# JUDGMENT OF THE COURT (Third Chamber)
13 November 1986 *

In Case 220/85

**Fadex NV,** whose registered office is at 5 Montevideostraat, Antwerp, acting through its Board of Directors, assisted and represented by Michèle Olinger-Courtois, of the Luxembourg Bar, with an address for service at the latter's Chambers,

applicant,

v

**Commission of the European Communities,** represented by Raymond Baeyens, Principal Legal Adviser, acting as Agent, assisted by Jean-Marie De Smet, of the Brussels Bar, with an address for service in Luxembourg at the office of Giorgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION concerning a claim against the Commission by Fadex NV for BFR 150 480 in respect of an invoice dated 31 January 1980 relating to the supply and the laying of a floor-covering in a television studio, and for BFR 30 096 under a penalty clause contained in the company's 'General Conditions of Sale', plus interest on those amounts at the rate applicable in Belgium,

THE COURT (Third Chamber)

composed of: Y. Galmot, President of the Chamber, U. Everling and J. C. Moitinho de Almeida, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Administrator

having regard to the Report for the Hearing as supplemented further to the hearing on 25 June 1986,

* Language of the Case: French.

after hearing the Opinion of the Advocate General delivered at the sitting on 24 September 1986,

gives the following

## JUDGMENT

1 By an application lodged at the Court Registry on 19 July 1985, Fadex NV brought a claim against the Commission, under an arbitration clause within the meaning of Article 181 of the EEC Treaty, for BFR 150 480 in respect of an invoice dated 31 January 1980 relating to the supply and the laying of a floor-covering in a television studio and BFR 30 096 under a penalty clause contained in the company's 'General Conditions of Sale', plus interest on those amounts at the legal rate applicable in Belgium.

2 The facts of the case and the arguments of the parties are set out in the Report for the Hearing. It is sufficient to note that in September 1979 Commission officials discovered that the weight of cameras was dislodging the wooden tiles covering the floor of a television studio. Accordingly they contacted the applicant with a view to laying an appropriate floor-covering.

3 By an internal memorandum dated 28 November 1979 the relevant Commission department informed the Head of the Technical Services Division that 'the new covering should be level and without joins and sufficiently resistant to bear the weight of cameras and their dollies'. That requirement did not appear subsequently in the purchase order sent by the Commission to Fadex on 14 December 1979. After the work had been completed the Commission refused to pay the invoice on the ground that the studio floor was not sufficiently level with the result that it was impossible to use television cameras in the studio normally.

4 The Court must therefore determine whether the Commission was justified in refusing to pay the abovementioned invoice. It must also decide whether the applicant's claim that it is entitled to apply a penalty clause laid down in its General Conditions of Sale to the disputed contract is well-founded.

**The claim for BFR 150 480 for the work done**

5 In this connection it is necessary to determine whether the applicant was under a contractual obligation either to level the floor prior to laying the covering, or, at least, to note that the surface was not sufficiently level and to warn the Commission of that fact before commencing the work.

6 The applicant maintains that it is not specialized in laying floor-coverings for television studios and that under the terms of the contract it was required only to supply and to lay a covering sufficiently resistant and smooth to bear the weight of television cameras and to make it possible for such cameras to be moved with sufficient ease. In particular the contract makes no reference to the requirement that the floor should be perfectly level; the inequality in the level of the floor, approximately 2 mm per metre, occurs only in the last third of the studio and was not visible when the covering was laid. On the other hand, the Commission had expressly undertaken to remove the existing covering and therefore to prepare it for the laying of the new covering.

7 The Commission, for its part, states that Fadex was chosen on the basis of the references it supplied, in particular with regard to work which it had carried out for Radio-Télévision Belge in Brussels. It contends that the undertaking was fully aware of the purpose of the work commissioned, namely the complete resurfacing of the floor of a television studio in order to make it suitable for the use of new, heavy, mobile cameras. Fadex must have known that it was indispensable for the proper functioning of those cameras for the surface to be perfectly level. Despite that, the undertaking merely laid the different layers of covering without first having ascertained the state of the concrete base. In the Commission's view that constitutes 'serious negligence'. In addition, the Commission maintains that in connection with a contract for specialist work such as that which lies at the origin of this dispute the undertaking is bound to take into consideration the end purpose of the work and thus to warn his client of any defects which might prevent a faultless performance of the contract. That means that, in the circumstances of this case, Fadex ought to have warned the Commission that the surface in question was not absolutely level and that, as a result, its re-laying would not be carried out in the best conditions.

8 It should be noted in the first place that neither the Commission's purchase order of 14 December 1979, nor Fadex's tender of 4 December 1979 to which that order relates, which are the only documents having contractual force, requires the applicants to eliminate any unevenness in the surface.

9 Secondly, neither the documents before the Court nor the argument which has been heard has shown that Fadex was informed that it was indispensable for the proper functioning of the studio that the surface should be perfectly level, or that it acted in breach of contract by failing to note that the surface was uneven and to notify the Commission thereof before commencing the work. In fact, contrary to the Commission's contention, Fadex is not specialized in floor-coverings for television studios and the defect in question was not apparent.

10 It follows from the foregoing that the Commission was not entitled to refuse to pay the sum of BFR 150 480 due in respect of the applicant's invoice of 31 January 1980. The Commission must therefore be ordered to pay that amount with interest at the rate provided for under Belgian law, which is applicable pursuant to Article 17 of the Commission's General Terms and Conditions, as from 11 June 1980, the date on which Fadex addressed a formal demand to the Commission.

**The payment of BFR 30 096 in accordance with the applicant's General Conditions of Sale**

11 In addition the applicant considers that the Commission should be ordered to pay it the abovementioned sum pursuant to Article 13 of its own General Conditions of Sale. However, as the Commission has rightly pointed out, Article 1 of the Commission's General Terms and Conditions provides that 'the submission of a tender entails the tenderer's . . . waiving his own conditions of sale'. In those circumstances, the applicant's claim must be rejected.

**Costs**

12 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the Commission has failed in the main part of its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

**(1) Orders the Commission to pay the applicant BFR 150 480 plus interest at the rate fixed by Belgian law from 11 June 1980.**

**(2) Dismisses the remainder of the applicant's claims.**

**(3) Orders the Commission to pay all the costs.**

Galmot Everling Moitinho de Almeida

Delivered in open court in Luxembourg on 13 November 1986.

P. Heim
Registrar

Y. Galmot
President of the Third Chamber