JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
11 February 2004 *

In Case T-259/01,

Nutrinveste — Comércio Internacional, SA, established in Algés (Portugal), represented by A. Vasconcelos, lawyer,

applicant,

v

Commission of the European Communities, represented by G. Berscheid and A. Alves Vieira, acting as Agents, assisted by N. Castro Marques, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for an order for payment by the Commission of the sum of EUR 61 226 in respect of a supply of food aid,

* Language of the case: Portuguese.

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

composed of: V. Tiili, President, P. Mengozzi and M. Vilaras, Judges,
Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 9 April 2003,

gives the following

Judgment

Legal background

1 Under Commission Regulation (EC) No 2608/97 of 22 December 1997 on the supply of vegetable oil as food aid (OJ 1997 L 351, p. 44), an invitation to tender was organised in order to provide food aid in Angola. Article 1 of the said regulation states that:

'Vegetable oil shall be mobilised in the Community, as Community food aid for supply to the recipient listed in the Annex, in accordance with Regulation (EEC)

No 2200/87 and under the conditions set out in the Annex. Supplies shall be awarded by the tendering procedure.

...

The successful tenderer is deemed to have noted and accepted all the general and specific conditions applicable. Any other condition or general reservation included in his tender is deemed unwritten.'

2 The Annex to Regulation No 2608/97 provides *inter alia* as follows:

'1. Operation No([1]): 1513/95 (A1); 523/96 (A2); 524/96 (A3); 525/96 (A4)

...

3. Recipient ([2]): Angola

4. Representative of the recipient: UTA/ACP/UE, Rua Rainha Jinga No 6, Luanda, Angola ...

8. Total quantity (tonnes): 1 800

9. Number of lots: one in four parts (A1: 800 tonnes; A2: 200 tonnes; A3: 500 tonnes; A4: 300 tonnes)

...

12. Stage of supply: free at destination ([9]) ([10])

...

16. Address of the warehouse and if appropriate port of landing: A1 and A2: Somatrading (off port of Luanda); A3: A.M.I. (off port of Lobito); A4: Socosul, Lubango (180 km from Namibe)

...

18: Deadline for the supply: 22.3.1998 ([11])

19. Procedure for determining the costs of supply: invitation to tender

...

Notes:

...

([2]) The successful tenderer shall contact the recipient as soon as possible to establish which consignment documents are required.

...

([10]) The successful tenderer shall bear the port costs and charges (EP-13, EP-14, EP-15 and EP-17). Notwithstanding the second paragraph of Article 15(1) of Regulation (EEC) No 2200/87, the costs and charges relating to customs formalities on importation are borne by the successful tenderer and are deemed to be included in the tender.

([11]) Compliance with the deadline is determined by the proof of arrival at one of the destinations.'

3 Article 1(1) and (2) of Commission Regulation (EEC) No 2200/87 of 8 July 1987 laying down general rules for the mobilisation in the Community of products to be supplied as Community food aid (OJ 1987 L 204, p. 1) states that:

'1. Where it is decided, for the purpose of implementing a Community food aid operation, to mobilise products in the Community, the procedures laid down in this regulation shall apply, without prejudice to any special provisions adopted on a case-by-case [basis] by the Commission ....

2. The general procedures adopted in this regulation shall apply to operations to be carried out on a free-at-port-of-shipment, free-at-port-of-landing or free-at-destination basis.'

4 The third indent of Article 7(3)(f) of Regulation No 2200/87 provides that:

— 'in the case of supply free-at-destination, the tenderer shall simultaneously submit three tenders:

— the first, corresponding to supply free-at-destination, shall show clearly and separately the costs relating to overseas land transport proper, in accordance with Annex II,

— the second and third, corresponding to supply free-at-port-of-landing and free-at-port-of-shipment respectively, shall be in accordance with the provisions given above.'

5 The first paragraph of Article 10 of Regulation No 2200/87 provides that:

'As soon as the award is made, the Commission shall inform the successful tenderer of the name of the undertaking selected in advance by invitation to tender, responsible for carrying out the checks provided for in Article 16, issuing the taking-over certificate in accordance with Article 17(2) and, on a general level, coordinating all the stages of the supply operation ....'

6 Article 12(1) of Regulation No 2200/87 states that:

'The successful tenderer shall meet his obligations in accordance with the conditions laid down in the regulation opening the invitation to tender and shall comply with the undertakings referred to in this regulation, including those arising from his tender ....'

7 Article 15 of Regulation No 2200/87 provides that:

'The following provisions shall apply in the case of supply free-at-destination:

...

2. The successful tenderer shall bear all the risks relating to the goods, notably those of loss or deterioration, up to the time when the goods are actually unloaded and placed in the warehouse at their destination.

The successful tenderer shall take out an appropriate insurance policy, of the type laid down in point 3(a) of Article 14.

...

4. Supply must take place before the end of the period specified in the notice of invitation to tender.'

8 Article 16(1) of Regulation No 2200/87 provides that:

'For all supplies to be provided in accordance with this regulation, the undertaking referred to in Article 10 shall check, prior to the commencement of loading operations at the port of shipment, that the provisions relating to quantity, quality, packaging and, where appropriate, the verification of bags, have been complied with. The checks shall be carried out a time and under conditions which make it possible to obtain all the results of analyses required and, where appropriate, the results of a second opinion, before the goods are made available in the case referred to in the first subparagraph of point 2 of Article 13, or before the commencement of loading at the port of shipment in all other cases ....

The undertaking referred to above shall issue, when the checks are complete, a certificate of conformity in accordance with the analyses and checks carried out ....

In the case of supply free-at-port-of-landing or free-at-destination the certificate referred to in the previous subparagraph shall be only a provisional guarantee of conformity. Final assessment of conformity shall take place, in accordance with the methods of analysis in force in the Community, at the stage laid down for supply.

For this purpose, the undertaking referred to in Article 10 shall at this stage carry out the checks provided for in the first subparagraph and, if appropriate, issue a definitive certificate of conformity ....'

9 Article 17 of the regulation states that:

'A taking-over certificate containing the particulars set out in Annex III shall be issued in accordance with the provisions of this article; it shall be deemed to constitute acceptance of the goods by the recipient in accordance with point 1 or acknowledgement of the supply in accordance with point 2.

1. Immediately after the goods have been made available at the stage laid down or agreed for the supply, the successful tenderer shall ask the recipient or his representative to issue the taking-over certificate and shall present to the recipient or his representative the certificate of conformity referred to in Article 16, a certificate of origin and a proforma invoice establishing the value of the goods and their transfer to the recipient free of charge.

...

2. Failing the issue of the taking-over certificate by the recipient, the undertaking referred to in Article 10 shall issue to the successful tenderer, at his request and on receipt of the certificate of origin and the invoice referred to in point 1, a certificate of acknowledgement of supply where the checks carried out at the stage laid down for supply have been such as to permit the issue of the certificate of conformity referred to in Article 16.

...

4. The net quantity supplied to the recipient shall be verified precisely at the time of taking over ....'

10 Article 18(1) of Regulation No 2200/87, as amended by Commission Regulation (EEC) No 790/91 of 27 March 1991 (OJ 1991 L 81, p. 108), provides that:

'The sum to be paid to the successful tenderer shall not exceed the amount of the tender plus any costs as provided for in Article 19, less any drawbacks provided for in paragraph 2 or sums forfeit as provided for in Article 22(7) ....'

11 Article 22(3) of Regulation No 2200/87, as amended by Regulation No 790/91, states that:

'Save in cases of *force majeure*, the delivery security provided for in Article 12 shall be partially and cumulatively forfeit as follows, without prejudice to the application of point 7 of this article:

— in proportion to the percentage of the quantities not delivered, without prejudice to the tolerances referred to in Article 17(4),

...

The amounts specified in the first and third indents shall not be withheld if the failure which has taken place is not attributable to the successful tenderer and does not lead to a payment under insurance cover.'

12 Article 23 of Regulation No 2200/87 reads as follows:

'The Court of Justice of the European Communities shall be competent to judge any dispute resulting from the carrying-out of, or the failure to carry out, supply operations in accordance with this regulation, or from the interpretation of provisions concerning such operations.'

The facts

13 By fax of 6 January 1998, sent in reply to the invitation to tender organised under Regulation No 2608/97, the applicant submitted an offer to the Commission for the delivery of 1 800 tonnes of vegetable oil, divided into four lots of 800, 200, 500 and 300 tonnes respectively, to be delivered in three separate warehouses in the ports of Luanda, Lobito and Lubango (Angola), at a price free at destination of EUR 937.50 per tonne. The deadline for the supply was set at 22 March 1998.

14 By fax of 8 January 1998, the Commission accepted this offer, informing the applicant that the supply contract (hereinafter 'the contract') had been awarded

to it. The contract includes a reminder that the stage of supply was free at destination, in accordance with point 12 of the Annex to Regulation No 2608/97. The Commission also stated that the company Socotec International Inspection (hereinafter 'Socotec') was nominated as the undertaking referred to in Article 10 of Regulation No 2200/87 (hereinafter 'the monitor').

15 In accordance with Article 16(1) of Regulation No 2200/87, Socotec carried out checks at the factory of origin and issued a certificate of provisional conformity on 6 March 1998. The provisional certificate of conformity shows that, at the date of shipment at Lisbon, the total quantity of goods was 1 787 024 kg net, that is to say 12 976 kg less than the quantity stipulated in the contract, and, subject to certain qualifications, that the supplies complied with the Community contractual requirements.

16 Transport of the goods was arranged in the following manner: lot No 525/96 of 18 containers comprising 26 458 boxes, lot No 524/96 of 31 containers comprising 44 790 boxes, lot No 523/96 of 12 containers comprising 17 520 boxes, and lot No 1513/95 in two parts, of 48 and two containers respectively, comprising 69 917 and 2 987 boxes respectively. Each box contained 12 one litre bottles of vegetable oil. The containers were delivered to the warehouses at their destination between 23 March 1998 and 14 May 1998.

17 On 18 May 1998, Socor L[da], the undertaking instructed by Socotec, the monitor, to supervise unloading, issued a report on the delivery of the four lots referred to above. The report states that:

'According to the bill of lading, the cargo comprised 161 672 cartons, having a net weight of 1 787.024 tonnes. These goods were delivered to the Somatrading

warehouse in Luanda, to the Ami warehouse at Lobito and, lastly, to the Socosul warehouse at Lubango.

...

Each location is dealt with separately below, as follows:

Operation No 1513/95

"Mv *Merkur River*" ...

The vessel berthed at the SGEP terminal at the port of Luanda on 16 March 1998; unloading proceeded until 19 March 1998.

It carried 48 containers for delivery to the Somatrading warehouse, six [kilometres] from the terminal. Customs clearance took some time and the first containers were only delivered to the warehouse on 6 April 1998.

The containers were transported to Somatrading warehouse No 2 at Mulemba by Orey, the undertaking appointed as carriers in this project. Following delivery to the warehouse, the containers were only opened once it was certain that they could be unloaded immediately, and thus did not require to remain partly loaded overnight. The warehouse remained open until 17.00 hours, and if unloading of the containers could not be guaranteed before then, it was held over until the following day.

During the same period, a cargo of maize and beans was unloaded in the warehouse. The containers of sunflower oil were unloaded while still on trailers; the latter were parked directly opposite the unloading doors of the warehouse.

We proceeded to carry out an inspection at the door of the containers and we also checked the seals at the time of delivery at the warehouse, before the containers were unloaded.

On unloading, it was found that four containers no longer had a seal or that the seal had been tampered with. In these four containers, 219 boxes were missing from SCMU202425/5, and 1 027 were missing from PRSU210852/3. The seal of two other containers had been tampered with. That of container CMBU219437/6 was broken, but had been reattached with wire. 1 137 boxes were missing from it. The remaining container retained its seal, but the latter had been tampered with; on unloading, it was found that 42 boxes were missing.

In total, 2 425 boxes were missing from these four containers. Furthermore, after the other containers from this cargo were unloaded, other discrepancies were found, inasmuch as either boxes were missing, or there were more boxes than shown on the packing list (see attached).

Delivery was completed on 8 May 1998, as follows:

Total number of boxes delivered 65 082 boxes

Of which:

Damaged boxes 395 boxes

Recovered boxes 54 boxes

Total number of boxes after recovery 64 741 boxes

Total weight supplied 715.388 tonnes

The quantity indicated on the bill of lading is 69 917; 5 176 boxes are accordingly missing.

...

"MV *Nuova Europa*" ...

The vessel arrived at the port of Luanda on 26 March 1998 and unloading commenced on the same date. It carried two containers for delivery to Somatrading warehouse No 2 at Mulemba. The containers were delivered to this warehouse on 14 May 1998, following completion of customs clearance formalities.

The seals of these containers were checked on unloading; they were intact and had not been tampered with. After unloading, it was found that 2 964 boxes had been unloaded, that is to say 23 fewer boxes than indicated by the bill of lading. Furthermore, 15 boxes were recorded as having been damaged; out of the 15, 10 were able to be recovered.

The total delivery from the *Merkur River* and the *Nuova Europa* can be broken down as follows:

Total delivery 68 046 boxes

Of which:

Damaged 410 boxes

Recovered 310 boxes

Total supplied after recovery 67 946 boxes

Total weight supplied 750.803 tonnes

Operation No 523/96

"MV *Fatzeh*"

The vessel arrived at the port of Luanda on 23 March 1998 with a cargo of 12 containers for delivery to the Somatrading warehouse in Mulemba. Delivery commenced on 15 April 1998 and was completed on 8 May.

The containers were unloaded on the same day and our staff were present when unloading and opening took place. We took an inventory at the doors of the container.

On completion of the delivery, our count recorded the following figures:

Total number of boxes supplied 17 459 boxes

Of which:

Damaged boxes 84 boxes

Recovered boxes 64 boxes

Total number of boxes after recovery 17 439 boxes

Total weight supplied 192.700 tonnes

Although the containers were sealed, there were discrepancies between the numbers unloaded and those declared on the bill of lading. In total, there were 61 fewer boxes than indicated in the documentation ...

Operation No 524/96

"MV *Orinoco*" ...

The vessel arrived at the port of Lobito on 14 March 1998 and was to unload a cargo of 31 containers for delivery to the AMI warehouse at Lobito. The warehouse is approximately one kilometre from the port area.

Delivery commenced on 30 March 1998 after completion of customs formalities. The containers were delivered in shipments of varying numbers between 30 March and 5 April.

On delivery, our staff took an inventory at the doors of the containers. The seals were checked before opening; it was found that one container had lost its seal and that on another the seal was in place, but broken.

The contents of the two boxes were checked and they corresponded to what was shown on the bill of lading.

On completion of deliveries, our inventory recorded the following information:

Total delivery 42 146 boxes

Of which:

Damaged 91 boxes

Recovered 86 boxes

Total supplied after recovery 42 141 boxes

Total weight supplied 465.658 tonnes

Although the containers which had lost their seal did not disclose any shortfall in contents, there was some discrepancy in relation to the amounts counted in the other containers. In aggregate, 2 644 boxes were missing against the number recorded on the bill of lading. Given that all the seals were intact, save those mentioned, we think that this discrepancy arises because the quantities loaded were lower than those provided for.

Operation No 525/96

"MV *Orinoco*" ...

The vessel arrived at Namibe on 12 March 1998 and berthed on the same date. Unloading commenced at 15.00 hours and was completed the following day at 11.20 hours.

Our functions related to the unloading of 18 containers for delivery to the Socosul warehouse at Lubango. Lubango is approximately 150 km to the east of Namibe and the containers were transported by road.

The first container was delivered to Lubango on 23 March 1998 and the last on 28 March 1998.

We took an inventory at the doors of the containers, which were located directly opposite the doors of the warehouse, so as to facilitate unloading. Heavy rain fell during this period, causing regular interruptions.

Of the containers delivered, two had been sealed for security reasons, and two others had lost their seal. In total, the losses from these containers amounted to 95 boxes.

Of the boxes delivered, it was found that 34 were damaged, of which 20 were recovered.

The final inventory of these goods gave the following results:

Total delivery 26 317 boxes

Of which:

Damaged 34 boxes

Recovered 20 boxes

Total supplied after recovery 26 303 boxes

Total weight supplied 290.648 tonnes.

...'

18 Socor L[da] concluded as follows:

'In total, 153 829 boxes, or 1 699.810 tonnes, were delivered, less than the quantity specified, which was 161 672 boxes. The difference amounts to 7 843 boxes or 86.665 tonnes. Except where the containers had lost their seal or where the seal had been tampered with, we think that the missing boxes were not loaded. On opening the sealed containers, it was found that the goods were properly stowed. Photographs taken when the containers were opened clearly show the manner in which the goods were stacked. These photographs were taken by the warehouse managers. The containers were unloaded by workers employed by the warehouse managers; the distance between the doors of the containers and those of the warehouse was generally under five metres. The boxes were carried by hand until they were in the warehouse, then stacked. The damage noted is generally attributable to the fact that the plastic bottles were damaged or had leaks. Those leaks were always less serious than they appeared and, after opening of the boxes and separation, recovery was good. Letters of protest were sent to the carrier "Orey Angola" in relation to those losses. Delivery to the warehouses was slow, even allowing for the customs delays which are to be expected in Angola. It was necessary to deal with some congestion at the warehouses in Luanda and Lubango; rain and the taking in of other goods caused some delay in the onward transportation of the containers. The delivery took 53 days between the arrival of the first container at the port of Lubango on 23 March and that of the last container at Luanda on 14 May 1998.'

19 According to the definitive certificate of conformity issued by Socotec on 23 June 1998 for the purposes of Article 16(1) of Regulation No 2200/87, the total tonnage accepted was 1 697 552.899 kg net, that is to say 102 447 kg less than the amount specified in the contract, and the date of the final delivery was 14 May 1998.

20 On 29 June 1998, the applicant submitted to the Commission an invoice for the sum of EUR 1 591 455.84 for the 1 697 522.899 kg of vegetable oil that were actually delivered. In accordance with Article 22(3) of Regulation No 2200/87, the Commission paid this invoice, under deduction of a penalty of EUR 7 916.91 in respect of the goods that were not delivered.

21 In addition, the insurance company with which the applicant had taken out an insurance policy in accordance with Article 15 of Regulation No 2200/87 paid the applicant, by way of compensation, the sum of PTE 6 116 746 (approximately EUR 30 510), representing the price of approximately 32 544 kg of the goods.

Procedure and forms of order sought

22 By application lodged at the Registry of the Court of First Instance on 16 October 2001, the applicant brought the present action.

23 The written procedure came to an end on 5 March 2002, since the applicant failed to lodge a reply within the prescribed period.

24 On hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, in the framework of the measures of procedural organisation provided for in Article 64 of the Rules of Procedure of the Court, requested the parties to produce certain documents and to reply to written questions. The parties complied with these requests.

25 The parties presented oral argument and their replies to oral questions from the Court at the hearing on 9 April 2003.

26 The applicant claims that the Court should order the Commission to pay it the sum of EUR 61 226, that is to say EUR 53 310, representing the unpaid part of the price for the goods which, according to the provisional certificate of conformity, were loaded, and which were not the subject of compensation by way of insurance, and EUR 7 916, representing the penalty imposed.

27 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

28 At the hearing, the applicant amended, without giving any reasons for doing so, its claim for payment so as to seek recovery from the Commission solely of the price of 44 496 kg of goods (approximately EUR 41 715) which, according to the applicant, represents the Commission's assessment of the shortfall, that is to say a failure to deliver in terms of the contract, and which was not reimbursed by its insurers. As regards the penalty, the applicant amended its initial claim for repayment of the whole of the penalty imposed by the Commission, stating that it accepted that the Commission was entitled to impose a penalty in respect of the 12 976 kg of goods which were missing at the date of shipment according to the provisional certificate of conformity.

Law

29 The applicant relies essentially on three pleas in support of its request for payment. The first plea is in two parts. The first part alleges that the Commission wrongly refused to pay for the undelivered goods, without establishing that the applicant was liable for the goods that were missing. The second part seeks to establish that, in any event, the Commission's representative was at fault. The second plea alleges that the Commission's imposition of a penalty in relation to the undelivered goods was unjustified. The third plea alleges breach of the proportionality principle in the allocation of the risks to which the goods were exposed.

The first plea, alleging, first, that the Commission wrongly refused to pay for the undelivered goods, and, secondly, that the Commission's contractual representative was at fault

Arguments of the parties

30 The applicant claims, first, that its obligation to deliver oil was performed in its entirety since at the time the goods were loaded no failure on its part, other than the shortfall of 12 976 kg, was detected, and that the further shortfalls found at the warehouses at the destination of the goods related to lots where certain containers had lost their seal. It submits that the most plausible explanation is that the shortfall of 5 176 boxes in lot No 1513/95 and of 2 644 boxes in lot No 524/96 arose as a result of containers having been opened by unidentified third parties.

31 It claims that it is not liable for either the delays in delivery or the missing boxes. It submits that, according to the provisional certificate of conformity, save for the 12 976 kg which were admitted, no shortfall in the goods was found at the time of shipment. It adds that customs clearance was difficult and slow by reason of the situation in Angola, where the functioning of institutions and services is seriously deficient.

32 It claims, secondly, that the Commission is liable under the contract on the ground that Socor L[da], which was instructed, both by the carrier engaged by the applicant and by the monitor, Socotec, to supervise unloading, only informed the carrier too late of the deficiencies in issue. Furthermore, Socor L[da] was unable to confirm which boxes had come from which containers and, accordingly, in which containers there were boxes missing or whether the containers had lost their seal. This error made it difficult, or even impossible, to establish the facts and liability for the goods that were missing, with the result that the applicant's insurer had only covered the losses relating to the containers that had lost their seal. Lastly, Socotec had admitted in 1999 that the physical counting of the boxes had taken place when the goods entered the warehouses and not when the containers were opened and that some warehouses had more than one means of access, which could lead to mistakes being made. It considers that the Commission is liable for the errors and omissions of the monitor.

33 At the hearing, the applicant developed its arguments, claiming that the fact that the Commission had taken the view that the applicant had failed to deliver 44 496 kg of goods, without proving it, had led to a refusal by the insurer to pay compensation. The applicant submits that circumstances amounting to a failure to perform the contract fall to be distinguished from the risks to which the goods were exposed, such as theft.

34 The Commission considers that the application is not well founded in law, as, in the present case, the supply contract specified that delivery was to be made 'free at destination'. It submits that, according to Article 15(2) of Regulation

No 2200/87, the applicant bore all the risks relating to the goods up to the time when they were actually unloaded and delivered to the warehouse at their destination. Furthermore, under the conditions of contract and in accordance with Article 7(3) of Regulation No 2200/87 and the Annex to Regulation No 2608/97, all costs were deemed to be included in the offer to supply. In that respect, it notes that in its offer, the applicant tendered different prices for different stages of delivery.

35 The Commission adds that Article 15(2) of Regulation No 2200/87 expressly requires the successful tenderer to take out an insurance policy, covering the risks specified in Article 14(3)(a) of the same regulation.

36 As regards the question of conformity of the goods delivered, the Commission notes that, in the factory of origin, a shortfall of 12 976 kg of vegetable oil had already been detected. Furthermore, in the case of deliveries made 'free at destination', the definitive certificate of conformity is only issued at the stage of supply. In the present case, this definitive certificate shows, according to the Commission, that the amount delivered at the destination was only 1 697 552.899 kg, that is to say 102 447.101 kg less than the 1 800 tonnes stipulated in the contract. According to the Commission, 8 089 boxes were therefore missing, of which 5 138 corresponded to containers whose seals were intact.

37 The Commission points out that transport, unloading and customs clearance were the responsibility of the applicant under the contract. It also challenges the argument that the nomination of a monitor, in accordance with Articles 10 and 16 of Regulation No 2200/87, meant that these responsibilities were transferred to the monitor, as they were to lie with the successful tenderer.

38 As regards its alleged liability, it adds that it is not in any way liable for the alleged delay in the supply of information relating to the loss to the applicant's insurance company. In that regard, it states that it is not responsible either for the

errors allegedly committed by the carrier engaged by the applicant. The Commission notes, moreover, that the applicant was represented at the place of destination by the carrier, who had been informed of the definitive figures for the whole of the operation in the five days following the delivery of the final container.

Findings of the Court

39 It should be noted at the outset that the applicant was required, under the contract, to supply 1 800 tonnes net of vegetable oil to Angola. It is a matter of agreement between the parties that the applicant delivered 1 697 553 kg of vegetable oil. Accordingly, 102 447 kg of vegetable oil were not delivered. It is also a matter of agreement between the parties that the Commission has paid the price agreed in the contract for the goods delivered, that is to say EUR 1 583 539, from which the penalty of EUR 7 916 for the undelivered quantity has already been deducted.

40 Furthermore, it is agreed between the parties that of these 102 447 kg of goods that were missing on delivery, 12 976 kg of goods were already missing at the time of loading. The applicant does not seek any payment for these 12 976 kg. In reply to a written question put by the Court, the applicant stated that its request for payment related to the value of 89 424 kg of goods at the price of EUR 0.9375 per kilo, that is to say EUR 83 820. From this sum, the applicant has, first, deducted the sum of EUR 30 510, which was reimbursed by its insurer, and, secondly, added the penalty of EUR 7 916. It has accordingly requested that the Commission be ordered to pay the sum of EUR 61 226.

41 In this regard, it should be recalled (see paragraph 28 above) that at the hearing the applicant amended, without giving any reasons for doing so, its claim for

payment so as to seek recovery from the Commission solely of the price of 44 496 kg of goods (approximately EUR 41 715) which, according to the applicant, represents the Commission's assessment of the shortfall, that is to say a failure to deliver in terms of the contract, and which was not reimbursed by its insurers. As regards the penalty, the applicant amended its initial claim for repayment of the whole of the penalty imposed by the Commission, stating that it accepted that the Commission was entitled to impose a penalty in respect of the 12 976 kg of goods which were missing at the time of shipment according to the provisional certificate of conformity.

42 The applicant's arguments in relation to its first plea in law may be divided into two main parts. First, the applicant claims that its obligation to deliver oil was performed, except as regards the 12 976 kg that were missing when the goods were shipped. It claims that the Commission should pay the price due for 44 946 kg of the goods. In that respect, the applicant considers that it cannot assume the burden of the risks relating to these goods solely because, according to the report of 18 May 1998 by Socor L[da], they disappeared from the containers whose seals were not tampered with.

43 In the alternative, it claims that the Commission should, in any event, pay it the price for these 44 496 kg of goods, on the basis that it is obliged to do so under the contract, given that the monitor, Socor L[da], which was instructed by the Commission to supervise unloading, wrongly and without good reason stated in the definitive certificate of conformity that some of the missing goods belonged to the containers whose seals were intact, and thus that they fell to be treated as undelivered. This error made it difficult, or even impossible, to establish the facts and liability, with the result that the applicant's insurer refused to compensate it for a part of the missing goods, and only covered losses in respect of containers that had lost their seal.

44 As regards the first part of the first plea in law, it should be noted that Article 1 of Regulation No 2608/97 states that:

'Vegetable oil shall be mobilised in the Community, as Community food aid for supply to the recipient listed in the Annex, in accordance with Regulation No (EEC) 2200/87 and under the conditions set out in the Annex. Supplies shall be awarded by the tendering procedure .... The successful tenderer is deemed to have noted and accepted all the general and specific conditions applicable. Any other condition or general reservation included in his tender is deemed unwritten.'

45 It follows from these provisions that the supplies in question were subject to compliance by the applicant with a certain number of contractual provisions, which included the provisions of Regulations No 2200/87 and No 2608/97.

46 These contractual provisions include the obligation that the applicant deliver 1 800 tonnes net of vegetable oil, with a stage of supply 'free at destination'. The wording of Article 15(2) of Regulation No 2200/87 clearly specifies, where delivery is to be made 'free at destination', as in the present case, the precise point at which the burden of the risk in the goods is to be transferred from supplier to recipient. It states that 'the successful tenderer shall bear all the risks relating to the goods, notably those of loss or deterioration, up to the time when the goods are actually unloaded and placed in the warehouse at their destination'.

47 Article 15 of Regulation No 2200/87 thus links the transfer from supplier to beneficiary of the burden of the risks to which the goods may be exposed to their being actually made available, after unloading, inside the warehouse at their destination. These risks cover all loss and damage to which the goods may be exposed. As regards the contractual relationship between the Commission and the applicant, it is accordingly unnecessary to establish the reasons for which any

losses of goods may have arisen, if they arose before the actual supply of the goods to the warehouse at their destination, as mentioned above.

48 In the present case, notwithstanding the oral and written questions put by the Court, the applicant has been unable to show when precisely the goods disappeared. In reply to a written question put by the Court, the applicant simply stated that in its view the missing goods disappeared either between the arrival of the containers in the vicinity of the warehouses at their destination and their unloading, or during unloading.

49 It is for the applicant to establish that the information contained in the definitive certificate of conformity is incorrect. In the present case, there is nothing to prove that the findings of the report of 18 May 1998 by Socor L[da], on which the definitive certificate of conformity is based, and which states that the missing boxes were not loaded or disappeared before the goods were actually made available at the warehouse at their destination, as mentioned above, were wrong. In both these cases, the applicant was liable for the partial failure to make delivery.

50 Contrary to what the applicant claimed at the hearing, the circumstances of the present case differ from those which gave rise to the Court's judgment in Case T-26/00 *Lecureur* v *Commission* [2001] ECR II-2623. In that case, the Court rejected the proposition that the transfer of the burden of risk from supplier to beneficiary is necessarily linked to the issuing of the definitive certificate of conformity, with the result that the latter becomes the sole means of proving delivery. The Court held that, in the circumstances of the 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 goodwill 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 (para-

graphs 63 and 64). In that case, the monitor's findings, reproduced in the definitive certificate of conformity, made it clear that the thefts in issue had in any event been perpetrated after the goods were supplied to the recipient (paragraph 67).

51 In the present case, the applicant has been unable to establish that the losses occurred after the goods were supplied to the recipient, that is to say when the burden of risk for the goods had already been transferred to the latter. Accordingly, the Commission is not liable for such losses, which are the responsibility of the applicant, according to Article 15 of Regulation No 2200/87.

52 This conclusion is not affected by the applicant's argument that the conditions in which delivery was made were difficult.

53 It is clear from the report of 18 May 1998 by Socor L[da] that the containers were delivered to a point outside the different warehouses in varying quantities between 23 March 1998 (the first container of lot No 525/96) and 14 May 1998 (the final containers of lot No 1513/95). The report also makes it clear that the unloading operations were carried out over several days, or even over several weeks. This is also clear from the applicant's written answer to the question put by the Court, in particular in Annex 1 to that answer, which was issued by the carrier and shows the number of days during which the containers remained outside the warehouses without being unloaded. It follows that some of the containers were stacked outside the warehouses at their destination and that delivery, that is to say the opening of the containers and the placing of the boxes inside the warehouses, did not take place immediately following their arrival in the vicinity of the warehouses at their destination. There is nothing in the documents before the Court to indicate that the containers were monitored during the period when they remained outside the warehouses before being opened and their contents placed in the warehouses.

54 Given that these containers were left outside the recipient's warehouses, the applicant or the carrier which represented it should have ensured that the goods

were monitored until the recipient took them over. Prior to that date, the applicant, through its representative, continued to have control of the goods.

55 The burden of risk cannot be transferred from the successful tenderer to another person. As Article 12(3) of Regulation No 2200/87 states, 'the rights and obligations arising from the award shall not be transmissible'. The fact that carriage of the goods was handled by an undertaking other than the applicant thus does not alter in any way the applicant's duty to deliver the quantity agreed in the contract to the place specified in Regulation No 2608/97.

56 There is no need in this regard to establish the reasons for the delay in unloading and actually making the goods available inside the warehouses at their destination, as the goods were under the control of the applicant who, accordingly, should have organised their monitoring during these operations.

57 Article 17 of Regulation No 2200/87 states that: 'a taking-over certificate containing the particulars set out in Annex III shall be issued in accordance with the provisions of this article; it shall be deemed to constitute acceptance of the goods by the recipient in accordance with point 1 or acknowledgement of the supply in accordance with point 2'. Article 17(1) provides that immediately after the goods have been made available at the stage agreed for the supply, the successful tenderer is to ask the recipient or his representative to issue the taking-over certificate. Article 17(2) provides that, failing the issue of the taking-over certificate by the recipient, the undertaking referred to in Article 10 of the regulation is to issue to the successful tenderer, at his request and on receipt of the certificate of origin and the invoice referred to in point 1, a certificate of acknowledgement of supply where the checks carried out at the stage laid down for supply have been such as to permit the issue of the certificate of conformity referred to in Article 16 of the regulation. In the case of a supply free at port of landing or free at destination, the certificate is also to be issued on presentation of the certificate of conformity made out prior to shipment and also, depending on the case, of the documents referred to in Article 14(6).

58 In the present case, the definitive certificate of conformity of 23 June 1998 also comprises the certificate of acknowledgement of supply, whereby Socotec acknowledged that control of the goods had been taken over by the recipient on 14 May 1998, which was the date of the final delivery to the warehouses at their destination. The same certificate records that the total accepted tonnage was 1 697 552.899 kg. It has accordingly been established that the delivery was not complete, but that 102 447 kg of vegetable oil was missing when the recipient took control of the goods.

59 If the applicant was of the view that it had unloaded and delivered some of the goods to the warehouses at their destination before 14 May 1998, the date of the final delivery, it or its representative could, under Article 17 of Regulation No 2200/87, have requested the taking-over certificate or the certificate of acknowledgement of supply immediately after the goods had been made available to the recipient, in relation to those goods that it considered had been duly delivered. The applicant does not even claim that it made such a request.

60 In these circumstances, the applicant has failed to establish either that the burden of risk in the goods was transferred to the recipient before 14 May 1998, the date of the final supply of the goods to the warehouses at their destination, or that the goods were lost after that date.

61 Consequently, the first part of the first plea must be rejected.

62 As regards the second part of this plea, which seeks to establish contractual liability on the part of the Commission, and in which the applicant states that its insurance company has not compensated it in full for the loss, as, according to the definitive certificate of conformity issued by the monitor, 44 496 kg of goods were missing by reason of non-performance of the contract on the applicant's part, it is noteworthy, first, that the applicant has failed completely to establish

that this statement was wrong. It is stated in the conclusions of the report of 18 May 1998 by Socor L[da], in which each delivery is considered vessel by vessel, that:

'except where the containers had lost their seal or where the seal had been tampered with, we think that the missing boxes were not loaded. On opening the sealed containers, it was found that the goods were properly stowed. Photographs taken when the containers were opened clearly show the manner in which the goods were stacked. These photographs were taken by the warehouse managers. The containers were unloaded by workers employed by the warehouse managers; the distance between the doors of the containers and those of the warehouse was generally under five metres. The boxes were carried by hand until they were in the warehouse, then stacked.'

63 It is clear from the applicant's replies to the questions put by the Court at the hearing that it does not know when precisely the losses occurred. It simply asserts that, according to the provisional certificate of conformity, 1 787 024 kg of the goods were supposed to have been shipped. Given that the provisional certificate of conformity was issued at the factory from which the goods departed, this certificate does not prove that the conclusions in the report of 18 May 1998 by Socor L[da] were erroneous.

64 Secondly, with respect to the applicant's argument that Socor L[da] was unable to confirm which boxes had come from which containers and, accordingly, in which containers there were boxes missing or whether the containers had lost their seal, it is noteworthy that the applicant was represented by the carrier, which the applicant itself had appointed, at the place of destination. If the unloading of the goods in the warehouses at their destination was incorrectly handled, it was the duty of the carrier, as the applicant's representative, to act so as to avoid any errors in the calculation and the unloading of the different boxes coming from the different containers. This duty arises under Article 15 of Regulation No 2200/87, which states that the successful tenderer is to bear all the risks relating to the goods, notably those of loss or deterioration, up to the time when the goods are

actually unloaded and placed in the warehouse at their destination. Given that the risk in the goods remained with the applicant up to the time when the goods were actually unloaded and placed in the warehouse at their destination, the applicant or its representative was also under a duty to ensure that unloading was properly carried out. This point also addresses the applicant's argument, presented at the hearing, that it is possible that the seals which were treated as being intact were tampered with while the goods were in transit.

65 Finally, the applicant's claim that its insurer had refused to reimburse the price of the missing goods by reason of Socor L[da]'s late intimation of the existence of discrepancies to the carrier is not well founded. It is clear from the faxes annexed to the report of 18 May 1998 from Socor L[da] that the carrier was informed that goods had been lost. This fact is also clear from a fax from the carrier of 22 May 1998, replying to the faxes referred to above. Moreover, Socotec confirmed in a fax it sent to the Commission on 19 February 1999 that the carrier and the applicant had been informed, on 14 May 1998 and 19 May 1998 respectively, that goods had been lost.

66 It follows that the second part of the first plea cannot be upheld either and that the first plea must be rejected.

The second plea, alleging that the Commission's imposition of a penalty in respect of the undelivered goods was unjustified

Arguments of the parties

67 The applicant requests, on the same grounds as those stated in relation to the first plea, a reduction in the penalty imposed on it by the Commission under

Article 22(3) of Regulation No 2200/87. It maintains that there is no justification for imposing a penalty on it in respect of the undelivered goods, given that it was not responsible for this failure, save in relation to the 12 976 kg which the provisional certificate of conformity recorded as already missing when the goods were shipped.

68 The Commission challenges this request for the reasons given in relation to the first plea.

Findings of the Court

69 It should be stated at the outset that it is clear from a document issued by the Commission, provided as part of the measures of organisation of procedure, that the penalty was calculated in accordance with the first indent of Article 22(3) of Regulation No 2200/87, that is to say that it was calculated in proportion to the percentage of the quantities not delivered, namely 102 447 kg.

70 It should be noted in that regard that Article 22(3) of Regulation No 2200/87 provides that 'the amounts specified in the first and third indents shall not be withheld if the failure which has taken place is not attributable to the successful tenderer and does not lead to a payment under insurance cover'.

71 In the present case, it is a matter of agreement between the parties that there was a shortfall of 102 447 kg of goods as between what was stipulated in the contract and what was delivered. As regards the 12 976 kg which, according to the provisional certificate of conformity, were already missing at the factory of origin the applicant has withdrawn its request. As regards the goods which were lost

before their actual delivery in the warehouses at their destination, the applicant is unable to explain these losses. Given that the burden of risk in the goods lay with the applicant at the time the goods were lost, it ought to have established that it was not responsible for these losses, which it has failed to do.

72 In these circumstances, the applicant's request for a reduction in the penalty imposed under the first indent of Article 22(3) of Regulation No 2200/87 likewise cannot be upheld.

73 It follows that the second plea must be dismissed.

The third plea, alleging breach of the principle of proportionality in the allocation of the risks to which the goods were exposed

Arguments of the parties

74 The applicant claims that if, according to Regulation No 2608/97 and Article 15 of Regulation No 2200/87, the burden of risk for the goods lay with it until they arrived at their destination, with the result that the Commission is legally protected against all perils to which the cargo might have been exposed, the application in the present case of Article 15 of Regulation No 2200/87 infringes the principle of proportionality, as it fails to observe the fundamental principles of law recognised by the legal systems of the great majority of Member States and in international commercial custom in the field of the allocation of risks to which goods are exposed.

75 According to the applicant, the Commission acted unreasonably and in bad faith in selecting the delivery clause 'free at destination' in a case involving the supply of goods to an African country which was at war and in which it is difficult to make the rules and mechanisms of international trade apply. Accordingly, the Commission imposed an excessive risk on the applicant, since there were serious deficiencies in the operation of both the mechanisms for ensuring due delivery and the general mechanisms for allowing suppliers to offset the burden of risk faced by them operated in the present case.

76 With respect to the proportionality of the burden of risk, the Commission argues that the applicant should be deemed to act knowingly in the field of international trade, and be aware of the situation in Angola. It adds that the present case does not involve *force majeure*.

Findings of the Court

77 The applicant's claims, based on the proposition that the transfer of the burden of risk from supplier to recipient does not apply in the present case given the exceptional conditions in the country of delivery, cannot be upheld.

78 As the Commission rightly argues, the applicant is an undertaking which must be deemed to have acted in full awareness of the situation in Angola when it submitted its offer. Moreover, Article 15(2) of Regulation No 2200/87 expressly requires the successful tenderer to take out appropriate insurance, covering the risks specified in Article 14(3)(a) of the same regulation. The latter article provides that the successful tenderer is to take out a marine insurance policy or

claim cover under a general policy. That policy, which must be for at least the amount of the tender, is to cover all the risks associated with carriage and, where appropriate, trans-shipment and unloading, including all cases of non-delivery, loss and risks regarded as exceptional.

79 For the same reasons, there is no infringement of the principle of proportionality in relation to the allocation of risks in the contract. As is clear from the facts of the case, the applicant was aware of all the conditions applying to the tender when it submitted its offer. The papers before the Court disclose nothing that would serve to qualify this.

80 Furthermore, under Article 7(3) of Regulation No 2200/87 and the Annex to Regulation No 2608/97 all costs were deemed to be included in the offer price. In that regard, it is clear from the applicant's offer that it submitted different prices for different stages of supply. Thus, the free at destination price was higher, so including by definition costs such as those of insurance, the purpose of which was precisely to cover losses such as those suffered in the present case.

81 In those circumstances, the third plea in law must also be dismissed.

82 It follows that the application must be dismissed in its entirety.

Costs

83 Under Article 87(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Tiili Mengozzi Vilaras

Delivered in open court in Luxembourg on 11 February 2004.

H. Jung
Registrar

V. Tiili
President