OPINION OF ADVOCATE GENERAL ALBER

delivered on 28 January 1999 *

A — Introduction

1. By this application the Commission seeks to recover funds advanced as financial support for a demonstration (or pilot) project relating to hydroelectric power. The Commission had terminated its contract with the defendants after they announced a substantial change to the project initially planned. Following the defendants' failure, according to the Commission, to submit a due statement of defence, the Commission has requested that judgment be given by default.

B — Facts

2. On 6 December 1990 the European Community, represented by the Commission, entered into contract no. HY 84-89 FR ('the contract') with SIVU [1] du plan d'eau de la Vallée du Lot ('SIVU') and SARL Hydro-Réalisations, acting jointly and severally. The aim of the contract was to provide financial support by the European Community for the following project: Water level on the River Lot — Incorporation in the barrage weir of a small low-head hydro-electric power station. [2]

3. The financial support was granted, pursuant to Council Regulation (EEC) No 3640/85, [3] in order to promote a demonstration project or an industrial pilot project relating to hydroelectric power. Pursuant to point I(1)(a) of Annex II to the contract, the Commission granted the defendants an advance in the amount of ECU 83 928 on 31 December 1990. This amount was remitted on 17 January 1991.

4. The first technical progress report was made to the Commission by letter of 23 May 1991. The Commission gave its approval on 4 July 1991. However, since the report contained no financial information, the Commission requested, by letter of 5 August 1991, that the defendants provide a financial report covering the period beginning with the commencement of work (1 April to 30 June 1990). That report was communicated to the Commission by letter of 13 August 1991.

* Original language: German.

1 — Syndicat intercommunal à vocation unique de droit français.

2 — In French: 'Plan d'eau sur le Lot. Intégration d'une microcentrale hydroélectrique basse chute dans le seuil.'

3 — 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).

5. Since the Commission, after examining the latest report, came to the conclusion that stages I and II, as described in Annex I [4] to the contract, did not merit financial support, it made no further payments. Subsequently it endeavoured, without success, to obtain from the defendants reports on the project's technical progress and financing for the period 1 July to 31 December 1991. As it received no answer, it called upon the defendants on 7 October 1992 to communicate the reports to it.

6. By letter of 6 November 1992 SIVU announced a fundamental change to the original project due to the misgivings of environmental groups. According to this change, the construction of a small low-head hydro-electricity power station in the barrage weir would be replaced by the construction of a spill-weir. In addition, SIVU expressly declined to accept any further payments from the Commission and offered to repay the amount already received.

7. By letter of 18 November 1992 the Commission terminated the contract in accordance with Clause 9 and demanded repayment of the advance of ECU 83 928 together with interest accumulated since receipt of the payment. On 8 December 1992 the Commission issued a requisition order against SIVU for that amount, payable by 28 February 1993.

4 — Annex I contains the work programme as agreed between the parties.

8. On 27 January 1994, after having received no response whatsoever from the defendants, the Commission sent a first reminder to SIVU requiring repayment of the advance. On 1 June 1994, 31 October 1994 and 12 October 1995 additional reminders were sent to SIVU by registered mail with acknowledgment of receipt.

9. Since no reaction came from the defendants to those, either, the Commission considered itself obliged to initiate proceedings.

10. By application lodged at the Court on 2 May 1997 the Commission requested

1. that SIVU and SARL Hydro-Réalisations be ordered to pay ECU 83 928 (eighty three thousand, nine hundred and twenty eight ECU) together with interest as from 17 January 1991 at the rate applied by the EMCF for its ECU transactions, published on the first working day of every month, in addition to statutory default interest as from February 28 1993;

2. that SIVU and SARL Hydro-Réalisations be ordered to bear the costs of the proceedings.

11. As evidenced by the acknowledgment of receipt, notice of the proceedings was served on SIVU on 10 May 1997. Such service was not immediately achieved in regard to SARL Hydro-Réalisations.

12. Since the defendants failed to lodge a defence within the time-limit of one month, as prescribed by Article 40(1) of the Rules of Procedure of the Court of Justice, the Commission applied in writing on 8 July 1997 for judgment by default pursuant to Article 94(1) of the Rules of Procedure of the Court of Justice. It was only after that application had been made that the Commission became aware of the fact that the original claim against SARL Hydro-Réalisations had not been duly served, and that the company had been in liquidation for quite some time. After having located the administrator of the bankrupt company, service was duly made on 30 April 1998.

13. On 14 May 1998 the administrator sent the Court a letter to the following effect:

'1. Following the judgment of the Commercial Court in Rodez dated 13 February 1992, SARL Hydro-Réalisations is in compulsory liquidation.

2. Unprivileged claims stand no chance of being satisfied.'

The letter contained no further information.

14. In written observations submitted to the Court on 25 June 1998, the Commission stated that in its opinion the administrator's letter did not constitute a defence within the meaning of Article 40(1) of the Rules of Procedure of the Court of Justice. It did not contain the elements outlined therein: particularly lacking were any arguments of fact or law as well as any form of order sought by the defendant.

15. The Commission concluded, therefore, that its original application for the defendant to be ordered to pay ECU 83 928 together with interest should be upheld by default.

C — The contract between the Community and the defendants

16. I shall now describe the clauses in the contract which are relevant for the purposes of considering the application.

17. Pursuant to point 1 of Clause 1, the object of the contract is the promotion of the project 'Water level on the River Lot — Incorporation in the barrage weir of a small

low-head hydro-electric power station' for which, according to Clause 3, the financial support of the Community is to amount to a maximum of ECU 279 761.

18. Pursuant to Clause I(1)(a) of the financial provisions contained in Annex II to the contract, the Commission is to pay an advance of ECU 83 928. That clause also stipulates that where the contract is revoked for any of the reasons set out in Clause 4.3.1 of the contract, the contracting party [5] shall be required to immediately reimburse the advance plus interest.

19. Clause 4.3 of the contract states the obligations of the defendants to submit progress, technical and financial reports at various stages of the project.

20. Pursuant to Clause 4.3.1, the defendants are obliged, where it has become impossible to commence work at the time planned, to inform the Commission as soon as possible as to the reasons why this is so, as well as to designate a new date for the commencement of work. The Commission may then, after examining the information and suggestions within a time-limit of 30 days, either approve the changes or decline to give its consent, the latter having as a consequence that the contract shall be automatically [6] terminated. Should this be the case, any advance which has already been paid is to be repaid to the Commission with interest.

21. Pursuant to Clause 8, the Commission may revoke the contract where the contracting parties (in this case the defendants) violate their contractual obligations, in particular the obligations resulting from Clause 4.3. In order to be able to do so, the Commission must also provide notice and set a time-limit of one month. Any financial support which has already been provided must then immediately be returned to the Commission together with interest as of the date such funds were obtained. The interest to be paid is to be calculated in accordance with the rate applied by the EMCF [7] for its ECU transactions as published on the first working day of every month.

22. Pursuant to Clause 9 of the contract, each party may terminate the contract where the continuation of work has become devoid of interest, particularly for technical, economic or financial reasons. The contracting parties (the defendants) are to return to the Commission the amount paid together with interest accumulated since the end or termination of work. The applicable interest rate is the same as in Clause 8 of the contract.

23. Pursuant to Clause 13, the Court of Justice of the European Communities has jurisdiction to hear claims concerning the

5 — This term is meant to denote both defendants.

6 — In the original French '... le contrat est résilié d'office...'.

7 — European Monetary Cooperation Fund.

validity, interpretation and application of the contract.

24. Pursuant to Clause 14, the contract is subject to French law.

D — Procedural provisions

25. Article 38 of the Statute of the Court of Justice provides:

'Where the defending party, after having been duly summoned, fails to file written submissions in defence, judgment shall be given against that party by default...'

26. Article 94(1) of the Rules of Procedure of the Court of Justice states:

'If a defendant on whom an application initiating proceedings has been duly served fails to lodge a defence to the application in the proper form within the time prescribed, the applicant may apply for judgment by default...'

Paragraph (2) states:

'Before giving judgment by default the Court shall, after hearing the Advocate General, consider whether the application initiating proceedings is admissible, whether the appropriate formalities have been complied with, and whether the application appears well founded...'

27. As regards the contents of the defence, Article 40(1) of the Rules of Procedure of the Court of Justice states:

'Within one month after service on him of the application, the defendant shall lodge a defence, stating:

(a) the name and address of the defendant;

(b) the arguments of fact and law relied on;

(c) the form of order sought by the defendant;

(d) the nature of any evidence offered by him.

...'

28. I shall refer where necessary to details of the Commission's submissions and the relevant provisions later in this Opinion.

E — Opinion

29. In proceedings for judgment by default the Court must consider the admissibility of the application (general and special procedural requirements) as well as its merits (whether the application 'appears well founded')

Admissibility

30. After the second defendant — SARL Hydro Réalisations — was also duly notified on 30 April 1998, no doubt subsists as to the admissibility of the original application.

31. The only question here is whether the special requirements for giving judgment by default are met, that is to say, that no defence to the application was lodged, or it was not lodged in due form or time.

32. Pursuant to Article 40(1) of the Rules of Procedure of the Court of Justice the defence to the application must include arguments of fact and law as well as the form of order sought by the defendant.

33. It is not contested that SIVU failed to react, in any way whatsoever, to the duly served application initiating proceedings, so that no defence to the application was made. The administrator of SARL Hydro-Réalisations has informed the Court that the company has been in liquidation since 1992 and that there is no hope of satisfying unprivileged claims.

34. It was in *IRACO* [8] that the Court last considered the question whether a written pleading contained the elements necessary to constitute a defence. In that case, the written pleading bore the title 'Defence and Counterclaim', which did indicate a certain defensive intention. In particular, the reply

8 — Case C-337/96 *Commission* v *Industrial Refuse & Coal Energy* [1998] ECR I-7943.

given in that case indicated that the defendant was explicitly opposed to the reimbursement of funds received from the Commission. The Court therefore allowed the pleading to stand as a defence to the application lodged in due time and form.

35. The situation is different in this case, as the letter from the second defendant's administrator contains no arguments whatsoever pertaining to the facts and the legal situation. Nothing resembling the content of the written pleading in *IRACO* is to be found in the administrator's letter. No opinion whatsoever is expressed in regard to the Commission's arguments, and in particular no defensive intention is apparent. To conclude from the statement that unprivileged claims stand no chance of being satisfied that the defendant wishes to reject the Commission's claim would, first, be contrary to the wording of Article 40(1) of the Rules of Procedure of the Court of Justice and, secondly, ascribe a meaning to these few words which they clearly do not have. It is not apparent how far, if at all, the defendant challenges the Commission's claims.

36. The administrator's letter could, on the contrary, even be interpreted to indicate that the claim to reimbursement, as such, is not contested. The statements would thus be considered as pertaining less to the existence of the claim to reimbursement than to the impossibility of collecting the amount due at a later date.

37. From the above one may conclude that no correctly formulated defence has been submitted and that consequently the requirements for giving judgment by default are met.

Merits

38. As regards the merits, Article 94(2) of the Rules of Procedure requires the Court of Justice to consider whether the application of the Commission appears well founded.

39. The Commission has applied, first, for the reimbursement of the advance paid. Secondly, the Commission claims contractual interest from the date of receipt of the advance, as well as statutory default interest from the date of service of the requisition order (28 February 1993).

40. The right to reimbursement may be derived from Clause 9 of the contract, upon

which the Commission based its termination.

41. Clause 9 provides for the right to terminate where the continuation of the agreed works is of no further interest, in particular for technical, economic, or financial reasons.

42. The Commission justifies the action it took under Clause 9 by stating that its letter of 7 October 1992 had put the defendants on notice of default regarding communication of the technical and financial reports provided for by the contract. The Commission had already thus adverted to the possibility of termination in the event of non-performance. After SIVU, for its part, had informed the Commission in its letter of 6 November 1992 that the project initially agreed had been altered due to the misgivings of environmental protection groups and had offered to repay the advance, the Commission chose to terminate the contract in accordance with Clause 9. It maintains that continuation of the project had ceased to be of interest. In reaching that conclusion, the Commission considers that whether work on the project had begun or not is immaterial.

43. It is beyond question that continuation of the project is of no further interest where, as is the case here, the objections of environmental protection groups have made continuation of the project as planned impossible.

44. It is, however, questionable whether the right to terminate under Clause 9 requires that work already have been carried out. The wording of this clause seems to support such an interpretation, as it refers to pursuance of the work programme. However, where (construction) work has yet to be carried out at all, as is the case here, there may be doubt as to whether termination of the contract under Clause 9 is possible.

45. Nevertheless, the Commission's action under Clause 9 seems permissible. The defendants had only sent a preliminary technical progress report to the Commission prior to the commencement of work. After it became apparent that the project as initially planned could not be carried out due to the misgivings of environmental protection groups, SIVU informed the Commission of the situation. In addition, it declined further funds and offered to reimburse the amount already received. The Commission was, thus far, right to assume that continuation of the project had become pointless.

46. If termination is possible under Clause 9 of the contract even if work has already been carried out (something which in practice would entail severe disadvantages for the party responsible for the work) then it must certainly be possible, all other things being equal, to terminate the contract where the actual construction work has not yet even started. Moreover, it would be against all good reason if in order to be able to terminate a contract it were necessary to wait for the commencement of work, or even to demand that such work be started, when it has already become clear that the project cannot be completed in its initial form.

47. The question need not be answered in the present case in any event, as the Commission, in addition to termination, also had the possibility of revocation under Clause 8. It was entitled to revoke because the defendants were in breach of their contractual obligations, inasmuch as they failed, despite having been warned and given a time-limit, to submit to the Commission the reports as stipulated in Clause 4.3 of the contract.

48. The legal consequences under both Clause 8 and Clause 9 of the contract would have been the same *in the present case*. Both the advance paid and the contractually-owed interest would have had to have been reimbursed. It is true that Clause 9 gives the right to claim interest in principle only once work has been completed or terminated. However, in the present case no (construction) work had been done; only the preliminary technical progress report had been drafted. That can only be regarded a preparatory measure and not an activity equivalent to construction work. However, where no construction work whatsoever has been done — as is the case here — then the non-commencement of work can certainly be equated with the termination of work for the purposes of Clause 9 of the contract. The decisive point in time for the start of the right to claim interest under Clause 9 of the contract is thus the time when the funds where received (17 January 1991) and hence, in the present case, the same point in time as would apply if the contract were to be revoked under Clause 8.

49. From those considerations — and from the Commission's submissions, which are sufficient for the purposes of considering the application for judgment by default — the Commission's application appears well founded.

50. As regards, next, the amount of the interest claimed by the Commission, it may be remarked that this claim exists only in so far as contractual interest is owed since receipt of the advance. The claim for additional interest (statutory default interest) is unfounded.

51. It was agreed in the contract, in both Clause 8 and Clause 9, that in the case of termination interest would be owed at the

rate used by the EMCF for its ECU transactions, as published on the first working day of each month.

52. Under French law, which is applicable in accordance with Clause 14 of the contract, a claim for interest can be statutory or based upon a contract (Article 1153 of the Code Civil). The right to claim interest is intended to cover damage incurred when a creditor did not have a specific amount at his disposal during a certain period of time. Such damage is, however, sufficiently covered by the claim for contractual interest. It would therefore be unreasonable to allow the creditor — here the Commission — to claim, in addition to contractual interest, further interest. As regards further damage incurred due to the delay, it remains up to the creditor to claim for such damage and to seek compensation in accordance with the statutory provisions.

53. In the present case, however, the Commission has not made any further claims with regard to damage, so that in the final analysis it can (merely) claim the contractual interest.

54. To conclude, therefore, the Commission's claim for reimbursement of the advance together with interest appears well founded only to the extent that it refers to the sum of the advance as such, as well as the contractual interest.

55. From all that I have said it follows that the Commission's application may likewise be upheld only to that extent, but must, for the rest, be rejected.

F — Costs

56. Under the first paragraph of Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs, so that in accordance with the second paragraph thereof the defendants in the present case are liable jointly and severally. Under Article 69(3), the Court may order that the costs be shared where each party succeeds on some and fails on other heads. In the present case, the Commission requested that the defendants be ordered to bear the costs. The Commission's application has only been unsuccessful in regard to the amount of interest claimed. In relation to the complete sum claimed, the amount of interest which was not granted is relatively small, so that it would appear reasonable and fair to order the unsuccessful parties to bear the entire costs of the proceedings.

G — Right of appeal

57. Pursuant to Article 94(4) of the Rules of Procedure of the Court of Justice, an application to set aside a judgment by default can be made within one month of the date of service of the judgment.

H — Conclusion

58. I propose that judgment by default pursuant to Article 94(2) of the Rules of Procedure of the Court of Justice be given as follows:

(1) SIVU du plan d'eau de la Vallée du Lot and SARL Hydro-Réalisations (in liquidation) are ordered jointly and severally to pay to the Commission ECU 83 928 (eighty three thousand, nine hundred and twenty eight ECU) together with interest from 17 January 1991 at the rate used by the EMCF for its ECU transactions, as published on the first working day of each month.

(2) As regards the statutory default interest also claimed, the application is dismissed.

(3) The defendants shall bear the costs of the proceedings.