2011/01/07 - PL. ÚS 14/10: INSOLVENCY PROCEEDINGS - PROTECTION OF CREDITORS

Pl. ÚS 14/10 of 1 July 2011
"Insolvency Proceedings - Protection of Creditors"

HEADNOTES

The basic purpose of the insolvency rights governed by the Insolvency Act is resolving the property relationships of a bankrupt debtor and satisfying the claims of the debtor's creditors from the debtor's assets. The insolvency administrator's decision to allow or challenge a claim (or to what extent), constitutes a binding determination of the creditor's right to proportional satisfaction of the claim in the insolvency proceeding (including all other consequences tied to the outcome of the review), and at the same time constitutes a binding decision on the rights of all other creditors for their proportional satisfaction. Incorrect registration or allowance (non-challenge) by the insolvency administrator of one creditor's claim (validity, amount, priority) can therefore result in (among other things) satisfying another creditor's claim in a lower amount than would be the case if the claim in question were properly determined.

The contested provision rules out the possibility of one creditor challenging the claims of other creditors, through any procedural means.

If, under Art. 36 par. 1 of the Charter, everyone has the right to seek protection of his rights before a court or other authority, and the conditions and rules for the implementation of that right are provided by law, then that law, issued on the basis of constitutional authorization, cannot completely negate the right of every person to seek protection of his rights before a court or other authority in any particular situation, and thus deny the constitutionally guaranteed fundamental right. Article 36 par. 1 of the Charter constitutionally guarantees everyone the possibility to seek protection of his rights before a court or other authority in all situations.

In the contested provision the legislature limited, even annulled, the creditor's right to seek protection of his rights before a court or other authority, and thereby also in these cases denied the fundamental right under Art. 36 par. 1 of the Charter.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

On 1 July 2010 the Plenum of the Constitutional Court, consisting of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická ruled on a petition from SCA Packaging Česká

republika, s. r. o., with its registered office at Teplická 109, Jílové, Středočeské plynárenské, a. s., IČ: 60193158, with its registered office at Novodvorská 803/82, Praha 4, and RWE Energie, a. s., with its registered office at Klíšská 940, Ústí nad Labem, seeking the annulment of § 192 par. 1, § 198 par. 1, § 199 par. 1 and § 201 par. 1 of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the "Insolvency Act"), as follows:

I. The first sentence, including the part after the semi-colon, of § 192 par. 1, of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the "Insolvency Act"), as amended by later regulations, is annulled as of 31 March 2011.

II. The rest of the petition is denied.

REASONING

I.
The course of the Proceeding

1. The Constitutional Court received a petition from the abovementioned petitioners against decisions by the debtor's insolvency administrator and against the actions of the City Court in Prague in the cited insolvency proceeding, joined with a petition seeking the annulment of § 192 par. 1, § 198 par. 1, § 199 par. 1 a § 201 par. 1 of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the "Insolvency Act").

2. The Plenum of the Constitutional Court joined all three petitions, and the matter is being conducted as file no. II. ÚS 1412/09.

3. The second panel of the Constitutional Court found no reason to deny the petitioners' constitutional complaint under § 43 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the "Act on the Constitutional Court"), because application of the contested provisions resulted in a situation that is the subject of the constitutional complaint, the formal requirements for handling it under § 43 par. 1 of the Act on the Constitutional Court have been met, and the constitutional complaint was not found to be manifestly unfounded under § 43 par. 2 let. a) of that Act, and therefore, under § 78 par. 1 of the Act on the Constitutional Court, the panel suspended the proceeding on the constitutional complaint and passed the petition seeking annulment of the abovementioned provisions of the Insolvency Act to the Plenum of the Constitutional Court for a decision under Art. 87 par. 1 of the Constitution of the Czech Republic (the "Constitution").

II.
Recapitulation of the Petition and Essential Parts of the Parties' Briefs

4. Petitioner SCA Packaging Česká republika, s. r. o. stated that, together with other creditors, it submitted to the insolvency administrator an extensive legal analysis, detailed legal arguments supporting denial of the claims of other creditors, and proposed evidence that the administrator should obtain for proper determination of a claim. The insolvency administrator did not consider the proposals for evidence, and also did not consider the legal arguments set

out in the legal analysis. If the Municipal Court in Prague learned during the insolvency proceeding that a significant part of the creditors reasonably questions the claims of secondary creditors, which have a decisive influence on the satisfaction of the claims of other creditors, it should have required the insolvency administrator to consider these matters and investigate the disputed claims in detail. However, the Municipal Court remained completely inactive in its investigative activity. In the review hearing, it limited itself to giving instructions under § 192 par. 1 of the Insolvency Act, and instructed the creditors that they do not have the right to challenge the claims of other creditors.

5. Petitioner Středočeská plynárenská, a. s. stated that the insolvency administrator and the court did not pay proper attention either to the alleged facts and the legal objections of the petitioner and the other abovementioned creditors, or, especially, to the proposed and submitted evidence in the form of "an analysis of the financial flows in Bohemia Crystalex Trading, a. s., in the year 2001." Neither the insolvency administrator nor the court ruled on this evidence.

6. Petitioner RWE Energie, a. s. stated that at the review hearing it requested that special attention be paid to the claim of Citibank; the court was notified in advance in writing of doubts about this claim, and the insolvency administrator was notified in advance in writing and orally. The court then informed the petitioner that it had been given an opportunity to state its position on Citibank's claims in writing, and that a challenge of a creditor's claims that is not allowed by the Insolvency Act would not be permitted. Petitioner RWE Energie, a. s. proposed that the court order the insolvency administrator to have its decision on Citibank's claim read, and, in view of the final nature of the review, that a proper response to the petitioner's objections be submitted. The insolvency administrator stated that it is not the insolvency administrator's job, within the scope of the review of claims, to consider the claims of creditors, analyses of financial statements, and legal arguments, and that this should be exclusively the role of the court. Thus, the insolvency administrator's statement did not publicly state even one argument that would refute the conclusions of the legal opinions submitted by the petitioner. Nevertheless, the court was satisfied with it.

7. Petitioners object, regarding the contested provisions of the Insolvency Act, that incorrect registration, or allowance (non-challenge) of particular claims of certain other creditors in the insolvency proceeding by the insolvency administrator results in reduced satisfaction of their claims, i.e. infringement of their rights, primarily property rights. This is because the insolvency administrator's decision to allow or challenge their claims constitutes a binding determination of the creditor's right to have the claim proportionately satisfied in the insolvency proceeding (including other consequences). So, if a creditor's claim is allowed, this ultimately decides (among other things) on the amount of (proportional) satisfaction of other registered creditors, whose claims compete with each other. If the insolvency administrator does not challenge contested claims, it does not give other creditors the opportunity to have the true validity, amount, and security of claims determined before an independent and impartial court, and thus the requirement of the fundamental right to judicial protection under Art. 36 par. 1 of the Charter of Fundamental Rights and Freedoms (the "Charter") and Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") has not been met. The status of the insolvency administrator, as defined by the Insolvency Act, certainly cannot be placed on the same level as an independent and impartial judicial body, as presumed by Art. 36 par. 1 of the Charter and Art. 6 of the Convention. The fundamental attributes of the independence and impartiality of a judicial body are, in particular, that it cannot be recalled, cannot be transferred, and is appointed with

no time limitation. The insolvency administrator also does not meet the attributes of non-removability from office, because under § 29 par. 1 of the Insolvency Act he can be recalled, upon a vote of the majority of all registered creditors, counted according to the amount of their claims. Given the fact that a creditor, by challenging the claim of another creditor, protects his own property – and therefore fundamental right, the contested provisions also violate Art. 4 of the Constitution, Art. 13 of the Convention, as well as Art. 11 par. 1 of the Charter and Art. 1 of Protocol no. 1 to the Convention. The reason for adopting the contested provisions was evidently misuse of the right to challenge by some creditors, and an effort to speed up insolvency proceedings as much as possible. However, this aim, though certainly legitimate, must be consistent with the principle of proportionality, which is expressed in Art. 4 par. 4 of the Charter, under which, when limiting the fundamental rights and freedoms, their essence and significance must be preserved. Petitioners believe that the contested provisions have quite exceeded the bounds of proportionality, because they gave disproportionate precedence to speed over the principle of protecting creditors' property rights. In these questions, the European Court of Human Rights (the "ECHR") always emphasizes the principle of a fair balance between the general interest of the community (and society) and the individual's right to protection of property, and always reviews whether the state's interference in the individual's property rights is not an excessive and disproportionate burden for the individual.

8. In the supplement to the petition, petitioner RWE Energie, a. s. stated, in particular, that the absence of a right to challenge claims and the current form of the Insolvency Act suits the interests of large creditors, who, by the nature of their business, are always secured – banks – and thus damages other unsecured creditors, whose level of satisfaction of claims under the new Insolvency Act, compared to the previous Act no. 328/1991 Coll., on Bankruptcy and Settlement, has allegedly (and quite unjustifiably) been reduced from an average 9% to 4% (these data are unverified). It is an open secret among insolvency administrators that the claims of banks in the Czech Republic need not be subject to thorough review, because there is a strong conviction that the banks, represented by prominent law firms, simply do not make mistakes in the creation, administration and enforcement of their claims. Neither the statutory requirements for the insolvency administrator nor the opportunity to seek compensation of damages from the insolvency administrator ex post can be seen as adequate measures to balance out denying creditors the right to challenge claims. Of course, under Art. 13 of the Convention and the settled case law of the European Court of Human Rights, compensation of damages is not considered to be an effective legal remedy for an incorrect decision before a national body; it is not a remedy that is truly effective and efficient, but it is only capable of correcting (or mitigating) the adverse effects of a defective decision within the scope of the injured party's property sphere. One can only with difficulty imagine that an injured creditor in the costly proceedings in the current Czech system of justice would be able, within an acceptable time, to effectively obtain from an insolvency administrator compensation of damages in the hundreds of millions of crowns that it incurred as a result of the insolvency administrator's defective review of claims.

9. In another supplement to the petition, petitioner RWE Energie, a. s. refers to certain foreign legislation (Austria, Germany, Great Britain, etc.), which grants creditors the right to challenge claims.

10. In its statement on the petition, the Chamber of Deputies stated that Act no. 182/2006 Coll. was assigned for discussion to the Constitutional Law Committee, which discussed it at its meetings on 1 December 2005 and 20 January 2006, and recommended adopting it in the

wording of the comprehensive amending proposal that was contained in committee resolution no. 235 (publication 1120/1). This comprehensive amending proposal also amended § 192 par. 1, § 198 par. 1, § 199 par. 1 and § 201 par. 1. The bill was adopted in the third reading on 8 February 2006 in the wording of the Constitutional Law Committee's comprehensive amending proposal, as well as other amending proposals that did not affect the cited provisions.

11. The Senate stated that no discussion was conducted either in Senate committees or in the Senate session regarding the provisions that are proposed to be annulled. In view of the foregoing, one can state that no opinions were stated in the upper house of Parliament that would either support, or refute, the petitioners' claims that § 192 par. 1, § 198 par. 1, § 199 par. 1 and § 201 par. 1 of the Insolvency Act are unconstitutional.

III.
Wording of the Contested Provisions of the Act

12. The contested provision of § 192 par. 1 of the Insolvency Act reads: "The debtor and the insolvency administrator may challenge the validity, amount, and priority of all registered claims; individual creditors do not have this right. In the review hearing, the insolvency administrator may change the position that he took on individual claims in the list of claims."

13. The contested provision of § 198 par. 1 of the Insolvency Act reads: "Creditors with an unenforceable claim that was challenged by the insolvency administrator may exercise their right through a complaint for determination before an insolvency court within 30 days from the review hearing; however, this deadline will fall no earlier than 15 days after the delivery of notice under § 197 par. 2. This complaint is always filed against the insolvency administrator. If no complaint is received by the insolvency court by the stated deadline, a claim that is challenged as regards its validity is not taken into account; in this case a claim that is denied as regards its amount or priority is taken into account in the amount or priority stated in the challenge."

14. The contested provision of § 199 par. 1 of the Insolvency Act reads: „The insolvency administrator who challenged an enforceable claim, shall, within 30 days from the review hearing, file a complaint with the insolvency court, whereby he exercises his challenge against the creditor that registered the enforceable claim. The deadline is preserved if the complaint reaches the court no later than the last day of the deadline period."

15. The contested provision of § 201 par. 1 of the Insolvency Act reads: "An unenforceable claim is determined a) if the insolvency administrator did not challenge it, b) if the insolvency administrator who challenged it withdraws his challenge, or c) by decision of the insolvency court in a dispute to determine its validity, amount, or priority."

IV.
Constitutionality of the Legislative Process

16. The bill of the Insolvency Act, which was subsequently promulgated as no. 182/2006 Coll. (Publication 1120/2 of the Chamber of Deputies 2002–2006, 4the electoral term), was discussed by the Chamber of Deputies of the Parliament of the Czech Republic as publication 1120 in the first reading on 26 October 2005 and assigned for discussion to the constitutional law committee, which discussed it at its meetings on 1 December 2005 and 20 January 2006 and recommended adopting it in the wording of the comprehensive amending proposal contained in committee resolution no. 235 (publication 1120/1). This comprehensive amending proposal also amended the contested provisions. The second reading of the bill took place on 27 January 2006, and the amending proposals presented in the second reading were processed as publication 1120/2. The bill was approved by the required majority of deputies present in the third reading on 8 February 2006, in the wording of the comprehensive amending proposals. The bill was passed to the Senate on 28 February 2006, and the Senate organization committee assigned it for discussion, as publication no. 288 (5^{th} electoral term), to the constitutional law committee. The committee discussed the bill on 15 March 2006 and adopted resolution no. 93 (Senate publication no. 228/1), n which it recommended that the Senate approve the bill in the wording passed on by the Chamber of Deputies. The plenum of the Senate discussed the bill at its 10^{th} session on 30 March 2006; in vote no. 199 on the bill, in resolution no. 416 the bill was adopted in the wording passed on by the Chamber of Deputies. Out of 54 senators present, 49 senators voted in favor, 5 senators abstained from voting, and none voted against. The Act was delivered to the President for signature on 7 April 2006, and he signed it on 14 April 2006. The approved Act was delivered to the Prime Minister for signature on 27 April 2006 and was promulgated in the Collection of Laws on 9 May 2006, in part 62, as number 182/2006 Coll.

17. The Constitutional Court states that Act no. 182/2006 Coll. was adopted and issued within the bounds of constitutionally specified competence an in a constitutionally prescribed manner, and that during this proceeding it did not find anything that would support a different conclusion.

V.
The Constitutional Court’s Review

18. The Constitutional Court first considered the status of an insolvency administrator in allowing creditors’ claims in an insolvency proceeding, and determined that he has the status of a public authority, not a representative of the creditors.

19. The Constitution does not define the term “public authority”; therefore, the Constitutional Court addressed defining the content of the term in its case law, in which it inclined to the “power” theory [cf., e.g., decision of the Constitutional Court of the Czech and Slovak Federal Republic, file no. I. ÚS 191/92 of 9 June 1992, Collection of Decisions of the Constitutional Court of the Czech and Slovak Federal Republic, year 1992, decision no. 3; Constitutional Court resolution file no. II. ÚS 75/93 of 25 November 1993 (U 3/2 SbNU 201; and others].

20. Allowance of a creditor's claim by the insolvency administrator is governed by § 188 et seq. of the Insolvency Act. By allowing a claim (not challenging it), the insolvency administrator makes a binding determination of the creditor’s right to proportional satisfaction in the insolvency proceeding (including all other consequences tied to the result of the review,

i.e., voting and participation in creditor bodies, or penalties and other procedural rights and obligations), and also makes a binding determination of the rights of all other creditors to proportional satisfaction [one consequence of allowing a creditor's claim is that it also sets the level of (proportional) satisfaction of the claims of other registered creditors, whose claims compete with each other]. Thus, allowance (non-challenge) of a claim by the insolvency administrator results in determination of the claim in insolvency proceedings with final effect.

21. Although the Insolvency Act does not expressly state the nature of the act by the insolvency administrator whereby he manifests the will to allow a registered claim, the insolvency administrator's act must, of course be reviewed from a material standpoint, i.e. according to its actual nature and effects [cf., e.g., Constitutional Court resolution file no. IV. ÚS 233/02 of 28 August 2002 (U 30/27 SbNU 337)].

22. The legal opinion stated in the Constitutional Court's case law also applies to this issue. The Constitutional Court, e.g. in judgment file no. Pl. ÚS 36/01 of 25 June 2002 (N 80/26 SbNU 317; 403/2002 Coll.) stated the legal opinion that a bankruptcy trustee is not a party to a bankruptcy proceeding; however, as a special procedural subject, he has a separate status both vis-à-vis the debtor and vis-à-vis the bankruptcy creditors, and he cannot be considered to be either a representative of the bankruptcy creditors or a representative of the debtor. The Constitutional Court added to this that "taking as a starting point the aspects defining the concept of a public law body: They are a public purpose, manner of establishment, and authorization. The public purpose of the institution of the bankruptcy trustee must be seen in the acceptance of limited public interference into resolving property rights which have reached a critical state. The manner of the trustee's appointment is provided by a decision by a state body (court). His powers, which are established in a number of provisions in the Bankruptcy and Settlement Act (§ 14, § 17 to 20, § 24, § 26 to 29), in view of their heteronomous nature (the trustee cannot be considered the representative of the creditors or the bankrupt), are an exercise of authority (in contrast to the heteronomous nature of public law acts, private law acts – legal acts – are of an autonomous nature)."

23. The public purpose of the institution of an insolvency administrator must also be seen in the acceptance of limited public interference in the resolution of property relationships that have gotten into a crisis situation. The administrator's powers, which are enshrined in a number of the Insolvency Act, in view of their heteronomous nature (as the insolvency administrator cannot be considered to be the representative of the creditors or the representative of the debtor), then represent the exercise of authority (cf. e.g., the authority to allow registered claims, which is the issue in this case. The manner in which an administrator is appointed comes from a decision by a state body (a court), under § 25 of the Insolvency Act (cf. par. 1, first sentence: "The insolvency administrator for an insolvency proceeding is appointed by the insolvency court.")

24. Nothing about this is changed by the fact that in the process of appointing an insolvency administrator the participation of the creditors may – but need not – play a role in selecting the administrator. The creditors may only change the person of the insolvency administrator, and they can do so only after the review hearing has ended (§ 29 par. 1 of the Insolvency Act), when evaluation of the validity of claims made in the individual registered claims (under § 192 par. 1 of the Insolvency Act the insolvency administrator may change his opinion on the registered claims at the latest in the review hearing).

25. After all, the explanatory report to the bill expressly stated that the insolvency administrator is a special procedural subject, and is neither the representative of the debtor, nor the representative of the creditors. The legislature's intent that the insolvency administrator is not the representative of the creditors was not challenged when the bill was being discussed, and it was declared precisely in connection with the creditors' opportunity to change the person acting as insolvency administrator.

26. Of course, the proposition that the insolvency administrator, when allowing registered claims (validity, amount, and priority) appears to be the creditors' representative is also ruled out by the nature of the matter; an insolvency proceeding generally involves several creditors, but their claims compete with each other. Moreover, under § 24 of the Insolvency Act the grounds for bias on the part of the insolvency administrator can also involve the parties to the proceeding, i.e. not only the debtor, but the creditors as well. How could the insolvency administrator be biased on the grounds of his relationship to the creditors (absence of bias is required by § 24 of the Insolvency Act), if the proposition that the insolvency administrator is the creditors' representative were valid at the same time.

27. Thus, the insolvency administrator makes authoritative decisions on the rights and obligations of creditors who are not on an equal footing with the insolvency administrator; the content of the decision is not subject to their will. Thus, the insolvency administrator's opinion on a creditor's claim at the review hearing, which is stated in the list of registered claims, which is attached to the protocol from the review hearing, can be considered to be a decision of the insolvency administrator.

28. Petitioners propose annulling, on the grounds of unconstitutionality, especially § 192 par. 1, first sentence, including the part after the semicolon, of the Insolvency Act, under which: "The debtor and the insolvency administrator may challenge the validity, amount and priority of all registered claims; individual creditors do not have this right."

29. The contested provision contains an exhaustive list of the group of persons who have the right to challenge claims. The clarity of this norm is further strengthened by the express statement that individual creditors (i.e., including the petitioners) do not have this right.

30. The basic purpose of the insolvency rights governed by the Insolvency Act is resolving the property relationships of a bankrupt debtor and satisfying the claims of the debtor's creditors from the debtor's assets. For example, under § 1 let. a) of the Insolvency Act, "This Act governs the resolution of a debtor's insolvency and impending insolvency through a court proceeding in one of the specified ways so as to settle the property relationships of persons affected by the debtor's insolvency and achieve the greatest possible, fundamentally proportional satisfaction of the debtor's creditors." Several creditors exercise their right to have their claims satisfied from one debtor's assets. Incorrect registration or allowance (non-challenge) by the insolvency administrator of one creditor's claim (validity, amount, priority) can therefore result in (among other things) satisfying another creditor's claim in a lower amount than would be the case if the claim in question were properly determined. Thus, ultimately, it can mean interference in the creditor's property rights, as well as other rights (cf. the other consequences tied to the outcome of the review, i.e. voting and participation in creditor bodies, or penalties and other procedural rights and obligations). One can agree with the petitioners' opinion that the insolvency administrator's decision to allow or challenge a claim (or to what extent), constitutes a binding determination of the creditor's right to proportional satisfaction of the claim in the insolvency proceeding (including all other

consequences tied to the outcome of the review), and at the same time constitutes a binding decision on the rights of all other creditors for their proportional satisfaction. As the professional literature mentions, it happens, not infrequently, that persons who claim to be creditors, although they really are not, attempt to influence insolvency proceedings, or a number of creditors attempt to intentionally exaggerate (overvalue) the amount of their claims, in order to obtain greater influence in the proceeding than they are actually entitled to (cf., e.g., Taranda, P.: Nad některými souvislostmi sankce za nadsazenou přihlášku v insolvenčním řízení [On some aspects of penalties for exaggerated claim registration in insolvency proceedings], Daně [Taxes], 2008, no. 6, p. 53).

31. Yet, the contested provision rules out the possibility of one creditor challenging the claims of other creditors, through any procedural means, e.g. on the basis of appropriate application of the Civil Procedure Code. The standard legal instrument aimed at challenging the claim of a creditor is the so-called "right to challenge". Insofar as the first sentence, and the sentence after the semi-colon of § 192 par. 1, of the Insolvency Act denies creditors the right to challenge the claims of other creditors, the legislature expressed its intent that creditors should not have the ability to challenge a claim, not only through an act of challenge in the review hearing, but through any other legal institution for exercising a right (such as, e.g., a complaint for determination of the claim of another creditor or an appeal against the insolvency administrator's decision). Thus, the first sentence and the sentence after the semi-colon of § 192 par. 1 of the Insolvency Act is a lex specialis vis-à-vis all other procedural means for protection of rights. Otherwise, the intent of the legislature would be circumvented; the first sentence and the sentence after the semi-colon of § 192 par. 1 of the Insolvency Act would cease to make sense.

32. The Constitutional Court has already considered these issue in its case law.

33. In judgment file no. Pl. ÚS 72/06 of 29 January 2008 (N 23/48 SbNU 263; 291/2008 Coll.) the Constitutional Court considered the constitutionality of legal regulations that limited the range of facts that a tax guarantor was entitled to raise in an appeal against a "guarantee" call.

34. In that judgment [as well as subsequently in judgments file no. Pl. ÚS 12/07 of 20 May 2008 (N 90/49 SbNU 247; 355/2008 Coll.) and Pl. ÚS 42/08 of 21 April 2009 (163/2009 Coll.); both available at http://nalus.usoud.cz] the Constitutional Court stated the legal opinion that Article 36 par. 1 of the Charter enshrines the right of everyone to seek protection of his rights before a court or other body. The meaning and purpose of this provision is to impose on the state an obligation to protect everyone's rights, because in a state governed by the rule of law one cannot have a situation in which the holder of rights could not obtain protection of those rights (before a court or other body). The general starting point is that the state exists in order to protect its citizens, as well as persons present on its territory, and to give them guarantees that their rights will be protected. Paragraph 4 of Art. 36 of the Charter (to which paragraph 1 of Art. 36 of the Charter refers in the phrase "the prescribed procedure") refers to a law that governs the "conditions and detailed provisions" in relation to all the preceding paragraphs of Art. 36 of the Charter; nevertheless, that law, issued on the basis of constitutional authorization, is bound by Art. 36 of the Charter, and cannot deviate from its content. The meaning and purpose of an "ordinary" law under Art. 36 par. 4 of the Charter is merely to specify the conditions and details of implementation of the content of rights (already) enshrined in Art. 36 of the Charter by the legislature, i.e. conditions and details of a purely procedural nature (not "substantive law"). The Constitutional Court then also stated

that “thus, it is an irrelevant argument that the key aspect for constitutionality of such a law is, e.g. the degree of denial of these constitutional rights by the legislature, etc., as the Supreme Administrative Court argued in decision file no. 2 Afs 51/2004: “of course, the constitutional safeguards arising from Art. 36 par. 1 of the Charter of Fundamental Rights and Freedoms and from Art. 1 par. 1 of the Constitution do not permit denying a tax guarantor in such a degree … the right to effective protection of his subjective public law rights ….” If, under Art. 36 par. 1 of the Charter, everyone has the right to seek protection of his rights before a court or other authority, and the conditions and rules for the implementation of that right are provided by law, then that law, issued on the basis of constitutional authorization, cannot completely negate the right of every person to seek protection of his rights before a court or other authority in any particular situation, and thus deny the constitutionally guaranteed fundamental right. Article 36 par. 1 of the Charter constitutionally guarantees everyone the possibility to seek protection of his rights before a court or other authority in all situations.

35. This also follows from the axiom of a reasonable legislature. That axiom would be in conflict with the idea that the constitutional framers would leave to the legislature, whose competence to enshrine fundamental constitutional values in the form of fundamental rights and freedoms (contained in the Charter) it did not trust (and therefore it enshrined them itself), essentially free discretion to enshrine the content of one of the fundamental principles of a law-based state, the guarantee of judicial protection of subjective public law rights, i.e. when an individual can seek protection of his rights and when he can no longer do so. In this hypothetical situation, the constitutional framers would, to a substantial extent degrade this key principle of a law-based state practically into a merely statutory principle [in view of its content being (basically) determined by the will of the “ordinary” legislature].

36. Thus, one can only conclude that in the contested provision the legislature limited, even annulled, the creditor’s right to seek protection of his rights before a court or other authority, and thereby also in these cases denied the fundamental right under Art. 36 par. 1 of the Charter. The contested provision of § 192 par. 1, first sentence, including the sentence after the semi-colon, of the Insolvency Act is inconsistent with Art. 36 par. 1 of the Charter. Moreover, under Art. 4 par. 4 of the Charter the meaning and significance of the fundamental right must be preserved, i.e. a fundamental right may not be denied, which, however, the contested provision did. The opposite opinion would be in conflict with the Constitutional Court’s case law cited above, from which the Constitutional Court found no reason to deviate.

37. Indeed, the previous framework, in § 21 par. 2 of the Act on Bankruptcy and Settlement, which – unlike the current framework – granted the other creditors the “right of denial,” documents that it is possible to have a constitutionally conforming situation where creditors are granted the right to challenge the claims of other creditors.

38. One cannot agree with the argument of the Municipal Court in Prague, stated in its response to the constitutional complaint, that interference in Art. 36 par. 1 of the Charter is justified by the effort to prevent abuse of the right of denial, leading, for example, to delays in the proceeding. That is because it presupposes the creditor’s intent to abuse the right, despite the fact that the causes (challenging a claim of another creditor) may be objective (in particular, an incorrect amount given for another creditor’s registered claim). Access to the courts cannot be subordinated to speculative considerations such as a presumption of guilt [which, in fact, the Constitutional Court already argued in judgment file no. II. ÚS 217/98 of 22 June 1999 (N 95/14 SbNU 283)]. Other ways must be found to prevent abuse of one or another right in insolvency proceedings (which, indeed, the Insolvency Act fulfills in other

aspects – cf., e.g., prevention of abuse of the right to register a claim under § 178 of the Insolvency Act). In any case, any right can be abused, which, taken ad absurdum, would mean, according to the criticized logic, that no right could be granted to any subject, because it could be abused.

39. The speed of the proceeding can be considered only within a particular – fair – trial. A trial, even if were guaranteed to be "speedy," would make no sense if it were not fair, and did not guarantee a fair outcome, i.e. (among other things) if everyone did not have the opportunity therein to seek protection of his rights (this is a conceptual component of a trial). Each individual's fundamental right, under Art. 36 par. 1 of the Charter, to protection of his rights, implemented in a trial, by the nature of the matter takes precedence over the speed of the trial; it is its obligatory starting point. Otherwise the trial and its speed would practically become an end in themselves.

40. Meeting the requirement of a speedy trial is guaranteed by other instruments in the Insolvency Act. For example, the explanatory report to the bill of the Insolvency Act – which, contrary to the contested provision included the creditor's right to challenge – expressly sets out that "the aim is to achieve a speedy and efficient proceeding. Achieving a speedy and efficient proceeding is surely the effort and aim of every procedural regulation. However, practice has shown that this aim can almost never be achieved merely by introducing formal procedural deadlines. The bill of the Insolvency Act introduces formal procedural deadlines at several points (more often than the existing framework), but it is based on the idea that these deadlines will be implemented only in conjunction with other measures (other statutory provisions), that permit actually observing the appropriate procedural deadline. In connection with this aim, the outlines leaves room for different approaches, simplifies the proceeding by removing its phases, and removes certain institutions that allowed the proceeding to be extended. These include removing the protective period in its present form; the fact that only 8 protective periods were permitted from 1998 through 2003 shows that it was non-functional. The bill also permits shortened proceedings and procedures and creates conditions for real application of procedural penalties and for financial liability of persons who act in the proceeding in a manner that is inconsistent with its purpose. From this point of view, including incidental disputes in the insolvency proceeding is also of considerable importance. Generally, of course, no procedural law (no matter how well drafted) can ensure a speedy trial in and of itself (just by the fact that it exists); rather, such a norm merely provides (is supposed to provide) instruments that the procedural subjects can use for effective and speedy protection of rights. In this regard it must be said that several of the shortcomings of the present bankruptcy proceeding lie in its application in practice, in particular by courts and administrators, who do not use, or only partly use, the possibilities that the present regulation gives them. The proposed regulation tries to avoid these shortcomings by placing emphasis on the greatest possible degree of predictability for the actions of all subjects taking part in insolvency proceedings and on the greatest possible degree of transparency, so that it will be clear to all subjects what rights and obligations they have in which phase of the insolvency proceeding." Indeed, even the proponent of the draft Insolvency Act argued in support of its adoption in the first reading in Parliament: "Another significant element of the draft Insolvency Act is the emphasis on the unity of the insolvency proceeding and minimizing the time-consuming nature of the entire process."

41. In the first reading the draft Insolvency Act still contained a provision opposite to the contested provision, i.e. it established a right of denial for creditors. After all, the Insolvency

Act directs in the principles of an insolvency proceeding that the proceeding must be conducted so as to obtain speedy satisfaction of the creditors [cf. § 5 let. a)].

42. In a similar sense, the contested provision is also inconsistent with Art. 6 par. 1 of the Convention, because it does not meet the requirement that everyone whose civil rights or obligations are at issue must be guaranteed access to a court (cf. judgment file no. Pl. ÚS 72/06 – see above).

43. This statement applies especially in a situation where a creditor, by challenging the claim of another creditor, seeks protection not only of an "ordinary" right, but of a fundamental right. The case law of the European Court of Human Rights and of the Constitutional Court indicates that the term "property" in the first part of Article 1 of the Protocol to the Convention has an autonomous scope that is not limited to the ownership of tangible assets and does not depend on formal status in national law. It can include "existing property" and property values, including receivables, on the basis of which an individual can claim to have at least "legitimate expectation" of their being met ("ésperance légitime"). According to the case law of the European Court of Human Rights, as well as of the Constitutional Court [e.g., judgments in matters file no. Pl. ÚS 2/02 of 9 March 2004 (N 35/32 SbNU 331; 278/2004 Coll.), IV. ÚS 525/02 of 11 November 2003 (N 131/31 SbNU 173), I. ÚS 287/04 of 22 November 2004 (N 174/35 SbNU 331), I. ÚS 344/04 of 15. 12. 2004 (N 191/35 SbNU 497), I. ÚS 353/04 of 16 June 2005 (N 124/37 SbNU 563)] such legitimate expectation is an integral component of the protection of property rights. Therefore, strictly speaking the contested provision is inconsistent with Article 1 of the Protocol to the Convention and Art. 11 par. 1 of the Charter (cf. judgment file no. Pl. ÚS 72/06 – see above).

44. In view of the fact that a creditor, by challenging the claim of another creditor, seeks protection of a fundamental right, the contested provision is also inconsistent with Art. 4 of the Constitution, under which fundamental rights and freedoms are under the protection of the judicial branch.

45. The Constitutional Court also finds the contested provision unconstitutional in the context of Art. 13 of the Convention, under which "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." The contested provision rules out an effective legal remedy for a decision allowing the claim of one creditor that could interfere in another creditor's right to protection of property ["wherefore we can only state that the third sentence of the contested provision is also inconsistent with the cited article of the Convention" (cf. judgment file no. Pl. ÚS 72/06 – see above)].

46. The Constitutional Court also points to the appropriate application of the decision by the panel (Fifth Section) of the European Court of Human Rights in the case Kohlhofer and Minarik v. the Czech Republic (Application No. 32921/03, 28464/04 and 5344/05). In that decision the ECHR considered three applications. The applicants, minority shareholders, objected that after the registration in the Commercial Register of a resolution to dissolve the company and transfer its assets to the main shareholder they do not have an opportunity to contest the decision or the contract on the transfer of assets. In that judgment, the ECHR stated that limiting access to the courts was legal in the sense that it was governed by national law, and it was also legitimate as regards the public purpose (interest) pursued, that being "furthering stability in the business community by preventing abusive challenges to

resolutions" (cf. point 102 in fine). Nevertheless, it also concluded that this limitation of access to the courts is disproportionate to the legitimate aim pursued. The ECHR also stated that a complaint for compensation of damages or for just satisfaction for a breach of fundamental rights of shareholders cannot be regarded as a means of mitigating the effects of § 131 par. 3 let. c) of the Commercial Code in connection with the core issue in the proceedings [cf., e.g., the following text of the judgment: "101. As to the Government's contention that it was open to the applicants to seek to vindicate their interests in other ways, such as by requesting a separate judicial review of the compensation paid by the main shareholder, or by claiming damages or just satisfaction for a breach of fundamental rights of shareholders, the Court would note that those proceedings had different objectives and dealt with the separate issue of the monetary satisfaction. Moreover, just satisfaction could be claimed for breach of not all but only fundamental rights of shareholders. The Government have not shown that these legal avenues were capable of giving rise to a discussion of the lawfulness of the resolution in circumstances comparable to a review in the set-aside proceedings. They cannot be therefore regarded as a means of mitigating the effects of Article 131(3)(c) of the CC in connection with the core issue in the proceedings. Nor could they be considered as effective remedies to be exhausted by the applicant (see paragraph 74 above), an issue which the Court joined to merits (see paragraph 80 above) … 105. As for the proportionality of that limitation, the Court notes that the Government relied, as in application no. 32921/03 above, on the existence of alternative legal avenues which rendered the limitation compatible with the Convention. The Court further notes that in its view expressed above those legal avenues did not constitute remedies to be exhausted within the meaning of Article 35 § 1 of the Convention, nor could they adequately mitigate the impairments of minority shareholders' rights caused by that limitation (see paragraph 101 above). Given that the third applicant's right to access to a court was limited as a result of the operation of Article 220h(4) of the CC in a manner similar to that in application no. 32921/03, the Court finds that the availability of alternative remedies could not satisfy the requirements of Article 6 § 1 of the Convention in the present application."].

47. The Constitutional Court also states, from a comparative law viewpoint, that, e.g., under Austrian or German legislation a creditor can challenge the claim of another creditor (cf., e.g., § 105 Konkursordnung, § 178 Insolvenzordnung). The comparative law aspect of this issue is also extensively referred to by the supplement to the petition from petitioner RWE Energie, a. s., of 24 June 2010, which concludes that "the comparison presented her shows that countries where the economic view of legal institutions has a much longer tradition than in the CR did not take this route, because, as countries of the "Rule of Law" they respect the constitutional dimension of the rights of creditors, the principle of full jurisdiction of decisions by the public authorities, and want to avoid potential "hidden pressures" on the administrator by some creditors with disputable claims. At the same time, these traditional democracies are able to find other effective ways to prevent excessively long insolvency proceedings, without limiting creditors' rights."

48. Nothing about the abovementioned conclusion that the contested provision is unconstitutional is changed by the fact that creditors damaged by an incorrect registration, or allowance (non-challenge) by the insolvency administrator of the individual claim (validity, amount, priority) of another creditor have the opportunity to seek compensation of damages or other detriment from the insolvency administrator (on the basis of § 37 of the Insolvency Act).

49. That is a different legal structure, i.e. within the framework of liability [cf. judgment file no. I. ÚS 2219/07 of 2 April 2008 (N 63/49 SbNU 3)]; moreover, it is directed against a different subject. Rights and obligations are a paired concept; the right of one subject corresponds to the obligation of another subject. In the contested provision, the legislature denied the right of one creditor to challenge the claim of another creditor, although in this right to challenge another creditor's claim a creditor pursues protection of its property (and other) rights. Thus, the addressee of the challenging of a claim is another creditor. This involves protection of the rights (primarily property rights) of one creditor over an incorrect claim (incorrect as to validity, amount, priority) of another creditor. However, a complaint for compensation of damages caused by the insolvency administrator is a procedural means to protect rights directed exclusively against the insolvency administrator. Thus, if a creditor were hypothetically successful with a complaint for compensation of damages caused by the insolvency administrator, the creditor would not alter the fact that a claim of another creditor was incorrectly registered [which, ultimately, could mean the (proportional) satisfaction of his claim to a lesser extent, and also mean interference in his other rights (cf. other consequences tied to the outcome of a review)].

50. Regardless of the fact that, despite hypothetical future compensation, not all negative results arising from the non-challenge by a second creditor of incorrectly registered claims would be removed from the creditor's legal sphere (cf., e.g., these creditors' increased influence at the meeting of creditors and in creditor bodies, cf., e.g., § 49 par. 1 of the Insolvency Act, under which, "Unless this Act provides otherwise, a valid resolution of the creditors' meeting requires a simple majority of votes of the creditors present or duly represented, counted according to the amount of their claims; every CZK 1 claimed receives one vote."). Thus, a creditor could later exercise against the insolvency administrator requirements arising from the framework regulating the insolvency administrator's liability for damages, but this changes nothing about the fact that, even if he received satisfaction in this regard, he could retroactively achieve only the removal of the property damage he incurred, not the damage to his other (procedural) rights.

51. Liability for damages is a secondary institution. However, individuals are primarily guaranteed rights and freedoms, and the state is required to provide effective means for the effective protection and enforcement of them. Thus, a creditor is primarily entitled to seek protection of his rights and freedoms as such, and cannot be required to content himself only with later compensation for violation of his rights and freedoms on the basis of exercising his right to compensation of damages. This would contradict the purpose of Art. 36 par. 1 of the Charter. Otherwise, the legal order would approve the violation of the rights and freedoms of that creditor. Likewise, in judgment file no. Pl. ÚS 72/06 (see above), the Constitutional Court argued on the basis of violation of a tax guarantor's fundamental right to seek protection of his right because of statutory limitation of the facts that a guarantor could raise in an appeal against a guarantee call, although the possibility was not ruled out or arguing analogously, i.e. that the guarantor can exercise recourse vis-à-vis the debtor (analogous to the possibility of exercising a claim for compensation of damages against the insolvency administrator). In its case law the Constitutional Court also stated a legal opinion on the requirement of subsidiarity for exercising a claim for compensation of damages vis-à-vis the state after exhausting effective procedural means for protection of rights directed toward tenants (cf., e.g., judgments file no. I. ÚS 1180/07 of 12 February 2009 of IV. ÚS 1253/08 of 3. December 2008; both available at http://nalus.usoud.cz). This legal opinion can be applied proportionately to the present issue.

52. In an on-going insolvency proceeding, the participants (i.e., including creditors) unquestionably have an interest in achieving fair protection of their rights and legitimate interests (cf. § 1 of the Civil Procedure Code). The participant's right is the primary interest of the fulfillment of the meaning and purpose (among other things) of the insolvency proceeding, which is to provide protection of rights under Art. 90 of the Constitution, finding expression in the requirement that no participant be unfairly damaged or impermissibly advantaged [cf. the fundamental principle of insolvency proceedings expressly set forth in § 5 let. a) of the Insolvency Act]. This interest cannot be settled by compensation of damages, because the priority here is avoiding a situation where a participant is unfairly damaged or impermissibly advantaged, so that compensation is not necessary. A participant in the proceeding (including creditors) can later exercise against the insolvency administrator claims arising from the insolvency administrator's liability for damages, but that changes nothing about the fact that, even if he were provided satisfaction in this regard, that would not erase the previous situation when his rights were violated (he only received compensation, but not in full – cf. the text above). A creditor who seeks effective protection of his rights in an on-going insolvency proceeding must have the opportunity to request protection under Art. 36 par. 1 of the Charter. [The Constitutional Court has argued likewise in its case law (cf., e.g., judgment file no. IV. ÚS 391/07 of 7 August 2007, N 122/46 SbNU 151) in relation to constitutional complaints concerning delays in proceedings that are still on-going before the general courts – it does not deny a constitutional complaint as impermissible with the provision that during the course of a proceeding it is possible to exercise claims against the state that arise from the framework for state liability for delays under of Act no. 82/1998 Coll., on liability for damages caused in the exercise of state authority by a decision or incorrect official procedure, and amending Czech National Council Act no. 358/1992 Coll., on Notaries and their Activities (the Notarial Code), as amended by later regulations]

53. The foregoing applies all the more so because the insolvency administrator can relieve himself of liability (under conditions provided in § 37 of the Insolvency Act). Thus, this instrument does not provide an absolute guarantee that compensation for damages will be paid by the insolvency administrator, and for that reason as well it cannot be an effective means for protecting a creditor's rights.

54. The right to a fair trial also includes timely provision of judicial protection, but another proceeding (on a claim for compensation of damages, directed against the insolvency administrator) constructed as a necessary proceeding, would violate this principle. The Constitutional Court reasoned analogously in judgment file no. I. ÚS 2219/07 (see above), in which it reviewed a constitutional complaint on the merits, although the contested appeals court decision required the complainants to file an independent complaint for compensation of damages in order to exercise their right to compensation of expenses incurred. In that judgment the Constitutional Court stated the legal opinion that further proceedings would violate the principle of timely judicial protection.

55. If the Constitutional Court approved the contested provision from a constitutional law viewpoint, with petitioners' reference to possible compensation of damages by the insolvency administrator, it would approve a situation where an insolvency proceeding is conducted so that some participants are unfairly damaged and some impermissibly advantaged. Although participants could be compensated for the property damage later, that would in no way remove the situation where another participant is impermissibly advantaged by having his claims allowed in a higher amount than corresponds to reality, which would be reflected in higher proportional satisfaction of his claim than he is really legally entitled to. A public

authority must interpret legal regulations in such a way as to eliminate this irrational, and, especially, unjust, state of affairs. The purpose of an insolvency proceeding – like every civil trial – is to achieve fair protection of the rights and legitimate interests of the participants, as well as education on the preservation of laws, honorable fulfillment of obligations, and respect for the rights of other persons (cf. § 1 of the Civil Procedure Code).

56. For the abovementioned reasons, the Constitutional Court annulled the first sentence, including the sentence after the semi-colon, of § 192 par. 1 of the Insolvency Act, which results in an unconstitutional gap in the form of an unconstitutional narrowing of the group of subjects entitled to challenge the validity, amount, and priority of registered claims. The Constitutional Court considered it essential to provide time for the legislature to remove the constitutional defect in the legislative framework, and therefore postponed the enforceability of this judgment.

57. The Constitutional Court denied the remainder of the petition seeking annulment of the last sentence of § 192 par. 1, § 198 par. 1, § 199 par. 1 and § 201 par. 1 of the Insolvency Act as manifestly unfounded, primarily because of the principle of minimizing the Constitutional Court's interference in the activities of the legislature (which the Constitutional Court is guided by in its settled case law). The other contested provisions govern only the procedures of exercising the right to challenge, even though for an unconstitutionally diminished group of subjects. After the legislature removes the abovementioned unconstitutional gap by expanding the group of those holding the right to challenge, it will be up to it, how to establish the procedures for exercising creditors' right to challenge (whether the legal framework will follow the current procedure or whether a different system will be chosen); the Constitutional Court's decision cannot anticipate the solution of that issue.

Dissenting opinions to the Plenum's decision, under § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, were submitted by Judges Vladimír Kůrka, Jiří Nykodým and Miloslav Výborný.

1. Dissenting opinion of Judge Vladimír Kůrka

I cannot agree with the opinions held by the majority of the Plenum, and especially with the outcome, for reasons that focus on reservations whose aim is to criticize the hypertrophied protection that the judgment ties to the status of creditors in insolvency proceedings:

1. Generally – including outside insolvency proceedings – (in any case), a creditor cannot interfere (with the exception established in § 91a of the Civil Procedure Code, which does not apply here) in the dispute conducted with the debtor by another creditor, even though, if he succeeds, the realistic possibility of satisfying his claim, even if allowed later, will become more difficult. The legal framework in the first sentence of § 192 par. 1 of Act no. 182/2006 Coll., on Bankruptcy and Settlement (the Insolvency Act), did not decisively interfere in the property relations of a particular creditor otherwise than was the case before the insolvency proceeding began.

2. Even in similar circumstances (for example the enforcement of a decision or execution), a creditor challenging the claim of another creditor does not have greater rights than those that correspond to this provision.

3. To protect the rights of a creditor who feels affected by the claim of another creditor, the insolvency proceedings provides a review hearing (§ 190 et seq. of the Insolvency Act), in which the creditor has room to question the claim and adequately document his opposition, as well as to exert pressure on the insolvency administrator to challenge the disputed claim in a legal manner.

4. The insolvency administrator is here exposed to the consequences of the statutorily established liability for damage (§ 37 of the Insolvency Act) that could other creditors could incur through non-challenge of such a claim.

5. The institutions in § 178, 179, 182 of the Insolvency Act operate with a similar purpose.

6. A creditor who challenges the claim of another creditor has at his disposal not only the regime of compensation of damages against the insolvency administrator (which the majority of the Plenum concluded to be inadequate), but also a complaint based on a stronger right, through which it can seek from that creditor the shortfall in satisfaction of his claim that was caused by the actions of that creditor – granted, outside the insolvency proceeding, but with precisely the argument that in the distribution another claims was unjustly satisfied at his expense.

7. Which corresponds to the fact that the creditor limitations criticized by the majority of the Plenum basically have no effect except inside the insolvency proceeding, not outside it. It is also worth noting the "principles of insolvency proceedings" postulated in § 5 of the Insolvency Act, especially in letter c), under which "Unless this Act provides otherwise, a creditor's rights acquired in good faith before an insolvency proceeding began cannot be limited by a decision of the insolvency court or by actions of the insolvency administrator."

8. Insofar as the majority opinion concluded that the insolvency administrator has the status of a particular public body and non-challenge of a creditor's claim is placed on the level of "a decision in the substantive sense," the question also arises, why guarantee the right to a factual review (through an incidental proceeding), if it is not guaranteed otherwise, at the general constitutional law level. Basically the point is nothing more than to ensure a certain degree of control over registered claims, and defining the level of control (more or less) is primarily up to the legislature.

9. The majority of the Plenum rejects, as a lower value, the "speed" of the insolvency proceeding, but conceives of it in isolation (only as such), without reflecting the natural consequences of this "speed" that are projected into the generally pursued context of protecting property rights; the speed of insolvency proceedings is one of the important practical conditions for protection property rights – both of the debtor and of all the creditors.

10. The existence of other (foreign) legislative frameworks cannot be overestimated; the Slovak legislation stands in contrast to the majority decision.

Thus, I summarize that the creditor's rights were not limited by the framework in the first sentence of § 192 par. 1 of the Insolvency Act beyond the tolerable level conceived in Article

36 par. 1 of the Charter; the concept of an insolvency proceeding as in effect until now is possible (it is not significant that there are also others), and its adoption is a matter of the legislature's choice; therefore, in my opinion, there were no grounds for the interference by the Constitutional Court that the majority of the Plenum has made.

2. Dissenting opinion of Judge Jiří Nykodým

In this judgment, the Constitutional Court annulled the first sentence and the sentence after the semicolon of § 192 par. 1 of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the "Insolvency Act"), as amended by later regulations, as of 31 March 2011. The majority of the Plenum of the Constitutional Court concluded that in this provision the legislature limited, even annulled, a creditor's right to seek protection of his rights before a court or other body, and thereby in these cases denied a fundamental right under Art. 36 par. 1 of the Charter, and from that it concluded that the first sentence, including the sentence after the semi-colon, of § 192 par. 1 of the Insolvency Act is inconsistent with Art. 36 par. 1 of the Charter. I have doubts about the correctness of this opinion, for the following reasons.

The reasoning of the judgment states that the Constitutional Court first considered the status of an insolvency administrator in the case of allowing creditor claims in an insolvency proceeding and considered it to be the status of a public authority (see point 18 of the judgment), not that of a representative of the creditors. By allowing a claim, the insolvency administrator makes a binding determination of the creditor's right to have it proportionally satisfied in an insolvency proceeding; allowance (non-challenge) of a claim by the insolvency administrator results in determination of the claim, in an insolvency proceeding with final effect. Even if this conclusion were correct and non-challenge of a creditor's claim was of the nature of a "decision in the substantive sense," there would be no grounds for intervention by the Constitutional Court, because the entitlement to review in an incidental proceeding is not constitutionally guaranteed, because such a decision would have to be seen as a decision by the court that appointed the insolvency administrator and thus transferred to him part of the judicial powers.

In my opinion non-challenge of a claim is not a "decision" in the legal sense. When the insolvency administrator in an insolvency proceeding allows or does not allow the claims of creditors registered in the insolvency proceeding, he acts as an officially appointed administrator of the debtor's assets, and on his behalf allows or does not allow the validity of a claim. He enters into the contractual relationship of two subjects in a private law relationship, and, on the basis of a court decision, by allowing or not allowing a creditor's claim he replaces the will of the debtor. In fact, the decision is whether he will or will not enter into a lawsuit with the creditor. Thus, this is an action that expresses the will of a party to a private law relationship. The fact that the law ties certain consequences to this act, in view of the fact that it is made in an insolvency proceeding and that, because of the nature of that proceeding this is done with final effect, does not make the allowance a public law act. The insolvency administrator basically acts on behalf of the debtor, on his account.

An insolvency proceeding is a special form of a civil trial. In proceedings for determination conducted under the Civil Procedure Code third parties also do not have a procedural right to interfere in proceedings conducted against the defendant by other plaintiffs. Thus, in a civil trial this is nothing unusual. The fact that insolvency proceedings involve several creditors at the same time cannot be grounds for a different procedure, because even in this proceeding

each creditors acts for himself and exercises his claims against the debtor independently of the other creditors. It cannot be overlooked that every creditor has the right in the review hearing to raise objections against registered claims that he considers to be problematic. I don't agree that this mechanism is insufficient, because it must be seen in the full context of the legislative framework. I have in mind, in particular, the penalties that the Act assigns for registering an incorrect claim (see, e.g., §178 and 179), and the insolvency administrator's liability for damage.

Art. 36 par. 1 of the Charter of Fundamental Rights and Freedoms guarantees everyone the right to exercise, through the prescribed procedure, his rights before an independent and impartial court, and in specified cases before another body. Registering a claim in an insolvency proceeding is exercising one's rights before an independent and impartial court, and the Insolvency Act provides the rules under which this right can be exercised. The fact that the creditor cannot defend himself in an independent proceedings against the allowance of the claim of another creditor does not in any way exceed the standards of providing judicial protection to subjects of a private law relationship, in which protection is provided directly to the parties of the relationship, not to parties outside it. The purpose of this constitutionally guaranteed right is not to create a hypertrophy of lawsuits in which, in any case, every party cannot be satisfied, because it is quite usual that in a lawsuit there is always only one winner and one loser. Insofar as, in our context, a framework for insolvency proceedings was adopted that, in the interest of speeding up the insolvency proceeding, made it impossible for creditors to challenge the claims of other creditors by filing independent complaints, in my opinion this was a legitimate step, despite the fact that arguments were made on the basis of foreign legislation where that possibility exists. Neither foreign legislation nor the fact that the previous framework preserved this possibility are a measure of constitutionality. Such a framework is possible, but its absence is not unconstitutional. The purpose of a bankruptcy proceeding is to resolve a crisis situation with the least possible property losses by the parties involved. A speedy solution is one of the main conditions for meeting this aim, and its purpose is to prevent further losses caused by delays in the proceeding.

3. Dissenting opinion of Judge Miloslav Výborný

1. I cannot agree with the adopted judgment, basically for the same reasons as those given in the dissenting opinions of Judges Vladimír Kůrka and Jiří Nykodým.

2. Among all the cited reasons, of course, I would not accentuate the importance of "victory of the speed of insolvency proceedings."

3. I consider the primary reason why the petitions should not have been granted to be the error in the majority conclusion that it is somehow obvious that the actions of the insolvency administrator that are criticized by petitioners are decisions in a legal sense. The insolvency administrator in the matters in question did not issue any decisions, so there was also no room for any sort of judicial review, including review of constitutional complaints that sought not only annulment of the allegedly applied first sentence of § 192 par. 1 of the Insolvency Act, but especially annulment of specified "decisions" by the insolvency administrator on the allowance of the cited claims. Therefore, the constitutional complains connected to the petition for annulment of the cited statutory provision should have been denied (by a panel).

4. It remains quite unclear how the conclusions adopted by the majority decision of the Plenum of the Constitutional Court will manifest themselves in legal practice and thus in the legal relations of the parties to insolvency proceedings in the period before the adoption and entry into effect of a new legislative framework.