OPINION OF ADVOCATE GENERAL JACOBS
delivered on 1 July 1992 *

My Lords,

1. Cebag, the applicant in this case, was engaged by the Commission to supply rape seed oil as food aid to Uganda, Mozambique and Bangladesh under a number of tendering procedures designated as actions Nos 401/89, 759/89, 760/89 and 904/89. The four procedures were governed by a number of Commission regulations adopted pursuant to Commission Regulation (EEC) No 2200/87 of 8 July 1987 laying down general rules for the mobilization in the Community of products to be supplied as Community food aid (OJ 1987 L 204, p. 1).

2. The tenders in question were awarded in February 1990 and the deliveries were made between April and August 1990. Pursuant to Article 12(2) of Regulation No 2200/87, the applicant provided delivery securities. In each case the delivery security was released before the whole consignment had been delivered. The Commission presumably released the security under Article 22(2)(a), last indent, of Regulation No 2200/87 following the constitution of a 'security on the advance'. For a variety of reasons the goods were in each case delivered late. When it came to make final payment under each of the four transactions the Commission made deductions for late delivery under Article 22(2)(b), third indent, of Regulation No 2200/87. The total sum deducted amounted to ECU 104, 508.61. The deductions were made on 23 October 1990 in the case of action No 760/89 (Mozambique), 31 October 1990 in the case of action No 401/89 (Uganda) and action No 759/89 (Mozambique) and on 21 January 1991 in the case of action No 904/89 (Bangladesh).

3. In its judgments of 12 December 1990 in Case C-172/89 *Vandemoortele* v *Commission* [1990] ECR I-4677 and of 21 March 1991 Case C-226/89 *Haniel Spedition* v *Commission* [1991] ECR I-1599 the Court held that the Commission had no power to make deductions for late delivery when making final payment on food aid tenders governed by Regulation No 2200/87. Expressly relying on the *Vandemoortele* judgment, the applicant asked the Commission, on 4 March 1991, not to make the deductions. By a telex message dated 27 March 1991, the Commission replied that the *Vandemoortele* judgment applied only to payments made after 23 January 1991 (i. e. the date on which the judgment was published in the Official Journal).

4. On 27 May 1991 Cebag lodged an application requesting the Court to:

* Original language: English.

(1) order the Commission to pay it ECU 104, 508.61 plus interest in accordance with Article 18 of Regulation No 2200/87;

(2) annul, or partially annul or at least declare invalid, the Commission's decision contained in its telex message of 27 March 1991;

(3) take any other measures that the Court should deem necessary;

(4) order the Commission to pay the costs.

5. In the defence the Commission stated that the telex message of 27 March 1991 was concerned only with the operations in respect of Uganda and Mozambique. As regards the Bangladesh operation, it had decided to reimburse the deduction for late delivery on the ground that, the payment having been made on 21 January 1991, Cebag's request, dated 4 March 1991, could be regarded as 'a complaint lodged in good time against the final payment'. Cebag amended its claim accordingly, in the reply, and now asks for ECU 65, 093.10, plus interest.

Substance

6. In view of the Court's previous judgments in *Vandemoortele* and *Haniel*, there can be no doubt that the Commission did not have the power under Regulation No 2200/87 to make deductions from the final payments owed to the applicant. The only issue that arises in this case is whether the application is admissible. If it is held to be admissible, the applicant must succeed on the substance.

Admissibility

7. The application is stated to be founded on Article 181 of the EEC Treaty, on Article 23 of Regulation No 2200/87 and on the provisions of the contracts which it says were concluded between the applicant and the Commission. In its defence the Commission contends that the application cannot be founded on Article 181 and raises Article 173 as the proper basis for this type of claim, although it goes on to argue that the action would in any event be time-barred if it had been brought under Article 173. In the reply, the applicant pleads Article 173 as an alternative basis for its claim, relying on the telex message of 27 March 1991 as the reviewable act. The Commission argues in the rejoinder that the applicant is barred from pleading Article 173 for the first time in the reply, by virtue of Article 42(2) of the Rules of Procedure. The Commission also maintains that the telex message of 27 March 1991 is not a reviewable act since it merely confirmed the earlier decisions — taken in October 1990 — to make deductions for late delivery.

8. It will be recalled that in *Haniel* the Commission contended that a similar application

should be regarded as being based on Article 181 of the Treaty, in conjunction with Article 23 of Regulation No 2200/87, in so far as the applicant claimed the payment of a sum of money. Article 181 of the Treaty provides:

'The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community whether that contract be governed by public or private law.'

Article 23 of Regulation No 2200/87 provides:

'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.'

Thus the Commission regarded Article 23 of Regulation No 2200/87 as an 'arbitration clause' within the meaning of Article 181 of the Treaty.

9. In my Opinions in *Vandemoortele* and *Haniel* I questioned whether an action of this type could properly be founded on Article 181 of the Treaty. Since the Opinion in *Haniel* was not published in full in the European Court Reports, I will quote in full the passage in which I set out the objections to a contractual classification of this type of action (paragraphs 9 to 12):

'... In the present case the Commission relies expressly on Article 181, but I am not convinced that the Commission is right on that point. In the first place, Article 181 envisages jurisdiction conferred on the Court by a contract, not by a regulation of the Commission.

Secondly, I question whether the relationship between the Commission and the applicant is really of a contractual nature at all. It seems to me to be more of a statutory nature, since the rights and obligations of the parties are laid down unilaterally by a legislative act and there is no possibility for the Commission and the tenderer to vary them by negotiation. There is a fundamental difference between a regulation and a contract, even a standard-form contract or "contrat d'adhésion". If the relationship were contractual, then even in the case of a standard-form contract or "contrat d'adhésion" it would be open to the parties to vary the terms of the contract and to adopt, for example, a different jurisdiction clause. In the present case both the applicant and the Commission were bound by the terms of the regulation.

Thirdly, if the present case is treated as a contractual dispute for which the Court is competent under Article 181 of the Treaty, certain practical difficulties ensue. Under Article 215, first paragraph, the contractual liability of the Community is governed by the law applicable to the contract in question. As I suggested in my Opinion in

Vandemoortele, one would expect an "arbitration clause" within the meaning of Article 181 to be accompanied by a clause specifying the law applicable to the contract. In the absence of such a choice of law, it would be for the Court to determine the proper law of the contract. Yet it would be strange if a Community regulation fell to be interpreted differently, or had different consequences, according to the relevant national rules of contract. It is unnecessary to reach that result, since the relationship between the applicant and the Commission is governed exhaustively by the legislation. It is unnecessary to have recourse to Article 181 at all. That view has the advantage also of avoiding the conclusion reached by the Commission that the action is based in part upon Article 173, in part upon Article 181.

I conclude that the present action cannot be regarded as a contractual action founded on Article 181 of the Treaty. It must be treated as an action for annulment under Article 173, second paragraph. ...'

10. In its judgments in *Haniel* and *Vandemoortele* the Court did not expressly state whether its jurisdiction was founded on Article 173 or Article 181. It simply annulled the decisions to make deductions for late delivery. In *Haniel* it also ordered the Commission to pay a sum of money, plus interest, to the applicant.

11. It might be thought, however, that in those cases the Court made an implied decision as to the basis for its jurisdiction in such proceedings as these. In particular, the fact that in *Haniel* the Court ordered the Commission to pay a sum of money might be taken to suggest that the Court regarded the application as a contractual claim under Article 181. Strictly speaking, it would seem that the Court could not make such an order under Article 173. On the other hand, it could have achieved exactly the same result under that article, since the Commission would in any event have been obliged to take the steps needed to comply with the judgment under Article 176 of the Treaty.

12. The Commission does not read the *Haniel* judgment as confirming the position it took in that case. On the contrary, it relies on the *Vandemoortele* and *Haniel* judgments to argue that, contrary to the position it took in *Haniel*, the transactions entered into pursuant to Regulation No 2200/87 are not contractual and that in consequence Article 23 of that regulation cannot be construed as an arbitration clause under Article 181 of the Treaty.

13. There is no doubt that an undertaking in Cebag's situation may in principle use Article 173, second paragraph, to contest a Commission decision informing it that deductions are to be made from the sum payable to it in connection with the execution of a food aid

programme. This is a typical example of a natural or legal person calling upon the Court to review the legality of a decision addressed to it by the Commission; as such it falls squarely within the terms of Article 173, second paragraph. I shall therefore first examine whether the present action is admissible under that provision.

14. The Commission objects to admissibility under Article 173 on two grounds. First, it contends that Article 42(2) of the Rules of Procedure precludes Cebag from changing the basis of its claim — from Article 181 to Article 173 — in the reply. Secondly, it maintains that an application under Article 173 would in any case be out of time.

15. The first subparagraph of Article 42(2) of the Rules of Procedure states:

'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.'

16. If Article 42(2) were applied strictly, it is extremely doubtful whether an applicant would be allowed to transform, at the stage of the reply, a contractual action founded on Article 181 of the Treaty into an action for annulment under Article 173. The case-law of the Court suggests that the legal basis of an action cannot be changed in the course of the proceedings: see Case 17/57 *Steenkolenmijnen* v *High Authority* [1959] ECR 1, at p. 8, and Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, at p. 3191, paragraph 26.

17. However, I do not think that it would be equitable to apply Article 42(2) strictly in the special circumstances of the present case. The confusion about the proper basis for the type of claim pursued by the applicant is due largely to the terms of Article 23 of Regulation No 2200/87 and was not dissipated by the Court's judgments in *Vandemoortele* and *Haniel*. If in the *Vandemoortele* judgment, which directly provoked the present application, the Court had clarified the basis for its jurisdiction, Cebag would have been in no doubt as to the correct way to frame its application. Moreover, in *Vandemoortele* and *Haniel* the applicants did not specify the Treaty provision on which the jurisdiction of the Court was founded and yet the Court still felt able to entertain claims for annulment and compensation. It would be strange if the applicant who specified a basis for the Court's jurisdiction, albeit an incorrect one, were to be treated less favourably than an applicant who specified no basis at all. In any event, Cebag has not in my view modified the substance of its application. A claim for the annulment of the Commission's decision of 27 March 1991 formed part of the relief sought by Cebag in its application. The Commission cannot argue that by changing the basis for that claim from Article 181 to Article 173 Cebag has prevented it from preparing an effective defence. Of course, the applicant cannot amend its claims in such a way as to circumvent the rules on time-limits. If, for example, the claim under Article 173 were time-barred, it would not be

possible to begin by pleading a claim under Article 181 and then transform it into an action for annulment under Article 173. I shall examine in the following paragraphs whether the claim under Article 173 is out of time.

18. The act challenged by Cebag is the telex message of 27 March 1991 in which the Commission refused to reconsider in the light of the *Vandemoortele* judgment the deductions made in October 1990 in relation to the supplies to Mozambique and Uganda. The Commission maintains that that decision is not a reviewable act inasmuch as it merely confirmed decisions which could no longer be challenged because the two-month period laid down in Article 173 had already expired. Cebag argues that the decision of 27 March 1991 was not purely confirmatory, since it expressed the results of a balancing of interests which the Commission was required to carry out as a result of the *Vandemoortele* judgment.

19. I do not see how Cebag's argument can be accepted. Certainly the Commission was compelled to apply the principles laid down in the *Vandemoortele* judgment of 12 December 1990 to all decisions taken after the date of that judgment (and not just, as the Commission suggests, to decisions taken after the publication of the judgment in the Official Journal). Thus when it came to make the final settlement in respect of the Bangladesh operation in January 1991 it was precluded from making any deduction for late delivery. The Commission has in substance accepted that. But it was not compelled to re-examine legal situations that had been definitively settled before the date of the *Vandemoortele* judgment. Cebag could have challenged the decisions taken in October 1990 within the two-month period laid down in Article 173. Once that period had expired, the decisions could no longer be challenged under Article 173. The judgment of 12 December 1990 cannot have changed that state of affairs. According to the established case-law of the Court, a judgment of the Court given in proceedings brought by a different party cannot have the effect of reopening a limitation period: Case 43/64 *Müller* v *Council* [1965] ECR 385; Case 55/64 *Lens* v *Court of Justice* [1965] ECR 837; and Case 125/87 *Brown* v *Court of Justice* [1988] ECR 1619. Although those judgments were all given in staff cases, the same principle must apply to actions for annulment under Article 173. Any other solution would be contrary to the principle of legal certainty; the institutions might be compelled to reconsider decisions adopted many years earlier if a judgment of the Court had the effect of reopening limitation periods in favour of persons who had not challenged decisions affecting them in good time. I conclude therefore that Cebag's application is out of time in so far as it is based on Article 173.

20. The fact that the application is not admissible under Article 173 does not mean

that it cannot be admitted under some other provision of the Treaty. In fact, it seems clear to me that the present type of claim must in principle be capable of being pursued under some provision of the Treaty other than Article 173. Although much argument has been addressed to the question whether Cebag has a contractual remedy under Article 181, no one appears to have considered the alternative possibility of a non-contractual remedy under Article 178 of the Treaty. And yet it would be logical to consider that, if Cebag's claim is not contractual, it must, almost by definition, be non-contractual.

21. Indeed it may be unnecessary, in the circumstances of this case, to decide whether the action is contractual or non-contractual. The substantive conditions of liability do not appear to differ: either way, the Commission is liable for an unlawful act consisting in the making of deductions from the sums payable to Cebag when there was no legal basis for doing so in the applicable legislation. The unlawfulness of the act cannot be doubted, in the light of the *Vandemoortele* judgment; nor is there any doubt that Cebag suffered damage as a result. It is equally clear that interest is payable on Cebag's claim under Article 18(6) of Regulation No 2200/87, which refers to 'the Commission's normal rate', and that it is payable at that rate whether the basis of the claim is contractual or non-contractual, since that is the rate requested by the applicant: see Joined Cases C-104/89 and C-37/90 *Mulder and Others* [1992] ECR I-3061, at paragraph 36.

22. As regards procedural conditions, the only respect in which the two remedies might differ significantly is that different limitation periods might apply. An action for non-contractual liability under Article 178 of the Treaty is subject to the five-year limitation period laid down in Article 43 of the Statute of the Court of Justice of the EEC. A contractual action under Article 181 is presumably subject to the limitation period laid down in the 'law applicable to the contract in question' (see Article 215, first paragraph, of the Treaty). In the absence of a choice-of-law clause, it would not be easy to determine the applicable law and, as I pointed out in my Opinion in *Haniel*, it would hardly be desirable if food aid operations were to be subject to different national laws, depending perhaps on the place of establishment of the successful tenderer. The 'law applicable to the contract' might of course be taken to mean nothing more than the law contained in Regulation No 2200/87, supplemented where necessary by the general principles of Community law. Since the regulation does not lay down a limitation period, one solution would be to apply Article 43 of the Statute by analogy and to hold that the action must be brought within a period of five years from the occurrence of the event giving rise to liability. If that solution is adopted, it makes no difference whether the present action is regarded as contractual or non-contractual. An alternative solution would be to hold that, in the absence of any express

rule on time-limits, the contractual action is only time-barred if the applicant's delay in commencing proceedings amounts to waiver of the right of action: see Case 25/60 *De Bruyn* v *Parliament* [1962] ECR 21, at p. 28. On neither view could the present action be regarded as out of time.

23. It remains finally to be considered whether a contractual or non-contractual remedy may be pursued where the action has the same object as an action for annulment which is inadmissible because, for example, it is time-barred. It was once held by the Court that an administrative measure which has not been annulled cannot of itself constitute a wrongful act on the part of the administration and so cannot give rise to an action for damages: Case 25/62 *Plaumann* v *Commission* [1963] ECR 95.

24. However, that decision was severely criticized (see the authors cited by Advocate General Roemer in his Opinion in Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, at p. 991) and in more recent judgments the Court has emphasized that the action for damages is of an autonomous nature and is subject to its own conditions of admissibility: see, for example, Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle* v *Council and Commission* [1981] ECR 3211. *A fortiori*, the contractual action provided for in Article 181 must also be of an autonomous nature.

25. It is true that in Case 175/84 *Krohn* v *Commission* [1986] ECR 753 (at paragraph 33) the Court appeared to uphold the *Plaumann* decision by confining it to the exceptional case in which the action for damages seeks payment of an amount equal to the amount that the applicant was required to pay under an individual decision, so that the application seeks in effect the withdrawal of that individual decision. It is also true that in a number of staff cases the Court has held that, although a person may bring an action for damages without being obliged to seek the annulment of the illegal measure which caused him damage, he may not by that means circumvent the inadmissibility of an action for annulment which concerns the same illegality and which has the same financial end in view: see, for example, Case 543/79 *Birke* v *Commission and Council* [1981] ECR 2669, at paragraph 28. However, that decision and others like it can be explained on the ground that a servant of the Community cannot in any event bring an action under Article 178 in respect of a claim which originates in the relationship of employment between him and his institution: see, for example, Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171, at p. 1181, paragraph 7.

26. As for the Court's attempt to distinguish in *Krohn* between situations in which the action for damages is completely autonomous and those in which the action for damages cannot be used because it would obtain the same result as an action for annulment which is inadmissible, I doubt very much whether such a distinction can be defended. As Advocate General Mancini put it in his Opinion in *Krohn* (at p. 762):

'... either an action for compensation is an independent right of action or it is not; if it is, it is not apparent why the choice of that means of legal recourse, with its more limited effects, should be regarded automatically as a means of circumventing the procedure for declaring a measure void'.

It must, moreover, be borne in mind that the conditions of admissibility laid down by the second paragraph of Article 173, as regards both *locus standi* and the time-limit for commencing proceedings, are extremely restrictive. If those conditions were extended beyond their natural sphere and applied to other forms of action, the system of legal protection envisaged by the Treaty would be severely weakened.

27. I conclude from the above that the fact that the action would, if founded upon Article 173, be time-barred does not preclude the Court from awarding Cebag damages on account of the contractual or non-contractual liability of the Commission.

Conclusion

28. Accordingly, I am of the opinion that the Court should:

(1) order the Commission to pay the applicant ECU 65, 093.10, plus interest at the Commission's normal rate as from 23 October 1990 in the case of action No 760/89 and as from 31 October 1990 in the case of actions Nos 401/89 and 759/89;

(2) order the Commission to pay the costs.