JUDGMENT OF THE COURT (First Chamber)
11 September 2003 *

In Case C-323/02,

Commission of the European Communities, represented by H. Støvlbaek, acting as Agent, and by E. Cabau, avocat, with an address for service in Luxembourg,

applicant,

v

Hydrowatt SARL, established in Lyon (France),

defendant,

APPLICATION by the Commission under Article 238 EC for recovery of the outstanding balance of an advance paid by the applicant to the defendant under Contract No HY 134/87 FR on the completion of a project receiving financial support pursuant to 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),

* Language of the case: French.

THE COURT (First Chamber),

composed of: M. Wathelet, President of the Chamber, P. Jann (Rapporteur) and A. Rosas, Judges,

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

having regard to the report of the Judge-Rapporteur,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By application lodged at the Court Registry on 16 September 2002, the Commission of the European Communities brought an action pursuant to an arbitration clause based on Article 238 EC against Hydrowatt SARL ('Hydrowatt') for reimbursement of the sum of EUR 25 109, outstanding on an advance of EUR 37 109, plus interest of EUR 23 422.91. That advance was granted under financing arrangements governed by Contract No HY 134/87 FR ('the contract'), which the applicant has terminated on the ground that the defendant failed to perform its contractual obligations.

Factual and legal background to the dispute

2 By decision of 29 October 1987, taken pursuant to 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), the Commission granted Hydrowatt a subsidy for the purpose of completing a project entitled 'New group with turbine and generator adapted for low heads'.

3 On 8 November 1989, the Commission entered into the contract relating to completion of that project with Hydrowatt.

4 Clause 4.3.2 of the contract provides:

'Within three months of the date of signing of the contract and before the expiry of each six-month period thereafter, the contractor shall submit to the Commission, in separate documents:

— a detailed interim report... on the progress of the works, the results obtained and any patent applications which have been lodged,

— ...'.

5 Clause 8 of the contract states:

'The present 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 the present contract, in particular failure to observe the provisions laid down in Clause 4.3. Such termination shall take effect only where the contractor has been given formal notice to comply by means of a registered letter with acknowledgement of service and has failed to do so within a period of one month.

...

In the situations referred to in the two preceding paragraphs, the contractor must immediately reimburse the Commission the amounts paid to it by way of financial support, together with interest as from the date of receipt of those amounts. The Commission may however take account of any works which have yielded concrete results as provided for in the work programme contained in Annex I to the contract. The rate of interest applicable shall be the rate applied by the European Monetary Cooperation Fund for its transactions in ecus published on the first working day of each month.'

6 Under Clause 13 of the contract, the parties agreed to refer to the Court of Justice all disputes concerning the validity, interpretation or performance of the contract which, in accordance with Clause 14, is governed by French law.

7 According to Annex I to the contract, the project was broken down into five phases (studies and authorisation dossier, civil engineering studies, civil engineering works, materials and installation, and acceptance and inspection), only the

last two of which were eligible for Community financial support, according to Table 2 of that annex. In accordance with that annex, the works were to start on 1 November 1989 and finish on 30 April 1991.

8 On 8 December 1989, in accordance with Part I(1)(a) of Annex II to the contract, the Commission made an advance payment of ECU 37 109 to Hydrowatt.

9 Since at the end of the three-month period provided for in the contract the Commission had not received any report from Hydrowatt, it sent Hydrowatt a reminder by letter of 21 March 1990. Hydrowatt replied by letter of 18 June 1990, in which it requested an extension of that period to 12 July 1990.

10 Still not having received any report, the Commission gave Hydrowatt formal notice, by registered letter with acknowledgement of service of 1 August 1991, to send it a report within one month, failing which it would terminate the contract.

11 Since no reaction was forthcoming from Hydrowatt, the Commission confirmed its termination of the contract by registered letter with acknowledgement of service of 24 January 1992, and sought reimbursement of the advance, together with interest at the contractual rate.

12 On 6 February 1992, referring to the Commission's letters of 1 August 1991 and 24 January 1992, Hydrowatt sent the Commission a report noting the 'administrative inconvenience involved in obtaining the prefectorial operating permit' and a 'technical difficulty with the constructor of the turbines'.

13 By letters of 21 October 1992 and 8 February 1993, the Commission once again requested reimbursement of the advance. On 6 April 1993, Hydrowatt repaid a sum of ECU 12 000.

14 By letter of 6 November 1996, the Commission gave Hydrowatt formal notice to repay the outstanding balance. That letter was returned to it by the postal service. It thus became apparent that Hydrowatt had moved its company seat.

15 After carrying out searches of the Registries of the French commercial courts, the Commission located Hydrowatt's new company seat and, on 10 July 1997 and 5 February 1998, sent it two further letters of formal notice.

16 Since Hydrowatt did not respond to those letters or to a subsequent letter sent to it by the Commission on 19 November 2001, the Commission brought the present action.

Procedure before the Court

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

18 In that connection, it must be noted that Hydrowatt did not lodge a defence within the meaning of Article 40(1) of the Rules of Procedure within the period prescribed. 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.

The termination of the contract and the recovery of the outstanding balance of the advance

19 The first paragraph of Clause 8 of the contract provides that in the event of non-fulfilment by the contractor of any of its obligations under the contract, in particular failure to fulfil the obligation to submit a periodic report laid down in Clause 4.3, the Commission may, after giving the contractor formal notice to comply, regard the contract as terminated if, one month after that formal notice, the contractor remains in breach of the contract. The formal notice must be served by registered letter with acknowledgement of service.

20 Under Clause 4.3.2 of the contract, the contractor has a duty to submit to the Commission an interim report setting out the progress of the works and a statement of the expenditure incurred, within three months of the date of signing of the contract, and at six-monthly intervals thereafter.

21 As the contract was signed on 8 November 1989, the period for submission of Hydrowatt's first report started to run from that date.

22 It is clear from the information supplied by the Commission that Hydrowatt did not submit the report within the period laid down in the contract. In addition, after being called upon by the Commission to comply with its obligation, Hydrowatt merely requested, by letter of 18 June 1990, an extension of that period to 12 July 1990. Upon expiry of that period, Hydrowatt had still not submitted the report.

23 Therefore, the Commission was entitled to give Hydrowatt formal notice, by registered letter with acknowledgement of service of 1 August 1991, to fulfil its obligation within one month. Since Hydrowatt did not comply with that formal notice, the Commission was likewise entitled to affirm the termination of the contract by registered letter with acknowledgement of service of 24 January 1992.

24 The fact that Hydrowatt, referring to the Commission's letters of 1 August 1991 and 24 January 1992, sent the Commission a report, on 6 February 1992, containing explanations for the delays in the completion of the project is of no relevance. That report was submitted at a date on which the contract was already terminated. Moreover, even assuming that the technical and administrative difficulties to which that report refers could have been such as to justify delays in carrying out the project had they been raised in sufficient time, they certainly could not have been relied on as justification for the non-fulfilment of the obligation to submit a report within the period stated in the contract.

25 In accordance with the third paragraph of Clause 8 of the contract, where the Commission terminates the contract as of right the contractor is immediately to reimburse the amounts paid by way of financial support.

26 That provision also states that the Commission may nevertheless take account of any works which have yielded concrete results as provided for in the work programme contained in Annex I to the contract.

27 The Commission's claim to reimbursement of the total advance thus comes within the scope of its discretion in the present case.

28 Therefore, the Court must grant the form of order sought by the Commission as regards recovery of the outstanding balance of the advance paid by it.

Interest

29 Under the third paragraph of Clause 8 of the contract, interest is incurred on the amounts to be reimbursed as from the date of receipt of those amounts. That provision also states that the rate of interest is to be the rate applied by the European Monetary Cooperation Fund for its transactions in ecus published on the first working day of each month.

30 It is apparent from the information supplied by the Commission that Hydrowatt received an advance of EC 37 109 on 8 December 1989. The Commission received a partial reimbursement of ECU 12 000 on 6 April 1993, thus leaving an outstanding balance of ECU 25 109.

31 In its application, the Commission does not seek interest for the period up to the complete payment of the debt, but sets 30 June 2002 as the date up to which it is seeking payment of the interest due under the contract.

32 In consequence, the sum that Hydrowatt must repay to the Commission must be increased by default interest at the contractual rate:

— on ECU 37 109, from 8 December 1989 until 6 April 1993,

— on ECU 25 109, from 7 April 1993 until 30 June 2002.

33 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), references to the ecu must be replaced by references to the euro at a rate of one euro to one ecu.

34 It is apparent from the documents produced by the Commission that for the period from 8 December 1989 to 6 April 1993 the interest, calculated in respect of EUR 37 109 using the monthly interest rates applied by the European Monetary Cooperation Fund for its transactions in ecus, came to EUR 12 498.50. For the period from 7 April 1993 to 30 June 2002, the interest, calculated in respect of EUR 25 109 using the monthly interest rates applied by the European Monetary Cooperation Fund for its transactions in ecus, published from August 1994 as 'the interest rate charged by [that fund]', then, from April 2000, as 'the

interest rate charged by the European Central Bank for capital financing operations', came to EUR 15 577.26. Accordingly, the total interest thus calculated amounts to EUR 28 075.76.

35 However, in calculating the interest claimed, the Commission applied a single rate of 10.27837%, rounded up to 10.28%, for the period from 8 December 1989 to 6 April 1993, and a single rate of 4.619591% for the period from 7 April 1993 to 30 June 2002, equal to the average of the monthly rates recorded during those periods. According to that calculation, the total outstanding interest amounts to EUR 12 707.04 for the first period and EUR 10 715.87 for the second, which comes to a total of EUR 23 422.91.

36 Since that amount is the lower of the two amounts, the Court must grant the form of order sought by the Commission as regards the payment of interest of EUR 23 422.91.

37 It follows from all the foregoing considerations that Hydrowatt must be ordered to pay to the Commission the sum of EUR 25 109, plus contractual interest of EUR 23 422.91.

Costs

38 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 Hydrowatt has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Orders Hydrowatt SARL to pay to the Commission of the European Communities the sum of EUR 25 109, plus contractual interest of EUR 23 422.91;

2. Orders Hydrowatt SARL to pay the costs.

Wathelet Jann Rosas

Delivered in open court in Luxembourg on 11 September 2003.

R. Grass
Registrar

M. Wathelet
President of the First Chamber