JUDGMENT OF THE COURT (Third Chamber)

10 June 1999 *

In Case C-334/97,

Commission of the European Communities, represented by Paolo Stancanelli, of its Legal Service, acting as Agent, assisted by Alberto Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

applicant,

v

Comune di Montorio al Vomano, acting through its legal representative for the time being, represented by Paolo Scarpantoni, of the Teramo Bar,

defendant,

APPLICATION under Article 181 of the EC Treaty (now Article 238 EC) for an order requiring the defendant, first, to reimburse advance payments made by the Commission to the defendant in connection with two contracts for the completion of a demonstration project relating to the exploitation of alternative

* Language of the case: Italian.

energy sources and, second, to pay the Commission damages by way of compensation for the damage suffered,

THE COURT (Third Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J.C. Moitinho de Almeida and C. Gulmann (Rapporteur), Judges,

Advocate General: N. Fennelly,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 4 February 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 24 September 1997, the Commission of the European Communities brought an action under an arbitration clause entered into pursuant to Article 181 of the EC Treaty (now Article 238 EC), claiming that the municipality of Montorio al Vomano

('Montorio') should be ordered, first, to reimburse advance payments, a total sum of ITL 613 600 000, made by the Commission to Montorio in connection with two contracts for the completion and commissioning of an integrated system, with a wind-diesel facility and a hydroelectric power plant, together with interest of ITL 894 557 399, and interest as from 31 August 1997 until the day on which repayment is fully effected, and, second, to pay the Commission the sum of ITL 50 000 000 by way of compensation for the damage suffered.

2 On 28 July 1986, the European Economic Community, represented by the Commission, entered into two contracts with Montorio, No WE 147/85 and No HY 149/85 ('Contract 147' and 'Contract 149').

3 Those two contracts, which concerned the completion and commissioning of an integrated system, with a wind-diesel facility (Contract 147) and a hydroelectric power plant (Contract 149), came within the context of the financial support granted by a Commission decision of 8 November 1985 for demonstration projects relating to the exploitation of alternative energy sources in accordance with Council Regulation (EEC) No 1972/83 of 11 July 1983 (OJ 1983 L 195, p. 6)

4 Under Article 13 of Contracts 147 and 149, 'the contracting parties agree to refer to the Court of Justice of the European Communities all disputes concerning the validity, interpretation or application of this contract'.

5 According to Article 14 of both contracts, 'this contract shall be governed by Italian law'.

Contract 147

6 The facility which was the subject-matter of the contract was to enable the energy needs of a tourist centre and housing units planned in Cusciano (a hamlet in Montorio) to be met.

7 Under Article 2 of Contract 147 and point 2.1 of section A of Annex I thereto, the installation of the wind-diesel facility, commenced on 8 April 1986, was to be finished on 30 November 1988.

8 Under Article 4.1 of Contract 147, Montorio assumed technical and financial responsibility for the work specified in Annex I thereto. Under Article 4.3, it undertook to submit, within three months of signature of the contract, and thereafter every six months, a progress report and a statement of expenditure incurred. Under Article 4.4, Montorio was to inform the Commission immediately, supplying all relevant particulars, of any incident liable to prejudice the proper performance of the contract. Furthermore, in accordance with Article 4.5.1, Montorio undertook to supply the Commission, without delay, with any information which it might request concerning the implementation of the work programme. Under Article 4.5.2, Montorio was required to make available to the Commission the technical and financial documents needed to verify the execution of the work programme.

9 Under Article 8 of the contract, 'This contract may be terminated as of right by the Commission in the event of non-fulfilment by the Contractor of any of its obligations under this contract, in particular failure to observe the time-limits for submitting the reports provided for in Article 4.3, where formal notice has been served by means of a registered letter with an acknowledgement of receipt and the Contractor has failed to fulfil its obligations within a period of one month thereafter... In such a case, the Contractor shall immediately reimburse to the Commission the amounts paid by way of financial contribution, together with interest payable from the date of receipt of those amounts. The rate of interest shall be that applied by the European Investment Bank as at the date of the Commission decision on the granting of financial support for the project.'

10 On 20 August 1986, the Commission made an advance payment of ITL 246 000 000 to Montorio.

11 In January and September 1987, the Commission made a written request to Montorio to comply with the requirements to submit the reports provided for in Article 4.3 of Contract 147.

12 By letter of 3 November 1987, the Commission agreed to Montorio's request for an extension until 31 May 1989 for completion of the work.

13 In 1987 and 1988, the Commission paid Montorio, in three instalments, a total sum of ITL 209 200 000.

14 In November 1988 and March 1989, the Commission was obliged to remind Montorio of its obligations under Article 4.3 of Contract 147.

15 By letter of 18 September 1991, Montorio told the Commission that the tourist and residential centre in Cusciano would not be built as initially planned and that, as a consequence, the original project had to be modified, providing for the installation of a wind power plant connected to the electricity grid from which energy would be distributed to the whole municipality. Montorio envisaged that the work would be completed by 31 December 1992. It guaranteed that the project finance not assured by the European Community would be covered.

16 By letter of 20 December 1991, the Commission demanded a copy of the formal decision taken by the competent authorities of Montorio to allocate the financing

for the modified project, and of the authorisation to connect the turbine to the electricity grid. Montorio replied on 8 January 1992.

17 After a site inspection in March 1992, the Commission requested Montorio, by letter of 25 August 1992, to provide, in particular, the following documents:

— the written agreement of the Abruzzo Region indicating the amount and date of payment of its contribution to the new project;

— an analysis of the financing for the total cost of the project; and

— a new work programme showing how the project would be carried out.

The Commission stated that if those documents did not reach it by 30 September 1992, it would implement Article 8 of Contract 147.

18 On 13 October 1992, Montorio replied by asking, in effect, for another extension. By two letters of 29 October 1992, it told the Commission that its delay in carrying out the civil engineering work relating to the project under the contract was due 'to the bureaucratic slowness of the bodies responsible for issuing environmental licences' and informed it that the authorities of the Abruzzo Region had not yet taken a decision on granting the second instalment of the financing provided for in Decree No 1550 of 4 December 1986 of that

region. In one of those letters, it was stated that the new work programme showing how work would progress was attached as an annex.

19 On 30 November 1992, the Commission pronounced the termination of the contract on the ground that the documents requested in its letter of 25 August 1992 had not reached it. Following that termination, on 19 December 1995 and 24 January 1996, the Commission requested repayment of the sums advanced. Montorio made no repayment.

Contract 149

20 Under Article 2 of Contract 149 and point 2.2 of section A of Annex I thereto, the work which was the subject-matter of that contract, which involved a 300 kW hydroelectric plant, was to be completed by May 1988 at the latest.

21 In accordance with Article 4.2.1 of Contract 149 and point 3 of section A of Annex I thereto, Montorio sub-contracted to TECNO Srl ('TECNO') the work of completing that hydroelectric plant.

22 Under Article 4.3.1 of Contract 149, in the event of Montorio finding it impossible to begin the work, it was required to inform the Commission and to propose a new date to it. Furthermore, within three months of the date of signature of that contract, Montorio was to submit an interim report on the progress made with the project and a statement of expenditure incurred during that period.

23 Articles 4.1 and 8 of Contract 149 are drafted in terms identical to those of Articles 4.1 and 8 of Contract 147.

24 On 8 August 1986, the Commission made an advance payment of ITL 158 400 000 to Montorio.

25 On 27 January 1987, the Commission called on Montorio to fulfil its obligations under Article 4.3.1 of Contract 149 because Montorio had not submitted within the period prescribed in that provision either the first interim progress report or the statement of expenditure. On 3 July 1987, the Commission sent a further reminder to Montorio in a similar letter.

26 On 8 January 1988, the Commission urged Montorio to fulfil its obligations and stated that, in the event of its refusing to do so, the contract might be terminated as of right in accordance with Article 8 thereof.

27 Since Montorio did not reply to those requests and reminders, the Commission sent it, on 16 March 1988, a letter terminating the contract and a request for repayment of the financial contribution of ITL 158 400 000 that it had received, together with the interest relating thereto. Montorio has not repaid the sums claimed.

Termination of the contracts

Contract 147

28 The Commission claims, in particular, that after granting Montorio, on several occasions, extensions of the time-limits for fulfilling its contractual obligations, it had, by letter of 25 August 1992, served notice that certain documents, in particular those referred to in paragraph 17 of this judgment, should be sent to it by 30 September 1992 at the latest. Those documents were required to be sent in accordance with Articles 4.4, 4.5.1 and 4.5.2 of the contract. The Commission states that, since Montorio had not sent it those documents, it notified Montorio, by letter of 30 November 1992, of the termination of Contract 147 under Article 8 thereof.

29 In its defence, Montorio argues that the application for termination of the contract based on Article 1453 of the Italian Civil Code is inadmissible, contending, first, that the Commission should have put the municipal administration on notice to construct the plant concerned and, to that end, fixed a time-limit, the expiry of which would have resulted in termination. Montorio submits, next, that it had reasonably believed that the Commission was prepared to await the outcome of the legal proceedings which Montorio had initiated against TECNO and the new decision of the Abruzzo Region concerning the financing for the work, since almost a decade had elapsed before the Commission took appropriate action to impose the consequences of the failure to meet the time-limit for completing the work.

30 Montorio submits, finally, that the express termination clause set out in Article 8 of the contract is inapplicable for the following reasons:

— the letter of formal notice was not sent by registered post with an acknowledgement of receipt;

— the Commission continued to demand reports even after the time-limit had expired, so that its conduct amounts to a waiver of the express termination clause;

— Montorio sent the documents required on 29 October 1992, thus fulfilling its contractual obligation.

31 As to the plea of inadmissibility, it should be pointed out that, contrary to what is argued by Montorio, the Commission's action is not an application for judicial termination of the contract for non-performance based on Article 1453 of the Italian Civil Code, but an application for a declaration that the contract was terminated as of right under the termination clause set out in Article 8 thereof, the general rules for which are to be found in Article 1456 of the Italian Civil Code.

32 In any event, the two grounds put forward by Montorio in support of its plea of inadmissibility are ineffective. First, the fact that the Commission did not put Montorio on notice specifically to fulfil its contractual obligation to construct the plant concerned and did not fix, to that end, a time-limit, the expiry of which would have resulted in termination, is not, of itself, such as to entail the inadmissibility of the action. Under Article 8 of Contract 147, non-performance of contractual obligations other than that mentioned by Montorio is also capable of resulting in the automatic termination of the contract. Second, as to the ground alleging breach of Montorio's legitimate expectations, it should be stated that, even if an action may be declared inadmissible on the ground that it is brought in breach of the defendant's legitimate expectations, the facts revealed in the case-file, as set out, in particular, in paragraphs 17 to 19 of this judgment, exclude the possibility that the Commission might have caused Montorio to entertain a legitimate expectation that it was prepared not to take legal action before the outcome of the legal proceedings for non-performance brought by the defendant against TECNO and before the Abruzzo Region took a new decision concerning the financing for the work.

33 It follows that the plea of inadmissibility must be rejected.

34 As regards Montorio's other pleas in law, it is important to point out, first, that the Commission has, contrary to Montorio's submission, produced a copy of the acknowledgement of receipt relating to the letter of formal notice of 25 August 1992. Moreover, Montorio replied to that letter by letter of 13 October 1992, so that it cannot claim not to have received it.

35 Second, the case-file contains no evidence to establish the truth of Montorio's assertions that the Commission continued to demand reports from it even after the expiry of the time-limit given in the formal notice of 25 August 1992.

36 Third, it should be pointed out that the Commission claims that it has not received the documents referred to in paragraph 17 of this judgment and that Montorio has not supplied any evidence that it actually sent them to the Commission.

37 In that regard, it must be noted that Montorio has not disputed the obligation incumbent on it to produce those documents to the Commission and has not raised the defence of the inapplicability of the termination clause set out in Article 8 of Contract 147 in the event of non-fulfilment of that obligation. It is thus apparent that that obligation was deemed by the contracting parties to be an essential contractual obligation, non-fulfilment of which was capable of causing the automatic termination of the contract.

38 Accordingly, since it is clear that Montorio did not fulfil the obligation in question, the automatic termination pronounced by the Commission under the said termination clause and communicated to Montorio by letter of 30 November 1992 is well founded in fact and in law.

Contract 149

39 The Commission points out that Montorio was required, under Article 4.3.1 of Contract 149, to submit to it within three months of signature of the contract an interim report on the progress of the work programme set out in Annex I to that contract, and a statement of expenditure incurred during the same period. However, despite several letters asking Montorio to submit those documents to it and the formal notice in that regard, Montorio did not respond. The Commission states that, as a consequence, it informed Montorio of the termination of the contract by registered letter of 16 March 1988.

40 In its rejoinder, Montorio claims that that last letter never reached it, so that the contract was not terminated in 1988, but only at the date on which the Commission submitted its application to the Court.

41 As the Advocate General pointed out in paragraph 22 of his Opinion, that plea is manifestly inadmissible. Article 42(2) of the Rules of Procedure of the Court of Justice prohibits the introduction of new pleas in law in the course of proceedings unless those pleas are based on matters of law or of fact which come to light in the course of the procedure. This is not so in the present case.

42 Moreover, Montorio does not dispute that the conditions for terminating the contract were satisfied. In that regard, it is clear from the case-file that the automatic termination pronounced by the Commission pursuant to the termination clause set out in Article 8 of Contract 149, read in conjunction with Article 4.3.1 thereof, and communicated to Montorio by registered letter of 16 March 1988 is well founded in fact and in law.

Reimbursement of the advance payments

43 It follows from the third paragraph of Article 8 of Contracts 147 and 149 that, in the event of the application of the termination clause provided for in that article, Montorio is required to reimburse immediately to the Commission the sums paid by way of advances. In this case, it is common ground that the total sum of those advances amounts to ITL 613 600 000.

Interest

44 In its defence, Montorio argues that the clause set out in the third paragraph of Article 8 of Contracts 147 and 149, which provides that the rate of interest applicable is the European Investment Bank rate as at the date of the Commission decision on granting the financial contribution to the project, is null and void. It submits in that regard that, in specifically approving Article 8 of the contracts, in accordance with Articles 1341 and 1342 of the Italian Civil Code, the Mayor accepted the conditions for termination of the contract but not the rate of interest applicable. Montorio also contends that the interest due, namely statutory interest, is payable, under the said Article 8, only from the date of the termination of the contract and not from that of the receipt of the various sums.

45 In its rejoinder, Montorio claims, furthermore, that the contractual clause imposing the rate of interest higher than the statutory rate is unlawful on the ground that the actual rate was not mentioned and that the dominant party is required to give the other party to the contract all relevant particulars.

46 That last plea is inadmissible for the same reasons as those set out in paragraph 41 of this judgment.

47 As to the defence raised by Montorio, it must be stated that, even if a provision fixing the rate of interest, such as that in this case, is a vexatious clause which must be expressly approved as required by Article 1341(2) of the Italian Civil Code, it is common ground that Article 8 of Contracts 147 and 149, and thus, in particular, the clause fixing the rate of interest to be applied to the contract, was expressly approved in writing, on 25 July 1986, by the Mayor of Montorio. Accordingly, that plea must be rejected.

48 Since Montorio has not challenged the rate of 14.2% cited by the Commission as the rate applied by the European Investment Bank at the date of the decision to grant the financial contribution to the project, that rate is to be used to calculate the interest on the advance payments made by the Commission.

49 The plea raised by Montorio concerning the date from which interest is payable must also be rejected. It is clear from the third paragraph of Article 8 of Contracts 147 and 149 that the relevant date is that of the receipt of the advance payments made.

50 As to Contract 147, the Commission submits that interest is due from 1 December 1986 in respect of the first advance payment of ITL 246 000 000, from 1 March 1988 in respect of the second advance payment of ITL 49 200 000, from 1 June 1988 in respect of the third advance payment of ITL 110 800 000, and from 1 August 1988 in respect of the fourth and final advance payment of ITL 49 200 000. As to Contract 149, the Commission claims that the interest due on the advance payment of ITL 158 400 000 is payable from 1 November 1986.

51 In the absence of any evidence in the case-file which might cast doubt on those dates and amounts, the Commission's application is granted in respect of the calculation of interest.

Compensation for damage

52 Relying on Article 1453 of the Italian Civil Code, the Commission also claims that Montorio should be ordered to pay the sum of ITL 50 000 000 by way of compensation for the damage which the Commission claims to have suffered, by way of waste of human resources and of damage to the credibility of the institution, on account of the breach of the contracts.

53 As regards the alleged misuse of Commission staff, it should be noted that, in respect of the period before the contracts were terminated, the combined provisions of Articles 4.3 and 8 gave the Commission the right to draw the proper inferences in due time as to the other party's failure to honour its contractual undertakings and to bring the contractual relationship to an end, in advance and unilaterally. The Commission itself points out, moreover, that, out of a willingness to accommodate Montorio, it granted it extensions of time-limits in order to enable it to discharge its contractual obligations. In those circumstances, the Commission cannot expect the defendant to assume liability for damage which is the result of the Commission's own decisions or inaction.

54 As to the period after the contracts were terminated, it should also be noted that the costs incurred by the parties for the purpose of these proceedings cannot as such, in any event, be regarded as constituting damage distinct from the burden of costs.

55 As regards the other head of damage claimed by the Commission and based on alleged damage to its credibility, it has failed to establish satisfactorily or with the requisite precision that such damage was in fact caused.

56 The Commission's claim for damages must thus be dismissed.

Costs

57 Under Article 69(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 Commission has applied for costs and Montorio has been essentially unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. **Orders Comune di Montorio al Vomano to pay to the Commission, under Contracts Nos WE 147/85 and HY 149/85:**

— **the sum of ITL 246 000 000, together with interest at the rate of 14.2% calculated from 1 December 1986 until the day on which repayment is fully effected;**

— **the sum of ITL 49 200 000, together with interest at the rate of 14.2% calculated from 1 March 1988 until the day on which repayment is fully effected;**

— the sum of ITL 110 800 000, together with interest at the rate of 14.2% calculated from 1 June 1988 until the day on which repayment is fully effected;

— the sum of ITL 49 200 000, together with interest at the rate of 14.2% calculated from 1 August 1988 until the day on which repayment is fully effected;

— the sum of ITL 158 400 000, together with interest at the rate of 14.2% calculated from 1 November 1986 until the day on which repayment is fully effected;

2. Dismisses the remainder of the action;

3. Orders Comune di Montorio al Vomano to pay the costs.

Puissochet Moitinho de Almeida Gulmann

Delivered in open court in Luxembourg on 10 June 1999.

R. Grass J.-P. Puissochet

Registrar President of the Third Chamber