

Decision 661/2009 The Official Gazette of June 30th, 2009

DECISION no. 661 of April 30th, 2009 regarding the exception of unconstitutionality of the provisions of art.119 paragraph (3) of the Law no. 31/1990 on the trade companies

Ioan Vida – President

Nicolae Cochinescu – Judge

Aspazia Cojocaru – Judge

Acsinte Gaspar – Judge

Petre Lăzăroiu – Judge

Ion Predescu – Judge

Tudorel Toader – Judge

Puskas Valentin Zoltan – Judge

Augustin Zegrean – Judge

Carmen-Cătălina Gliga – Prosecutor

Patricia Marilena Ionea- Assistant Magistrate

Pending for settlement is the exception of unconstitutionality of the provisions of art. 119 paragraph 3 of the Law no. 31/1990 on the trade companies, exception raised by Constantin Colțatu in the Case no. 24.993/3/2007 of the Bucharest Court – the Sixth Commercial Section.

The parties are not present at the roll call, against which the summons procedure is legally met.

The representative of the Public Ministry draws conclusions of rejecting the exception of unconstitutionality as ungrounded, showing that the procedure referred to in the criticized text of law has a non-contentious nature, because the court decides by conclusion, without compromising on opposing rights.

THE COURT,

Considering the filed documents and writings, holds the following:

By the Conclusion of 8th December, 2008, pronounced in the Case no. 24.993/3/2007, the Bucharest Court – The Sixth Commercial Section notified the Constitutional Court with the exception of unconstitutionality of the provisions of art. 119 paragraph 3 of the Law no. 31/1990 on the trade companies, an exception raised by Constantin Colțatu on the occasion of settling a commercial case.

In sustaining the exception of unconstitutionality his author claims, essentially, that the criticized text of law is against the provisions of art. 21 paragraph 3 and art.24 of the Constitution. In this sense, he shows that, following the amendments made by the Law no. 441/2006, art. 119 paragraph 3 of the Law no. 31/1990 no longer specifies whether the decision by which the court decides on the summoning of the general meeting of shareholders is within a contentious procedure or a non-contentious one. Thus, if the text of law is interpreted in the sense that it is about a contentious procedure, then the settlement of such a petition by conclusion and not by court decision, without indicating whether there are any remedies and which are these, is against the constitutional provisions which guarantee the right to a fair trial and the right to defence.

Bucharest Court – The Sixth Commercial Section considers that the exception of unconstitutionality is ungrounded. In this sense, shows that, even if the criticized text of law does not expressly provides, in practice it is still appreciated that the procedure to authorize the summoning has a non-contentious nature, all the features that characterize this procedure being present, and the petition for authorization does not aim to establish an opposing right towards another person. Because the provisions of art.336 of the Code of Civil Procedure are incidental, the conclusion by which the petition for authorization is

admitted is enforceable and can be appealed against within 15 days, and in case the petition is rejected the general rules are applicable, in the sense that the conclusion will be appealed against. In accordance with the provisions of art.30 paragraph 1 of the Law no. 47/1992, the notification ruling was communicated to the presidents of the two Parliament Chambers, to the Government, as well as to the People's Advocate so that they could formulate their points of view on the exception of unconstitutionality.

The People's Advocate considers that the criticized text of law is constitutional.

The presidents of the two Parliament Chambers and the Government have not communicated the points of view on the exception of unconstitutionality.

THE COURT,

Examining the notification ruling, the point of view of the People's Advocate, the report prepared by the Judge-Rapporteur, the Prosecutor's conclusions, the criticized law provisions, the provisions of the Constitution, as well as the Law no. 47/1992, holds the following:

The Constitutional Court was legally notified and has jurisdiction, according to the provisions of art.146 letter d) of the Constitution, to art. 1 paragraph 2. To art. 2, 3, 10 and 29 of the Law no. 47/1992, to settle the exception of unconstitutionality.

The subject matter of the exception of unconstitutionality are the provisions of art.119 paragraph 3 of the Law no. 31/1990 on the trade companies, as republished in the Official Gazette of Romania, First Part, issue 1.066 of November 17th, 2004, as amended by art. I section 66 of the Law no. 441/2006, as published in the Official Gazette of Romania, First Part, issue 955 of November 28th, 2006, provisions according to which, "In case the board of directors, respectively the management, does not summon the general meeting, the court from the company's headquarters, with the citation of the board of directors, respectively the management, will be able to authorize the summoning of the general meeting by the shareholders that formulated the petition. By the same conclusion the court approves the agenda, establishes the date of reference provided by art.123 paragraph 2, the date of holding the general meeting and, amongst the shareholders, the person who will chair it."

The author of the exception considers that the criticized texts of law are against the constitutional provisions of art. 21 paragraph 3 regarding the free access to justice and art.24 regarding the right to defence.

Examining the exception of unconstitutionality, the Court holds that the author of the exception asks the constitutional contentious court to decide if the procedure referred to in art. 119 paragraph 3 of the Law no. 31/1990 is non-contentious or contentious and, in case that it holds the fact it is about a contentious procedure, to establish that the criticized text of law is unconstitutional, because it does not provides the applicable remedies.

Compared to these, the Court holds that the aspects invoked by the author of the exception depend, in reality, by the way of interpreting the criticized text of law. Indeed, following the amendments to this text, the express reference that it was making to the provisions of art.331 – 339 of the Code of Civil Procedure was removed, thus creating an uncertainty regarding the applicable rules of procedure, respectively those specific to a contentious or non-contentious procedure.

The Court holds that the amendment of a text of law in the sense of removing the express reference to the rules of a special procedure, respectively the non-contentious one, can only have the significance of defending the common law, respectively the contentious procedure. Indeed, finding that, in practice, the shareholders who initiate the procedure provided by art.119 paragraph 3 of the Law no. 31/1990 are often in antagonistic positions with the company's administrators who are against the summoning

of the general meeting, the legislator considered that it is more appropriate to apply the rules of contentious procedure.

From the fact that the legal provisions regarding the non-contentious procedure are no longer applicable results that the decision pronounced in the dispute having as subject matter the petition for authorization can be appealed against, according to the rules of the common law contained by art.282 of the Code of Civil Procedure.

In view of all these, the Court finds that the claims of the author of the exception regarding the unconstitutionality of the criticized text of law are ungrounded.

For the above reasons, in accordance with art.146 letter d) and art.147 paragraph 4 of the Constitution, art.1-3, art.11 paragraph 1 letter A.d) and art.29 of the Law no. 47/1192,

THE CONSTITUTIONAL COURT,

In the name of law

DECIDES:

Rejects the exception of unconstitutionality of the provisions of art.119 paragraph 3 of the Law no. 31/1990 on the trade companies, an exception raised by Constantin Colțatu in the Case no. 24.993/3/2007 of the Bucharest Court – the Sixth Commercial Section.

Final and generally mandatory.

Pronounced in public hearing on April 30th, 2009.

PRESIDENT OF THE CONSTITUTIONAL COURT,

Univ. Prof. PhD IOAN VIDA

Assitant Magistrate,

Patricia Marilena Ionea

Published in the Official Gazette issue 451 of June 30th, 2009