CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF MOREL v. FRANCE

(Application no. 34130/96)

JUDGMENT

STRASBOURG

6 June 2000

FINAL

18/10/2000

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

In the case of Morel v. France,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr W. FUHRMANN, *President*,
Mr J.-P. COSTA,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 23 November 1999 and 16 May 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 34130/96) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr Hubert Morel ("the applicant"), on 20 July 1996.

2. The applicant was represented before the Court by Mr M. Puechavy. The French Government ("the Government") were represented by their Agent, Mr R. Abraham.

3. The applicant alleged, in particular, that his right to a fair hearing before an impartial court, as guaranteed by Article 6 § 1 of the Convention, had been infringed in that the insolvency judge's report to the Commercial Court and the documents annexed thereto had not been disclosed to him and the insolvency judge had sat on the bench that heard the case.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 6 July 1999, the Chamber declared the application partly admissible[1].

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

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1. *Note by the Registry*. The Court's decision is obtainable from the Registry.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 23 November 1999.

There appeared before the Court:

(a) *for the Government*
Mr R. ABRAHAM, Head of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mrs M. DUBROCARD, Deputy Head of the Human
Rights Office, Department of Legal Affairs,
Ministry of Foreign Affairs,
Mr O. DOUVRELEUR, Deputy Head of the Commercial Law,
Land Law and Civil Judicial Cooperation Office,
Ministry of Justice, *Counsel*;

(b) *for the applicant*
Mr M. PUECHAVY, of the Paris Bar, *Counsel*.

The applicant also attended the hearing.
The Court heard addresses by Mr Puechavy and Mr Abraham and their answers to questions from Judge Tulkens.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant formed five construction companies to build catering and accommodation facilities at the request of the Olympic Games Organisation Committee (“the OGOC”). He was the manager of the companies. He held 99% of the shares in one of the companies, which was the sole shareholder in the other four. He also acted as guarantor of virtually all the companies' debts.

10. As the works were not completed within the agreed period, the OGOC suspended payment for them. On 24 February 1992 the applicant lodged a declaration of insolvency on behalf of the companies with the registry of the Nanterre Commercial Court.

11. On 25 February 1992 the Nanterre Commercial Court made an order for the judicial reorganisation of the applicant's five companies. It named Mr A. as the insolvency judge, and also appointed a deputy insolvency judge, a judicial administrator and a creditors' representative. It ordered a

six-month observation period during which the judicial administrator was to draw up a report on the companies' finances and labour force with his recommendations as to whether the companies should continue or cease trading. The observation period was renewed twice.

12. During the observation period, the insolvency judge made various orders, namely: orders for the appointment of an expert on management supervision (11 March 1992), a valuer (6 April 1992) and an accountant (22 April 1992); orders declaring claims time-barred (two orders were made on 13 October 1992 and others on 16 November 1992, 17 February 1993, 10 and 30 March 1993, 5 May 1993, 1 June 1993 and 25 March 1994); orders for the restitution of equipment (on 8 September, 14 December 1992 and 30 March 1993); an order authorising the applicant's intervention in the management of the hotels (on 15 September 1992); an order dismissing applications for the restitution of equipment (16 November 1992); orders for an action to be brought against one of the other contracting parties and for other measures (on the same date) and for the restitution of equipment (30 March 1993); orders dismissing thirteen members of staff (7 April 1992) and a further member of staff (8 September 1992); and lastly an order for the freezing of accounts (8 September 1992).

13. On 23 September 1993 the judicial administrator asked the Commercial Court to decide whether to accept the applicant's proposals for its recovery through continued trade.

14. The applicant appeared at the hearing and gave evidence as the manager of the companies concerned. The judicial administrator and the creditors' representative also made oral submissions. The judicial administrator presented a report in which he explained to the Commercial Court the history of the dealings which had led to the applicant's filing in insolvency. He then related to the court events during the observation period. He stressed that the applicant's recovery plan had been accepted by a majority of the creditors. He raised doubts over certain issues and said that it was for the applicant to dispel those doubts by putting up financial and professional guarantees.

15. The Commercial Court decided (on application by State Counsel's Office) that before approving the applicant's proposed recovery plan, it needed to be satisfied that the companies' continued economic activity would be permanent. For that purpose, it needed financial and professional guarantees from the applicant. It therefore asked him to produce certain additional documents so that it could be sure that the guarantees existed. The applicant lodged an additional file in response to that request. In the light of the new file lodged by the applicant, the administrator filed a supplemental report.

16. On 26 October 1993 the Commercial Court terminated the observation period and put the five companies into compulsory liquidation. It held that the proposed recovery plan was not accompanied by sufficiently

reliable guarantees to ensure that the companies could continue as a going concern. The judgment contained, *inter alia*, the following passages:

> "Consequently the Court must find that the proposed plan is not accompanied by the guarantees required to ensure its future economic activity in a difficult sector.
>
> Pursuant to the provisions of sections 1, 36 and 146 of Law no. 85-98 of 25 January 1985, it therefore orders the compulsory liquidation of the aforementioned companies in accordance with the provisions of Chapter III of that statute and holds as follows.
>
> FOR THESE REASONS
>
> The Court, sitting in public and as a court of first instance,
>
> Having examined the insolvency judge's report,
>
> Having examined the judicial administrator's report ...
>
> Terminates the observation period ..."

17. The Commercial Court reassigned the case to the insolvency judge, decreed that the administrator's mission had been completed and appointed the creditors' representative as liquidator of the companies. The insolvency judge sat on the bench that delivered that judgment in his capacity as President of the Chamber. He was assisted by the Vice-President of the Commercial Court and another judge.

18. In a judgment of 31 January 1994, the Versailles Court of Appeal upheld the Commercial Court's judgment in its entirety. It delivered its decision after examining the applicant's recovery plan, the judicial administrator's report and the liquidator's submissions. The applicant attended the hearing and made oral observations.

On 7 April 1994 the applicant appealed to the Court of Cassation. He put forward two grounds of appeal based on Article 6 of the Convention. On 23 January 1996 the Court of Cassation dismissed the appeal. The applicant had argued that the Commercial Court had not been impartial because the insolvency judge had sat on the bench of the Commercial Court that had ordered the companies' liquidation after playing an active role in the period of observation of the companies. The Court of Cassation met the argument as follows:

> "... the fact that, in accordance with Article 24 of the decree of 27 December 1985, the insolvency judge sat on the bench that made the order for compulsory liquidation is not contrary to the provisions of Article 6 § 1 of the European Convention on Human Rights; that ground of appeal is unfounded; ..."

The applicant's second ground of appeal read as follows:

> "... the insolvency judge's report and accompanying documents were not communicated to the appellants. In that regard the hearing was not fair for the purposes of Article 6 § 1 of the Convention and the rights of the defence were not respected within the meaning of Article 16 of the New Code of Civil Procedure. A

hearing can only be said to be fair – again for the purposes of the European Convention – if equality of arms is ensured, in other words, if each party is aware of all the matters on which the court will rely in coming to its decision. Among those matters, the insolvency judge's report plays a paramount role in helping the court to reach its decision. However, it is deemed privileged information to which the debtor is unable to have access (it is not communicated, does not appear in the official case file which may be communicated and is not read out at the hearing). Nor, consequently, may he contest it. The principle of a fair hearing is thus infringed for the purposes of the Convention and the rights of the defence under the New Code of Civil Procedure denied.

The Court of Cassation answered that argument as follows:

"... Article 111 of the decree of 27 December 1985 provides that the insolvency judge's report may be presented orally; that provision is not contrary to Article 6 of the European Convention on Human Rights. Accordingly, since the applicant has not submitted that the insolvency judge did not present his report orally, this ground of appeal cannot succeed ..."

The applicant also raised a ground of appeal based on the fact that the Court of Appeal had failed either to summons the other party to a contract to appear or to take evidence from it. The Court of Cassation dismissed that ground of appeal, holding:

"... other contracting parties are only required to be summonsed to appear before the court of appeal when assignment of the contract as part of a plan for the sale of the undertaking is envisaged. There is no provision requiring other contracting parties to be summonsed to appear when an order for compulsory liquidation is made. This ground of appeal is therefore unfounded ..."

Concurrently, on 27 February 1995 the applicant lodged an application with the President of the Commercial Court for an order for the communication of the insolvency judge's report. On 15 March 1995 the President of the Nanterre Commercial Court dismissed the application, holding:

"... the insolvency judge's report is clothed in the secrecy of the deliberations and cannot be communicated to anyone."

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. Law no. 85-98 of 25 January 1985 on the judicial reorganisation and liquidation of undertakings and its implementing Decree no. 85-1388 of 27 December 1985[1]

Purpose of judicial reorganisation and liquidation proceedings

1. *Note by the Registry*. Sections relate to Law no. 85-98 of 25 January 1985 and Articles to Decree no. 85-1388 of 27 December 1985.

Section 1 – "This Act institutes a new procedure of judicial reorganisation proceedings with the aim of preserving undertakings, maintaining their activities and employment and clearing their debts."

Judicial reorganisation shall take place in accordance with a plan approved in a judicial decision at the end of an observation period. The plan shall provide for the continuation or the sale of the activity of the undertaking. When neither alternative appears possible, the undertaking shall be put into compulsory liquidation."

Section 8 – "When an order for judicial reorganisation is made an observation period shall commence so that a report can be prepared on the company's finances and labour force and proposals made for the continuation or sale of the undertaking. If neither alternative appears possible, the court shall make an order for compulsory liquidation."

Section 10 – "In the insolvency order the court shall designate the insolvency judge [from a list compiled by the president of judges with at least two years' experience] and two court officers, namely the administrator and the creditors' representative. It shall invite the works council or, if none, the staff delegates or, if none, the members of staff to appoint a staff representative from the undertaking ..."

Functions of the insolvency judge during the observation period

Section 14 – "The insolvency judge shall be responsible for ensuring that the case proceeds expeditiously and that all relevant interests are protected."

Section 20 – "The administrator shall receive from the insolvency judge all information and documents that are relevant to the performance of his or her and the experts' duties."

Powers of the insolvency judge during the observation period

Power to supervise the company's situation

Section 13 – "The administrator and the creditors' representative shall keep the insolvency judge and State Counsel's Office informed of the progress of proceedings. The insolvency judge and State Counsel's Office may at any time require communication of any pleading or document related to the procedure.

Notwithstanding any statutory provision to the contrary, State Counsel's Office shall communicate to the insolvency judge at the latter's request or on its own initiative all information he holds that may be of relevance to the proceedings."

Section 19 – "Notwithstanding any statutory or regulatory provision to the contrary, the insolvency judge may procure communication to him by the auditors, staff members and representatives, public authorities and bodies, pension and social-security funds, lending institutions and the departments responsible for centralising banking risks and defaults in payment information apt to give him precise details of the undertaking's economic and financial circumstances."

Section 29 – "During the observation period the insolvency judge may order that letters addressed to the debtor shall be remitted to the administrator ..."

Power to intervene in the management of the undertaking

Article 25 of the decree – "The insolvency judge shall make an order when deciding applications, challenges and claims within his jurisdiction or grievances concerning acts of the administrator, the creditors' representative, the commissioner responsible for the execution of the plan, the liquidator or the staff representative.

Should the insolvency judge fail to make an order within a reasonable time, the court may hear the case on its own initiative or at the request of a party.

Orders of the insolvency judge shall be lodged with the registry forthwith and communicated to the court officers. An appeal shall lie against them [to the court].

The court may on its own initiative quash or vary an order within the same period."

Section 27 – "The insolvency judge may order an inventory of the assets of the undertaking and the affixation of seals."

Article 28 of the decree – "The insolvency judge shall give authority to the administrator or the debtor to pay over to the creditors' representative the sums which the latter requires to discharge his obligations."

Section 30 – "The insolvency judge shall fix the remuneration for the duties performed by the head of the undertaking or the company management ..."

Section 33 – "The judgment setting the proceedings in motion shall automatically entail a ban on the payment of any debts that arose before the insolvency judgment.

The insolvency judge may authorise the head of the undertaking or the administrator to dispose of property other than in the ordinary course of the business of the undertaking, to grant a mortgage or a pledge, or to compromise or settle.

The insolvency judge may also authorise such persons to pay debts that arose before the judgment or to release a lien or property that is the subject of a valid retention of title clause provided such release is justified in that it permits the company to continue to trade.

Any document entered into or payment made in breach of the provisions of this section shall be set aside on application by any interested party lodged within three years from the execution of the document or payment of the debt. For registrable documents, time shall start to run from the date of registration."

Section 34 – "In the absence of agreement, the insolvency judge shall decide by order whether proposals by the debtor or administrator to the creditors for substituting security with equivalent security shall be implemented."

Section 39 *in fine* – "The insolvency judge may authorise the debtor or, as the case may be, the administrator, to sell movable assets in rented property that is liable to deteriorate rapidly or depreciate imminently, whose upkeep would be costly or

realisation will not jeopardise the existence of the business or the preservation of sufficient security for the landlord."

Section 45 – "Where during the period of observation redundancies are urgent, inevitable and essential, the insolvency judge may authorise the administrator to effect the dismissals ..."

Section 53 – "Creditors failing to lodge a proof within the periods laid down by decree of the *Conseil d'Etat* shall not be entitled to any share or dividend unless the insolvency judge grants them an extension of time after they have satisfied him that they were not responsible for the failure ..."

Decision-making power

Section 101 – "In the light of proposals by the creditors' representative, the insolvency judge shall decide to accept or reject proofs or shall note that proceedings are under way or that the dispute is not within his jurisdiction ..."

Section 156 – "The insolvency judge shall order the sale by auction or by private agreement of the remaining property belonging to the undertaking ..."

Section 173 – "No application to set aside, whether by the other party to a contract or a third party, and no ordinary appeal or appeal on points of law shall lie against:

...

2. Judgments delivered by the Commercial Court on appeal against an order of the insolvency judge ..."

Sundry prerogatives

Section 12 – "The court may, on its own initiative, on a proposal by the insolvency judge or at the request of State Counsel's Office, replace the administrator, an expert or the creditors' representative ..."

Section 15 – "Either one or two supervisors chosen from among the creditors may be appointed by order of the insolvency judge ..."

Court's decision on the plan for the continuation or sale of the undertaking

Judgment deciding on the plan

Section 61 – "After hearing the debtor, the administrator, the creditors' representative and the representatives of the works council or, if none, the staff delegates or duly summonsing them to appear, the court shall deliver its judgment in the light of the administrator's plan and shall order either reorganisation or liquidation ..."

Section 36 is contained in the part of the Act relating to the pursuit of the undertaking's activity. The Act provides that the activity of the undertaking shall continue during the observation period subject to the provisions of Section 36, which reads as follows:

> "At any stage, the court may, at the request of the administrator, the creditor's representative, the debtor, State Counsel's Office or on its own initiative and in the light of the insolvency judge's report, order the cessation of all or part of the activity or compulsory liquidation."
>
> The court shall deliver its judgment in private after hearing the debtor, the administrator, the creditors' representative and the representatives of the works council or, if none, the staff delegates or after duly summonsing them to appear."

20. Judgment of 11 September 1997 of the Grenoble Court of Appeal, Hapian v. Hidoux, *Recueil Dalloz* 1998, J. 128

The Court of Appeal said:

> "The insolvency judge has the role of supervising the administration and compulsory liquidation while also exercising an investigative role; his presence in the trial Chamber is an exception to the principle that the investigation and trial stages should be kept separate."

The facts, however, were concerned with another aspect of the procedure, namely the making of a personal bankruptcy order against the manager of a company that had been put into liquidation. The same judge had sat as president and insolvency judge in two sets of proceedings in which first the company's judicial reorganisation and then its compulsory liquidation had been ordered. He had subsequently served a summons on the manager of the company to appear before the commercial court (the summons contained a recommendation that the manager should be declared personally bankrupt) and presided over that court, which made an order declaring the manager personally bankrupt. The Court of Appeal quashed the judgment of the commercial court on the ground that there had been a violation of Article 6 § 1 of the Convention. It found that the fact that the insolvency judge had sat on the bench that heard the case was inconsistent with the principle that the investigation and trial stages should be kept separate and could legitimise the appellant's concerns regarding the objective impartiality of the court that had delivered the impugned decision (*Recueil Dalloz* 1998, *jurisprudence*, pp. 128 et seq.). The Court of Appeal relied essentially on the role of appearances and expressly followed the judgments in Delcourt v. Belgium of 17 January 1970, Series A no. 11, p. 17, § 31, and De Cubber v. Belgium of 26 October 1984, Series A no. 86, p. 14, § 26.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

21. With regard to the proceedings before the Commercial Court the applicant alleged a violation of Article 6 § 1 of the Convention in so far as it guaranteed the right to a fair hearing by an impartial tribunal. The Government contested that argument.

22. Article 6 § 1 provides, *inter alia*:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Alleged unfairness of the proceedings before the Commercial Court

1. Arguments of the parties

23. In his written observations, the applicant noted that in its judgment the Commercial Court had included the insolvency judge's report in the list of documents it had seen. He concluded that the report in question, which section 36 of the Law of 25 January 1985 made mandatory, was in written form, as otherwise the Commercial Court would have used the term "heard". The Court of Cassation had not established that the report did not exist. The applicant also referred to the order dated 15 March 1993 of the President of the Nanterre Commercial Court, who was familiar with the procedure in that court and could not have confused the report which the insolvency judge had submitted at the hearing with the remarks he had exchanged with his colleagues at that hearing. The applicant therefore maintained that the insolvency judge had in the instant case submitted a written report to the Commercial Court.

He complained that the document which had been lodged with the judges had not been communicated to the parties, in breach of the right to adversarial proceedings in accordance with the principle of equality of arms. Adversarial proceedings implied that a court should not base its decision on evidence that had not been made available to each of the parties and equality of arms required each party to be afforded an opportunity to present his case under conditions that guaranteed a balance between the parties to the cause (see, among other authorities, the Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993, Series A no. 274, p. 19, § 33, and the Hentrich v. France judgment of 22 September 1994, Series A no. 296-A, p. 22, § 56).

In his pleadings at the hearing, the applicant's lawyer said that since a recovery plan had been put before the court, section 61 of the Law of 25 January 1985 was applicable.

24. The Government pointed out that the insolvency judge might have to draw up two very different types of reports in compulsory liquidation proceedings. The first type was a report under section 36 of the Law of 25 January 1985 that was required if it was at the insolvency judge's request that the commercial court had to decide whether to make an order for the undertaking to cease trading or to be liquidated. In such cases, the report was a procedural document that was communicated to the parties. That type of report was not relevant in the instant case as the application to the court had been made by the judicial administrator pursuant to section 61 of the Law of 1985 cited above. The applicant had not alleged that that report had not been communicated to him for comment.

25. Where – as in the instant case – the court was exercising jurisdiction on an application by the judicial administrator, the insolvency judge explained to the other members of the court all the measures he had taken during the observation period and gave them his opinion on the final decision which the court should take. There was no formal procedure for making that report and in practice it was usually done orally. Although in the present case the Commercial Court had expressly used the term “seen” in its judgment when referring to the report, that did not necessarily mean that a written document had been read.

In the Government's submission, the insolvency judge's report in the latter type of case could be regarded as privileged from disclosure as forming part of the deliberations, since the insolvency judge's role in deliberations with his colleagues was similar to that of a judge rapporteur in a collegiate court. In its Reinhardt and Slimane-Kaïd v. France judgment (31 March 1998, *Reports of Judgments and Decisions* 1998-II, pp. 665-66, § 105), the Court had already ruled that the legal analysis of a case and the opinion of the advocate-general on the merits of an appeal to the Court of Cassation were “legitimately privileged from disclosure as forming part of the deliberations”. Moreover, since the report had not been communicated to any of the parties to the proceedings in the instant case, there had been no failure to maintain equality of arms between them.

26. The Government indicated for the first time at the hearing in answer to a question put by the Court that the judgment of 26 October 1993 contained a typographical error, a fact which the applicant's lawyer did not contest. The references to section 36 of the Law of 25 January 1985 were incorrect, the applicable provision in fact being section 61 of the Law as, the Government maintained, became apparent when the judgment was read as a whole, since it stated that the Commercial Court had obtained jurisdiction at the end of the observation period when the judicial administrator had asked

it to adjudicate on the proposed recovery plan, a procedure prescribed by section 61, not section 36.

2. The Court's assessment

27. The Court reiterates that the right to adversarial proceedings "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision" (see the Lobo Machado v. Portugal judgment of 20 February 1996, *Reports* 1996-I, pp. 206-07, § 31).

The principle of equality of arms "– one of the elements of the broader concept of fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent" (see the Nideröst-Huber v. Switzerland judgment of 18 February 1997, *Reports* 1997-I, p. 107, § 23).

28. The Court notes that for the first time at the hearing before it both the Government and the applicant said that, contrary to what was stated in the judgment, the Commercial Court had followed the procedure governed by section 61 of the Law of 25 January 1985, and not the section 36 procedure (see paragraph 16 above). That could be seen from the reasoning of the judgment taken as a whole.

29. The Court notes that the reasoning set out in the judgment shows that the cause before the Commercial Court proceeded as follows: an application was made by the judicial administrator for the court to rule on the applicant's proposed recovery plan; the Commercial Court examined the recovery plan, heard submissions from the judicial administrator and the creditors' representative and reached its decision in the light of the administrator's report. Those facts were not contested by the parties.

30. The Court notes that those events support the submission made at the hearing that the judgment was delivered pursuant to section 61 of the Law of 25 January 1985. It is thus satisfied that the reference in the judgment to section 36 of the Law of 1985 is a typographical error made when the document was drawn up (see, *mutatis mutandis*, *Douiyeb v. the Netherlands* [GC], no. 31464/96, § 52, 4 August 1999, unreported), a fact which the parties do not contest.

31. The procedure under section 61 does not provide for a written report to be lodged by the insolvency judge (see paragraph 19 above), unlike the procedure under section 36. The Court concludes from that that the reference in the judgment to the Commercial Court having seen the report was also an error.

The case file shows that the applicant's complaint of a violation of Article 6 was based on those references in the judgment.

32. From the information available to the Court, it is therefore apparent that the applicant's complaint is based on erroneous references in the Commercial Court's judgment.

33. In those special circumstances, the Court holds that there are no grounds for finding a violation of Article 6 § 1 in so far as it guarantees the right to a fair hearing and to equality of arms.

B. Alleged lack of impartiality by the insolvency judge in the Commercial Court

1. The parties' submissions

34. The applicant questioned the subjective impartiality of the insolvency judge. In doing so, he pointed to matters set out in the Commercial Court's judgment.

He relied on the failure to communicate the insolvency judge's report, errors in the facts in the judgment and omissions in the reasoning regarding certain matters relating to the companies, difficulties encountered during the course of the observation period and the substantial indebtedness of the companies concerned. He added that relations between one of the companies and the insolvency judge had been conflictual.

The applicant said that the Commercial Court had failed to rectify errors in the administrator's report and to hear adversarial argument about the criticism that had been made of candidates wishing to pursue the companies' activity and about the erroneous assessment of their professional capabilities.

He added that no action had been taken against third parties guilty of criminal acts committed to the detriment of his companies.

35. In the applicant's submission, his concerns were justified by the following objective factors.

Article 26 of the decree of 27 December 1985 laid down that, on pain of the judgment being declared null and void, the insolvency judge could not sit when the court was acting on its own initiative or was hearing an appeal against one of its own orders. The applicant maintained that it was inconsistent for the insolvency judge to be allowed to sit in certain cases but not in others, since the case file in insolvency proceedings was indivisible.

Under the Law of 25 January 1985 (see paragraph 19 above), the insolvency judge had very wide powers during the period when the companies were under observation. Thus, during that stage of the proceedings, he played an active role in the companies' management and had powers of information and investigation enabling him to run the companies.

In the instant case, the insolvency judge had made thirty orders in spheres ranging from dismissal to the attachment of accounts and the sale of

movable and immovable property. On a number of points the applicant had disagreed with the insolvency judge and may therefore have formed the impression that he was appearing before an opponent. Further, a number of the insolvency judge's decisions indicated the position he would take in the trial court.

That suggested to the applicant that an insolvency judge subsequently exerted a decisive influence over a commercial court's decision on a company's future.

That influence was increased by his reports to his colleagues, on which no adversarial argument from the parties was heard. Nor did his colleagues take any active part in the commercial court's decision. It was for that reason that certain French commercial courts refused to allow the insolvency judge to take part in the deliberations of the trial court.

The Court of Cassation, sitting as a full court, had in a decision of 5 February 1999 confirmed the necessity of separating the functions of the rapporteur from those of members of the Stock Exchange Regulatory Authority (*Commission des opérations de bourse*). One of the findings in that judgment was that the rapporteur was responsible for conducting an investigation into the facts with the assistance of the administrative services and for making any relevant inquiries. Moreover, the Grenoble Court of Appeal had held in a judgment of 11 September 1997 (*Dalloz* 1998, J. 128) that the fact that an insolvency judge had sat on a trial bench infringed the principle that the investigation and trial stages should be kept separate.

36. The Government noted that individual judges were presumed to be impartial unless there was evidence to the contrary. Unlike the applicant, they considered that the judgment was couched in neutral terms and did not suggest any bias against the applicant. They therefore submitted that the applicant's concerns were not objectively justified.

37. Furthermore, the Government said that the manner in which the proceedings had been conducted had guaranteed the insolvency judge's neutrality, as the case had come before the Commercial Court at the request of the judicial administrator, not the insolvency judge, under section 61 of the Law of 1985 cited above. The Commercial Court was asked to rule on the applicant's proposed recovery plan. It was only because the plan did not appear viable that the court had decided to order the companies' liquidation. The court had been careful to request additional information from the applicant before reaching its decision.

38. When performing their duties during the observation period, insolvency judges did not have any preconceived ideas on the issues they would have to decide before the commercial court.

That was because during the observation period insolvency judges were responsible for managing and supervising the activities of companies in difficulty. Their aim was to manage the various conflicting interests without jeopardising the direct functioning of the company. For that purpose they

were empowered to make orders, against which an appeal lay to the commercial court.

In the instant case, most of the orders made by the insolvency judge had concerned procedural issues. Only two orders (authorising redundancies) had directly concerned the economic exploitation of the applicant's companies.

However, the Government considered that those orders had had no effect on the insolvency judge's capacity at the hearing before the Commercial Court to consider the issue at hand without prejudging it.

39. When sitting in the commercial court the insolvency judge's role was to account to his colleagues for the tasks which he had performed during the observation period. His opinion did not bind the other two judges called upon to decide whether the undertaking was viable. Thus, the commercial court was the sole judge and its judgment was unconnected with the various steps taken by the insolvency judge during the observation period.

In the instant case, it had been the judicial administrator who had questioned the viability of the undertaking. He had pointed out that the applicant's proposed recovery plan contained areas of uncertainty which the applicant had to resolve. The Commercial Court had given the applicant time to produce all the guarantees necessary for his plan to be approved. In subsequently deciding to order the companies' liquidation, the Commercial Court had relied on objective factors relating to the lack of financial guarantees, the recent balance sheets of the companies and further information about their financial means.

The Government submitted in conclusion that there was no evidence of any lack of impartiality on the part of the insolvency judge.

2. The Court's assessment

40. There are two tests for assessing whether a tribunal is impartial within the meaning of Article 6 § 1: the first consists in seeking to determine the personal conviction of a particular judge in a given case; the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among other authorities, the Gautrin and Others v. France judgment of 20 May 1998, *Reports* 1998-III, pp. 1030-31, § 58).

41. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see, among other authorities, the Padovani v. Italy judgment of 26 February 1993, Series A no. 257-B, p. 20, § 26).

However, despite the applicant's submissions (see paragraph 34 above), the Court is not satisfied that there is evidence establishing that the insolvency judge acted with any personal prejudice.

42. As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of

the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. It follows that when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see the Gautrin and Others judgment cited above, ibid.).

43. In the instant case, the concerns regarding the insolvency judge's impartiality stemmed from the fact that he had taken various measures concerning the companies during the observation period and subsequently presided over the court that had decided the companies' fate.

44. The Court accepts that that situation could raise doubts in the applicant's mind about the impartiality of the Commercial Court. However, it has to decide whether those doubts were objectively justified.

45. In that connection, the Court notes that the answer to that question depends on the circumstances of the case. For that reason, it cannot be bound by the decisions cited by the applicant; moreover, one of those decisions concerned a different sphere (see paragraph 35 above) while the other dealt with an aspect of insolvency proceedings that was different from that under consideration in the present case (see paragraph 20 above).

Furthermore, the mere fact that a judge has already taken pre-trial decisions cannot by itself be regarded as justifying concerns about his impartiality. What matters is the scope and nature of the measures taken by the judge before the trial. Likewise, the fact that the judge has detailed knowledge of the case file does not entail any prejudice on his part that would prevent his being regarded as impartial when the decision on the merits is taken. Nor does a preliminary analysis of the available information mean that the final analysis has been prejudged. What is important is for that analysis to be carried out when judgment is delivered and to be based on the evidence produced and argument heard at the hearing (see, among other authorities, *mutatis mutandis*, the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 22, § 50; the Nortier v. the Netherlands judgment of 24 August 1993, Series A no. 267, p. 15, § 33; and the Saraiva de Carvalho v. Portugal judgment of 22 April 1994, Series A no. 286-B, p. 38, § 35).

46. In the light of those principles, the Court considers that the applicant's concerns cannot be justified in themselves by the fact that the insolvency judge took certain decisions during the observation period (orders concerning the management of the companies, dismissals and interim measures). His knowledge of the case file was not in itself decisive either. As regards the influence which the applicant alleged the insolvency judge had on the bench, it is not in issue here.

47. All the Court has to decide is whether, having regard to the nature and extent of his functions during the observation period and of the measures adopted, the insolvency judge displayed any bias regarding the decision to be taken by the Commercial Court. Such would have been the case if the issues dealt with by the insolvency judge during the observation period were analogous to those on which he ruled as a member of the trial court (see the Saraiva de Carvalho judgment cited above, p. 39, § 38).

48. There is nothing in the case file to suggest that that was the case here. The case file shows that the insolvency judge made orders dealing with questions relating to the companies' economic and financial survival and staff management during the observation period. Under the applicable domestic law, his role was to ensure that the proceedings advanced rapidly and that relevant interests were protected.

When the Commercial Court presided over by the insolvency judge subsequently acquired jurisdiction under section 61 of the Law of 25 January 1985 (that is to say, contrary to the applicant's submission, without a written report from him), it was required to assess the mid- to long-term viability of the applicant's plan for the companies' continued trading at the end of the observation period. In that connection, the Commercial Court had to examine the financial guarantees and other evidence produced by the applicant at the hearing and the circumstances of the companies at that time (as regards such matters as staff and immovable property, and the fact that they were trading in a difficult sector). It also relied on information supplied by the administrator.

The Commercial Court's assessment was based on evidence that was produced and was the subject of argument at the hearing. That is attested by the fact that the Commercial Court did not finally decide the case until it had requested and obtained from the applicant additional documents proving the credibility of the guarantees he had produced.

The Court notes, therefore, that the insolvency judge had to deal with two quite separate issues. Although, as a result of his role during the observation period, he had acquired special knowledge of the companies' circumstances (one of the factors to which the Commercial Court had regard in its decision), nonetheless he could not have formed a view at that juncture on the plan proposed by the applicant at the hearing before the court for the continuation of the activity, while the viability of that plan was assessed by the Commercial Court in the light of the guarantees furnished and examined at the hearing (see, *mutatis mutandis*, the judgments cited above: Saraiva de Carvalho, p. 39, § 38 *in fine*, and, *a contrario*, Hauschildt).

49. The Court, therefore, does not find in the present case any objective grounds for believing that the nature and extent of the insolvency judge's duties during the observation period (which were intended to ensure the day to day management of the companies) gave rise to any prejudice on the – separate – issue which the Commercial Court had to decide regarding the

viability of the applicant's plan for the companies continued trading at the end of the observation period and of the financial guarantees produced at the hearing.

50. In the light of the special circumstances of the present case, the Court finds that the applicant's concerns were not objectively justified.

Consequently, there has been no violation of Article 6 § 1 to the extent that it guarantees the right to an impartial tribunal.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of the right to a fair hearing as guaranteed by Article 6 § 1 of the Convention;

2. *Holds* that there has been no violation of the right to an impartial tribunal as guaranteed by Article 6 § 1 of the Convention;

Done in French, and notified in writing on 6 June 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

W. FURHMANN
President