

2005/10/25 - PL. ÚS 20/04: BUSINESS TRUSTEE

HEADNOTES

The mere fact that the final result may be a situation where a business trustee's claims are not satisfied is not unconstitutional. This fact must also be seen in light of the abovementioned decision of the European Court of Human Rights (*Van der Musselle v. Belgium*), which emphasized that the risks undertaken in connection with the practice of a particular profession (in the cited case, of an attorney), which include the risk of non-payment of compensation for work performed, are balanced out by advantages connected with that profession (in the cited case, a professional monopoly in defense and representation). These conclusion can also be applied, without anything further, to the activity and position of a business trustee, in whose case the risk of non-satisfaction of statutory claims, which is of course quite insignificant, basically has a counterweight in his monopoly status for conducting the activity of an trustee.

The Constitutional Court concluded that there are no grounds for granting the constitutional complaint, and it is not necessary to annul § 338zo par. 4 of the CPC, because in the overwhelming majority of cases satisfaction of a business trustee's statutory claims can be achieved with the help of instruments contained in the CPC.

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH EPUBLIC

The Plenum of the Constitutional Court, composed of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová a Michaela Židlická decided on this day on a petition from the District Court in Ostrava, seeking the annulment of § 338zo par. 4 of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, as follows:

The petition is denied.

REASONING

I.

The petitioner, in accordance with Art. 95 par. 2 of the Constitution of the Czech Republic seeks to have the Constitutional Court issue a judgment annulling § 338zo par. 4 of the Civil Procedure Code (the “CPC”). It stated that in its decision-making in the matter file no. 90 E 1096/2002 it concluded that this provision is inconsistent with Art. 1 and Art. 3 par. 1 of the Charter of Fundamental Rights and Freedoms, for the following reasons:

In its decision of 7 April 2003, ref. no. 90 E 1096/2002-8, the District Court in Ostrava ordered execution of its decision by sale of the obligated party’s business, and appointed Mgr. Z. N. as the trustee. In a filing of 14 November 2003, the trustee gave the court a report on the price of the business under § 338m of the CPC. According to this report, the obligated party’s business has debts totaling CZK 26,035. As regards the obligated party’s assets, it was determined that the business has de facto not existed for over 4 years, and it has no personal property, real estate, or receivables. By decision of 23 January 2004, ref. no. 90 E 1096/2002-37, the District Court in Ostrava stopped execution of the decision under § 338n par. 6 of the CPC, because the value of things, rights and other assets belong to the business is not greater than the amount of the business’s payable financial obligations, the expected compensation for the trustee, and reimbursement of the trustee’s cash expenses. In her filing of 11 March 2004, the trustee, pursuant to § 338zo par. 4 of the CPC, provided an accounting of the trustee’s compensation and cash expenses. She listed cash expenses of CZK 106 for postage, and proposed that the court set the compensation for the trustee in its discretion, based on the time required to perform the office; under § 2 of Decree no. 485/2000 Coll. on Compensation of Trustees, the basis for determining a trustee’s compensation is the price determined under § 338n par. 2 of the CPC, but in this case it is impossible to determine that compensation, because the business has no property.

The petitioner also pointed to § 338h par. 1 of the CPC, under which a court, in a decision ordering execution of a decision by sale of a business, shall appoint a trustee for the business, whom the law (e.g. § 338k of the CPC, 338m of the CPC) charges with fulfilling a number of obligations, and also makes him liable for damages which he causes by at-fault violation of his obligations. The court shall appoint as trustee a person registered under special regulations in the list of bankruptcy trustees. Under § 338i par. 4 of the CPC, the trustee is entitled to compensation and to reimbursement of cash expenses. The amount of trustee compensation, how it is determined, and determination of cash expenses is regulated by Ministry of Justice Decree no. 485/2000 Coll. The basis for determining a trustee’s compensation is the price of the business determined under § 338n par. 2 of the CPC (the net assets of the business). The decree does not provide for compensation of the trustee in the event that execution of the decision is stopped, e.g. under § 338n par. 6 of the CPC. According to the court, the inconsistency between the regulation provided by the cited § 338i par. 4 and the decree can be overcome by interpreting the statute so that the court determines the compensation in its discretion, and taking into account the scope of the trustee’s work.

The petitioner also referred to the contested § 338zo par. 4 of the CPC, under which the court shall impose an obligation to pay the trustee compensation and reimbursement of

cash expenses if execution of a decision is stopped, either on the obligated party, or jointly and severally on the entitled party, those who entered proceedings as additional entitled parties, and creditors who have registered their claims (§ 338s and 338zn of the CPC), depending on the grounds on which the execution of the decision was stopped (§ 338zo par. 4 of the CPC). However, the statutory construction of § 338zo par. 4 of the CPC makes it possible for a situation to arise in the proceedings, where the ability to satisfy the trustee's claims is directly dependent on the solvency of the parties to the proceedings. Because an entitled party can be required to pay the trustee's claims only in exceptional cases (usually when he did not observe the necessary level of care when filing the petition for execution of a decision), in most cases it is the obligated party who is bound by this obligation. Especially in a situation where the obligated party's business is over-indebted (§ 338n par. 6 of the CPC), it is evident that the trustee's claims will not be satisfied, or will be satisfied only in part; if the business trustee was not made the bankruptcy trustee under § 13b par. 3 of Act no. 328/1991 Coll., on Bankruptcy and Settlement (the "Bankruptcy Act"), the business trustee has only non-priority claims against the bankrupt (§ 31 par. 5 of the Bankruptcy Act). If the bankruptcy petition was denied, then the business trustee does not have even this possibility for satisfying his claims. As a result of the statutory framework for compensation of trustees, in a number of cases the business trustee, although he fulfills all obligations imposed by law, does not receive compensation for fulfilling his office, and he is not reimbursed for cash expenses which he paid out of his own funds. The structure of compensation for business trustees not only leads to failure to satisfy their lawful claims, but also thus deforms the overall results of execution of a decision by sale of a business, because it removes from a certain group of business trustees the important motivation of compensation.

The petitioner added that a business trustee must be considered a special public law body, just like a bankruptcy trustee (see Constitutional Court judgment file no. Pl. US 36/01, published as no. 403/2002 Coll., also Collection of Decisions of the Constitutional Court, volume 26, judgment no. 80). The abovementioned statutory structure for deciding on a trustee's compensation and cash expenses (§ 338zo par. 4 of the CPC) creates a situation where it is impossible to satisfy a business trustee's lawful claims for compensation and cash expenses, without establishing another, alternative source for paying these claims (e.g. an obligation of the state to pay a trustee's claims, or an obligation on the entitled party to provide a deposit for the compensation and cash expenses). The provision of § 338zo par. 4 of the CPC does not even permit using as an alternative source any deposit paid under § 270 par. 3 of the CPC, because that deposit can be used only to pay expenses of execution of a decision which are paid by the state. Thus, in the petitioner's opinion, this creates an inequality in compensation for two groups of business trustees - a first group of business trustees, the satisfaction of whose claims for compensation and cash expenses is secured by law (in the budget of revenues from sale of a business or in the budget of bankruptcy assets under § 31 par. 5 of the Bankruptcy Act) and a second group of business trustees without the possibility of satisfying their claims, or with only a negligible possibility - even though both groups of business trustees fulfill all the obligations imposed on them by law.

II.

The Constitutional Court, in accordance with § 69 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the Act on the Constitutional Court”), sent the petition to open proceedings to parties to the proceedings - the Chamber of Deputies and the Senate of the Parliament of the Czech Republic and also requested a position statement from the Ministry of Justice of the Czech Republic.

The statement from the Chamber of Deputies of the Parliament of the Czech Republic begins by recapitulating the content of the petition to annul the contested statutory provision and then the statutory process leading to the enactment of that provision. The amending proposals which were passed did not affect the contested provision. The legislature acted in the belief that the enacted statute was in accordance with the Constitution and our legal order, and leaves it to on the Constitutional Court to evaluate its constitutionality.

The Senate of the Parliament of the Czech Republic, in its extensive statement on the merits of the matter, stated that in the case of a sale of a business the legislature could not ignore the situation where, in the course of an execution of a decision by sale of a business it becomes apparent that the business is insolvent (over-indebted). The only procedural methods for addressing insolvency in our law are bankruptcy and settlement; therefore, when insolvency was discovered, it was appropriate to address it by stopping the execution proceedings (§ 338n par. 6 of the CPC, § 338w par. 3 of the CPC), in favor of bankruptcy proceedings which were intended for that purpose (§ 4b of the Bankruptcy Act). If a court stops execution of a decision, it shall, under § 338zo par. 4 of the CPC, impose an obligation to pay the business trustee compensation and reimbursement of cash expenses, on the obligated party, or jointly and severally on the subjects cited therein. Thus, the legislature did not leave the claims of business trustees without statutory support - although in the form of a monetary claim. In the Senate’s opinion, on can conclude from these circumstances, supported by further statutory texts (§ 338i par. 4 of the CPC, § 338ze par. 7 of the CPC), that one can not ascribe to the legislature an intent to create a legal situation which would deny business trustees the possibility of being paid compensation and reimbursement of cash expenses. In this regard, a source of funds for satisfying the claims of a business trustee found primarily with those (private) persons as a result of whose conduct the business trustee’s expenses arose, can also be considered legitimate (and constitutional).

The Senate also points to § 338i par. 4 of the CPC, under which the trustee is entitled to compensation and reimbursement of cash expenses. If a business is successfully sold, the claim is satisfied from the assets being divided; if the claim is not satisfied in full from the assets, the court shall recognize the business trustee’s claim against the obligated party, secured under § 338ze par. 7 of the CPC. However, if the business is not sold in civil proceedings, the court - as already stated - shall stop the proceedings and impose an obligation to pay the trustee’s claim on subjects specified in § 338zo par. 4 of the CPC. If a qualified reason for the “unsuccessful” sale of a business is that funds obtained through

the sale are insufficient to cover the specified obligations (the price of things, rights and other property valued belonging to the business together with the funds ... does not exceed the amount of the business's payable monetary obligations, the claims of the entitled party, of persons who joined the proceedings as additional entitled parties ... the compensation of the trustee and reimbursement of his cash expenses, or exceeds it only negligibly), the business trustee has an opportunity to realize his claim under the Bankruptcy Act. The fate of the satisfaction of the claim depends on whether the bankruptcy trustee in the matter is the same person (a business trustee, who, however, does not perform his function while the bankruptcy proceedings are going on) or not.

Thus, in the Senate's opinion, one can say that, as regards the claim to compensation and reimbursement of cash expenses, a business trustee who is also the bankruptcy trustee has a "more advantageous position" in bankruptcy proceedings than a "mere" business trustee. The advantage of the claim consists in the fact that it will be satisfied from the bankruptcy assets (§ 31 par. 5, together with § 31 par. 2 of the Bankruptcy Act), at any time during the bankruptcy proceedings (§ 31 par. 1 of the Bankruptcy Act). In its filing, the petitioner objects to the "inequality of business trustees" or the "creation of two groups of business trustees," insofar as it places other trustees, the satisfaction of whose claims is "secured from the budget proceeding from the sale of the business or from the budget from the bankruptcy assets," opposite the group of business trustees who do not have the opportunity to have their claims thus satisfied. In the Senate's opinion, the inequality according to the selected structure is not "claimed" comprehensively. Other examples could be constructed in addition to the one provided by the petitioner, for example, one where a business trustee's claim was not fully satisfied from the proceedings of sale of real estate, and he was also unable to exercise his claim against a guarantor (§ 338ze par. 7 of the CPC). Therefore, the Senate closed this part of its statement by saying that if "perfect" equality was to have been achieved (here one allegedly can not literally use the claim stated by the petitioner to secure the same right for compensation and cash expenses, because that would make the entire problem unsolvable) in satisfying the claims of business trustees for compensation and cash expenses, their claim would have to be satisfied as part of the execution of a decision by sale of the business. This would basically mean that the remainder of the claim (or perhaps all of it) would have to be paid by the state. Here it is possible - in the Senate's opinion - to counter the petitioner's claim about de-motivation of business trustees with the argument that it is not the threat of non-satisfaction of their claims, but the "one hundred percent" certainty, that could be the de-motivating factor. Likewise, it is not insignificant that full satisfaction of a trustee's claims in the regime of execution proceedings would, in the case of an over-indebted business, lead to an undesirable exemption of the claims from the regime of the Bankruptcy Act.

In its statement the Senate refers to judgment no. 403/2002 Coll., in which the Constitutional Court addressed the similar issue of compensation and reimbursement of expenses of a bankruptcy trustee in bankruptcy proceedings. In the Senate's opinion, the following statement by the Constitutional Court will be fundamental to the key issue of differentiating two groups of business trustees (with unequal possibilities for satisfaction of their claims) even though both groups fulfill all the obligations imposed by law: "If the

purpose of the statutory framework permitting bankruptcy proceedings is also constitutional in a case where, in bankruptcy proceedings, no bankruptcy assets are converted to money, and a deposit for bankruptcy expenses was not paid ... (note: and there was thus no other source) ..., it is then necessary to consider that the situation which this creates at the statutory level of payment to the trustee of cash expenses and compensation must be considered to violate the constitutional principle of non-accessory equality.” However, in the Senate’s opinion, it would easy, viewed through the prism of that text, to “succumb to the impression that there is a clear solution even in the event that § 338zo par. 4 of the CPC is annulled.” However, it is necessary to consider other circumstances. As was already stated, the claim of a business trustee is satisfied from the bankruptcy assets (§ 338ze of the CPC), or from other sources. Apart from the obligated party, these sources are the guarantors, under § 338ze par. 7 of the CPC, or the entitled parties or creditors, under § 338zo par. 4 of the CPC. Of course, in the special case of the company being over-indebted, sources for satisfying a business trustee’s claims must be sought in bankruptcy proceedings. Thus, from the point of view of the Civil Procedure Code, no other source of funds for a business trustee exists, but the civil procedure code does not prevent (on the contrary, it creates essential prerequisites for) the use of a special, standard, and legislatively adequate source for the situation (over-indebtedness of a business); (here the Senate referred to part of its statement, already cited above). However, according to the Senate, the entire matter appears different from the point of view of the Bankruptcy Act. In that regard one can share the petitioner’s concerns about the unequal approach to satisfying the claims of a business trustee (regarding this, see above - claims with a “more advantageous” position). However, according to the Senate a possible solution would be outside the regime of the Civil Procedure Code and is thus not the topic of this detailed statement, which the Senate closed by stating that it is completely up to the Constitutional Court, to evaluate the constitutionality of the contested provision.

The brief position statement of the Ministry of Justice, which proposes not granting the petition, states that annulling the contested provision would, on the contrary, create inequality, because “the court would not have a provision in the law” under which it could allocate compensation and reimbursement of cash expenses to the trustee.

III.

The Constitutional Court, in accordance with § 68 par. 2 of the Act on the Constitutional Court, considered the question whether the Act whose contested provision is claimed to be unconstitutional was passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner.

The statute in question is Act no. 30/2000 Coll., which amends Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, and certain other Acts. In this regard, the Constitutional Court determined from the relevant parliamentary publications, shorthand transcripts, and voting records, that the Chamber of Deputies of the Parliament

of the CR duly approved the draft of this Act at its session on 9 December 1999 and the Senate of the Parliament of the CR approved the draft in the wording approved by the Chamber of Deputies at its session on 12 January 2000. After signature by the President and the Prime Minister, the Act was promulgated in the Collection of Law, in part 11, as number 30/2000 Coll. Thus, the statute in question was passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner.

IV.

After this determination, the Constitutional Court turned to evaluating the content of the contested statutory provision in terms of its consistency with the constitutional order of the Czech Republic [Art. 87 par. 1 let. a) of the Constitution of the Czech Republic]. The provision which the petitioner contests and seeks to have annulled reads:

“The court shall impose an obligation to pay the trustee compensation and reimbursement of cash expenses either on the obligated party or jointly and severally to the entitled party, those who joined the proceedings as additional entitled parties, and creditors who registered their claims (§ 338s a 338zn), according to the grounds on which the execution of the decision was stopped.”

To begin with, the Constitutional Court dealt with the question of the status of a business trustee and his definition in relation to a bankruptcy trustee. The activity and status of a business trustee is similar to the status and activity of a bankruptcy trustee under the Bankruptcy Act. As with bankruptcy proceedings, the appointment of a business trustee is an obligatory, conceptual component of execution of a decision by sale of a business (§ 338i of the CPC). As was already stated in Constitutional Court judgment file no. Pl. US 36/01, doctrine ranks a bankruptcy trustee among special public law bodies, and his task is to ensure the proper conduct of bankruptcy proceedings (see K. Eliáš, *Konkurs [Bankruptcy]*. *Právník [The Lawyer]*, no. 2/1995, p. 123; H. Hrstková, R. Tománek, *Některé základní otázky zákona o konkursu a vyrovnání [Some Basic Issues of the Bankruptcy Act]*. *Právo a podnikání [Law and Business]*, no. 10/1994, p. 27 et seq.; Fr. Štajgr, *Konkursní právo [Bankruptcy Law]*. Prague 1947, p. 71).

The Constitutional Court agrees with the doctrinaire definition in relation to a bankruptcy trustee, and has no reservations to its use in relation to a business trustee. The doctrinaire definition is based on factors defining the concept of a public law body, which are public purpose, the manner of appointment, and authority. The public purpose of the institution of a bankruptcy trustee, as well as of a business trustee, must be seen in acceptance of limited public interference in the resolution of property relations. The manner of appointment of a business trustee results from a decision by a state body - a court (§ 338i par. 1 of the CPC). His authority and obligations, which are established in a number of provisions of the CPC, are then the exercise of authority.

A business trustee is appointed by a court, from a list of persons registered under the Bankruptcy Act in the list of bankruptcy trustees. The list of trustees can include only individuals with a clean criminal record, who have full legal capacity, have appropriate expert competence, and agree to be registered, or a general partnership, which will perform the trustee's activities through its partners, and proves that they meet the conditions for being registered in the list. In exceptional cases, the court may appoint as trustee a person who is not registered in the list, provided he meets the conditions for registration, if he agrees to be appointed as trustee.

As in its previously cited judgment (file no. Pl. 36/01), to which it refers in this regard, the Constitutional Court starts with the fact that the performance of the office of a business trustee appointed by a court can not, from a constitutional law standpoint, be classified as work or services required by law for the protection of the rights of others under Art. 9 par. 2 let. d) of the Charter. This follows from the fact that a business trustee is chosen from the list of bankruptcy trustees (§ 338i par. 1 of the CPC) maintained by the appropriate court, and an individual or general partnership can be registered in the list only if he or it agrees to be registered. A person who is already in the list can refuse appointment as a business trustee only if there are serious reason for doing so. In exceptional cases, the court may appoint as trustee a person who is not registered in the list, if, of course, the person agrees to be appointed. This mechanism ensures either an implicit, prior consent to perform the office of trustee, or specific consent in a given case. Therefore, the performance of this office does not meet the element of lack of consent, as a condition for the performance of work or services under Art. 9 par. 2 of the Charter, or Art. 4 par. 3 of the Convention. This conclusion is also consistent with the legal opinion stated by the European Court of Human Rights in the matter Van der Mussele v. Belgium (decision of 23 November 1983). A person registered in the list of bankruptcy trustees, by applying for and registering in the list, gave preliminary consent to appointment to the position and the related risks, which include the risk that a business trustee may not have all his statutory claims satisfied in all cases. The fact that a business trustee may not have all his claims satisfied, even in bankruptcy proceedings, if the process of execution of a decision fails, is a risk which applies to all business trustees, and there is thus no inequality in their position. In any case, not only a business trustee, but everyone who performs a similar office by state authorization (e.g. a notary) is in a similar situation.

Performance of the office of a business trustee is also not part of an employment relationship, and thus neither the content, nor the purpose and significance of Art. 26 of the Charter apply to it. It is also not the conduct of business, although it is similar to it, because of the nature of the activity which is conducted for purposes of earning profits, nor is it the conduct of other economic activity, and therefore, from a constitutional law viewpoint, it can not be classified in the framework defined by Art. 26 of the Charter.

In addition to the abovementioned common elements, to which we can add the liability of a business trustee or a bankruptcy trustee for violation of obligations caused by his fault, there are of course also substantial differences between the two offices. It must be kept in mind that both the regulations for a bankruptcy trustee in the Bankruptcy Act, and the

regulations for a business trustee in the Civil Procedure Code are different, comprehensive, and independent frameworks. While the activity of a business trustee is aimed only at the sale of a business, the activity of a bankruptcy trustee is aimed at converting all the bankruptcy assets to money, and the main purpose is the proportional satisfaction of the claims of all creditors from the property included in the bankruptcy assets. In the case of execution of a decision by sale of the business of the obligated party, there is usually no interference in the activity of the business itself, as often happens with bankruptcy, but only a forced change of the business owner (the original owner, the obligated party, is replaced by a new owner - the winner at auction).

However, the main, and fundamental difference between the two kinds of proceedings lies in the fact that while bankruptcy proceedings are opened if the debtor is insolvent, on the basis of a bankruptcy petition filed by the debtor, or a creditor (thus, opening proceedings is not available to only one person), execution of a decision by sale of a business is comprehensively governed by the dispositive principle. Thus, it is fundamentally a proceeding which is opened only at the proposal of the entitled party. This brings with it the specific features of execution proceedings. Above all, the entitled party has the opportunity to choose the manner of executing the decision, and it is purely up to him whether to turn to execution of a decision by sale of a business, where there may be, e.g., a danger of over-indebtedness. Therefore he also bears greater responsibility for his decision. Before filing a petition for execution of a decision the entitled person must carefully weigh how he will proceed. In addition, the entitled person has relatively effective means for determining the extent of the obligated party's property. These include primarily the institution of a property declaration, established in § 260a et seq. of the CPC, under which a creditor whose monetary claim has been recognized by an executable decision, before filing a petition for execution of the decision, may petition the court to summon the obligated party and require him to make a property declaration. That, in addition to § 260 of the CPC (court assistance in determining the financial abilities of the obligated party) is another form of assistance which the court provides to creditors so that they can successfully exercise their claims through execution of a decision. Moreover, the court too is supposed to evaluate the suitability of the proposed method of executing a decision, and if it considers it evidently unsuitable, it should order execution of the decision in another suitable manner. (§ 264 par. 1 of the CPC).

In the present matter, annulment of § 338zo par. 4 of the CPC is proposed, because in the petitioner's opinion the manner of compensating a business trustee provided in the statute need not lead to satisfaction of his statutory claims (the claim for reimbursement of cash expenses and to compensation). The statutory construction permits a situation to arise where the statutory claims of a business trustee can not be satisfied, without establishing another alternative source for paying these claims. According to the petitioner, this deforms the overall results of execution of a decision by sale of a business, because it removes from a certain group of business trustees the important motivation of compensation; it establishes inequality in compensation between a bankruptcy trustee, the satisfaction of whose claim for compensation and cash expenses is secured by the Bankruptcy Act (§ 31 par. 5 of the Bankruptcy Act) and a business trustee under the Civil Procedure Code, who does not have the possibility of satisfying his claims, or the

possibility for satisfying them is only negligible. The Constitutional Court does not completely agree with this opinion. It must be kept in mind, as mentioned above, that execution of a decision is a proceeding based on a petition. This also underlies the regulation in the CPC. Under § 338i par. 4 of the CPC, a business trustee is entitled to compensation and reimbursement of cash expenses. If a business is successfully sold, his claims is satisfied from the distributed assets. The business trustee's claim to compensation and cash expenses must be satisfied even if the distributed assets are not sufficient. Thus, if the claim is not fully satisfied from the assets, the court shall recognize the business trustee's claim against the obligated party, the fulfillment of which is guaranteed jointly and severally by the entitled party, those who joined the proceedings as additional entitled parties, and creditors who registered their claims (§ 338ze par. 7 of the CPC). The obligation to satisfy the trustee's claims is primarily imposed on the obligated party. In the interests of actual satisfaction of the business trustee is provided that the entitled party, those who joined the proceedings as additional entitled parties, and creditors who registered their claims (§ 338s of the CPC) are jointly and severally liable for fulfillment of this obligation. This regulation ensures that a business trustee will not find himself in a situation where his statutory claims are not paid.

If the sale of a business does not take place in civil proceedings, the court shall stop the proceedings and impose an obligation to pay the trustees' claims on the subjects specified in § 338zo par. 4 of the CPC. These are either the obligated party or, jointly and severally the entitled party, those who joined the proceedings as additional entitled parties, and creditors who registered their claims (§ 338s of the CPC and § 338zn of the CPC). If the obligated party does not have sufficient funds to pay the claims of the business trustee, it is quite legitimate to require them to be paid by the entitled party or other creditors, because, as stated above, the entitled person is responsible for the choice of the manner of execution of the decision, and bears the related risk for possible non-payment of the business trustee's claims by the obligated party. The business trustee's claims for payment of his compensation and expenses is thus not completely statutory without legal support. In this regard we must point out that a business trustee can request advances for cash expenses, as indicated in § 338i par. 5 of the CPC. The advance for cash expenses shall be provided to the trustee by the court on the basis of the request. Although this provision speaks in particular about expenses in connection with engaging an expert, it is not ruled out for the trustee to request an advance for other expenses which he will incur in the sale or preparation of the sale of the business. Therefore, if, in the course of the execution of the decision, a need arises to cover expenses for cash expenditures, there is nothing to prevent the court from requiring the entitled party to provide an advance for paying them. This also applies in a situation where it is obvious that it will not be possible to pay the business trustee's expenses from the sale of the business. The court can also take such measures ahead of time, e.g. when ordering execution of the decision. Thus, it is up to the business trustee to thoroughly use all the opportunities and mechanisms which the CPC provides him. Cash expenses paid from this advance are considered to be expenses of the sale of the business. Thus, the situation in the judgment cited above concerning a bankruptcy trustee can not arise; in that situation the bankruptcy trustee incurred expenses which he had to pay himself. The only problem can arise at the point where the entitled party has fulfilled the conditions for exemption from court fees. The court can not require such a person to pay an advance for expenses of executing a decision (§ 270 par. 3

second sentence of the CPC). If there is any revenue from the sale of the business, the business trustee's statutory claims are of course paid from it. If that is not the case, the business trustee must pay the expenses of execution of a decision himself. However, if it is evident before execution of a decision is ordered that the profit from sale of the business will not be sufficient even to pay the business trustee's claims and a situation could arise where satisfaction of the business trustee's claims could be threatened, it is up to the court, to carefully evaluate the obligated party's financial situation before ordering execution of the decision. If it is quite evident that the obligated party's assets will not suffice even to cover expenses, it should not order execution of the decision at all. The court is also directed to follow these steps by § 264 par. 2 of the CPC, under which the court shall deny the petition to execute a decision if it is evident from the petition that the revenue which would be achieved would not even suffice to cover the expenses of executing the decision. The properly functioning system, opportunities and mechanisms established in the CPC, together with careful evaluation of the situation both by the entitled party and by the court, should prevent a situation from arising which would be a basis for a petition to annul § 338zo par. 4 of the CPC. Thus, we can conclude that the contested § 338zo par. 4 of the CPC is not a violation of the constitutional law principle of equality.

If, despite all the foregoing, a situation arises where a business trustee is required to pay the expenses of execution of a decision himself, he has an opportunity to exercise his claim against the obligated party by a different method of execution of the decision, or by bankruptcy proceedings. Another non-negligible difference between the execution of a decision and bankruptcy lies in the fact that when bankruptcy is completed, it is quite evident that the bankrupt has left only the assets which are part of the bankruptcy assets, or that he has no assets left. This is not the case with execution of a decision by sale of a business. If the sale of a business as part of execution of a decision is unsuccessful, the court can not determine the overall financial situation of the obligated party from the materials which it has at its disposal. It can only speculate, but can not reach a reliable conclusion, because proceedings on execution of a decision by sale of a business are not proceedings on total assets, but only on part of them. Therefore, if the abovementioned opportunities and mechanisms fail, a business trustee always has, within execution of a decision under the CPC (guarantee by the entitled party, advances for expenses, etc.), an opportunity to exercise recognized claims for compensation and cash expenses through a different manner of execution of a decision, and in an extreme case also through bankruptcy proceedings.

In conclusion, the Constitutional Court emphasizes that the mere fact that the final result may be a situation where a business trustee's claims are not satisfied is not unconstitutional. This fact must also be seen in light of the abovementioned decision of the European Court of Human Rights (*Van der Musselle v. Belgium*), which emphasized that the risks undertaken in connection with the practice of a particular profession (in the cited case, of an attorney), which include the risk of non-payment of compensation for work performed, are balanced out by advantages connected with that profession (in the cited case, a professional monopoly in defense and representation). These conclusion can also be applied, without anything further, to the activity and position of a business trustee, in

whose case the risk of non-satisfaction of statutory claims, which is of course quite insignificant, basically has a counterweight in his monopoly status for conducting the activity of an trustee.

It is true that in terms of the Bankruptcy Act, one can agree with the petitioner's fears about an unequal approach to satisfying the claims of a business trustee who later, in bankruptcy proceedings, became the bankruptcy trustee, and a business trustee who did not become a bankruptcy trustee. However, that question exceeds the regime of the Civil Procedure Code, and is therefore also not the subject of the reasoning of this judgment.

Based on the foregoing considerations, the Constitutional Court concluded that there are no grounds for granting the constitutional complaint, and it is not necessary to annul § 338zo par. 4 of the CPC, because in the overwhelming majority of cases satisfaction of a business trustee's statutory claims can be achieved with the help of instruments contained in the CPC. Given correctly functioning mechanisms and correct use of the procedural regulation of execution of a decision, a situation should not arise where a business trustee's claims are not satisfied. If the Constitutional Court annulled the cited provision, it would thereby, for example, deprive the court of the ability to bind the obligated party to pay a business trustee's claims in a situation where a claim was exercised that was satisfied by the obligated party from other funds, and the court stopped the execution of the decision.

In view of the foregoing conclusions, the Constitutional Court did not find the petition for annulment of § 338zo par. 4 of the CPC to be justified. Therefore, it denied it under § 82 par. 1 of the Act on the Constitutional Court.

Notice: Decisions of the Constitutional Court can not be appealed.

Brno, 25 October 2005

Dissenting Opinion

of judges Vojen Güttler, Ivana Janů, Dagmar Lastovecká, Miloslav Výborný and Eliška Wagnerová to the judgment of the Plenum of the Constitutional Court of 25 October 2005, which denied the petition from the District Court in Ostrava to annul § 338zo par. 4 of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations I. The reasoning of the Plenum's judgment remains primarily at the level of simple law. The detailed interpretation of the provisions of the CPC under consideration, which can more or less relate to the adjudicated matter is certainly of good quality from an expert standpoint, but it misses the constitutional law substance of the case, and in the conclusion admits that the final result can be a situation (which it does not consider unconstitutional) where the business trustee's claims won't be satisfied anyway.

It is, of course, not the task of the Constitutional Court, in proceedings on a petition to annul a certain statutory provision, to give exhaustive instructions on how to proceed in interpreting simple law in a particular case, but to evaluate - either as part of specific review of constitutionality (at the petition of a general court) - whether the contested provision will stand in terms of constitutionality.

Here one also can not overlook the constitutional requirement of clarity and certainty of law (note: in relation to the detailed legal regulation of the issues under review the gap in the statute becomes all the more apparent, if it does not regulate a subsidiary source from which a business trustee's claim can be paid), as well as (in particular) the requirement of transparency of the decision making of the Constitutional Court itself (to handle similar matters in a similar manner). The Plenum's judgment - in the opinion of the dissenting judges - does not respect these requirements because it does not sufficiently reflect the similar situation discussed in Constitutional Court judgment file no. Pl. US 36/01, which concerns a bankruptcy trustee.

The general court rightly proposed - knowing the Constitutional Court's case law, with express reference to the previously addressed comparable matter - annulment of the contested provision of the CPC, evoking similar unconstitutional results. With reference to the key constitutional arguments which are analyzed in the following text, in particular the opinion that both matters are comparable from a constitutional law viewpoint (not only in terms of ordinary law), we can not but conclude that also in terms of the principle of predictable decision making by the Constitutional Court itself the petition should have been granted.

II. That conclusion can be based, in particular, on the following grounds. The essence of the matter is (in particular) the already mentioned question whether the conclusions stated in Constitutional Court judgment file no. Pl. US 36/01 (Collection of Laws no. 403/2002), concerning a bankruptcy trustee, apply in principle (*mutatis mutandis*) to the present matter, i.e. for a situation in which a business trustee can find himself, as regards his claim for compensation and reimbursement of cash expenses. Basically the question is one of weighing whether the position of a business trustee is comparable with the position of a bankruptcy trustee, as the petitioner believes, or whether there are sufficiently important differences that would justify different treatment of them as regards the claim for compensation and reimbursement of cash expenses (giving an advantage to a bankruptcy trustee), as the Senate of the Parliament of the CR indicated in its statement - although not with a clear conclusion - and as the Plenum's majority opinion concludes.

The dissenting judges emphasize that this evaluation must, naturally, and primarily, be based on a constitutional law viewpoint, not only on the position of simple law. They conclude that the key part of the constitutional law arguments contained in the abovementioned judgment is also applicable to the present case; because they did not find grounds to diverge from the previously expressed opinions they state (repeat) the following

arguments, which led the Constitutional Court to grant the previous petition.

Execution of a decision by sale of the business of the obligated party is, generally speaking, a relatively effective means of enforcing a financial claim; yet, there is no interference in the actual activity of the business, but only a forced change of its owner (the original owner, the obligated party, is replaced by a new owner - the winner at auction). However, a different situation arises if the court determines that the business is over-indebted - i.e. in the event that the value of things, rights and other assets belong to the business together with the funds specified in § 338n par. 1 let. b) is not greater than the amount of the business's payable financial obligations, the claims of the entitled party and those who joined the proceedings as additional entitled parties, which do not belong to the business, and the expected expenses of the sale, compensation for the trustee, and reimbursement of the trustee's cash expenses or exceeds it only negligibly (§ 338n par. 6 of the CPC); in that case the court shall stop execution of the decision. It is precisely this situation that arose in the case that led the general court to file the present petition to annul the contested statutory provision.

An obligatory component of proceedings to execute a decision by sale of a business is - similarly to the appointment of a bankruptcy trustee in bankruptcy proceedings - appointment of a business trustee. Under § 338i of the CPC the court shall appoint as trustee a person registered under special regulations in the list of bankruptcy trustees. In exceptional cases, the court may also appoint a person who is not registered in the list, provided he meets the conditions for registration, if he agrees to be appointed as trustee. Persons registered in the list of bankruptcy trustees can refuse the position only for serious reason, which the court will evaluate. The trustee is required to perform his position with expert care, and is liable for damages which he caused by at-fault violation of his obligations imposed by law or by the court.

In the cited judgment, file no. Pl. US 36/01, published as no. 403/2002 Coll., the Constitutional Court defined the elements of a public law body as follows: they are public purpose, the manner of appointment, and authority. The public purpose of the institution of a business trustee must also be seen in acceptance of limited public interference in the resolution of property relations which have reached a crisis (in the form of forced sale of the obligated party's business), the manner of appointment results from a decision by a state body (a court), and his authority, as in the case of a bankruptcy trustee, are the exercise of authority. Thus, one can conclude that a business trustee is a special public law body whose activity is, also in doctrinaire opinion, similar to the activity of bankruptcy trustees (cf., e.g., Bureš, Drápal, Krčmář, Mazanec, Občanský soudní řád, komentář, 6. vydání [The Civil Procedure Code, Commentary, 6th ed.], Prague, C. H. Beck, 2003, p. 1427). It is precisely in the public law nature of the position of a business trustee in execution proceedings under the CPC that the dissenting judges see substantial grounds which lead them to consider the petition to annul the contested provision to be justified.

Under § 338i par. 4 of the CPC the (business) trustee is entitled to compensation and to reimbursement of cash expenses. If execution of a decision is stopped, then under the

contested provision, the court shall impose an obligation to pay the trustee compensation and reimbursement of cash expenses either on the obligated party, or jointly and severally on the entitled party, those who entered proceedings as additional entitled parties, and creditors who have registered their claims (§ 338s a 338zn), depending on the grounds on which the execution of the decision was stopped. As the petitioner correctly stated, this statutory structure for deciding on the trustee's compensation and cash expenses permits a situation to arise where the business trustee's statutory claims to compensation and reimbursement of cash expenses can not be satisfied, without establishing another alternative source for paying these claims. The provision of § 338zo par. 4 of the CPC does not permit using as an alternative source any deposit paid under § 270 par. 3 of the CPC, because that deposit can be used only to pay expenses of execution of a decision which are paid by the state. Thus, the possibility of satisfying a business trustee's claims is really tied to the solvency of the parties to the proceedings. The dissenting judges are naturally aware that proceedings on bankruptcy and execution proceedings are not of a completely identical nature, and that in execution proceedings the entitled party initially bears certain costs of the proceedings (e.g. the court fee for a petition). However, in this adjudicated matter a special regulation applies (§ 338zo par. 4); it permits imposing an obligation to pay the trustee's compensation and reimbursement of cash expenses on the entitled party, but depending on the grounds for which the proceedings were stopped. In this regard we can agree with the petitioner that the obligation to pay the trustee's claims can be imposed on the entitled party only in exceptional cases - usually when he did not observe the necessary level of care when filing the petition for execution of a decision (i.e. in the case of procedural fault on the part of the entitled party) - and that in most cases it is the obligated party who is bound by this obligation (cf. also the cited Commentary, p. 1461,1268). Especially in a situation where the obligated party's business is over-indebted (§ 338n par. 6 of the CPC), it is evident that the trustee's claims will not be satisfied, or will be satisfied only in part; if the trustee of the business was not made the bankruptcy trustee under § 13b par. 3 of Act no. 328/1991 Coll., the business trustee has only non-priority claims against the bankrupt (cf. § 31 par. 5 of Act no. 328/1991 Coll.); and if the bankruptcy petition was denied, the business trustee does not have even this possibility for satisfying his claims. Thus, in the petitioner's opinion, this creates an inequality in compensation for two groups of business trustees - a first group of trustees of businesses, the satisfaction of whose claims for compensation and cash expenses is secured by law (in the budget of proceeds from sale of a business or in the budget of bankruptcy assets under § 31 par. 5 of Act no. 328/1991 Coll.) and a second group of business trustees who do not have the possibility of satisfying their claims, or with only a negligible possibility, even though both groups of trustees of businesses fulfill all the obligations imposed on them by law. In the opinion of the dissenting judges this opinion of the general court can not be completely ruled out - with reference to the already stated conclusions of the Constitutional Court in judgment file no. Pl. US 36/01, published as no. 403/2002 Coll. - or from a constitutional law viewpoint. In particular we must conclude that the legal framework in question also establishes inequality between business trustees as a public law body and a comparable group of other public law bodies (e.g. bankruptcy trustees) although no reasonable grounds for such differential treatment can not be found. As was already stated, a business trustee can refuse the public law position to which he is appointed by a court only in exceptional cases ("for serious reasons, which the court shall evaluate"), and he is required to perform it with expert care, and is liable for damages

which he caused by violation of his obligations. Surely it can not be allowed for the state not to ensure for the holder of a public position, on whom it imposes non-negligible obligations, and on whom it has increased demands, appropriate compensation and reimbursement of cash expenses, or for a situation to be permitted to arise - not as an exception - in which he would basically perform this position for free, or even pay for doing it.

Thus, we can only repeat that if the Constitutional Court accepts as its starting point the hypothesis that a business trustee - similarly to a bankruptcy trustee - can be classified as a special public law body, then from a constitutional viewpoint the key issue for this matter is that of constitutional safeguards for compensation and reimbursement of expenses connected with the exercise of public positions. These safeguards are provided by the normative content arising from the constitutional principle of equality (Art. 1 and Art. 3 par. 1 of the Charter). In the understanding of the constitutional principle of equality the Constitutional Court agreed (in particular in the judgments in matters file nos. Pl. US 16/93, Pl. US 36/93, Pl. US 5/95, Pl. US 9/95) with the concept of the constitutional principle of equality as it was expressed by the Constitutional Court of the CSFR (R 11, 1992): "It is a matter for the state, in the interests of securing its functions, to decide to provide a particular group fewer advantages than another. Even here, however, it may not proceed arbitrarily ... If the law provides benefits for one group, and simultaneously thereby imposes disproportionate obligations on another group, this can be done only on the basis of public interests." The Constitutional Court thereby rejected an absolute concept of the principle of equality, and further stated: "the equality of citizens can not be understood as an abstract category, but as relative equality, as is intended by all modern constitutions." (Pl. US 36/93). It thus shifted the content of the principle of equality into the area of constitutional acceptability of viewpoints for differentiating subjects and rights. It sees the first viewpoint in ruling out arbitrariness. The second viewpoint arises from the legal opinion stated in the judgment in the matter file no. Pl. US 4/95: "inequality in social relationships, if it is to affect fundamental human rights, must reach an intensity which casts doubt, at least in a certain regard, on the very essence of equality. As a rule this happens if the violation of equality is connected to violation of another fundamental right, e.g. the right to own property under Art. 11 of the Charter, one of the political rights under Art. 17 et seq. of the Charter, etc." (concurring, Pl. US 5/95). The second viewpoint in evaluating the unconstitutionality of a legal regulation establishing inequality is thus the interference it establishes in another fundamental right and freedom.

The Constitutional Court points out, as it stated in the cited judgment file no. Pl. US 36/01, that in its case law it interprets the constitutional principle of equality in the sense of accessory and non-accessory equality. In the cited judgment, the Constitutional Court among other things stated as regards the issue, concerning the adjudicated case, that "If the purpose of the statutory framework permitting bankruptcy proceedings is also constitutional in a case where, in bankruptcy proceedings, no bankruptcy assets are converted to money, and a deposit for bankruptcy expenses was not paid because the petitioner seeking a declaration of bankruptcy was exempt from that obligation, then the situation which this creates at the statutory level of reimbursement of cash expenses and

compensation of the trustee must be considered to violate the constitutional principle of non-accessory equality. Compared to cases where, in bankruptcy proceedings, assets were converted into money, or a deposit for bankruptcy expenses was paid, and the funds used to pay trustees' cash expenses and compensation, the trustees' claims (payment of cash expenses and compensation) in cases of an insolvent bankrupt and a petitioner exempt from the obligation to pay a deposit for bankruptcy proceedings expenses will not be satisfied, because the bankruptcy assets are insufficient to pay the expenses of bankruptcy proceedings." The text of the then-valid and effective provisions of the Bankruptcy Act, which the Constitutional Court, in that judgment, found to be unconstitutional, was the following: "If the petitioner's claim arises from wage claims, the petitioner is exempt from payment of advances, with the exception of employees specified in § 67b." (§ 5 par. 1 second sentence of the Bankruptcy Act) and "The trustee's claims shall be paid from the bankruptcy assets, and if they are insufficient, from the advance for bankruptcy proceedings expenses paid by the petitioner." (§ 8 par. 3 second sentence of the Bankruptcy Act). The dissenting judges do not overlook the fact that the normative framework in the present case is - as follows from the foregoing text - somewhat different; however, the unconstitutional consequences established by the relevant statutory framework (i.e. the lack of provision of an alternative source for paying the trustee's compensation and expenses, see above) affecting the position of a business trustee, or some of them, are basically identical. The obligated party is simply over-indebted. If there are no funds and no person to pay the justified claims of a business trustee, it must be explicitly stated how to address such a situation; this applies all the more if the relevant statutory framework concerning execution of a decision by sale of a business is otherwise so comprehensive and detailed that it evidently tries to address every situation which could arise in the course of execution. In this regard it can not be overlooked that § 338i par. 5 of the CPC does provide the obligation of a court to provide an advance to the request of a business trustee, but only for payment of cash expenses incurred, in particular for engaging an expert; thus, it does not concern the trustee's compensation at all. However, the constitutional principle of non-accessory equality, which includes ruling out arbitrariness by the legislature in differentiating subjects and rights, also implies the maxim of proportionality for the area of compensation and reimbursement of expenses connected with the exercise of public positions. Therefore, the dissenting judges conclude that the inequality created in compensation and reimbursement of expenses connected with the exercise of the public position of a business trustee is an inequality which is extreme (because it permits non-payment of compensation and reimbursement of cash expenses for one group of trustees), as well as an inequality which lacks a reasonable purpose and significance. At this point we can also state that in these cases it would evidently be appropriate - *de lege ferenda* - to have the state pay the trustees' compensation and cash expenses. As regards the consideration expressed in the statement from the Senate of the Parliament of the CR about the allegedly de-motivating factor of "one hundred percent" certainty of satisfying a business trustee's claims, we can only state, for completeness, that this matter is not about the issue of motivation or de-motivation of a business trustee, but about the entitlement to compensation and reimbursement of cash expenses to the holder of a public office, which is expressly stated by law (the cited § 338i par. 4 of the CPC).

As in the case of judgment file no. Pl. US 36/01, it must be stated that if the contested provision, for the reasons stated, is inconsistent with Art. 1 and Art. 3 par. 1 of the Charter of Fundamental Rights and Freedoms, this is not caused by its text, but by the gap in the law which it creates. What is unconstitutional is the omission by the legislature, which results in an unconstitutionally unacceptable inequality (on the doctrinaire concept of the concept of legislative omission see V. Šimíček, *Opomenutí zákonodárce jako porušení základních práv* [Legislative Omission as a Violation of Fundamental Rights]. In: *Deset let Listiny základních práv a svobod v právním řádu České republiky a Slovenské republiky* [Ten Years of the Charter of Fundamental Rights and Freedoms in the Legal Order of the Czech Republic and the Slovak Republic]. Eds. B. Dančák, V. Šimíček, Brno 2001, pp. 144-159). This matter concerns a false gap, which is the incompleteness (absence) of the written law compared to the explicit regulation of similar cases, i.e. incompleteness in terms of the principle of equality, or in terms of general legal principles. An illustration of how to solve such a gap is the judgment in the matter file no. Pl. US 48/95 (Collection of Decisions of the Constitutional Court, volume 5, judgment no. 21), in which the Constitutional Court normatively filled the gap created by inequality in the legal framework with the help of constitutionally consistent interpretation of the relevant legal framework. However, that method can not be used in the present matter. Likewise, it is not possible to derive, e.g. by expansive interpretation of general provisions of the CPC (see, e.g., § 270 par. 3 of the CPC) a subsidiary obligation on the part of the state to pay a business trustee's compensation and cash expenses, if the provision of that obligation is lacking in the special provisions concerning the execution of a decision by sale of a business. It would be difficult to understand the cited § 270 par. 3 of the CPC as a sort of "general rule," establishing the state's obligation to pay expenses for execution of a decision in all situations coming into consideration. In this adjudicated matter there is a special, exhaustively conceived framework for the execution of a decision by sale of a business, moreover in a situation where proceedings are stopped (§ 338n par. 6, § 338zo par. 4 of the CPC). Another special provision, i.e. § 338i par. 5 of the CPC permitting the business trustee to ask the court for an advance - as was already stated - also does not resolve the matter, because the advance applies expressly only to payment of cash expenses (not to the trustees' compensation), and generally only in connection with engaging an expert.

Therefore the Constitutional Court - as was already stated - should have granted the petition and annulled § 338zo par. 4 of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations.

III. The dissenting judges - only for completeness - add to the main arguments of the Plenum's judgments, which are basically built on interpretation of ordinary (general) law, the following:

1) The judgment argues on the basis of § 260a et seq. of the CPC (the obligated party's property declaration), which permits the entitled party to determine the obligated party's financial situation and not propose execution of a decision by sale of a business, where there may be a danger of over-indebtedness. In the opinion of the dissenting judges, however, this does not address the essence of the matter, because the contested provision

§ 338zo par. 4 involves an entitlement of the business trustee, not an entitlement of the entitled party; the business trustee himself can not affect the conduct of the entitled party in any way.

2) The judgment argues on the basis of § 338ze, par. 7 of the CPC, under which - if the business trustee's claims were not satisfied from the distributed assets - the court shall impose this obligation on the obligated party; the entitled party and other specified persons are guarantors for the fulfillment of this obligation (note: in other words satisfaction of the business trustee is thus guaranteed).

This argument can not be accepted. The contested § 338zo par. 4 involves a completely different procedural situation, because there the business is over-indebted, and the court has therefore stopped the proceedings without the execution of the decision having been performed (the business was not, in fact, sold). Thus, one can not proceed according to § 338ze par. 7 (see judgment), where the business was already sold and paid for, i.e. the execution of the decision was implemented and the budget is being implemented. We can also add that if it was not possible, even after stopping execution of a decision due to over-indebtedness (§ 338n par. 6 of the CPC) to proceed under § 338ze par. 7 of the CPC (as the judgment states), then the existence of the contested provision § 338zo par. 4 of the CPC would have no purpose at all. However, it does have a purpose, it is a special regulation for the case of stopping execution of a decision, which imposes an obligation to pay a business trustee's claims, possibly on the entitled party, but according to the grounds on which the execution of the decision was stopped. (Note: It is precisely in view of this that the legal framework does not ensure that a business trustee's claims will always be satisfied. This is discussed in more detail at another point in this dissenting opinion.)

3) The judgment also points to § 338i par. 5 of the CPC and states that a business trustee may request an advance for the payment of cash expenses, even if it is evident that it will not be possible to pay his expenses from the sale of the business. In the opinion of the dissenting judges, however, this will not be sufficient in a number of cases, because the cited provision makes it possible to provide an advance only for payment of cash expenses, but not for the trustee's compensation, which is often considerably higher (e.g., in this matter, the cash expenses were only CZK 106). In addition, in a number of cases the trustee will not request an advance, because often it is not possible to estimate that a business is over-indebted; if the entitled party then meets the conditions for being exempt from court fees, he can not be given an obligation to pay an advance for expenses of execution of the decision at all (§ 270 par. 3 of the CPC).

4) The judgment also argues on the basis of § 264 par. 2 of the CPC, under which the court shall deny the petition ... if it is evident from the petition that the revenue which would be achieved would not suffice to cover the expenses of executing the decision; thus it is claimed to be up to the court, before proposing execution of a decision, to carefully evaluate the obligated party's financial situation so that - depending on that - it might not order execution of the decision at all. In the opinion of the dissenting judges even this

does not address the essence of the matter; the present case concerns the already existing claims of a business trustee, which arose after a court simply ordered execution of a decision by sale of a business, and did not proceed according to § 264 par. 2 of the CPC. In any case, in a number of cases the court will not determine the financial situation of the obligated party, and (in particular) the over-indebtedness of the business will not be evident “from the petition,” as the cited § 264 par. 2 of the CPC presumes.

5) The judgment also states that even if a business trustee were nevertheless forced to pay the expenses of execution of a decision himself, he can exercise his claim against the obligated party through a different manner of execution of a decision, or through bankruptcy proceedings. In the opinion of the dissenting judges this is an academic consideration, because in a number of cases there will be no other executable property of the obligated party, all the more so if an unsuccessful execution of a decision was exercised on his over-indebted business.

6) Finally, the judgment considers that if a business trustee’s claims were not satisfied at all, this would not be an unconstitutional situation. It argues on the basis of the decision of the European court of Human Rights (*Van der Musselle v. Belgium*), which states that the risks of the work of a lawyer (including the risk of non-payment of fees) are balanced out by the professional monopoly in defense and representation; these conclusions can allegedly also be applied to the activity and position of business trustees. In the opinion of the dissenting judges, however, this comparison is not appropriate, because a lawyer conducts his profession continually, as his permanent and paid profession (and only as part of that can he be appointed, for example, as a defense counsel *ex offio*), whereas the position of a business trustee is not a permanent profession.

It is evident from this text that the routes which should - according to the judgment of the Plenum - with the help of interpretation of ordinary law, lead to securing a business trustee’s claims to compensation and payment of cash expenses are not an unambiguous and clear solution to the matter. If the execution of a decision is stopped, they are - in the opinion of the dissenting judges - largely unusable, including from the viewpoint of the cited ordinary law. The important thing is that it is the state that is required - from the point of view of constitutionality - to guarantee to a public functionary whom it appoints (the business trustee) payment of his statutory financial claims. However, the state has not done this, because, as has already been stated, the statutory framework of the Civil Procedure Code contains a gap which can not be filled in by constitutionally consistent interpretation.

Brno, 25 October 2005