OPINION OF ADVOCATE GENERAL LÉGER

delivered on 2 May 1995 *

Introduction

1. Pursuant to an arbitration clause based on Article 181 of the EC Treaty contained in the contract for services which it concluded on 27 July 1990 with the European Parliament (hereinafter 'the Parliament' or 'the defendant'), the Netherlands company Heidemij Advies BV (hereinafter 'the plaintiff' or 'Heidemij') asks the Court, by application lodged at the Court Registry on 1 February 1994, to order the Parliament to pay damages in accordance with Article 1794 of the Belgian Civil Code (hereinafter 'the Civil Code').

Facts

2. In connection with the construction of buildings D1, D2 and D3 of the Parliament in Brussels (also called the 'Parliament extension programme' or the 'construction of the Espace Léopold complex'), the Parliament issued an invitation to tender for a pilot study, assistance and advice on the property aspects. [1]

3. In the tender specifications, [2] the Parliament, the contract awarder, stipulated that the contractor's work was to be subdivided into three distinct lots termed A, B and C. Lot A concerned the financial aspects of the project, Lot B the technical and architectural assessment and Lot C the supervision and inspection of the realization of the project. It was also indicated that the price was to be expressed as a global fixed sum for each lot.

4. Heidemij was awarded the entire contract. [3] The parties entered into a contract for services on 27 July 1990 (hereinafter 'the contract').

5. The present dispute solely concerns the supervision and inspection of the realization of the project, namely Lot C.

1 — OJ Supplement of 12 June 1990, S 112, p. 65.

2 — Annex 13 to the application.

3 — On 10 July 1990.

* Original language: French.

6. Heidemij began work on that lot on 1 January 1991 [4] and was to finish 'on the date when the buildings were finally handed over', [5] namely on 1 June 1996.

7. On 21 January 1993, after a difference as to the assessment of the extent of additional work necessary for the proper execution of Lot C, the Parliament notified Heidemij that:

— the contract was terminated in accordance with clause 4 thereof and would cease to have legal effect on 1 July 1993;

— a public invitation to tender for the remaining works would be issued. [6]

8. In response to the latter, Heidemij put in a bid [7] which was rejected by the Parliament. [8]

9. On 28 June and 1 July 1993, Heidemij claimed, by way of damages for termination of the contract notified on 21 January 1993, 10% of the payment sought in the context of the second public invitation to tender for the completion of the works relating to buildings D2 and D3 together with default interest.

10. On 15 July 1993, the Parliament raised an objection as to admissibility.

11. The parties decided to confer jurisdiction on the Court to rule on disputes relating to the contract pursuant to clause 10 thereof and expressly provided that Belgian law was to apply:

'The law applicable to this agreement is Belgian law. The Court of Justice of the European Communities shall have jurisdiction by virtue of Article 42 of the ECSC Treaty, Article 181 of the EEC Treaty and Article 153 of the EAEC Treaty to rule on any dispute relating to the present contract.'

12. That jurisdiction is not in issue.

4 — See Annex 6 to the application.

5 — Fifth paragraph of clause 4 of the contract.

6 — OJ Supplement of 9 February 1993, S 27, p. 72.

7 — That bid, dated 5 April 1993, provided that the total fixed payment for all the contracted work would be ECU 7 971 500.

8 — On 11 June 1993.

Claims and arguments of the parties

13. Heidemij asks the Court to order the Parliament:

— to pay it, by way of agreed damages for termination of contract, the principal sum of ECU 797 150 together with interest for late payment at the contractual rate of 8% per annum as from 15 September 1993;

— to pay all the costs of the proceedings.

14. It puts forward two pleas in law in support of its claim:

— the first plea is that the contractor's right to agreed damages following unilateral termination of a contract for services is conferred by Article 1794 of the Civil Code and at no point did Heidemij intend to waive that right;

— the second plea is that the amount of damages payable by the contract awarder must be assessed in accordance with Article 11 of the Netherlands Code of Professional Conduct for Consultants (hereinafter 'the RVOI-1987') made applicable by clause 8 of the contract.

15. The Parliament asks the Court to:

— declare unfounded and dismiss Heidemij's action and order Heidemij to pay the costs;

— in the alternative, fix the amount of the damages at ECU 20 883.33 and order Heidemij to pay the costs.

16. The defendant makes the following points:

— it disputes the validity of the claim for agreed damages pursuant to Article 1794 of the Civil Code. Since that provision is not one concerning a matter of public interest, it is clear both expressly from an analysis of the terms of the contract, in particular the fifth paragraph of clause 4 and clause 12, and tacitly from

the contractor's conduct after termination of the contract, that the parties intended to derogate from it;

— in the alternative, it submits that the amount of the compensation claimed must be assessed in accordance with the terms of the contract and the provisions of the Civil Code.

Belgian law — Article 1794 of the Civil Code

17. Article 1794 of the Civil Code provides:

'A person awarding a building contract may of his own accord terminate a fixed-price contract, even though building work has already commenced, by indemnifying the contractor in respect of all his expenses, all work done and all his potential earnings under the contract.'

18. That provision thus permits the contract awarder to terminate, *of his own accord* and *without needing to prove that the contractor has failed to perform or has not properly performed the contract*, the fixed-price contract even though the building work has commenced. By way of compensation, he is bound to indemnify the contractor for all his expenses, all work done and all his potential earnings under the contract.

19. Since that provision is not one concerning a matter of public interest, [9] the parties may with no particular formalities [10] disapply it or waive the benefit of some of its provisions. [11] Thus it has been held that the contractor may tacitly waive the right to any compensation. That waiver may be inferred in particular from his conduct after termination of the contract for services. [12]

Scope of the right to terminate

20. Since a judgment given on 4 September 1980 by the First Chamber of the Belgian Court of Cassation, [13] holding that:

'by virtue of the generality of its wording, that provision (Article 1794 of the Civil

9 — See in particular P. Flamme and M.-A. Flamme: *Le contrat d'entreprise — Quinze ans de jurisprudence (1975— 1990)*, Larcier 1991, p. 194, paragraph 244: T. Delahaye: *Résiliation et résolution unilatérales en droit commercial belge*, Bruylant 1984, p. 57, paragraph 42.

10 — T. Delahaye, op. cit., paragraphs 71 and 72.

11 — See M.-A. Flamme and J. Lepaffe: section 'Devis et marchés', *Répertoire pratique du droit belge*, supplement, volume II (hereinafter 'the RPDB'), Bruylant 1966, p. 415, and in particular paragraph 285.

12 — Court of Cassation, 24 September 1981, *Journal des tribunaux*, 1982, p. 57.

13 — SA Artic, formerly SA 'Iceberg', v SA 'Bianca'/SPRL 'Représentations Wolff', *Revue critique de jurisprudence belge*, 1981, p. 527.

Code) applies to any activity, physical or intellectual, under a contract for services, provided that the scope of the contracted work is defined by its subject matter or by an express term',

it has been accepted

(1) *that Article 1794 of the Civil Code applies to all contracts for services*: (a) whatever their subject matter (both intellectual and physical work); [14] (b) whether the contract is on the basis of an estimate or a fixed price, provided that the price is or may be determined by reference to the terms of the contract; [15]

(2) *provided that* (a) the relationship between the parties is governed by a concluded contract and (b) the *subject matter of the contract* is *precise* or a *specific term* has been fixed. In other words, Article 1794 of the Civil Code will apply solely if the contract is for a period determined either by an express term or by its very subject matter. [16]

21. Furthermore, the option of unilateral termination given exclusively to the contract awarder [17] by Article 1794 of the Civil Code may be exercised for as long as the work has not been completed. [18]

The applicability of Article 1794 of the Civil Code to the contract

22. It is clear from an analysis of its provisions that the contract falls within the scope of the right of termination laid down in Article 1794 of the Civil Code. This is moreover not in dispute.

23. The dispute before the Court raises the two following questions: has the principle of agreed damages provided for by Article 1794 of the Civil Code been excluded by the contract? If not, what is the quantum of damages to which Heidemij is entitled? I will consider these two points in turn.

A — *Have the parties waived Article 1794 of the Civil Code, in whole or in part, in the context of Lot C?*

24. With regard to the option of *exercising the right* conferred on the *contract awarder*,

14 — T. Delahaye, op. cit., p. 59, paragraph 44.

15 — Ibidem, p. 60.

16 — See on this point RPDB, paragraph 278.

17 — See in particular T. Delahaye, op. cit., p. 84, paragraph 62; RPDB, paragraphs 279 and 280.

18 — Ibidem T. Delahaye, p. 85, paragraph 63; RPDB, paragraphs 274 and 282.

it is clear that the Parliament, the contract awarder, did not intend to waive it, since the Parliament incorporated it in the fifth paragraph of clause 4 of the contract:

'The contracted work on lot C shall come to an end on the date when the buildings are finally handed over. However, the Parliament shall be entitled to terminate Heidemij Adviesbureau BV's assignment at the end of each period of twelve months by notice sent by registered post at least three months before the end of each such period.'

25. The intention to exercise that right is demonstrated by letter dated 21 January 1993. [19] In that letter, the Parliament refers expressly to clause 4 of the contract and makes no complaint concerning Heidemij:

'...

Consequently, in accordance with Article 4 of our contract with you of 27 July 1990, I hereby give you notice of termination of this contract as at 30 June 1993.

On behalf of my colleagues in the Directorate-General for Administration I would like to express my appreciation and thanks for the services you have rendered to the Parliament in recent years.

We do hope that you will respond to the new call for tender to be issued shortly.'

26. With regard to the *contractor's right to agreed damages*, the defendant argues that it intended to derogate from it. It finds support for this assertion in the fifth paragraph of clause 4 and clause 12 of the contract. It adds that Heidemij's conduct after termination of the contract must also be interpreted to that effect.

27. Contrary to the Parliament's submissions, [20] I consider that it does not follow from the fifth paragraph of clause 4 read in conjunction with clause 12 that the contractor's rights to damages for unilateral termination of the contract have been excluded.

28. As I have shown, the fifth paragraph of clause 4 is unambiguous. The contract awarder simply intended to incorporate the exercise of his right of unilateral termination.

19 — Annex 11 to the application.

20 — Page 19 of the defence.

That clause is not concerned with the effect that the exercise of that right might have on the contractor's right to damages.

29. The provision for frustration set out in clause 12 is irrelevant to this matter.

30. That clause provides:

'If as a result of a decision of a European political, judicial or administrative body the Parliament terminates its building leases or withdraws from the proposed leases, this contract will be terminated with three months' notice without any compensation for termination being payable.

All sums due in respect of services already carried out will be paid to Heidemij Advies BV on production of all relevant documents.'

31. I consider that, by that clause, the Parliament in essence intended to derogate from Article 1789 of the Civil Code — which does not concern a matter of public interest [21] — which provides that:

'If the subject matter of the contract perishes, a contractor who provides labour alone is liable only where he has been at fault.'

Academic writings interpret that provision as the application of the principle 'Res perit domino' in the event that the subject matter of the contract for services does not belong to the contractor. [22]

32. By that clause, the Parliament envisages a very specific situation:

— if it were led to terminate leasing contracts previously concluded [23] whether by the fault of another (for example: a decision of the Court of Justice of the European Communities) or by its own fault ('the European political body' is none other than the Parliament itself),

21 — RPDB, paragraph 252.

22 — Ibidem, paragraph 252; H. De Page: *Traité élémentaire de droit civil belge*, volume IV (part 1), Bruylant 1943, p. 901, paragraph 877.

23 — See 'Introduction' to the tender specifications cited above, p. 2.

— if the contract were annulled — since the subject matter of the contractors' obligations would have perished —,

— the Parliament has expressly reserved the right not to compensate Heidemij although Heidemij could have claimed damages by virtue of the combined effect of Articles 1794 and 1789 of the Civil Code.

Article 12 of the contract accordingly denies this option to Heidemij.

33. In the present case, however, the conditions for the application of clause 12 are not satisfied and moreover, as I have shown, [24] the Parliament has expressly invoked clause 4.

34. The Parliament argues that Heidemij tacitly waived the possibility of relying on the right to damages provided for in clause 1794 of the Civil Code by participating in the second invitation to tender and by its delay in acting.

35. It is clear that Heidemij did not explicitly waive its right to damages. I have shown [25] that it has been held that the waiver by a contractor of the right to damages under Article 1794 of the Civil Code may be tacit. May it validly be deduced from Heidemij's conduct after termination of the contract that it manifested its intention to waive its right to damages?

36. I do not think so, for two essential reasons.

37. *First*, the relations between the Parliament and Heidemij, in the period from the notice given on 21 January 1993 and Heidemij's claims for damages, must be assessed in different legal contexts:

— first, the contract and the application of the obligations flowing from it,

— secondly, the procedure for the public invitation to tender and the application of the relevant non-contractual law.

There are therefore two different legal situations, governed by two distinct legal regimes which must not be confused.

24 — Point 25 of this Opinion.

25 — Ibidem, point 19.

38. *Secondly*, on the facts, I consider that by participating in the new invitation to tender Heidemij acted as a *reasonable* contractor. He had to give his company the chance of being retained and thus possibly reduce the amount of the damages payable by the Parliament for termination of the contract.

39. I therefore consider that Heidemij's action for damages is well founded.

B — *The amount of damages payable by the Parliament*

40. Under Article 1794 of the Civil Code, the contractor must be indemnified in respect of 'all his expenses, all work done and all his potential earnings under the contract'.

41. Heidemij claims damages solely for loss of earnings, namely for the sum of ECU 797 150 together with interest for delayed payment calculated at the contractual rate of 8% in accordance with the RVOI-1987 made applicable by clause 8 of the contract. That interest should run from 15 September 1993 by virtue of the second paragraph of clause 7 of the contract.

42. For its part, the Parliament proposes in the alternative to pay Heidemij 10% of the sum which it could legitimately have claimed had the contract continued throughout its term, namely ECU 20 883.33.

43. In order to assess the amount of the damages and default interest to which Heidemij is entitled, I consider that Belgian law must be applied by virtue of clause 10 of the contract which is drafted in clear and general terms. On the question of the date from when the default interest runs, I note that clause 7 of the contract concerns interest for late payment for works carried out and not sums claimed for loss of earnings. I therefore consider that the second paragraph of clause 7 and clause 8 are not applicable to this dispute.

44. In Belgian law, the principle is that loss of earnings must be assessed in concreto. However, where there are no criteria for assessment, which is the case here, the case-law has fixed the amount at 10% of the value of the work not carried out. [26]

26 — T. Delahaye, op. cit., paragraph 68; RPDB, p. 480, paragraph 288.

45. An analysis of the documents produced and the terms of the contract suggests that the loss of earnings cannot be calculated on the value of a bid which the defendant rejected but solely by taking into account the sum which the plaintiff could legitimately have claimed had the contract been performed throughout its term, namely until 1 June 1996. The only sum agreed between the parties is that in the third indent of the first paragraph of clause 3 (since additional payments [27] are not *mandatory*).

46. Since the price contractually fixed for carrying out the work relating to Lot C is ECU 71 600, the loss of earnings must be calculated on the basis of that annual fixed price of ECU 71 600, namely:

— the price which would have been payable over thirty-five months: [28]

$$\frac{71\ 600\ \text{ECU} \times 35}{12} = 208\ 833{,}33\ \text{ECU}$$

— damages calculated on that amount:

ECU 208 833.33 x 10% = ECU 20 833.33.

47. With regard to the default interest claimed by Heidemij, since the contract is synallagmatic Article 1153 of the Civil Code applies. It is accordingly to be calculated as from the application at the statutory rate applicable in Belgium.

48. I therefore consider that the Parliament should be ordered:

(1) to pay Heidemij by way of damages for termination the sum of ECU 20 833.33 together with default interest calculated at the statutory rate in accordance with Article 1153 of the Belgian Civil Code;

(2) to pay the costs pursuant to the first paragraph of Article 69(2) of the Rules of Procedure.

27 — Sixth paragraph of clause 3 of the contract.

28 — Namely the date of termination, 30 June 1993, until the agreed term of the contract, namely 1 June 1996, therefore thirty-five months.