The Court did not reference the case Law or legal

¹⁰ U-I-295/13, para. 112.

Acts of any individual foreign country. The conclusions made with the interpretation of constitutional provisions considering EU Law and the European Convention on Human Rights (and the relevant case Law) were mostly strengthening arguments (in 5 cases), they were the defining argument in one case and the decisive argument in one case. In the latter case the external legal Act was a preliminary ruling of the Court of Justice of the EU (CJEU), made on the demand of the Court and regarding the interpretation of the Commission's Banking Communication.

Lastly, constitutional provisions were interpreted considering legal theory in 4 cases. Theoretical findings of domestic and foreign literature were used as strengthening and illustrative arguments and did not contribute importantly to the Court's decision.

Overall, we can conclude, that the *Court was especially keen to use its own case Law to interpret constitutional provisions in ongoing cases*. In cases where the provisions interpreted were clear and concise the Court *also used the grammatical method* of interpretation, but it never relied solely on it, rather using the findings obtained with it as determining arguments. Other interpretation methods were both far less common and bore far less weight. The Court interpreted constitutional provisions in accordance with legal acts of the EU and with the Case Law of the CJEU and of the ECHR (external systemic method of interpretation) in cases that had a supra-national element, while it never used the case Law or legal provisions of a foreign country in its reasoning. Legal theory (textbook, articles, commentaries of Acts) was also used sometimes, but only to strengthen the findings obtained with the use of other methods of interpretation. Lastly, as already said, the Court was not too keen to use non-legal arguments. It did so in two cases; in one it implemented economic reasoning, stating that even if proprietors of subordinate bonds were expropriated this was not a violation of their constitutional rights if *inter alia* they were not put in a worse economic position that they would be in, had the banks of whose subordinated bonds they were proprietors wound up. Non-legal arguments were used as strengthening arguments in both cases. The Court was also very reticent to use general principles of Law in its reasoning in commercial disputes, using them twice (as a strengthening argument), both times referencing the principle of protection of consumers.

V.4. Comparison of Methods

Firstly, since the judgements analysed above are a representative sample of the Court's judgements in commercial disputes, we can extrapolate that similar findings are also true for the Court's rulings in commercial disputes in general. Regarding the comparison of the methods of argumentation used in commercial disputes to those used in other types of disputes an explanation is in place; the methods of argumentation in disputes other than commercial are not the topic of this paper and therefore only an analysis of a relatively small number (5) of judgements in criminal and administrative disputes¹¹ was carried out. Therefore, this sample is clearly not completely representative, but still able to show a relatively clear picture.

The methods of interpreting constitutional provisions/rights in the 5 judgements of criminal and administrative nature analyzed, were very similar to the methods of interpretation used in the 11 analyzed commercial disputes. The Court's own case Law (domestic systemic method) was still the most important tool for interpreting provisions of the Constitution, followed by the grammatical method. One noticeable difference however was that the case Law of the ECHR played a much more important role in criminal cases as it did

¹¹ Up-171/14-13, Up-1006/13-20, Up-57/14-13, joined cases U-I-115/14-28 and Up-218/14-45, Up-152/14-14.

in commercial disputes. The author did, furthermore, not notice any important differences in the principles followed by the Court reflecting the specialities of private Law as opposed to public Law. The Court did not put special emphasis on the specificities of civil Law in any of the analyzed judgements, neither did it express any principles regarding the horizontal effect of fundamental rights¹². All in all, we can conclude, that the types of arguments and principles used in argumentation are very similar in both commercial disputes and disputes of public legal nature (criminal and administrative), with one noticeable difference being the extensive use of the ECHR's case Law in criminal disputes. In the authors opinion it is especially pertinent to point out, that the Court never relied on the case Law of Slovenian courts, even that of the Supreme court, or case Law of foreign national constitutional courts. The findings clearly show that in all types of cases the Court is relying in a great extend on its own case Law to interpret constitutional provisions.

VI. Conclusion

Of all 34 commercial disputes adjudicated on by the Court in the timeframe covered, 21 were complaints and 16 were assessments (3 being both). 9 assessments found a legal provision to be unconstitutional, while 17 complaints found an individual legal act to be unconstitutional. In an overproportionate number of cases the legal provisions that were alleged and found to be unconstitutional were part of the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act. In the authors opinion the reasons for this are both the complicated nature of the said Act and the large number of insolvency and compulsory dissolution proceedings after the recession. The constitutional rights that were most commonly found to have been violated in the 11 cases analyzed in depth were the equal protection of rights, equality before the Law and right to judicial protection. These rights (as well as the general provision that Slovenia is a country ruled by law) were also most invoked by petitioners.

Regarding the methods of interpretation used by the Court the quantitative and qualitative analysis showed, that the most important method for interpreting constitutional provisions was the domestic systemic method (more precisely, the use of the Court's case Law, both of individual decisions and established practice), with the Court never using case Law of the Slovenian regular judiciary. This method was followed by the grammatical method, that was mostly used to supplement the findings obtained using the domestic systemic method in cases where there was not much need for the interpretation of constitutional provisions as they are clear in meaning. The external systemic method was used with regards to the judgements of the ECHR and of the CJEU. The Court never used judgements of foreign national courts or foreign national legislation to interpret domestic constitutional provisions. As regards for the use of legal theory, the Court used mostly domestic legal theory (textbooks, articles, commentaries of Acts) with only rare use of foreign legal theory. General principles of Law and non-legal arguments were used rarely. The logical and teleological method of interpretation were not used by the Court in any of the analyzed cases. It also must be noted that the findings obtained with methods other than domestic systemic and grammatical only rarely had an important role in the Court's final decision, acting mostly as strengthening and illustrative arguments. Lastly, a comparison of the judgements in commercial disputes with 5 judgements of criminal and administrative nature showed, that the Court's methods of interpreting constitutional provisions do not greatly differ

¹² There were no horizontal violations of human rights in the examined cases.

between public and private Law cases, the only important difference being the greater role of the case Law of the ECHR in criminal cases.