JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
11 July 1996 *

In Case T-175/94,

International Procurement Services SA, a company governed by Belgian law, whose registered office is in Brussels, represented by Peter De Troyer, of the Audenarde Bar, and Lydia Lorang, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 6 Rue Heine,

applicant,

v

Commission of the European Communities, represented by Étienne Lasnet, Legal Adviser, acting as Agent, assisted by Hervé Lehman, of the Paris Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for compensation of BFR 14 797 706 for damage allegedly suffered by the applicant following reduction of the financial assistance granted to the other party to a contract concluded by it in relation to a project financed by the European Development Fund,

* Language of the case: French.

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

composed of: R. Schintgen, President, R. García-Valdecasas and J. Azizi, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 7 May 1996,

gives the following

Judgment

Facts

1 On 21 March 1990 the Unidade de Coordenação dos Programas de Importação (Import Programme Coordination Unit, hereinafter 'the UCPI') of the Ministry of Commerce of the People's Republic of Mozambique issued an invitation to tender for a public contract for the supply of 11 batches of goods for a project financed by the European Community through the European Development Fund (hereinafter 'the EDF') (OJ 1990 S 56, p. 5). The invitation to tender expressly indicated that the supplies must without fail originate in States of the European Economic Community or African, Caribbean or Pacific States (hereinafter 'ACP') signatories to the Third Lomé ACP-EEC Convention signed in Lomé on 8 December 1984 (OJ 1986 L 86, p. 3).

2 For one of the batches, comprising 7 400 tonnes of steel billets, the UCPI accepted the tender submitted by the applicant, International Procurement Services SA, to which it sent a contract letter under reference LC 25/90/EEC on 13 July 1990.

3 The price stipulated in the contract for that batch (hereinafter 'the contract') was BFR 97 561 461, that is to say BFR 13 320 per tonne.

4 Transport of the goods commenced in March 1991 and the final delivery was made on 24 April 1991.

5 On 17 and 30 April 1991, the South African branch of Société Générale de Surveillance (hereinafter 'SGS'), an undertaking which on request carries out analyses of goods, issued inspection certificates in Johannesburg for the goods delivered, indicating that the inspections had taken place in March and April 1991.

6 On 20 June 1991, the UCPI received from the company Cifel, the end user of the steel billets, a message to the effect that, according to the documents accompanying the goods delivered, they came from ('proveniente da') the South African company Iscor and the consignee ('consignatário') was the South African company John Palmer Steel.

7 On 2 July 1991, the UCPI sent a telex to the applicant stating that the documents accompanying the goods gave the names of Iscor as supplier and John Palmer Steel as buyer. It requested clarification in view of the lack of any transport documents.

8 On 20 July 1991 the Lugano Chamber of Commerce, at the request of a Swiss company named by the applicant as its supplier, drew up a certificate of origin mentioning the names of the applicant, the UCPI (preceded by the word 'to'), and Cifel (preceded by the abbreviation 'imp'), together with the number of the invitation to tender relating to the contract at issue and describing the goods as comprising three batches of steel billets of a total weight of 7 324 434 kg. The certificate gave Italy as the country of origin.

9 By telex of 25 July 1991, the UCPI asked the company RIH, a distributor of Iscor products, to confirm to it that the 7 400 tonnes of steel billets supplied to Cifel in April of that year by John Palmer Steel had been manufactured in South Africa by Iscor.

10 On 2 August 1991, RIH replied that it had received from the London company Gover, Horowitz & Blunt an order for 7 400 tonnes of steel billets, with instructions to forward the goods to the UCPI in Maputo. It also stated that the proposed price related to South African products.

11 By fax of 20 August 1991, the defendant asked SGS to forward to it the 'work certificates of tests and analysis' and the 'rail consignment notes' referred to by the inspection certificates drawn up by that company on 17 and 30 April 1991. It also asked it to confirm the identity of the manufacturer.

12 On the same day SGS informed the defendant that the requested documents had been forwarded to the company by which it had been instructed, Gover, Horowitz & Blunt. The next day it reported that, before forwarding the requested documents to third parties, it would first have to obtain the consent of that company.

13 On 22 August 1991, the defendant sent a fax to the applicant asking it urgently to obtain as a matter of urgency a copy of the work certificates of tests and analysis and the rail consignment notes from the company responsible for the pre-dispatch inspection of the goods. The next day the applicant replied that it would seek the requested certificates from the seller.

14 By telex of 19 September 1991, the UCPI, at the defendant's suggestion, asked the applicant for a 'bona fide' document indicating the identity of the manufacturer and the route of the goods from the manufacturing plant to the Cifel warehouse. It also stated that if the applicant failed to produce that document it would conclude that the contractual clause concerning the origin of the goods had been breached.

15 By fax of 6 November 1991, the defendant instructed its Mozambique delegation to inform the Mozambique authorities that the applicant had been unable to prove that the goods delivered had been manufactured in the Community or an ACP country and that the UCPI could therefore either cancel the contract or pay for the goods the market price corresponding to their presumed place of origin.

16 By letter of 25 November 1991, in reply to a letter from the applicant of 24 October 1991, the defendant stated that it could not pay the balance until it had received authorization from the UCPI and that no such authorization had been received. It also recommended that the applicant send the UCPI a request for payment if it considered that it had fulfilled all its obligations.

17 By telex to the applicant of 6 December 1991, the UCPI indicated that it had not received the requested 'bona fide' document: it therefore considered that the goods had originated in South Africa and would pay for them at the price prevailing on that market.

18 By fax of 11 March 1992, the defendant asked its Mozambique delegation to inform the local authorities that, having regard to the contradictory documents produced by the applicant and Cifel, it endorsed the view of those authorities that the amount of the contract as a whole should be calculated on the basis of the price prevailing on the South African market.

19 By telex of 9 June 1992, the applicant stated that its financial situation left it no choice but to come to terms with the UCPI. However, it stressed that it would regard the payment to be made as a payment on account. It stated that it would refer to arbitration the question of the difference between the price initially agreed and the amount calculated on the basis of the South African price.

20 The next day the UCPI replied to the applicant that the defendant would not agree to issue a partial payment order if the balance was to be the subject of arbitration and that it would not effect payment until the file was closed. It expressed the view that two possibilities were open to the applicant: either to bring the dispute to an end by concluding an agreement for a reduced price or to initiate the arbitration procedure immediately.

21 On 17 July 1992, the applicant and the UCPI concluded an agreement recording acceptance of the goods, reduction of the price on the basis of the price prevailing on the South African market, set at BFR 12 000 per tonne, and waiver of the right to have recourse to arbitration (hereinafter 'the agreement').

Procedure

22 By application lodged at the Registry of the Court of First Instance on 20 April 1994 the applicant brought the present action under the second paragraph of Article 215 of the EC Treaty.

23 The Judge-Rapporteur was assigned to the Fifth Chamber, and the case was therefore assigned to that Chamber.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry. By way of measure of organization of procedure, the parties were asked to reply in writing to a number of questions before the hearing and to produce certain documents.

25 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 7 May 1996.

Forms of order sought

26 The applicant claims that the Court should:

— order the defendant to pay it BFR 14 797 706 as compensation for the damage suffered by it or any other amount — even if greater — to be determined by the Court *ex aequo et bono* or by an expert, together with default interest at a rate to be fixed by the Court;

— order the defendant to pay the costs.

27 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Summary of the pleas in law and arguments of the parties

28 The applicant criticizes the Commission for having authorized financing of the contract only as to 92.49% of the total amount even though it fulfilled all the conditions of that contract.

29 According to the applicant, the defendant acted unlawfully in that, first, it did not prevent consumption of the goods by Cifel even before acceptance of them by the other party to the contract with the applicant and transfer of title; secondly, it played an active role by calling for certificates of tests and analysis and rail consignment notes which were not required to be produced under the contract, and also a 'bona fide' document, the nature of which was never clearly described; and, thirdly, it took the view, without justification, that the financing conditions had not been fulfilled, without giving any credence to the certificate of origin drawn up by the Brussels Chamber of Commerce.

30 Regarding the latter point, it maintains that a certificate of origin adequately establishes the origin of goods since chambers of commerce issue such certificates only on production of supporting documents. In contrast to the documents submitted by Cifel, which strengthened the defendant's doubts as to the origin of the goods delivered, the certificate of origin, being an authenticated original document, carefully describes the goods to which it relates. On the other hand, the documents

forwarded by Cifel are barely legible, unauthenticated photocopies of certificates concerning a casting test of steel regularly used in Mozambique. There is no evidence to show that those documents, drawn up eight months after delivery of the goods, relate to the steel used for the goods delivered.

31 The applicant maintains that it has suffered a loss corresponding to the difference between the initial contract price and the amount that it actually received (BFR 9 668 253), together with financial costs (BFR 5 129 453) which it claims it unavoidably incurred as a result of the defendant's refusal to pay in full the price initially agreed, that is to say, a total loss of BFR 14 797 706.

32 It submits that the damage derives from the fact that the defendant considered that the conditions for the financing of the contract had not been fully satisfied and that it was appropriate to calculate the amount to be paid on the basis of the prices prevailing on the South African market.

33 Referring to the case-law of the Court of Justice to the effect that contracts financed under the EDF are national contracts to which the Commission is not a party, the defendant concludes that the action, purporting to be a claim for non-contractual liability, is inconsistent since the applicant criticizes it for having unilaterally changed the conditions of the contract.

34 It also considers that none of the conditions for non-contractual liability is fulfilled.

35 It contends that it did not act unlawfully. Good reasons for the serious doubts that it entertained as to the origin of the goods were provided, first, by the content of the letter from Cifel received by the UCPI on 20 June 1991 and RIH's telex of

2 August 1991 and, secondly, as it stated at the hearing, by the fact that the inspection certificates drawn up by the SGS related to inspections carried out in South Africa. In that connection, the defendant had then sent numerous requests to the applicant for documents unambiguously proving the Community origin of the goods delivered. The defendant states that the applicant has produced neither those documents nor the pre-shipment inspection report referred to in Article IX.5 of the schedule of special requirements. However, it is incumbent on the applicant to prove the Community origin of the goods.

36 It casts doubt on the credibility of the certificate of origin produced by the applicant since it was drawn up by the Brussels Chamber of Commerce several months after delivery of the goods in question on the basis of a certificate issued by the Lugano Chamber of Commerce, which was not in a position to carry out any on-the-spot checks in Italy.

37 Finally, it emphasizes that the applicant was not able to give it details of the route by which the goods were transported or the name of the vessel carrying them or to produce the supporting documents on the basis of which the certificates of origin had been drawn up, whereas it could easily have at least allayed the doubts as to the existence of contractual relations with the South African companies Iscor and John Palmer Steel.

38 Referring to the judgments of the Court of Justice in Case 126/83 *STS* v *Commission* [1984] ECR 2769 and Case 118/83 *CMC and Others* v *Commission* [1985] ECR 2325, the defendant considers that it was entitled to verify compliance with the financing conditions, in particular the requirement concerning the origin of the goods, by asking for further information about the origin of the goods in order to dispel the doubts raised by the contradictory nature of the documents in its possession.

39 The defendant denies that the applicant has suffered any damage. The difference between the initial contract price and the amount actually received is merely the result of the agreement for reduction of the price of the goods and waiver of the right to have recourse to arbitration, an agreement freely entered into by the applicant and the UCPI on 17 July 1992. Moreover, the defendant contends that no damage arose in respect of financial costs because it paid the balance due following that agreement within the stipulated period.

40 The defendant also denies that there was any causal link between any unlawful conduct and the alleged damage. The difference between the initial price and the final price resulted not from its conduct but from the agreement entered into by the UCPI and the applicant on 17 July 1992. Not does it consider that any responsibility for the financial costs at issue can be imputed to it since it was required under Article 8.2 of the contract letter to await payment authorization from the UCPI. Responsibility for that part of the damage falls upon the applicant, which, in 1991 and 1992, temporized rather than producing evidence of the Community origin of the goods.

41 In its reply, the applicant claims that the agreement it concluded with the UCPI on 17 July 1992 is effective only between the parties to it and has no bearing on any claim for non-contactual liability. It emphasizes that it was the defendant which suggested recourse to the South African price. As far as it is concerned, the conclusion of that agreement was dictated by a need for liquid funds and, in the event, it had to choose between accepting a reduction in the price or not being paid at all in the short term.

42 According to the defendant, either the applicant freely entered into the agreement reducing the price of the goods and therefore cannot claim to have suffered damage or else it signed that agreement under duress so that the appropriate course would have been to challenge it, which it did not do.

Findings of the Court

43 The Court observes first that according to settled case-law contracts financed by the EDF remain national contracts which only the ACP States have the responsibility of preparing, negotiating and concluding. For their part, undertakings which submit tenders for or are awarded the contracts in question remain outside the exclusive dealings conducted on this matter between the Commission and the ACP States (*STS* v *Commission*, cited above, paragraph 18, Case C-257/90 *Italsolar* v *Commission* [1993] ECR I-9, paragraph 22, Case T-451/93 *San Marco* v *Commission* [1994] ECR II-1061, paragraph 42).

44 Furthermore, Community liability depends on proof by the applicant of the unlawfulness of the alleged conduct of the Community institution concerned, the reality of the damage and the existence of a causal link between that conduct and the alleged damage (Joined Cases 197/80, 198/80, 199/80, 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle and Others* v *Council and Commission* [1981] ECR 3211, paragraph 18, *Italsolar*, cited above, paragraph 33, Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 80).

45 Finally, the Commission has not only the right but also the duty to ensure, before any payments are made out of Community funds, that the conditions for such payments are in fact fulfilled (*CMC*, cited above, paragraph 44). To that end, it is under a duty in particular to seek the necessary information in order to ensure the economical administration of the resources of the EDF (same judgment, paragraph 47, and Case C-370/89 *SGEEM and Etroy* v *EIB* [1993] ECR I-2583, paragraph 31) and to refuse to endorse invoices submitted to it (*San Marco*, cited above, paragraph 50).

46 It is in the light of those factors that it must be considered whether the defendant has been guilty of unlawful or improper conduct.

47 In this case it was incumbent on the defendant to ensure, in particular, compliance with the precondition for financing, according to which the goods delivered had to originate in the Community or an ACP State.

48 The applicant cannot criticize the defendant for not having prevented consumption of the goods before their acceptance and transfer of title. Since contracts financed by the EDF are national contracts to which only the ACP State and the contractor are parties, it would certainly not have been appropriate for the defendant to interfere in such matters, which are of a purely contractual nature.

49 Nor can the applicant criticize the defendant for doubting, despite the existence of a certificate of origin from the Brussels Chamber of Commerce evidencing the Italian, and thus Community, origin of the goods, that the latter fulfilled the prescribed conditions. It is clear from a telex from Cifel to the UCPI that the documents accompanying the goods delivered mentioned that they came from a South African company. Moreover, the applicant has not denied that the inspection documents relating to the goods were not provided prior to their shipment and related to inspections carried out by a South African company. Furthermore, it was from South Africa that the goods came to Mozambique. However, South Africa is not a signatory to the Third Lomé Convention.

50 Since proof of the origin of the goods delivered was the responsibility of the successful tenderer, the defendant was, in the light of the foregoing considerations, fully entitled to require documents or additional information to support the certificate of origin. It must be pointed out that the applicant has produced no evidence such as to enable the Community origin of the goods delivered to be established beyond doubt. It has not even been able to provide the supporting

documents on the basis of which the Lugano Chamber of Commerce drew up its certificate of origin, on which the Brussels Chamber of Commerce relied in issuing its own. In response to a written request from the Court, the applicant did no more than produce an incomplete copy of a documentary credit containing no information as to the origin of the goods sold, an undated letter from an Italian transport company certifying that the applicant is known as an exporter, consignee, principal or guarantor in respect of transactions involving goods, in particular steel, carried by Messrs Jadroplov between autumn 1989 and summer 1991, and extracts from Lloyds Registers concerning vessels bearing the name Africa mentioned on the export permit. The applicant cannot in any event base any argument on the imprecise nature of the term 'bona fide document' since it has produced nothing to support its certificate of origin. The Court also considers that the applicant was fully informed as to the evidence that it was required to produce (see paragraphs 13 and 14, above).

51 It follows that the defendant was fully entitled to conclude that the financing condition concerning the origin of the goods was not satisfied in this case.

52 Finally, the applicant has no grounds for criticizing the defendant for playing an active role by requesting documents whose production was not required by the contract. The defendant did no more than inform the Mozambique authorities of its position and of the possibilities open to them. It did not, by so doing, in any way undermine the sovereignty of the People's Republic of Mozambique. It is also apparent from the letter which it sent to the applicant on 25 November 1991 (see paragraph 16, above) and the fax that it sent to its delegation in Mozambique (see paragraph 18, above) that the Mozambique Government continued to take its own decisions independently.

53 Consequently, the applicant has not demonstrated that the defendant was guilty of any unlawful or improper action regarding the relations between the People's Republic of Mozambique and the applicant.

54 It follows that the applicant has not proved any unlawful or improper conduct on the part of the defendant.

55 Furthermore, according to settled case-law the damage must be a sufficiently direct consequence of the conduct complained of (Joined Cases 64/76, 113/76, 167/78 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091, paragraph 21; see also, with regard to Article 40 of the ECSC Treaty, which is similarly worded and can be applied by analogy to this case, Joined Cases C-363/88 and C-364/88 *Finsider and Others* v *Commission* [1992] ECR I-359, paragraph 25, and the cases cited therein).

56 It is clear from the documents before the Court and the arguments presented at the hearing that the damage of which the applicant complains derives, primarily, from two factors: first, the People's Republic of Mozambique's ultimate refusal to pay the agreed price in its entirety and, secondly, the agreement of 17 July 1992 following that refusal whereby the initially agreed price was reduced and the right to have recourse to arbitration was waived.

57 The Court observes that, even though the defendant may have indirectly influenced the conduct of the Mozambique Government by suggesting the conclusion of that agreement, the fact remains that the applicant has not shown that either party entered into it under duress. Moreover, rather than concluding that agreement, the applicant could, as the UCPI suggested to it (see paragraph 20, above), have had recourse to arbitration in order to settle the difference. The fact that, according to the applicant, it chose not to follow that course because it was in urgent need of liquid funds cannot have the effect of attaching responsibility for the damage to the defendant, since the motive referred to does not involve it in any way.

58 It should also be borne in mind that it has been held that, where a contractual dispute between the State awarding a contract financed by the EDF and the successful tenderer has not been settled earlier on an amicable basis or by arbitration,

the successful tenderer is unable to establish that the Commission's action caused it to sustain damage distinct from the damage in respect of which it ought to have sought compensation from the State which awarded the contract, in accordance with the appropriate procedure (Case 33/82 *Murri Frères* v *Commission* [1985] ECR 2759, paragraph 38).

59 In this case the applicant seeks compensation for damage corresponding exactly to the price reduction which it granted to the UCPI under the agreement it concluded with the latter on 17 July 1992 together with the financial costs incurred as a result of that agreement. Since it has not challenged, in accordance with the appropriate procedure, that agreement and the refusal of the Mozambique Government to pay the full price initially agreed, the applicant is unable to establish that the defendant's action caused it to sustain damage distinct from the damage in respect of which it ought to have sought compensation from that State.

60 Nor, for the same reason, has it established any causal link between the conduct for which the defendant is criticized and the alleged damage.

61 It follows that the action must be dismissed in its entirety.

Costs

62 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 successful party's pleadings. Since the applicant has been unsuccessful and the defendant has applied for costs, the applicant must be ordered to pay the costs in their entirety.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Schintgen García-Valdecasas Azizi

Delivered in open court in Luxembourg on 11 July 1996.

H. Jung R. Schintgen

Registrar President