CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 50357/99
by Camberrow MM5 AD
against Bulgaria

The European Court of Human Rights (First Section), sitting on 1 April 2004 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs E. STEINER,
Mr K. HAJIYEV, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 19 July 1999 and registered on 17 August 1999,

Having deliberated, decides as follows:

THE FACTS

The applicant, Camberrow MM5 AD, is a company with registered office in the village of Zeleni Dol, the Blagoevgrad region. It held approximately 98% of the shares of Dobrudjanska Commercial Bank AD ("DCB AD" or "the bank"), a bank with registered office in Dobrich. The applicant was represented before the Court by Mr Y. Yankov and Mr F. Martineau, lawyers practising in Sofia and Paris respectively.

A. The circumstances of the case

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

1. Problems with DCB AD's financial situation and the Bulgarian National Bank ("BNB")'s request for the opening of bankruptcy proceedings against it

On 23 September 1996 BNB found that as of 31 August 1996 DCB AD's capital adequacy had been minus 54.06%, which was significantly below the level set forth in the Banks and Credit Business Act 1992. The fact that the capital adequacy of the bank was negative indicated that the bank's risk-weighted assets significantly exceeded the amount of its capital base. The bank experienced durable difficulties to perform its obligations on the date of their maturity, as evidenced by the high number of non-completed payments. For a prolonged period the bank had not had enough liquid funds to perform its obligations to pay. For the period after 2 September 1996 the bank had had waiting payments every day. As of 20 September 1996 these payments had been 5,416 amounting in total to 587,872,561.76 old Bulgarian levs ("BGL") [On 5 July 1999 the Bulgarian lev was denominated. One new Bulgarian lev ("BGN") equals 1,000 old Bulgarian levs ("BGL")]. Thus, BNB was of the opinion that there was a risk of DCB AD becoming insolvent within the meaning of section 64(1) and (2) of the Banks and Credit Business Act 1992. Therefore BNB placed the bank under special supervision („особен надзор"). It removed its board of directors from office and appointed special administrators („квестори") to act in its place. It also limited the bank's activities, prohibiting it from taking deposits, extending loans, dealing with commercial papers, dealing with foreign currency and precious metals, making guarantees, effecting non-cash payments, clearing cheques, acting as a stock broker and carrying out factoring operations. It also prohibited the bank to pay dividends and to dispose of its assets.

DCB AD did not seek judicial review of this decision.

On 10 November 1996 BNB petitioned the Dobrich Regional Court to open bankruptcy proceedings against DCB AD. The bank, which was

respondent in these proceedings, was represented by the special administrators previously appointed by BNB.

2. Attempts to improve DCB AD's financial situation

On 2 September 1997 BNB found that during the period of special supervision, which had expired on 1 September 1997 (i.e. two months after the entry into force of the Banks Act 1997 – paragraph 13 of the transitional and concluding provisions of the Act), DCB AD's financial situation had improved through the efforts of the special administrators. Its debts towards other financial institutions had been paid off and the bank had collected more than BGL 4,000,000,000 it had extended as loans and had thus improved its capital adequacy. Also, it could be expected that its overall capital adequacy would improve sharply during the following month. However, as at that time the bank was still unable to pay off all its creditors, certain restrictions on its activities had to be maintained. Accordingly, BNB, exercising its powers under section 65 of the Banks Act 1997, re-appointed the special administrators for a period of one month, ordered DCB AD to increase its capital adequacy to 2% of its tier-one capital not later than 30 September 1997, and prohibited it from receiving deposits, extending loans, paying dividends, effecting non-cash operations and clearing cheques until it had attained the said 2% ratio. The decision stated that it was not subject to judicial review.

On 12 September 1997 the general meeting of shareholders of DCB AD resolved to increase the bank's capital from BGL 1,404,480,000 to BGL 20,000,000,000 through the issuing of 18,595,520 new shares with par value of BGL 1,000 each. 8,045,520 new shares were to be subscribed exclusively by the applicant and the remaining 10,550,000 shares were to be subscribed by all shareholders of DCB AD pro rata their respective shareholdings. On 26 September 1997 the resolution was entered in the register of companies kept by the Dobrich Regional Court.

The applicant subscribed the shares and, accordingly, became liable to pay them up.

However, it sought to discharge this liability by other means. On 4 May 1997 it had purchased debts due by DCB AD to three other banks. By virtue of these debt assignments the applicant, apart from being shareholder of DCB AD, had become also its creditor. It advised DCB AD that it wished to set off its obligation to pay its newly subscribed shares against the debt that DCB AD now owed to it. Accordingly, on 26 September 1997 DCB AD made entries in its accounts whereby it effected the required setoff.

Also, on 27 August 1997 the applicant had made a contract with DCB AD whereby it had provided funds to the bank under the understanding that they were given as a hybrid capital instrument for the increase of the bank's capital base. The applicant had transferred to DCB AD BGL 2,258,096,800 pursuant to the contract.

On 3 November 1997 BNB, exercising its powers under section 65 of the Banks Act 1997, ordered DCB AD to cancel the above-mentioned entries in its accounts and to return the amounts given by the applicant. It reasoned that the setoff had represented non-cash consideration for the shares and that it had been effected in breach of sections 72 and 73 of the Trade Act and of section 19(2)(5) of the Banks Act 1997. Further, BNB found that the contract whereby the applicant had provided a hybrid capital instrument to DCB AD had not been approved by BNB, as required by section 10(4) of its Regulation No. 8 on the capital adequacy of banks, and was thus invalid.

Meanwhile, on 30 September 1997 the Dobrich Regional Court, acting on the joint motion of BNB and DCB AD, decided to stay the proceedings under the bankruptcy petition against the bank. Also, on 3 October 1997 BNB, finding that the previous special administrators' mandate had expired, appointed new special administrators of DCB AD.

3. The revoking of DCB AD's licence and BNB's renewed request for the opening of bankruptcy proceedings against it

On 11 November 1997 BNB revoked DCB AD's licence by reason of insolvency. It found that a check up of its assets and liabilities as of 30 September 1997 indicated that the liabilities exceeded its assets by BGL 6,161,379,000. The decision stated that it was not subject to judicial review.

On an unspecified date in November 1997 BNB requested the Dobrich Regional Court to resume the proceedings for declaring DCB AD bankrupt.

On 2 December 1997 the Dobrich Regional Court held a hearing in chambers. DCB AD was represented by attorneys retained by the special administrators appointed by BNB. The attorneys for DCB AD argued that the bank's assets exceeded its liabilities and that BNB's determination in this respect had been erroneous. Also, DCB AD tried to commence an action for declaratory judgment to the effect that BNB's decision for revoking the bank's licence had been unlawful. The court rejected the action as inadmissible, holding that by section 21(5) of the Banks Act 1997 BNB's decisions for revoking a bank's licence were not subject to judicial review and that it was thus not competent to examine the action.

In a judgment of the same date the Dobrich Regional Court declared DCB AD insolvent and bankrupt, terminated the powers of its bodies, appointed trustees in bankruptcy („синдици“) (the companies Yavor Zartov AD and BDO Binder), divested the bank of its property and ordered the sale of its assets. It held that whereas under the Banks and Credit Business Act 1992 it had had the power to independently ascertain whether a bank was indeed insolvent either because its liabilities exceeded it assets or because it could not discharge a undisputed debt which had fallen due, under the new Banks Act 1997 it was precluded from verifying the existence of these prerequisites. According to section 82 of the Act, the court's task was only

to ascertain whether BNB's bankruptcy petition complied with the requirements of sections 79(3) and 21(2) of the Act, i.e. whether it was facially valid and indicated the grounds on which the bank's licence had been revoked. In the case at hand BNB had revoked DCB AD's licence and had indicated the ground on which it had done that. Therefore its bankruptcy petition had to be allowed.

As the judgment was immediately enforceable, from that moment on the persons having the right to act on behalf of DCB AD were the court-appointed trustees.

Before the trustees had started performing their duties, the bank's attorneys filed appeals against the judgment for declaring DCB AD bankrupt and against the decision in which the Dobrich Regional Court had rejected the action for a declaratory judgment as inadmissible. However, once the trustees started performing their duties, they withdrew the powers of the attorneys and withdrew the appeals. Accordingly, in a decision of 12 February 1998 a three-member panel of the Supreme Court of Cassation discontinued the appeal proceedings and declared that the Dobrich Regional Court's judgment had entered into force.

4. The criminal proceedings against the vice-governor of BNB

On 8 June 1998 the applicant complained to the prosecution authorities about the actions of the vice-governor of BNB who had signed BNB's decision of 3 November 1997 and had proposed the revoking DCB AD's licence on 11 November 1997. It argued that she had acted ultra vires with a view to causing prejudice to DCB AD. The prosecution authorities opened criminal proceedings against the vice-governor and on 15 June 1998 charged her. However, on 23 April 1999 the Chief Prosecutor's Office discontinued the proceedings, holding that the vice-governor had acted lawfully and had not abused her office.

5. The bankruptcy proceedings against DCB AD and the applicant's requests for the replacement of the trustees

On an unspecified date in June 1998 the applicant requested the Dobrich Regional Court to replace the trustees. It argued, *inter alia*, that their actions had prejudiced the creditors of DCB AD. In particular, the trustees had failed to collect a number of the bank's receivables and had deposited 1,200,000 United States dollars (“USD”) of the bank's money in a another bank which was experiencing financial difficulties.

On 22 June 1998 the Dobrich Regional Court rejected the motion, holding that the applicant did not have standing to make such a request and that the trustee of a bankrupt bank could only be removed if BNB had struck its name off the register of bank trustees it was keeping. The applicant did not appeal against this decision.

On 13 July 1998 the Dobrich Regional Court discharged Yavor Zartov AD and BDO Binder as trustees in bankruptcy. It appointed Ms A.G. as the new trustee of DCB AD. The applicant did not specify whether this was done on its motion, on the motion of another creditor or of the court's own motion. However, it appears that this was done because in June 1998 the Trade Act was amended to provide that only natural persons, and not juridical persons, could be trustees in bankruptcy.

On 16 December 1999 the applicant requested the Dobrich Regional Court to replace the new trustee. It argued, *inter alia*, that she had failed to collect a number of the bank's receivables, that she had been squandering the bank's assets, that she had deposited USD 1,200,000 of the bank's money in another bank which was experiencing financial difficulties and that she had made unnecessary expenses.

In a decision of 22 December 1999 the Dobrich Regional Court rejected the request. It held that the trustee had not failed to perform her duties. In particular, she had commenced a large number of actions to recover the bank's dues. The depositing of the USD 1,200,000 had been done by the previous trustees. Finally, the trustee had been making monthly reports about the expenses she had been incurring. The court instructed the trustee to reduce to a minimum the number of attorneys she had retained to prosecute actions on the bank's behalf. The applicant did not appeal against the decision.

On 11 October 2000 the applicant requested BNB to strike Ms A.G. out of its register of bank trustees in bankruptcy. It averred that she had deposited USD 1,200,000 in another bank which had gone bankrupt. The expenses (allegedly 3,000,000 Bulgarian levs ("BGN")) she had incurred for administrating the bankruptcy estate – in particular, by retaining a high number of lawyers to prosecute cases on behalf of the bank – had been unreasonably high. Further, she had done nothing or very little to collect the bank's dues and had kept the bank's accounting books in a very poor manner.

BNB carried out an inspection in DCB AD and in a letter of 2 March 2001 rejected the applicant's request. As regards the deposit of USD 1,200,000 in another bank, BNB found it had been done by the previous trustees. Moreover, as of the date of the deposit the other bank had not experienced financial difficulties. At the time Ms A.G. had been appointed, she had tried to withdraw the amount from the other bank, but had succeeded only partially. She had made a claim before the trustees of the other bank in respect of the part of the amount which had remained at the other bank at the time it had been declared bankrupt. As regards the fact that Ms A.G. had commenced a large number of actions, the vast majority of those had been against debtors of DCB AD and for the avoidance of transfers, i.e. for the benefit of the bankruptcy estate. The number of lawyers retained by the trustee had been minimal and the expenses,

compared to those for the administration of the estates of other bankrupt banks, had been smaller. The overall expenses incurred by the trustee had not been BGN 3,000,000, as claimed by the applicant, but BGN 1,554,647.92.

On 5 February 2001 the applicant requested the Dobrich Regional Court to replace the trustee. It argued that she had improperly filed actions against DCB AD and that she had been squandering the bank's assets.

On 5 March 2001 the trustee filed objections against the request, submitting that it was inadmissible and unfounded. As regards the actions she had filed against DCB AD, those were actions seeking to avoid transfers effected by the bank prior to becoming bankrupt; the court examining those actions had instructed the trustee to constitute the bank as a co-defendant. The trustee further provided a detailed account of the expenses she had incurred.

In a decision of 13 March 2001 the Dobrich Regional Court rejected the applicant's request. It held that it was inadmissible, because a bank's trustee in bankruptcy could only be removed by the court if he or she had been stuck off the register of bank trustees kept by BNB. Nevertheless, the court proceeded to examine the request on the merits and held that it was also unfounded. It found that in 2000 the applicant had signalled BNB about alleged irregularities in the trustee's activities and that BNB had carried out an inspection and had not found any wrongdoing on the part of the trustee. The court went on to state that the fact that the trustee had constituted DCB AD as a co-defendant in the actions she had filed was not improper; on the contrary, it had been done pursuant to the court's express instructions. The applicant's contention that the trustee had squandered the bank's assets was unsubstantiated. The trustee had provided a detailed account of the amounts she had expended. That account, as well as the results of BNB's inspection of 2000, indicated that she had not spent large amounts, as averred by the applicant.

The applicant appealed to the Varna Court of Appeals.

In a decision of 4 May 2001 the Varna Court of Appeals vacated the lower court's decision and declared the applicant's request inadmissible. It held that in proceedings for the bankruptcy of a bank the court could only remove the trustee if he or she had been struck off the register of bank trustees kept by BNB. Therefore the Dobrich Regional Court should have declared the request inadmissible and should not have examined its merits.

Despite an express request by the Court in a letter to the applicant of 3 December 2002, the applicant did not provide any information about the further course of these proceedings. However, the published case-law of the Supreme Court of Cassation (определение № 586 от 9 ноември 2001 г. по ч.гр.д. № 535/2001 г., ВКС V г.о., БВС 9/2001, № 19, с. 34) indicates that the applicant appealed to that court and that in a decision of 9 November 2001 it quashed the Varna Court of Appeals' decision and remitted the case

with instructions to the lower court to examine the request on the merits. It held that the striking of a trustee off the register kept by BNB and the removal of the trustee pursuant to a request by the debtor or a creditor – such as the applicant – were completely distinct hypotheses. The fact that BNB could bring about the discharging of a trustee did not mean that a creditor could not request her removal if she did not perform her duties properly or imperilled the creditor's interests through her actions.

Similarly, despite the above-mentioned express request by the Court, the applicant did not provide any information about the proceedings on remittal before the Varna Court of Appeals. Noting however that Ms A.G. was not removed as trustee, the Court concludes that apparently the Varna Court of Appeals examined the applicant's request on the merits and found it to be unfounded.

On 16 August 2001 the applicant requested the Dobrich Regional Court to annul certain actions of the trustee which it considered prejudicial to DCB AD's creditors. On 5 September 2001 the judge in charge of the bankruptcy proceedings informed the applicant that he did not have the power to annul actions of the trustee.

6. The sale of assets belonging to DCB AD in November 1999

On 24 November 1999 some of DCB AD's assets were put on sale by the trustee, at a price fixed by experts appointed by BNB. The applicant submitted that it had tried to challenge that price as being too low, but that the courts examining its request had rejected it as inadmissible because they had considered that the experts' valuation was not subject to judicial review and that a creditor of the bankrupt bank did not have standing to appeal against the fixing of the sale price. Despite an express request by the Court in a letter to the applicant of 3 December 2002, the applicant did not provide any further details, not did it submit any documents relating to these events.

7. DCB AD's sale as a going concern and the termination of the bankruptcy proceedings

On an unspecified date in the end of 2001 or the beginning of 2002 DCB AD's trustee in bankruptcy asked the Dobrich Regional Court for permission to sell the bank as a going concern.

In a decision of 6 February 2002 the Dobrich Regional Court granted permission. On 20 May 2002 the trustee entered into a contract with the Central Cooperative Bank AD ("CCB AD") whereby it agreed to purchase DCB AD as a going concern. The contract provided that CCB AD would pay BGN 1 for the bank and pay BGN 4,170,000 to the bank's fourth-tier creditors (all previous tiers having been already paid off), which consisted solely of the Ministry of Finance (which had indemnified all depositors of the bank and had subrogated itself in their claims). By an annex to the

contract of 19 June 2002 CCB AD agreed to pay the creditors BGN 4,500,000 instead of BGN 4,170,000.

The trustee submitted the contract to the Dobrich Regional Court for approval. The court requested BNB to submit its observations on the contract. BNB submitted its observations on 26 June 2002. It maintained that CCB AD's offer to buy DCB AD was fully compliant with the Banks Act 1997 and that CCB AD had enough funds to pay the creditors of the bankrupt bank.

In a decision made in chambers on 10 July 2002 the court approved the contract, terminated the bankruptcy proceedings and struck DCB AD from the register of companies. It held, *inter alia*, that the sale of DCB AD as a going concern would not prejudice its creditors' interests and would not put them in a worse position than that which would have obtained in case the bank's assets were sold apiece. The net worth of DCB AD, as assessed by experts appointed by the trustee with the assent of the court, was a negative value. The total value of its assets, as assessed by the same experts, was BGN 4,169,000. Since the price agreed by CCB AD was BGN 4,500,000, the creditors were in fact placed in a better position. Moreover, the creditors would receive their dues much faster (within one month after the sale had been approved by the court) than if the bank's assets were to be sold apiece. The assets which had been sold apiece thus far had generated proceeds amounting only to BGN 874,766.28, whereas the aggregate of the creditors' claims against DCB AD amounted to BGN 22,185,355.

As provided by section 94(9) of the Banks Act 1997, the decision was not subject to appeal.

B. Relevant domestic law

1. BNB's powers

(a) To place a bank under special supervision

Under the Banks and Credit Business Act 1992 (superseded on 1 July 1997 by the Banks Act 1997) BNB could put a bank under special supervision, if it found that the bank was at a risk of becoming insolvent (section 65(1)). By section 64 of the Act, a bank was at such a risk when (a) its capital adequacy was below a certain minimal level or when (b) due to the state of its assets there was a risk that it could not pay its debts at maturity. When BNB placed a bank under special supervision, it could remove the members of its governing bodies from office and appoint special administrators with powers to act in their place (section 65(2) *in limine* and section 65(2)(7)). It could also limit the bank's activities and prohibit it from

paying dividends or from disposing of its assets (section 65(2)(3), (4) and (5)).

Paragraph 13 of the transitional and concluding provisions of the Banks Act 1997 provides that the regime of special supervision imposed on a bank under the repealed Banks and Credit Business Act 1992 lapses if within two months after the entry of the Act into force (i.e. 1 September 1997) BNB does not revoke the bank's licence.

(b) To order remedial action

Section 65(1)(1) and (2)(3) of the Banks Act 1997 allows in broad terms BNB to order a bank to remedy violations it has made of the Act and of BNB's regulations and other acts and directives.

(c) To appoint special administrators at a bank

Under section 69 of the Banks Act 1997 BNB may, in certain circumstances (e.g. when placing a bank under compulsory administration or revoking its licence) appoint special administrators („квестори“). These special administrators act in place of the banks' board of directors (section 71(1)), i.e. on behalf of the bank. They are appointed and dismissed by BNB (section 69(1)), it may give them directions (section 71(3)), and they are accountable to it (section 71(5)).

(d) To revoke a bank's licence

BNB mandatorily revokes the licence of a bank on the ground of insolvency when (a) the bank does not discharge for more than seven working days a debt which has fallen due or (b) the total amount of the bank's debts is greater than the total amount of its assets (section 21(2) of the Banks Act 1997). The value of the assets and of the debts of the bank is determined by BNB in accordance with supervisory requirements and rules prescribed in regulations issued by it (section 21(3)).

When revoking a bank's licence, BNB appoints special administrators if such have not been appointed before that (section 21(4)). The administrators manage and represent the bank until the court appoints trustees in bankruptcy (section 69(3)). BNB's decision to revoke a banking licence is immediately enforceable (section 21(5)). In derogation of the general rules of administrative procedure, BNB does not have to inform the bank about the opening of the procedure for revoking its licence, nor does it have to examine and take into account the bank's explanations and objections, if any (ibid.).

After revoking a bank's licence on the ground of insolvency, BNB must mandatorily file with the competent court a petition for the opening of bankruptcy proceedings against the bank (section 79(1)).

2. Judicial review of BNB's decisions

Whereas BNB's decisions under the Banks and Credit Business Act 1992 were, without limitation, subject to review by the Supreme Administrative Court (section 88(2) and (3)), the Banks Act 1997 prohibits judicial review of a number of BNB's decisions. Thus, coercive measures ordered by BNB under section 65 of the Banks Act 1997 are not subject to judicial review (section 65(4)); neither are its decision to revoke a bank's licence (section 21(5)), or to appoint or replace special administrators (sections 65(4) and 69(4)).

3. The capital adequacy of a bank

A bank's "capital adequacy": the ratio between its "capital base" – defined as its primary, or tier-one, capital (including paid-up shares plus premiums and statutory and other reserves minus intangible assets, losses, and treasury shares – section 9 of BNB's Regulation No. 8 on the capital adequacy of banks) plus supplementary capital elements, or tier-two capital (including retained earnings, special reserves, hybrid capital instruments, subordinated debt, etc. – section 10 of the Regulation) – and its risk-weighted assets and off-balance-sheet items may not be less than 12% (section 23(3) of the Regulation). Hybrid capital instruments may be included in the tier-two capital of a bank only after the approval of the vice-governor of BNB (section 10(4) of the Regulation).

4. Bank bankruptcy

(a) General features

Before 1 July 1997 bank bankruptcy was regulated by the Banks and Credit Business Act 1992. From that date onward the newly adopted Banks Act 1997 became applicable to such proceedings.[On 29 December 2002 the provisions of the Banks Act 1997 relating to bank bankruptcy were superseded by the Bank Bankruptcy Act] The regime of bank bankruptcy set forth in the Banks Act 1997 contained a number of special features. Only BNB, and not just any creditor or the bank itself, could file a petition for the opening of bankruptcy proceedings against a bank (section 79(2) of the Banks Act 1997). BNB mandatorily filed such a petition after revoking a bank's licence on the ground of insolvency (section 79(1)). The petition needed only specify the grounds for revoking the bank's licence under section 21(2) (section 79(3)). The petition was examined by the court in chambers (section 81). There was no possibility for reorganisation of the bank (section 91), it was divested of all its assets (section 82(6)), and, when allowing the petition, the court had to also immediately order the sale of the assets and the distribution of the proceeds to the bank's creditors (section 82(7)). The court terminated the powers of the bank's bodies (general meeting of shareholders, board of directors, etc.) (section 82(4)) and

appointed trustees in bankruptcy in whom these powers, including the right to represent the bank in court, vested (section 84(3) in conjunction with section 658(1)(6) [At present section 658(1)(7)] of the Trade Act). The court could appoint trustees only from a pool of persons featuring on a list drawn up by BNB (section 84(1)). The Trade Act applied only insofar as the Banks Act 1997 did not contain special rules and insofar as its provisions were compatible with the special features of bank bankruptcy (section 97). Section 634 of the Trade Act, which appears to have been thus applicable, provides that the court's judgment for declaring a debtor insolvent and for the opening of bankruptcy proceedings against it is immediately enforceable.

(b) Remedies against the activities of a bank's trustee in bankruptcy

Section 657(2) of the Trade Act provides that upon the motion of the debtor or any creditor the bankruptcy court may discharge the trustee if he or she does not perform his or her duties or imperils the creditor's or the debtor's interests through his or her actions.

Section 663(3) of the Trade Act provides that the trustee is liable to indemnify the debtor and the creditors for all damage caused due to his or her fault.

Section 84(2) of the Banks Act 1997 provided that the bankruptcy court must discharge the trustee if he or she was struck off the list of bank trustees kept by BNB.

(c) Sale of a bankrupt bank as a going concern

In Bulgarian law there are two methods for disposing of the assets of a bankrupt company in order to satisfy its creditors' claims: (a) selling them apiece or (b) selling the company as a going concern, i.e. as an aggregate of assets and liabilities. Section 94a of the Banks Act 1997 gave preference to the second method. It provided that the trustee of a bankrupt bank had to first try to sell it as a going concern. He or she had to opt for the other method and dispose of the bank's assets apiece only if the sale as a going concern was not possible within six months after all creditors' claims had been filed and allowed or if that would place the bank's creditors in a worse position.

A bankrupt bank could be sold only to another bank (section 94(1) of the Banks Act 1997). The buying bank had to pay directly to the creditors of the bankrupt bank by opening bank accounts in their names within one month after the sale had been approved by the court (section 94(6)). The issue which creditors were to be thus paid off and which not was to be determined in the sale contract. The buying bank was liable to pay only those creditors whose claims it had agreed to pay off. All other creditor's claims were extinguished (section 94(4)). The shareholders' rights, including the right to a share of the remaining assets of the bank, if any, were likewise

extinguished, unless the buying bank had agreed to pay to the shareholders as well (section 94(5)).

The procedure for selling a bankrupt bank as a going concern was as follows: the trustee requested the bankruptcy court to allow the sale of the bank through direct negotiations (section 93(1)). After receiving permission from the court, the trustee approached potential buyers and entered into a contract with them. He or she then submitted the contract for approval by the court. The court had to call for observations from BNB (section 93(3)), and, after receiving them and verifying whether the sale did not contravene the law and did not prejudice the creditor's interests (section 93(4)), approved it, terminated the bankruptcy proceedings and struck the bank off the register of companies. The court's decisions were not subject to appeal (section 94(9)).

COMPLAINTS

1. In its initial application, introduced on 19 July 1999, the applicant complained under Article 6 of the Convention that by section 21(5) of the Banks Act 1997 BNB's decision to revoke DCB AD's licence had been excluded from judicial review. It further complained under Article 6 of the Convention that in the proceedings leading to declaring DCB AD bankrupt the Dobrich Regional Court had not examined in substance whether the bank had in fact been insolvent and had instead chosen to defer to the findings of BNB, considering itself competent to verify only the formal validity of BNB's decision to revoke its licence on the ground of insolvency. The applicant also complained that in these proceedings DCB AD had been represented by BNB-appointed special administrators, which had deprived the proceedings of their adversarial character. In addition, the applicant complained that the hearing before the Dobrich Regional Court on 2 December 1997 had been held in chambers, as mandated by section 81 of the Banks Act 1997.

The applicant also complained under Article 1 of Protocol No. 1 about BNB's decisions of 2 September and 3 and 11 November 1997 and about the opening of bankruptcy proceedings against DCB AD on 2 December 1997. It submitted that these acts had been unlawful and arbitrary and had constituted unjustified interferences with DCB AD's peaceful enjoyment of its possessions. It further submitted that DCB AD had not had effective remedies against these interferences, in breach of Article 13 of the Convention.

2. The applicant complained under Article 6 of the Convention that it, as a shareholder, could not appeal against BNB's decisions concerning DCB

AD and could not take part in the proceedings before the Dobrich Regional Court. It also relied on Article 13 of the Convention.

3. In a subsequent brief, filed with the Court on 14 June 2001, the applicant complained about the lack of possibility to challenge before a court the price at which certain assets of DCB AD were sold by the trustee in bankruptcy on 24 November 1999.

4. In the same brief the applicant complained about the activities of DCB AD's trustees in bankruptcy. It submitted that they had squandered the bank's assets and had done nothing to collect the amounts due to the bank by its debtors.

In a letter filed with the Court on 23 May 2002 the applicant raised new complaints about the actions of DCB AD's trustees. It submitted, in particular, that the trustees had deposited USD 1,200,000 belonging to DCB AD in another bank which had gone bankrupt and that they had failed to collect the amounts due to DCB AD by its debtors.

5. In a brief filed with the Court on 30 September 2002 the applicant complained that the Dobrich Regional Court's decision of 10 July 2002 approving the contract for the sale of DCB AD as a going concern had been adopted without its participation in the proceedings and had not been subject to appeal. It relied on Article 6 of the Convention and on Article 1 of Protocol No. 1.

THE LAW

1. The Court notes at the outset that most of the applicant's complaints relate not to an alleged violation of its Convention rights, but the rights of DCB AD of which it is a shareholder. The Court must therefore establish whether the applicant can claim to be a "victim" within the meaning of Article 34 of the Convention.

The applicant submitted that it was a 98% shareholder of DCB AD. Therefore there existed a direct and personal link between the bank and itself and an impingement on the rights of DCB AD had direct repercussions on the applicant.

The Court recalls that the term "victim" in Article 34 of the Convention denotes the person directly affected by the act or omission which is at issue (see *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 30, § 66). The Court further recalls that disregarding a company's legal personality as regards the question of being the "person" directly affected will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Court through the organs set up under its articles of incorporation or – in the event of liquidation or bankruptcy – through its liquidators or trustees in

bankruptcy (see *Agrotexim and Others v. Greece*, judgment of 24 October 1995, Series A no. 330, p. 25, § 66).

However, in the present case DCB AD was first managed and represented by special administrators appointed by BNB and then, when it was declared bankrupt, by trustees in bankruptcy appointed by the court, while the application before the Court relates precisely to the complex of events leading to the appointment of the special administrators and the trustees and the actions of the trustees. In these circumstances, the Court considers that because of the conflict of interests between DCB AD and its special administrators and trustees it was not possible for the bank itself to bring the case before the Court. Moreover, the Court recalls that the applicant held a substantial shareholding of 98% in the bank. It was in effect carrying out part its business through the bank and has, therefore, a direct personal interest in the subject-matter of the application (see *G.J. v. Luxembourg*, no. 21156/93, § 24, 26 October 2000).

Therefore, the Court finds that in the special circumstances of the present case the applicant may claim to be a victim of the alleged violations of the Convention affecting the rights of DCB AD.

2. The applicant raised several complaints under Article 6 of the Convention. In particular, it complained about the lack of judicial review of BNB's decision to revoke DCB AD's licence and about the fairness of the proceedings before the Dobrich Regional Court. It also complained under Article 1 of Protocol No. 1 about BNB's decisions of 2 September and 3 and 11 November 1997 and about the opening of bankruptcy proceedings against DCB AD on 2 December 1997. It also relied on Article 13 of the Convention.

Article 6 of the Convention provides, as relevant:

> "1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

Article 1 of Protocol No. 1 provides:

> "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."

Article 13 of the Convention provides:

> "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."

The Court does not consider it necessary to examine the substance of the applicant's complaints. According to Article 35 § 1 of the Convention, it "may only deal with [a] matter ... within a period of six months from the date on which the final decision was taken". Article 35 § 1 refers to "the final decision" taken in the process of exhausting domestic remedies which are "effective and sufficient" for the purpose of redressing the applicant's complaint (see *Scotts' of Greenock, Lithgows v. the United Kingdom*, no. 9599/81, Commission decision of 11 March 1985, Decisions and Reports (DR) 42, p. 33). Where no such remedies are available, the six-months period runs from the date of the act or decision complained of (see *W. v. Ireland*, no. 9360/81, Commission decision of 28 February 1983, DR 32, p. 211). Finally, special considerations apply in exceptional circumstances where an applicant first avails himself of a remedy and only at a later stage becomes aware, or should become aware, of circumstances which make that remedy ineffective. In such a situation, the six-months period might be calculated from the time when the applicant becomes aware, or should have become aware, of these circumstances (see *Veznedaroğlu v. Turkey* (dec.), no. 32357/96, 7 September 1999).

The applicant submitted that the final decision within the meaning of Article 35 § 1 of the Convention was the Chief Prosecutor's Office decision of 23 April 1999 to discontinue the criminal proceedings against the vice-governor of BNB. In its view, in case those criminal proceedings had led to the conviction of the vice-governor, it could have requested reopening of the proceedings leading to DCB AD's declaring bankrupt. Therefore the criminal proceedings, coupled with a request for reopening, were an effective remedy which it had tried to use. However, after the Chief Prosecutor's Office discontinued the criminal proceedings, a request for reopening became impossible and the remedy became an ineffective one.

In the alternative, the applicant submitted that the alleged violations of Article 6 of the Convention and Article 1 of Protocol No. 1 had been continuing ones and had lasted until the conclusion of the bankruptcy proceedings against DCB AD.

The Court notes that BNB's decisions were made on 2 September and 3 and 11 November 1997. It further notes that no remedies existed against those decisions, because, as provided by sections 65(4) and 21(5) of the Banks Act 1997, they are not subject to judicial review. Thus, as a rule, the six months' time-limit would start to run from the date of the impugned decisions. However, even if it is accepted that the attempt to commence an action for declaratory judgment at the hearing before the Dobrich Regional Court and the appeal against its refusal to examine it were a remedy which could have led to the invalidation of BNB's decision of 11 November 1997, the Court notes that this remedy became impossible to use because the court-appointed trustees withdrew the appeal and the withdrawal was

confirmed by the Supreme Court of Cassation on 12 February 1998. However, the application was lodged with the Court on 19 July 1999.

As regards the proceedings before the Dobrich Regional Court and its judgment opening bankruptcy proceedings against DCB AD, the Court notes that an appeal lay against the judgment to the Supreme Court of Cassation, but that the appeal filed by DCB AD's attorneys was later withdrawn by the court-appointed trustees and the withdrawal was confirmed by the Supreme Court of Cassation on 12 February 1998. Even if it is accepted that the appeal was at first a remedy which had to be used, but whose use became impossible due to the actions of the court-appointed trustees, the latest date when the applicant should have been aware that the remedy became ineffective was 12 February 1998. However, the application was lodged with the Court on 19 July 1999.

As regards the applicant's argument that the criminal proceedings against the vice-governor of BNB, coupled with a request for reopening of the proceedings before the Dobrich Regional Court, were in principle an effective remedy whose exhaustion was frustrated by the Chief Prosecutor's Office decision to discontinue them, and that therefore the date of the final decision was 23 April 1999, the Court recalls that as a rule a request for the reopening of a case cannot be regarded as an effective remedy within the meaning of Article 35 § 1 of the Convention (see *Väinö Uskela v. Sweden*, no. 10537/83, Commission decision of 10 October 1985, DR 44, p. 98). The decision of the Chief Prosecutor's Office cannot therefore be taken into account when calculating the six months' time-limit.

Further, the Court cannot accept the applicant's argument that DCB AD was a victim of a continuing situation which lasted until the end of the bankruptcy proceedings. The Court does not doubt that the opening of bankruptcy proceedings continued to have serious repercussions on DCB AD while these proceedings lasted. However, the fact that an event has significant consequences over time does not in itself constitute a continuing situation for the purposes of Article 35 § 1 of the Convention. The concept of a "continuing situation" refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicant a victim (see *Montion v. France*, no. 11192/84, Commission decision of 14 May 1987, DR 52, p. 227, *Hilton v. the United Kingdom*, no. 12015/86, Commission decision of 6 July 1988, DR 57, p. 108 and *Posti and Rahko v. Finland*, no. 27824/95, §§ 39-40, ECHR 2002-VII). The applicant's complaints were that (a) BNB's decision of 11 November 1997 was not subject to judicial review, that (b) the proceedings before the Dobrich Regional Court – which ended on 2 December 1997 – had not complied with the requirements of Article 6 of the Convention and that (c) BNB's decisions of 2 September and 3 and 11 November 1997 and the Dobrich Regional Court's declaration of 2 December 1997 that DCB AD was bankrupt were unlawful and arbitrary. These complaints have as their source

specific events which occurred on identifiable dates and therefore cannot be construed as a continuing situation.

It follows that these complaints were introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

3. The applicant complained under Article 6 of the Convention that it, as a shareholder, could not appeal against BNB's decisions concerning DCB AD and could not take part in the proceedings before the Dobrich Regional Court. It also relied on Article 13 of the Convention.

The Court notes that neither Article 6 nor Article 13 of the Convention imply that under the national law of the Contracting States shareholders in a limited company, such as DCB AD, should have the right to bring or participate in proceedings in respect of acts that are prejudicial to "their" company (see *Agrotexim and Others*, cited above, pp. 26-27, § 73).

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

4. The applicant complained about the impossibility to challenge before a court the valuation of the assets which the trustee had put on sale on 24 November 1999.

The Court notes that despite an express request by the Court in a letter to the applicant of 3 December 2002, the applicant did not provide any details or documents relating to this complaint. In these circumstances, the Court is of the view that the applicant did not submit any *prima facie* evidence pointing towards a violation of the Convention. It follows that this complaint is unsubstantiated and therefore manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

5. The applicant complained about the activities of DCB AD's trustees in bankruptcy. It submitted that the actions and omissions of the initial trustees, Yavor Zartov AD and BDO Binder, and of the trustee appointed later, Ms A.G., had harmed the bank's property rights.

The Court is of the view that the applicant's complaint falls to be examined under Article 1 of Protocol No. 1. It notes that the responsibility of the Contracting States is incurred solely by the actions or omissions of their organs, not by the actions and omissions of private individuals. Thus, for example, a lawyer, even if he or she is officially appointed to a case, cannot be considered as an organ of a State and his or her actions do not normally engage its responsibility under the Convention (see *W. v. Switzerland*, no. 9022/80, Commission decision of 13 July 1983, DR 33, p. 21 and *Rutkowski v. Poland* (dec.), no. 45995/99, ECHR 2001-XI). Similarly, the Court sees no grounds on which to accept that the function of a trustee in bankruptcy, carried out on the basis of a case-to-case appointment by a bankruptcy court, could be assimilated to the functions carried out within the hierarchical organisation systems of public service

(see, *mutatis mutandis*, *Werner v. Poland*, no. 26760/95, § 34, 15 November 2001). Thus, the State cannot be held directly liable for the trustees' alleged shortcomings in managing the bankruptcy estate.

However, the applicant may be understood as raising a complaint under Article 13 of the Convention in conjunction with Article 1 of Protocol No. 1 that there were no effective remedies against the actions and omissions of the trustees.

In this connection, the Court notes that by section 657(2) of the Trade Act the debtor or a creditor may request the bankruptcy court to discharge the trustee if he or she does not perform his or her duties or imperils the creditor's or the debtor's interests through his or her actions. It further notes that by section 84(2) of the Banks Act 1997 the trustee must be discharged by the court if he or she is struck off the list of bank trustees kept by BNB.

The Court must also verify whether these remedies were effective in practice. It notes that the applicant made several requests to the Dobrich Regional Court to remove the trustees. The applicant's first request, made in June 1998, was rejected as inadmissible, but the applicant did not appeal against this decision. The applicant's second request, made in December 1999, was examined on the merits and was found to be unfounded. The Dobrich Regional Court gave detailed reasons for its findings and there is nothing to indicate that its decision was arbitrary. Concerning the applicant's third request, it submitted that it had been declared inadmissible by the Dobrich Regional Court and by the Varna Court of Appeals. However, the Court notes that despite an express request the applicant failed to inform the Court about the further course of these proceedings. It also notes that from the published case-law of the Supreme Court of Cassation it could be established that that court quashed the lower court's decision and remitted the case with express instructions to the Varna Court of Appeals to examine the request on the merits. Finally, the Court notes that the applicant did not submit any information about the proceedings on remittal before the Varna Court of Appeals.

In addition, the Court notes that in October 2000 the applicant signalled BNB about certain alleged wrongdoings of the trustee and that BNB acted on this signal and carried out an inspection. After the inspection BNB rejected the request to strike the trustee out of its register, finding that the applicant's allegations were unfounded. It examined all issues raised by the applicant and gave detailed reasons for its findings.

Finally, it should be noted that in case the applicant took issue with the actions of the trustees, it could commence proceedings against them under section 663(3) of the Trade Act and obtain compensation for the damage, if any, it had sustained from their allegedly faulty actions or omissions (see *Savona v. Italy*, no. 31661/96, Commission decision of 14 January 1998, unreported and *Paparatti and Others v. Italy* (dec.), nos. 37196/97,

37198-200/97, 37202-5/97, 37208/97, 1 June 1999). It does not appear that the applicant has availed itself of this opportunity.

In these circumstances, the Court concludes that there existed sufficient remedies against the actions and the omissions of the trustees. In this connection, it should be stressed that it is not necessary under Article 13 that an applicant obtains a favourable decision on the substance of his claim (see *Salonen v. Finland*, no. 27868/95, Commission decision of 2 July 1997, DR 90, p. 60 and *the Islamic Republic of Iran Shipping Lines v. Turkey* (dec.), no. 40998/98, 10 April 2003).

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

6. The applicant complained that the Dobrich Regional Court's decision of 10 July 2002 approving the contract for the sale of DCB AD as a going concern had been adopted without an opportunity for the applicant to express its opinion about the sale and could not be appealed against. The applicant relied on Article 6 of the Convention and on Article 1 of Protocol No. 1.

The Court notes that the impugned decision concerned the forced sale of all of DCB AD's assets, its striking off the register of companies and the complete extinction of the rights of its shareholders and of those of its creditors to whom the CCB AD had not agreed to pay. It also notes that the applicant held approximately 98% of the bank's shares and was also a creditor of the bank who received no payment. The Court therefore considers that the decision involved a determination of the applicant's "civil rights" within the meaning of Article 6 § 1 of the Convention.

The gist of the applicant's complaint is that it was denied access to a court to protect its interests prior to the sale of the bankrupt bank.

The Court reiterates that according to its established case-law the right of access to a court is not absolute but may be subject to limitations, if they pursue a legitimate aim and the means employed to achieve that aim are proportionate. In particular, such limitations are permissible in situations involving bankruptcy (see *M. v. the United Kingdom*, no. 12040/86, Commission decision of 4 May 1987, DR 52, p. 269, *Sjöö v. Sweden*, no. 34072/96, Commission decision of 14 January 1998, unreported and *Skrobol v. Poland* (dec.), no. 44165/98, 15 January 2002).

The Court notes that the sale of the bankrupt bank as a going concern was effected in order to achieve the prompt and more certain satisfaction of its creditors, who had been waiting for years to receive their dues, and the quick completion of the bankruptcy proceedings. Therefore the need for simplicity and speed in the proceedings leading to the sale of DCB AD was of paramount importance. If the law provided that the bankruptcy court was under an obligation to consult with all shareholders and creditors of DCB AD, that would have led to a substantial slowing down of the proceedings and, consequently, to a further delay in the payment of the creditors' dues

and in the completion of the bankruptcy proceedings. Noting that in delicate economic areas such as the stability of the banking system the Contracting States enjoy a wider margin of appreciation (see, *mutatis mutandis*, *Olczak v. Poland* (dec.), no. 30417/96, § 85, ECHR 2002-X (extracts)), the Court concludes that the impossibility for the applicant to participate in the proceedings leading to the decision to sell DCB AD as a going concern was not disproportionate to the legitimate aims of protecting the rights of its creditors and safeguarding the proper administration of the bank's bankruptcy estate.

As regards the lack of possibility to appeal against the Dobrich Regional Court's decision, the Court reiterates that Article 6 § 1 of the Convention does not guarantee a right of appeal as such or a second level of jurisdiction (see *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, pp. 78-79, § 59).

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

As the decision taken concerned the sale of the bank in which it was a 98% shareholder, the applicant further claimed that the fact that it had not been consulted constituted a breach of Article 1 of Protocol No. 1.

The Court considers, however, that this complaint is in substance identical to that already examined and rejected in the context of Article 6 of the Convention. Consequently, no separate issue arises under Article 1 of Protocol No. 1 (see *Sjöö*, cited above).

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren NIELSEN
Registrar

Christos ROZAKIS
President