AS TO THE ADMISSIBILITY OF

Application No. 19314/92
by Erich NOLD
against Germany

The European Commission of Human Rights (Second Chamber) sitting in private on 31 March 1993, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
J.-C. GEUS
M. NOWICKI

Mr. K. ROGGE, Secretary to the Second Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 18 November 1991 by Erich NOLD against the Federal Republic of Germany and registered on 7 January 1993 under file No. 19314/92;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a German citizen born in 1928 and living in Darmstadt. He is represented by Mr. Heinrich Rodrian, a lawyer practising in Bad Homburg.

The facts of the case, as agreed by the parties, may be summarised as follows.

The applicant brought an action on 24 January 1991 against Metallgesellschaft A.G., a public limited company, contesting the validity of decisions taken at the company's general meeting. The applicant is a minority shareholder of the company.

On 3 June 1991 the Regional Court (Landgericht) in Frankfurt fixed the value of claim (Streitwert) at 1,310,000 DM in the matter against Metallgesellschaft A.G. The Court stated in the decision that in view of the importance of the matter and the fact that the success of the action inter alia depended on it being lodged within a certain time-limit it would be served on the defendant party even before the required advance on court fees was paid by the plaintiff.

The decision of 3 June 1991 was taken in accordance with Section

247, para. 1, 2nd sentence, of the Act on Stock Companies (Aktiengesetz).

The relevant part of Section 247 reads as follows:

[Translation]

"Value of claim.

(1) The value of claim is fixed by the trial court which determines it according to equity taking due account of all circumstances of the case at issue, in particular the importance of the matter for the parties. It may not exceed 1/10 of the stock capital (Grundkapital) or, if 1/10 corresponds to more than 1,000,000 DM, it may only exceed this amount to the extent that this is justified by the importance of the matter for the plaintiff.

(2) If a party can show (glaubhaft machen) that having to bear costs calculated on the basis of the value of claim as determined in accordance with para. 1 would seriously endanger its economic situation the trial court may, on request, order that court costs are to be calculated on the basis of a value of claim adjusted to that party's economic situation. In consequence of such an order the fees due to the lawyer of that party are likewise calculated on the basis of the adjusted value of claim. Where that party has to bear the costs of the proceedings ... it has to reimburse the costs advanced by the other party and its lawyer's fees only to the extent corresponding to the adjusted value of claim. ..."

The applicant lodged an appeal (Beschwerde) without relying on paragraph 2 of Section 247, i.e. without arguing that his economic situation required an adjustment of the value of claim. He only argued that if the decisions taken at the defending company's general assembly were not annulled the company would suffer losses in the amount of some 17,000,000 DM which, however, would affect him only in the amount of some 15 DM as he held only a few shares.

On 11 July 1991 the appeal was rejected by the Court of Appeal (Oberlandesgericht) in Frankfurt/Main which considered that the Regional Court had not misused its discretionary powers.

The applicant then lodged a constitutional complaint which was rejected by the Federal Constitutional Court (Bundesverfassungsgericht) on 30 October 1991 as being partly inadmissible and partly clearly ill-founded. The Federal Constitutional Court found that the constitutional complaint was not sufficiently substantiated. Furthermore the decisions complained of did not constitute a denial of access to court. It was justified that a State recovered costs of court proceedings from those who institute such proceedings. The fixing of the value of claim which determines the calculation of the costs could violate the right of access to court only where in practice it meant that judicial review was virtually impossible. The fixing of the value of claim in accordance with Section 247 of the Stock Companies Act did not have such an effect as on the one hand the Section in question provided for limitations (Höchstgrenzen) and paragraph 2 of the Section allowed for a reduction taking into account the economic possibilities of the shareholder. The applicant had not made use of this possibility. Furthermore it had to be taken into account that the proceedings which the applicant intended to bring would, by their result, not only affect him personally but all other shareholders. Therefore it was not arbitrary that the Stock Companies Act allowed to take into account the interests of the company and its shareholders.

The applicant submitted a copy of a decision of the Court of Appeal in Celle concerning a similar matter (H. Nold v. Kali-Chemie

AG). In that case the plaintiff had invoked paragraph 2 of Section 247 of the Stock Companies Act and the Court ordered that costs were to be calculated on the basis of an adjusted value of claim in the amount of 20,000 DM.

COMPLAINTS

The applicant complains that in fixing a value of claim at 1,310,000 DM, the German courts in practice denied him access to justice as the possible costs of the proceedings which have to be paid by the losing party are calculated on the basis of the value of claim. Consequently, the risk for him of having to bear costs in the amount of some 130,000 DM was too high in relation to the dispute which related to a sum of 7,92 DM. He submits that he does not qualify for a request under paragraph 2 of Section 247 of the Stock Companies Act.

PROCEEDINGS BEFORE THE COMMISSION AND FURTHER DEVELOPMENTS

The application was lodged on 18 November 1991 and registered on 7 January 1992. On 2 April 1992 the Commission decided to communicate the application to the respondent Government for observations on admissibility and merits. The Government submitted observations on 4 June 1992 and 7 September 1992 and the applicant replied on 16 June 1992 and 23 September 1992.

On 6 June 1992 the applicant withdrew his action as the defendant company renounced implementing the measures which the action was designed to prevent. The object of this action had thus been achieved. The advance of DM 7,000 on court costs claimed from the applicant had been paid by the defendant company. The applicant states that in view of the high value of claim he renounced the possibility of having the court decide which of the parties had to bear the costs of the proceedings already incurred.

THE LAW

1. The applicant complains that as a minority share-holder he was deprived of his right of access to a court under Article 6 para. 1 (Art. 6-1) of the Convention as defined by the European Court of Human Rights (Airey judgment of 9 October 1979, Series A No. 32, p.12, paras. 22 et seq.) in that a very high value of claim was fixed by the domestic court for an action he had lodged against a company. He had to take an enormous and unacceptable risk of having to bear very high costs in case he was the losing party.

The Government submit that the costs would have been proportionate given the importance of the matter to which the action in question related. If minority shareholders wanted to safeguard their interests vis-a-vis a company without taking high cost-risks they could do so by a joint action. Moreover, the advance on costs was paid for the applicant by the defendant company and he withdrew his action stating that its object had been achieved.

The Commission considers that Article 6 para. 1 (Art. 6-1) of the Convention would only apply if the applicant were still seeking a determination of a dispute ("contestation" in the French text - cf. Eur. Court H.R., Fredin judgment of 18 February 1991, Series A no. 192, p. 32, para.82) over a civil right . It notes that the applicant withdrew his action as the defendant company renounced implementing the measures which the action was designed to prevent. There was thus no longer a "dispute" and the applicant can no longer claim to be a victim, within the meaning of Article 25 (Art. 25), of the alleged violation of Article 6 of the Convention.

It follows that this complaint is inadmissible under Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant now complains that in view of the risk of having to bear high costs he was likewise prevented from having the court decide which of the parties had to bear the cost of the proceedings already incurred. The Commission, assuming that Article 6 (Art. 6) applies to the costs claims in question, noting that the advance on court costs was paid by the defendant company for the applicant, finds no evidence of a "dispute" as required by Article 6 para 1 (Art. 6-1). Moreover, the risk of having to bear costs of full proceedings with pleadings and taking of evidence at two levels of jurisdiction and possibly a review of legal issues at a third level is not comparable to the risk which the applicant would have had to take had he requested a decision on costs after his action had become without object. The applicant has not shown that this risk was disproportionate in the circumstances.

In this respect there is consequently no appearance of a violation of Article 6 para. 1 (Art. 6-1) and this part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber President of the Second Chamber

(K. ROGGE) (S. TRECHSEL)