

An arbitrator who is called upon to decide a dispute between the parties to a contract under a clause inserted in that contract is not to be considered as a "court or tribunal of a member state" within the meaning of Article 177 of the Treaty where the contracting parties are under no obligation , in law or in fact , to refer their disputes to arbitration and where the public authorities in the Member State concerned are not involved in the decision to opt for arbitration and are not called upon to intervene automatically in the proceedings before the arbitrator.

If in the course of arbitration resorted to by agreement between the parties questions of community law are raised which the ordinary courts may be called upon to examine either in the context of their collaboration with arbitration tribunals or in the course of a review of an arbitration award , it is for those courts to ascertain whether it is necessary for them to make a reference to the court of justice under article 177 of the treaty in order to obtain the interpretation or assessment of the validity of provisions of community law which they may need to apply in exercising such functions.

Judgment of the Court

23 March 1982

In Case 102/81

REFERENCE to the Court under Article 177 of the EEC Treaty by Walther Richter, President of the Hanseatischen Oberlandesgericht (Hanseatic Higher Regional Court) Bremen, acting as arbitrator, for a preliminary ruling in the arbitration before him between

Nordsee Deutsche Hochseefischerei GmbH , Bremerhaven, Federal Republic of Germany,

and

1 . Reederei Mond Hochseefischerei Nordstern AG & Co. KG, Bremerhaven,

2. Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co . KG , Bremerhaven,

Grounds

1. By a decision of 22 April 1981 which was received by the Court on 27 April, the arbitrator in a dispute between three undertakings, all incorporated under German law and established in Bremerhaven, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning the interpretation of Article 177 of the Treaty and the interpretation of Regulation No 17/64 of the Council of 5 February 1964 (Official Journal, English Special Edition 1963-1964, p. 103), Regulation (EEC) No 729/70 of the Council of 21 April 1970 (Official Journal, English Special Edition 1970 (i). P. 218) and Regulation (EEC) No 2722/72 of the Council of 19 December 1972 (Official Journal, English Special Edition 1972 (28 to 30 December) p. 31), all concerning aid from the guidance section of the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as "the Fund").

2. The original dispute related to performance of a contract entered into on 27 June 1973 by a number of German shipbuilders. The contract concerned a joint project for building thirteen factory-ships for fishing and its purpose was to apportion equally among the contracting parties all financial aid received by them from the Fund, so that one-thirteenth of the total amount of aid granted would be allotted for each ship to be built. By mutual agreement the parties to the contract had previously submitted applications to the Fund for aid for the construction of nine ships.

3. Of those nine applications the Commission finally accepted only six, the others being either withdrawn or rejected. One of the undertakings participating in the building programme sought payment from two of the other undertakings of the amounts to which it was entitled under the contract of 27 June 1973.

4. A dispute arose on the subject and was submitted for arbitration, as the contract of 1973 contained a clause stating that in the event of disagreement between the parties on any question arising from the contract a final decision was to be given by an arbitrator, all recourse to the ordinary courts being excluded. In accordance with that clause the arbitrator was appointed by the Chamber of Commerce of Bremen after it had become apparent that the parties to the dispute could not agree on the appointment of an arbitrator.

5. During the arbitration hearing the respondents claimed that the 1973 contract was void in so far as it arranged for aid from the Fund to go to the building of ships in respect of

which the Commission had not granted such aid. They took the view that aid from the Fund was linked to completion of a specific project and could not therefore validly be transferred by the recipient to a different project.

6. The arbitrator was of the opinion that under German law the validity of a contract to share aid from the Fund depended on whether such sharing amounted to an irregularity under the relevant Community regulations. Considering that a decision on the point was necessary in order to allow him to make his award he referred the matter to the Court for a preliminary ruling.

Applicability of Article 177

7. Since the arbitration tribunal which referred the matter to the Court for a preliminary ruling was established pursuant to a contract between private individuals the question arises whether it may be considered as a court or tribunal of one of the Member States within the meaning of Article 177 of the Treaty.

8. The first question put by the arbitrator concerns that problem. It is worded as follows:

“Is a German arbitration court, which must decide not according to equity but according to law, and whose decision has the same effects as regards the parties as a definitive judgment of a court of law (Article 1040 of the Zivilprozessordnung (rules of civil procedure)) authorized to make a reference to the Court of Justice of the European Communities for a preliminary ruling pursuant to the second paragraph of Article 177 of the EEC Treaty?”

9. It must be noted that, as the question indicates, the jurisdiction of the Court to rule on questions referred to it depends on the nature of the arbitration in question.

10. It is true, as the arbitrator noted in his question, that there are certain similarities between the activities of the arbitration tribunal in question and those of an ordinary court or tribunal inasmuch as the arbitration is provided for within the framework of the law, the arbitrator must decide according to law and his award has, as between the parties, the force of *res judicata*, and may be enforceable if leave to issue execution is obtained. However, those characteristics are not sufficient to give the arbitrator the status of a “court or tribunal of a member state” within the meaning of Article 177 of the Treaty .

11. The first important point to note is that when the contract was entered into in 1973 the parties were free to leave their disputes to be resolved by the ordinary courts or to opt for arbitration by inserting a clause to that effect in the contract. From the facts of the case it appears that the parties were under no obligation, whether in law or in fact, to refer their disputes to arbitration.

12. The second point to be noted is that the German public authorities are not involved in the decision to opt for arbitration nor are they called upon to intervene automatically in the proceedings before the arbitrator. The Federal Republic of Germany, as a Member State of the Community responsible for the performance of obligations arising from Community law within its territory pursuant to Article 5 and Articles 169 to 171 of the Treaty, has not entrusted or left to private individuals the duty of ensuring that such obligations are complied with in the sphere in question in this case.

13. It follows from these considerations that the link between the arbitration procedure in this instance and the organization of legal remedies through the courts in the Member State in question is not sufficiently close for the arbitrator to be considered as a "court or tribunal of a member state" within the meaning of Article 177.

14. As the Court has confirmed in its judgment of 6 October 1981 *Broekmeulen*, Case 246/80 (1981) ECR 2311), Community Law must be observed in its entirety throughout the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it. In that context attention must be drawn to the fact that if questions of Community Law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award – which may be more or less extensive depending on the circumstances – and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation.

15. It is for those national courts and tribunals to ascertain whether it is necessary for them to make a reference to the Court under Article 177 of the Treaty in order to obtain the interpretation or assessment of the validity of provisions of community law which they may need to apply when exercising such auxiliary or supervisory functions.

16. It follows that in this instance the court has no jurisdiction to give a ruling.

Costs

17. The Costs incurred by the Kingdom of Denmark, the Italian Republic, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main dispute are concerned, in the nature of a step in the arbitration proceedings, the decision as to costs is a matter for the arbitrator .

On those grounds ,

THE COURT ,

In answer to the questions referred to it by the arbitrator in the dispute between Nordsee Deutsche Hochseefischerei GmbH, on the one hand, and Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG, on the other hand, by a decision of 22 April 1981, hereby rules:

The court has no jurisdiction to give a ruling on the questions referred to it by the arbitrator.

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