JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

17 December 2010 *

In Case T-460/08,

European Commission, represented by A. Aresu and A. Caeiros, acting as Agents,

applicant,

v

Acentro Turismo SpA, established in Milan (Italy), represented by A. Carta and G. Murdolo, lawyers,

defendant,

APPLICATION by the Commission under Article 153 EA for an order requiring the defendant to pay sums allegedly payable, plus late payment interest, by way of performance of the contract for provision of services 349-90-04 TL ISP I, concerning the organisation of journeys for official trips required by the Joint Research Centre,

* Language of the case: Italian.

THE GENERAL COURT (Eighth Chamber),

composed of M. E. Martins Ribeiro, President, S. Papasavvas and N. Wahl (Rapporteur), Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 February 2010,

gives the following

Judgment

Contractual framework

1 On 6 April 1990, the European Atomic Energy Community (Euratom), represented by the Commission of the European Communities, concluded with Acentro Divisione Turismo SpA, subsequently Acentro Turismo SpA ('Acentro'), the contract for provision of services No 3949-90-04 TL ISP I ('the contract').

2 The contract provided that, in the interest of the Commission, Acentro would ensure the organisation of journeys for the official trips required by the Joint Research Centre (JRS), situated at Ispra (Italy).

3 Under Article 2.1 of the contract, it was concluded for an initial period of two years as from 1 October 1990. The contract was subsequently extended by four years by an initial additional agreement signed at Ispra on 11 August 1992, then by six years by a second additional agreement signed at Ispra on 7 July 1994 and, lastly, by six months by a third additional agreement signed at Ispra on 9 September 1996.

4 Under Article 6.2 of the contract, Acentro was to compile, three times per month, the details of the bills corresponding to travel tickets issued, then send them to the relevant services of the Commission, together with bills of any expenses. Those services were then to make any reimbursement within 60 days from the date when the accounts were presented.

5 Article 7 of the contract provided that Acentro owed three types of pecuniary obligations to the Commission:

— a premium (agio) calculated 'on the basis of 3 % of the amounts relating to international air travel ticketing' (Article 7.1);

— a contribution to the expenses relating to the use and maintenance by Acentro of the premises placed at its disposal by the Commission at the Ispra site, including expenses for cleaning, heating, air conditioning and electricity, in accordance with the parameters fixed in Appendix 1 to the contract (Article 7.2);

— responsibility for running expenses and expenses involved in the performance of the tasks entrusted to it, as well as expenses for telephone, telex and fax (Article 7.3).

6 Under Article 8 of the contract, every six months the Commission was to send Acentro an invoice relating to the abovementioned obligations, which was to be paid by it within 30 days of receipt.

7 Article 15 of the contract provided as follows:

'15. 1 This contract is governed by Italian law.

15. 2 In the event of any disagreement, the Court of Justice of the European Communities shall have exclusive jurisdiction to hear any dispute between the parties to the contract concerning this contract.'

8 The contract also provided, in accordance with Article 1341, second paragraph, of the Italian Civil Code ('the CC'), that the arbitration clause stipulated was to be the subject of a second signature, in a separate document.

9 Article 1341, second paragraph, of the CC provides that '…derogations from the jurisdiction of the courts will, in any event, be of no effect if they are not specifically approved in writing.'

Background to the dispute

10 Following expiry of the contract on 31 March 1997, the competent services of the Commission found that Acentro had not settled two invoices issued by the Commission pursuant to Article 8 of the contract, namely:

— the invoice with reference number 97170/REE of 19 May 1997, for an amount of ITL 1 566 571, relating to expenses for placing the premises at Acentro's disposal for the period from 1 September 1996 to 31 March 1997;

— the invoice with reference number 97182/REE of 19 May 1997, for an amount of ITL 75 042 795, concerning the 3 % premium on international air travel ticketing for the period from 1 October 1996 to 31 March 1997.

11 By letter of 2 September 1997, the Commission called on Acentro to pay the amounts of the two invoices in question within 15 days of receipt of that reminder.

12 By letter of 12 September 1997, Acentro replied to the Commission's letter of 2 September 1997. In that reply, it stated, first, that the estimated overall amount of ITL 22 257 166, which the Commission owed to it, should be deducted from the total amount of ITL 76 609 366 claimed by the Commission. Second, it stated its intention not to settle the remaining debt, since it took the view that the debt should be offset by the amount of ITL 29 328 000, which it was owed for performance of the contract for provision of services Phare No 96-0781.00 which it had concluded on 23 July 1996 at Milan (Italy) with the European Community.

13 Accepting the principle of set-off between the debts and claims that Acentro and the Commission had against each other for performance of the contract, the Commission conducted a comparative examination of the debts and claims of each contracting party relating to the 1997 financial year.

14 In that examination, the Commission took into consideration, in addition to the invoices referred to in paragraph 10 above, six invoices relating to telephone expenses which had not been paid by Acentro, namely the invoices bearing reference numbers 97171/REE, 97172/REE, 97173/REE, 97174/REE, 97175/REE and 97176/REE, totalling ITL 80 501 938. Next, it took into consideration the invoices included in the details of the bills sent by Acentro in 1997 which had not yet been paid to that company, totalling ITL 54 367 200. The Commission accordingly concluded that there was an outstanding balance in its favour of ITL 26 134 738 (EUR 13 497.46) and, therefore, a debt in the same amount owed to Euratom by Acentro.

15 By letter of 31 May 2002, sent by registered post with recorded delivery, the Commission informed Acentro of that result and served formal notice on it to pay the amount of EUR 13 497.46 within 15 days of receipt of that letter.

16 By letter of 10 June 2002, Acentro informed the Commission of its refusal to settle the debt in question, taking the view that it could be offset by the sum it was owed by Euratom for performance of the contract for provision of services Phare No 96-0781.00.

17 By letter of 11 November 2002, sent by registered post with recorded delivery, the Commission claimed from Acentro payment of the amount of EUR 13 497.46

18 By letter of 20 November 2002, Acentro replied to the Commission's letter of 11 November 2002. It reiterated its point of view and maintained its refusal to settle the debt in question.

19 By letter of 20 January 2004, sent by registered post with recorded delivery, the Commission again requested Acentro to pay the amount of EUR 13 497.46

20 When Acentro did not respond to that letter, the Commission engaged an Italian lawyer in order to obtain payment of the amount it claimed was owed to it. When the situation had not changed and the debt owed to Euratom by Acentro had not been recovered, the Commission decided to bring an action before the Court pursuant to the arbitration clause in Article 15 of the contract.

Procedure and forms of order sought

21 By application lodged at the Registry of the Court on 10 October 2008, the Commission brought the present action pursuant to Article 153 EA.

22 At the hearing on 11 February 2010, the parties presented their oral arguments and answered the questions put by the Court.

23 At the hearing, the Commission applied to the Court for leave to place in the file certain additional documents concerning the debt in question. Acentro objected. The documents were not placed in the file.

24 The Commission claims that the Court should:

— order Acentro to pay the principal sum of EUR 13 497.46;

— order Acentro to pay the sum of EUR 2 278.55 by way of late payment interest due at the date of lodging of the application in the present case and to pay the late payment interest which will accrue from the date of lodging of the application in the present case until the date of actual payment of the principal sum, to be calculated subsequently, according to the interest rate fixed by the Italian legislation;

— order Acentro to pay default interest on the late payment interest due at the date of lodging of the application in the present case, it being understood that that default interest will have to be calculated subsequently according to the date of payment of the aforementioned late payment interest and the interest rate fixed by the Italian legislation;

— order Acentro to pay the costs.

25 Acentro contends that the Court should:

— hold and declare that the jurisdiction clause is non-existent, invalid and, in any event, ineffective and, consequently, dismiss the action as inadmissible;

— dismiss all the claims brought by the Commission against it;

— order the Commission to pay the costs.

Law

Admissibility

Arguments of the parties

26 Without formally raising an objection of inadmissibility by separate document under Article 114 of the Rules of Procedure of the Court, Acentro disputes the admissibility of the action, alleging that the Court lacks jurisdiction.

27 Acentro submits that the clause referred to in Article 15.2 of the contract, which confers exclusive jurisdiction on the Court of Justice of the European Communities, had not been specifically approved in writing at the time of conclusion of the contract and that, accordingly, on the basis of the contract itself, with reference to Article 1341 of the CC, that clause is ineffective, which means that the Court does not have jurisdiction and that, consequently, the action is inadmissible.

28 The Commission submits that the clause referred to in Article 15.2 of the contract should not be subject to the formal requirements laid down in Article 1341, second paragraph, of the CC.

29 First, national law applies only to what is not specifically provided for by the contract or, in the event of doubt, in respect of the interpretation of a clause of the contract. The clause referred to in Article 15.2 of the contract, conferring exclusive jurisdiction on the Court of Justice, appears to be extremely clear and explicit, and there cannot reasonably be any remaining doubt as to its content and meaning.

30 Second, Article 1341, second paragraph, of the CC is not applicable to the present case. In that regard, the Commission takes the view, in the first place, that Article 153 EA does not provide for a requirement of separate approval in writing for arbitration clauses. In its view, a national provision requiring the clause in question to be expressly stipulated in a separate written document would inevitably come into conflict with the letter and spirit of the abovementioned provision of the EA Treaty, which prevails over national law. In the second place, according to the Corte suprema di cassazione (Court of cassation), separate approval in writing cannot be required for procurement contracts concluded with public bodies on the basis of public selection procedures, as in the present case. In the third place, that separate approval in writing is applicable only in situations characterised by an obvious imbalance between the contracting parties. In the Commission's submission, it is evident that the contract included the features of a classic 'business to business' relationship at which the parties arrived following negotiations between professionals who were fully aware of the issues at stake in the negotiations.

31 Third, the Commission submits that, if it were to be held that not only national law, but also the specific provision referred to in Article 1341, second paragraph, of the CC were to apply to what is provided for by the contract, *quod non*, Acentro gave its full, unconditional agreement to the inclusion of the arbitration clause in the contract during the negotiations which followed the call for tenders.

Findings of the Court

32 As a preliminary point, the Court's jurisdiction is as laid down in Article 225 EC and Article 140a EA, as further specified by Article 51 of the Statute of the Court of Justice. Under those provisions, the Court has jurisdiction to rule on contractual disputes brought before it only by virtue of an arbitration clause. That jurisdiction, which

is based on an arbitration clause, derogates from the ordinary rules of law and must therefore be given a restrictive interpretation (Case 426/85 *Commission* v *Zoubek* [1986] ECR 4057, paragraph 11).

33 Next, it should be borne in mind that, according to case-law, the jurisdiction of the Courts of the European Union ('the Courts of the Union'), to determine, under an arbitration clause, a dispute concerning a contract falls to be determined solely with regard to Article 238 EC or Article 153 EA and the terms of the arbitration clause itself, and this cannot be affected by provisions of national law which allegedly exclude their jurisdiction (Case C-209/90 *Commission* v *Feilhauer* [1992] ECR I-2613, paragraph 13, and Case C-299/93 *Bauer* v *Commission* [1995] ECR I-839, paragraph 11).

34 In the present case, the contract contains a clause conferring jurisdiction, for the purposes of Article 153 EA, on the Courts of the Union.

35 The contract was signed on 6 April 1990. By contrast, the arbitration clause was not the subject of a second signature by Acentro in a separate document.

36 However, although specific approval is required by the national law applicable to the contract, the lack of such approval does not invalidate the arbitration clause in question.

37 According to the case-law referred to in paragraph 33 above, although a contract which contains an arbitration clause within the meaning of Article 238 EC or Article 153 EA is governed by national law as stipulated in that contract, the jurisdiction

of the Courts of the Union is governed solely by the treaty in question and the stipulations of the arbitration clause itself. Moreover, national law cannot preclude the jurisdiction of the Courts of the Union. That case-law also applies in the circumstances of the present case, where the contract itself stipulates specific approval in writing.

38 It follows from the foregoing considerations and case-law that, by virtue of Article 153 EA and Article 15.2 of the contract, the Court has jurisdiction to hear the present case.

Substance

The claim for payment of the principal sums

— Arguments of the parties

39 The Commission submits that the existence of a debt in the amount of EUR 13 497.46 owed to Euratom has been sufficiently established in connection with the provisions of the contract and that, accordingly, that debt appears to be certain, of a fixed amount and immediately payable. Moreover, Acentro was duly placed in default by being served with formal notice in accordance with Article 1219, first paragraph, of the CC.

40 The Commission explains that, in order to calculate the amount of the debt in question, it used the relevant invoices in its possession, relating to the three types of pecuniary obligations owed by Acentro under Article 7 of the contract, namely the 3% premium on international air travel ticketing (invoice with reference number 97182/REE for the period from 1 October 1996 to 31 March 1997), expenses for placing the premises in Ispra at Acentro's disposal (invoice with reference number 97170/REE for the period from 1 September 1996 to 31 March 1997) and running expenses (invoices with reference numbers 97171/REE, 97172/REE, 97173/REE, 97174/REE, 97175/REE and 97176/REE, representing, essentially, all the telephone expenses to be borne by Acentro for March 1997 and the periods from January to March and from May to June 1996).

41 In response to Acentro's argument that it did not provide sufficient supporting documentation in relation to the telephone invoices, the Commission states that the invoicing was done as provided for in Article 8 of the contract and that Acentro never voiced the slightest objection in that regard. It adds that Acentro never called in question the content of the eight invoices referred to in the preceding paragraph, including the telephone invoices.

42 Moreover, the length of time elapsed plays an important role in the present case. The Commission observes in that regard that, under Italian law, there is an obligation to keep invoices relating to a contract for 10 years in civil law and five years in tax law. It therefore displayed greater care in keeping the accounting items for a longer period than was required under Italian law.

43 In the Commission's submission, given the length of Acentro's reaction time, the only evidence on the basis of which it was possible to deduce in a clear, documented manner the asset and liability items in connection with the financial transfers relating to the contract has disappeared or is difficult to reconstitute 12 years after the fact.

44 Similarly, the difficulty in obtaining data relating to telephone traffic from the service supplier used at the time is linked to the fact that Acentro had chosen to use the central switchboard at the Ispra site for communications which were inherently related to its functions. That choice made it necessary to invoice separately the costs of Acentro's use of those services. In accordance with the Community and national rules applicable to data processing and protection of privacy, the data in question could not be stored for very long.

45 Referring to the exchange of correspondence with Acentro, the Commission further states that Acentro never contested the existence of the debt in question and, in that regard, argued that that debt should be offset against another sum it alleged it was owed by the Commission under the contract for provision of services Phare No 96-0781.00. The Commission states that such set-off necessarily presupposes that Acentro acknowledges the amounts it owed the Commission.

46 As regards the set-off itself, the Commission, which admits to no debt to Acentro for performance of the contract for provision of services Phare No 96-0781.00, explains that, under Article 1241 of the CC and Article 1242, first paragraph, of the CC, the set-off suggested by Acentro can take place only if two parties are mutually indebted and their reciprocal debts are certain, of a fixed amount and immediately payable. According to the Commission, that is not so in the present case, since the first debt is owed to Euratom by Acentro, whereas the second is allegedly owed to Acentro by the European Community, which is a separate legal entity from Euratom.

47 Acentro observes that it is for the alleged creditor to provide proof of its claim, in accordance with the burden of proof as set out in Article 2697 of the CC. In that regard, it states that the invoices relied on by the Commission in support of its claims are not sufficient proof of the debt, and even less of its being certain, of a fixed amount and

immediately payable. In particular, the invoices on the basis of which the Commission required reimbursement of the telephone expenses do not contain any supporting documentation enabling a verification to be made of whether the claim is well founded.

48 Acentro also disputes the Commission's argument that its letter of 12 September 1997 constitutes an acknowledgement of debt since, at the time that letter was written, it thought it was possible to offset the debt in question against the sum it was owed by the Commission for performance of the contract for provision of services Phare No 96-0781.00.

— Findings of the Court

49 It should be observed as a preliminary point that, under Article 2697 of the CC, it is for the creditor to establish that his right is well founded. In the present case, the Commission relied on eight invoices sent in the context of a contractual relationship to establish the debt owed to Euratom by Acentro.

50 It should also be observed that, in order to call in question the existence of the debt in question, Acentro merely argues, essentially, that the invoices on the basis of which the Commission required reimbursement of the telephone expenses do not contain any supporting documentation enabling it to verify whether the claim is well founded.

51 It should be noted in that regard that, under the contract, Acentro had the option of using the central switchboard at the Ispra site for communications which were inherently related to its functions (second subparagraph of Article 5.2 of the contract) or of activating and maintaining at its own expense, by paying the service provider directly,

the telephone, telex and fax lines necessary for the performance of its obligations (Articles 5 and 7 of the contract). At the material time, it opted to use the central switchboard at the Ispra site and the services of the Commission for communications concerning the service to be performed.

52 That choice led to the need to invoice separately the costs relating to the use of those services by Acentro. Using the lists of telephone communications issued by the telephone operator, the technical service of the Ispra site generated a statement of the telephone communications effected by Acentro, calculated the corresponding amount and forwarded the information to the financial service, which issued the invoice and sent it to Acentro, attaching a statement of those telephone communications.

53 It should thus be observed that the invoicing was done in accordance with Article 8 of the contract and that Acentro never questioned that method of operation during the course of the contract.

54 It should also be noted that there is nothing in the file to indicate that, at the time of the facts, Acentro disputed the invoices in question or the subsequent reminders sent to it by the Commission.

55 On the contrary, the file shows that, instead of contesting the sums claimed or requesting explanations about the invoices in question, Acentro called on the Commission to offset that debt with another sum it alleged it was owed by the Commission for performance of another contract, namely the contract for provision of services Phare No 96-0781.00.

56 Irrespective of the question whether Acentro and the Commission are mutually indebted or whether the fact that the contracts were concluded by Acentro with two

different Communities, namely the European Community for the contract for provision of services Phare No 96-0781.00 and Euratom for the contract, precludes the set-off suggested by Acentro, such a reaction is not sufficient in itself to contest the invoices in question.

57 It should be noted in that regard that, under Italian law, the contractual relations between the Commission and Acentro were governed by the principle of good faith. That principle implies that if one of the parties, in this case Acentro, contests one or more invoices or certain parts of the invoices, it must, within a reasonable time, notify the other party, in this case the Commission.

58 It was, therefore, for Acentro to request explanations or details on the invoices in question at the time of the facts, which it did not do.

59 Accordingly, the form of order sought by the Commission should be granted as regards ordering Acentro to pay the principal sum of EUR 13 497.46, corresponding to the debt owed to Euratom by Acentro under the contract.

The claim for late payment interest

— Arguments of the parties

60 The Commission submits that the starting point for calculating late payment interest is 25 June 2002. It submits that for the period between that date, when Acentro was given formal notice to pay the principal sum, and 10 October 2008, when the application was lodged, the amount of late payment interest, calculated according to the applicable statutory rate, is EUR 2 278.55.

61 According to the Commission, the late payment interest which will accrue after the date of lodging of the application in the present case until the date of actual payment of the principal sum must be calculated separately, according to the interest rate fixed by the Italian legislation.

62 Lastly, referring to Article 1283 of the CC, the Commission seeks additional default interest. That interest must also be calculated separately, according to the date of actual payment of the interest payable and the interest rate fixed by the Italian legislation.

63 Acentro did not submit any argument on the point.

— Findings of the Court

64 As held in paragraph 59 above, the Commission's claim for payment must be upheld in respect of the principal sum of EUR 13 497.46.

65 Regarding the interest, it should be noted that, in its letter of 31 May 2002, the Commission indicated that the principal sum owing was payable within 15 days of receipt of that letter. It was received by Acentro on 10 June 2002 at the latest.

66 In the absence of agreed interest and since the contract in question is governed by Italian law, the relevant provisions and the default interest provided for by the Italian legislation should be applied.

67 Under Italian law, and more specifically Article 1224 of the CC, a creditor may, in the event of non-payment, demand the default interest fixed by the law without establishing any loss.

68 Moreover, under Article 1283 of the CC, a creditor may seek additional default interest as from the date of lodging of the application initiating proceedings, provided that it is interest payable on a period of at least six months.

69 Article 1284 of the CC provides:

'The rate of statutory interest shall be 3% annually. At the initiative of the Minister for the Treasury, by means of a decree published in the Gazzetta ufficiale della Repubblica Italiana before 15 December of the year preceding the application of the rate, it shall be possible to modify the value thereof annually, according to the annual gross average yield on State bonds of under 12 months in duration and taking into account the inflation rate recorded during the year. If a new rate value is not fixed before 15 December, it shall remain unchanged during the following year ...'.

70 That rate was fixed at 3% by ministerial decree of 11 December 2001, published in *Gazzetta ufficiale della Repubblica italiana* No 290 of 14 December 2001, and remained applicable in 2002 and 2003. It was amended by ministerial decree of 1 December 2003, published in *Gazzetta ufficiale della Repubblica italiana* No 286 of 10 December 2003, which fixed it at 2.5% as from 1 January 2004, and remained

applicable from 2004 to 2007 inclusive. By ministerial decree of 12 December 2007, published in *Gazzetta ufficiale della Repubblica italiana* No 291 of 15 December 2007, the rate was fixed at 3 % as from 1 January 2008.

71 As indicated in paragraph 65 above, the letter containing the formal notice to pay was received in the present case by Acentro on 10 June 2002 at the latest. Consequently, the 15-day deadline expired on 25 June 2002. It is therefore from that date that late payment interest began to accrue.

72 It follows that the total amount of late payment interest payable by Acentro was EUR 2 278.55 on the date when the application initiating proceedings was lodged.

73 Therefore, Acentro must be ordered to pay the Commission the principal sum of EUR 13 497.46, the sum of EUR 2 278.55 in late payment interest due at the date on which the application in the action was lodged (10 October 2008) and late payment interest on those amounts calculated in accordance with the rates in effect from 10 October 2008 until the date of full payment of the principal sum owing.

Costs

74 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Orders Acentro Turismo SpA to pay the European Commission the principal sum of EUR 13 497.46, the sum of EUR 2 278.55 in late payment interest due at the date on which the application in the action was lodged and late payment interest on those amounts calculated in accordance with the rates in effect from 10 October 2008 until the date of full payment of the principal sum owing;**

2. **Orders Acentro Turismo to pay the costs.**

Martins Ribeiro Papasavvas Wahl

Delivered in open court in Luxembourg on 17 December 2010.

[Signatures]