OPINION OF ADVOCATE GENERAL SAGGIO
delivered on 14 July 1998 *

1. The Commission has applied to the Court under Article 181 of the Treaty for recovery of moneys advanced to Industrial Refuse & Coal Energy Limited (hereinafter 'IRACO'), an English company, for the execution of a project under the terms of a contract which the Commission unilaterally terminated in view of IRACO's non-performance.

Specifically, the Commission claims that the Court should order IRACO to pay it the sum of ECU 242 234, together with continuing interest for late payment at the annual rate of 8.15% from 20 October 1993, plus costs.

Facts

The contract

2. On 9 July 1987 the European Economic Community, represented by the Commission, entered into a contract with IRACO concerning the execution of a demonstration project for the conversion of an existing refuse transfer station to electrical power generation from the preparation of raw urban refuse (hereinafter 'the contract').

3. Article 13 of the contract contains an arbitration clause under which the parties refer to the Court of Justice all disputes concerning the validity, interpretation or application of the contract. In accordance with the wishes of the contracting parties, the contract is governed by English law. [1]

4. Under the terms of the contract, IRACO was required to complete the project by August 1989 and the Commission undertook to provide funding equal to 26.2% of the actual cost of the project, subject to a ceiling

* Original language: Italian.

1 — See Article 14 of the contract.

of ECU 636 612. In any case, advance payments made by the Commission were recoverable until the final report and the statement of expenditure had been approved.

5. Pursuant to Article 6 of the contract, IRACO accepted sole liability for any loss, damage or injury suffered by it in, or in connection with, the performance of the contract. Article 7 required any variation of the contract to be agreed in writing between the contracting parties.

6. Lastly, under Article 9, it was open to either contracting party to terminate the contract on giving two months' notice, if its performance were to serve no further purpose. In that event, if the amounts already paid by the Commission exceeded the costs actually incurred by IRACO and payable by the Commission, IRACO was required to repay the balance to the Commission, together with interest calculated from the date of cessation of the work.

Conduct of the contracting parties

7. In performance of the contract, the Commission made two advance payments to IRACO, to the value of ECU 190 984 and ECU 11 005, respectively.

By letter of 20 November 1987, IRACO informed the Commission that the initial project site had to be abandoned and that the search for an alternative site would delay completion of the project by several months. The Commission expressed disappointment at this delay but, by letter of 29 November 1988, agreed that the completion date could be moved back from August 1989 to September 1990. That postponement was made conditional, however, on IRACO finding a suitable site and on the competent local authorities giving their approval, within six months of receipt of the letter, failing which the Commission would avail itself of its right to terminate the contract unilaterally, on the basis of Article 9 thereof, since the funds committed could not remain frozen for a longer period.

8. On 30 May 1989, since a project site had not yet been found, the Commission wrote to IRACO warning of its intention to terminate the contract. Formal confirmation was given by letter of 23 August 1989, in which the Commission requested IRACO *inter alia* to send it, by 30 September 1989, a financial report with a detailed statement of all expenditure incurred under the contract up to 15 December 1988, together with the sum of interest accrued meanwhile on the interest-bearing account for the advance.

9. Finally, on 15 May 1990 — following further prompting from the Commission —

IRACO sent the Commission a report justifying its failure to complete the project and setting out a statement of the expenses incurred under the contract.

10. The Commission asked an independent firm to carry out a technical and financial audit of the costs claimed by IRACO. The results of the audit were accordingly communicated to IRACO by the Commission in a letter of 4 August 1993, which stated that the sum of ECU 242 234 was payable to the Commission within two months, by way of reimbursement. On 12 October 1993 the Commission sent IRACO the appropriate demand for payment.

11. By letter of 18 August 1993, IRACO contested the Commission's claim for recovery of the advance payments and raised a counterclaim against the Commission for payment of ECU 636 612, by way of compensation for additional work, damages and loss of profit as a result of the termination of the contract. IRACO also claimed payment of ECU 1 000 000 by way of damages for defamation by Commission officials at a meeting between the parties.

Procedure

12. In accordance with the arbitration clause, the Commission applied to the Court of Justice claiming that IRACO should be ordered to pay the sum of ECU 242 234, together with continuing interest for late payment at the rate of 8.15% from 20 October 1993.

13. IRACO lodged a document with the Court entitled 'Defence and Counterclaim', in which it contested the Commission's claim for recovery of the sums paid and contended that the Court should order the Commission to pay it the sum of ECU 445 174 by way of compensation for damage suffered as a result of the Commission's breach of contract, plus the sum of ECU 1 000 000 by way of damages for loss of business during the period from 1987 to 1996. [2]

Substance

14. The Commission's claim for reimbursement is well founded and must be upheld. Its claim for payment of interest should only be allowed in part, however, as I shall explain below.

2 — The Commission's claim that the Court should declare the counterclaim inadmissible and grant judgment by default, pursuant to Article 94 of the Rules of Procedure, was dismissed: see the order of 23 September 1997 in Case C-337/96 *Commission* v *IRACO*, not published in the ECR.

15. In the Commission's submission, IRACO's breach of contract consists in its delay in finding a suitable site for the project, which extinguished any interest on the part of the Community administration in prolonging contractual relations. Under Article 9 of the contract, the Commission was therefore justified in terminating such relations and, accordingly, entitled to reimbursement of moneys advanced, and to payment of the interest provided for in the contract, less the expenses actually incurred by IRACO and payable by the Commission.

16. IRACO contends that the Commission failed on two counts to fulfil its contractual obligations.

First, the Commission frustrated the object of the contract by causing the planned project to become 'technically illegal'. [3] More specifically, it reportedly entered into discussions in 1987 with the United Kingdom authorities responsible for environmental policy and, more generally, initiated research with a view to the adoption of a more stringent directive on environmental protection, concerning the characteristics of waste incineration plants.

17. The Commission's unlawful conduct is said to have culminated in the adoption of Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants. [4] The emission limit values set by the Community legislation are lower than those provided for in the project and, more generally, the Directive lays down standards for the construction of incineration plants which are not compatible with the project provided for under the contract.

18. Consequently, IRACO decided to do its utmost — thereby delaying completion of the work — to make the project compatible with the terms of the Directive, which it regarded as a variation in writing of the contract for the purposes of Article 7 thereof.

19. Secondly, the Commission breached its contractual obligations by forewarning a third party, KTI Energy Inc., of the action which it proposed to take in relation to its contract with IRACO. The latter refers in particular to a letter of 12 June 1989 (placed before the Court) by which the Commission, in response to a request made by KTI Energy Inc., informed that company that its participation

3 — See paragraph 10 of the counterclaim.

4 — OJ 1989 L 163, p. 32.

in the project was out of the question, since the contract was about to be terminated.

20. IRACO's third and last argument appears, on the other hand, to rely on the Commission's non-contractual liability, in so far as it impugns the conduct of a Commission official, who is alleged to have defamed a member of IRACO's managerial staff at a meeting. This prevented a consortium formed by IRACO together with other companies from taking part in another project, which, however, falls outside the purview of the contract at issue here.

21. To my mind, none of IRACO's arguments is persuasive.

As regards the adoption and preparation of Directive 89/369, the first point to note is that IRACO's approach is fundamentally misconceived in so far as it confuses the Commission's role as a contracting party subject to private law with its responsibility to participate in the preparation of Community legislation. Indeed, even if the Directive had introduced mandatory rules such that the substantive terms of the contract were varied at the instance of an external authority, that would not render the Commission liable for breach of contract.

22. In any event, Directive 89/369 has absolutely no bearing on the parties' contractual obligations, for the following reasons:

(A) The Directive, adopted on 8 June 1989, should have been implemented by the Member States by 1 December 1990. The project envisaged by the contract should have been completed — notwithstanding the postponement agreed by the parties — by September 1990, and a site should have been found by May 1989 at the latest. It follows that IRACO's delay in finding a project site, thereby causing the contract to be terminated, actually predated the adoption of the Directive and cannot therefore be regarded as a consequence thereof.

(B) The measures provided for in Article 2 of the Directive apply solely to 'new ... waste-incineration plants'. These are defined in Article 1(5) as plant for which authorisation to operate is granted as from 1 December 1990. Accordingly, the plant referred to in the contract, which was to be in place by September 1990 at the latest, would not in any event have been subject to the new rules.

(C) The Directive cannot be regarded as a variation in writing of the contract for the purposes of Article 7 thereof, for the simple

reason that, being a legislative measure, it was not negotiated by the contracting parties.

23. Turning to the alleged breach of confidentiality — IRACO's second complaint — the first point to note is that, under Article 11 of the contract, only certain information was confidential, namely that which IRACO gave the Commission concerning events relevant to the performance of the contract, and the project's industrial and commercial results.

In this instance, IRACO alleges that, by letter of 12 June 1989, the Commission forewarned KTI Energy Inc. of the action which it planned to take. That letter was in fact merely its response to a request from KTI Energy Inc. to take part in the project as one of IRACO's associates. The response was negative, on the ground that the contract was to be terminated on account of the failure to find a site for the plant. However, there is nothing in that communication to suggest any breach of confidentiality under Article 11, since it does not touch on any of the circumstances covered by that provision. This is all the more evident if it is borne in mind that KTI Energy Inc. and IRACO were members of a joint venture set up with a view to executing the project and that, consequently, the Commission was entitled to assume that the former company would be properly informed of any developments concerning the contract.

24. As regards the third complaint, concerning the allegation that a Commission official had defamed IRACO and a member of its managerial staff, it must be pointed out — even before emphasising that this is mere hearsay reported by IRACO, unsubstantiated by any evidence and denied by the Commission — that the claim for damages is inadmissible, since it is based on circumstances which are independent of the contract at issue in this case and are merely incidental to its performance. Defamatory behaviour on the part of a Commission official might give rise to non-contractual liability on the part of the Community, but that is an issue wholly separate from the Court's determination of this case in accordance with the arbitration clause, under which its jurisdiction is confined to questions concerning the validity, interpretation or execution of the contract. [5]

25. It follows from the above considerations that IRACO's counterclaim, in so far as it seeks compensation from the Commission for damage caused by that institution's breach of its contractual obligations, must be dismissed as unfounded. In other words, the claim for compensation from the Commission for

5 — The Court's jurisdiction under an arbitration clause must be interpreted restrictively, solely in the light of Community law, the national law governing the contract being irrelevant: see Case 426/85 *Commission* v *Zoubek* [1986] ECR 4057, paragraphs 10 and 11.

damage caused by conduct unconnected with the performance of contractual obligations and not directly linked thereto must be declared inadmissible because it falls outside the Court's jurisdiction. [6]

26. Since it has been shown that IRACO failed without justification to fulfil its own contractual obligations and, in particular, the primary obligation to find a suitable project site, the termination of the contract under Article 9 thereof is justified.

Article 9 requires, in such cases, verification of the amounts paid by the Commission and the costs actually incurred by IRACO for the execution of the project, the latter being under a duty to repay to the Commission any excess amount, together with interest.

27. The quantification of the sum to be reimbursed, according to the audit commissioned by the Commission from an independent firm of consultants, has not in fact been challenged by IRACO, which merely pleads the 'tragic' circumstances, [7] allegedly brought about by the Commission, that deprived IRACO of its good name, its profit and its commercial business.

The costs borne by IRACO are estimated at UKL 32 151. Under Article 3 of the contract, the Commission should have paid 26.2% of the costs, that is to say, ECU 10 551. The Commmission made advance payments amounting to ECU 201 989. The capital sum to be reimbursed is therefore the balance — ECU 191 438 — together with the interest calculated in accordance with the contract.

Article 9 provides that interest is payable from the date of completion or cessation of the work. The parties did not specify the date when work actually ceased. In the absence of that information, it is reasonable to refer to the date when the contract was terminated, namely 23 October 1989. The sum of ECU 191 438 is therefore subject to interest at the rate of 8.15% from 23 October 1989 until 23 November 1990, the cut-off date set by the Commission itself.

It follows that IRACO is required to repay to the Commission the sum of ECU 208 340,

6 — A plea with a 'non-contractual basis' falls outside the scope of the arbitration clause and the Court is not competent to consider it: see Case C-330/88 *Grifoni* v *EAEC* [1991] ECR I-1045, paragraph 20. A counterclaim is inadmissible where it does not arise from the contract containing the arbitration clause or is not directly connected with the obligations arising from that contract: see Case C-114/94 *IDE* v *Commission* [1997] ECR 803, paragraph 82.

7 — See paragraph 29 of the counterclaim.

which includes interest calculated up until 23 November 1990.

Payment of the sum due was demanded by the Commission by debit note dated 12 October 1993 and received by IRACO, at the latest, on 20 October 1993, as is apparent from the letter which IRACO sent to the Commission on the same day. Since no payment has been made, interest on the capital sum is payable from that date, in accordance with the terms of the contract.

Apart from the computation of the interest, the calculation sent to IRACO by letter of 4 August 1993 would appear to be free of any flaws, and the Commission's claim must therefore be upheld, to the extent specified above.

28. Since IRACO has been unsuccessful in its pleadings, and the Commission has asked for costs to be awarded against it, IRACO must be ordered to bear the costs, pursuant to Article 69(2) of the Rules of Procedure.

Conclusion

29. In the light of the foregoing observations, I therefore propose that the Court:

— order Industrial Refuse & Coal Energy Ltd to pay the Commission the sum of ECU 208 340, together with interest calculated at the annual rate of 8.15% with effect from 20 October 1993;

— dismiss the counterclaim by Industrial Refuse & Coal Energy Ltd for compensation to be paid by the Commission for damage caused by the adoption of the Directive and breach of confidentiality under the contract;

— declare inadmissible the counterclaim by Industrial Refuse & Coal Energy Ltd for compensation to be paid by the Commission for damage caused by a Commission official's defamatory conduct;

— order Industrial Refuse & Coal Energy Ltd to bear the costs of these proceedings.