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Order of the Court (First Chamber) of 17 September 1996. - San Marco Impex Italiana Srl v Commission of the European Communities. - Appeal - Public works contract - Article 178 and the second paragraph of Article 215 of the Treaty. - Case C-19/95 P.

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Keywords

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1. Appeals ° Pleas in law ° Mere repetition of pleas and arguments put forward before the Court of First Instance ° Incorrect appraisal of the facts ° Inadmissible ° Rejected

(EC Treaty, Art. 168a; EC Statute of the Court of Justice, Art. 51; Rules of Procedure of the Court of Justice, Art. 112(1)(c))

2. Appeals ° Pleas in law ° Incorrect appraisal of evidence properly adduced ° Inadmissible ° Rejected

(EC Statute of the Court of Justice, Art. 51)

3. Appeals ° Pleas in law ° Plea put forward for the first time in the appeal proceedings ° Inadmissible

(EC Statute of the Court of Justice, Art. 51)

Summary

1. It follows from Article 168a of the Treaty, Article 51 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal.

That requirement is not satisfied by an appeal which confines itself to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that court. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake.

An appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The Court of First Instance has exclusive jurisdiction, first, to establish the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, secondly, to assess those facts. The Court of Justice has jurisdiction under Article 168a of the Treaty to review the legal characterization of those facts by the Court of First Instance and the legal conclusions it has drawn from them.

2. It follows from Article 113(2) of the Rules of Procedure of the Court of Justice and Article 48(2) of the Rules of Procedure of the Court of First Instance that, in appeal proceedings, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to

the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence submitted to it.

3. A plea in law put forward for the first time in an appeal to the Court of Justice must be rejected as inadmissible. Were a party to be allowed to put forward before the Court of Justice a plea in law which it had not raised before the Court of First Instance, that would enable it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the Court' s jurisdiction is confined to review of the assessment made by the Court of First Instance of the pleas argued before it.

Parties

In Case C-19/95 P,

San Marco Impex Italiana Srl, a company governed by Italian law, whose registered office is in Modena, Italy, represented by Lucette Defalque, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 16 November 1994 in Case T-451/93 San Marco v Commission [1994] ECR II-1061, seeking to have that judgment set aside and claiming compensation for the damage allegedly suffered by the appellant in relation to a public works contract concluded by it with the Government of the Somali Democratic Republic,

the other party to the proceedings being:

Commission of the European Communities, represented by Hans Peter Hartvig, Legal Adviser, and Claire Bury, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Commission' s Legal Service, Wagner Centre, Kirchberg,

THE COURT (First Chamber)

composed of: D.A.O. Edward (Rapporteur), (President of Chamber), P. Jann and L. Sevón, Judges,

Advocate General: N. Fennelly,

Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

Grounds

1 By application lodged at the Registry of the Court of Justice on 26 January 1995, San Marco Impex Italiana (hereinafter "San Marco") brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance (Fifth Chamber) of 16 November 1994 in Case T-451/93 San Marco v Commission [1994] ECR II-1061, which dismissed its action under Article 178 and the second paragraph of Article 215 of the EEC Treaty for compensation for the damage allegedly suffered by it in connection with a public works contract which it concluded with the Government of the Somali Democratic Republic.

2 It is appropriate first to summarize briefly the background to the dispute as set out in the contested judgment.

3 On 3 March 1987 the Commission, acting on behalf of the European Economic Community, concluded an agreement with the Somali Democratic Republic by which it agreed to finance a project submitted by the Somali Government for the design and construction of five bridges across the River Shebelli and one bridge across the River Juba, together with the construction of associated access roads. That agreement was concluded under the second ACP-EEC Convention,

signed at Lomé on 31 October 1979 (OJ 1980 L 347, p. 2, hereinafter "the Second Lomé Convention"), and the corresponding funds were made available from the Fifth European Development Fund ("the EDF") (paragraph 1).

4 Following the issue of a call for tenders, a contract was concluded on 22 February 1988 between San Marco and the Somali Minister for Foreign Affairs as National Authorizing Officer, on behalf of the Somali Ministry for Public Works and Housing. The contract was endorsed by the delegate of the Commission in Somalia ("the delegate") and by Consulint International (hereinafter "Consulint"), consulting engineers, hired by the Somali Government to supervise the construction works (paragraph 2).

5 The works commenced in May 1988 (paragraph 5).

6 Two problems then arose. The first concerned replacement, at the suggestion of Consulint, of one of the sub-base materials for the access roads because it was not available sufficiently close to the work sites. That change entailed an increase in the unit cost of the materials. The second problem arose from the refusal of the delegate to endorse two invoices incorporating price revisions for certain materials (cement, steel, diesel fuel and labour) on the ground that the revisions were based only on invoices and not ° for the materials concerned ° on proof of an increase in market prices (paragraphs 6 to 8).

7 On 23 August 1989, a request for additional funding of ECU 750 000 was submitted by the National Authorizing Officer through the Commission delegate in order to resolve, in particular, those two problems. In anticipation that such funding would be forthcoming, Addendum No 1 to the contract, drafted by Consulint and signed by the appellant, the National Authorizing Officer and the Somali Ministry of Public Works and Housing, was sent to the delegate on 28 August 1989 for endorsement (paragraphs 13 and 14).

8 On 21 December 1989 the Commission, through its delegate, informed the National Authorizing Officer of its decision to provide additional funding of ECU 750 000. By letter of 25 December 1989, the Somali Department of Highways informed Consulint that "Addendum No 1 (supplementary fund) has been approved". Consulint sent a copy of that letter to the appellant on 27 December 1989, stating that the additional funding of ECU 750 000 had been approved "as per Addendum No 1" (paragraphs 15 and 16).

9 By letter of 6 February 1990, the delegate informed the Somali Department of Highways that he was not able to endorse the addendum submitted. He therefore suggested a modified version on 1 March 1990, and submitted it for signature. After the revised version of the addendum had been signed by the appellant, the Somali Minister of Public Works and Housing and the National Authorizing Officer, the delegate wrote to the Somali Ministry of Public Works and Housing on 1 March 1990 informing it that he refused to endorse the addendum. The appellant was not in his view entitled to a unit-price revision for sub-base materials and had not provided the requisite supporting details for the price revisions for cement and steel. That letter was confirmed on 6 June 1990 (paragraphs 17 to 20).

10 In December 1990, civil war broke out in Somalia. By letter of 1 March 1991, the Commission' s Director-General for Development wrote to the appellant in his capacity as Chief Authorizing Officer ° the authority ultimately responsible under Article 121(1) of the Second Lomé Convention for managing the EDF' s resources ° to inform it that he had temporarily assumed the functions of the National Authorizing Officer, on the basis of Article 60 of the Financial Regulation applicable to the Fifth EDF, since he believed that the National Authorizing Officer was no longer in a position to carry out his duties. In that capacity, the Chief Authorizing Officer informed the appellant that he was terminating the contract under Article 93(1) of the General Conditions as from 1 March 1991 (paragraphs 22 and 23).

11 Under cover of a letter of 7 February 1992, the appellant' s lawyers forwarded to the Commission a full statement of the amounts claimed, totalling ECU 4 389 498.40, relating in particular to the unpaid invoices and the sums for which requests for payment had been made on the basis of the Commission' s letter of 1 March 1991. By letter of 15 April 1992, confirmed by letter of 11 May 1992, the Commission rejected the claim made by the appellant' s lawyers (paragraphs 28 and 29).

12 For a fuller account of the facts of the case, reference is made to paragraphs 1 to 29 of the contested judgment.

13 On 7 July 1992, San Marco brought an action before the Court of First Instance for compensation for the damage allegedly suffered by it in connection with that public works contract.

14 By judgment of 16 November 1994, the Court of First Instance dismissed the application.

15 Essentially, the Court of First Instance found in the first place that it had no jurisdiction to adjudicate on the appellant' s contractual entitlement to the amounts claimed in the invoices. It considered that this was an issue to be determined by arbitration, in accordance with Article 132 of and Annex XIII to the Second Lomé Convention (paragraph 42).

16 Second, the Court of First Instance considered that the Commission delegate was entitled, and indeed bound, to refuse to endorse invoices submitted by contractors where he had substantial grounds for doubting that the conditions for Community funding had been met (paragraph 50).

17 Third, the Court of First Instance found that the appellant had produced no evidence to show that the delegate' s refusal to endorse the invoices in question was not justified; likewise the appellant had not shown that, as a result of the Commission' s conduct, it had a legitimate expectation that the delegate would endorse the invoices in question (paragraphs 56, 73 and 74).

18 Fourth, the Court of First Instance considered, as regards the question of the increase in the unit-price of the sub-base materials for the access roads, that the delegate had been entitled to refuse to endorse the invoices concerned. The appellant had tendered a firm unit-price without undertaking a thorough investigation prior to submitting its bid. It thus seriously underestimated the availability, close to the sites, of one of the required components (paragraphs 57 to 62).

19 Fifth, the Court of First Instance noted that the appellant had not yet established, in the appropriate forum, that any sums were in fact owed to it by the Somali Government (paragraph 67).

20 Sixth, the Commission was under no obligation, in the view of the Court of First Instance, to meet the claim for expenses incurred prior to termination of the contract (paragraph 93).

21 Seventh, the Court of First Instance took the view that there had been no breach either of the appellant' s legitimate expectations or of the principle of legal certainty. The appellant was not entitled to rely on an alleged promise to pay contained in a letter sent after the expenses in question had been incurred (paragraphs 95 to 98).

22 Eighth, the Court of First Instance considered that the appellant had not established that any damage allegedly suffered by it resulted from termination of the contract by the Chief Authorizing Officer (paragraph 107).

23 Finally, according to the Court of First Instance, the terms of the letter of 1 March 1991 were not such as to give rise to a legitimate expectation on the part of the appellant that the Commission would compensate it for losses resulting from termination of the contract (paragraph 112).

24 On 20 January 1995, San Marco brought the present appeal against that judgment.

The appellant' s pleas in law

25 In its appeal, the appellant asks the Court of Justice to set aside the judgment of the Court of First Instance, to rule afresh on its claim and to order the Commission to pay it a total of ECU 4 389 498.40 or, in the alternative, a total of ECU 2 504 280.07 representing the balance of ECU 148 192.09 for incorrect processing of the invoices, the uncontested balance of ECU 483 830.65 in respect of the invoices outstanding and compensation for the loss resulting from termination of the contract in the sum of ECU 1 922 258.

26 The grounds of appeal relied on by the appellant concern, first, non-payment of certain invoices and, second, failure by the Commission to pay compensation following termination of the contract.

27 As regards non-payment of certain invoices, the appellant puts forward eight pleas in law concerning:

° incorrect appraisal of the facts by the Court of First Instance leading to misapplication of the law;

° the appellant' s obligation strictly to comply with the instructions given to it by Consulint;

° improper application of contractual conditions by the Commission in processing the invoices;

° breach of the appellant' s legitimate expectations by the Commission and its delegate in refusing to endorse the relevant invoices;

° breach of the appellant' s legitimate expectations by the Commission in refusing to sign Addendum No 1;

° breach of the appellant' s legitimate expectations by the delegate in refusing to pay such part of the invoices as was to be paid in Somalia;

° incorrect assessment of the appellant' s claim by the Court of First Instance and unfounded dismissal of the claim concerning the amounts correctly invoiced, and

° inadequate organization of the Commission' s departments.

28 As regards the Commission' s failure to pay compensation following termination of the contract, the appellant puts forward four pleas in law concerning:

° the Commission' s obligation to state the reasons on which its decisions are based;

° misinterpretation and misapplication of Article 60 of the Financial Regulation applicable to the Fifth EDF and Article 93(1) of the General Conditions;

° breach by the Commission of its duty to assist Community undertakings working under EDF contracts, and

° incorrect appraisal by the Court of First Instance of the fault of the Commission.

29 In its response, the Commission requests the Court of Justice to declare the appeal inadmissible pursuant to Article 119 of the Rules of Procedure and, in the alternative, to dismiss it as unfounded.

30 According to the Commission, all the pleas in law are inadmissible for three reasons.

31 First, it is clear from Article 168a of the EC Treaty and Article 51 of the EC Statute of the Court of Justice that an appeal to the Court of Justice is to be limited to points of law. Second, pursuant to Article 112(1) of the Rules of Procedure of the Court of Justice, an appeal to the Court of Justice must contain the pleas in law and legal arguments relied on. Third, pursuant to Article 113(2) of those Rules of Procedure, the subject-matter of the proceedings before the Court of First Instance may not be changed in the appeal. The Commission considers that in this appeal none of those three requirements is satisfied.

32 As regards the substance, the Commission considers that the findings of fact and of law made by the Court of First Instance are absolutely correct and that therefore, even if they were considered admissible, all the appellant' s pleas in law would have to be dismissed as entirely unfounded.

33 Pursuant to Article 119 of its Rules of Procedure, where the appeal is clearly inadmissible or clearly unfounded, the Court may at any time dismiss it by reasoned order.

The non-payment of certain invoices

The first plea in law

34 The appellant considers that the Court of First Instance erred in its appraisal of the facts, leading to a misapplication of the law. This plea raises three points.

35 First, the appellant alleges that the Court of First Instance was wrong to consider that it had failed to produce information concerning the invoices rejected by the delegate incorporating price increases for cement, steel and bitumen. Next, referring to Consulint' s letter of 13 June 1990 stating that the "unit-price of the sub-base materials had not been increased", the appellant maintains that the Court of First Instance misapprehended the facts by finding that it had underestimated the availability, close to the sites, of one of the required components. Finally, it considers that the Court of First Instance did not correctly appraise the facts when it stated that the three invoices issued by San Marco following the Commission' s decision to grant additional funding (notified to the appellant on 27 December 1989) related to expenses incurred after it had been informed of that decision.

36 Under the first paragraph of Article 49 of the EC Statute of the Court of Justice, an appeal may be brought against a decision of the Court of First Instance. Under Article 168a of the Treaty and Article 51 of that Statute, the appeal is to be limited to points of law and must be based on grounds of lack of competence of the Court of First Instance, a breach of procedure before that

court which adversely affects the interests of the appellant or infringement of Community law by that court. Article 112(1)(c) of the Rules of Procedure of the Court of Justice provides that the appeal must contain the pleas in law and legal arguments relied on.

37 It follows from those provisions that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal (see the order in Case C-173/95 P Hogan v Court of Justice [1995] ECR I-4905, paragraph 20).

38 According to settled case-law, that requirement is not satisfied by an appeal which confines itself to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by the court. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction under Article 49 of the EC Statute to undertake (see in particular the order dated 24 April 1996 in Case C-87/95 P CNPAAP v Council [1996] ECR I-0000, paragraph 30).

39 It also follows from the foregoing provisions that an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The Court of First Instance has exclusive jurisdiction, first, to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has established or assessed the facts, the Court of Justice has jurisdiction under Article 168a of the Treaty to review the legal characterization of those facts by the Court of First Instance and the legal conclusions it has drawn from them (see Case C-136/92 P Commission v Brazzelli Lualdi and Others [1994] ECR I-1981, paragraphs 48 and 49).

40 The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it (see to that effect Commission v Brazzelli Lualdi, cited above, paragraph 66).

41 As regards the three points raised under the first plea, suffice it to note that the appellant has failed, first, to put forward arguments establishing that the Court of First Instance erred in law in making its assessment and, second, to specify the contested elements of the judgment which it seeks to have set aside. The appellant does not allege breach of any rule of law and merely challenges the appraisal of the facts by the Court of First Instance.

42 The first plea in law must therefore be rejected as clearly inadmissible.

The second plea in law

43 Relying on Article 56 of the Special Conditions of the contract, which concerns relations between the engineer and the successful tenderer, the appellant considers that it was required strictly to comply with the instructions given to it by Consulint, including its decision to change the composition of the sub-base for technical reasons. It was therefore entitled to argue before the Court of First Instance that the delegate had exceeded his powers by refusing to endorse the invoices in respect of the access roads to the bridges over the Rivers Juba and Shebelli for reasons connected with changes to the sub-base.

44 The appellant is, however, merely repeating the arguments already raised at first instance and has advanced no argument showing that that the Court of First Instance erred in law in making its assessment. In paragraph 63 of the contested judgment, the Court of First Instance found that Consulint "can in no way be considered as having acted as an agent of the Commission" and in paragraph 62 that "the delegate was entitled to refuse to endorse the relevant invoices". The appellant does not contest those findings of law.

45 The second plea in law must therefore be rejected as clearly inadmissible.

The third and sixth pleas in law

46 The appellant alleges that the Commission did not make the payments in question within the time-limits laid down by the contract, with the result that interest is payable to it under the contract. Furthermore, it claims that the Commission did not observe Article 33 of the Special

Conditions pursuant to which payments made in Somalia were to be made in ECU and that it failed to pay in Somalia 12% of certain invoices which had already been settled as to 88% in Italy. Similarly, since the invoices of 7 February 1989, 5 March 1989, 5 April 1989, 8 May 1989 and 31 August 1989 had been approved, it was entitled to expect payment of those invoices as regards both the portion payable in Somalia and that payable in Italy. Since the part payable in Italy had been paid in due time, the delegate, by not paying the portion payable in Somalia, acted in breach of the appellant' s legitimate expectations.

47 Under Article 113(2) of the Rules of Procedure of the Court of Justice, the subject-matter of the proceedings before the Court of First Instance may not be changed in the appeal.

48 Moreover, under Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

49 Were a party to be allowed to put forward for the first time before the Court of Justice a plea in law which it had not raised before the Court of First Instance, that would enable it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the Court' s jurisdiction is confined to review of the assessment made by the Court of First Instance of the pleas argued before it (see to that effect Commission v Brazzelli Lualdi, cited above, paragraph 59).

50 In this case, it need merely be observed that the arguments put forward by the appellant in support of its third and sixth pleas in law were not raised by it at first instance.

51 Furthermore, the appellant has failed to put forward arguments showing that the Court of First Instance erred in law in making its assessment and to specify the contested elements of the judgment under appeal.

52 In those circumstances, the third and sixth pleas in law must be rejected as clearly inadmissible.

The fourth plea in law

53 Relying once again on Article 56 of the Special Conditions of the contract, the appellant considers that since the Commission paid without reservation the invoices for the first four bridges for which the same modified sub-base had been used, the delegate was not entitled to refuse to endorse the invoices for the last two bridges and the Commission and its delegate were not entitled to refuse payment of the invoices because of the problem concerning the sub-base. In so doing, the respondent acted in breach of the appellant' s legitimate expectations.

54 That allegation was not made by the appellant before the Court of First Instance.

55 It is true that, in its first plea in law (in so far as it concerned more particularly the third non-contractual fault of the Commission) raised before the Court of First Instance, the appellant claimed that the Commission had acted in breach of its legitimate expectations. However, it maintained that the acts or omissions which had given rise to those expectations related only to the manner in which the Commission had granted additional funding in order to cope with the changes requested by the National Authorizing Officer and the manner in which it had altered Addendum No 1 and sent it for signature.

56 Moreover, the appellant has neither put forward any arguments showing that the Court of First Instance erred in law in making its assessment nor specified the contested elements of the judgment under appeal.

57 The fourth plea in law must therefore be rejected as clearly inadmissible.

The fifth plea in law

58 The appellant considers that the Commission acted in breach of the principle of the protection of legitimate expectations by refusing to sign Addendum No 1 which it had drawn up after announcing the allocation of funds. It maintains that, by his attitude and, in particular, by approving the change to the sub-base for the first four bridges and the request for additional funds and by drawing up the addendum without any reference to the problem of the sub-base, the delegate led the appellant to believe that Addendum No 1 would be signed and that the additional funds would be paid.

59 It need merely be pointed out that the appellant is simply repeating the arguments put forward at first instance and that it has not advanced any argument showing that the Court of First Instance erred in law in making its assessment.

60 The fifth plea merely reiterates part of the first plea raised by the appellant before the Court of First Instance. As is apparent from paragraph 36 of the contested judgment, the appellant maintained before that court that "in the manner in which it granted additional funding to pay for the changes requested by the National Authorizing Officer and in the manner in which it amended Addendum No 1 and sent it for signature, the applicant was entitled to expect the Commission to sign the addendum and to pay the invoices relating to it". In effect, the fifth plea seeks a re-examination of that part of the first plea in law raised before the Court of First Instance, which was rejected in paragraphs 70 to 75 of the contested judgment, and of the facts which, according to the appellant, founded a legitimate expectation on its part.

61 This plea in law must therefore be rejected as clearly inadmissible.

The seventh plea in law

62 Although the Court of First Instance considered that the delegate' s refusal to endorse the invoices in question by reason of the increase in the price of cement, steel and bitumen and of the increase in the unit-price of the sub-base materials was justified, the appellant maintains that it was entitled to receive payment of such part of the invoices as did not concern those two matters. In that connection, it considers that all the necessary information was set out in the documents produced to the Court of First Instance.

63 That complaint was not put forward at first instance, the appellant having at that time merely argued that that delegate was not entitled to refuse to endorse the invoices in question and that, in any event, those refusals were not justified in this case (paragraphs 33 to 37 of the contested judgment).

64 Furthermore, in paragraph 51 of the contested judgment, the Court of First Instance referred to a question put to the appellant in order to determine whether its application was limited to the increase in the price of cement, steel and bitumen and to the increase in the unit-price of the sub-base materials and, if that was not the case, to enable the appellant to adduce relevant evidence. After receiving the appellant' s reply, the Court of First Instance found, in paragraph 52, that it could assess the appellant' s claim only to the extent to which it was founded on an allegedly wrongful refusal on the part of the delegate to endorse invoices incorporating those price increases.

65 In those circumstances, the appellant' s seventh plea in law must be rejected as clearly inadmissible.

The eighth plea in law

66 In paragraph 101 of the contested judgment, the Court of First Instance found that the appellant had adduced no argument or evidence pointing to any malfunction on the part of the Commission' s administration.

67 The appellant contests that finding, stating in particular that it had referred in its application to the improper way in which the invoices, questions concerning the sub-base and Addendum No 1 were dealt with. Similarly, it maintains that the handwritten note sent by the delegate to his superior in Brussels on 30 June 1990 is evidence of the fact that the relevant Commission departments were not functioning properly.

68 The appellant is merely contesting the appraisal of the facts by the Court of First Instance.

69 In any event, in paragraph 100 of its judgment, the Court of First Instance found that, in the absence of any duty on the part of the Commission to meet the appellant' s claim for payment, that argument had to be dismissed as irrelevant. The appellant has not put forward any argument showing that the Court of First Instance erred in law in making that appraisal.

70 In those circumstances, the appellant' s eighth plea in law must be rejected as clearly inadmissible.

The Commission' s failure to pay compensation following termination of the contract

The first and third pleas in law

71 The appellant maintains that the Commission decision contained in the letters of 15 April and 11 May 1992 did not state the reasons on which it was based, as required by Article 190 of the EC Treaty. Furthermore, relying on Article 60 of the Financial Regulation applicable to the Fifth EDF, which concerns delays in procedures relative to projects financed by the EDF, the appellant considers that the Commission failed in its general duty to protect the financial interests of Community undertakings working under EDF contracts.

72 Those pleas in law were not raised by the appellant before the Court of First Instance and are therefore clearly inadmissible.

The second plea in law

73 The appellant alleges that the Court of First Instance misinterpreted and misapplied Article 60 of the Financial Regulation applicable to the Fifth EDF and Article 93(1) of the General Conditions and made an erroneous appraisal of the duty imposed on the Commission to meet the appellant' s claim.

74 Article 93(1) of the General Conditions provides that, where the administration unilaterally orders the definitive cessation of performance of the contract, the latter is to be terminated forthwith and the contractor is entitled to compensation for any loss arising from such termination, where it is not attributable to him.

75 The second plea is divided into two parts.

The first part of the second plea

76 The appellant claims that the Commission, acting as Chief Authorizing Officer and as National Authorizing Officer under Article 60 of the Financial Regulation applicable to the Fifth EDF and as the administration under Article 93(1) of the General Conditions, undertook, in the letter of 1 March 1991, to pay to the appellant, for the work already carried out, the sums which were duly justified. The total amount was ECU 582 022.74.

77 The Commission contends that that argument must be rejected as inadmissible. In its view, the appellant is, in the main, merely repeating the arguments put forward at first instance.

78 The first part of the second plea in law must be held to be admissible. The appellant in fact criticizes, albeit by implication but nevertheless clearly, the finding made by the Court of First Instance in paragraph 93 of the contested judgment to the effect that Article 60 of the Financial Regulation applicable to the Fifth EDF allows, but does not oblige, the Commission to make payments to a contractor where delays in clearance or authorization occur at national level. The appellant also considers that it is apparent from the wording of Article 60 of that regulation, read in conjunction with Article 93(1) of the General Conditions, that the Commission is under an obligation to pay the sums legally and contractually due to the appellant since the former acted as Chief Authorizing Officer and as National Authorizing Officer.

79 Nevertheless, this first part of the second plea in law is clearly unfounded. It is apparent from the clear and precise terms of Article 60 of the Financial Regulation applicable to the Fifth EDF that the Chief Authorizing Officer may take all appropriate measures to obviate further delay in clearance, authorization or payment which is likely to call into question the full performance of a contract. However, it does not follow from the fact that the Commission decided to terminate the contract in question, under Article 93(1) of the General Conditions, that the power vested in it became an obligation incumbent upon it. As the Court of First Instance was right to point out in paragraph 91 of the contested judgment, if the appellant considers that it is contractually entitled to certain amounts, that is a matter to be determined by arbitration in accordance with Article 132 of and Annex XIII to the Second Lomé Convention.

The second part of the second plea

80 The appellant maintains that, pursuant to Article 93(1) of the General Conditions and following the letter of 1 March 1991, the Commission was under an obligation to compensate it for the loss resulting from termination of the contract.

81 It is unnecessary to consider that line of argument, since the appellant is merely challenging the assessment of the facts made by the Court of First Instance in paragraph 107 of the contested judgment. There the Court of First Instance found that the appellant had not established that any damage alleged to have been suffered by it resulted from the termination of

the contract by the Chief Authorizing Officer. It follows that the second part of the second plea must be rejected as clearly inadmissible.

The fourth plea in law

82 The appellant alleges that the Court of First Instance erred in failing to recognize the fault on the part of the Commission which caused the damage existing at the time when the contract was terminated and in finding that such damage had not been established. It maintains that it was on the instructions of Consulint that it left materials on site at the last two bridges.

83 It need merely be pointed out that the appellant has not put forward any argument showing that the Court of First Instance erred in law in making its assessment, nor has it specified the contested elements of the judgment which it seeks to have set aside. Moreover, the appellant does not allege infringement of any rule of law but merely challenges the appraisal of the facts by the Court of First Instance.

84 In any event, the Court of First Instance found, in paragraph 108 of the contested judgment, that the appellant had not proved that it was still on the site at the date of termination of the contract and, in paragraph 118, that it had not put forward any argument or produced any evidence showing, not only that the Commission committed some fault, but also that the loss said to have been suffered by the appellant was caused by the fault alleged and not by civil war, theft or other extraneous cause. The appellant merely challenges that factual assessment. Moreover, it has not put forward any argument showing that the Court of First Instance erred in law in making that assessment.

85 In those circumstances, the fourth plea in law must be rejected as clearly inadmissible.

86 It follows from all the foregoing considerations that the pleas in law advanced by the appellant in support of its appeal are either clearly inadmissible or clearly unfounded. The appeal must therefore be dismissed pursuant to Article 119 of the Rules of Procedure.

Decision on costs

Costs

87 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the appellant has been unsuccessful it must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT

hereby orders:

1. The appeal is dismissed.

2. San Marco Impex Italiana Srl is ordered to bear its own costs and to pay the costs incurred by the Commission.

Luxembourg, 17 September 1996.