JUDGMENT OF THE COURT (Fourth Chamber)

27 January 2005 *

In Case C-125/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Collège d'arbitrage de la Commission de Litiges Voyages (Belgium), made by decision of 4 December 2003, received at the Court on 8 March 2004, in the proceedings

Guy Denuit,

Betty Cordenier

v

Transorient — Mosaïque Voyages et Culture SA,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

* Language of the case: French.

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Belgian Government, by E. Dominkovits, acting as Agent,

— the Commission of the European Communities, by A. Aresu and J.-P. Keppenne, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59, hereinafter 'the directive').

2 It was submitted in the context of a dispute between Mr Denuit and Ms Cordenier and Transorient — Mosaïque Voyages et Culture SA, a travel agency (hereinafter 'the agency'), concerning the price of a package trip to Egypt.

Legal background

3 Article 4(4)(a) of the directive provides:

'The prices laid down in the contract shall not be subject to revision unless the contract expressly provides for the possibility of upward or downward revision and states precisely how the revised price is to be calculated, and solely to allow for variations in:

— transportation costs, including the cost of fuel,

— dues, taxes or fees chargeable for certain services, such as landing taxes or embarkation or disembarkation fees at ports and airports,

— the exchange rates applied to the particular package.'

4 The directive was transposed into Belgian law by the law of 16 February 1994 governing the travel-organisation contract and the travel-agency contract (*Moniteur Belge* — Official Gazette, of 1 April 1994, p. 8928). Article 11(1) thereof corresponds to the aforementioned Article 4(4)(a) of the directive and provides:

'The price agreed in the contract shall not be subject to revision unless the contract expressly so provides and states precisely how the revised price is to be calculated, and provided that revision is consequent upon variations in:

(a) the exchange rates applied to the package, and/or

(b) transportation costs, including the cost of fuel, and/or

(c) dues, taxes or fees chargeable for certain services.

In such cases the variations mentioned shall also result in a price reduction.'

Dispute in the main proceedings and the questions referred

5 Mr Denuit and his wife, Ms Cordenier, who are the claimants in the main proceedings, reserved with the agency an all-inclusive package to Egypt from 2 to 9 March 2003 for themselves and their child, Thierry, at a total price of EUR 2 765, comprising air transport from Brussels and back as well as a Nile cruise.

6 In the agency's special conditions it is stated that 'the price of these services have been calculated on the basis of the dollar rate in force on publication of this brochure (January 2002 — EUR 1 = USD 0.91). Any alteration in either direction of more than 10% prior to departure will enable us to adjust our prices.'

7 After the holiday, the claimants in the main proceedings requested the agency to reimburse to them a part, namely EUR 217.61, of the total price already paid by them, claiming that it ought to have been revised downwards in proportion to the dollar amount calculated in respect of the services offered following a change in the exchange rate of that currency, which was exchanged on the date of their departure at the rate of USD 1.08 to EUR 1.

8 The agency refused to reimburse the claimants in the main proceedings, relying in particular on Article 11(1) of the law of 16 February 1994.

9 The claimants in the main proceedings then brought the matter before the Collège d'arbitrage de la Commission de Litiges Voyages (Arbitration Panel of the Travel Dispute Committee), a non-profit-making association governed by Belgian law.

10 Taking the view that the dispute before it necessitated an interpretation of Article 4 (4) of the directive, the Collège d'arbitrage de la Commission de Litiges Voyages decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Where a clause in a contract between a consumer and a [travel] organiser and/or retailer provides only for the possibility of an upward price revision and states precisely how the revised price is to be calculated, solely to allow for variations set down in an exhaustive list by Article 4(4) of Directive 90/314/EEC, must that article be interpreted as implicitly requiring downward price revision according to the same method of calculation?

(2) Where a clause in a contract between a consumer and an organiser and/or retailer provides for the possibility of both upward and downward price revision without stating precisely how the revised price is to be calculated, and solely to allow for variations set down in an exhaustive list by Article 4(4)(a) of Directive 90/314/EEC, must that article be interpreted as invalidating the entire clause or as limiting that invalidity to upward price revision?

(3) Where a clause in a contract between a consumer and an organiser and/or retailer gives only the organiser and/or retailer the possibility of revising prices

upwards or downwards, stating precisely how the revised price is to be calculated, solely to allow for variations set down in an exhaustive list by Article 4(4)(a) of Directive 90/314/EEC, must that article be interpreted as rendering the whole clause void, or is its invalidity limited to upward price revision?

(4) Where a clause in the contract between a consumer and an organiser and/or retailer gives both the travel organiser and/or retailer and the consumer the possibility of benefiting from upward and downward price revision, and states precisely how the revised price is to be calculated, solely to allow for variations set down in an exhaustive list by Article 4(4)(a) of Directive 90/314/EEC, must that article be interpreted as requiring the travel organiser and/or retailer to revise the price downwards if the consumer has not asked it to do so?'

Competence of the Court

11 As a preliminary issue it must be examined whether the abovementioned Collège d'arbitrage should be regarded as a court or tribunal for the purposes of Article 234 EC.

12 In order to determine whether a body making a reference is a court or tribunal of a Member State for the purposes of Article 234 EC, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in

particular, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23, and the case-law there cited, and Case C-516/99 *Schmid* [2002] ECR I-4573, paragraph 34).

13 Under the Court's case-law, an arbitration tribunal is not a 'court or tribunal of a Member State' within the meaning of Article 234 EC where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator (Case 102/81 *'Nordsee' Deutsche Hochseefischerei* [1982] ECR 1095, paragraphs 10 to 12, and Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 34).

14 In the main proceedings it is apparent from the decision to refer the matter that submission of the matter to the arbitration panel of the travel dispute committee stems from an arbitration agreement entered into between the parties.

15 Belgian legislation does not lay down recourse to this arbitration board as the sole means of resolving a dispute between an individual and a travel agency. It is true that an ordinary court before which a dispute is brought to which an arbitration agreement applies must decline jurisdiction under Article 1679(1) of the Belgian judicial code. None the less, jurisdiction of the arbitration panel is not mandatory in the sense that, in the absence of an arbitration agreement entered into between the parties, an individual may apply to the ordinary courts for resolution of the dispute.

16 Since in the main proceedings the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the Belgian public authorities are not involved in the decision to opt for arbitration, the Collège d'arbitrage de la Commission de Litiges Voyages cannot be regarded as a court or tribunal of a Member State for the purposes of Article 234 EC.

17 Accordingly, the Court is not competent to rule on questions referred to it by that body.

Costs

18 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the Collège d'arbitrage de la Commission de Litiges Voyages, the decision on costs is a matter for that body. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) rules as follows:

The Court is not competent to rule on questions referred to it by the Collège d'arbitrage de la Commission de Litiges Voyages.

[Signatures]