JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
19 September 2001 *

In Case T-26/00,

Lecureur S.A., established in Paris (France), represented by L. Funck-Brentano and J. Villette, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by P. Oliver, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for an order for payment of sums withheld by the Commission when paying the balance for a supply of food aid,

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: A.W.H. Meij, President, A. Potocki and J. Pirrung, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 21 March 2001,

gives the following

Judgment

The relevant provisions

1 Article 1(1) of Commission Regulation (EC) No 2519/97 of 16 December 1997 laying down general rules for the mobilisation of products to be supplied under Council Regulation (EC) No 1292/96 as Community food aid (OJ 1997 L 346, p. 23, 'the Regulation') provides:

'Where a decision has been taken to mobilise products for the purposes of a Community operation under Regulation (EC) No 1292/96, the procedures laid down in this Regulation shall apply'.

2 The first paragraph of Article 11 of the Regulation provides:

'As soon as the contract has been awarded the Commission shall inform the supplier of the agency which will be responsible for carrying out the checks referred to in Article 16, issuing the certificate of conformity or the certificate of delivery, and generally coordinating all stages of the supply operation (hereinafter referred to as "the monitor")'.

3 According to Article 15 of the Regulation:

'(1) The provisions of paragraphs 2 to 11 shall apply in the case of delivery free at destination either by sea and by land, or by land only.

(2) ...

The supplier shall bear all the costs until the goods are made available at the warehouse of destination.

...

(5) Without prejudice to paragraph 9, the supply shall be complete when all the goods have actually been made available at the warehouse of destination. The supplier shall not be responsible for the unloading of the means of transport.

(6) The supplier shall bear all risks, including loss or deterioration, to which the goods may be subject until completion of supply at the stage defined in paragraph 2 and recording of that fact by the monitor in the final certificate of conformity....'

4 Article 16 of the Regulation provides:

'(1) The monitor shall check the quality, quantity, packing and marking of the goods to be delivered in respect of each supply.

The final check shall be carried out at the delivery stage specified...

(3) When the final check is complete, the monitor shall issue the supplier with a final certificate of conformity specifying in particular the date of completion of the supply and the net quantity supplied; such certificate shall be subject to reservations if necessary.

(4) Where the monitor establishes a non-conformity, he must notify the supplier and the Commission in writing as soon as possible. This shall be known as the "notice of reservation". If the supplier wishes to dispute the findings with the monitor and the Commission, he must do so within two working days of dispatch of this notice.

...'

5 In accordance with Article 17:

'(2) The taking-over certificate or the delivery certificate shall establish the net quantity actually delivered.

(3) A taking-over certificate containing the particulars set out in Annex III shall be issued by the beneficiary to the supplier without delay after the goods have been supplied at the stage of delivery specified and the supplier has provided the beneficiary with the original of the final certificate of conformity...'

6 In accordance with Article 18 of the Regulation:

'...

(2) Payment shall be made in respect of the net quantity shown in the taking-over certificate or the delivery certificate. However, in the event of discrepancy between the taking-over certificate and the final certificate of conformity, the latter shall take precedence, and shall be the basis for the payment.

...

(4) In the case of delivery free at port of landing or free at destination, and at the supplier's request, advance payment of up to 90% of the tender amount may be made...

(7) All payments shall be made within 60 days of the receipt by the Commission of the complete request for payment presented in accordance with paragraph 5.

Payments made later than the specified period, for reasons not attributable to additional inspections or investigations, shall attract post-maturity interest at the monthly rate applied by the European Monetary Institute, as published in the C series of the *Official Journal of the European Communities*. The interest rate applicable shall be that for the month in which the day following expiry of the deadline referred to in the first subparagraph falls. Where payment is more than a month late, the interest rate applicable shall be an average weighted by the number of days on which each such rate prevailed.'

7 Article 22(4) of the Regulation provides:

'Except in cases of *force majeure*, the delivery guarantee shall be partially forfeit on a cumulative basis in the following cases, without prejudice to paragraph 8:

(a) 10% of the value of the quantities not delivered, without prejudice to the tolerances referred to in Article 17(1)

...

(c) 0.2% of the value of the quantities supplied after the deadline, per day of delay or, where appropriate, and only if this is specified in the tender notice, 0.1% per day where they are delivered prematurely.

The amounts shall not be forfeit in accordance with points (a) and (c) if the failures found are not attributable to the supplier'.

8 Article 24 is worded as follows:

'The Court of Justice of the European Communities shall be competent to resolve any dispute resulting from the implementation or the non-implementation or from the interpretation of the rules governing supply operations carried out in accordance with this Regulation.'

9 Article 1 of Commission Regulation (EC) No 990/98 of 11 May 1998 on the supply of cereals as food aid (OJ 1998 L 140, p. 7) provides:

'Cereals shall be mobilised in the Community, as Community food aid for supply to the recipient listed in the Annex, in accordance with Regulation (EC) No 2519/97 and under the conditions set out in the Annex...'.

Background to the dispute

10 By fax of 26 May 1998, in response to a call for tenders under Regulation No 990/98, the company Lecureur submitted to the Commission an offer for the delivery of 15 000 tonnes of maize to Niger at the free-at-port-of-destination price of ECU 206.87 per tonne.

11 By fax of 28 May 1998 the Commission accepted that offer and stated that the company Socotec International Inspection was appointed 'monitor' in accordance with Article 11 of the Regulation.

12 In accordance with Article 16(5) of the Regulation, the monitor issued the applicant with a provisional certificate of conformity on 26 June 1998.

13 On 2 July 1998 the goods were unloaded in bulk at the port of transit of Cotonou (Benin) and bagged at the quay between 2 and 17 July 1998, for a total quantity of 14 976 tonnes, and then transported to Niger, in order to be delivered to the four destinations provided for.

14 On 30 June 1998 the applicant had sent the Commission a request for payment of an advance, pursuant to Article 18(4) of the Regulation, equivalent to 90% of the value of the goods, that is to say, a total of ECU 2 792 745. The Commission allowed that request.

15 Deliveries to the receiving warehouses of the Office des Produits Vivriers du Niger ('the OPVN') were completed on the following dates: 21 July at Maradi, 26 July at Tahoua, 6 August at Zinder and 7 September 1998 at Niamey.

16 By telex of 21 August 1998 the applicant informed the Commission that part of the goods delivered had been damaged by an infestation of insects. The telex states in particular:

'[...] we are taking steps to carry out the conditions fixed by OPVN mail of 17 August 1998 annotated and corrected by Socotec. This decision was taken for the sole purpose of preserving the goods and obtaining the corresponding taking-over by the monitor. Liability will be settled later by the insurers knowing that our position has been clearly set out on the above basis.'

17 In response to the applicant's telex the monitor made it known by fax of 27 August 1998, in essence, that it rejected the applicant's inference that the state of the warehouses could have been the cause of the infestation.

18 On 24 September 1998 the company Agri Control International, instructed by the applicant *inter alia* to supervise the transportation of the goods, stated in a document drawn up after delivery as follows:

'[...] Total weight determined on delivery to receiving warehouses, sound goods: 14 806.600 tonnes. Total weight determined after repackaging damaged goods: 14 931.739 tonnes'.

19 On 27 October 1998 the monitor sent the applicant a notice of reservation, in accordance with Article 16(4) of the Regulation. That document states *inter alia*:

'We have communicated to you on 21 October 1998 the final analysis results on the basis of samples taken in the presence of your staff at destination. Those results show that product does not conform to the contractual specifications governing this contract, in particular as regards the content of miscellaneous impurities (1.43% as opposed to 0.5% maximum)... The beneficiary OPVN is willing to take over the maize definitively only on the express condition that it is cleaned by winnowing, a process which will result in most of the miscellaneous impurities being removed...'.

20 An agreement protocol ('the agreement protocol') was drawn up between the Commission and the OPVN on 27 November 1998. This document states *inter alia*:

'(4) A month after samples were taken a visit of inspection was paid to the supplier Lecureur and the seat of the monitor Socotec. That visit led to an agreement on the procedure for taking over including agreement on protection and restraint measures.

(5) Among those measures the immediate removal of the goods was plainly necessary, given the heating up of the maize and the risk of fire. The removal was carried out at the supplier's expense.

(6) When the grain was being removed, the damaged sacks were sorted. The final assessment is being made and will be submitted for verification to the representative of the supplier's insurers if necessary.

...

(B) Decision

(1) The OPVN shall take over the sound goods delivered, that is to say:

...Niamey	158 204 sound sacks net weight	7 910 200 kg
Total	296 045 sound sacks net weight	14 802 250 kg

subject to the final assessment referred to at point A (6)...'.

21 On 7 December 1998 the monitor delivered a document entitled 'Final certificate of part conformity'. In essence, that document relates:

'The goods have been accepted in part, subject to sorting of the damaged parts (water-damaged in transit) and the parts with a high content of miscellaneous

impurities... Having regard to the above, the delivery is in part in conformity with the EEC regulations at the time of delivery to the final destination...'.

22 On 20 February 1999 the OPVN issued the taking-over certificate provided for by Article 17(3) of the Regulation. In that document it declares that it has received a total quantity of 14 182 687 kg of maize.

23 On 25 February 1999 the monitor issued the delivery certificate provided for by Article 17(2) and (4) of the Regulation and the final certificate of conformity provided for by Article 16(3) of the Regulation.

The delivery certificate is worded as follows:

'...

Place and date of taking over:	Niamey/Maradi/Tahoua/Zinder 20 February 1999
Date of delivery	Between 14 July 1998 and 7 September 1998

(B) Refusal to take over

Refusal to take over the goods listed below:

Product:	Maize	
Tonnage, net weight refused	149 250 kg	Before sorting and winnowing
	154 250 kg	After sorting and winnowing

(C) Additional remarks and reservations:

Estimated theft of 300 mt from the OPVN warehouse compound at Niamey at the time of the sorting and winnowing processes'.

24 The final conformity certificate mentions:

'... At the time of delivery to the final destination we found:

Quantities delivered

The goods were accepted in part, subject to sorting of the damaged parts (water-damaged in transit) and parts with a high content of miscellaneous impurities. To

date the sorting has been only partly carried out, the remainder to be sorted being the subject of an assessment of future loss...

Total delivered to Niamey: 147 864 sacks — 7 393 200 kg net...

Final quantity delivered: 284 648 sacks — 14 232 400 kg net...

However, the average quality of the consignment in respect of grain impurities and miscellaneous impurities is still not in conformity with the tender specifications. Those results are, none the less, within the recognised acceptable limits...

Observation

Thefts were carried out within the OPVN warehouse compound at Niamey during the processes of sorting and winnowing the goods. It has not been possible to say how much was stolen; it is estimated to be about 300 tonnes.

Conclusion

Having regard to the foregoing, the delivery described above is in conformity with the EEC regulations at the time of delivery to the final destinations, except

for the following matters:

— Delayed delivery to Niamey

— Grain impurity rate and miscellaneous impurities rate greater than specifications.'

25 On 25 February 1999 the monitor also sent the Commission a fax in which it referred to the terms of the agreement protocol as follows:

'... It should be noted that some sound quantities already taken over on 22 November 1998 have decreased.... Nevertheless, having regard to the fact that it was established in an agreement protocol drawn up on 22 November 1998 that the consignment had been taken over in part, we consider that the sound quantities certified and accepted by the OPVN at that date ought not to be called in question...'.

26 By letter of 3 March 1999 the applicant requested the Commission to pay it the balance of ECU 310 305, equivalent to 10% of the price agreed for the supply of 15 000 tonnes of maize.

27 By fax of 25 August 1999 the Commission sent the applicant a financial statement setting out in substance the following facts:

'... Quantity delivered: 14 232.400 tonnes...

(B) Debit items		ECU
(1)	Quantity not delivered: 767.600 tonnes % age not delivered: 5.12	158 793.41
(2)	Advance made (Art. 18(5) of Regulation No 2200/87)	2 792 745.00
(3)	Drawbacks provided for (Art. 18(2) of Regulation No 2200/87)	23 625.780
(4)	Penalties provided for in the first indent of Article 22(4)(a) of Regulation No 2519/97	12 776.29
(5)	Penalties provided for in the third indent of Article 22(3) of Regulation No 2200/87	1 677.20
Total debits		2 989 617.68
Balance payable		113 432.32
Attributable to goods transport		70 185.80 43 246.52'

28 On 26 October 1999 a lawyer representing the applicant sent the following letter to the Commission:

'...

(7)... [I]t would appear that the beneficiary had not taken steps to distribute or sell the goods, which is clearly a matter falling outside the supply by and control of Lecureur.

(8) Lecureur agreed to participate in and contribute financially to the implementation of protective measures for the preservation, sorting and, possibly, repackaging of the goods stored at Niamey...

(11) In reality, the certificate drawn up on and dated 25 February 1999 is based on the quantities of sound sacks accepted and taken over in the protocol of 27 November 1998, so far as concerns...

(12) But none of that has anything to do with Niamey, which is where the whole dispute arises.

	27 November 1998	25 February 1999
Niamey	158 204	148 543

That is to say, the disappearance from the warehouses of the OPVN, after delivery to the place of destination, of 9 661 sacks with a net weight of 483 050 kilos. It is true that the certificate states that thefts were carried out within the compound of the OPVN warehouses at Niamey during the processes of sorting and winnowing the goods, indicating that "it has not been possible to say how much was stolen; it is estimated to be about 300 tonnes". As a matter of fact, and contrary to what has been said, it is possible to quantify those thefts exactly on the basis of the number of sacks presented on leaving, which is to say, 9 661 sacks stolen, as just calculated.

(13) The total quantity in the certificate is 14 232 400 kilos net, sound value.

(14) When the time came to pay the balance of the supply the Commission paid ECU 113 432.52, whereas the sum demanded was ECU 310 305. The Commission set out its computation in a fax of 25 August 1999.

(A) Two sums were deducted from the payment in relation to

drawbacks in respect of quality	23 625.780
penalties for delay	1 677.200
total ECU	25 302.980

Lecureur accepts those deductions.

(B) The most significant deduction of ECU 158 793.41 corresponds to the "quantity not delivered" of 767 600 kilos and another deduction of ECU 12 776.29 corresponds to the penalty for failure to deliver (5.12%) provided for by Article 22(4)(c) of Regulation No 2519/97.

(15) Lecureur does not accept those last two deductions, and maintains:

(1) The quantities stolen at Niamey are known quite precisely and are not attributable to Lecureur and may not be charged to it under contract.

There were 9 661 sacks, net weight 483 050 kilos. The quantity not delivered by Lecureur is therefore 767 600 - 483 050 = 284 550.

The deduction is thus T.284 550 × 206.87 = ECU 58 864.85.

(2) The quantity not delivered being 284 550 kilos, the penalty under Article 22(4)(c) must be:

$$\begin{array}{l} 284\ 550 \\ -\ 150\ 000\ \text{(Article 17)} \\ \hline \dfrac{(134\ 550 \times 206.87 \times 10\%}{100} \end{array} \qquad = \text{ECU } 2\ 783.44$$

(16) In consequence, Lecureur cannot accept any deduction in respect of quantities not delivered greater than 58 864.85 + 2 783.44 = ECU 61 648.29.

Whereas the Commission has deducted: 158 793.41 + 12 776.29 = ECU 171 569.70.

(17) Lecureur therefore requests the Commission to complete payment for the supply by paying it the sum of ECU 109 921.41.'

29 On 13 December 1999 the Commission answered that letter in the following terms:

'(1) Lecureur accepts the deductions in payment made in relation to drawbacks in respect of quality and of penalties for delay...

(2) Lecureur does not accept the deductions in respect of quantities not delivered or the amount of the penalty imposed under Article 22(4)(a) of Regulation No 2519/97...

The deduction made by the Commission thus relates to 767.6 tonnes, which is the difference between the 15 000 tonnes net which the supplier was required by contract to deliver to the final destination... [and] the 14 232.4 tonnes net recorded in the certificate of delivery and the final certificate of conformity...

So far as the results of the certificate of delivery and/or the final certificate of conformity are concerned, the supplier had the right to challenge them as provided for by Article 16(4) of Regulation 2519/97. There is however nothing in our files to suggest that the supplier did challenge those results. Quite the contrary: it sent copies of those certificates with its request of 3 March 1999 for payment of the balance without making any reservation as to the results set out therein.

As regards loss or deterioration of the goods occurring before completion of the delivery in accordance with the specifications during the contractual stage of the supply recorded by the monitor in the final certificate of conformity, such loss or deterioration is to be borne in full by the supplier (Article 15(6) of Regulation No 2519/97). The Commission may in no circumstances accept any taking-over in full or in part of the financial consequences of such losses, even if certain protective measures taken by the supplier and/or the beneficiary might have prevented them... '

Procedure and forms of order sought by the parties

30 Those were the circumstances in which the applicant brought this action by application lodged at the Registry of the Court of First Instance on 11 February 2000.

31 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and, by way of measures of

organisation of procedure, asked the parties to reply to written questions and to produce certain documents, in particular a copy of the document setting out the conditions applicable to delivery agreed by the Commission and Niger. The parties have acceded to those requests.

32 The parties presented oral argument and replied to the oral questions of the Court of First Instance at the hearing in open court on 21 March 2001.

33 The applicant claims that the Court should:

— annul the decision of the Commission of 13 December 1999;

— order the Commission to pay the applicant EUR 109 921 in performance of the supply contract;

— order the Commission to pay post-maturity interest on the basis of Article 18(7) of the Regulation;

— order the Commission to pay the costs.

34 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

35 The Commission submits that the terms used in the application in relation to the request for annulment of the decision of 13 December 1999 are inappropriate, in so far as the dispute is contractual in nature, as it was in the cases giving rise to the judgment of the Court of Justice in Case C-142/91 *Cebag* v *Commission* [1993] ECR I-553 and to the order of the Court of First Instance in Case T-186/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1633.

36 In its application Lecureur argues that the Commission's letter of 13 December 1999 is a decision which may properly be the subject of an action for annulment and that it, Lecureur, is directly and individually concerned by that decision

which adversely affects it. In its reply, on the other hand, referring to the case-law of the Court of Justice, it maintains that the inaccuracy of expression alleged by the Commission does not call in question the admissibility of its action. Lastly, it points out that it brought its action before the Court in accordance with Article 24 of the Regulation.

Findings of the Court

37 It is true that the applicant has brought these proceedings on the basis of Article 173 of the EC Treaty (now Article 230 EC). However, as pointed out by the Court of Justice in its judgment in *Cebag* v *Commission*, paragraph 11, food aid is provided on the basis of contractual undertakings. In this case, the contract was concluded by exchange of letters between the parties on 26 and 28 May 1998. The dispute is therefore contractual in nature.

38 Moreover, according to settled case-law, when an action for annulment or an action for damages is brought before the Court of First Instance when the dispute is, in point of fact, contractual in nature, the Court reclassifies the action and, if necessary, declares that it lacks jurisdiction in the absence of an arbitration clause (see, *inter alia*, the orders of the Court in *Mutual Aid Administration Services*, paragraphs 41 to 44, and in Case T-180/95 *Nutria* v *Commission* [1997] ECR II-1317, paragraph 39).

39 In the circumstances of this case, it must be held that the action falls under Article 181 of the EC Treaty (now Article 238 EC) in conjunction with Article 24 of the Regulation. Following the conclusion of the supply contract in question on the basis of Regulation (EC) No 990/98, the clause set out in Article 24 of the Regulation forms an integral part of the supply contract and must therefore be

regarded as an arbitration clause within the meaning of the abovementioned provision of the Treaty (*Cebag*, paragraph 14). The action must, consequently, be held to be admissible.

Substance

40 In essence, the applicant raises two pleas in law in order to show that the Commission has not, in the circumstances of the case, performed its contractual obligations. The first alleges that the Commission was mistaken with regard to the transfer of responsibility for the goods which were the subject-matter of the contract. The second claims that the Commission erred in its assessment of the legal value of the final certificate of conformity, inasmuch as the institution takes the view that the applicant ought to have challenged the particulars set out in that document within the time-limit laid down in Article 16(4) of the Regulation.

41 In the circumstances, the Court considers it appropriate to set out, first, all the arguments of the parties relating to those two pleas before giving a decision on them together.

Arguments of the parties

The first plea: alleging error with regard to the transfer of responsibility for the goods which were the subject-matter of the contract

42 Relying on the final certificate of conformity of 25 February 1999 and the agreement protocol, the applicant challenges the figure used by the Commission as the basis of its payment of the balance in respect of the goods actually delivered. In its view, the facts appearing in those documents, if taken together, demonstrate that the quantity of maize delivered amounts to 14 802 250 kg and not 14 232 400, as claimed by the Commission. The only quantities to be deducted from that total of 14 802 250 kg are those which correspond to deterioration in the goods occurring at a time when they were actually in Lecureur's possession. On the other hand, deterioration occurring once the goods have been delivered, or the theft of part of the goods after the transfer of responsibility, cannot be attributed to the applicant.

43 Lecureur points out, in the first place, that the supplier's responsibility is defined in Article 15(6) of the Regulation. In its submission, the Commission's analysis rests on a false interpretation of that provision. The supplier bears responsibility until the moment of delivery, the date of which is made known by the certificates of conformity and of delivery. Consequently, the applicant cannot be held to be responsible for the thefts committed after the goods were delivered to Niamey on 7 September 1998.

44 Second, the applicant considers that the agreement protocol is evidence of the transfer of responsibility inasmuch as it states *inter alia*:

'The OPVN shall take responsibility for goods delivered sound'.

45 Third, it disputes the Commission's argument that the thefts committed at Niamey ('the thefts in question') were the result of sorting processes made

necessary by the infestation of the goods by insects. According to the applicant, there is no causal connection between those processes and the thefts in question, since the latter were purely the result of the OPVN's defective surveillance. The applicant notes, finally, that contrary to the Commission's contention, the reservation in paragraph A-6 of the agreement protocol relates only to the counting of the damaged sacks and not to the sacks delivered in aggregate.

46 The applicant concludes, therefore, that the Commission has still to pay it the sum of EUR 109 921 under the supply contract. It submits that the amount deducted by the Commission, the sum of EUR 171 569.41, is too great since it includes the thefts in question.

47 The applicant also requests the Court to order the Commission to pay post-maturity interest as from 15 October 1999 in accordance with Article 18(7) of the Regulation. In its reply to a written question asked by the Court, Lecureur clarified its request for post-maturity interest to the effect that such interest should be calculated from 6 May 1999 since its completed request for payment was presented on 3 March 1999 in accordance with Article 18(5) of the Regulation and Article 18(7) allows the Commission 60 days from receipt of the request to make the payment concerned.

48 The Commission points out, *first*, that the applicant's argument is based on an incomplete reading of Article 15(6) of the Regulation, in that that argument relies on only one of the conditions set out in that provision. The latter in fact makes it clear that the supplier continues to bear all risks until, first, the goods have been delivered and, second, the final certificate of conformity has been issued, that is to say, in the present case, until 25 February 1999.

49 *Second*, the Commission states that the deductions in issue cannot be contested in so far as they were made on the basis of the information contained in the final certificate of conformity. It points out that, in accordance with Article 18(2) of the Regulation, in the event of discrepancy between the taking-over certificate and the final certificate of conformity, the latter is to take precedence.

50 *Third*, the Commission observes that the applicant cannot rely on the contents of the agreement protocol, since that document, for which no provision is made in the Regulation, cannot call in question the operation of legislative provisions.

51 *Finally*, the Commission states that, as regards the penalties for quantities not delivered, it applied Article 22(4)(c) of the Regulation. Moreover, it argues that it does not have to pay post-maturity interest.

The second plea, challenging the final certificate of conformity

52 Answering the argument developed by the Commission to the effect that it had not used the procedure laid down in Article 16(4) of the Regulation, which would have enabled it to contest the results of the delivery certificate and/or final certificate of conformity, the applicant states first of all that it did not disagree with the tenor of the monitor's fax of 25 February 1999, since the fax referred to the agreement protocol and the monitor considered that the sound quantities certified and accepted in that protocol ought not to be called in question.

Accordingly, the applicant submits that it had no reason to utter any reservations concerning the final certificate of conformity.

53 Next, it states that the Commission is seeking refuge behind the formal validity of the final certificate of conformity, whereas that document is not immune from error. First, the applicant takes the view that the certificate was not issued within a reasonable period. Second, it alleges that while the document mentions thefts perpetrated at Niamey it does not quantify the goods stolen, and it points out that it was not until December 1999 that the monitor gave the Commission an accurate estimate of the goods stolen. Last, it observes that according to the information supplied by the monitor on 21 December 1999 the thefts in question were of 9 661 sacks, that is to say, of 483 050 kg of maize.

54 The Commission claims, first of all, that the agreement protocol relied upon by the applicant has no legal value *vis-à-vis* the applicant, unlike the certificates expressly provided for by the Regulation. It then submits that, since Lecureur did not contest the notice of reservation within the period prescribed by Article 16(4) of the Regulation, it could not call in question the conclusions in the final certificate of conformity either.

55 In replying to the applicant's allegation that it had failed to draw the appropriate conclusions from the corrections made concerning the quantities of goods stolen at Niamey, the Commission argues that since the quantity of 483 050 kg of stolen maize, determined by the monitor in December 1999, is greater than the provisional estimate of 300 000 kg contained in the final certificate of conformity, it ought as a result to recover part of the advance overpaid to the applicant.

Findings of the Court

56 The supply operation in issue forms part of a body of contractual stipulations linking the applicant and the Commission and including Article 15 of the Regulation (compare paragraph 14 of *Cebag* v *Commission*).

57 Article 15(6) of the Regulation makes it possible, in a case of delivery free at destination such as that in issue, to determine the moment at which the burden of risk attaching to the contractual goods is transferred from supplier to beneficiary.

58 Article 15(5) provides that the supply transaction is complete when the goods have been made available at the warehouse of destination and Article 15(6) that the supplier is to bear all risks to which the goods may be subject until they have been supplied, that is to say, made available as referred to above.

59 In addition, Article 7 of the conditions of delivery agreed between the Commission and Niger for the purposes of the food aid in question states that: 'the beneficiary shall bear all risks to which the goods may be subject, including loss or deterioration, from the time at which the goods are actually unloaded and delivered to the warehouse of destination'.

60 Article 15 of the Regulation, placed in that context, links the transfer from supplier to beneficiary of the risks to which the goods may be subject to their being made available at the warehouse of destination.

61 As well as determining the process which occasions the transfer of the burden of risk, Article 15(6) of the Regulation provides that the completion of that process is to be established by means of the issuing of the final certificate of conformity by the monitor when making the final check, which must be carried out at the delivery stage in accordance with Article 16 of the Regulation.

62 Unlike the substantive condition to which the transfer of risk is made subject, namely, the delivery of the goods, the steps taken by the monitor to establish that that process has been completed cannot in this instance be regarded as necessarily excluding evidence not expressly provided for by Article 15(6) of the Regulation, which forms a constituent part of the agreement which binds the parties to the supply process.

63 The Commission's interpretation of the provision in issue, which is that the legal effect of delivery, namely the transfer of the burden of risk from supplier to beneficiary, is necessarily dependent on the time at which the final certificate of conformity — the sole means of proving delivery expressly provided for in the Regulation — is drawn up, cannot therefore be accepted.

64 In circumstances such as those of this case, such an interpretation would risk jeopardising the performance in good faith of the contractual obligations in question, by making the time at which the burden of risk is transferred dependent

on the good will of the monitor appointed by the Commission and by making the supplier continue to bear the risks to which the goods may be subject even when it no longer has control over them.

65 In those circumstances, although the agreement protocol concluded between the Commission and the beneficiary cannot on its own fix the moment at which the burden of risk was transferred from the applicant to the beneficiary, the factual information formally stated and approved by the Commission in that document may nevertheless serve to establish the relevant facts in respect of the relations between the supplier and the institution.

66 In that protocol the Commission and the beneficiary formally declared that 158 204 'sound sacks', with a net weight of 7 910 200 kg, had been registered at Niamey, subject to an inventory being prepared exclusively concerning the conformity of the goods with the contractual quality requirements.

67 Furthermore, the monitor's findings, reproduced in the final certificate of conformity, make it clear that the thefts were in any event perpetrated after the goods were supplied to the beneficiary at its warehouses in Niamey on 7 September 1998. Indeed, the date on which the goods were made available is not in dispute between the parties.

68 It must therefore be held that before the thefts in question took place the applicant delivered the goods, within the meaning of Article 15(6) of the Regulation, irrespective of whether or not the goods thus delivered conformed to the quality requirements agreed between the parties.

69 In consequence, contrary to the Commission's contention, it was in the circumstances of this case the beneficiary which, pursuant to the contractual provisions governing the relations between the applicant and the Commission, bore responsibility for the goods when the thefts in question were committed. In this regard it is immaterial that the thefts could have taken place during the sorting and winnowing processes required because some part of the goods did not conform, since during those processes the goods had already been removed from the applicant's control and supervision.

70 It should be pointed out that in the agreement protocol the Commission expressed its agreement concerning the quantities delivered by the applicant to Niamey. Furthermore, the monitor informed the Commission in the fax sent to it on 25 February 1999 that the quantities referred to in the agreement protocol were no longer open to challenge.

71 Lastly, it should be noted that the interpretation to be placed on Article 16(4) of the Regulation concerning notices of reservation is not such as to influence the determination of the time at which the burden of risk passed from the supplier to the beneficiary, as established above. That provision is concerned solely with the matter of the non-conformity of the goods with the applicable contractual conditions.

72 The Commission therefore acted in breach of its contractual obligations, and at variance with the facts which it had itself approved, when it stated in its letter of 13 December 1999 that the applicant must bear responsibility for all the losses, including those arising out of the thefts in question, amounting to 767 600 kg of maize. As the applicant correctly claimed in its letter of 26 October 1999, a total of 483 050 kg, corresponding to the quantity, which is not disputed, of goods stolen after delivery, is to be deducted from the abovementioned 767 600 kg.

73 It follows that the Commission ought to have confined itself to the conclusion that, after sorting and winnowing the goods, the applicant had supplied only 14 715 450 kg of maize, the market value of which was ECU 3 044 185.1415 (14 715 450 kg × ECU 206.87 per tonne). In other words, in this instance the applicant has failed, with regard to the applicable contractual clauses, to supply 284 550 kg of maize, the market value of which was ECU 58 864.85 (284 550 kg × ECU 206.87 per tonne). Given that, in accordance with Article 18(4) of the Regulation, the applicant obtained an advance of 90% of the tender amount which, in this instance, amounts to the sum of ECU 2 792 745, the Commission ought in principle to have paid it the balance, calculated in accordance with the contractual provisions applicable, of ECU 251 440.15 (3 103 050 - 2 792 745 - 58 864.85).

74 The amounts of various penalties must however, be deducted from that balance. In particular, it is apparent from the applicant's letter of 26 October 1999 that it does not contest the Commission's imposition of a penalty of ECU 2 783.44 pursuant to Article 22(4) of the Regulation, inasmuch as part of the goods it supplied did not conform to the contractual conditions. Nor does the applicant challenge the Commission's deduction from the balance of the sum of ECU 25 302.98 by way of drawback and penalties for delay. Consequently, the sum of ECU 28 086.42 must be deducted from the balance of ECU 251 440.15 (see paragraph 28 above).

75 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), the references to ecus must be replaced with references to euros at the rate of one euro for one ecu.

76 It follows that the balance remaining due to the applicant is EUR 223 353.73 instead of the sum of EUR 113 432.52 paid by the Commission. The applicant is therefore justified in requesting that the Commission should be ordered, principally, to pay it the sum of EUR 109 921.

77 As regards post-maturity interest, the Commission has neither denied the applicant's claim that it actually received the applicant's request for payment dated 3 March 1999, presented in accordance with Article 18(5) of the Regulation, nor disputed that it is, in principle, bound by Article 18(7) of the Regulation to make the payment within 60 days of receipt of such request. The Commission must therefore be ordered to pay the applicant post-maturity interest on the abovementioned sum of EUR 109 921 as from 6 May 1999, in accordance with Article 18(7) of the Regulation.

78 Consequently, the Commission must be ordered to pay Lecureur the sum of EUR 109 921, together with post-maturity interest calculated in accordance with Article 18(7) of the Regulation from 6 May 1999 until the debt is paid in full (see, to that effect, Case C-356/99 *Commission* v *Hitesys* [2000] ECR I-9517, paragraph 29).

Costs

79 Under Article 87(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 other party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear, in addition to its own costs, those incurred by the applicant, in accordance with the forms of order sought by the latter.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Orders the Commission to pay the applicant the sum of EUR 109 921, together with post-maturity interest calculated in accordance with Article 18(7) of Commission Regulation (EC) No 2519/97 of 16 December 1997 laying down general rules for the mobilisation of products to be supplied under Council Regulation (EC) No 1292/96 as Community food aid, as from 6 May 1999 until the debt is paid in full;**

2. **Orders the Commission to pay the costs.**

Meij Potocki Pirrung

Delivered in open court in Luxembourg on 19 September 2001.

H. Jung

Registrar

A.W.H. Meij

President