REPORT FOR THE HEARING
delivered in Case 426/85 *

I — Facts

1. On 23 December 1971 Mr Jan Zoubek, a journalist in Brussels, entered into a contract with the Commission's Directorate-General for External Trade in which he undertook to carry out a study entitled 'Catalogue, analyse et exploitation des positions des pays de l'Est pour une coopération économique en Europe' in return for a fixed sum of BFR 100 000.

2. Article 2 of the contract stipulated that a progress report was to be submitted on 31 March 1972 and that the final report was to be submitted on 30 June 1972. In performance of Article 4 (3) of the contract, the Commission paid Mr Zoubek the sum of BFR 33 000 as soon as the contract was signed.

3. Article 7 of the contract stipulated that in the event of non-performance or improper performance on the part of Mr Zoubek, the Commission could, after giving notice by registered letter and failing performance of the contract within a period of 30 days thereafter, exercise its right to terminate the contract without prejudice to a claim for damages.

4. Article 8 stipulated that the Court of Justice of the European Communities alone was to have jurisdiction in any dispute relating to performance of the contract, which was to be governed by Belgian law as regards the substance.

5. In its letter of 23 June 1972 the Commission stated that Mr Zoubek had not submitted the preliminary report and requested him to indicate the date on which he would submit the study. By registered letter of 27 october 1972 it formally requested Mr Zoubek to submit the study within 30 days, failing which it would consider itself obliged to terminate the contract.

6. By registered letter of 21 December 1972, the Commission terminated the contract and demanded repayment of the sum of BFR 33 000 from Mr Zoubek. On 27 July 1973 the Commission sent Mr Zoubek an order for collection.

7. In a letter of 20 December 1973 Mr Zoubek referred to an agreement concluded between the parties in November 1973, in pursuance of which he was sending the Commission two recent copies of *East-West*, a fortnightly bulletin.

8. In its reply of 21 December 1973 the Commission denied that there was an agreement of any kind between itself and Mr Zoubek, whilst undertaking to inform the latter of 'any news concerning him'.

9. On 17 December 1979 the relevant Directorate-General informed Mr Zoubek that, unless payment of the sum in question was forthcoming, it would pass on the file to its Legal Department with a view to instituting legal proceedings. On 12 March and 30 October 1980, the Legal Department wrote to Mr Zoubek demanding repayment of the sum in question.

10. In a letter of 17 November 1980 Mr Zoubek's lawyer referred to an agreement concluded between the Commission and his client whereby the sum of BFR 33 000 was to be set off against the value of the *East-West* bulletins supplied to the Commission as from 1974. Since the value of the bulletins supplied was BFR 65 000, Mr Zoubek was claiming the difference of BFR 32 000 from the Commission.

* Language of the Case: French.

11. In its reply of 25 March 1981 the Commission refused to accept the set-off proposed by Mr Zoubek.

12. On 23 June 1982 and 12 November 1984 the Commission wrote to Mr Zoubek setting on each occasion a final date for payment.

II — Written procedure and conclusions of the parties

1. By application lodged at the Court Registry on 20 December 1985 the *Commission* brought an action against Mr Zoubek in which it claims that the Court should:

(i) Declare the application admissible and well founded;

(ii) In consequence, upon finding that the termination of the study contract concluded between the parties on 23 December 1971 was attributable to the sole fault of Mr Jan Zoubek, order him to pay the Commission BFR 33 000, plus interest at the statutory rate as from 7 January 1972;

(iii) Order Mr Zoubek to pay the costs.

2. Mr *Zoubek*, the defendant, claims that the Court should:

(i) Declare the application admissible but unfounded;

(ii) In consequence, dismiss the Commission's application.

The defendant has also submitted a counterclaim against the Commission based on a debt of BFR 65 000 owed by it for the *East-West* bulletins supplied to the applicant. He contends that the Court should:

(i) Declare the counterclaim admissible and well founded;

(ii) In consequence, order the applicant to pay the claimant BFR 32 000 plus interest at a rate to be determined by the Court from the date on which the counterclaim was submitted, upon holding that one claim may be set off against the other.

In any event, the defendant contends that the Court should:

Order the applicant to pay the costs.

3. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

4. Pursuant to Article 95 (1) and (2) of the Rules of Procedure, the Court decided on 4 June 1986 to assign the case to the First Chamber.

III — Submissions and arguments of the parties

A — *The principal claim*

1. The *Commission*, the applicant in these proceedings, points out that the Court has jurisdiction in this dispute pursuant to the arbitration clause, within the meaning of Article 42 of the ECSC Treaty, Article 153 of the EAEC Treaty and Article 181 of the EEC Treaty, set out in Article 8 of the contract.

Since the defendant failed to perform his obligations under the contract, the Commission was entitled to terminate it.

In accordance with Article 1142 of the Belgian Civil Code, which is applicable to the contract and which provides that damages may be awarded for non-performance by the debtor of any obligation to act or to refrain from acting, the Commission is demanding repayment from Mr Zoubek of the sum of BFR 33 000 that was advanced to him. Furthermore, by way of compensation for the unavailability of that sum, the Commission also claims interest at the statutory rate in force in Belgium as from 7 January 1972, the date

on which the sum in question was advanced to Mr Zoubek.

The Commission maintains that no transaction forming the subject-matter of an agreement was concluded with the defendant in connection with the setting-up of East-West Sprl. Mr Zoubek is seeking to blur the distinction between his identity and that of the company, and between the specific services relating to documentary research, referred to in the contract concluded in 1971, and the fortnightly information bulletin published by East-West Sprl.

2. Mr *Zoubek*, the defendant in these proceedings, does not contest the termination of the contract. He maintains that an agreement was concluded at the end of 1973 with a Commission official whereby Mr Zoubek undertook to deliver free of charge, as consideration for the sum of BFR 33 000 claimed by the Commission, the bulletins published by East-West Sprl of which he is the manager and editor and which was set up in order to publish studies of the kind stipulated in the contract concluded in 1971. The Commission did not demand any compensation when the contract was terminated, nor did it take any steps in that regard before 1979. Admittedly, the transaction forming the subject-matter of the agreement was not set out in a formal draft in clear and unequivocal terms. However, the bulletins which he forwarded to the Commission, at his own cost, on 20 December 1973 were not refused. The Commission's undertaking in its letter of 21 December 1973 to inform him as soon as possible of any developments concerning him was followed by an agreement confirmed orally and by delivery of the bulletin for a further five years. The fact that the defendant performed his obligations for five years without being challenged by the applicant is sufficient evidence of the existence of the agreement. After such a long silence, the existence of which is proven, the Commission cannot at this stage deny the existence of that agreement.

If the Court of Justice were to uphold the Commission's claim, however, interest at the rate determined by the Court or at the statutory rate would be payable only from the date on which the application was submitted.

B — *The counterclaim*

1. Mr *Zoubek* states that the value of the *East-West* bulletins delivered to the Commission from 1974 to 1978, in pursuance of the transaction forming the subject-matter of the agreement, amounts to BFR 65 000. The sum of BFR 33 000 claimed by the Commission should be set off against the sum of BFR 65 000. In addition, the defendant puts forward a counterclaim against the Commission for the sum of BFR 32 000 plus interest at a rate determined by the Court as from the date on which the counterclaim was submitted. Since the bulletins were made available by the defendant, it was not possible to draw up an invoice. If the Court were to uphold the principal claim, it would be tantamount to sanctioning the Commission's unjust enrichment.

2. According to the *Commission*, the counterclaim is inadmissible. Neither the Treaties, nor the Protocol on the Statute of the Court of Justice, nor the Rules of Procedure permit a defendant to submit a counterclaim in proceedings the subject-matter of which is strictly defined in the application. The Court's jurisdiction is based on the arbitration clause in the contract. In order to be able to rely on any claim in respect of the information bulletins delivered to the Commission, the representatives of East-West Sprl should bring an action against the Commission before the national courts under Article 183 of the EEC Treaty.

Even if the possibility of a set-off was referred to in discussions between Mr Zoubek and the Commission officials concerned, the Commission pointed out in its letter of 21 December 1973 that no

agreement had been concluded. Moreover, a set-off would have been impossible since *East-West* bulletin is owned by East-West Sprl and not by Mr Zoubek.

The Commission also submits certain documents prepared by the Commission library which show that a varying number of subscriptions to *East-West* bulletin were taken out between 1970 and 1977 through Office International de Librairie, Brussels, and, as from 1978, directly with East-West Sprl, and that those subscriptions were paid for.

F. Schockweiler
Judge-Rapporteur