

# Joined Cases T-428/07 and T-455/07

## Centre d'étude et de valorisation des algues SA (CEVA)

v

## European Commission

(Arbitration clause — Contracts entered into under a specific research, technological development and demonstration programme in the field of 'Quality of life and management of living resources (1998-2002)' — Seahealth and Biopal projects — Debit notes — Applications for annulment — Reclassification of the actions — Admissibility — Rule that the parties should be heard and rights of the defence — Recovery of all the financial contributions paid by the European Union — Serious financial irregularities)

Judgment of the General Court (Sixth Chamber), 17 June 2010 . . . . . II - 2435

### Summary of the Judgment

1. *Actions for annulment — Application concerning in reality a contractual dispute — Reclassification of the action — Conditions*  
(Arts 230 EC and 238 EC; Rules of Procedure of the General Court, Art. 44(1)(c))
2. *Procedure — Referral to the General Court under an arbitration clause — Contracts entered into under a specific research, technological development and demonstration programme — Obligation on the Commission to observe the principles governing contracts — Settlement of debit notes — Effects*  
(Art. 238 EC)

3. *Procedure — Referral to the General Court under an arbitration clause — Contracts entered into under a specific research, technological development and demonstration programme — Right to be heard during the audit procedure — Seizure by the European Anti-Fraud Office of supporting documents — No effect on that right — Infringement of that right — Consequences*  
(Art. 238 EC)
  
4. *Procedure — Referral to the General Court under an arbitration clause — Contracts entered into under a specific research, technological development and demonstration programme — Claims seeking the appointment of an expert — Examination by the Community judicature under the rules of procedure on measures of inquiry*  
(Art. 238 EC; Rules of Procedure of the General Court, Arts 65 to 67)
  
5. *Procedure — Referral to the General Court under an arbitration clause — Contracts entered into under a specific research, technological development and demonstration programme — Serious financial irregularities*  
(Art. 238 EC)

1. When an action for annulment or an action for damages is brought before the Court when the dispute is, in point of fact, contractual in nature, the Court reclassifies the action, provided that the conditions for such a reclassification are satisfied. When faced with a dispute which is contractual in nature, the Court considers itself unable to reclassify an action for annulment either where the applicant's express intention not to base his application on Article 238 EC precludes such a reclassification or where the action is not based on any plea alleging

infringement of the rules governing the contractual relationship in question, whether they be contractual clauses or provisions of the national law designated in the contract.

It is sufficient that one of the pleas in law characteristic of an action based on Article 238 EC is put forward in the application in accordance with Article 44(1)(c)

of the Rules of Procedure of the General Court in order for that action to be capable of being reclassified without any infringement of the rights of defence of the defendant institution.

(see paras 57, 59, 61)

2. In contractual matters, the Commission must observe the principles governing contracts. In principle, it does not have the right, in that context, to adopt unilateral measures. Consequently, the Commission is not entitled to address any measure having the nature of a decision to the contractor concerned with a view to the latter's performance of his contractual obligations of a financial nature, but is required, where appropriate, to bring a claim for payment before the court having jurisdiction.

Moreover, the settlement of the debit notes by the other party to the contract, despite the fact that they were not in the nature of decisions, cannot be considered a waiver of any claim it may have to payment of the sums in question. Only a waiver by that party of that claim or the fact that that claim is time-barred, neither of which has been alleged by the Commission, could cause its claims for payment to fail, if they are justified by the clauses of the contracts.

(see paras 68, 70)

3. The fact that the supporting documents held by a contractor were seized by the European Anti-Fraud Office and that they are covered by the exceptions to the right of access to documents provided for by Regulation No 1049/2001 cannot justify negating the right of that contractor to be heard in accordance with Article 26(3) of Annex II of the contracts in question during the audit procedure.

However, with regard to the legal consequences of the infringement of that contractor's right to be heard, in the context of an action to enforce contractual liability, such an irregularity is not, on its own, such as to justify a possible order against the Commission to pay to the applicant the sums which it claims. In the context of actions based on Article 238 EC, the Commission's contractual liability must be assessed in the light of all the relevant clauses of the contracts in question, relied on by the parties, and on the basis of all the available evidence before the Court, having due regard to the rule that the parties must be heard and to the rights of the defence.

(see paras 89-90)

4. In accordance with the principle that each court applies its own procedural rules, the claims seeking the appointment of an

expert must be examined by the Court in the light of the provisions of Articles 65 to 67 of the Rules of Procedure, concerning measures of inquiry.

irregularities, does not entitle the Commission to avoid the principle that contracts must be performed in good faith and that contractual clauses must not be applied unfairly, by assuming a discretionary power in the interpretation and application of those clauses.

(see para. 108)

5. Where fraud or serious financial irregularities are discovered during a financial audit, Article 3(5) of Annex II of the contracts in question provides for the possibility for the Commission to recover the whole of the financial contribution paid by the Union and thus has a deterrent purpose.

In view of the scale and gravity of the manifest financial irregularities discovered in the course of the audit and confirmed by the documents from the criminal investigation which have been discussed in this case between the parties, the recovery by the Commission of the whole of the financial contribution paid under the contracts in question cannot be regarded as an unfair application of the clauses of Article 3(5). That recovery is therefore not disproportionate to the objectives pursued by the relevant clauses of the contracts in question.

However, the objective pursued by Article 3(5) of Annex II, which is to deter against fraud and serious financial

(see paras 128-129, 140)