REPORT FOR THE HEARING
in Case C-209/90 *

I — Facts of the case

On 17 December 1982 the European Economic Community, represented by the Commission, and Mr Felix Schulze Isfort-Ekel, a farmer, concluded a contract for the grant by the Community of financial support for a project, which was described as follows in Clause 1 of the contract: 'Piggery for production of heat required for anaerobic processes using solar energy and conversion of sewage gas (biogas) into heat and electrical energy'.

Clause 8 of the contract stated that: '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 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.'

Under Clause 13 of the contract, 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 stated that the contract was governed by German law.

By an amendment dated 20 February 1984, it was agreed that Walter Feilhauer would take over Mr Schulze's rights and obligations under the contract, including the rights and obligations in respect of the amount already paid by the Commission as financial support, which had been granted pursuant to 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).

The Commission had in fact on 24 January 1983 paid the original contracting party an advance payment of financial support amounting to DM 72 000, pursuant to subparagraph I(1)(a) of Annex II to the contract.

On 4 March 1984 Mr Feilhauer confirmed that he had received that sum from Mr Schulze, together with DM 931.74 interest. The interest could be used for the project in question, and a balancing would

* Language of the case: German.

take place at the time of the final payment, as confirmed by the Commission in a letter of 23 January 1984.

In a letter of 5 February 1985, the Commission demanded repayment of the advance within one month, on the ground of Mr Feilhauer's failure to comply with his contractual obligations relating to implementation of the project.

In a letter to the Commission of 19 February 1985, Mr Feilhauer stated that the Commission had not yet given him notice of default in accordance with Clause 8 of the contract, and also claimed that he had already purchased materials worth DM 77 222.02 for implementation of the scheme.

The Commission then required evidence of these purchases; Mr Feilhauer did not produce such evidence, despite his promise to provide it by mid-July 1985 at the latest.

As Mr Feilhauer had still not supplied any specific information on the project and the expenditure said to have been already incurred, despite a letter from the Commission of 7 August 1985, the Commission informed him on 21 March 1986 that it was definitively terminating the contract and required repayment of the advance, together with interest thereon and default interest at the rate of 11.9% from 5 March 1985.

In a letter of 4 April 1986, Mr Feilhauer contested a corresponding debit note and also contested the 'annulment of the contract under Clause 8'. In a letter of 25 July 1986 he firstly again challenged the statement of rescission of 5 February 1985 and secondly asserted that he had acquired land for the scheme.

By registered letter of 9 December 1986, received by Mr Feilhauer on 17 December, the Commission gave Mr Feilhauer notice of default, stating that it would rescind the contract if he did not within one month demonstrate that land was available and the necessary administrative permissions had been obtained. The essential part of the letter read as follows:

'In view of the factual and legal situation described above, the Commission, referring to its letter of 5 February 1985 and relying on Clause 8 of the contract of 17 December 1982 and amendment of 20 February 1984, gives you notice of default. If you do not within one month of receipt of this letter provide the Commission with evidence of the availability of land suitable for carrying out the project, by producing an extract from the land register or other appropriate documents, and of the receipt of all official permissions necessary for carrying out the project, by producing copies of the relevant official documents, the Commission will rescind the contract in accordance with Clause 8.'

Mr Feilhauer did not produce any of the documentation requested within the time-limit.

The Landrat (Chief Administrative Officer) of Kreis Neustadt an der Aisch-Bad Windsheim subsequently approached the Commission and informed it that Mr Feilhauer now had suitable land available for the project. The Commission stated in two letters of 20 March and 31 July 1987, copies of which were sent to Mr Feilhauer, that it nevertheless felt compelled to maintain its decision to terminate the contract.

In a letter of 24 June 1987 the Commission's accounting officer demanded that Mr Feilhauer pay within 14 days the sum of DM 72 000 together with interest thereon and default interest at the rate of 11.9%.

In a letter of 15 July 1987 Mr Feilhauer again maintained that the contract had not been rescinded and that implementation of the scheme was imminent.

In a letter of 16 September 1987 the Commission, referring to its letter of 9 December 1986, once more demanded payment. It repeated the demand in a letter of 11 February 1988. On 8 July 1988 it informed Mr Feilhauer that it would take legal proceedings if he did not pay.

In a letter from his lawyer of 19 July 1988, Mr Feilhauer again alleged that the contract had not been rescinded, but conceded that the project had fallen through; he also claimed to set off DM 72 000 on the ground that in performance of the contract he had made considerable purchases of materials, whose value exceeded the amount of the advance paid.

In a letter of 8 December 1988 the Commission again stated that the rescission was effective, and also ruled out the possibility of set-off.

Finally, in a letter from his lawyer of 2 January 1989, Mr Feilhauer maintained that he was entitled to set off a counterclaim for the purchases of materials, which would be awarded him on the basis of the legal principle of *culpa in contrahendo*. He also cited a statement by the Commission of 30 April 1985, in which the Commission admitted that '40% of the purchases of materials would be accepted as reimbursable items'.

Mr Feilhauer did not subsequently make any repayment.

II — Written procedure and forms of order sought by the parties

The Commission's application was lodged at the Court Registry on 12 July 1990.

The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. By decision of 15 May 1991 the Court assigned the case to the Third Chamber.

The *Commission* claims that the Court should:

(i) Order the defendant to pay the Commission of the European Communities the sum of DM 72 000, together with interest at the rate of 6% from 24 January 1983 and at the rate of 11.9% from 18 January 1987;

(ii) Order the defendant to pay the costs.

Mr Feilhauer contends that the action should be dismissed.

III — Pleas in law and arguments of the parties

The *Commission* argues that the Court's jurisdiction to hear the present case derives from Clause 13 of the contract, which is an arbitration clause within the meaning of Article 181 of the EEC Treaty. It also states that, under Clause 14, the contract is governed by German law.

With respect to its *claim to repayment of the principal sum* of DM 72 000, the Commission relies on the termination provision in Clause 8 of the contract.

The Commission notes to begin with that Mr Feilhauer does not dispute having received the abovementioned sum in connection with the contract in question.

It argues that the contract was rescinded by the letter of 9 December 1986, with effect from 18 January 1987.

The Commission states in this respect that in that letter it firstly gave notice of default to Mr Feilhauer, who on that date had undeniably failed to fulfil his contractual obligations. Although according to the timetable of work the scheme should already have been long since put into effect, Mr Feilhauer was not even in a position to demonstrate that he had suitable land available.

In the letter it secondly gave notice of rescission of the contract, subject to the suspensory condition of Mr Feilhauer not within the stated period of one month proving at the very least, by producing the relevant documents, that he had land available and had obtained the necessary administrative permissions. Since this condition had undeniably not been complied with when that period expired, the rescission, in the Commission's opinion, took effect on that date, namely 18 January 1987, given that Mr Feilhauer had received the letter in question on 17 December 1986.

In reply to Mr Feilhauer's argument that he was not 'liable' for rescission as the project was impossible to carry out (because of legal and administrative problems), in view of which the Commission should in his opinion have examined this first and, if appropriate, not have had the project carried out in Germany, the Commission invokes the wording of Clause 8 of the contract. That clause provides for a right to rescind which is independent of the reason for the failure to perform contractual obligations. This corresponds, in the Commission's opinion, to the concept which is the basis of the whole system of financial assistance for projects of this type, namely that it is not the Commission but the other party to the contract who is obliged to carry out the measures provided for in the contract. If he does not do this, for whatever reason, he is not entitled to the subsidy.

The Commission does not dispute that in general a contract cannot be rescinded conditionally, as rescission is a 'constitutive act' (*Gestaltungsgeschäft*) which alters the legal position. Such a declaration of intent (*Willenserklärung*) cannot be combined with conditions whose effect would be to create uncertainty as to the legal position. In the present case, in the Commission's opinion, once the stated period had expired it was clear to both parties that as the condition had not been fulfilled the rescission had become effective, with the reasons for Mr Feilhauer's failure to perform his contractual obligations being of no importance.

Moreover, whether that condition took effect depended in the present case solely on the recipient of the notice of rescission, so that he did not need to be protected from uncertainty as to the new legal position.

The Commission states on this point that German case-law on the contractual right of rescission under Paragraph 349 of the German Civil Code allows conditional declarations of rescission, provided that the occurrence of the condition depends solely on the will of the recipient of the notice (BGHZ (Decisions of the Federal Court in Civil Cases) 97, p. 264).

Finally, in the Commission's opinion, since there had already been previous correspondence between the parties to the contract on the procedure to be followed in the event of rescission, Mr Feilhauer cannot claim to have understood the letter only as announcing a rescission which would still have to be declared later.

The Commission argues in the alternative that under Clause 8 of the contract rescission took effect in any event on 1 April 1987, when Mr Feilhauer received a copy of the letter of 20 March 1987 to the Landrat of Kreis Neustadt an der Aisch-Bad Windsheim confirming the decision to rescind the contract.

The Commission argues in the further alternative that by the letter from his lawyer of 2 January 1989 Mr Feilhauer acknowledged that the contract had been validly rescinded.

In addition, the Commission considers that Mr Feilhauer cannot set off against its claim for repayment a claim for the costs allegedly incurred by him in connection with the contract.

In this respect, the Commission observes, firstly, that the costs allegedly incurred by Mr Feilhauer for travel, accommodation and time spent were not financed by the Community, as can be seen from Section B of Annex I to the contract and the accompanying tables (see pp. 8 and 9 of the annexes to the contract).

Secondly, the alleged purchases of materials for carrying out the project, claimed by Mr Feilhauer, cannot in the absence of any legal basis give rise to a claim for compensation against the Commission. The Commission adds that the *culpa in contrahendo* principle invoked by Mr Feilhauer is of no relevance in this context.

The Commission considers that its undertaking of 30 April 1985 that it intended to finance 40% of the purchases of materials (a figure corresponding to the percentage of the cost of setting up the project to which its financial contribution was limited) lapsed in any event because of the lack of proof of those purchases. The Commission points out that its undertaking was subject to the condition that the materials had been purchased before 31 December 1984 and that the purchases were attested by invoices and proof of payment.

The letter from Gartner & Co. produced by Mr Feilhauer in fact shows merely that Gartner had incurred a certain expense ('installation of equipment') before the date of the letter, 1 October 1982, in other words before the conclusion of the contract with the original party, Mr Schulze Isfort-Ekel, and long before Mr Feilhauer's own involvement in the contract. The letter also shows that materials worth DM 37 083.88 were in stock at Gartner's premises. In the Commission's opinion, however, there is no evidence of expenditure by Mr Feilhauer either on equipment or on materials. Moreover, no connection with the demonstration project has been shown. The Commission also states that as early as 30 April 1985 it asked Mr Feilhauer to provide proof of the alleged purchases of materials, but he did not do so.

The Commission considers that it is also *entitled to interest on the amount paid*, which must not be credited to Mr Feilhauer. It relies in this respect on Clause 8 of the contract, which provides for the restoration, in the event of rescission, of the *status quo ante* and consequently for the repayment of the interest which has been earned (see the Court's judgment in Case 426/85 *Commission* v *Zoubek* [1986] ECR 4057). The Commission considers that the principle that if the recipient of a subsidy paid from public funds is obliged to repay it, he must not retain the interest which has accrued on the sum made available to him, is also the basis of the German rule contained in Paragraph 44a(3) (in force since 18 July 1980) of the Bundeshaushaltsordnung (Federal Budget Code) of 19 August 1969 (BGBl. I, p. 1284).

The Commission considers that such interest should be calculated on a flat-rate basis, the amount of interest actually received not being relevant in this respect. It states that the interest rate generally prescribed in such cases in Germany is 6%, in that under Paragraph 44a(3) of the Bundeshaushaltsordnung claims to repayment as a general rule attract interest at the rate of 6%.

The Commission states that as the right to repayment in this case derives from the rescission of a contract, the interest should run from the date when Mr Feilhauer received the advance payment, 24 January 1983.

Finally, the Commission considers that it is *entitled to interest for late payment*, at the rate applied by the European Investment Bank at the date of the Commission's decision to grant the financial support in question, in accordance with the third and fourth sentences of Clause 8 of the contract.

In this connection, the Commission points out that that rate was 11.9% at the time and that the interest is payable from the expiry of the period of one month referred to in the said Clause 8, that is to say, from 18 January 1987.

Mr Feilhauer states to begin with that he was the one who provided the technical drawings for the project in question. He has reason to believe that a sum of DM 240 000 was allocated to Mr Schulze Isfort-Ekel subject to the grant of an additional subsidy by the Federal Republic of Germany. As he was unable to obtain that subsidy, the original party to the contract withdrew.

Mr Feilhauer maintains that at the insistence of the Commission, which was aware of the difficulties he would be confronted with in the scheme, he eventually assumed responsibility for carrying out the project himself.

Mr Feilhauer then argues that the contract was indeed terminated, but it was only the Commission's letter to him of 16 September 1987 which constituted the moment of termination, since that letter refers to the letter of 9 December 1986 and the rescission which was announced in that letter.

The Commission's letter of 9 December 1986, in Mr Feilhauer's opinion, in fact constitutes only a notice of default and a statement that the contract would be terminated, since rescission is by definition a declaration of intent which must be received and cannot be made subject to a condition but must show clearly that the contract ceases from that moment.

Mr Feilhauer goes on to argue that he is not responsible for the rescission of the contract, as the scheme was impossible to carry out 'because of provisions of public law and the large number of official bodies involved'.

Thus it was not possible, for example, to become independent from the public electricity supply network, or even to be allowed to feed the surplus energy produced into the public network, because of the Energiewirtschaftsgesetz (Law on Energy Policy). Moreover, he constantly met with opposition from the nature conservation authorities, such as the refusal of his preliminary request for a building permit, for which he had to pay DM 240 as administrative fees.

Mr Feilhauer asserts that, relying on the effective contract and confident that the project was feasible, he incurred expenditure which considerably exceeded the sum of DM 72 000 claimed by the Commission. As shown by a letter from the firm of Gartner & Co., he gave an order for tools costing DM 44 190, and also ordered DM 37 083.88 worth of materials. It is unfortunate — he states — that these items can no longer be proved in detail, eight years having passed between the orders and the lodging of the application.

Mr Feilhauer considers that it is hard to understand why only 40% of the costs proved were to be recognized, as stated in the Commission's letter of 30 April 1985, since the fact that the project could not be carried out in Germany was nothing to do with him. The Commission should in his opinion have ascertained the difficulties of carrying out the project much earlier and ought possibly to have had it implemented in another Member State.

Mr Feilhauer points out that there is also no justification for recognizing only the expenditure effected before 31 December 1984, given that the contract was not effectively terminated until much later and that, even in the Commission's opinion, the earliest the contract could have been rescinded was clearly the letter of 9 December 1986, taking effect from 18 January 1987.

Mr Feilhauer adds for information that he discussed the project in question with the Federal Minister of Agriculture, Ignaz Kiechle, who was then Deputy Chairman of the Agricultural Committee of the Bundestag. Mr Kiechle initially promised him that the subsidy he had requested would be granted, but later changed his mind. The President of the German Farmers' Union, Mr von Heeremann, had also assured him of his support, and had tried *inter alia* to arrange for financing, independently of the public institutions which had failed to act. This attempt came to nothing, according to Mr Feilhauer, because the project was not likely to make a profit.

Finally, Mr Feilhauer states that these and many other meetings involved travel expenses of at least DM 30 000, accommodation costs of nearly DM 4 000, and approximately DM 15 000 for the time spent.

In his opinion, the application should therefore be dismissed, since the expense incurred by the defendant exceeds the amount claimed by the applicant.

J. C. Moitinho de Almeida
Judge-Rapporteur