OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 10 June 1987

My Lords,

This case comes before the Court by way of a reference for a preliminary ruling by the Court of Appeal, Athens. It is the first such reference to the Court made by a Greek court.

By a contract of 22 April 1982 the Greek company Ioannis Theodorakis Biomichania Elaiou AE, which I shall call 'Theodorakis', agreed to sell to a Polish State undertaking, called Agros Bohdanowicz, 100 tonnes of refined olive-residue oil from the 1981/82 crop at a price which was set on an alternative fob and fot basis. The time of delivery was stipulated to be until 31 August 1982, departure from Greece.

Payment was to be made against documents which included a declaration that the goods had been shipped in accordance with the instructions of C. Hartwig of Gdansk. There was in the contract an arbitration clause which provided for all disputes arising in connection with the contract to be settled by the Court of Arbitration at the Polish Chamber of Commerce.

Under Commission Regulation No 3183/80 of 3 December 1980 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (Official Journal 1980, L 338, p. 1), an export licence was required for this transaction. It was in fact granted by the Greek Ministry of Agriculture upon deposit with the Ministry of a letter of guarantee by the National Bank of Greece for DR 310 000 on 23 April 1982.

Although it does not appear in the contractual documents before this Court it seems to have been understood between the parties that a representative of the buyer would come to Greece to take delivery of the goods, or at any rate to give delivery instructions. However, the representative's arrival was first postponed and in the end never took place despite several messages by telegram and telex from Theodorakis calling for instructions.

Theodorakis alleges that on 30 or 31 August 1982 it asked for and was granted an extension of its export licence to 31 December 1982. The copy of the licence produced to the Court by the Commission does not show that it was so extended and the Greek authorities deny that there was any extension beyond 31 August 1982.

Eventually, on 9 December 1982, Agros sent a telex stating that it could not take delivery of all the quantities in December whereupon Theodorakis regarded the contract as terminated.

On 19 February 1983 Theodorakis asked the Ministry to release its letter of guarantee. By a decision dated 13 April

1983 the Ministry declared the security forfeit in the amount of DR 297 400 plus DR 3 569 in taxes, making a total of DR 300 969.

By letter of 5 September 1983 the Ministry instructed the National Bank to pay that sum over on the ground that Theodorakis had not fulfilled its obligations, and the sum was paid on 19 September 1983.

On 1 December 1983 Theodorakis brought an action before the Greek courts seeking an order that the State pay it the sum of DR 300 969, claiming that the Greek authorities had decided wrongly to forfeit its security. It relied in the alternative on a number of matters of Greek law, such as that there was no principal debt and that if the amount was not repaid the State would be unjustly enriched.

The court of first instance dismissed the claim rejecting the first two submissions on the ground that, according to the relevant provisions of Regulation No 3183/80, the export licence issued by the Greek authorities could be cancelled only in the case of *force majeure* on which Theodorakis had not sought to rely in its application. The court also rejected the allegation of unjust enrichment on the ground that the security was surrendered on lawful grounds in accordance with the EEC Regulation.

Theodorakis then appealed to the Court of Appeal, arguing that the relevant provisions were wrongly interpreted and applied. It contended that the circumstances set out in the original application, that is the failure of the Polish buyer to take delivery of the oil in Greece, constituted a case of *force majeure*. The Court of Appeal held that the crucial question in this case was whether the circumstances constituted *force majeure* within the meaning of the relevant provisions of the Regulation and, in particular, Articles 36 and 37.

Accordingly, by an order lodged on 7 May 1986, it asked the Court for a preliminary ruling under Article 177 of the EEC Treaty on the following question:

'Do the circumstances set out in the plaintiff's application of 1 December 1983 constitute *force majeure* within the meaning of Commission Regulation No 3183/80 of 3 December 1980, in particular Articles 36 and 37 thereof, so as to justify the cancellation of the export licence issued by the Foreign Trade Section of the Greek Ministry of Agriculture and repayment of the amount lodged by the plaintiff by way of security?'

The essential question contained within the question referred is whether the Regulation is to be read, when it refers to *force majeure*, as including a case where the buyer fails to take delivery or to give delivery instructions.

In its observations to the Court, Theodorakis asked the Court to rule that the failure to carry out the export transaction is not the result of any fault on its part and accordingly that it constitutes a case of *force majeure*.

The Commission, in its observations on the basis of the decision of the Court in Case 284/82 *Busseni* v *Commission* [1984] ECR 557, contends that the failure to execute a contract because the purchaser failed to take delivery of the goods cannot be considered as a case of *force majeure*. Such a situation is perfectly foreseeable in the context of commercial transactions and is a usual commercial risk.

The Court has held that the concept of *force majeure* may differ in its content in different areas of the law and in its various spheres of application so that the precise meaning of the concept has to be decided by reference to the legal context in which it is intended to operate (Case 158/73 *Kampffmeyer* v *Einfuhr- und Vorratsstelle Getreide* [1974] ECR 101). There the concept was said not to be limited to cases of absolute impossibility.

In the case of *Busseni*, to which the Commission has referred, the Court said that except for specific cases in specific areas the concept of *force majeure* essentially covers unusual circumstances which make it impossible for the relevant act to be carried out, and:

'Even though it does not presuppose absolute impossibility, it nevertheless requires abnormal difficulties independent of the will of the person concerned and apparently inevitable even if all due care is taken.'

More recently, the Court, following Case 42/79 *Milch-, Fett- und Eierkontor GmbH* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1979] ECR 3703, has ruled, in cases concerning an agricultural regulation in relation to butter, that '*force majeure* must be understood as meaning absolute impossibility caused by abnormal circumstances beyond the control of the purchaser of the butter, the consequences of which could not have been avoided without reasonable sacrifice, despite the exercise of all due care' (judgment of 1 October 1985 in Case 125/83 *Office belge de l'économie et de l'agriculture* v *Nicolas Corman et fils SA* ECR 3039, and judgment of 3 July 1985 in Case 20/84 *De Jong NV* v *Voedselvoorzienings in- en verkoopbureau* ECR 2061).

It seems to me that the essence of *force majeure* in relation to a contract is that there should have come about an unforeseeable event which prevents the performance of the contract, an event which is completely outside the control of the parties, and the effect of which the parties cannot or cannot reasonably avoid.

In the context of Regulation No 3183/80 it has to be shown that the importation or exportation cannot be effected during the period of validity of the licence. I consider that where there is an importation or exportation pursuant to a contract an analogous test must be applied to that which applies in the law of contract. There must be, in other words, such an unforeseeable event outside the control of the parties to the importation or exportation, the effect of which the parties cannot or cannot reasonably avoid and which prevents the importation or exportation.

It can be said that in a case like the present the seller is in no way at fault. On the other hand, the failure of a buyer to take delivery of the goods or to give delivery instructions of itself is not such an event as I have described and in my view it does not come within the concept of *force majeure* for the purposes of the regulation.

Contrary to the argument of the applicants in this case, it is not sufficient for a seller who is not at fault to show that the failure to export was a breach of contract by the buyer. It seems to me, as the Commission argues, that such a breach is not unforeseeable for the purposes of the *force majeure* rule but is an ordinary commercial risk which, if it occurs, may give the seller a remedy in damages or otherwise against the buyer.

If in a particular case a buyer can show that his failure to give delivery instructions, or to take delivery, was due to some independent act of *force majeure* then a different question may arise. As I see it, that is not this case. Neither the order for reference nor any of the other documents put forward any contention other than that the seller was not at fault and it was the buyer who failed to take delivery. In my view that is not sufficient.

Whether the procedural steps required under Articles 36 and 37 of the Regulation have been carried out seems doubtful, since apparently Theodorakis did not ask the competent authorities within the meaning of Article 36 (4) to decide if there was *force majeure*. Nor apparently was the matter raised in the application to the court of first instance. These are however matters for the national court and not for this Court to decide.

Accordingly, in my opinion the question referred by the Court of Appeal of Athens falls to be answered on the lines that the fact that a buyer fails to take delivery of goods or to give delivery instructions under an export contract coming within Regulation No 3183/80 is not of itself capable of constituting *force majeure* for the purposes of that regulation.

The costs of the Commission are not recoverable and the costs of the parties to the main action fall to be dealt with by the national court.