1. The expression 'court or tribunal' in Article 177 of the EEC Treaty may in certain circumstances include bodies other than ordinary courts of law.
2. Cf. para. 1, summary in Case 6/64, Rec. 1964, p. 1145.
3. Rules governing sickness insurance for workers and their survivors, laid down and operated by an institution established under private law, since they are 'enforceable provisions' fall within the term 'legislation' within the meaning of Articles 1 (b) and 4 of Regulation No 3 when the said provisions supplement or are a substitute for laws and regulations establishing a general or special social security scheme.
4. In particular a special scheme within the meaning of Article 2 (2) of Regulation No 3 of the Council of the EEC exists when a specific group of workers is compulsorily made subject to a special type of insurance by virtue of public law. It is for the national court to examine whether the conditions required for the existence of a special scheme are met. Regulations Nos 3 and 4 are applicable to a special scheme in its entirety, including any provisions which it may contain concerning the voluntary and optional affiliation of former insured persons and their survivors.
5. The heading 'Netherlands' in Annex B to Regulation No 3 of the Council of the EEC covers both the general and the special social security schemes providing for insurance against sickness.
6. One of the intentions of Articles 48 to 51 of the EEC Treaty and of Regulation No 3 of the Council of the EEC is to prevent territorial provisions from being applied against workers or their survivors in matters of social security. Accordingly under Regulation No 3 an institution managing a sickness insurance scheme may not refuse to give the benefit of affiliation to the scheme, even an optional scheme, to a worker entitled to a pension by virtue of the legislation of a Member State or to his survivor, if the reason for so refusing is that the person so entitled resides permanently in a Member State other than the one in which the said institution is situated.
7. Article 22 of Regulation No 3 also applies to benefits given in the form of reimbursement of expenses for medical treatment, medicines and nursing.

In Case 61/65

Reference to the Court under Article 177 of the EEC Treaty by the Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf, Heerlen (Netherlands), for a preliminary ruling in the action pending before the court between

MRS G. VAASSEN (NÉE GÖBBELS) (A WIDOW), resident at Bardenberg (Germany),

and

MANAGEMENT OF THE BEAMBTENFONDS VOOR HET MIJNBEDRIJF, Heerlen (Netherlands),

on the interpretation of Regulation No 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.),

THE COURT

composed of: Ch. L. Hammes, President, L. Delvaux and W. Strauß (Rapporteur), Presidents of Chambers, A. M. Donner, A. Trabucchi, R. Lecourt and R. Monaco, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts in the main action

It appears from the decision making the reference to the Court, adopted by the Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf (Arbitration Tribunal of the Fund for non-manual workers employed in the mining industry, hereinafter called 'the Scheidsgerecht'), and from the file forwarded by this tribunal, that the following facts form the basis of the present dispute:

— The applicant in the main action, aged 70, is the widow of a Dutchman employed in mining. She is in receipt of a pension from the pension fund of the social security institution known as the 'Beambtenfonds voor het Mijnbedrijf' (hereinafter called 'the BFM'). The BFM is the defendant in the case pending before the Scheidsgerecht. While she was resident in the Netherlands, and because of her entitlement to a pension, the BFM registered the applicant as a member of its sickness fund for pensioners.

— On 31 August 1963 she went to live in Germany. In accordance with information furnished to her by the defendant, she asked the latter to remove her name from the list of members of the abovementioned sickness fund. She received the reply that her membership of the sickness fund had terminated since the abovementioned date, because pensioners resident abroad could not be members of the fund.

— Subsequently and as a result of other information, the applicant asked for her name to be re-entered on the list of members of the fund. The defendant rejected this request, relying on the former Article 18 (b) of the Rules of the BFM (hereinafter called 'the RBFM'), which corresponds to the present Article 18 (1).

— The applicant appealed to the Scheidsgerecht against this decision.

II — Questions asked by the Scheidsgerecht and the reasons for its decision to refer the case

In its decision dated 10 December 1965 the Scheidsgerecht requests the Court to rule on the following questions:

'(1) Is the scheme laid down in Chapter II (of the RBFM) to be regarded as legislation, as defined in Article 1 (b) of Regulation No 3 and mentioned in Article 4 thereof? Furthermore can the said scheme governing sickness expenses be classified as 'sickness insurance for mine workers (benefits in cash and in kind in the event of sickness and maternity)' listed at (i) under the heading 'Netherlands' in Annex B to Regulation No 3, to which Article 3 of the said Regulation refers? Thus does Regulation No 3 (and also Regulation No 4) apply to non-manual workers employed in the Netherlands mining industry to whom

the said scheme governing sickness expenses is applicable?

(2) If this question is answered in the affirmative, can it then be accepted that in this case *the applicant is entitled to the benefits* referred to in Article 22 of Regulation No 3 and specified at the end of Article 22 (2)? Can this be accepted even though under Article 18 (b) (1) [of the RBFM], according to the wording which it had at the relevant time, the only right conferred is the right to be admitted, subject to certain stated conditions, to insurance providing reimbursement out of the sickness fund for the cost of medical treatment, the provision of medicines and nursing?'

The abovementioned decision of the Scheidsgerecht is based chiefly on the following considerations:

— By providing that the Scheidsgerecht shall give judgment 'in accordance with the provisions of these rules from which no departure may be made', Article 89 (3) of the RBFM seeks to prevent the Scheidsgerecht from basing its decisions exclusively on considerations of fairness. On the other hand, the said Article cannot be interpreted as prohibiting the Scheidsgerecht from applying other legal provisions, such as Regulations Nos 3 and 4.

— In the present case the parties hold different views on the question whether the latter Regulations apply to the applicant's situation. The Court has therefore jurisdiction to give a preliminary ruling on the questions thus raised.

— Whilst the Scheidsgerecht cannot be regarded as a court of law under Netherlands law, it is not excluded that it may be regarded as a 'court or tribunal' under Article 177 of the EEC Treaty; this question is also one for the Court of Justice.

III — Selected instruments governing the procedure of the Scheidsgerecht

The following are the chief provisions governing the procedure of the Scheidsgerecht:

The RBFM

'Article 89

1. Any person concerned may appeal to an Arbitration Tribunal to be appointed by the Minister responsible for the mining industry against decisions of the Board concerning the rights of members and former members or their surviving relations.
2. ...
3. The Arbitration Tribunal shall, observing the provisions of these rules from which no departure may be made, give judgments from which no appeal shall lie. Where these rules confer on the Board powers to be exercised at its discretion, decisions made thereunder shall not fall within the jurisdiction of the Arbitration Tribunal.

Article 90

1. Every appeal shall be lodged in writing within two months after the date of notification of the decision against which it is brought.
2. The notice of appeal shall contain the date of notification mentioned in paragraph 1, a statement of the objections to the decision and a clear indication of the relief sought.
3. The notice of appeal shall be signed by the person lodging it, or by an authorized representative on his behalf.

Article 91

1. The lodging of an appeal shall not stay the effects of the decision against which it is brought.
2. The decision on the appeal shall, in so far as it differs from the decision against which it was brought, replace it.

Article 92

1. The Arbitration Tribunal shall consist of three members and three deputy members.
2. The Minister responsible for the mining industry shall appoint one of the members as chairman.
3. The Arbitration Tribunal shall decide which member shall replace the chairman in

the event of his being absent or unable to act.
4. The Arbitration Tribunal may appoint one of its members as secretary.
5. Deputy members shall carry out the duties of a member whenever called upon so to do.

Article 94

1. The Minister responsible for the mining industry shall, after hearing the Board [of the BFM], prescribe rules of procedure for the Arbitration Tribunal .....

Article 95

1. In giving each judgment the Arbitration Tribunal shall state whether and to what extent the costs of that judgment shall be borne by the applicant.
2. The remaining costs of the Arbitration Tribunal shall be borne by the Board of the [BFM].

Article 96

1. The Board of Management of the Fund shall, subject to the provisions of the following paragraphs, be empowered to amend these rules.
2. – 3. ....
4. The resolution shall require the approval of the general meeting and of the Minister for the mining industry.

Article 108

These rules together with the transitional provisions included in the same shall require the approval of the Minister responsible for the mining industry.'

Rules of Procedure of the Arbitration Tribunal

('Reglement voor het Scheidsgerecht')

'Article 1

1. The date and place of sittings of the Arbitration Tribunal shall be determined by the chairman, and shall be notified by him or on his behalf to the members or, when necessary, to the deputy members.
2. The Arbitration Tribunal shall lay down a rota for the replacement of members by deputy members.
3. Members and deputy members of the Arbitration Tribunal shall not take part in the consideration of a case which affects them personally, or which affect their spouses or their relatives by blood or by marriage to the third degree.

Articles 2 and 3

(These provisions, for the main part, empower the chairman to declare appeals inadmissible when certain requirements are not met. They also provide that the parties concerned may further appeal against such a decision to the Arbitration Tribunal.)

Article 5

1. Where an appeal is not dismissed by a decision of the chairman, or where such a decision is over-ruled pursuant to a further appeal against it which is allowed, the secretary shall send a copy of the notice of appeal to the Board of the BFM as soon as possible.
2. Within 14 days after receipt of this notice, the Board shall send to the Arbitration Tribunal a copy of its decision against which the appeal has been lodged, together with the originals or copies of all documents in its possession relating to the case.
3. Within the same period the Board may lodge with the Arbitration Tribunal the objections which it intends to present against the appeal. A copy of the document containing these objections shall be sent by the secretary to the applicant.
4. The Arbitration Tribunal shall afford the applicant or his authorized representative the opportunity of inspecting or taking copies, if desired, of the documents mentioned in paragraph 2 above.

Article 6

1. Before giving judgment on an appeal, the Arbitration Tribunal shall hear the submissions of the parties at an oral hearing in cases in which it is requested to do so.
...
...

Article 8

1. Where the Arbitration Tribunal considers it desirable that the parties should appear in person before it, the secretary shall summon them to attend.
2. The Arbitration Tribunal may, through its secretary, summon witnesses and experts to be heard before it. The Arbitration Tribunal may require experts to undertake an investigation.
3. Parties shall be permitted to bring witnesses and experts to a hearing.

Article 10

The Arbitration Tribunal shall take its decisions when sitting as such.
2. These decisions shall be taken by a majority of votes.
3. The decisions shall include a statement of the reasons on which they are based, and shall be signed by the chairman and the secretary.
...

Article 11

The Arbitration Tribunal shall be empowered to lay down further rules of procedure concerning any matters not covered by the present rules.'

IV — Procedure

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the defendant in the main action, the Government of the Kingdom of the Netherlands, and the Commission of the EEC.
The oral hearing took place on 3 May 1966. The Advocate-General delivered his opinion on 18 May 1966.

V — Summary of the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

1. *Observations of the defendant in the main action*

A — The right of the Scheidsgerecht to refer the case to the Court

The *defendant* in the main action thinks that the Scheidsgerecht is not a court or tribunal within the meaning of Article 177 of the EEC Treaty. It points out first of all that the Scheidsgerecht is not regarded as a court under Dutch law, whilst admitting, however, that this fact is not of itself decisive.
The defendant also takes the view that the decisions of the Scheidsgerecht are not arbitration decisions within the meaning of the Netherlands Code of Civil Procedure, but that they are binding opinions. Such an opinion 'must be considered as the contractual sequel to an agreement between parties which must be determined by a third party, in this case the Arbitration Tribunal. From the point of view of legal form this recommendation is not the decision of a court; in reality it must certainly be considered as if it were'.
It is important to note that under Article 170 of the Constitution, the parties which can come before the Scheidsgerecht retain the right to submit the disputes concerned to the civil court. Therefore 'the binding opinion always has a provisional character in the sense that there is always the possibility that the judgment of an ordinary civil court will be necessary to ensure that it is complied with ... According to an unwavering line of previous decisions of the Hoge Raad (Supreme Court of the Netherlands), the civil court must then rule on the question whether it is reasonable to take the view that the opposing party must respect the binding opinion either because of the contents of the opinion itself, or because of the way in which it was delivered. Thus the ordinary court exercises a control over the binding opinion even though the control is somewhat remote'. It is for the ordinary court to satisfy itself that 'the arbitrators have not gone beyond the bounds of the area in which they are required to exercise their jurisdiction upon being given their

task either expressly of by implication by the parties'.

Contrary to the opinion of the Scheidsgerecht, the defendant in the main action thinks that, considering the wording of Article 89 of the RBFM, this tribunal has no jurisdiction to apply Community law. It is also argued on the basis of the considerations set out above that the parties may, where appropriate, submit this question to the civil court.

B — The first question put by the Scheidsgerecht

(a) The *defendant* in the main action thinks that Chapter II of the RBFM, which concerns the sickness fund managed by the BFM, cannot possibly be treated as 'legislation' within the meaning of Regulation No 3. As regards this it argues in particular as follows:

— These rules were drawn up by the Board of Management of the BFM, and then approved by the general meeting and by the Minister responsible.

— It starts with the idea that all persons employed in the mining industry are compulsorily affiliated to the BFM's sickness fund. This obligation arises under Article 33 of a regulation of 8 September 1952 made by the Mijnindustrieraad (Council of the Mining Industry). The fact that the latter is body established under public law cannot, however, be a decisive factor.

— Although affiliation to the sickness fund in question is compulsory for non-manual employees, this is not, however, the case for pensioners.

— No argument can be based on the fact that the rules relating to expenses incurred through sickness by *mineworkers* ('Mijnwerkers'; cf. infra (b)) replace the sickness insurance scheme provided by the law. Normally these workers, as also those *non-manual workers employed in the mining industry* ('mijnbeambten', cf. infra (b)) whose income is not above a certain ceiling, would be included in the general compulsory insurance scheme. However, Article 20 of the Law on Sickness has excluded them from this because of their affiliation to the scheme at issue in the proceedings. But *the other non-manual mining employees*—the group to which the husband of the *applicant* in the main action belonged—are not compulsorily affiliated to the insurance scheme provided by the law even if not insured with the BFM. Therefore so far as they are concerned it cannot be claimed that the RBFM replaces the ordinary scheme.

(b) The concept of 'mineworkers' ('mijnwerkers'), contained in Annex B to Regulation No 3 under the heading 'Netherlands' in subparagraph (i), does not include non-manual workers ('beambten'). This is confirmed by the fact that Supplementary Agreement No 2 relating to the Convention between Germany and the Netherlands of 29 March 1951 concerning social security deals with these two groups separately.

Another argument which lends weight to this reasoning is to be found in the fact that a representative of the mineworkers took part in the drafting of Regulation No 3 but no representative of the non-manual workers did so.

C — The second question put by the Scheidsgerecht

The *defendant* in the main action thinks that if the Court were to give an affirmative answer to the first question it should nevertheless reply to the second in the negative on the grounds that Article 22 (2) does not apply to the present case. As regards this the defendant puts forward in particular the following arguments:

— This Article is only concerned with 'benefits in kind'. But the sickness fund of the BFM does not provide such benefits. On the contrary the beneficiaries only receive benefits in money intended as a reimbursement of the expenses which they have incurred themselves.

— Affiliation to the sickness fund for pensioners of the BFM only arises through an agreement between the management of the BFM and the person insured; it is thus optional and takes place under private law.

— This affiliation is independent of the right to a pension paid by the BFM. For even a retired non-manual employee of

the mines not entitled to a pension can insure himself with the said fund. Yet Article 22 (2) of Regulation No 3 clearly states that the right to benefits in kind is tied to the right to a pension.

— Regulation No 3 governs the social security of migrant workers and members of their family. These categories do not include a deceased worker's widow who has never been a worker herself and who, after having obtained the right to a widow's pension, transfers her permanent residence to another Member State without the intention of working there. If it were otherwise such a person might take up residence in the Member State where she received the best treatment.

— Finally and generally speaking, it is never possible, at least in the Netherlands, to take out private insurance against sickness expenses such that the benefits do not cease to be payable when the person concerned takes up residence abroad.

2. *Observations of the Government of the Kingdom of the Netherlands*

The Government of the Kingdom of the Netherlands only defines its position as regards the question whether the Scheidsgerecht has the capacity to make a reference to the Court.

Whilst of the opinion that the present case does not require the Court to issue a ruling on the capacity in this respect of arbitration tribunals in general, the said government takes the view that the Scheidsgerecht is a court or tribunal within the meaning of Article 177. Its thinking is based mainly on the following considerations:

— In accordance with the provisions in force in the Netherlands, the RBFM—by which the Scheidsgerecht was brought into being—had to be approved by the Minister of Social Affairs and Public Health and also by the Minister for Economic Affairs. The latter approval was required under Article 39 of the Invaliditeitswet (Invalidity Law). The compulsory insurance provided for by the said Article need not apply to persons whose sickness and old age pensions respectively are governed by another scheme falling under public law. This condition is fulfilled when the competent authorities declare that the other scheme, the purpose of which must be to replace the general scheme, satisfies the legal requirements and offers sufficient guarantees for the payment of pensions. It is important to note that the persons to which the RBFM apply must be covered by the BFM.

Because of all the above it is considered that the RBFM constitute a scheme falling under public law. Therefore 'the functions of the Scheidsgerecht are, to a large extent, comparable to those of an ordinary administrative court'.

— It is true that the Scheidsgerecht is not a board of arbitrators within the meaning of Article 620 of the Netherlands Code of Civil Procedure. It is also true that therefore the Scheidsgerecht's decisions cannot include an operative clause requiring their enforcement, and that in order to secure their enforcement the person concerned must go through the normal procedure before a civil court. But the latter does no more than exercise a 'secondary' control. Furthermore the points just mentioned are of little importance in practice. The reality is that whenever the Scheidsgerecht's decisions say that the RBFM have not been correctly applied the said decisions are always addressed to the BFM which simply complies.

— Finally the Scheidsgerecht is bound by the law as laid down. Thus it may not take decisions simply on the basis of what it thinks right.

3. *Observations of the Commission of the EEC*

A — The right of the Scheidsgerecht to make a reference to the Court

The Commission of the EEC is of the opinion that this right must be accepted because the Scheidsgerecht 'possesses, as an institution, in its functions and its purpose, the normal characteristics of bodies excercising judicial functions and more particularly of courts having jurisdiction over social security matters':

— The Scheidsgerecht is independent of the BFM, its judicial characteristics being clearly separated from the administrative functions of the latter. It is a body of a permanent nature, for the rules under which it was created could not be made nor can they be modified without the approval of the Minister responsible who, moreover, appoints the members of the Scheidsgerecht and lays down its rules of procedure.
— 'The fact that it would not appear necessary for the members of the Scheidsgerecht to be judges by profession or even members of the legal profession—although at least in this case the decision was taken by professional lawyers—is of no importance'; this is a state of affairs which often occurs in social security matters.
— The rules of procedure applied by the Scheidsgerecht 'partake indisputably of the nature of court proceedings ... and the Scheidsgerecht's decisions take the form of judgments'.
— The Scheidsgerecht takes its decisions according to rules of law and not just according to broad rules of fair play.
— 'It in fact constitutes the Tribunal before which all contentious matters relating to insurance against costs incurred through sickness by non-manual employees in the mines must be heard'. In reality all such are automatically affiliated to the sickness fund as also to the pension fund, both of which are managed by the BFM.
— As will be explained below (B), the RBFM replaces the general legislation and must therefore be considered as legislation on social security within the meaning of Regulations Nos 3 and 4.
The Scheidsgerecht has been set up as a body of first and last instance for deciding disputes concerning the application of this special legislation and in fact it constitutes the only judge of these matters. Accordingly it thus replaces, in fact if not in law, the bodies having general jurisdiction which normally hear disputes in this area. If the request of the Scheidsgerecht were not admissible, then the Court would be practically unable to make sure that the Community legislation on social security is correctly interpreted when it is applied by the BFM to the non-manual employees in the mines in the Netherlands. It would be unable to do so not only as regards the sickness fund, but also as regards the other insurance scheme managed by the BFM, namely the pension fund.
— Taking into account all the matters set out above, the nature of the Scheidsgerecht's decisions is not decisive.
'Furthermore, it seems from information gathered, that in fact the decisions of the Scheidsgerecht are never followed by contentious proceedings before another court or tribunal'.

B — The first question put by the Scheidsgerecht

(a) *Do the rules at issue constitute 'legislation' as defined in Regulation No 3?*

According to the Commission this question asks the Court to examine first whether the concept of 'enforceable provisions' found in Article 1 (b) of Regulation No 3 'covers sets of rules such as those at issue, that is to say, rules setting up and governing a special sickness insurance scheme for persons in a particular sector, the rules being drawn up and the scheme managed by a body established under private law, which is not created by the state, but which is subject to the supervision of the state'.

1. Using supporting documents, the Commission says that the authors of the 'European Convention on Social Security', which was the forerunner of Regulation No 3, were quickly led to include 'enforceable provisions' alongside laws and regulations. Clearly the reason for including them was to take account of the distinctive aspects of the legal systems in the Member States. These seem to have in common the fact that they understand by the concept here considered 'regulations made by legal persons responsible for the management of the various branches of social security'. The Commission cites examples to show that 'enforceable provisions are the more important, the more the administration of social security is decentralized. They are

also the more important where the law or regulation grants the managing bodies, on which the persons insured are often represented, certain powers whereby the said bodies may adopt the state's social security provisions or add to them'.

2. The fact that the BFM is a private body should not influence the outcome of the question. For Article 1 (e) of Regulation No 3 defining the term 'institution' says that this shall mean 'the agency or authority responsible for enforcing all or part of the legislation'. This also corresponds to the internal law of the Member States 'where many private agencies are responsible for managing a branch of the social security legislation, and are also often responsible for adapting and working out the detailed rules appertaining to this branch'. The Commission gives examples.
3. On the other hand the question whether the provisions at issue supplement the law or replace it is decisive. The facts are that the RBFM replaces the provisions of the law on sickness insurance (benefits in kind) as also appears from the observations made by the Government of the Netherlands. In considering these ideas it is important to note that the RBFM may only be altered with the authorization of the public authorities and that in order to take the existence of this special body of rules into account it was necessary to make changes to the general rules. Another point is that under Article 2 (2) of Regulation No 3, the regulation applies to 'all general *and* special social security schemes'.
   These considerations receive further support from the fact that the Government of the Netherlands has considered the RBFM to be Netherlands legislation within the meaning of the Convention on Social Security between the Netherlands and the Federal Republic of Germany, as appears from certain supplementary texts to this Convention. A further consideration is that if one accepted the argument that the RBFM do not constitute 'legislation' within the meaning of Regulation No 3, this would throw doubt on the position of schemes managed according to similar rules by the Algemeen Mijnwerkersfonds, a Dutch institution which in fact applies Regulation No 3.
4. Since the RBFM are subject in their entirety to the approval of the public authorities, 'all the provisions therein constitute enforceable provisions within the meaning of Regulation No 3, including those which are more favourable for the persons concerned than the provisions of the general social security scheme'. Thus for this reason alone it is necessary to dismiss the objection that the RBFM only replace the general scheme in so far as the worker would be compulsorily affiliated to the latter if he were not affiliated to the BFM.
   'But there remain other reasons for dismissing this objection. It is unreasonable to accept the proposition that only those rules of the BFM relating to compulsory affiliation are enforceable provisions whereas those which are concerned with optional affiliation are not unless the same distinction can be applied to the legislation which the (RBFM) replace. Yet it does not seem possible to exclude national legislation from the field covered by Regulation No 3 on the ground that affiliation to a scheme may only be optional'. Rather, it is the contrary which results both from Article 9 of Regulation No 3 and from the judgment given by the Court in Case 75/63 (*Hoekstra, née Unger*, Rec. 1964, p. 366).
   'The general legislation may include a compulsory part and an optional part. The decisive point is not the question whether affiliation is voluntary or not, but the fact that the setting up of a scheme is obligatory and that non-manual workers in the mining industry are not allowed to join the general scheme, even voluntarily. In this case, the introduction of voluntary insurance provided for by the old Article 18 (b) (1) [of the RBFM] is only a part of a scheme which, looked at as a whole, has to be applied by the BFM because the Minister has approved the rules.'
5. In short, the Commission is of the opinion that the provisions at issue do constitute 'legislation' within the meaning of Regulation No 3.

(b) *The effect of Annex B to Regulation No 3*

The Commission points out that so soon as it is accepted that the rules under discussion are legislation within the meaning of Regulation No 3, the question of how they are classified under Annex B becomes a mere consequential matter. For since this Annex is only declaratory (cf. the Judgment given by the Court in Case 24/64, *Dingemans*, Rec. 1964, p. 1274), one cannot begin by observing that it covers a given set of rules and go on to conclude from this that those rules are 'legislation'. The converse is the only right conclusion.

However, the inclusion in the said Annex of the following under the heading 'Netherlands' in subparagraph (i): 'Sickness insurance for mineworkers (benefits in cash and in kind in the event of sickness and maternity)' proves that the regulation is intended to apply to the rules at issue.

Admittedly the corresponding Dutch text does not say 'werknemers' (workers) but 'mijnwerkers' (miners), an expression which is often used in Dutch law with a meaning which excludes non-manual workers. If it were necessary to attach decisive importance to this fact, which is not so, non-manual workers in the mining industry would come under subparagraph (a) under the abovementioned heading. Even in the latter case it would be possible to conclude that Regulation No 3 was drawn up with at least the desire to apply it to rules of the type here concerned, for sickness insurance for mineworkers is provided by a body similar to the BFM, which makes rules which are comparable with the RBFM.

Moreover, as appears from the file forwarded by the Scheidsgerecht, the Netherlands Minister of Social Affairs and Public Health is of the opinion that the RBFM is covered by the abovementioned subparagraph (i).

Finally, the Commission goes into a great deal of detail with a view to showing that Regulation No 3 is intended to cover the RBFM because of the combined effects of the provisions of this regulation together with Annex D thereto on the one hand, and of a convention between Germany and the Netherlands on the other.

In short, the Commission is of the opinion that the reply to the first question should be in the affirmative.

C — The second question put by the Scheidsgerecht

The Commission brings to the attention of the Court the fact that the argument is not about the possible attitude of the German body required both on principle and under Article 22 (2) of Regulation No 3 to furnish sickness benefits to the applicant. 'Thus the question is not put correctly. For, given the manner in which it is worded, it would simply have to be answered in the negative because the right to benefit depends on affiliation in the country competent to grant it and this affiliation is precisely what is refused'. The true meaning of the question is that it 'asks ... whether Article 22 of Regulation No 3 (benefits in kind payable under a sickness insurance scheme to pensioners not permanently resident in the country competent to grant affiliation) is applicable although admission to voluntary insurance here considered is subject to the condition (laid down by the RBFM) that the recipient must be permanently resident in the Netherlands. In other words the question asks whether this condition must be waived as regards persons covered by Regulation No 3'.

According to the Commission it follows from the spirit of the EEC Treaty, from Regulation No 3 itself, and from previous cases decided by the Court that the question thus put must receive an affirmative answer. 'The elimination of all conditions of residence constitutes one of the principles which governs social security for migrant workers and their families. The application of the relevant national legislation must not be limited by considerations based on the division of the EEC into different national territories'.

'The fact that affiliation to the fund of a sickness insurance scheme may not be made subject to a residence requirement is not open to doubt as regards "active" workers' (Articles 12 and 17 (3) of the Regulation). 'As regards sickness insurance for pensioners, a distinction must be made according to whether the pension does or does not auto-

matically carry with it entitlement to sickness insurance'. If it does, the combined provisions of Articles 12, 10 and 22 lead incontrovertibly to accepting the fact that permanent residence in a territory other than the territory of the state competent to confer the benefit cannot be used as a reason for refusing the benefit. If it does not, which is the case here, it is true that an interpretation based only on the wording of Article 22 would suggest the opposite solution since this provision only mentions the right (of the affiliated pensioner) to benefits from the sickness fund, and not the right to affiliation to the sickness fund.

However, such a solution should be rejected, for the following reasons in particular:

— 'The fact that Article 22 expressly deals with the exercise of rights in the case of permanent residence outside the country in which the institution liable for payment is situated shows that these rights may not be reduced, suspended or withdrawn on account of the place where the person entitled to them permanently resides.'

— 'The sickness insurance of a pensioner must be considered as the indispensable complement of insurance for an old age pension. For it is hardly to be conceived that a pensioner could be deprived of the right to be affiliated to a sickness fund, even if this be on a voluntary basis, at the moment when he ceases to be an active worker by reason of his age or of the state of his health, at the very moment therefore when the guarantee of the entitlement to benefits in kind under the sickness insurance scheme appears even more indispensable than at the time when the person concerned was in active work. This is not only because the chances of falling ill have increased, but also because the same pecuniary burden resulting from being uninsured against this risk would weigh more heavily on the now reduced income available to meet it.'

— 'Moreover the system set up by Regulation No 3 requires that a pensioner must be treated on the same basis as an active worker. That this is so appears from Article 4 which mentions workers who have been subject to the legislation of one or more Member States. Furthermore it is obvious that the rights of pensioners are nothing other than the natural consequence of their affiliation under the relevant legislation during their active working life'. A further point is that these rights are guaranteed by Article 48 (3) (d) of the EEC Treaty which says that workers have the right 'to remain in the territory of a Member State after having been employed in that state'.

— Whenever there is an intention in Regulation No 3 that the right to benefit is to cease in the event of a change of permanent residence to a foreign country, the Regulation says so expressly, as can be seen from Article 10 (2).

'Furthermore these exceptions have not been left to the discretion of each of the States: they must appear in Annex E of Regulation No 3, and no addition to this Annex may be made without a Confirmatory Opinion on the part of the Administrative Commission set up by the Regulation.'

In short, the Commission is of the opinion that the second question should also be answered in the affirmative.

Grounds of judgment

I — The admissibility of the request for interpretation

The defendant in the main action asserts that the Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf, hereinafter referred to as 'the Scheidsgerecht', is not a court or tribunal within the meaning of Article 177 of the EEC Treaty, and is therefore not competent to submit to the Court of Justice a request in pursuance of that Article for the interpretation of any of the matters therein specified.

The Scheidsgerecht is properly constituted under Netherlands law, and is provided for by the 'Reglement van het Beambtenfonds voor het Mijnbedrijf' (RBFM) which governs the relationship between the Beambtenfonds and those insured by it.

According to the terms of the Netherlands Invalidity Law, the compulsory insurance provided for by that Law does not apply to persons whose invalidity or old-age pension is provided for under the terms of another scheme which is intended to replace the general scheme. Such substitution will occur when the competent authorities declare that the substituted scheme satisfies the legal requirements and offers sufficient guarantees for the provision of pensions. Analogous provisions exist for other branches of social security. It follows that the Rules and any subsequent amendments of them must be approved not only by the Netherlands Minister responsible for the mining industry, but also by the Minister for Social Affairs and Public Health.

It is the duty of the Minister responsible for the mining industry to appoint the members of the Scheidsgerecht, to designate its chairman and to lay down its rules of procedure.

The Scheidsgerecht is a permanent body charged with the settlement of the disputes defined in general terms in Article 89 of the RBFM, and it is bound by rules of adversary procedure similar to those used by the ordinary courts of law.

Finally, the persons referred to in the RBFM are compulsorily members of the Beambtenfonds by virtue of a regulation laid down by the Mijnindustrieraad (Council of the Mining Industry), a body established under public law. They are bound to take any disputes between themselves and their insurer to the Scheidsgerecht as the proper judicial body. The Scheidsgerecht is bound to apply rules of law.

In this case the question whether rules such as the RBFM are covered by Regulation No 3 of the Council of the EEC concerns the interpretation of this regulation, and it must be examined in the context of the first question put by the Scheidsgerecht.

It follows from the above that the Scheidsgerecht should be considered a court or tribunal within the meaning of Article 177. Therefore the request for interpretation is admissible.

II — Substance

1. *The first question put by the Scheidsgerecht*

The Scheidsgerecht requests the Court to state whether the provisions of Chapter

II of the RBFM concerning the sickness fund managed by the BFM constitutes 'legislation' in the sense in which that term is used in Regulation No 3. The Court is further asked whether the said provisions are covered by Annex B of the said Regulation under the heading 'Netherlands' in subparagraph (i) and whether this Annex therefore applies to the non-manual employees in Netherlands mines covered by the aforementioned provisions.

According to Article 177 of the EEC Treaty, the Court is only empowered to give judgment upon the interpretation or validity of the Treaty and of acts of the institutions of the Community, but has no power to apply these to a specific case.

The Court must accordingly restrict itself to extracting from the question asked by the Scheidsgerecht, in the light of the facts given by that tribunal, only those matters which relate to the interpretation of the Treaty and of Regulation No 3.

(a) The question asks first whether rules governing sickness insurance for workers and their survivors laid down and operated by an institution established under private law can be considered as 'legislation' within the meaning of Regulation No 3.

According to Article 1 (b) of Regulation No 3, 'the term 'legislation' shall mean all laws, regulations and other enforceable provisions ... of each Member State relating to the social security schemes and branches of social security set out in Article 2(1) and (2) of this Regulation'. Thus in particular it means social security schemes and branches of social security which concern sickness benefits.

The expression 'enforceable provisions' is clearly intended to cover social security schemes and branches of social security which are managed by institutions other than the public authorities, and which have a certain freedom of action in relation to the latter.

According to Article 1 (e) of Regulation No 3, 'the term 'institution' shall mean ... the agency or authority responsible for enforcing all or part of the legislation'.

The juxtaposition of the terms 'agency' and 'authority' makes it clear that Regulation No 3 also applies to enforceable provisions governing the functioning of institutions established under private law, all the more so as these are not expressly excluded by any provisions of Regulation No 3.

The concept of 'enforceable provisions' thus applies to rules which, while being drawn up and applied in the form of private law and by bodies constituted under private law, are integrated into a Member State's social security scheme by reason of the fact that they are designed to supplement, or be a substitute for, laws and regulations relating to social security. It is apparent that there is in Regulation

No 3 a manifest concern not to exclude from the benefit of its provisions schemes managed otherwise than by the State, and which, at least in several Member States, cover a large proportion of the social security arrangements.

However, the defendant in the main action says that these arguments cannot be correct to the extent that if the rules at issue had not been made, the persons concerned would not be compulsorily insured by virtue of the general social security scheme. To this extent, the said provisions cannot be considered as being in substitution for the general scheme. The defendant also argues that the arguments set out above do not apply to a worker's survivors, who are affiliated merely on an optional basis to the body to which the said worker was formerly compulsorily affiliated.

The objection that Mr Vaassen would have been exempt from the general social security scheme is not relevant, since it is clear that the question which led the Scheidsgerecht to refer the case to the Court is whether the rules at issue are, or are not, part of a special scheme within the meaning of Article 2(2) of Regulation No 3. There clearly is such a special scheme when a specific group of workers is compulsorily made subject to a special type of insurance by virtue of public law. Moreover the defendant in the main action appears to have grasped the essence of the matter when it states in its observations first that all non-manual employees in Netherlands mines are compulsorily insured by virtue of Article 33 of the Regulation of the Mijnindustrieraad of 8 September 1952, concerning the working conditions of apprentices and persons employed on non-manual work in the mines (Nederlandse Staatscourant of 23 September 1952, No 185), and secondly that since the said provision has been made by a competent public authority, it belongs to the domain of public law. However, should a reference to the Court be made under Article 177 of the Treaty, as has occurred in this case, it is then for the national court to examine whether the conditions required for the existence of a special scheme are in fact met, so that the enforceable provisions comprised in the special scheme fall within the term 'legislation' as used in Article 1 (b) of Regulation No 3.

Once the existence of a special scheme has been established, Regulations Nos 3 and 4 apply to that scheme in its entirety, including any provisions which it may contain concerning the voluntary and optional affiliation of former insured persons and their survivors.

(b) In the second part of its question the Scheidsgerecht requests the Court to say whether a Netherlands scheme providing sickness insurance in favour of non-manual employees of the mining industry and their families is covered by Annex B to Regulation No 3, under the heading 'Netherlands' in subparagraph (i), the text of which is as follows: 'sickness insurance for *mineworkers* (benefits in cash and in kind in the event of sickness and maternity)'.

The defendant in the main action thinks that the reply should be in the negative. It states that the Dutch text of the above provision uses, as equivalent to the word 'workers' the expression 'mijnwerkers' which, in contrast to the expression 'werknemers', only refers to manual workers and thus excludes non-manual workers.

Even supposing that this interpretation of the term 'mijnwerkers' be correct, which seems open to doubt, the argument of the defendant in the main action would by no means be conclusive. The heading 'Netherlands' in Annex B to Regulation No 3 mentions in subparagraph (a) sickness insurance in general, and in subparagraph (i) sickness insurance for mineworkers. Thus if a special scheme of sickness insurance, as defined above, does not fall within subparagraph (i) it must fall within subparagraph (a), which applies without distinction to all 'workers' ('travailleurs'; 'Arbeitskräfte' and 'Arbeitnehmer'; 'lavoratori'; 'werknemers') within the meaning of Articles 48 to 51 of the Treaty, expressions which also include non-manual workers.

The heading 'Netherlands' in Annex B to Regulation No 3 thus covers both the general and the special social security schemes providing for insurance against sickness.

2. *The second question put by the Scheidsgerecht*

In its second question, submitted in the event of the first question's being answered in the affirmative, the Scheidsgerecht requests the Court to say whether a worker's survivor 'is entitled to the benefits referred to in Article 22 of Regulation No 3 and specified at the end of Article 22 (2)':

— even if he permanently resides in the territory of a Member State other than that of the sickness insurance institution in question;

— and even if the legislation applied by that institution only grants the said survivor the right to be admitted 'to insurance providing reimbursement out of the sickness fund for the cost of medical treatment, the provision of medicines, and nursing'.

(a) As to the first state of affairs set out in the above question, it appears from the context of the decision to refer the questions to the Court that the Scheidsgerecht in fact wishes to know whether Regulation No 3 forbids a social security institution to refuse to admit the survivor of a worker to an optional sickness insurance scheme, by reason only of the fact that he permanently resides in a Member State other than that of the organization in question.

Article 22 (2) and (3) of Regulation No 3 govern the method of granting sickness benefits to 'the beneficiary of a pension' payable under the legislation of one or

more Member States, when this beneficiary is permanently resident in the territory of a Member State in which none of the institutions liable for the payment of the pension is situated. These provisions certainly cover the case where sickness insurance necessarily follows from the right to a pension, that is to say, when it constitutes, in a sense, a necessary condition of the pension scheme.

The said provisions presuppose logically that this affiliation to a sickness insurance scheme cannot be terminated because the person concerned transfers his permanent residence to a country other than that or those of the institutions liable for the payment of the benefits in question. Furthermore the above supposition is confirmed by Article 10 (1) of Regulation No 3, according to which 'Pensions ... payable under the legislation of one or more Member States shall not suffer reduction, modification, suspension, termination or confiscation by reason of the fact that the beneficiary is permanently resident in the territory of a Member State other than that in which the institution liable for payment is situated'.

On the other hand Article 22 does not expressly mention the case in which the affiliation of the beneficiary of the pension to a sickness insurance scheme is only provided for on an optional basis. It is necessary, therefore, to examine whether, in spite of the silence of this Article, it nevertheless also applies in such a case.

According to the terms of Article 4 (2) of Regulation No 3 its provisions shall apply 'to the survivors of wage-earners or assimilated workers who were subject to the legislation of one or more Member States'. The general terms in which this provision is couched show that the application of the Regulation is not limited to workers or their survivors who have had employment in several Member States or who are, or have been, employed in one State, whilst residing or having resided in another. The Regulation thus applies even when the change of residence to another Member State has been effected not by the worker himself but by his survivor. This interpretation conforms with the spirit of Articles 48 to 51 of the Treaty as well as with that of Regulation No 3, which is, in addition to protecting the migrant worker *stricto sensu*, to prevent territorial provisions from being applied against workers or their survivors in matters of social security.

Furthermore it follows from Article 9 (1) of Regulation No 3 that this Regulation applies without distinction 'to compulsory, voluntary or optional continued insurance'. And from Article 10 (2) of this Regulation, read in conjunction with Annex E thereto, it follows that in every case where the Regulation intends existing territorial provisions in national legal systems to continue in force, it says so expressly. Consequently, even when affiliation to a sickness insurance scheme for a worker or his survivor who is entitled to a pension is merely optional, Regulation No 3 forbids a national institution to terminate this affiliation because the person so entitled changes his residence to a country other than that in which the institution is situated.

(b) The request for an interpretation also enquires whether Article 22, which refers only to 'benefits in kind', applies to the provision of medical treatment, medicines and nursing, given in the form of repayment of costs incurred.

Chapter 1 of Head III of Regulation No 3, entitled 'Sickness, Maternity', which includes the said Article 22, contrasts 'benefits in kind' with 'cash benefits' without however defining either term. It is nonetheless clear that the term 'benefits in kind' does not exclude the possibility that such benefits may comprise payments made by the debtor institution. For it is logical for such an institution to make such payments in the cases expressly referred to in Article 19 (5) of Regulation No 3 as 'benefits in kind', namely the provision of 'prostheses' and 'major appliances'. A further point is that the provisions of the said Chapter I of Head III draw no distinction between making the said payments directly to the person concerned and paying them to third persons. Finally, Article 18 of the Regulation allows of the interpretation that 'cash benefits' are essentially those designed to compensate for a worker's loss of earnings through illness. Thus it is concerned with an entirely different situation from the one under consideration.

It follows from all the above factors that Article 22 applies equally when benefits, such as those referred to by the Scheidsgerecht, are granted in the form of reimbursement of expenses incurred.

III — Costs

The Costs incurred by the Commission of the EEC, which submitted observations to the Court, are not recoverable, and as these proceedings are, so far as the parties to the main action are concerned, a step in the action pending before the Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf, the decision on costs is a matter for that tribunal.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing oral observations of the Commission of the EEC and the defendant in the main action;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the EEC, especially Articles 48 to 51 and 177;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;
Having regard to Regulation No 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958 p. 561 et seq.) especially Articles 1 (b) and (e), 2, 4, 9, 10, 18, 19 and 22 and Annex B under the heading 'Netherlands' in subparagraphs (a) and (i);

Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it for a preliminary ruling by the Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf by Order of that tribunal dated 10 December 1965

hereby rules:

1. **Rules governing sickness insurance for workers and their survivors, laid down and operated by an institution established under private law, since they are 'enforceable provisions' fall within 'legislation' within the meaning of Articles 1 (b) and 4 of Regulation No 3 when the said provisions supplement or are a substitute for laws and regulations establishing a general or special social security scheme;**

2. **Annex B, heading 'Netherlands', of Regulation No 3 of the Council of the EEC is applicable to both general and special social security schemes providing insurance against sickness for non-manual workers in the mining industry;**

3. **Under Regulation No 3 an institution managing a sickness insurance scheme may not refuse to give the benefit of affiliation to the scheme, even an optional scheme, to a worker's survivor entitled to a pension by virtue of the legislation of a Member State, if the reason for so refusing is that the person so entitled permanently resides in a Member State other than the one in which the said institution is situated;**

4. **Article 22 of Regulation No 3 also applies to benefits given in the form of reimbursement of expenses for medical treatment, medicines and nursing. and declares:**

5. **The decision on costs in the present proceedings is a matter for the Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf.**

Hammes Delvaux Strauß

Donner Trabucchi Lecourt Monaco

Delivered in open court in Luxembourg on 30 June 1966.

A. Van Houtte
Registrar

Ch. L. Hammes
President