2003/06/24 - PL. ÚS 44/02: INEQUALITY WITHIN BANKRUPTCY ACT

HEADNOTES

One can not a priori assume that the legislature, in passing § 12a par. 5, second sentence, of the Bankruptcy and Settlement Act, intended to violate Art. 96 par. 1 of the Constitution. Therefore, one also can not assume that by providing protection for the property of a group of creditors who, on its basis, file an appeal against a decision to deny bankruptcy due to insufficient assets and document that they have a monetary receivable against the debtor, it also intended to give an unjustifiably different procedural position as compared to the group of other creditors-parties.

Although in the case of the contested sentence the statute does not expressly state that a creditor making use of the right to appeal is limited by the state of the proceedings at the time he joined them, one can not conclude, merely because of that, that he is not limited by that state. On the contrary, in accordance with the requirement of a constitutional interpretation, it is necessary to assume that the creditor filing an appeal under § 12a par. 5, second sentence of the Bankruptcy and Settlement Act by filing an appeal, enters into already on-going proceedings analogously to "additional applicants" who also enter the proceedings after they have begun.
The proceedings must be taken as a whole, including the proceedings on the appeal. If it is possible to reach the constitutional conclusion that the appellant is entering the on-going proceedings as a party with equal rights, he must be given a deadline to file an appeal only until such time as the proceedings on the bankruptcy application are still continuing. Thus, he can file an appeal only within a period calculated from the delivery of the decision by the first level court to the (last) party.

As the Constitutional Court concluded in its judgment file no. Pl. ÚS 36/01, published as no. 403/2002 Coll., the enshrining in the Constitution of a general incorporative norm, and thereby overcoming a dualistic concept of the relationship between international law and domestic law (constitutional Act no. 395/2001 Coll.), can not be interpreted to the effect that it would remove the reference point of ratified and promulgated international agreements on human rights and fundamental freedoms for the evaluation of domestic law by the Constitutional Court, with possible derogative consequences. The scope of the concept of the constitutional order can not be interpreted only with regard to Art. 112 par. 1 of the Constitution, but also in view of Art. 1 par. 2 of the Constitution. The Constitutional Court also confirmed this conclusion in its further decision-making (cf. judgment file no. I. ÚS 752/02).

The inception of insolvency (§ 1 par. 2) is connected without differentiation with the debtor's obligations or the receivables of creditors, monetary or non-monetary. The only requirement is that the obligations/receivables be "due." A due receivable is a property value under Art. 1 of the Additional Protocol, as it meets the conditions

imposed by the ECHR case law on the concept of "legitimate expectation," which the creditor must have that his receivable against the debtor will be realized, and is in effect transformed into the effective exercise of the property right (a receivable made fully specific, current, and enforceable). The contested sentence, which expressly recognizes the right to appeal against a decision to deny the application for bankruptcy due to insufficient assets only to creditors with receivables of a monetary nature, disadvantages creditors who can document only a non-monetary receivable. This introduces an inequality between the creditors under the contested provision, an inequality which is not reasonably justified and is discriminatory, which is inconsistent with the ban on discrimination imposed by Art. 14 of the Convention on the Protection of Human Rights and Fundamental Freedoms. In view of the explicitly stated condition of a receivable being monetary, there is no room for a constitutional interpretation of the contested sentence.

CZECH REPUBLIC
CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, composed of JUDr. Vojtěch Cepl, JUDr. František Duchoň, JUDr. Miloš Holeček, JUDr. Pavel Holländer, JUDr. Vladimír Jurka, JUDr. Vladimír Klokočka, JUDr. Jiří Malenovský, JUDr. Jiří Mucha, JUDr. Antonín Procházka, JUDr. Pavel Varvařovský, JUDr. Vlastimil Výborný, JUDr. Eliška Wagnerová and JUDr. Eva Zarembová, ruled on a petition from the Supreme Court of the Czech Republic, panel no. 29, represented by the Panel Chairman, JUDr. Zdeněk Krčmář, seeking the annulment of § 12a par. 5, second sentence, of Act no. 328/1991 Coll., on Bankruptcy and Settlement, as amended by later regulations, as follows:

1.§ 12a par. 5 second sentence of Act no. 328/1991 Coll., on Bankruptcy and Settlement, as amended by later regulations, expressed by the word "monetary," is annulled as of the day this judgment is promulgated in the Collection of Laws.

2.The remaining part of the petition is denied.

REASONING

I.

On 2 December 2002 the Constitutional Court received a petition from panel no. 29 of the Supreme Court of the Czech Republic, in which the petitioner seeks the annulment of § 12a

par. 5, second sentence, Act no. 328/1991 Coll., on Bankruptcy and Settlement, as amended by Act no. 122/1993 Coll., no. 42/1994 Coll., no. 74/1994 Coll., no. 117/1994 Coll., no. 156/1994 Coll., no. 224/1994 Coll., no. 84/1995 Coll., no. 94/1996 Coll., no. 151/1997 Coll., no. 12/1998 Coll., no. 27/2000 Coll., no. 30/2000 Coll., no. 105/2000 Coll., no. 214/2000 Coll., no. 368/2000 Coll., no. 370/2000 Coll., and no. 120/2001 Coll. (also the "Bankruptcy and Settlement Act"), expressed by the words : "A decision to deny the application to declare bankruptcy due to insufficient assets may also be appealed by a creditor who proves that he has a monetary receivable against the debtor."

The petitioner stated that it is reviewing , under file no. 29 Odo 184/2001, a creditor's appeal on a point of law against a resolution of the High Court in Prague of 26 January 2001, file no. 2 Ko 172/2000-32, in the matter conducted at the Regional Court in Pilsen under file no. 26 K 72/2000 [application by the debtor Golf and Country Club, a.s. in liquidation, with its registered office in Karlovy Vary, Petřín 3/1165, postal code 360 01, Company ID no. 61 05 88 23 (the "debtor"), for a declaration of bankruptcy]. In reviewing this appeal on a point of law, the petitioner concluded that the Act which is to be applied to the matter is inconsistent with the Constitution of the Czech Republic. Therefore, it seeks annulment of that Act under Art. 95 par. 2 of the Constitution and § 64 par. 4 Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations.

The Supreme Court was led to this petition by the following reasons. The debtor's liquidator filed an application for bankruptcy with the Regional Court in Pilsen on 27 September 2000, on the grounds that the company was over-indebted and had no assets. The Regional Court, by decision of 4 October 2000, file no. 26 K 72/2000-12, denied the application for bankruptcy. That decision was contested by an appeal from the creditor, Československá obchodní banka, a.s., with its registered office in Prague 1 – Nové Město, Na Příkopě 854/14, Company ID no. 00 00 13 50. The High Court in Prague denied the appeal by decision of 26 January 2001, file no. 2 Ko 172/2000-32, considering the bank, under § 218 par. 1 let. b) of Act no. 99/1963 Coll., the Civil Procedure Code, as in effect before 1 January 2001 (the "CPC"), an entity which is not authorized to file an appeal.

The petitioner states that § 12a par. 5 of the Bankruptcy and Settlement Act gives standing to file an appeal against a decision to deny an application for bankruptcy due to insufficient assets to the existing parties to the proceedings, if these are the petitioner and other petitioners, as well as to a creditor who proves that he has a monetary receivable against the debtor. It thus relies on the standard interpretation of participation in the first phase of bankruptcy proceedings presented by court practice on the basis of the opinion of the civil law and commercial collegium of the Supreme Court, published as no. 52/1998 in the Collection of Court Decisions and Opinions. According to the cited opinion, § 90 of the CPC is not applicable in bankruptcy proceedings, even proportionately. The Bankruptcy and Settlement Act has an independent provision which defines the parties to proceedings, and the circle of parties to proceedings is further defined by defining the persons authorized to file an application (another application). Therefore, it is not appropriate to define a party to bankruptcy proceedings differently. However, neither § 12a par. 5, second sentence, of the Bankruptcy and Settlement Act (also referred to as the "contested sentence" nor other provisions of the Act provide an answer to certain fundamental questions in this regard. Primarily, it is not possible to determine at what time the period for filing an appeal begins to run for the persons defined in that provision.

The decision against which they are to appeal is not delivered to them. It is also not clear when that period expires. Further, there can be doubts as to whether the status of the proceedings applicable to such appellants is the status at the time when their appeal reaches the court. This is expressly provided for other applicants by the Bankruptcy and Settlement Act in § 4 par. 4. This allegedly creates room for the proceedings before the appeals court (in conflict with the principle of two-level proceedings) to become proceedings of the first level. The Act does not accord the right to appeal to everyone who claims to be a creditor of the debtor, but only to a person who proves his receivable against the debtor. It is evident that by filing an appeal the relevant person becomes a party to the appeals proceedings. However, if he does not at the same time file another application (§ 4 par. 4 of the Bankruptcy and Settlement Act), it is not clear in what manner and with what procedural rights and obligations he will take part in the new proceedings before the court of the first level in the event that his appeal is successful, the decision to deny is reversed, and the matter is returned to the court of the first level for further proceedings.

The petitioner claims that the contested provision is therefore inconsistent with Art. 1 of the Constitution and Art. 37 par. 3 of the Charter of Fundamental Rights and Freedoms (the "Charter"). The abovementioned questions lead the petitioner to conclude that the contested sentence is inconsistent with the principle of legal certainty. According to the petitioner, the principle of equality of the parties is violated because the contested sentence results in different treatment of the parties to the bankruptcy proceedings. However, the different treatment is not supported by any statutory viewpoint which would justify it. Finally, the petitioner also claims that a person who, as a creditor with a financial receivable against the debtor, enters the proceedings only by filing an appeal against the decision to deny the application for bankruptcy, under the contested sentence, either becomes a party to the bankruptcy proceedings only in the appeal stage, or becomes the same type of party to the proceedings as an additional applicant under § 4 par. 4 of the Bankruptcy and Settlement Act (including for proceedings before the court of the first level after reversal of the first level court's decision as a result of the appeal). In both cases, however, compared to an appellant who is an additional applicant, the appellant under the contested sentence must document his standing to appeal by "documenting" (verifying) the monetary receivable against the debtor. The appeals court is thereby also placed in the role of a court of the first instance (it reviews, acting as a court of first instance, whether the appellant is the debtor's creditor, regardless of the fact that the only substantive argument on the basis of which a decision to deny a bankruptcy application can be reversed in appeal proceedings can consist of refuting the conclusion that the debtor clearly has insufficient assets). Unlike an appellant who is an additional applicant, an appellant under the contested sentence is not limited in his procedural rights by the state of the proceedings at the time when his appeal reached the court (the law does not impose this limitation on him, although the need for it may become important after reversal of the first level court's decision by the appeals court, in the new proceedings before the court of the first level).

II.

The Constitutional Court, under § 69 par. 1 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, requested opinions on the petition from the Chamber of Deputies and the Senate of the Parliament of the Czech Republic, as parties to the proceedings. The Chamber of Deputies and the Senate provided opinions on the petition.

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III.

The Constitutional Court first, in accordance with § 68 par. 2 of the Act on the Constitutional Court, reviewed whether the statute whose provision the petitioner claims to be unconstitutional was passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner.

The Constitutional Court determined that the statute was passed and issued in a constitutionally prescribed manner and within the bounds of constitutionally provided jurisdiction, and that the rules provided in Art. 39 par. 1 and 2 of the Constitution were observed.

In view of the fact that further clarification of the matter could not be expected from oral proceedings, the court asked the parties to the proceedings whether they agreed to waive them (§ 44 par. 2 Act no. 182/1993 Coll., on the Constitutional Court), with the provision that if they did not send an express statement to the Constitutional Court by the stated deadline, the court would assume that they agreed to waive oral proceedings.

The Chairman of the Chamber of Deputies informed the Constitutional Court in his opinion on the petition, that he agreed with handling the matter without oral proceedings. The Chairman of the Senate also stated, by letter of 13 June 2003, that he agreed to waive oral proceedings. In view of the fact that before setting the date for issuing this judgment it was not whether the petitioner actually received the query from the Constitutional Court under § 44 par. 2 Act no. 182/1993 Coll., on the Constitutional Court, this was verified by telephone on 24 June 2003. The petitioner informed the Constitutional Court that it agreed to waive oral proceedings (cf. official record of 24 June 2003, p. 30 of the file). It then did not respond to the query in writing.

In this situation, the Constitutional Court believed that the conditions of § 44 par. 2 Act no. 182/1993 Coll., on the Constitutional Court, were met, and waived oral proceedings.

IV.

In the petition, the petitioner seeks the annulment of § 12a par. 5, second sentence, of the Bankruptcy and Settlement Act, under which “A decision to deny the application to declare

bankruptcy due to insufficient assets may also be appealed by a creditor who proves that he has a monetary receivable against the debtor."

Under § 1 par. 1 of the Bankruptcy and Settlement Act the purpose of this Act is to arrange the property relationships of a debtor who is insolvent. Arranging the debtor's property relationship must be understood to mean settling the claims of the debtor's creditors under conditions set by the Act. Likewise the amendment of the Bankruptcy and Settlement Act (Act no. 105/2000 Coll.), according to the background report, is aimed at, among other things, strengthening the position of creditors. The contested sentence also does not deviate from this legitimate aim of providing increased protection to creditors' property, as it strengthens the procedural position of creditors who were not yet parties to the bankruptcy proceedings and could not appeal the decision to deny the bankruptcy application due to insufficient assets.

The petitioner primarily sees the contested sentence as inconsistent with Art. 37 par. 3 of the Charter of Fundamental Rights and Freedoms, under which all parties to proceedings are equal. As the Constitutional Court said in a recent judgment, file no. Pl. ÚS 19/02, in which it also considered the issue of equality of parties in bankruptcy proceedings, in a different context, this provision of the Charter is supposed to guarantee equal procedural rights and obligations of the specific parties in particular proceedings. The petitioner's petition of course seeks abstract inspection of the contested norm, though with the background of a particular case. That case is known to the Constitutional Court only from reports and it is naturally not its task to consider it in any way in these proceedings. Therefore, the Constitutional Court reviewed the present petition through the prism of Article 96 par. 1 of the Constitution, which sets forth the general principle of equality of the parties in proceedings with the same subject matter.

In the cited judgment, file no. Pl. ÚS 19/02, the Constitutional Court granted the petition, as it found that the legislature impermissibly recognized different procedural rights and obligations for parties to proceedings with the same subject matter. The Constitutional Court also did not find a possibility for overcoming the unconstitutionality of the contested provision (§ 24 par. 4 of the Bankruptcy and Settlement Act) through an interpretation which would be constitutional.

The petitioner claims that the contested sentence is uncertain and violates the principle of legal certainty, and that it leads to different treatment of parties to bankruptcy proceedings. It does not define the beginning of the period for filing an appeal against a court decision denying the application for bankruptcy due to insufficient assets, and does not determine what position persons authorized to file an appeal will have in proceedings after such a decision is reversed. In contrast to an appellant who is an additional applicant, appellants under § 12a par. 5, second sentence, of the Bankruptcy and Settlement Act must document their standing to file an appeal by "documenting" their monetary receivable against the debtor. The contested sentence also does not mention whether and in what way the rights of these persons are limited by the fact that they are only entering the proceedings in this part. According to the petitioner appellants under § 12a par. 5, second sentence, of the Bankruptcy and Settlement Act are not limited in their procedural rights by the state of the proceedings at the time when their appeal reaches the court, as the Act does not impose such limitation on them (in contrast to "additional applicants").

V.

The objection relating to the indefiniteness of the contested sentence is related to the requirement that a statute be foreseeable. It can be said generally that the indefiniteness of a provision in a legal regulation must be considered in conflict with the requirement of legal certainty, and thus also with a state governed by the rule of law (Art. 1 par. 1 of the Constitution of the CR), only if the intensity of that uncertainty rules out the possibility of determining its normative content with the help of the usual interpretational steps (cf. Constitutional Court judgment file no. Pl. ÚS 9/95). In other words, a certain degree of uncertainty in a legal regulation is a logical consequence of the nature of a legal norm, being a general scale regulating the behavior of subjects of law. The Constitutional Court points to the settled case law of the European Court of Human Rights (the "ECHR"), under which the required degree of precision in a statute depends primarily on the nature of the relationships which it governs, but also on the number and nature of the persons at whom it is aimed. It is considered natural that courts "finish shaping" legal norms which can not expressly take into account the wealth of relationships and situations for which they are to be used. The degree of precision and foreseeability of a statute must, of course, be considerably higher where the statute specifically permits the public power to interfere in the rights and freedoms of the individual and opens up room for impermissible arbitrariness, and especially where the public power is applied secretly, without the supervision of the public (see ECHR judgment in the matter Kruslin v. France, 1990, § 30).

The wider subject governed by the contested sentence (the course of bankruptcy proceedings) does not, in terms of the foregoing, place any increased demands on the degree of precision, and so it can legitimately be expected that the court will remove possible unclear points through its interpretation.

The Constitutional Court believes that the petitioner's objections can, to a large extent, be overcome by a constitutional interpretation. The basis for its interpretative deliberations was the following starting point. One can not a priori assume that the legislature, in passing § 12a par. 5, second sentence, of the Bankruptcy and Settlement Act, intended to violate Art. 96 par. 1 of the Constitution. Therefore, one can not assume that by providing protection for the property of a group of creditors who, on its basis, file an appeal against a decision to deny bankruptcy due to insufficient assets and document that they have a monetary receivable against the debtor, it also intended to give an unjustifiably different procedural position as compared to the group of other creditors-parties. This constitutionally consistent assumption is also borne out by other parts of the Act's text. For example, a creditor who files an application for bankruptcy must also document that he has a (due) receivable against the debtor (§ 4 par. 2 of the Bankruptcy and Settlement Act). The same condition must be met by an additional applicant, joining the proceedings and filing an application for bankruptcy concerning the same debtor before the court rules on the bankruptcy application (§ 4 par. 4 in conjunction with § 4 par. 2 of the Bankruptcy and Settlement Act).

Therefore, we can not, without anything further, agree with the petitioner's claim, based on the logical interpretive argument a contrario, under which the unconstitutionality of the contested sentence lies in, among other things, the fact that it does not determine the position of a person authorized to file an appeal in the proceedings after reversal of a decision by which a court denies an application for bankruptcy due to insufficient assets, and does not determine in what way the rights of these person are limited by the fact that they are not entering the proceedings until this phase, unlike the explicit regulation of these issues in relation to "additional applicants." This argument can not succeed in competition with the legitimate assumption that the legislature did not intend to legislate in an unconstitutional manner, and reach a constitutional interpretation within proceedings through the obligations of the courts. In the past the Constitutional Court has repeatedly ruled that in a situation where a certain provision of a legal regulation permits various interpretations, one of which is consistent with the constitutional laws of the Czech Republic, whereas others are inconsistent with them, there are no grounds to annul that provision. In that situation, it is the task of all state bodies to interpret the provision in question in a constitutional manner (cf. judgment file no. Pl. ÚS 5/96). Although in the case of the contested sentence the statute does not expressly state that a creditor making use of the right to appeal is limited by the state of the proceedings at the time he joined them, one can not conclude, merely because of that, that he is not limited by that state. On the contrary, in accordance with the requirement of a constitutional interpretation, it is necessary to assume that the creditor filing an appeal under § 12a par. 5, second sentence of the Bankruptcy and Settlement Act by filing an appeal, enters into already on-going proceedings analogously to "additional applicants" who also enter the proceedings after they have begun. Therefore, it is necessary to analogously apply to him § 4 par. 4, the part of the sentence after the semi-colon, under which the state of the proceedings when an additional applicant joins is decisive for that applicant.

A constitutional interpretation can also remove doubts concerning the deadline for filing an appeal. The proceedings must be taken as a whole, including the proceedings on the appeal. If it is possible to reach the constitutional conclusion that the appellant is entering the on-going proceedings as a party with equal rights, he must be given a deadline to file an appeal only until such time as the proceedings on the bankruptcy application are still continuing. Thus, he can file an appeal only within a period calculated from the delivery of the decision by the first level court to the (last) party. The same conclusions are basically reached by both Z. Krčmář, in his commentary to the Bankruptcy and Settlement Act (IFEC Praha, 2000, p. 38), and by commentary authors JUDr. Ing. Jaroslav Zelenka, Ph.D., and JUDr. Jolana Maršíková (The Bankruptcy and Settlement Act, Commentary, LINDE Praha, a.s., 2002, p. 316).

The petitioner further states that creditors who joined proceedings may, under the first sentence of § 12a par. 5, of the Bankruptcy and Settlement Act, file an appeal without regard to whether they have documented their receivable. If the petitioner is trying to use this argument to support its conclusions on the unconstitutional disadvantaging of creditors who have not joined the proceedings and who, in contrast, must document their receivables during the appeal (§ 12 par. 5 second sentence), we can not agree. Every creditor who files an application for bankruptcy has an obligation to document his receivable (§ 4 par. 2 of the Bankruptcy and Settlement Act). If the contested sentence also imposes the same obligation on a particular category of creditors, this is not evidence

of inequality, but, on the contrary, equality among creditors. The petitioner's objection evidently relates not to the contested second sentence of § 12a par. 5, but to the first sentence of the same section and the same paragraph, which prima facie permits an "additional applicant" under § 4 par. 4 of the Bankruptcy and Settlement Act who establishes his participation in the bankruptcy proceedings only after the relevant decision is issued to file an appeal against it, without documenting his receivable. Nonetheless, the petitioner did not contest this first sentence, and the Constitutional Court has no reason to specifically consider interpretation of it.

VI.

Thus, the Constitutional Court did not agree with the petitioner's arguments presented in the present petition. However, it points out that under its settled case law it is bound only by the proposed judgment in the petition to open proceedings. However, it is not bound by the petition's reasoning. Therefore, it is not inconsistent with its mission it if reviews the contested provision from other viewpoints as well (cf. e.g. judgment I. ÚS 89/94). Therefore, it also considered the contested sentence beyond the framework of the arguments in the petition, from the point of view that the creditor is supposed to, simultaneously with the appeal, document his receivable, which must be a monetary one. It also took into account possible violation of ratified and promulgated international treaties on human rights and freedoms by which the Czech Republic is bound. As it concluded in its judgment file no. Pl. ÚS 36/01, published as no. 403/2002 Coll., the enshrining in the Constitution of a general incorporative norm, and thereby overcoming a dualistic concept of the relationship between international law and domestic law (constitutional Act no. 395/2001 Coll.), can not be interpreted to the effect that it would remove the reference point of ratified and promulgated international agreements on human rights and fundamental freedoms for the evaluation of domestic law by the Constitutional Court, with possible derogative consequences. The scope of the concept of the constitutional order can not be interpreted only with regard to Art. 112 par. 1 of the Constitution, but also in view of Art. 1 par. 2 of the Constitution. The Constitutional Court also confirmed this conclusion in its further decision-making (cf. judgment file no. I. ÚS 752/02).

The Constitutional Court again points to one of the main aims of the Bankruptcy and Settlement Act, protection of the rights of the creditors of a debtor who becomes insolvent. Under § 4 par. 1 of the Bankruptcy and Settlement Act, an application for bankruptcy can be filed by the debtor or any of the creditors. The inception of insolvency (§ 1 par. 2) is connected without differentiation with the debtor's obligations or the receivables of creditors, monetary or non-monetary. The only requirement is that the obligations/receivables be "due." Using a teleological, but systematic, interpretation of the Bankruptcy and Settlement Act (§ 1 par. 2 is among the "introductory provisions") the group of creditors under the contested sentence is subject to the condition of the receivables being "due."

Every natural person or legal entity has the right to peaceful enjoyment of his/its property (Art. 1 par. 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, the "Additional Protocol"). The enjoyment of the rights and freedoms set forth by the Convention for the Protection of Human Rights and Fundamental Freedoms must be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

A "due receivable" is a property value under Art. 1 of the Additional Protocol, as it meets the conditions imposed by the ECHR case law on the concept of "legitimate expectation," which the creditor must have that his receivable against the debtor will be realized, and is in effect transformed into the effective exercise of the property right (a receivable made fully specific, current, and enforceable) (see, e.g., the decision on acceptability in the matters Malhous v. the Czech Republic of 13 December 2000, part B; Gratzinger and Gratzingerová v. the Czech Republic of 10 July 2002, §§ 68 and 72).

In view of the guarantees provided for the right to use property and protection of it and the right not to be discriminated against in the peaceful enjoyment of one's property, we can admit the conclusion that creditors authorized under the Bankruptcy and Settlement Act could be only creditors with due "monetary" receivables. Creditors with non-monetary receivables can not be referred only to the phase of proceedings after a declaration of bankruptcy, as, in contrast, is claimed without further explanation by JUDr. Zelenka and JUDr. Maršíková in their commentary, p. 18. Their position would be discriminatory in comparison to creditors with monetary receivables, as it would unjustifiably advantage the protection of monetary property in contrast to non-monetary property. The relevant provisions of the Bankruptcy and Settlement Act must be interpreted in accordance with the guaranteed rights of all creditors. The contested sentence, which expressly recognizes the right to appeal against a decision to deny the application for bankruptcy due to insufficient assets only to creditors with receivables of a monetary nature, disadvantages creditors who can document only a non-monetary receivable. This introduces an inequality between the creditors under the contested provision, an inequality which is not reasonably justified and is discriminatory. In view of the explicitly stated condition of a receivable being monetary, there is no room for a constitutional interpretation. Z. Krčmář, in his commentary to this Act, also reached an analogous conclusion concerning the discriminatory nature of the contested sentence in this context, although he did apply it in the present petition (Krčmář, Z.: The Bankruptcy and Settlement Act, IFEC Prague, 2000, p. 38).

Therefore, for the abovementioned reasons, the Constitutional Court under § 70 par. 1 of the Act on the Constitutional Court, as amended by later regulations, annuls the contested § 12a par. 5 second sentence, of the Bankruptcy and Settlement Act, expressed by the word "monetary," due to inconsistency with Art. 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as of the day this judgment is promulgated in the Collection of Laws. The remaining part of the petition is denied, in view of the abovementioned reasons (§ 70 par. 2 of the Act).

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

Brno, 24 June 2003

Dissenting Opinion
of Constitutional Court judge Eliška Wagnerová to the judgment of 24. June 2003, file no. Pl. ÚS 44/02

I do not agree with the majority opinion insofar as it did not grant the petition to annul § 12a par. 5 second sentence of Act no. 328/1991 Coll., on Bankruptcy and Settlement, as amended, in its full extent. On the contrary, I agree with the reasons stated in the judgment concerning the unreasonableness and discriminatory nature of differentiating receivables into monetary and non-monetary. In other words, I agree with the evaluation of substantive law aspects of the contested provisions, but I have reservations about evaluating the equality of the position of parties to specific proceedings in a purely procedural sense.

The Constitutional Court reviewed the contested provision in the form of specific review of norms, as proceedings on review of a norm were opened at the instigation of the Supreme Court (thus, it was not a matter of abstract review of a norm, as the judgment states, in the sense of classification used by European legal scholarship – see, e.g. Cappeletti/Ritterspach, Die gerichtliche Kontrolle der Verfassungsmässigkeit der Gesetze in rechtsvergleichender Sicht, JöR 1071 or Ch. Starck, Verfassungsgerichtsbarkeit in Westeuropa, 1986). In my view, it is necessary to agree with the Supreme Court that the contested provision violates the principle of procedural equality in certain specific proceedings, contained in Art. 37 par. 3 of the Charter of Fundamental Rights and Freedoms, because this case concerns the procedural right of parties to single specific proceedings. As the judgment says, the states of the court proceedings at the first level and the appeal level must be seen as a whole, and a segment of the parties to the proceedings has the possibility to exercise its rights only in part of the proceedings, without the possibility of filing an appeal.

For this reason, the arguments contained in judgment Pl. ÚS 19/02 concerning Art. 96 par. 1 of the Constitution can not be used. If the Constitutional Court, in that judgment, concluded that the then-contested provision of the Bankruptcy and Settlement Act was unconstitutional on the grounds of conflict with Art. 96 par. 1 of the Constitution, the more so does the unconstitutionality of the provision reviewed today come to the forefront, if it is inconsistent with Art. 37 par. 3 of the Charter. The subjective law contained therein, though for purposes of reviewing norms transferred into the form of a principle, by which a norm is measured, strengthens the effect of applying this principle. It is evident that a court decision made with the application of the contested provision can be cast in doubt before the Constitutional Court in proceedings on a constitutional complaint, which will raise the objection that the court has interfered in subjective law arising from Art. 37 par. 3 of the Charter.

If a “legal norm” contained in Art. 37 par. 3 of the Charter takes both forms, i.e. both the form of a principle and the form of a subjective right, Art. 96 par. 1 of the Constitution is limited only to expression in the form of a principle, with no subjective right standing behind it. And if a contested norm is inconsistent with such a provision contained in the constitutional order, it must be subjected to a much stricter test than in a case where the contested norm conflicts merely with a principle representing only an objective right.

Paradoxically, the majority opinion increased the circle of addressees of the contested legal norm (creditors) who will be in an unequal position with other parties (particular applicants) of bankruptcy proceedings who exercise their rights in such proceedings at two levels. In my opinion, the Constitutional Court has thus not only failed to remove the unconstitutionality of the contested legal framework, as the Supreme Court proposed, but by slightly turning the angle of view at the substantive law aspect of the contested legal norm, which the Supreme Court did not share or raise, re-formed the contested legal norm.

Brno, 7 July 2003