JUDGMENT OF THE COURT (Third Chamber)
8 April 1992 *

In Case C-209/90,

Commission of the European Communities, represented by Götz zur Hausen, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Walter Feilhauer, represented by Gerhard Schlund, Rechtsanwalt, Neustadt an der Aisch, with an address for service in Luxembourg at the Chambers of Roland Funk and Marc Graser, 11 Place Dargent,

defendant,

APPLICATION for recovery of an advance payment made by the Commission for a demonstration project in the field of solar energy,

THE COURT (Third Chamber),

composed of: F. Grévisse, President of the Chamber, J. C. Moitinho de Almeida and M. Zuleeg, Judges,

Advocate General: C. O. Lenz,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

* Language of the case: German.

after hearing oral argument from the parties at the hearing on 26 September 1991,

after hearing the Opinion of the Advocate General at the sitting on 22 October 1991,

gives the following

Judgment

1 By application lodged at the Court Registry on 12 July 1990, the Commission of the European Communities brought an action, pursuant to an arbitration clause in accordance with Article 181 of the EEC Treaty, against Walter Feilhauer for repayment of an advance of DM 72 000 paid by the Commission for a demonstration project in the field of solar energy, together with interest at 6% from 24 January 1983 and at 11.9% from 18 January 1987.

2 On 17 December 1982, the Commission concluded a contract (hereinafter referred to as 'the contract') with Felix Schulze Isfort-Ekel, a farmer resident in Germany, in accordance with Article 8 of Council Regulation (EEC) No 1302/78 of 12 June 1978 on the granting of financial support for projects to exploit alternative energy sources (OJ 1978 L 158, p. 3). In the contract, Mr Schulze Isfort-Ekel undertook to carry out a demonstration project in the field of solar energy, in return for the payment of financial support by the Commission.

3 Clause 13 of the contract states: 'The contracting parties agree that the Court of Justice of the European Communities shall have exclusive jurisdiction over all disputes on the validity, interpretation and application of this contract.' Clause 14 states: 'The present contract shall be governed by German law.'

4 On 31 December 1982 the Commission paid Mr Schulze Isfort-Ekel, in accordance with paragraph I(1)(a) of Annex II to the contract, an advance of DM 72 000 by way of financial support; the money was credited to him on 24 January 1983.

5 In a supplementary contract of 20 February 1984 it was agreed that the original contracting party should transfer to the defendant his rights and obligations under the contract, including the rights and obligations in respect of the financial support already paid by the Commission.

6 According to the timetable of works laid down in Annex I (Table 3) to the contract, the project in question was to be completed by the end of 1984.

7 On 5 February 1985 and on several occasions thereafter the Commision unsuccessfully demanded repayment of the advance on the grounds that the defendant was failing to perform his contractual obligations. On 9 December 1986 it sent the defendant a registered letter, which he received on 17 December 1986, giving him notice of default and stating that it would rescind the contract, in accordance with Clause 8 thereof, if he did not within one month provide proof that he had suitable land available for carrying out the project and had obtained the necessary official permits.

8 As the defendant did not reply within that time-limit, the Commission, in a letter of 24 June 1987, called on him to repay the advance together with the interest which had accrued since its payment and also default interest at the rate of 11.9%.

9 Following a letter of 15 July 1987 from the defendant, in which he challenged the validity of the rescission and asserted that the project was on the point of being carried out, the Commission, in a letter of 16 September 1987, referring to its letter of 9 December 1986, again called for payment.

10 The defendant later conceded that the project had failed to come to fruition but, as in his previous letters, argued that he was entitled to counterclaim, since he had purchased materials in performance of the contract for an amount exceeding the sum claimed by the Commission.

11 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The Court's jurisdiction

12 The defendant objects that the Court has no jurisdiction to determine the Commission's claims. Under Clause 14 of the contract, German law applies, including German procedural rules. Article 29 of the German Zivilprozeßordnung (Code of Civil Procedure) precludes agreements conferring jurisdiction being entered into by contracting parties who are not registered as traders in the commercial register and that condition was not met in the present case.

13 This objection of lack of jurisdiction cannot be upheld. While, under an arbitration clause entered into pursuant to Article 181 of the EEC Treaty, the Court may be called on to decide a dispute on the basis of the national law governing the contract, its jurisdiction to determine a dispute concerning that contract falls to be determined solely with regard to Article 181 of the EEC Treaty and the terms of the arbitration clause, and this cannot be affected by provisions of national law which allegedly exclude its jurisdiction.

14 In the present case it is appropriate therefore to apply Clause 13 of the contract under which the contracting parties agree, pursuant to Article 181 of the EEC Treaty, to confer jurisdiction on the Court of Justice for disputes on the validity, interpretation and application of the contract.

Substance

The validity of the contract

15 The defendant argues that it was impossible for him to perform the contract for two reasons: the German regulations on building permits had prevented the project being carried out on a particular piece of land envisaged by the defendant for that purpose; and by reason of the Energiewirtschaftsgesetz (Law on Energy Policy) it had not been possible for him to become independent of the public electricity network or even to supply his surplus power to that network.

16 On the basis of that submission, it must first be examined whether the contract in question is invalid under Paragraph 306 of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB'), which states that a 'contract whose subject-matter is impossible to perform shall be void'.

17 With respect to the problems in connection with the German regulations on building permits, the contract did not prescribe any particular piece of land for carrying out the project, so that the difficulties alleged by the defendant are due exclusively to his choice of land. If it is accepted that the impossibility within the meaning of Paragraph 306 of the BGB must have already existed when the contract was concluded and must have constituted objective impossibility, it must be held that the impossibility alleged by the defendant was not in any event objective as required by that provision.

18 With respect to the alleged problems in connection with the Energiewirtschafts-gesetz, it suffices to note that the defendant has not explained precisely how the provisions of that law actually stood in the way of the implementation of the project.

19 The defendant stated at the hearing that the contract could be regarded as contrary to morality, since the Commission knew that he did not have the

capacities and knowledge necessary for carrying out the contract, which required the assistance of a farmer. Under Paragraph 138 of the BGB, a legal act which is contrary to morality is void.

20 This submission — assuming it is not out of time — cannot be accepted either. The fact that a contract is difficult to perform does not mean that it must be regarded as contrary to morality. In addition, it is not disputed that the defendant had conceived the project which was the subject-matter of the contract, and could not, therefore, later rely on difficulties which he was presumed to be aware of at the time of concluding the contract.

21 The defendant also maintains that the Commission pressed him to assume the rights and liabilities of the original contracting party.

22 It is true that a contract can be challenged under Paragraph 123 of the BGB if one of the contracting parties has been induced to make a declaration of intent by deceit or unlawful threats. However, the defendant has not produced any evidence in the present case indicating the existence of such deceit or threats.

23 It follows that the contract was validly concluded.

The claim for repayment of the advance

24 Clause 8 of the contract stipulates:

'In the event of failure by the contracting party to comply with an obligation under this contract, the Commission may rescind this contract, if it has given notice of default to the contracting party by registered letter and he has not complied with the obligation in question within one month. The contract may also be terminated if the contracting party has made false statements in order to obtain the financial

support, in so far as he is liable for those statements. In either case the contracting party must repay to the Commission without delay the financial support, together with interest from the expiry of the said period of one month. The interest rate shall be that applied by the European Investment Bank in force at the time of the Commission's decision to grant the financial support for the project.'

25 It is established that the defendant failed to perform his obligations under the contract. As already stated in paragraphs 17 and 18 of this judgment, the reasons put forward by the defendant to justify his failure to perform the contract cannot be accepted. Moreover, the application of the said Clause 8 of the contract is in any event not conditional on fault on the part of the contracting party. The fact that the project to which the Community's financial support was linked was not carried out was in itself sufficient reason for rescission of the contract by the prescribed procedure.

26 Those formal requirements were complied with in the present case. The Commission sent the defendant a letter, which he received on 17 December 1986, giving notice of default and setting a time-limit of one month.

27 That notice of default did not have any effect and it is not disputed that the Commission thereupon rescinded the contract.

28 Since the contract was thus terminated in accordance with Clause 8, it is necessary now to examine the defendant's argument in relation to set-off.

29 The defendant argues that he is entitled to set off an amount equal to that of the advance payment of financial support since in performance of the contract he incurred expenditure exceeding the sum claimed by the Commission.

30 He relies in this respect on a letter of the Commission of 30 April 1985 in which it undertook to finance 40% of the costs of materials incurred.

31 The Commission does not dispute the existence of the undertaking in its letter of 30 April 1985. However, it correctly points out that it had not in any event agreed to bear the defendant's administrative costs and travel and accommodation expenses.

32 The financial support does indeed relate only to the costs of purchasing materials and costs of assembly, as can be seen from points B.1 and 2 of Annex I to the contract and the explanatory notes on items 2.1.2 and 2.1.3 in Table 1 of that annex.

33 Moreover, the requisite proof has not been adduced that the costs of purchasing materials referred to by the defendant were connected with the project described in the contract, or indeed that they were actually incurred.

34 Finally, the defendant's argument that German law, which is applicable to the contract, also gives him a right of set-off cannot be accepted either.

35 The defendant did not provide the Commission with any contractual benefit, so that he is unable to relay on Paragraph 346 of the BGB, which states that in the event of rescission of a contract the parties are obliged to restore what they have received from each other.

36 Moreover, without it even being necessary to decide whether Paragraph 611 et seq. and Paragraph 631 et seq. of the BGB relating to contracts of employment and contracts for services apply to the contract at issue, those provisions cannot in any event confer on the defendant any right to reimbursement, since this matter is regulated exhaustively by the terms of the contract.

37 Finally, with respect to Paragraph 242 of the BGB, which lays down that all contracts must be fulfilled in good faith, and to the Commission's liability for non-performance of the contract on the basis of wrongful conduct in connection with the conclusion of the contract, it suffices to observe that the defendant has not explained precisely how the Commission failed to comply with such requirements or why its actions constitute wrongful conduct.

38 It follows from the above considerations that the defendant's argument relating to set-off is unfounded. The Commission's claim for repayment of the advance must therefore be upheld.

Interest

39 The Commission also claims default interest at 11.9% from 18 January 1987, when the contract was rescinded.

40 The defendant merely observes that it was not until the declaration in the Commission's letter of 16 September 1987 that the contract was rescinded.

41 It should be noted that under Clause 8 of the contract, default interest is due on the sums repayable because of the rescission of the contract, from the expiry of the period of one month allowed the contracting party in the letter giving him notice of default prior to rescission.

42 As stated above, in the present case that notice of default was received by the defendant on 17 December 1986. The one-month period therefore expired on 18 January 1987, and default interest is payable from that date.

43 Finally, the Commission claims interest at 6% for the period from 24 January 1983 to 17 January 1987 on the amount of the advance. It relies in this respect on the case-law of the Court (Case 426/85 *Commission* v *Zoubek* [1986] ECR 4057) to the effect that in the event of termination of a contract concluded with the Community, repayment of an advance which has been paid must also include the interest earned on the sum received since payment. In German law, the interest rate is 6% in the case of a public law subsidy contract.

44 In this respect Article 8(1) of Regulation No 1302/78 provides: 'The Commission shall negotiate and conclude the contracts necessary for the implementation of projects selected pursuant to Article 6. To that end the Commission shall draw up a model contract setting forth the rights and obligations of each party and in particular the procedures for any repayment of amounts of financial support'.

45 The requirement that the conditions of any repayment should be set forth in the contract is intended to remove any uncertainty in determining the applicable law and hence to make clear to the contracting parties the consequences of failure to perform the contract. As the contract does not provide for the payment of interest on the credit balance, the Commission cannot claim such interest in the event of non-performance. The Commission's arguments based on the *Zoubek* judgment cannot therefore avail in this case.

46 Only the claim for default interest can thus be upheld.

47 Consequently, the defendant must be ordered to pay the Commission DM 72 000 together with default interest at 11.9% from 18 January 1987.

Costs

48 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in all essential respects, he must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. Orders the defendant to pay the Commission DM 72 000 together with default interest at 11.9% from 18 January 1987;

2. Dismisses the remainder of the application;

3. Orders the defendant to pay the costs.

Grévisse Moitinho de Almeida Zuleeg

Delivered in open court in Luxembourg on 8 April 1992.

J.-G. Giraud
Registrar

F. Grévisse
President