JUDGMENT OF THE COURT (Third Chamber)

9 November 2000 *

In Case C-356/99,

Commission of the European Communities, represented by E. de March, Legal Adviser, acting as Agent, and A. Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hitesys SpA, established in Aprilia (Italy),

defendant,

APPLICATION by the Commission of the European Communities under Article 238 EC to recover moneys advanced in relation to Contract JOU2-

* Language of the case: Italian.

CT93-0417, which was terminated by the applicant on the ground of the defendant's failure to perform its contractual obligations,

THE COURT (Third Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, J.-P. Puissochet and F. Macken, Judges,

Advocate General: A. Saggio,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 23 September 1999 the Commission of the European Communities brought against Hitesys SpA

('Hitesys') an action under an arbitration clause based on Article 238 EC for recovery of an advance payment of a principal amount of EUR 132 500, together with EUR 61 032.8 by way of interest at the rate of 8.25% as from 8 January 1994, giving a total of EUR 194 443.7, and EUR 30.364 by way of interest for each additional day of delay until full payment is made. That advance was paid under financing arrangements governed by Contract JOU2-CT93-0417 (hereinafter 'the contract'), which the applicant terminated on the ground that the defendant had failed to perform its contractual obligations.

Facts

2 On 7 December 1993 the European Economic Community, represented by the Commission, concluded a contract with Irvin Elettronica SpA (hereinafter 'Irvin'), as coordinator, Zentrum für Sonnenenergie- und Wasserstoff-Forschung (hereinafter 'Zentrum') and University of Aston (hereinafter 'Aston'). Under the contract, they undertook to execute a research and technological development project, on the basis of financial support from the Community, in the context of the specific research and technological development programme in the field of non-nuclear energy (1990 to 1994) adopted by Council Decision 91/484/EEC of 9 September 1991 (OJ 1991 L 257, p. 37).

3 Under Article 2(1) of the contract, the duration of the project was to be 18 months as from 1 January 1994, the date of commencement of the contractual relationship. The contractual period within which the work was to be completed thus expired on 30 June 1995.

4 Under Article 4 of the contract, the Commission undertook to finance the project in accordance with a plan which provided for: (i) an advance of ECU 200 000; (ii)

subsequent periodical payments following proof of costs actually incurred in accordance with Article 5 of the contract, and (iii) the possibility of a retention of 10% of the total amount, under Article 4(1) of the contract.

5 Article 1(4) of the contract stipulated that Irvin, as coordinator, was to assume the exclusive responsibility for liaising between the Commission and the contracting parties. Consequently, it was under an obligation in particular to produce all documents specified by the contract. Irvin was required, *inter alia*, to submit half-yearly reports on the progress of the work, with details of the activities undertaken and the results obtained by all the contracting parties, and to deliver a final technical report covering the entire project within two months after the end of the contract. Under Article 5 of the contract, Irvin was required to submit a financial report every 12 months as from the date on which the contract entered into force and a final financial report within three months after the end of the contract.

6 On 8 December 1993 the Commission sent a payment order for the advance of ECU 200 000 provided for in Article 4 of the contract.

7 In 1994, as a result of serious financial difficulties resulting from the departure of a partner, Irvin found itself on the brink of insolvency. For that reason, the company, which had secured a new partner, reorganised itself during that year and became Hitesys. Irvin's obligations were transferred in full to Hitesys.

8 The Commission agreed to the change to the contract and, after formally reviewing it, gave notice by letter of 19 August 1994 that it consented to the replacement of Irvin by Hitesys as group coordinator for the entire contractual relationship.

9 Under the contract, the submission of periodical technical and financial reports became the responsibility of Hitesys. It is apparent from the Commission's correspondence that, as from 21 February 1995, it made clear its view that Hitesys had not discharged that obligation or had done so incompletely and belatedly.

10 In view of Hitesys's conduct, the Commission, by letter of 27 July 1995, called on it to forward the documents relating to the progress of the work provided for in the contract. In the same letter, the Commission informed Hitesys that it considered that the contract had come to an end on 30 June 1995 and that it reserved the right, after examining those documents, to seek repayment of the advance paid.

11 By letter of 3 September 1996, the Commission notified Hitesys of the termination of the contract in accordance with Article 8(2)(d) of the general conditions forming Annex II to the contract (hereinafter 'the general conditions') on the ground that the requisite technical reports had not been submitted and that the agreed work had not been carried out. The Commission then called for partial reimbursement of the advance paid, in the sum of ECU 132 500, representing the ECU 200 000 paid to Irvin by way of advance, less the amounts of ECU 55 000 and ECU 12 500 transferred by the latter to Zentrum and Aston respectively.

12 The Commission then sent demand order No 96005952, requiring the above-mentioned sum of ECU 132 500 to be repaid by 31 December 1996. It sent a reminder on 17 July 1997.

13 Hitesys replied by letter of 25 September 1997 attributing its temporary breaches to certain difficulties that it had encountered. On 17 December 1997, Hitesys sent the Commission a report of the expenses incurred by the company in executing the research project and expressed the hope that the report might

'demonstrate the financial probity' it had displayed in relation to the project despite its economic and financial problems.

14 By letter of 6 February 1998 the Commission repeated to Hitesys its request for reimbursement, stating that the contract had expired on 30 June 1995, that the company had not fulfilled its contractual obligations in so far as it had not provided the requisite reports within the time-limits laid down in the contract and, furthermore, that it had not responded to the reminder letters and faxes sent to it. The Commission stated that it could therefore take no account, with a view to possible reduction of the sum claimed, of any of the expenses declared by Hitesys in the annex to its letter of 17 December 1997.

15 By letter of 20 April 1998, Hitesys sent the Commission its final technical report.

16 By letter of 14 July 1998 the Commission reiterated its request for reimbursement, again stating that Hitesys had not complied with the contractual time-limits for submitting reports on its research activity and that the documentation sent to it on 20 April 1998 was not such that its staff could depart from their initial decision to seek reimbursement.

Procedure before the Court

17 The Commission's application was duly notified to Hitesys. Considering that Hitesys had not lodged a defence within the prescribed time-limit, the Commission requested that the Court give judgment by default in its favour in accordance with Article 94(1) of the Rules of Procedure of the Court.

18 In that connection, it must be noted that Hitesys, despite having been properly notified, did not lodge a defence within the time-limit prescribed by Article 40(1) of the Rules of Procedure. The Court must therefore give judgment by default. Since there is no doubt as to the admissibility of the application, it is incumbent on the Court, in accordance with Article 94(2) of the Rules of Procedure, to consider whether the form of order sought by the applicant appears well founded.

Substance

19 Article 8(2)(d) of the general conditions governs termination of the contract for non-performance. It stipulates that, if one or more of the contracting parties fail to fulfil their obligations, the Commission may, after serving written notice on the defaulting party or parties to fulfil their obligations, treat the contract as terminated if, one month after service of the abovementioned formal notice, non-performance continues and is not justified by reasonable technical or economic grounds.

20 It is clear from the information provided by the Commission that Hitesys sent its first half-yearly technical report six months late and that, as at 27 July 1995, that is to say after the final date for completion of the research project, it had not yet forwarded either the technical reports for the period from June to December 1994 or the definitive technical report or the financial reports for the period from 1 January 1994 to 30 June 1995. Hitesys did not forward until December 1997 a report of the expenditure incurred by the company in executing the research project and it did not forward the final technical report until even later, by letter of 20 April 1998.

21 Accordingly, the Commission was within its rights to require Hitesys, by fax of 21 February 1995, to discontinue any activity in connection with execution of the research project. Moreover, it is undeniable that, in its letter of 27 July 1995, it informed Hitesys that it was treating the contract as having expired on 30 June

1995 and that, in its letter of 3 September 1996, it notified Hitesys of termination of the contract for non-performance under Article 8(2)(d) of the general conditions.

22 The breaches established in paragraph 20 of this judgment cannot be regarded as justified by economic or technical reasons. The only explanation given by Hitesys relates to the economic crisis in the group of which Irvin formed part. A reason of that kind cannot be relied on since it relates to circumstances specific to the company concerned and not to technical or economic problems relating to execution of the research project.

23 The first subparagraph of Article 8(4) of the general conditions provides that, in the event of termination of the contract on the Commission's initiative for non-performance, the Commission may require repayment of moneys actually paid over, to the extent to which it considers it fair and reasonable to do so having regard to the nature and extent of the work done and the usefulness thereof to the project as a whole.

24 On this point, it is clear from the information provided by the Commission that, on 8 December 1993, it paid to Irvin, whose obligations were taken over by Hitesys, an advance of ECU 200 000 and that Irvin retained the share accruing to it, namely ECU 132 500. In view of the failings found at paragraph 20 above, requiring the entire sum of ECU 132 500 to be returned appears reasonable.

25 Accordingly, the Commission's claim must be upheld as regards repayment of the advance received by the company whose obligations were taken over by Hitesys.

26 As regards default interest, it must be observed that the second subparagraph of Article 8(4) of the general conditions provides that the amount to be reimbursed may be increased by interest reckoned from the date of receipt of the payment by the contracting party at the rate applied by the European Monetary Co-operation Fund for its transactions in ECU published on the first working day of each month, plus two percentage points.

27 The sum which Hitesys must pay to the Commission in respect of the advance received must therefore be increased by default interest, calculated in accordance with the second subparagraph of Article 8(4) of the general conditions from 8 January 1994, the date on which the advance was deemed to have been received, until the date on which the debt is paid in full.

28 Pursuant to Article 2(1) of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), the reference to the ecu must be replaced by a reference to the euro at a rate of one euro to one ecu.

29 Consequently, Hitesys must be ordered to pay the Commission the sum of EUR 132 500, together with default interest calculated in accordance with the second subparagraph of Article 8(4) of the general conditions from 8 January 1994 until the date on which the debt is paid in full.

Costs

30 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 Hitesys has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. **Orders Hitesys SpA to repay to the Commission of the European Communities the sum of EUR 132 500, together with default interest calculated in accordance with the second subparagraph of Article 8(4) of the general conditions forming Annex II to Contract JOU2-CT93-0417 from 8 January 1994 until full payment of the debt;**

2. **Orders Hitesys SpA to pay the costs.**

Gulmann Puissochet Macken

Delivered in open court in Luxembourg on 9 November 2000.

R. Grass

Registrar

G. Gulmann

President of the Third Chamber