

JUDGMENT OF THE COURT (Second Chamber)

17 February 2000 *

In Case C-156/97,

Commission of the European Communities, represented by H. van Lier and G. zur Hausen, Legal Advisers, acting as Agents, assisted by B. Wägenbaur, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Van Balkom Non-Ferro Scheiding BV, established in Oss, Netherlands, represented by D. Baas, Rechtsanwalt, Mannheim, Postfach 10 27 50, D-68027 Mannheim,

defendant,

APPLICATION for recovery of an advance payment which the Commission made to the defendant in respect of a demonstration project in the field of the production of energy from crushed motor vehicle scrap metal,

* Language of the case: German.

THE COURT (Second Chamber),

composed of: R. Schintgen, President of the Chamber, G. Hirsch (Rapporteur) and V. Skouris, Judges,

Advocate General: J. Mischo,

Registrar: L. Hewlett, Administrator, and then H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 February 1999,

after hearing the Opinion of the Advocate General at the sitting on 25 March 1999,

having regard to the order to reopen the oral procedure of 30 September 1999,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 21 October 1999,

after hearing the Opinion of the Advocate General at the sitting on 23 November 1999,

gives the following

Judgment

- 1 By application lodged at the Registry of the Court on 23 April 1997, the Commission of the European Communities brought an action pursuant to Article 181 of the EC Treaty (now Article 238 EC) for an order that Van Balkom Non-Ferro Scheiding BV (hereinafter 'Balkom') pay the sum of ECU 251 649, plus interest due as from 1 July 1991 at the percentage rates, published on the first working day of each month, which the European Monetary Cooperation Fund charges in respect of its ecu transactions. The Commission was claiming, in addition, the payment of default interest at the rate of 4% per annum as from 1 May 1995, a claim which it later withdrew.

- 2 On 4 December 1990, the European Economic Community, represented by the Commission, concluded with Balkom, established in Oss (Netherlands), Van

Balkom Seeliger GmbH (hereinafter 'VBS'), established in Heidelberg (Germany), both represented by their director, Mr Van Balkom, and Deutsche Filterbau GmbH (hereinafter 'DF'), established in Düsseldorf (Germany), represented by Mr Hahn, a contract concerning the grant, by the Commission, of financial support to those companies, acting jointly and severally, for the execution of a project entitled 'Energieerzeugung aus einer bei der Verwertung von Autoschrott anfallenden Reststofffraktion' (production of energy from crushed motor vehicle scrap metal) (hereinafter 'the contract').

- 3 That contract was concluded 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).

- 4 Under the terms of the contract, the three abovementioned companies, called 'the contractor', are jointly and severally liable *vis-à-vis* the Community.

- 5 Clause 3 of the contract stipulates that financial support is fixed at 17% of the actual cost, excluding value added tax, of the project and up to a maximum of ECU 987 343. The actual payment of that financial support is provided for in Annex II to the contract. Under Point I(1)(a) of that annex, the Commission was to make an advance payment of ECU 296 203 after the contract was signed and, subsequently, under Point I(1)(b), a payment amounting to 8.5% of the expenditure actually incurred as a function of the reports which the contractor was required to submit and after the documents submitted by the contractor had been checked.

- 6 Clause 4.3.2 of the contract stipulates, in particular, that the contractor is to send to the Commission, at least once a year, a report on the expenditure incurred, including the corresponding documentary evidence.

- 7 Under Clause 7 thereof, the contract may be amended or supplemented only by a written addendum signed by the two contracting parties.

- 8 Under the terms of Clause 8 thereof, the contract ‘may be rescinded by the Commission in the event of the contractor failing to fulfil one of its obligations under the present contract ...’.

- 9 The first and third paragraphs of Clause 9 stipulate:

‘The present contract may be terminated by any of the signatories, giving two months’ notice, where the programme of work set out in Annex I becomes inoperative by reason, in particular, of a foreseeable technical or economic failure or an excessive overrun on the costs of the project in relation to the estimates.

...

If an audit reveals that the amounts paid by the Commission are too high, the sum paid in error, plus interest due as from the date of ending or finishing the work stipulated in the contract, shall be reimbursed forthwith by the other party to the contract.'

- 10 Under Clause 13 of the contract, the contracting parties agreed to refer to the Court of Justice any dispute concerning the validity, interpretation or application of the contract. Clause 14 stipulates that the contract is governed by German law.

- 11 Under Annex I to the contract, the programme of work to be implemented by the contractor covered the following five phases: 'Engineering', 'Production and Delivery', 'Installation', 'Demonstration' and 'Final Report and Documentation'.

- 12 At the beginning of 1991, the Commission made VBS the advance payment of ECU 296 203 which had been agreed in the contract (see paragraph 5 of the present judgment).

- 13 By letter of 21 August 1991, DF informed the Commission that it was no longer in a position to be involved in the demonstration project and that, with VBS, it would make the necessary amendments to the contract. By letter of 26 August 1991, VBS then informed the Commission that it had entered into negotiations with DF on that point.

- 14 By letter of 7 October 1991, as stipulated in the contract, VBS sent the first interim technical report and the first financial report. That financial report stated that the expenditure incurred by the contractor amounted to DEM 1 038 723.40, of which the Commission accepted DEM 943 662.74, corresponding to ECU 460 808.82. Under Point I(1)(b) of Annex II to the contract, the Commission thus paid to VBS 8.5% of that amount, namely ECU 39 169 (see paragraph 5 of the present judgment).
- 15 By letter of 29 October 1992, VBS sent the Commission the second interim technical report and the second financial report on the practical execution of the demonstration project. That second financial report stated that the expenditure incurred since the beginning of the work amounted to DEM 1 541 278.48, including the sum of DEM 943 662.74 already accepted by the Commission. In addition, it was clear from, in particular, the reports, that between 1 July 1991 and 30 June 1992, none of the work had been carried out at the place of execution of the project (namely Heidelberg) because of the lack of a permit to be issued by the German authorities and that legal proceedings on that subject were pending before the administrative courts. As a result of those two reports, the Commission did not make any further advance payments.
- 16 On 16 December 1992, VBS informed the Commission in writing that it would no longer be involved in the project and asked it for permission to transfer the project to Balkom.
- 17 By letter of 9 March 1993, following a meeting on 3 March between the Commission, Balkom and VBS, the Commission confirmed to Balkom that both DF and VBS had withdrawn and it made the continuation of the project by Balkom subject, in particular, to the condition that Balkom obtain the administrative permission necessary for the execution of the project, by 31 December 1993 at the latest. The Commission also stated that it would not

make any further advance payments until that date and that it reserved the right to terminate the contract if the time-limit set was not complied with. The Commission sent VBS a copy of the letter of 9 March 1993.

- 18 By letter of 27 September 1993, Mr Van Balkom, in his capacity as liquidator of VBS, informed the Commission that Balkom was not in a position either to execute the demonstration project alone or to fulfil at the same time any of its obligations in the event of the contract's being terminated, since it had been, and still was, facing serious financial difficulties.

- 19 The efforts made meanwhile by Mr Van Balkom in order to find a partner with substantial financial means had come to nothing.

- 20 By letter of 16 August 1994, sent to VBS and to Balkom, and received by Balkom on 19 August 1994, the Commission terminated the contract and directed Balkom to send it the documents enabling it to check the amount of the advance payment. By letter of 29 November 1994, the Commission asked Balkom to reimburse to it a total amount of ECU 334 481. On 8 February 1995, it therefore issued a recovery order with a due date of 30 April 1995.

The termination of the contract

- 21 The Commission states that the present action is brought against only Balkom, since, in August 1991 and December 1992 respectively, VBS and DF withdrew from the contract. At the meeting of 3 March 1993, the Commission therefore

agreed with Mr Van Balkom and with a representative of VBS that VBS and DF were withdrawing from the contract and that Balkom was continuing with the project on certain conditions.

- 22 According to the Commission, its termination of the contract was justified, under the first paragraph of Clause 9 of the contract, by the foreseeable economic failure of the project.
- 23 Balkom contends that the termination by the Commission on 16 August 1994 cannot have brought the contract to an end.
- 24 There was no reason to justify the Commission's termination of the contract in accordance with Clause 9 thereof and there had been no foreseeable economic failure of the programme of work within the meaning of the first paragraph of Clause 9. However, a comparison of Clause 8 and Clause 9 of the contract reveals that rescission, in accordance with Clause 8, is authorised in the event of failure to fulfil or breach of an obligation by the contracting partner. In the present case, the conditions of Clause 8, but not those of Clause 9, are satisfied.
- 25 In addition, it results from the contract itself, in particular from the preamble thereto and Clause 1 thereof, read in conjunction with Paragraph 425 of the Bürgerliches Gesetzbuch (German Civil Code, hereinafter 'the BGB'), that it could be brought to an end by the Commission only by an act taking effect *vis-à-vis* all the other parties to the contract. The termination of 16 August 1994 did not therefore have any effect since it was notified only to VBS and Balkom, but not to DF.

- 26 The Court finds that the termination by the Commission by letter of 16 August 1994 brought an end to the contract.
- 27 First, the termination of the contract was justified under the first paragraph of Clause 9 of the contract. That provision does not necessarily presume that a foreseeable economic failure is the cause of the programme of work becoming inoperative. It is sufficient, as is clear from the use of the terms ‘in particular’, that the programme of work has become inoperative.
- 28 That last condition was satisfied when the Commission terminated the contract by letter of 16 August 1994 since, of the three undertakings initially associated with the project, there remained only one, which was manifestly not in a position to perform the contract. Admittedly, as Balkom accepts, in those circumstances the Commission could have rescinded the contract under Clause 8 thereof. However, that provision, which gives the Commission the right to rescind the contract, cannot be interpreted as meaning that it limits the Commission’s right to terminate the contract in accordance with Clause 9 thereof.
- 29 Second, the termination by the Commission was valid and therefore brought an end to the contract, although the Commission did not expressly terminate the contract also with regard to DF.
- 30 Such a termination was not necessary if all the parties to the contract had agreed, in relation to a contract under Paragraph 305 of the BGB, that DF would withdraw from the contract.

- 31 It is true that Balkom denies having agreed to such a contract which, moreover, according to German case-law and academic writing, would not, in spite of Clause 7 of the contract, have needed to be in writing. However, Balkom did not immediately challenge the letter of 9 March 1993, in which the Commission confirmed discussions which had taken place between the contracting parties on 3 March 1993 and according to which those parties had agreed on DF's withdrawal. According to German case-law and academic writing, there would be agreement on DF's withdrawal if the letter of 9 March 1993 were to be defined as a 'kaufmännisches Bestätigungsschreiben' (commercial letter of confirmation).
- 32 However, the question whether the letter of 9 March 1993 must be defined as such need not be answered at present. In this case, the termination by the Commission would have been effective even if DF had always remained formally a party to the contract.
- 33 Admittedly, as Balkom contends, it follows from Paragraph 425 of the BGB, read in conjunction with the contract, that the Commission could in principle terminate the contract only with regard to all the contracting parties, which were jointly and severally liable. Indeed, it would be contrary to the spirit of the contract for the Commission to bring the contract to an end in respect of one of the contracting parties and pursue it with the others. However, in this case, account must be taken of the fact that DF, as early as 21 August 1991, made a serious and definitive declaration that it could no longer be involved in the contract. The reasons it gave in that regard were expressly approved by VBS in its letter of 26 August 1991 sent to the Commission. Balkom has not challenged DF's withdrawal, but has continued performing the contract without DF's involvement. In the light of that, the contract concluded between the parties must be interpreted — in accordance with the principle of good faith referred to in Paragraphs 157 and 242 of the BGB — as meaning that the Commission was entitled to terminate it with regard to VBS and Balkom without notifying the termination of the contract to DF with which the continuation of the contract was not possible.

Reimbursement of the advance payment

34 The Commission claims that, under the third paragraph of Clause 9 of the contract, there should be deducted from the payment of ECU 335 372 only a sum of ECU 83 723 in favour of Balkom. In this case, that is the financial aid referred to in Clauses 1.2 and 3 of the contract. That aid corresponds to 17% of the costs of the project audited and approved by the Commission after submission of the first financial report for the engineering phase, which represents a total amount of DEM 943 662.74, namely the sum of ECU 492 489, 17% of which represents the sum of ECU 83 723. The balance which Balkom should reimburse to the Commission amounts, consequently, to the sum of ECU 251 649 (ECU 335 372 minus ECU 83 723). Admittedly, the Commission planned, in a note of 20 January 1994, that the engineering phase should be acknowledged at the level of DEM 1 127 800, on condition that the corresponding documentary evidence be available. However, neither VBS nor Balkom sent it that documentary evidence, the submission of which was expressly provided for in Clause 4.3.2 of the contract. Furthermore, that note was, as is expressly clear from its title, only 'a basis for non-binding discussion'.

35 According to Balkom, the third paragraph of Clause 9 of the contract does not provide for a right to reimbursement in the event of termination of the contract under the first paragraph. Even if the Commission enjoyed such a right, the expenditure to be acknowledged would amount to a total sum of DEM 1 127 800 and not only to that of DEM 943 662.74. In that case, the Commission would be entitled, in accordance with its note of 20 January 1994, to reimbursement of the sum of ECU 236 333. Furthermore, Balkom disputes that the documentary evidence was requested by the Commission.

36 It must be stated, as clearly follows from the third paragraph of Clause 9 of the contract, that, in the event of termination of the contract under the first

paragraph thereof, the contractor must reimburse the sum paid in error by the Commission.

- 37 As regards the exact amount to be reimbursed, it should be noted that the Commission made advance payments amounting to ECU 335 372 and that, in accordance with Clause 3 of the contract, 17% of the expenditure incurred by the contractor for the purpose of executing the project should be deducted from that sum. The Commission has shown that only expenditure amounting to DEM 943 662.74, and not DEM 1 127 800 as claimed by Balkom, must be acknowledged. It is common ground that the contractor did not send to the Commission documents proving that expenditure exceeding the sum of DEM 943 662.74 had been committed. It follows from the wording and the purpose of Clause 3 of the contract, read in conjunction with the third paragraph of Clause 9 thereof, that the Commission is obliged to acknowledge only expenditure which is shown by the transmission of documentary evidence to have been committed. Since the obligation to send that evidence follows from Clause 4.3.2 of the contract, it is irrelevant whether the Commission requested them.
- 38 Consequently, the balance to be reimbursed by Balkom is, in accordance with the Commission's claim, the sum of ECU 251 649 (ECU 335 372 minus the sum of ECU 83 723).
- 39 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), in respect of the amount of the principal amount and that of the interest, the

reference to the ecu should be replaced by a reference to the euro at a rate of one euro to one ecu.

The right to retention relied upon by Balkom

40 Balkom relies on a right to retention on the basis of Paragraph 273 of the BGB, arguing that the Commission has not yet taken a decision on VBS' request of 29 October 1992 as regards the second financial report.

41 The Commission claims that it took the decision on the second financial report by setting, by letter of 9 March 1993, a time-limit for Balkom, expiring on 31 December 1993, for obtaining administrative permission and by informing Balkom that the Commission would not make any further payments until that date.

42 The Court finds in that regard that Balkom may not exercise its right to retention pursuant to Paragraph 273(1) of the BGB.

43 It is sufficient to point out that since the contract has been terminated by the Commission, it is no longer appropriate to grant supplementary financial aid.

Interest

44 The Commission refers to the third paragraph of Clause 9 of the contract, under which the party liable to effect the reimbursement must pay the interest as due

from the date of ending or finishing the work stipulated in the contract. Balkom completed the first phase of the project on 30 June 1991. Consequently, the interest should be calculated as from 1 July 1991.

- 45 Balkom contends that the third paragraph of Clause 9 of the contract does not provide for the sum concerned by the right to reimbursement to produce interest as from the date of finishing or completing the first phase of the project. Furthermore, that phase, namely the engineering phase, was not completed on 30 June 1991, contrary to the Commission's claim. In fact, no-one is in a position to determine the date on which the engineering phase was completed.
- 46 In that regard, the Commission, having failed to establish the date on which the contractor had completed the work, may, under the terms of Paragraphs 284 and 288 of the BGB, claim only the payment of default interest as from 1 May 1995, at the rate stipulated in the fourth paragraph of Clause 9 of the contract.

Costs

- 47 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 Balkom has been unsuccessful, Balkom must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Orders Van Balkom Non-Ferro Scheiding BV to pay to the Commission of the European Communities the sum of EUR 251 649, plus interest on that sum as from 1 May 1995 at the percentage rates, published on the first working day of each month, which the European Monetary Cooperation Fund charges in respect of its euro transactions;
2. Dismisses the application as to the remainder;
3. Orders Van Balkom Non-Ferro Scheiding BV to pay the costs.

Schintgen

Hirsch

Skouris

Delivered in open court in Luxembourg on 17 February 2000.

R. Grass

Registrar

R. Schintgen

President of the Second Chamber