2009/04/21 - PL. ÚS 42/08: CONSTITUTIONALITY OF A DEBTOR´S POSITION

HEADNOTE

The contested provision, § 394 par. 2, the part of the sentence after the semicolon, of the Insolvency Act, restricts the implementation of the debtor's right to solve his insolvency through debt discharge, although it was permitted by the previous decision. As a result of a legal fiction that is applied not only when the debtor does not act, but also by a court's substantive judgment, without allowing the debtor to defend against the ordinary's court's decision using regular remedies, his right to a fair trial is limited, and it is not possible to correct a possible mistake that may happen in the court's actions (e.g. a debtor excuses his absence, but the notice is entered in a different file by mistake, etc.). Moreover, the fiction of withdrawal of a petition for debt discharge is not a mere procedural action through which the party determines the proceeding, but has fundamental substantive law consequences for the debtor and for creditors (subsequent declaration of bankruptcy, etc.).

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

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 (judge rapporteur), Miloslav Výborný, Eliška Wagnerová and Michaela Židlická ruled on a petition from the High Court in Olomouc, represented by JUDr. Miroslav Jansa, chairman of a panel of the High Court in Olomouc, seeking the annulment of part of § 394, paragraph 2, the part of the sentence after the semicolon, and § 93 par. 2 of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the "Insolvency Act"), with the participation of the Chamber of Deputies and the Senate of the Parliament of the Czech Republic, as follows:

I. Part of § 394, paragraph 2, the part of the sentence after the semicolon, of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the "Insolvency Act"), which reads: "appeal against it is not permitted" is annulled as of the day this judgment is promulgated in the Collection of Laws.
II. The petition to annul § 93 par. 2 of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the "Insolvency Act") is denied.

REASONING

I.
Recapitulation of the Petition

1. In a petition submitted under Art. 95 par. 2 of the Constitution of the Czech Republic (the "Constitution") and § 64 par. 3 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, the High Court in Olomouc (the "petitioner") sought a judgment annulling part of § 394, in paragraph 2, the part of the sentence after the semicolon, of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the "Insolvency Act"). The contested provision does not permit an appeal against a resolution in which the insolvency court takes cognizance of withdrawal of the debtor's petition for debt discharge, and, in the opinion of the High Court in Olomouc, thus prevents the debtor from seeking protection of his rights before a court under Art. 36 par. 1 and Art. 38 par. 2 of the Charter of Fundamental Rights and Freedoms (the "Charter"). The High Court in Olomouc adds that a procedural regulation that predetermines the result of an appeal proceeding on the merits of the matter contravenes the principles of a law-based state under Art. 1 par. 1 of the Constitution.

2. The petition indicates that the High Court in Olomouc is conducting insolvency proceeding opened by petition of the debtor Z. S. The Regional Court in Ostrava, by resolution of 14 August 2008 ref. no. KSOS 8 INS 3110/2008-A-5, found the debtor insolvent, permitted resolving the insolvency by debt discharge, and ordered a review hearing for 30 September 2008 at 10:30 a.m., and afterwards called a creditors meeting. The debtor was duly summoned to the meeting, but did not arrive, without excusing himself. Therefore, the court of the first instance decided at that hearing, by resolution of 30 September 2008 ref. no. KSOS 8 INS 3110/2008-B8, in which, in accordance with § 399 par. 2, the sentence in fine, after the semicolon, of the Insolvency Act, applied the statutory fiction of withdrawal of a debtor's petition to permit debt discharge, and decided to declare bankruptcy, with the provision that the bankruptcy would be treated as negligible (§ 314 et seq. of the Act). On 1 October 2008 the ordinary court received a notification in which the debtor excused himself from the creditors meeting on the grounds of illness, and documented the illness with a confirmation of 30 September 2008. The debtor filed a timely appeal against the resolution of 30 September 2008 ref. no. KSOS 8 INS 3110/2008-B8, in which the ordinary court took cognizance of the withdrawal of the debtor's petition to permit debt discharge, and decided to declare bankruptcy, with the provision that the bankruptcy would be treated as negligible; in the appeal, the debtor objected that he did not attend the hearing due to an urgent decline in health, and documented that fact. In the appeal proceeding, the High Court in Olomouc seeks annulment of the contested decision of the court of the first instance.

3. The High Court in Olomouc also states in its petition that the debtor would not be in a better position, even it he had excused himself in time and the court had not found the excuse justified. The fiction of withdrawal of the petition would then arise not as a consequence of the debtor's inactivity, but on the basis of review

deliberations by the court of the first instance, and a debtor has no remedy against such a court decision, wherein the court evaluates the resulting procedural situation differently than the debtor, although the consequences for the debtor are not only procedural, but also substantive law consequences that affect its existence. The debtor does have a right to file an appeal against the insolvency court's decision to resolve the debtor's insolvency through bankruptcy; however, as an appeal is not possible against verdict I., where the court takes cognizance of the withdrawal of the petition for debt discharge, the court must deny that part of the debtor's appeal that is directed against that verdict, without reviewing the justification of the reasons that prevented the debtor from attending the creditors meeting. As a result of the denial of the appeal, verdict I., in which the first-level court took cognizance of the withdrawal of the petition for debt discharge will remain untouched, and the appeal court has no alternative but to confirm the first-level court's decision in verdict II., to resolve the debtor's insolvency through bankruptcy, because the first-level court's decision is fully in accordance with § 396 par. 1 of the Insolvency Act. Thus, procedural regulations remove the debtor's right to resolve his insolvency through debt discharge, which was permitted by the previous court decision. Thus, the result of the appeal proceeding is predetermined by the relationship between § 394 par. 2, § 396 par. 1 and § 399 par. 2 of the Insolvency Act so that the declaration of bankruptcy of the debtor must be affirmed. The appeal proceeding thus becomes an empty, formal ritual.

4. In discussing the appeal, the High Court in Olomouc concluded that the part of § 394 par. 2 of the Insolvency Act that does not permit an appeal against a resolution in which the insolvency court takes cognizance of withdrawal of the debtor's petition for debt discharge is inconsistent with the abovementioned provisions of the Charter, and therefore it submitted a petition to the Constitutional Court seeking its annulment. The contested provision prevents a debtor from seeking protection of his rights before a court in terms of Art. 36 par. 1 and Art. 38 par. 2 of the Charter, a procedural regulation that predetermines the result of an appeal proceeding on the merits of the matter contravenes the principles of a law-based state under Art. 1 par. 1 of the Constitution. The unconstitutional consequences of this regulation of the right to an appeal can be avoided only by annulling § 394 par. 2, the part of the sentence after the semicolon, of the Insolvency Act, because, under Art. 95 par. 1 of the Constitution, an appeals court is bound by the clear wording of a statutory norm when this wording does not give the appeals court any possibility for a constitutional interpretation. The right to contest a decision by a first-level court is a procedural right, which is given or ruled out by procedural regulations, but the insolvency court's decision, in which it took cognizance of withdrawal of the debtor's petition for debt discharge, under § 394 par. 2 of the Insolvency Act, cannot be considered a mere decision on conducting a proceeding, by which a court would not be bound. Above all, it expresses consequences arising from § 399 par. 2 of the Insolvency Act and declares a legal fiction arising either from the debtor's inactivity, or even from the court's substantive deliberations. The entire statutory construction then connects to this insolvency court decision another irrevocable decision in the matter itself, which has substantive law consequences for the debtor and for creditors, and for the debtor these are consequences of existential importance.

5. In the second part of the petition submitted under Art. 95 par. 2 of the

Constitution a § 64 par. 3 of the Act on the Constitutional Court, the High Court in Olomouc seeks a judgment annulling § 93 par. 2 of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the Insolvency Act). The contested provision requires the appeals court to rule on an appeal against the method of resolving insolvency no later than two months after it is presented by the first-level court. In view of the submission of the present petition to the Constitutional Court, this deadline cannot be met. The appeals court is aware that this is a procedural deadline and protection of the constitutional order takes precedence over observing this deadline; however, the High Court in Olomouc believes that simple law should not create formal obstacles by setting procedural deadlines which, if observed, would hinder protection of the constitutional order, and therefore it proposes that the Constitutional Court also annul § 93 par. 2 of the Insolvency Act, because annulling it will not affect the speed of the appeal proceeding in an insolvency proceeding, because that is secured by § 92 of the Insolvency Act, which would remain untouched.

6. The petitioner also proposes, in view of the arguments presented under point 5, and in view of the fact that is interrupting insolvency proceedings is not possible under § 84 par. 1 of the Insolvency Act, and also in view of the fact that, regardless of the debtor's appeal, consequences of the declaration of bankruptcy have already taken place by virtue of publication of the decision to declare bankruptcy in the insolvency register, that the Constitutional Court treat the petition as urgent under § 39 of the Act on the Constitutional Court.

II.
Conduct of the Proceeding and Recapitulation of the Responses of the Parties to the Proceeding

7. In response from the Constitutional Court's request, under § 69 of the Act on the Constitutional Court the Chamber of Deputies of the Parliament of the Czech Republic submitted a response through its chairman, Ing. Miloslav Vlček. The Senate of the Parliament of the Czech Republic did likewise, through its chairman, MUDr. Přemysl Sobotka.

8. In its response, the Chamber of Deputies summarizes the process of adopting the contested provisions.

9. The Senate primarily addresses the process of adopting the contested provisions. It then states that there was no discussion of the contested provisions. There was debate about the institution of debt discharge only relating to the possibility of debt discharge of a legal entity that is not an entrepreneur. Thus, there were no statements made in the upper house of Parliament that could either support or refute the petitioner's claim that § 394 par. 2, the part of the sentence after the semicolon, and § 93 par. 2 of the Insolvency Act are unconstitutional.

10. The parties to the proceeding stated expressly – or by implication, by the deadline – consent to waive a hearing, and the Constitutional Court did not hold a hearing because it could not be expected to clarify the matter further.

III.
Text of the Contested Legal Provision

11. The contested provision of the Insolvency Act reads:
§ 394
[…]
(2) The insolvency court shall take cognizance of withdrawal of a petition to permit debt discharge in a decision that is delivered to the person who filed the petition, the debtor, the insolvency administrator and the creditors committee; an appeal against the decision is not permitted.
[…]

§ 93
[…]
(2) The insolvency court shall review and rule on an appeal against a decision under paragraph 1 no later than 2 months after the appeal is presented to it by the court of the first instance; this does not affect § 92.

IV.
Petitioner's Active Standing

12. The petitioner derives its active standing to submit the present petition from Art. 95 par. 2 of the Constitution. If, under that provision, a court concludes that a statute that is to be used in resolving a matter is inconsistent with the constitutional order, it shall submit the matter to the Constitutional Court. The court's right is made specific in § 64 par. 3 of the Act on the Constitutional Court as the right to submit a petition to annul a statute or individual provisions thereof. That means that the active standing of a court to submit a petition to annul a statute or individual provisions of a statue is derived from the subject matter of the dispute and its legal classification. In other words, a court can submit a petition to annul only a statute, or individual provisions of a statute, that are to be applied in resolving a dispute that is being heard before an ordinary court. The deliberation about applying it (them) must be supported with reasons, must be derived from meeting the conditions of the proceeding, including the active standing of the parties, and in the case of a substantive law regulation, must be derived from an unambiguous determination that the regulation is to be applied [see judgment file no. Pl. ÚS 50/05 of 16 October 2007 (2/2008 Coll.), point 11].

13. The foregoing indicates that the contested provision is decisive for the success of one of the parties in the proceeding before the petitioner. Thus, the petitioner meets the conditions for active standing to submit the present petition to the Constitutional Court as defined in the previous point.

V.

Constitutional Conformity of the Legislative Process
14. Under § 68 par. 2 of the Act on the Constitutional Court, the Constitutional

Court, in addition to reviewing the contested statute for consistency with constitutional acts, is to determine whether it was adopted and issued within the bounds of constitutionally provided competence and in a constitutionally prescribed manner.

15. Because the petitioner did not raise the objection of a flaw in the legislative process, or that the legislature exceeded its constitutionally provided competence, in view of the principles of procedural economy it is not necessary to review this question in more detail, and it will suffice, in addition to considering the responses submitted by the Chamber of Deputies and the Senate (see above, points 8 and 9 of this judgment), to formally verify the conduct of the legislative process from publicly available information at http://www.psp.cz.

16. The Constitutional Court determined that the draft act later promulgated as no. 182/2006 Coll. (Chamber of Deputies publication 1120/2 from 2002-2006, its 4th term of office), was processed by the Chamber of Deputies of the Parliament as publication 1120 in the first reading on 26 October 2005, and assigned for review to the Constitutional Law Committee, which discussed it at a meeting on 1 December 2005, and on 20 January 2006 recommended that it be approved, as amended by a comprehensive amending proposal contained in the committee's resolution no. 235 (publication 1120/1). This comprehensive amending proposal also revised the contested provision of § 394 par. 2. The bill went through a second reading on 27 January 2006, and amending proposals made in the second reading were processed as publication 1120/2. The draft act was approved by the necessary majority of deputies present in the third reading on 8 February 2006, as amended by comprehensive amending proposals. The bill was presented to the Senate on 28 February 2006, and the Senate Organization Committee assigned it for review, as publication no. 288 (5th term of office) to the Constitutional Law Committee. The committee reviewed the bill on 15 March 2006 and adopted resolution no. 93 (Senate publication no. 228/1), in which it recommended that the Senate approve the bill in the version presented by the Chamber of Deputies. The Plenum of the Senate discussed the bill at its 10th session on 30 March 2006, and it was approved, in the version presented by the Chamber of Deputies, in vote no. 199 on bill resolution no. 416. Out of 54 senators present, 49 voted in favor, 5 senators abstained, 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 provided competence and in a constitutionally prescribed manner, or that in this proceeding it found nothing to support a contrary conclusion.

VI.
The Constitutional Court's Review

18. The Constitutional Court first considered whether § 394 par. 2, the part of the sentence after the semicolon, of the Insolvency Act was consistent with Art. 36

par. 1 of the Charter, under which everyone may assert, through the legally prescribed procedure, his rights before an independent and impartial court or, in specified cases, before another body, and Art. 38 par. 2 of the Charter, under which everyone has the right to have his case considered in public, without unnecessary delay, and in her presence, as well as to express her views on all of the admitted evidence. The public may be excluded only in cases specified by law.

19. In its previous case law the Constitutional Court clearly stated that if, under Art. 36 par. 1 of the Charter everyone has the right to assert his rights before a court or another body, and the conditions for exercising that right are provided by a statute, then that statute, issued on the basis of constitutional authorization, may not completely negate everyone's right to seek protection of his rights before a court or another body in one or another situation, and thereby also deny a constitutionally guaranteed fundamental right, even if only in certain cases. Art. 36 par. 1 of the Charter constitutionally guarantees everyone the right to seek protection of his rights before a court or another body in all situations where the rights have been violated (there is no constitutional restriction here). In other words, no person can be completely excluded by law from the opportunity to seek protection of his right, even if only in a particular case, because his right under Art. 36 par. 1 of the Charter would be annulled. A contrary interpretation would also mean that the establishment of everyone's right to turn to judicial and other bodies for protection of his rights as enshrined by the constitutional framers – endowed with the highest legal force – would basically lose its meaning, because it could be annulled for one or another situation only by the will of the legislature. [judgment file no. Pl. ÚS 12/07 of 20 May 2008, judgment file no. Pl. ÚS 72/06 of 29 January 2008 (291/2008 Coll.), both available at http://nalus.usoud.cz].

20. The civil process rests on two fundamental principles – the dispositive principle and the procedural principle. The close connection between substantive private law and public civil procedural law is best expressed through the dispositive principle. The meaning and purpose of civil procedure law is to protect subjective private rights, i.e. public civil procedure law serves the private substantive law, and if it does not fulfill its role, it loses its purpose. The functional ties between private substantive law, which is based on the autonomy of will of the parties to private law relationships, and public civil procedure law are reflected in the area of procedural law, primarily through the dispositive principle, which governs civil trials. The dispositive principle is a specific projection of the private law autonomy of will into the field of civil trials. It is up to the parties to determine both the proceeding and the subject matter of the proceeding, freely, in accordance with the dispositive principle. Procedural rights, which are derived from the dispositive principle, are reserved exclusively for those who have these rights through dispositive procedural actions; the nature of these dispositive procedural actions indicates that they may not be part of a legal fiction, i.e. it cannot be deemed that someone withdrew a petition even though he did not do so. The legal construct of the fiction of withdrawal of a petition for debt discharge is inconsistent with the nature of a civil trial, which is true not only for an adversarial trial, but for any kind of civil judicial proceedings, i.e. including insolvency proceedings. A dispositive legal action may not be part of a legal fiction without violating the dispositive principle, on which the civil proceeding is built, and, ultimately, also violating the principle of autonomy of will. As the Constitutional Court stated, e.g.

in judgment file no. I. ÚS 167/04, “the autonomy of the will and individual liberty of action guaranteed on the constitutional level by Art. 2 par. 3 of the Charter of Fundamental Rights and Basic Freedoms. Art. 2 par. 3 of the Charter must be understood in a double sense. In its first dimension it represents a structural principle, according to which state authority may be asserted in relation to the individual and his autonomous sphere (including autonomous manifestations of the will) solely in cases where an individual’s conduct violates an explicitly formulated prohibition laid down in law. However, such prohibition must, in addition, reflect solely the requirements consisting in preventing the individual in encroaching upon the rights of others and in the attainment of the public good, provided that such restriction upon the individual liberty of action is legitimate and proportional. Such principle must, then, be conceived of as an essential attribute of every democratic law-based state (Art. 1 par. 1 or the Constitution of the Czech Republic). Art. 2 par. 4 of the Constitution of the Czech Republic has a like content. In its second dimension, Art. 2 par. 3 of the Charter operates as an individual right to the respect by state authorities of the autonomous manifestation of one’s personhood (including manifestations of the will), which are reflected in a person’s specific conduct, to the extent that such conduct is not expressly prohibited by law. In its second dimension, in which it operates as an individual fundamental right, Art. 2 par. 3 must be applied immediately and directly. In this dimension it does not merely radiate through ordinary law, rather it is an individual right which operates directly in relation to state authority. Thus, when state bodies apply ordinary law, they are also obliged to interpret the norms of that law, in which Art. 2 par. 3 of the Charter and Art. 2 par. 4 of the Constitution of the Czech Republic are reflected as objective constitutional principles, in such a manner that they do not encroach upon the right of the individual to the autonomy of his will, which is guaranteed by the second dimension of Art. 2 par. 3. The obligation to respect the autonomy of the will applies not only to the bodies that interpret and apply the law, but undoubtedly also to the legislature. Therefore, on the one hand the effort to speed up proceedings is desirable, but on the other hand it may take such a form that, by simulating a party’s procedural action, it actually removes his opportunity to act freely. That is why, for example, in all developed legal systems the institutions of presumptions are used exclusively in determining the facts, i.e. in clarifying and determining the decisive factual circumstances. Institutions for speeding up the process (e.g. a default judgment or preclusive deadlines) are used only in an area where the procedural principle applies, and it is not possible to use these means to determine a proceeding or the subject matter of a proceeding in the interests of speeding up the proceeding. The function of a legal fiction is not to make probable certain decisive facts; even less so may a legal fiction apply to the fundamental right of a party to a proceeding to determine a proceeding and the subject matter of a proceeding (cf. Macur, J. Rozsudek na základě fikce uznání nároku podle ustanovení § 114b o. s. ř. [A Decision on the Basis of the Fiction of Recognizing a Claim under § 114b of the Civil Procedure Code] Bulletin Advokacie [Bulletin of Advocacy], no. 2/2002, pp. 28-36).

21. The contested provision, § 394 par. 2, the part of the sentence after the semicolon, of the Insolvency Act, restricts the implementation of the debtor’s right to solve his insolvency through debt discharge, although it was permitted by the previous decision. As a result of a legal fiction that is applied not only when the debtor does not act, but also by a court’s substantive judgment, without allowing

the debtor to defend against the ordinary's court's decision using regular remedies, his right to a fair trial is limited, and it is not possible to correct a possible mistake that may happen in the court's actions (e.g. a debtor excuses his absence, but the notice is entered in a different file by mistake, etc.). Moreover, the fiction of withdrawal of a petition for debt discharge is not a mere procedural action through which the party determines the proceeding, but has fundamental substantive law consequences for the debtor and for creditors (subsequent declaration of bankruptcy, etc.).

22. Thus, for the foregoing reasons, the Constitutional Court concluded, that the contested provision § 394, in paragraph 2, the part of the sentence after the semicolon, of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the Insolvency Act) is inconsistent with Art. 36 par. 1 and Art. 38 par. 2 of the Charter, and therefore it annulled that provision as of the day this judgment is promulgated in the Collection of Laws. The Constitutional Court states that the fundamental reason why the annulled provision is unconstitutional is its connection in application to the obviously unconstitutional part of § 399 par. 2, the sentence after the semicolon, which reads: "if he does not appear without excusing himself, or if the insolvency court does not find his reason justified, he is deemed to have withdrawn the petition for debt discharge." However, the High Court in Olomouc did not directly apply this provision, establishing the legal fiction of withdrawal of a petition for debt discharge in its decision making (proceeding on an appeal), and therefore it did not have active standing to submit a petition to annul it. Such a petition was undoubtedly available to the Regional Court in Ostrava, as the court of the first instance, but that court did not use it. Thus, it is outside the scope of review before the Constitutional Court, which is bound by the petition from the High Court in Olomouc.

23. The Constitutional Court also considered whether § 93 par. 2 of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the Insolvency Act) is consistent with Art. 36 par. 1 of the Charter, under which everyone may assert, through the legally prescribed procedure, his rights before an independent and impartial court or, in specified cases, before another body.

24. The contested provision sets a procedural deadlineof two months by which the appeals court is to rule on the appeal. If this were a preclusive deadline, i.e. if the right expired, or if other fundamental legal consequences were tied to the expiration of the deadline (e.g. a legal fiction or presumption) that deadline would have to be considered unconstitutional, i.e. inconsistent with the principle of a fair trial. On the other hand, it must be emphasized that introducing procedural deadlines for court decisions may not be to the detriment of truthful determination of facts that lie at the foundations of substantive law relationships and subjective rights. The statutory deadline in § 93 par. 2 of the Insolvency Act applies to a decision on an appeal against an order by a preliminary injunction, against a decision on insolvency and against a decision on the method for resolving insolvency, i.e. it is an initial solution of the debtor's situation, when it is essential to limit any delays, and since it is a procedural deadline, its definition is not inconsistent with the right to a fair trial.

25. For the foregoing reasons, the Constitutional Court concluded that the

contested provision § 93 par. 2 of Act no. 182/2006 Coll., on Insolvency and Methods of Resolving It (the Insolvency Act) is not inconsistent with Art. 36 par. 1, and therefore it denied the petition to annul it.

26. The Constitutional Court granted the proposal of the High Court in Olomouc and treated the petition as urgent under § 39 of the Act on the Constitutional Court.

Instruction: Decisions of the Constitutional Court cannot be appealed.