OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 15 October 1998 *

1. By this action, which has been brought under Article 181 of the EC Treaty, the Commission of the European Communities (hereinafter 'the Commission') claims that SNUA Srl (hereinafter 'SNUA'), a company incorporated under Italian law, should be ordered to repay a sum advanced to it under a contract which the Commission maintains was terminated owing to SNUA's non-performance.

I — Facts

2. Under Contract No BM 441/86, concluded on 8 January 1998 between the European Economic Community, represented by the Commission, and SNUA (hereinafter 'the Contract'), SNUA agreed to install, in the municipality of S. Quirino, an integrated system for the collection and recycling of solid waste at a private plant with financial support from the Commission. The system was one of the demonstration projects and industrial pilot projects in the energy field referred to in Regulation EEC No 3640/85 [1] for which the Commission had given financial support. The Contract is governed by Italian law (see Clause 14). Under the arbitration clause in Clause 13, the Court of Justice has jurisdiction to hear all disputes concerning the validity, interpretation or application of the Contract.

3. The construction work on the plant was to have begun in June 1987 and been completed in August 1988. Under Clause 4.3.1 of the Contract, SNUA was required, in the event of its being unable to commence work on that date, to give the Commission at least two weeks' prior notice and to propose a new date for beginning work. If the Commission rejected the change proposed by the contractor, the Contract was to be terminated automatically and the advances repaid. [2]

4. Clause 8 of the Contract, which refers to Clause 4.3, states: 'The Commission may unilaterally terminate the Contract in the event of [SNUA]'s non-performance of any of its obligations thereunder, in particular if it fails to comply with the stipulations made in Clause 4.3 thereof; termination shall take effect on expiry of a period of one month after

* Original language: Italian.

1 — Council Regulation (EEC) No 3640/85 of 20 December 1985 on the promotion, by financial support, of demonstration projects and industrial pilot projects in the energy field (OJ 1985 L 350, p. 29).

2 — Clause 4.3.2 of the Contract also required SNUA — within three months of signature of the Contract, and thereafter every six months — to submit progress reports to the Commission containing statements of expenditure.

notice has been served by registered letter with acknowledgement of receipt, where non-performance persists'. Clause 8 further provides that, in those circumstances, 'the contractor shall immediately repay to the Commission any amounts advanced by way of financial assistance, together with interest payable from the date of receipt of such funding. Interest shall be payable at the European Investment Bank's rate applicable as at the date of the Commission's decision [11 November 1986] on the award of funding for the project'.

5. Clause 9 of the Contract further provides that 'Either party may terminate this Contract on two months' notice if it becomes apparent that to continue the works programme referred to in Annex I no longer serves any purpose owing, *inter alia*, to a foreseeable technical or economic defect in the said programme or because the cost estimate for the project has been exceeded to a degree considered excessive'.

6. As the parties had agreed, the Commission paid SNUA ECU 195 397 by way of advance within 60 days of signature of the Contract, specifically on 26 January 1988. By two letters of 25 August 1988 and 25 January 1989, the Commission expressed concern at not yet having received the first technical and financial progress report from SNUA and reminded SNUA of its obligations under Clause 4.3.1 of the Contract. On 15 March 1989, the Commission informed SNUA that the Contract would be terminated under Clause 8 unless the first report reached it by 10 April 1989. Meanwhile, by letter of 6 March 1989, SNUA applied to the Commission for an extension of the deadline for commencing the works. It informed the Commission that, although all official authorisations had been obtained, including planning permission from the municipality, the execution of the project was being impeded by strong opposition on the part of local communities to its going ahead as approved. It was therefore necessary for the autonomous region of Friuli-Venezia-Giulia (hereinafter 'the Region') to adopt a decision. Finding there to be *force majeure*, the Commission, by letter of 13 April 1989, set a deadline of 30 September 1989 for a definitive decision authorising work to be resumed, failing which the Contract might be terminated under Clause 9.

7. By letter of 24 September 1990, which was countersigned by the competent regional environmental assessor by way of confirmation, SNUA assured the Commission that the Region still intended fully to implement the project it was, in part, financing as soon as possible, whereupon the Commission, on 10 July 1991, once more served formal notice on SNUA to begin work before 15 August 1991. On 22 August 1991, the Region informed the Commission that it had found a new site for the project in the neighbouring municipality of Aviano and said that it anticipated that the work would definitely begin 'during the current year'. By letter of the same date, SNUA asked the Commission for a further extension, to 15 December 1991, of the date for commencement of the works. The Commission took formal note of the evidence produced by SNUA and acceded to its request in a letter of 18 September 1991, sent by registered post and asking for acknowledgement

of receipt, stating that the Contract would be terminated on 31 December 1991 if the works had still not been carried out by then. By letter of 5 November 1992, the Commission informed SNUA that, since it had received no information as to the commencement of the works, it had decided to invoke Clause 9 of the Contract. None of the subsequent requests the Commission sent to SNUA on 25 January 1994, 2 June 1994 and 15 February 1995 for repayment of the advance originally paid to it, plus interest, met with any response.

8. Following various actions brought by SNUA against, first of all, the municipality of S. Quirino and then the Region, the latter, on 15 July 1993, adopted the necessary decisions for the project to go ahead. The construction work for the plant finally began on 7 December 1994, barely two months after the municipality of Aviano had granted planning permission for the plant.

II — Pleas in law and arguments of the parties

9. By an action brought on 18 February 1997, the Commission applied to the Court for a declaration that its reliance on the express termination clause in Clause 8 of the Contract when it served notice on SNUA in its letter of 18 September 1991 was valid. It claims that under Article 1456 of the Civil Code, [3] the Contract was terminated on 31 December 1991 by operation of law. The Commission does not accept, in particular, that the Region's inefficiency can exempt SNUA from any responsibility for failure to execute the works which were begun seven years late. The difficulties associated with choosing the initial site did not amount to unforeseeable circumstances and, had SNUA shown itself to be a reasonably diligent contractor, it would at the very least have been under a duty to inform the Commission that there was a risk of delay. The Commission furthermore stated that the reference, in some of the letters it sent to SNUA at the time, to Clause 9 of the Contract, which gives the parties the right to terminate the Contract if it serves no further purpose to continue the agreed works programme (see point 5 above), was a simple factual error.

According to the Commission, the defendant's non-performance not only prevented other undertakings from obtaining financial help under the same programme but also led to the Commission's resources being wasted

3 — Article 1456, entitled 'Express termination clause', provides as follows:
'The parties to the contract may expressly agree that the contract shall be terminated if a specified obligation is not performed in the prescribed manner. In that event, termination shall occur by operation of law when the party concerned informs the other that it wishes to invoke the termination clause.'

on activities which contributed little to the common interest and furthermore damaged its credibility vis-à-vis the other Community institutions, the Member States and potential third party contractors. The Commission therefore considers that, pursuant to Article 1453 of the Civil Code, [4] it is entitled to be compensated for damage it can prove, which it estimates at ECU 60 000, subject to the Court's assessment *ex aequo et bono* under Article 1226 of the Civil Code. [5] The Commission therefore claimed that the Court should order SNUA:

(1) to repay to it ECU 195 397 plus interest in the amount of ECU 43.09 per day from 1 April 1988 to the actual date of payment;

(2) to pay it damages in the amount of ECU 60 000 or such other sum as the Court deemed just;

(3) to pay the costs of the proceedings.

10. SNUA, for its part, contended that the Court should dismiss the action and order the applicant to pay the costs. SNUA observes first of all that Clause 8 of the Contract, which contains a general reference to breach of contractual obligations, does not fulfil the conditions set out in Article 1456 of the Civil Code, cited above, which provides for automatic termination only where it has been expressly agreed upon as the result of non-performance of a specified obligation. In SNUA's view, the basis for the Commission's notice is actually Article 1454 of the Civil Code. [6] If that is so, in order for the notice to have the effect of terminating the contract, a specific application for termination must be made to a court in order to establish whether the period accorded the party in default is sufficient, to assess how serious the non-performance is, and to determine where responsibility for it lies. The Commission did not make any such application, nor did it give SNUA a reasonable time to perform having regard to the circumstances. As to the allegation that SNUA was to blame for the non-performance of which it is accused, SNUA states that it could not have foreseen that it would be impossible to bring the project to fruition on the site initially chosen because the difficulties encountered were not of a technical but of a political

4 — Article 1453, entitled 'Termination of contract for non-performance', provides as follows: 'In synallagmatic contracts, where one of the parties fails to perform its obligations, the other may require that the contract be performed or that it be terminated, without prejudice in either case to compensation for damage. Such party is also entitled to seek termination where it has initiated proceedings to obtain performance, but it is no longer entitled to require performance once it has requested termination. The party in default loses the right to perform the obligation incumbent on it once the request for termination is made.'

5 — Article 1226, entitled 'Fair assessment of damage', provides as follows:
'If the amount of damage cannot be established with precision, it shall be evaluated by the court with a view to a fair assessment.'

6 — Article 1454, entitled 'Formal notice to perform', provides as follows:
'Where a party fails to perform an obligation, the other party may serve on it written notice to do so within a reasonable time, stating that if, at the end of that period, the notice has not been complied with, the contract shall simply be considered terminated. The period may not be less than two weeks unless the parties agree otherwise or a shorter period is sufficient by reason of the type of contract or common usage. If the contract has not been performed within that period, it shall be terminated by operation of law.'

nature. It is no coincidence that the Commission itself acknowledged that those circumstances amounted to *force majeure*.

III — Legal analysis

11. As is clear from the Commission's application to the Court and the opposing arguments of the parties (see part II above), the main question raised by this case is whether or not the conditions are met for Clause 8 of the Contract, on which the applicant relies, to be properly invoked. In this respect, the starting point must be the wording of Article 1456 of the Civil Code, cited above (see footnote 3).

12. I should like to begin by considering — albeit only to reject it — the defendant's argument that the clause in question is no more than a 'style clause'. It is true that the case-law of the Corte Suprema di Cassazione unambiguously tends towards the view that a clause is only an express termination clause if the parties have provided that non-performance of one or more specifically defined obligations would result in termination of the contract, whereas a style clause is one which contains a general reference to breach of all contractual obligations — and which adds nothing to the general provisions of Articles 1453 (Termination of contract for non-performance) and 1455 (Seriousness of non-performance) of the Civil Code. [7] But that case-law also says that, where the parties have agreed on an express termination clause, in the sense of a clause which refers to particular obligations, the fact that there is a catch-all reference later on to all other contractual obligations does not alter the effect of that clause, because the reference to other obligations is not in itself an indication that the parties shared a common intention to divest the earlier definition of a particular obligation of all meaning and effect. [8] None the less, it seems to me difficult to deny that this is an instance of the latter situation. Whilst the Commission and SNUA provided that non-performance of *one of the obligations* in the Contract should result in termination thereof, they added a specific reference to breach of *Clause 4.3*, the provision with which the Commission alleges SNUA failed to comply. In the light of the case-law to which I have just referred, that fact alone shows that Clause 8 of the Contract is not merely a style clause.

13. Therefore, having established that the contractual clause in question cannot be considered invalid on the ground that it is couched in general terms, it remains to be determined whether or not the Commission's reliance on the express termination clause in its letter of

7 — See judgment of the Court of Cassation No 6827 of 16 November 1983, *Arch. civ.*, 1984, p. 158. I would point out that, where the parties have provided for termination of a contract by operation of law for non-performance of any obligation thereunder, the seriousness of any non-performance must be analysed in the context of the overall scheme of the contract; however, it is not sufficient to establish fault alone where there is a valid express termination clause (see judgments of the Court of Cassation No 3119 of 23 May 1985, and No 5169 of 2 June 1990).

8 — See judgment of 16 November 1983, cited in footnote 7.

18 September 1991 was valid. That is open to doubt. In the letter, which does not formally refer to Clause 8, the applicant merely gave SNUA a new deadline and warned the latter that if it took no action, the Contract would be terminated. To my mind, that statement of intent is closer to notice to perform under Article 1454 of the Civil Code (see footnote 6 above) than to an express termination clause. Indeed, the Commission did not state that the Contract was being terminated because it had allegedly not been performed, but rather gave SNUA an opportunity to perform the Contract, albeit belatedly, and informed SNUA that it would be opting for termination *only if SNUA took no action within the further period laid down in the letter.*

14. However, whether the letter of 18 September 1991 is taken as notice to perform, which I think is the better view, or as a statement to the other party of an intention to rely on the express termination clause, the result is in practice the same for the purposes of this analysis. [9] On either view, a statement of intent by the party not in default can only have the intended result of terminating the contract if the other party can be held responsible for the non-performance, within the meaning of Article 1218 of the Civil Code. [10] More specifically, as the Corte Suprema di Cassazione has held, where there is an express termination clause, in order for the contract to be terminated by operation of law there must still be non-performance for which a party can be held responsible. Insertion of the clause merely obviates the need to assess the seriousness of a particular instance of non-performance because the parties have already made that assessment, but it does not affect the other general principles governing termination of the contract, nor does it create strict liability. [11] Just as with an express termination clause, where there is provision for notice to be given, which I believe to be the position here, the contract can be terminated only if the other party is not responsible for the non-performance. [12] (It is, however, still necessary in such a case *also* to establish how serious the non-performance is by reference to the situation prevailing at the time of expiry of the deadline). [13]

15. Could it be that in this case SNUA complied with its obligation to provide evidence in exoneration, as Article 1218 of the Civil Code (see footnote 10) requires the defaulting party to do? It is probably worth recalling that the test which seems to emerge from the case-law of the Corte Suprema di Cassazione is that evidence that the defaulting party cannot be held to blame for the non-performance must be exhaustive and must

9 — See, however, footnote 13 and the relevant part of the text.

10 — That provision, on 'Liability of the defaulting party', provides as follows: 'Where the defaulting party fails to perform the contracted obligation, he shall be bound to pay damages unless he can show that the reason why he did not perform the obligation, or performed it late, was that he was unable to perform owing to a circumstance for which he cannot be held responsible.'

11 — See judgments of the Court of Cassation No 5710 of 27 June 1987, and No 4659 of 16 April 1992. See also judgment 11960 of 17 December 1990 in *Giur. it.*, 1991, part 1, section 1, column 773, according to which, even if the defaulting party is presumed to be at fault for the purposes of Article 1218 of the Civil Code, the court is not only bound, as regards termination of the contract, to find that the *event* provided for in the express termination clause has occurred but must consider the conduct of the defaulting party, in the light of the principle of good faith, since the contract cannot be terminated unless the defaulting party (at least) was to blame.

12 — See judgments of the Court of Cassation No 1355 of 31 March 1950 and No 1812 of 30 May 1981.

13 — See judgment of the Court of Cassation No 2979 of 20 March 1991.

demonstrate that that party is not at fault in any way, either because a particular impediment made the obligation impossible to perform, or at least because, whatever the reason for the failure, that party was not to blame for it. [14]

Responsibility for non-performance may in particular be excluded if there is what is known as *factum principis*, which may take the form of a legislative or administrative measure (including inaction by the authorities) [15] adopted in the general interest which makes performance impossible, irrespective of the conduct of the defaulting party. [16] The requirement that the order or prohibition emanating from the authorities should be wholly unintended by the defaulting party and beyond the reach of the duty to act with reasonable diligence does not mean that he need take no action, but that he must embark upon and exhaust, within the bounds of reasonable diligence, all possible courses of action to counteract the public authority's resistance or refusal to cooperate. [17] Therefore, where the obligation provided for under the contract is an activity requiring official permission, a defaulting party will incur blame if he cannot show that he used reasonable endeavours to obtain the permission required and that, upon such permission being refused, he exhausted all possible administrative and legal remedies. [18]

16. In the light of the principles set out above, it seems to me that SNUA's conduct was not blameworthy, as alleged, having regard to the exonerating evidence of the *factum principis* in the form of the forceful and protracted opposition of the S. Quirino community and local authority to the recycling plant. Moreover, at the time the Commission viewed this circumstance as constituting *force majeure* (in its letter to SNUA of 13 April 1989; see point 6 above). Accordingly, and having regard to the length of time for which that state of affairs continued, SNUA cannot be held responsible for the fact that the works did not begin before expiry of the 31 December 1991 deadline set by the Commission in its letter of 18 September 1991. The opposition to the works commencing any sooner constituted a circumstance wholly unintended by SNUA and beyond the reach of its duty to act with reasonable diligence. In fact the case-file shows that SNUA repeatedly and assiduously petitioned the competent municipal and regional authorities in an attempt to end the impasse by the most appropriate administrative judicial means and, and that it gave the Commission ample notice, in particular involving the regional environmental assessor in person in its correspondence with the Commission.

17. The termination of the Contract by operation of law, which the Commission has

14 — See judgments of the Court of Cassation No 1500 of 16 February 1994 and No 7604 of 19 August 1996.

15 — See judgment of the Court of Cassation No 44 of 7 January 1970.

16 — See judgment of the Court of Cassation No 119 of 11 January 1982 in *Arch. civ.*, 1982, p. 805.

17 — See judgment of the Court of Cassation No 818 of 25 March 1970.

18 — See judgment of the Court of Cassation No 1706 of 12 May 1973 in *Giur. it.*, part 1, section 1, column 771.

requested the Court to find, and which (as the Commission claims) should have come about as a result of the express termination clause or (as I believe to be more correct) at most because the period granted for performance had expired, in fact never occurred. As pointed out above, one of the conditions for termination of the Contract has not been met, namely non-performance by the defaulting party for which that party *can be held responsible* (regardless, therefore, of the seriousness of such non-performance if the rules on formal notice are considered to apply). [19] Accordingly, the Commission's action must be considered to be unfounded and must therefore be dismissed.

IV — Conclusion

Having regard to the considerations set out above, I propose that the Court should:

— dismiss the Commission's action, and

— order the Commission to pay the costs.

19 — See footnote 13 and the relevant part of the text.