



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIFTH SECTION

**CASE OF KOHLHOFER AND MINARIK v. THE CZECH
REPUBLIC**

(Applications nos. 32921/03, 28464/04 and 5344/05)

JUDGMENT

STRASBOURG

15 October 2009

FINAL

01/03/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kohlhofer and Minarik v. the Czech Republic,
The European Court of Human Rights (Fifth Section), sitting as
a Chamber composed of:
Peer Lorenzen, *President*,
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,
and Claudia Westerdiek, *Section Registrar*,
Having deliberated in private on 15 September 2009,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in applications (nos. 32921/03, 28464/04 and 5344/05) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mr Bruno Kohlhofer (“the first applicant”) and German nationals, Mr Roman Minarik (“the second applicant”) and Susanne Minarik (“the third applicant”), on 8 October 2003, 21 July 2004 and 29 April 2005, respectively.

2. The applicants were represented by Mr Petr Zima, a lawyer practising in Prague. The Czech Government (“the Government”) were represented by their Agent, Mr V.A. Schorm, of the Ministry of Justice.

3. On 4 September 2006 the President of the Fifth Section decided to give notice of the applications and to communicate complaints under Article 6 § 1 of the Convention to the Government. On 11 September 2006 he decided to give notice of the applications to the Government of Austria and the Government of Germany respectively in order to enable them to exercise their right to intervene in the proceedings (Article 36 § 1 and Rule 44). Neither the Government of Austria nor the Government of Germany exercised their right to intervene (Rule 44 § 1(b)).

4. The applicants and the Czech Government each filed written observations (Rule 59 § 1). The Chamber decided that no hearing on the admissibility and merits was required (Rule 59 § 3 *in fine*). It was further decided to join the aforementioned applications for examination and to examine the merits of the applications at the same time as their admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The facts of the case, as submitted by the parties, may be summarised as follows.

Application no. 32921/03

6. Through the acquisition of shares before January 2001, the first two applicants became minority shareholders of Českomoravský cement, a.s., a joint stock company incorporated under Czech law.

7. On 1 January 2001 the Commercial Code (hereinafter “the CC”) was amended. In accordance with its newly introduced Article 220p, a general meeting of a joint stock company was empowered to decide to wind up the company and transfer all its assets to a shareholder who owned shares representing more than 90% of the company's share capital (“the main shareholder”). An asset transfer contract between the main shareholder and the company was to be concluded to that end and compensation paid to the minority shareholders.

8. On 31 May 2001 the general meeting of the company adopted, by votes of the main shareholder, a resolution on the winding-up of the company and on the transfer of all its assets to the main shareholder (together also referred to as “the transfer”).

9. On the same day the applicants filed an action to have that resolution and the asset transfer contract set aside with the Prague Municipal Court (*městský soud*). They asserted that the resolution had been adopted contrary to law, treaties concerning the encouragement and reciprocal protection of investments and their property rights. They informed the court administering the commercial register (*obchodní rejstřík*) about this step.

10. On 31 October 2001 the court administering the commercial register (*rejstříkový soud*) approved the transfer. No hearing was held prior to that decision.

11. On 14 December 2001 the applicants contested the decision to register the transfer before the Constitutional Court (*Ústavní soud*), alleging an infringement of the right to a fair trial and their property rights. They claimed not to have been able to raise their objections to the general meeting resolution in a hearing during the non-contentious proceedings preceding the delivery of the decision. They invited the court to strike down *inter alia* Articles 220h(3) and (4) and 220p of the CC.

12. On 25 March 2003 the Constitutional Court in its decision no. IV. ÚS 720/01 rejected the applicants' appeal without holding a hearing. It found that the applicants were not entitled to participate in the proceedings as the task of the court in charge of the commercial register had been to

decide on the rights of the company, not on theirs. It noted that that court had the applicants' arguments in their action to set aside at its disposal and had taken them into consideration before delivering the impugned decision, whilst reviewing the lawfulness of the resolution as a preliminary question. It held that the power to stay the proceedings was still available to that court under the law as it stood at the relevant time. The Constitutional Court dismissed the applicants' second claim according to which that decision amounted to other interference by public authority into their right to access to a court. Referring to Article 220h of the CC, it found the application of Article 131 of the CC in conformity with constitutional law. In this regard, the court pointed to procedural safeguards enshrined in Articles 131, 220h, 220k, 220l and 220p of the CC which were available to the applicants, and emphasised the aim of the regulation providing for legal certainty and expeditious transformation of companies. As for the applicants' challenge to the law providing for the winding-up and the transfer on the ground of insufficient protection of the rights of minority shareholders, the court did not examine it since it went beyond the scope of that court's review defined by the applicants' constitutional appeal contesting the decision in which the court in charge of the commercial register had approved the registration of the winding-up and the transfer at the commercial register, but not any decisions adopted in other proceedings available to the complaining minority shareholders.

13. On 27 July 2006 the Municipal Court dismissed the applicants' action lodged on 31 May 2001. Having noted that the court in charge of the commercial register had approved the registration of the transfer, the Municipal Court, referring to Article 131(3)(c) of the CC, refused to deal with the applicants' assertions of unlawfulness of the impugned general meeting resolution, their principal allegation being that the resolution had been adopted by the main shareholder whose voting rights had been suspended. As for the applicants' plea of invalidity of the asset transfer contract, namely the insufficient number of experts commissioned for the expert report on the compensation and the determination of the decisive day (*rozhodný den*), the court expressed the view that the validity of the asset transfer contract must have been examined as a preliminary question by the court approving the registration of the transfer into the commercial register. At the same time, having reviewed the contract, the Municipal Court found that the determination of decisive day complied with the CC. Having interpreted relevant provisions of the CC, the court further found that the law did not require that more experts be commissioned for the purposes of assessing the compensation to be paid by the main shareholders to the applicants. Finally, the court examined and dismissed the applicants' claims that the compensation had not been properly determined as unfounded or reviewable only by a court reviewing the compensation in separate proceedings.

14. On 6 September 2007 the Prague High Court (*vrchní soud*), sharing the legal view of the court of first instance, upheld the Municipal Court's judgment of 27 July 2006.

15. The proceedings are now pending before the Supreme Court (*Nejvyšší soud*). According to the applicants, they have no prospect of success before that jurisdiction due to its settled case law.

16. According to the Government, the applicants filed with a court actions under Article 220k of the CC whereby they asserted that the compensation paid for the transfer pursuant to Article 220p(2) of the CC was not adequate and claimed the remainder thereof. According to the Government, these proceedings and the set-aside proceedings are still pending.

Application no. 28464/04

17. The third applicant owned 3% of the share capital of YTONG, a.s., a joint stock company incorporated under Czech law.

18. On 24 June 2003 the general meeting of that company adopted, by votes of the main shareholder, a resolution on the winding up of the company and the transfer of all its assets to the main shareholder.

19. On 25 June 2003 the third applicant filed with the Brno Regional Court (*krajský soud*) an action to have the resolution set aside, asserting that it had been adopted contrary to the applicable law, treaties concerning the encouragement and reciprocal protection of investments and their property rights. Asserting the unlawfulness of the asset transfer contract on account of its clause reserving for arbitration jurisdiction over disputes concerning the value of the compensation, she further emphasised a number of irregularities of the resolution. She informed the court administering the commercial register about the action.

20. On 1 September 2003 the court in charge of the commercial register approved the registration of the transfer. No hearing was held before that decision, which was not served on the third applicant as she did not have standing to participate in the proceedings.

21. On 11 December 2003 the Olomouc High Court rejected the third applicant's appeal contesting that decision. It ruled that since the applicant did not have standing to take part in the impugned proceedings, she was not entitled to appeal their outcome.

22. On 28 November 2005 the High Court, relying on Article 220h(4) of the CC, discontinued the set-aside proceedings without examining the merits.

23. According to the Government, the third applicant filed with a court an action under Article 220k of the CC whereby she asserted that the compensation for the transfer paid pursuant to Article 220p(2) of the CC was not adequate and claimed the remainder thereof.

24. According to the parties, these proceedings are after dismissive rulings of courts of first two instances pending before the Supreme Court.

25. On 24 June 2008 the Supreme Court rejected the applicant's appeal on points of law and upheld the High Court's ruling of 28 November 2005.

26. On 11 December 2008 the Constitutional Court rejected the applicant's constitutional appeal, in which the applicant claimed an impairment of her right to a fair trial in the set-aside proceedings by reason of the limitation on access to court brought about by Article 220h(4) of the CC. The Constitutional Court found that the Supreme Court had not erred in its impugned decision of 24 June 2008 and that neither the applicant's right to a fair trial nor any other constitutional right had been breached.

27. The third applicant also raised the claim for compensation, together with two other petitioners, before an arbitration tribunal to which she was referred in the decisions of the ordinary courts. The arbitration proceedings were discontinued and the petition rejected on 11 October 2006 for lack of jurisdiction.

Application no. 5344/05

28. The first applicant was a minority shareholder of Biocel, a.s., a joint stock company incorporated under Czech law.

29. On 21 November 2001 the company's general meeting decided to wind up the company and transfer its assets to the main shareholder.

30. On the same day the applicant brought an action in the Ostrava Regional Court (*krajský soud*) to have the general meeting resolution and the asset transfer contract set aside. He argued that the general meeting resolution was void on the grounds of unlawfulness as the main shareholder had taken part in the vote although not entitled to do so, the resolution had been adopted despite the fact that the shares had been lodged as securities, and the compensation payable to minority shareholders had been determined improperly. He further asserted a violation of treaties concerning the encouragement and reciprocal protection of investments and his right to the peaceful enjoyment of his possessions.

31. On 12 November 2002 the Regional Court, acting as a court in charge of the commercial register, approved the registration of the transfer at the commercial register without holding a public hearing.

32. On 21 November 2002 an appeal by the first applicant against this decision was rejected by the Olomouc High Court, which found that the minority shareholders were not parties to the proceedings concerning the approval of the registration at the commercial register.

33. On 14 January 2003 the Regional Court stayed the set-aside proceedings and asked the Constitutional Court to strike down Article 220p and other provisions of the Commercial Code.

34. On an unspecified date the first applicant filed a constitutional appeal alleging a violation of his right to judicial protection under Article

36 § 1 of the Charter of Fundamental Rights and Freedoms (*Listina základních práv a svobod*). He claimed that he had not been allowed to act as a party in the proceedings conducted by the court in charge of the commercial register and had been prevented *de facto*, by Articles 131(3)(c), 220h(4), 220p of the CC and 109(2)(c) of the Code of Civil Procedure (hereinafter “the CCP”), from acting before the court in the proceedings to set aside the general meeting resolution. He further contended that the relevant law was contrary to the Third Council Directive 78/855/EEC. The first applicant requested that the aforementioned provisions be struck down as being contrary to Article 36 § 1 of the Charter.

35. On 31 August 2004 the Constitutional Court by its decision no. II. ÚS 21/03 rejected the applicant's constitutional appeal against the decision approving the registration of the transfer at the commercial register. It found that, under Article 131 of the CC a court in charge of the commercial register is entitled to review as a preliminary question the lawfulness and validity of a general meeting resolution on the basis of which a registration in the commercial register is to be made. It held that the right to judicial protection was not denied to the first applicant having regard to the remedies enshrined in Article 131 taken in conjunction with Articles 220h, 220k, 220l and 220p of the CC. Therefore, shareholders of a joint stock company could seek protection of their rights before an independent and impartial court by another way than by taking part in the proceedings held before the court in charge of the commercial register.

36. On 22 February 2005 the Plenary of the Constitutional Court rejected by its decision no. Pl. ÚS 51/03 the request of the Regional Court that it should strike down, *inter alia*, Article 220p of the CC. It found that the Regional Court's request was ill-founded as Article 220p of the CC could no longer be applied by the Regional Court on account of Article 131(3)(c) of the CC, which barred that court from deciding the case before it on the merits once the general meeting resolution on the winding-up of the company and the transfer had been inserted into the commercial register. Four constitutional judges joined their dissenting opinions to the Plenary's decision.

37. On 14 March 2008 the Ostrava Regional Court, relying on Article 220h(4) of the CC discontinued the set-aside proceeding without examining the merits as the transfer was registered in the commercial register.

38. On 1 July 2008 the Olomouc High Court upheld that decision of the Regional Court. Referring to the Constitutional Court's decision no. IV. ÚS 720/01, the High Court found Articles 131(3)(b) and (c) and 220h(3) and (4), and Article 220k(1) of the CC conform with Czech law including the Charter of Fundamental Rights and Freedoms. The first applicant did not pursue the case before higher instances. He alleged to have no prospect of success due to the settled case law of the Supreme Court and the Constitutional Court.

39. According to the Government, the applicant filed with a court an action under Article 220k of the CC whereby he asserted that the compensation for the transfer paid pursuant to Article 220p(2) of the CC was not adequate and claimed the remainder thereof. According to the Government, these proceedings are still pending.

II. RELEVANT DOMESTIC LAW

1. *The Constitution*

40. Article 83 provides that the Constitutional Court is the judicial body responsible for the protection of constitutionality.

41. Article 89(2) provides that all national authorities and individuals are bound by enforceable rulings of the Constitutional Court.

2. *The Commercial Code (as in force at the relevant time)*

42. Article 27(3) provided *inter alia* that facts inserted in the commercial register became effective as of the date on which they were made public.

43. In accordance with Article 33 a court administering the commercial register made a registration into the commercial register public.

44. Article 131(1) gave shareholders the right to contest a general meeting resolution by means of an application to set aside if it was deemed to contravene the law, a deed of incorporation or by-laws. An application to set aside could be lodged within three months or, in certain circumstances, one year of the adoption of the resolution. The provision was applicable to general meeting resolutions of joint stock companies by virtue of Article 183(1).

45. Under Article 131(3)(c) the court could not set aside a general meeting resolution if a court in charge of the commercial register had recorded a transfer of the company's assets in the commercial register.

46. Article 131(4) provided, *inter alia*, that persons who had suffered damage by a resolution of the general meeting adopted contrary to law, the deed of incorporation or by-laws, were entitled to claim damages and/or just satisfaction for an impairment of fundamental shareholders' rights. This right could be asserted even if a court did not declare the general meeting resolution void for one of the reasons set out in Article 131(3) of the Code. Such a claim had to be made before a court within the same time-limit as applied for introducing an application to set aside of a general meeting resolution, or within three months of the day on which a court decided on such an action.

47. Under Article 131(7) everyone is bound by an enunciation of decision delivered pursuant to Article 131(1), (2) or (3).

48. Article 131(7) provides that if a resolution of general meeting was not contested under Article 131(1),(2) or such a claim was not upheld, the resolution may be reviewed only in proceedings on the registration of the resolution in the commercial register, unless the resolution involves amendments of by-laws or a deed of incorporation contrary to law.

49. Pursuant to Article 220a(11) proceedings to set aside a contract providing for a merger may be brought only if an application to set aside the relevant general meeting resolution has been filed.

50. Under Article 220h(3) an action to set aside a general meeting resolution, or a contract, on merger could not be filed if a registration of the merger into the commercial register had been allowed by a court in charge thereof.

51. By Article 220h(4), proceedings to set aside a general meeting resolution, or a contract, on merger brought prior to an registration of the merger in the commercial register could be continued after the registration had been made only if the plaintiff changed his or her action so as to seek damages or an adequate payment for surrendered shares pursuant to Article 220k, provided that those claims had not previously been raised.

52. Under paragraph (1) of Article 220k, if the exchange ratio for shares together with financial compensation was not adequate, shareholders of a merging company were entitled to seek compensation from an acquiring company. The *ratio decidendi* of a judicial decision granting compensation to a shareholder was by virtue of paragraph (5) thereof binding, in respect of remaining shareholders, upon an acquiring company.

53. Pursuant to Article 220l members of boards of directors and supervisory boards of companies involved in a merger, and experts who drew up an expert report for these companies were liable jointly and severally for damages caused by a breach of their duties during the merger.

54. Article 220p(1) empowered a general meeting of a joint stock company to decide to wind up the company and transfer all its assets to a shareholder owning shares which represented more than 90% of the company's share capital (the main shareholder).

55. Under Article 220p(2) the main shareholder was obliged to provide other shareholders with adequate compensation paid in cash in order to settle such a transfer.

56. Article 220p(3) provided, *inter alia*, that Articles 220a(1)-(4),(7)-(11), 220h and 220l were to be applied appropriately to the winding-up of a company and the transfer of its assets to its main shareholder.

57. According to Article 220p(4), among other obligations, a company must have concluded a contract for the transfer of its assets with its main shareholder. Shareholders must have been thereby informed of their right to apply for review by a court of the value of the compensation. Article 220k(1),(5) and (7) governing an exchange of shares pending mergers were to be applied appropriately.

3. *The Act on Transformation of Companies and Cooperatives (no. 125/2008)*

58. The Act which entered into force on 1 July 2008 replaced *inter alia* the provisions of the CC governing the winding up of a company and the transfer of its assets to its main shareholder, Articles 220h (3) and (4) and 220p (3) of the CC being among them.

59. Under Article 55(2) a court may declare a general meeting resolution on the transfer null and void only until the time when the transfer is inserted into the commercial register. Article 56(a) provides that such a registration may not be rescinded.

4. *The Code of Civil Procedure (as in force in the relevant time)*

60. Under Article 109(2)(c) a court is empowered to stay proceedings should a legal issue which might be relevant for its decision be examined in other pending proceedings. Courts deciding in proceedings on a registration into the commercial register ceased to have that power upon the amendment of that provision, which came into force on 31 December 2001.

61. Article 200c(1) defines the persons having standing to participate in proceedings on a request for a registration into the commercial register. Only the requesting entrepreneur and the persons whose names are required to be inserted into the commercial register have such standing.

62. Under Article 200c(3) a court in charge of the commercial register is obliged to proceed so as to take steps to prepare for delivery of decision within fifteen days from the day when the request was lodged.

63. According to Article 200d(2) a court in charge of the commercial register may decide the matter before it without holding a hearing if, *inter alia*, it can do so on the basis of deeds before it which have been written pursuant to a particular statute (deeds by notary public etc.).

64. By virtue of Article 243d a court to which a case was remitted following a quashing judgment of the Supreme Court is bound by a legal view enshrined therein.

5. *The Constitutional Court Act (Act no. 182/1993)*

65. Section 72(1)(a) stipulates that a constitutional appeal may be submitted: a) pursuant to Article 87(1)(d) of the Constitution, by a natural or legal person, if he or she alleges that his or her fundamental rights and basic freedoms guaranteed in the constitutional order have been infringed as a result of the final decision in proceedings to which he or she was a party, of a measure, or of some other encroachment by a public authority.

66. By virtue of Section 82(3) if the Constitutional Court grants the constitutional appeal of a natural or legal person under Article 87(1)(d) of the Constitution, it shall: a) quash the contested decision of the public authority, or b) if a constitutionally guaranteed fundamental right or basic

freedom was infringed as the result of an encroachment by a public authority other than a decision, enjoin the authority from continuing to infringe this right or freedom and order it, to the extent possible, to restore the situation that existed prior to the infringement.

6. *Act on Courts and Judges (acts nos. 335/1991 and 182/1993 respectively)*

67. The Supreme Court is by virtue of that legislation the highest Czech court of ordinary jurisdiction with the task *inter alia* to settle case law of ordinary courts.

III. RELEVANT DOMESTIC PRACTICE

1. *Judgment of the Constitutional Court no. I. ÚS 70/96*

68. In its judgment of 18 March 1997 the Constitutional Court, interpreting Article 89(2) of the Constitution, rejected the assumption according to which its views enshrined in reasoning of its judgments are legally irrelevant. The court held *inter alia* that an *a priori* disrespect by ordinary courts towards such views raises doubts whether ordinary courts decide in conformity with Article 90 of the Constitution, according to which their principal task is to ensure the protection of rights pursuant to law. Ordinary courts declining to follow such views must be aware that their rulings will be most probably brought by the Constitutional Court in line with its existent case law. The Constitutional Court added in this regard that an *a priori* disrespect towards existent case law, resulting in different decisions on a same matter, contravenes the principle of legal certainty, which is an indispensable component of constitutional law and the rule of law.

2. *Decision of the Constitutional Court no. III. ÚS 527/04*

69. In this decision of 25 May 2005 in which it rejected an appeal against a court's decision approving the registration of a transfer of company's assets to the main shareholder at the commercial register and a request to strike down Articles 131(3)(c), 220h(3) and 220p of the CC, the Constitutional Court held as follows:

“The law providing for the winding up of a company and the transfer of its assets to its main shareholder is at the very limit of constitutional conformity owing to the imperfect coordination of proceedings for a registration into the commercial register with proceedings to set aside an asset transfer contract (filed together with an application to set aside a general meeting resolution) which makes possible the irreversible registration of [the winding up of a company and the transfer of its assets to its main shareholder] into the commercial register without examination of an action to set it aside. It cannot be said, however, that minority shareholders have no remedy

at their disposal.. ..[A]ccording to Article 131(4) of the [CC], they can seek damages and just satisfaction.

The law governing proceedings before a court in charge of the commercial register is proportionate to the aim and objective of the legislation providing for transformations of companies, whose purpose is to accommodate expeditious registration of those transformations, made on the basis of the agreement among the companies' shareholders, into the commercial register, with regard to the fact that such a transformation is from a certain moment irreversible owing to legal, economic and technical aspects of that process.

...[T]he impugned decision of the court in charge of the commercial register did not amount to unconstitutional interference with the appellant's property rights as he retained access to legal remedies for the protection of his ownership rights to the shares in a proportionate manner.. ..[L]egitimate expectations of shareholders do not have the same intensity as those of owners of other property. ..[as] the nature of a joint stock company implies risks of a change in the shareholders' status...

The gist of the appeal consists in the applicant's disagreement with the law providing for [the winding-up of a company and the transfer of its assets to its main shareholder] as such, in particular with the insufficient guarantees for minority shareholders. The Constitutional Court, however, by Section 74 of the Constitutional Court Act is not empowered to examine these complaints as the appeal at hand contested only the decision adopted by the court in charge of the commercial register in the proceedings on the registration of the winding up and the transfer into the commercial register. [Examination] of these complaints would go beyond the scope of that court's review defined by the applicants' constitutional appeal contesting the decision of the court in charge of the commercial register which decided on the registration in the commercial register, not on decisions adopted in other proceedings available to the complaining minority shareholders."

3. Decision of the Supreme Court no. 29 Odo 1128/2005 of 23 May 2007

70. In this decision the Supreme Court upheld lower court's views according to which a legal impediment, enshrined in Article 131(3)(c) of the CC taken in conjunction with Article 183(1) thereof, and Article 220h(4) of the CC taken in conjunction with Article 220p(3) thereof, barred courts from setting aside general meeting resolutions and asset transfer contracts after such an asset transfer had been recorded into the commercial register.

THE LAW

I. JOINDER OF THE APPLICATIONS

71. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their common factual and legal background.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

72. The applicants, minority shareholders, complained that Czech law permitted them to challenge neither a company resolution to wind up the company and transfer its assets to the main shareholder nor an asset transfer contract, once the resolution had been registered in the commercial register.

They relied on Article 6 § I of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

73. The Government disagreed.

A. Admissibility

74. The Government maintained that the applications were inadmissible for non-exhaustion of domestic remedies or, alternatively, premature. They argued that only the proceedings before the courts administering the commercial register had ended, whilst the others - actions to set aside the general meeting resolutions, actions to determine the value of the compensation, and actions in damages and/or seeking just satisfaction - were still pending or were never brought. They maintained that the law hindering the applicants from seeking a review of lawfulness, i.e. Article 131(3)(c) and Article 220h(3) and (4) of the CC, had not yet been directly examined by the Czech higher courts. The existing case law of the Constitutional Court (decisions nos. IV. ÚS 720/01, Pl. ÚS 51/03, III. ÚS 527/04 and III. ÚS 84/05) consisted of unpublished resolutions whose normative force was “much less intensive” than that of that court's judgments. It could not therefore be argued that the relevant domestic case law was so settled as to prevent the applicants from defending their cause in proceedings before domestic courts.

75. The applicants disputed that objection, asserting that they had no prospect of success in the pending proceedings.

76. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention is based on the assumption that the domestic system provides an effective remedy in respect of the

alleged breach. It is for the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (*V. v. the United Kingdom* [GC], no. 24888/94, § 57, ECHR 1999-IX). The Court has recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 116, ECHR 2007-XII). The Court further reiterates that where a suggested remedy did not offer reasonable prospects of success, for example in the light of settled domestic case law, the fact that the applicant did not use it is not a bar to admissibility (*Radio France and Others v. France*, no. 53984/00, decision of 23 September 2003, § 34).

77. In the instant case, the Court notes that it appears from the Government's submissions that not all of the set-aside proceedings have ended. The Court understands their contention to be that, absent a determination by the Constitutional Court of the issues in the individual set-aside proceedings, the Court is not able to consider those proceedings.

78. The Court first notes that as regards application no. 28464/04, on 11 December 2008 the Constitutional Court - that is, after the Government's admissibility submissions - dealt with the third applicant's constitutional complaint by confirming the approach of the Supreme Court of 24 June 2008. As the third applicant had raised the compatibility of Article 220h(4) of the Commercial Code with provisions of constitutional law guaranteeing the right to a fair trial in those proceedings, the Government's contention as regards this particular application is no longer accurate and must be rejected.

79. As regards applications nos. 3291/03 and 5344/05, it is true that the applicants did not bring about a decision of the Constitutional Court: in application no. 5344/05 the proceedings ended with a ruling of 1 July 2008 by the Olomouc High Court, and in application no. 32921/03 the set-aside proceedings are still pending before the Supreme Court. In its decisions IV. ÚS 720/01 of 25 March 2003 (that is, the appeal of the applicants in application no. 3291/03 concerning, as such, the challenge to the registration of the asset transfer, see paragraph 12 above) and II. ÚS 21/03 of 31 August 2004 (in the context of the challenge by the applicant in

application no. 5344/05 to the registration of the transfer (see paragraph 35 above) the Constitutional Court examined the constitutional issues raised in applications no. 32921/03 and 5344/05. In particular, although the Constitutional Court was formally dealing with challenges to decisions to register asset transfers, in each case it made comprehensive findings that the legislation on regulation of actions to set aside was compatible with the Constitution, as extensive procedural safeguards were contained in the CC. Those safeguards included, in its view, the possibility of an action for compensation under Articles 131, 220h, 220(k), 220l and 220p of the CC. Moreover, the Constitutional Court subsequently took the same approach in its decision III. ÚS 527/04 of 25 May 2005, and on 23 May 2007 the Supreme Court applied those principles in a decision dealing directly with applications to set aside general meeting resolutions once the transfer had been registered. Furthermore, as to application no. 5344/05, the Plenary Constitutional Court did deal in the set-aside proceedings with the first applicant's complaint of denial of access to a court, when it refused the Ostrava Regional Court's request to strike down as unconstitutional the provisions of the Commercial Code preventing the first applicant from having his case decided on the merits (see paragraphs 33 and 36 above). The outcome of that review by the Constitutional Court embodied in its decision no. Pl. ÚS 51/03 did not differ from its earlier case law.

In these circumstances, the Court considers that the domestic courts' case law on the question was settled such that the applicants could not reasonably be expected to have pursued (or, in the case of application no. 32921/03, to await the outcome of) separate constitutional complaints in the individual set-aside proceedings. It is true, as the Government point out, that that case law consists of decisions rather than judgments. However, in the absence of any such judgments, or any indication that the Constitutional Court would regard those decisions as irrelevant, the Court does not consider that the decisions should be afforded lesser weight for the purposes of the review under Article 35 § 1 of the Convention.

Accordingly, the Government's objection is in this respect dismissed for all three applications.

80. As for the other proceedings which, according to the Government, the applicants could have brought or whose outcome they should have awaited, that is, actions in damages or for just satisfaction, or actions for compensation, the Court considers that the question of alternative remedies is inseparably linked to the Government's plea on merits that those remedies justified the limitation on the applicants' access to a court in the set-aside proceedings. The Court therefore joins those legal questions to its examination on the merits of the applications.

81. The Court notes that non-compliance with other admissibility criteria was not asserted by the Government. Recalling that the right to seek a review of the lawfulness of a general meeting resolution and related

measures affecting applicants' shares falls within the ambit of Article 6 § 1 of the Convention (*Pafitis and Others v. Greece*, judgment of 26 February 1998, *Reports of Judgments and Decisions* 1998-1, § 87), it therefore declares the applicants' complaints under Article 6 § 1 of the Convention admissible.

B. Merits

1. The parties' submissions

(a) The applicants

82. The applicants alleged that the main shareholders voted in the respective general meetings for resolutions approving the transfers against the applicants' will. Their right to have the lawfulness of those resolutions reviewed by means of an action to set aside was infringed by the outcome of separate proceedings initiated by the respective companies requesting the courts in charge of the commercial register to insert the impugned resolution therein and wind them up. Having granted these requests, the courts made it impossible for the applicants to pursue their actions to set aside as the CC prevented them from doing so once the requests for registration had been granted. Since the applicants were not allowed to participate in the proceedings before the courts granting those requests, and as the courts were obliged to decide on the requests within fifteen days of their introduction, the applicants lost any chance of a fair trial on their actions for review of the lawfulness of the transfer. They maintained that on account of these shortcomings and the inevitably perfunctory examination of the lawfulness of the transfers caused by the fifteen-day time-limit, these proceedings should be deemed contrary to Article 6 § 1 of the Convention and bilateral treaties concerning encouragement and reciprocal protection of investments binding upon the Czech Republic and Germany and Austria, respectively.

83. The applicants further asserted that the legal protection of their impaired rights consisting of actions in damages referred to in the decisions of the domestic courts was infeasible or, at very best, quasi-feasible. The right to bring proceedings against the main shareholder in order to be paid the value of the compensation was excessively difficult to assert before the courts. The third applicant stressed in that regard that, according to the asset transfer contract, entered into by the company and the main shareholder, whereby all the company's assets had been transferred from the former to the latter, she could assert that right only before an arbitration tribunal.

84. The applicants moreover contended that the legislation providing for the transfer was allegedly inspired by Austrian and German law, yet its

conformity with the purpose of the Third Council Directive 78/855/EEC was not ensured.

(b) The Government

85. The Government conceded that an action to set aside a general meeting resolution whereby a company's assets had been transferred to the main shareholder when the company was wound up could be brought only if a court administering the commercial register had not yet authorised the registration of the transfer into the commercial register. Nevertheless, they maintained that such a court was indeed obliged to review the lawfulness of that resolution as a preliminary question. The impossibility for shareholders to take part in proceedings before that court pursued a legitimate aim to eliminate protraction of the issue and abusive challenges which would weaken the protection of shareholders' rights, including those of minority shareholders. They added that the court deciding in the case of the first applicant was empowered to stay the proceedings if it thought that to be necessary.

86. As regards the alleged breach of bilateral treaties concerning protection of investments, that issue was, in the Government's view, outside the scope of review under the Convention.

87. Moreover, where the majority shareholder possessed more than 90 percent of a company's shares, minority shareholders could not influence the company's conduct. Therefore, benefits arising from their shares were *de facto* reduced to the asset value of the shares which they possessed, the other rights attached thereto being rather theoretical. The influence of minority shareholders could not be durable and those shareholders were to be considered rather as brakes delaying the plans of the main shareholder. In these circumstances, the legislature allowed a main shareholder to squeeze out minority shareholders by winding up a company without liquidation whilst all its assets were transferred to the main shareholder. This form of squeeze out had been found to be in conformity with the Convention in the case of *Bramelid and Malmström v. Sweden* (nos. 8588/79 and 8589/79, Commission decision of 12 October 1982, Decisions and Reports (DR) 29, p. 64).

88. The Government further maintained that alternative legal remedies were available to the applicants. In the event of disagreement regarding the compensation, it was possible for the applicants to request that the value of that compensation be determined by a court. In such proceedings a court was obliged to seek and take into account even evidence which was not presented by the parties but which was necessary for it to establish relevant facts. Moreover, if the decision depended on an expert opinion, a party could be discharged of its obligation to pay the costs of proceedings even if it was only partly successful. Therefore, such proceedings, in the Government's view, did not put the applicants at a disadvantage in

comparison with their standing as the plaintiffs in set-aside proceedings. Furthermore, an action for compensation for the damage inflicted by the resolution and an action for just satisfaction for a breach of fundamental shareholders' rights were at the applicants' disposal.

89. They concluded that even though the applicants had been hindered from seeking a review of the transfer through actions to set aside, this limitation of their rights under Article 6 of the Convention had to be regarded as justified, since it pursued the legitimate aim of promoting legal certainty in legal relations, protecting the interests of third parties and the main shareholder and, alternatively, of guaranteeing the efficient operation of business companies. The judicial protection afforded to minority shareholders must therefore be considered adequate.

2. The Court's assessment

90. The Court recalls that Article 6 § 1 of the Convention embodies the “right to a court”, of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect (*Osman v. the United Kingdom*, 28 October 1998, § 147, *Reports of Judgments and Decisions* 1998-VIII).

However, being able to put a case to a court does not in itself satisfy all the requirements of that provision. It must also be established that the degree of access afforded under the national legislation was sufficient to secure the individual's “right to a court”, having regard to the rule of law in a democratic society (*Petkoski and Others v. “the former Yugoslav Republic of Macedonia”*, no. 27736/03, § 40, 8 January 2009 which itself refers to *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, § 57). Moreover, Article 6 § 1 of the Convention guarantees the right of access to a court which does not only include the right to institute proceedings, but also the right to obtain a “determination” of the dispute by a court. As stated in the Court's case-law, “it would be illusory if a Contracting State's domestic legal system allowed an individual to bring a civil action before a court without securing that the case would be determined by a final decision in the judicial proceedings. It would be inconceivable that Article 6 § 1 of the Convention should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without guaranteeing the parties to have their civil disputes finally determined” (*Petkoski*, cited above, and *Multiplex v. Croatia*, no. 58112/00, §§ 44 and 45, 10 July 2003).

At the same time, the “right to a court” is not absolute; it is subject to limitations permitted by implication, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired (*Edificaciones March Gallego S.A. v. Spain*, 19 February 1998,

§ 34, *Reports of Judgments and Decisions* 1998-I). In addition, the principle of the rule of law and the notion of fair trial enshrined in Article 6 § 1 of the Convention preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute (*Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, § 49).

i. Application no. 32921/03

91. In the instant case, the Court observes that the applicants' action lodged on 31 May 2001 was twofold, consisting of the claim of unlawfulness of the general meeting resolution of Českomoravský cement, a. s. and that of unlawfulness of the asset transfer contract (see paragraph 9 above).

92. Dealing first with the applicants' claim before the Municipal Court that the asset transfer contract had been unlawful, the Court notes that the Municipal Court dealt with all heads of the claim (see paragraph 13 above). In particular, it dealt on the merits with the claims concerning the determination of the decisive day and the number of experts commissioned. There was therefore no limitation on access to court in this respect. As regards the head of unlawfulness purportedly deriving from the manner of determining compensation for minority shareholders, the Municipal Court referred the applicants to the other fora which were available. Given that such fora were set up and used by the applicants, this part of the decision did not limit the applicants' access to court, either.

It follows that there was no limitation on access to court concerning the applicants' claim that the asset transfer contract was unlawful.

93. However, as regards the claim that the courts failed to deal with the applicants' contention that the resolution of the general meeting of Českomoravský cement, a. s. was unlawful, on 27 July 2006 the Municipal Court declined to examine the applicants' challenge of unlawfulness to the general meeting resolution of 31 May 2001 on the ground that the resolution had been registered in the commercial register, and that Article 131(3)(c) of the CC, taken in conjunction with Article 183(1) thereof, therefore deprived the Municipal Court of jurisdiction (see *ibidem*). The Court finds that the application of Article 131(3)(c) of the CC in the case constituted a limitation on the applicants' access to court as it prevented them from having a court determination on merits of the legal issue at stake, namely whether the resolution had been adopted contrary to law.

94. The Court must examine whether that limitation is compatible with Article 6 § 1 of the Convention.

95. The Court first notes that the limitation on access to court came about as a result of the operation of Article 131(3)(c) of the CC, and it is clear that that provision covered the present case. The limitation was therefore lawful in the sense that it was provided for by domestic law. As to

the applicants' contention that the domestic law was, itself, incompatible with Community law, and apart from the fact that it is in the first place for the domestic authorities to interpret domestic law and for the Community judicial organs to interpret Community law, the applicants, referring to the Third Council Directive 78/855/EEC, have not specified what provisions thereof they invoked. The Court therefore finds this applicant's plea unsubstantiated. The same applies *mutatis mutandis* to the contention whereby the applicants relied on the aforesaid bilateral treaties.

96. Consequently, it is to be examined whether the interference was justified, i.e. whether it pursued a legitimate aim in the public interest and was proportionate (*Osman v. the United Kingdom*, referred to above, § 147).

97. The Government maintained that the limitation aimed to preserve legal certainty and facilitate the operation of business. The applicants disagreed, contesting the existence of any public interest in the case.

98. The Court recognises that giving companies flexibility in determining their share-holdership, and a concomitant limitation on challenges to asset transfers once they have been registered, can be seen as enhancing trade and economic development. The Court further recognises that Article 131(3)(c) of the CC can have the effect of preventing delays by abusive challenges to company resolutions, which in turn promotes stability in commercial markets and also contributes to trade and economic development. This is so, even though in the present cases the immediate beneficiary of the transfer was the main shareholder: the mere fact that legislation benefits a private person does not mean that the impugned legislation cannot have pursued a public interest (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, §§ 39-40). The Court finds that the denial of access to a court through the contested legal provision, which is part of the legislation on asset transfers, pursued a legitimate aim in the public interest.

99. As for the proportionality of the contested limitation, the Court reiterates that a limitation will not be compatible with Article 6 § 1 of the Convention if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*Ashingdane v. the United Kingdom*, cited above, § 57).

100. The Court first observes that the application by the Municipal Court on 27 July 2006 of Article 131(3)(c) of the CC in the case at hand prevented any further examination of the merits of the applicants' claim that the resolution of 31 May 2001 was unlawful. As to the Government's suggestion that the applicants' interests were adequately considered in the proceedings connected with the registration of the resolution, the Court notes that the applicants had no standing in the registration proceedings as is shown in rulings of domestic courts upheld by the decision of the Constitutional Court of 25 March 2003. Thus, the applicants' interests under Article 6 § 1 of the Convention could not be protected in those proceedings.

Further, the registration was not adjourned pending the outcome of the challenge to the resolution, even though the applicants informed the court of their views, and even though the law at the relevant time would have permitted such an adjournment.

101. As to the Government's contention that it was open to the applicants to seek to vindicate their interests in other ways, such as by requesting a separate judicial review of the compensation paid by the main shareholder, or by claiming damages or just satisfaction for a breach of fundamental rights of shareholders, the Court would note that those proceedings had different objectives and dealt with the separate issue of the monetary satisfaction. Moreover, just satisfaction could be claimed for breach of not all but only fundamental rights of shareholders. The Government have not shown that these legal avenues were capable of giving rise to a discussion of the lawfulness of the resolution in circumstances comparable to a review in the set-aside proceedings. They cannot be therefore regarded as a means of mitigating the effects of Article 131(3)(c) of the CC in connection with the core issue in the proceedings. Nor could they be considered as effective remedies to be exhausted by the applicant (see paragraph 74 above), an issue which the Court joined to merits (see paragraph 80 above).

102. Thus, the Court concludes that as a result of the operation of Article 131(1)(c) of the CC, the applicants were deprived of a determination on the merits of the claim that the resolution of the general meeting was unlawful. Their access to a court was therefore limited, and no reasons have been established which could render that limitation proportionate to the legitimate aims of furthering stability in the business community by preventing abusive challenges to resolutions.

Accordingly, the Court dismisses the Government's objection of non-exhaustion of domestic remedies in this respect and finds that there has been a violation of Article 6 § 1 of the Convention.

ii. Application no. 28464/04

103. The Court notes that on 25 June 2003 the third applicant contested by her action to set aside both the general meeting resolution of YTONG, a. s. and the asset transfer contract to which she was not a party (see paragraph 19 above) and pursuant to which the compensation she received from the main shareholder for the transfer was reviewable not by courts but only an arbitral tribunal. The Court further notes that she claimed, in particular, that the transfer was unlawful because of a compulsory arbitration clause in the contract. The Court further notes that the Olomouc High Court discontinued the set-aside proceedings initiated by the third applicant without reviewing the merits with reference to Article 220h(4) of the CC. The Court observes that she had no standing in the proceedings on the registration of the transfer into the commercial register, and that those

proceedings were not adjourned pending the outcome of the challenge to the resolution and the contract.

104. After the transfer had been registered with the commercial register, it was no longer possible for the applicant to seek that the general meeting resolution and the asset transfer contract be set aside, as the proceedings could have continued only if she had changed the object of her action so as to claim damages or to request a review of compensation. Article 220h(4) of the CC thus constituted a limitation on the third applicant's access to a court as it prevented her from having a court determination on merits of the legal issue at stake, in particular whether the resolution and the contract had been adopted contrary to law. Its effects on the third applicant were thus similar to those of Article 131(3)(c) of the CC on the applicants in application no. 32921/03 examined above.

105. Reviewing whether that limitation was justified, the Court notes that Article 220h(4) of the CC pursued according to the Government the same aim as Article 131(3)(c) thereof. Having regard to its considerations expressed in paragraph 98 above, the Court finds Article 220h(4) of the CC to have pursued a legitimate aim in the public interest within the meaning of Article 6 § 1 of the Convention.

As for the proportionality of that limitation, the Court notes that the Government relied, as in application no. 32921/03 above, on the existence of alternative legal avenues which rendered the limitation compatible with the Convention. The Court further notes that in its view expressed above those legal avenues did not constitute remedies to be exhausted within the meaning of Article 35 § 1 of the Convention, nor could they adequately mitigate the impairments of minority shareholders' rights caused by that limitation (see paragraph 101 above). Given that the third applicant's right to access to a court was limited as a result of the operation of Article 220h(4) of the CC in a manner similar to that in application no. 32921/03, the Court finds that the availability of alternative remedies could not satisfy the requirements of Article 6 § 1 of the Convention in the present application.

106. It ensues that the third applicant's right of access to a court was limited as a result of the operation of Article 220h(4) of the CC which deprived her of a determination on merits of the claim of unlawfulness of the general meeting resolution and the asset transfer contract, and no reasons that would render that limitation justified were established. Therefore, the Court dismisses the Government's objection of non-exhaustion of domestic remedies in this respect and finds that there has been a violation of Article 6 § 1 of the Convention.

iii. Application no. 5344/05

107. The applicant in application no. 5344/05 complained about a lack of access to court in the set-aside proceedings in two respects. He

complained, first, that the courts had not dealt with his claim that the asset transfer contract was invalid because of the way it provided for the calculation of compensation, and he complained that the courts had not dealt with his claim that the asset transfer contract and the general meeting resolution were invalid on the ground of serious irregularities at the general meeting of Biocel, a. s.

108. As to the claim that the courts did not deal with the claim concerning compensation provisions, the Court notes, as the Government contended, that it was open to him to raise precisely this issue in proceedings under Article 220k of the CC. The applicant did bring such proceedings, and they are still pending. It follows that the refusal to deal with the claim in the set-aside proceedings did not deprive the applicant of access to court in this respect.

As to the claim that the courts did not deal with the merits of the proceedings to have the transfer set aside, the Court notes that those proceedings were discontinued by the decisions of the Ostrava Regional Court and Olomouc High Court of 14 March 2008 and 1 July 2008 respectively, without having been examined on merits. Both courts, referring to the registration of the transfer in the commercial register, relied on Article 220h(4) of the CC which prevented them from further reviewing the action to set aside. The Court observes that the first applicant had no standing in the proceedings on the registration of the transfer into the commercial register, and that those proceedings were not adjourned pending the outcome of the challenge to the resolution and the contract.

109. The Court notes that the situation of the first applicant in the set-aside proceedings became after the decision of the Regional Court and High Court respectively, analogous to the position of the third applicant in application no. 28464/04 (see paragraph 103 above), as he was prevented from having a court determination on merits of his action to have the general meeting resolution set aside. His access to a court was therefore limited in a manner similar to that in application no. 28464/04. Having found that the alternative legal avenues referred to by the Government did not constitute an effective legal remedy within the meaning of Article 35 § 1 of the Convention and did not adequately mitigate such a limitation (see paragraphs 101 and 105 above), the Court finds that no reasons that would render that limitation proportionate to the legitimate aims of furthering stability in the business community by preventing abusive challenges to general meeting resolutions were established.

In the light of the foregoing, the Court dismisses the Government's non-exhaustion arguments in this respect and finds that there has been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

110. The applicants further complained that the transfer of the companies' assets amounted to the expropriation of their property, which was not safeguarded by sufficient procedural safeguards. They contested the relevant legislation as such, in particular the way it governed determination of the compensation. Furthermore, they argued that the relevant law did not provide for a sufficient level of precision, foreseeability and certainty regarding the rights of minority shareholders. It lacked such features as duty for companies to provide information, joint representation of minority shareholders and other safeguards. They considered the relevant law unbalanced as it failed to strike a fair balance between the interests of a main shareholder and those of minority shareholders. Finally, they alleged an interference with their legitimate expectation, as Czech law had not provided for that form of transformation of a company when they acquired their shares. Moreover, it had to be considered legitimate to expect observation of the legal standards of west European countries and international treaties on protection of investments by the Czech legislature when it introduced the impugned provisions contravening Article 1 of Protocol No. 1, the relevant part of which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

111. The Government maintained that the complaints under this provision of the Convention were inadmissible.

112. The Court observes that the complaint before it aims at the entire process of the company's transformation and the position of minority shareholders therein. However, this process has not yet been fully completed, as the compensation proceedings, crucial in the light of Article 1 of Protocol No. 1, are still pending.

It follows that this part of the applications is premature within the meaning of Article 35 § 1 of the Convention and must be declared inadmissible pursuant to Article 35 § 4 of the Convention.

IV. APPLICATION OF ARTICLE 13 OF THE CONVENTION

113. The applicants complained that they did not have at their disposal any remedy against the interference with the property rights asserted in their

applications. They relied on Article 13 of the Convention which reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

114. The Court notes that this complaint is linked to the claims made by applicants under Article 1 of Protocol No. 1, which were declared inadmissible as premature.

It follows that this complaint is manifestly ill-founded pursuant to Article 35 § 3 of the Convention and must be declared inadmissible in accordance with Article 35 § 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

115. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

116. The applicants asserted that they had not yet been able to assess pecuniary damage inflicted by the “expropriation” of their shares as the relevant domestic proceedings were still pending. They reserved the right to specify the damages once those proceedings are terminated. The third applicant claimed in addition CZK 622,160 (EUR 22,200) for fees she had been obliged to pay in the arbitration proceedings.

The Government maintained that the applicants failed to establish any damage. They saw no causal link between the alleged damage and the violation of Article 6 § 1 of the Convention. They noted in respect of the third applicant that the asserted arbitration fee was incurred by all three petitioners together, not just by the third applicant.

The Court considers that the damage alleged by the applicants is connected to the loss of their shares upon the liquidation of the companies and the attempts to recover it in proceedings before domestic courts. These claims, however, are linked to the complaint under Article 1 of Protocol No. 1, which has been declared inadmissible. It follows that no causal link has been established between the alleged damage and the violation found. As for the damage allegedly incurred by the payment of the arbitration fee, the third applicant did not allege in her submissions under Article 1 of Protocol No. 1 that her property rights had been impaired by the payment of that fee. Even if she had done so, no causal link between the alleged damage

and the violation found could be established as only a violation of Article 6 § 1 of the Convention was found.

No award under this head is therefore granted.

117. As for non-pecuniary damage the applicants claimed EUR 1,000,000 for having suffered on account of uncertainty and frustration caused by their inability to enjoy rights under the Convention. They considered that sum to be proportionate to the size of their investment and of the class of shareholders affected by the impugned legislation and case law. In the applicants' view a smaller amount would not compel the responding Party to bring that legislation in line with European standards.

The Government pointed out that the Convention system does not recognize *actio popularis* and therefore only the situation of the applicants may be taken into consideration. They consider that a mere statement of finding a violation of Article 6 § 1 of the Convention is sufficient satisfaction for the applicants.

The Court, ruling on an equitable basis and in accordance with its case law concerning the denial of access to a court, holds that finding a violation of Article 6 § 1 of the Convention represents in itself just satisfaction for the applicants.

B. Costs and expenses

118. Each applicant claimed the costs of legal representation amounting to CZK 120,000 (EUR 4,528). They asserted that the legal representation in each case consisted of fifty billable hours charged CZK 2,400 (EUR 90) per hour.

Invoking Rule 60 paragraph 2 and 3 of the Rules of Court, the Government asserted that it appeared that the applicants had not provided within the time specified therein any documents proving the payment of those costs at the amount sought. They contended that the Court should reject the claim as insufficiently grounded (*Aldoshkina v. Russia*, no. 66041/01, § 32, 12 October 2006).

119. The Court reiterates that an applicant may recover his costs and expenses only in so far as they have been actually and necessarily incurred and are reasonable as to quantum (*Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V). Having regard to the material before it, particularly the complexity of the case, domestic proceedings pursued in search of remedy of violation found, the aforementioned criteria, and the fact that the applicants were successful only in part of their claim raised in their applications, the Court finds it proportionate to award the applicants, in respect of each application, EUR 2,264 for costs and expenses, plus any tax that may be chargeable to the applicants on this amount, all that to be converted into Czech crowns at the rate set by the Czech National Bank and applicable at the date of settlement.

C. Default interest

120. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Decides* unanimously to join the applications;
2. *Joins* unanimously *to the merits* the Governments' contention that the applicants did not exhaust domestic remedies in that they did not avail themselves of the available alternative remedies and declares the complaints under Article 6 § 1 of the Convention concerning the denial of access to a court admissible and the remainder of the applications inadmissible;
3. *Dismisses* by five votes to two the non-exhaustion argument which was joined to the merits and holds that there has been a violation of Article 6 § 1 of the Convention in respect of each application;
4. *Holds* by five votes to two that finding a violation of Article 6 § 1 of the Convention represents in itself just satisfaction for the applicants;
5. *Holds* by five votes to two
 - a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,264 (two thousand two hundred and sixty four euro) in respect of each application for costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, together with any tax that may be chargeable to the applicants;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Jaeger joined by Judge Rait Maruste is annexed to this judgment.

P.L.
C.W.

DISSENTING OPINION OF JUDGE JAEGER,
JOINED BY JUDGE MARUSTE

I am unable to agree with the majority's finding of a violation of Article 6 § 1 of the Convention – access to court – without any determination of the substantive civil right at stake.

The case is about the rights of shareholders as defined by the Czech law. On the one hand owners of shares may be protected under Article 1 of Protocol No. 1 in so far as these shares constitute a possession or a property right of a certain variable value according to the stock market. But the Chamber declared these claims inadmissible as being premature (§ 110-112). On the other hand shareholders are empowered to participate in certain decisions concerning the future of the company concerned by means of resolutions taken within a general meeting, which is an added value to the pure monetary value.

These decisions are taken under the majority rule. Shareholders being in the majority have the overwhelming power to transform the company into something different and to transfer its assets. Minority rights are rather limited, according to the restrictions by law: the minority, or a single shareholder, can institute proceedings to set aside such resolutions, but cannot inhibit registration following the majority's vote by virtue of his own right. After registration the minority's rights dwindle to a mere right to compensation. This is all set out in the judgment under § 42-59.

The Czech courts gave some reasoning why they considered those restrictions of shareholder rights to be legitimate – legal certainty and the expeditious transformation of companies. The court administering the commercial register was established to protect majority rights and the rights of the company as such (see paragraph 12 of the judgment). In addition, by reviewing the legality of the decision-making process within the company the courts administering the commercial register also protect the public interest in ensuring that the law is complied with.

I am of the opinion that the restrictions of which the applicants complain are partly implemented by substantive provisions, partly by procedural ones. Whether these restrictions are in conformity with Convention rights cannot be answered by Article 6 § 1 of the Convention only focusing on the procedural aspect, even limited to one single factor within the procedural safeguards. In the context of civil rights that are not to be exercised individually but collectively together with other shareholders in the same position and under the obligation to reach a majority vote, access to court

cannot be understood as a purely individual right to challenge and suspend every decision. This would at the same time grant every single shareholder a veto right against majority decisions. Thus the scope of shareholders' voting rights is defined within the limits of judicial control attached to them.

Whether the rights enshrined in the Convention demand for an extension of minority rights with the aim to sufficiently protecting a minority of shareholders cannot be answered by Article 6 § 1 of the Convention but only by Article 1 of Protocol No. 1. It is a substantive and not a procedural question.

Article 6 of the Convention applies under its “civil head” if there was a “dispute” over a “right” which can be said, at least, on arguable grounds, to be recognised under domestic law irrespective of whether it is also protected under the Convention (see *Associazione Nazionale Reduci Dalla Prigionia Dall'Internamento E Dalla Guerra Di Liberazione and others v. Germany*, no. 45563/04; *J.S. and A.S. v. Poland*, no. 40732/98, 24 May 2005). The absence of a legitimate expectation of a property right or any other civil right does not presuppose the absence of a right recognised on arguable grounds and the applicability of Article 6 of the Convention. The Court therefore has always to examine whether there was a dispute over a defensible right, which the Chamber did not do in any depth in this case.

The civil right under dispute might be the purely financial property right embodied in the share. This dispute is still pending as conceded by the majority of the Chamber. It might as well be the additional right to influence important resolutions taken in a general meeting. The only existing legal provisions regarding a right to influence the future of a company clearly limit shareholders' bearing to a right to participate and vote in the general meeting, to a right to challenge resolutions as long as the changes are not registered and assets transferred by the commercial court, and – after the registration finalises the transactions – to claim compensation in case of any damages sustained or of inadequate compensation paid for their shares. Domestic law neither provides for any right to set aside majority resolutions nor to suspend their execution after registration. Minority shareholders are clearly excluded from these rights. Thus they cannot claim to have such right on arguable grounds. Article 6 § 1 of the Convention is not applicable (see *Associazione Nazionale*, referred to above).

Finding Article 6 of the Convention not applicable in the case does not necessarily exclude finding a violation under Article 1 of Protocol No. 1 to the Convention. This question, especially whether the law strikes a fair balance between the competing interests of the majority's rights and the

public interest in the functioning of economy under the safeguards of the rule of law on the one hand and the protection of minority rights on the other hand, cannot be decided before compensation is determined. In the course of their scrutiny the courts will have to examine whether the totality of restrictions, including those on access to court, can be deemed necessary to control the use of property in accordance with the general interest (under the second paragraph of Article 1 of Protocol No. 1). I agree with the majority of the Chamber under § 112 that this part of the application is premature.