

JUDGMENT OF THE COURT (Second Chamber)
27 October 1987 *

In Case 109/86

REFERENCE to the Court under Article 177 of the EEC Treaty by the Efeteio (Court of Appeal), Athens, for a preliminary ruling in the proceedings pending before that Court between

Ioannis Theodorakis Biomichania Elaiou AE, whose registered office is in Chania, represented by the Chairman of the Board of Directors, Ioannis Dimitris Theodorakis,

and

Greek State, represented by the Minister for Finance,

on the interpretation of Articles 36 and 37 of Commission Regulation (EEC) No 3183/80 of 3 December 1980 laying down common detailed rules for the application of the system of import and export licences and advance-fixing certificates for agricultural products (Official Journal 1980, L 338, p. 1),

THE COURT (Second Chamber),

composed of: O. Due, President of Chamber, K. Bahlmann and T. F. O'Higgins, Judges,

Advocate General: Sir Gordon Slynn
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

Ioannis Theodorakis Biomichania Elaiou AE, by E. S. Zouridakis,

the Commission of the European Communities, by X. Yataganas,

* Language of the Case: Greek.

having regard to the Report for the Hearing and further to the hearing on 10 June 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 10 June 1987,

gives the following,

Judgment

- 1 By order of 16 October 1985, which was received at the Court on 7 May 1986, the Efeteio (Court of Appeal), Athens, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 36 and 37 of Commission Regulation (EEC) No 3183/80 of 3 December 1980 laying down common detailed rules for the application of the system of import and export licences and advance-fixing certificates for agricultural products (Official Journal 1980, L 338, p. 1).
- 2 The question was raised in proceedings between the Greek company Ioannis Theodorakis Biomichania Elaiou AE (hereinafter referred to as "Theodorakis") and the Greek State for the return of security furnished by that company. In April 1982, Theodorakis had agreed to sell to a Polish undertaking goods whose exportation from the Community was subject, by virtue of the applicable Community rules, to the issue by the competent Greek authority of an export licence, which Theodorakis duly obtained by providing the security required for that purpose. The licence in question was valid until 31 August 1982, and the Polish purchaser was to take delivery of the goods in Greece no later than that date. However, since the purchaser did not attend in due time to take delivery of the goods, despite Theodorakis's requests to that effect, Theodorakis claims to have obtained from the competent Greek authority an extension of the time-limit for exportation until 31 December 1982. After being informed by the Polish purchaser that the latter would not be able to take delivery of the goods even in December Theodorakis cancelled the contract.
- 3 The competent Greek authority declared the security forfeit for failure to complete the export transaction and Theodorakis brought an action for its return. The action was dismissed at first instance and Theodorakis brought the matter before

the Court of Appeal, Athens, maintaining, *inter alia*, that the Polish purchaser's failure to take delivery of the goods in Greece constituted a case of *force majeure* within the meaning of Commission Regulation No 3183/80, so that the export licence in question should be cancelled and the security returned.

4 With a view to determining the action before it, the Athens Court of Appeal submitted a question to the Court of Justice for a preliminary ruling, in order to ascertain, essentially, whether the concept of *force majeure* contained in Articles 36 and 37 of Regulation No 3183/80 must be interpreted as extending to a case where the goods were not exported during the period of validity of the export certificate because the purchaser, contrary to his contractual obligation to do so, failed to take delivery of the goods sold for export.

5 Reference is made to the Report for the Hearing for a fuller account of the written observations submitted to the Court, which are mentioned or referred to hereinafter only in so far as is necessary for the reasoning of the Court.

6 In order to answer the question submitted, it must first be borne in mind, as the Court held in its judgment of 30 January 1974 in Case 158/73 *Kampffmeyer v Einfuhr- und Vorratsstelle Getreide* [1974] ECR 101, that since the concept of *force majeure* differs in its scope in different areas of the law and in its various spheres of application, its precise meaning must be determined by reference to the legal context in which it is intended to operate. In the present case, the legal situation is characterized by the obligation imposed by Community law upon the holder of the export licence to export the goods in question during the period of validity of his licence, the fulfilment of that obligation being guaranteed by the provision of security, as is apparent in particular from Articles 8 (1) and 29 (b) of Regulation No 3183/80 and the ninth recital in its preamble. By virtue of the combined provisions of Articles 36 and 37 of the same regulation, that security is to be released when the competent national authority cancels the obligation to export because 'as a result of *force majeure* . . . exportation cannot be effected during the period of validity of the licence'.

7 The Court held in the abovementioned judgment, with respect to provisions similar to Articles 36 and 37 of Regulation No 3183/80, that the concept of *force majeure*

was not limited to cases of absolute impossibility. However, the Court has also consistently held that, whilst that concept does not presuppose absolute impossibility, it nevertheless requires the non-performance of the act in question to be due to circumstances beyond the control of the person claiming *force majeure* which are abnormal and unforeseeable and of which the consequences could not have been avoided despite the exercise of all due care.

- 8 Where the failure to export goods as planned is not attributable to any fault on the part of the holder of the export licence but is due solely to non-performance by the other party to the sales contract under which the goods were to be exported, it is clear that although such a hindrance to the performance of a contract may be described as a circumstance outside the control of the holder of the licence, it is none the less neither abnormal nor unforeseeable. Such an event is an ordinary commercial risk inherent in commercial transactions and it is for the holder of the licence, who is fully at liberty to select such trading partners as his interests in that respect may dictate, to take the appropriate precautions either by including the requisite clauses in the contract in question or by effecting appropriate insurance.

- 9 It must therefore be stated in reply to the national court that the concept of *force majeure* within the meaning of Articles 36 and 37 of Commission Regulation No 3183/80 of 3 December 1980, properly construed, does not extend to a case where goods were not exported during the period of validity of an export licence because the purchaser, contrary to his contractual obligation, failed to take delivery of the goods sold for export.

Costs

- 10 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in reply to the questions submitted to it by the Efeteio (Court of Appeal), Athens, by order of 16 October 1985, hereby rules:

The concept of *force majeure* within the meaning of Articles 36 and 37 of Commission Regulation (EEC) No 3183/80 of 3 December 1980, properly construed, does not extend to a case where goods were not exported during the period of validity of an export licence because the purchaser, contrary to his contractual obligation, failed to take delivery of the goods sold for export.

Due

Bahlmann

O'Higgins

Delivered in open court in Luxembourg on 27 October 1987.

P. Heim

O. Due

Registrar

President of the Second Chamber