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Arbitrators: judges or not? An EC approach…

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The mechanism for referring questions regarding a preliminary ruling allows the national judge to ask the ECJ for a clarification on a point of EC law. Art 234 EC Treaty, governing preliminary rulings before the ECJ, applies to national courts or tribunals ruling as courts of final appeal and it does not open up directly the possibility for arbitral tribunals to address such preliminary questions to the ECJ. The Court of Justice confirmed that in *Nordsee V. Reederei Mond* [Case 102/81, 23 March 1982–]

The ECJ elucidated in *Nordsee* that an arbitral tribunal constituted pursuant to an arbitration agreement is purely private in nature because its authority derived only from party autonomy and therefore it is not a "court or tribunal of a Member State" within the meaning of Art 234 EC Treaty. In this case, the Court applied the criteria laid down in the *Vaasen Göbbels* [Case 61/65, 30 June 1966] decision whether a Member State had entrusted or left to a tribunal the duty of ensuring compliance with the State's obligations under Community law. In order for an organ to be considered as a court or tribunal and be in the position to refer preliminary questions to the ECJ, it has to fulfil five criteria: the organ in question must be provided for by law, must be permanent, must respect due process requirements, must apply rules of law and those under its jurisdiction must be bound to go before it. Moreover, the degree of governmental co-operation with, and supervision of, the organ in question is ultimately decisive in recognizing it as a tribunal under Art 234 EC Treaty.

In general, arbitration fulfils these criteria. Arbitration is provided for by law. Moreover, due process is fully respected. Additionally, rules of law are applied. Therefore the first, third and fourth criteria are satisfied. Also, the criterion of permanence seems to be satisfied in light of the permanence of arbitral institutions as a standard means for resolving international disputes. It is, in fact, the freedom to choose to have recourse to arbitration and to constitute the arbitral tribunal that seem to be determining factors behind the ECJ's refusal to classify an arbitral tribunal as a "court or tribunal" within the meaning advocated by the European Community. The ECJ explained in *Danfoss* [Case 109/88, 17 October 1989], by distinguishing voluntary arbitration from mandatory arbitration, that, according to EC case law, voluntary arbitration is not considered equivalent to a "court or tribunal". Therefore, since the parties were free to have their dispute settled either by a court of law or by arbitration, the objection seems to lie in arbitration lacking a mandatory nature, which is the fifth criterion. This objection seems to be doubtful considering that the arbitration agreement is mandatory once the parties have submitted to a valid agreement in terms. Furthermore, the ECJ in *Nordsee* concluded that an arbitral tribunal is not a "court or tribunal", because there was no involvement of the State in the decision to refer the matter to arbitration or in the arbitral proceedings.

However, the *Nordsee* case has further implications. The test applied by the Court also demonstrated that parties to a commercial arbitration cannot benefit from the mechanisms of co-operation between national courts and Community institutions. At the same time, it seems that arbitrators are not bound by legislative provisions or case law that imposes duties on the national courts, notably in the area of binding effect of decisions by the Commission. *Nordsee* is consistent with the private nature of commercial arbitration. However, the prevention for arbitrators to make references to the Court of Justice under Art 234 EC Treaty raises the risk of endangering the uniform application of the Community law within the European Community.

Nevertheless, the *Nordsee* ruling did not completely exclude the possibility of a Community Law question which has

arisen in an arbitration from reaching the Court of Justice, because this is possible through the intervention of national courts. This may happen when an arbitral award is being reviewed by a national court in an appeal, a request to be set aside or finally at the recognition and enforcement phase, leaving to national courts the uniform and effective application of EC Competition Law (*Commune d'Almelo,* Case 393/92, 27 April 1994).

As a conclusion it should be noted that while national laws tend to strive to minimize the intervention of courts in arbitral proceedings, the ECJ in *Nordsee* further reinforced their intervention. This action does not establish arbitration as an independent alternative to litigation, but it widens the need for the court's assistance. Even though the Court demands the respect of the EC law by tribunals and courts, it precludes at the same time arbitral tribunals from requesting a preliminary ruling, which could ensure the homogenous, correct and complete application of EC law by arbitral tribunals. Additionally, this attitude towards arbitration becomes less clear by virtue of the fact that the Commission has come to use arbitration clauses as a mechanism for enforcing third party rights derived from remedies related in the aftermath of its original commitment decisions, as in the case of merger-related remedies. Nowadays, the European Commission uses arbitration clauses as a mechanism for the judicial monitoring of the merging parties' compliance with the remedies they have undertaken in order to obtain clearance of their proposed merger from the Commission. Conclusively, on the one hand, the European Commission shows signs of distrust towards arbitration, while it uses arbitration as an ideal tool for the judicial monitoring in the context of EC merger control. It sounds confusing…

Don't you think so?

This entry was posted on Monday, March 9th, 2009 at 10:13 am and is filed under Arbitrators, Domestic Courts, Europe
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