# OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 24 September 1986 *

*Mr President,*
*Members of the Court,*

1. This dispute is exceptional inasmuch as it does not fall within the general scope of the Court's task of interpreting Community law. The case is not concerned with the provisions of the EEC Treaty at all, except for Article 181, which confers jurisdiction on the Court 'to give judgment pursuant to any arbitration clause' contained in a private law contract such as that concluded between the applicant, Fadex NV, and the Commission.

2. The facts are not in dispute. On 4 December 1979, Fadex NV sent to the competent department of the Commission a tender for the supply and the laying of a floor-covering (Dex-o-tex) for a television studio in Brussels. The tender set a price of BFR 150 480; there was an additional charge of BFR 13 230 for finishing work, which is not at issue in these proceedings.

On 14 December 1979, Mr Gibbels, the Head of the Buildings, Technical Services and Telecommunications Division of the Commission, sent to Fadex a purchase order which referred expressly to the above-mentioned tender and which contained the following statement: 'This order is governed by the provisions of our General Terms and Conditions Governing Supply Contracts, reference 10.070/IX/69'. A copy of that order, bearing the stamp and signature of the supplier, was returned by Fadex to the Commission for confirmation of the order.

On 31 January 1980 Fadex sent an invoice for the agreed amount in respect of the completed work. In spite of a formal demand dated 11 June 1980, the Commission refused to pay on the ground that the floor-covering in question did not provide a surface which was sufficiently level for the stability of the mobile cameras used in the studio. By a letter of 29 July 1980, Fadex protested to the Commission, stating *inter alia*:

'The specifications in your purchase order correspond exactly to the product which we have installed.

We were never informed of your requirements concerning either the evenness or the resistance of the floor-covering'.

3. The fact that the covering was not sufficiently level, which is the only complaint relied on by the Commission against the applicant, is not seriously denied by Fadex, which claims, however, that that defect is not attributable to it. In order to rule on its claim for the payment of BFR 150 480 plus interest the Court must consider whether, under the agreements binding the parties, Fadex was required to level the surface prior to laying the covering or, at least, to warn the defendant of the risk it was running by failing first to prepare the surface in question itself.

If the Court finds the claim well-founded, it must then rule on whether Fadex may rely

* Translated from the French.

on the penalty clause in its own Conditions of Sale to claim the sum of BFR 30 096 by way of a flat-rate surcharge.

**The claim for the payment of BFR 150 480**

4. The Commission contends that the Court should dismiss that claim, arguing that Fadex was fully aware that mobile television cameras require a sufficiently level surface in order to operate normally, that its attention had been specially drawn to that point in the course of previous discussions and that it had, moreover, referred to work completed by it on behalf of Radio-Télévision Belge in Brussels. In its rejoinder it laid particular emphasis on a letter dated 3 March 1980 addressed to it by Fadex. It maintains that in that letter the company made no attempt to deny that it had been aware of the specific requirements concerning the work in question and that it admitted that it had simply laid the covering without verifying the condition of the base, which clearly constitutes serious negligence.

Fadex, on the other hand, claims that the only contractual obligations which were binding on it related to the supply and laying of the covering and that it is for the Commission to prove that the defects relied upon by it are the result of an error made by Fadex in performing its contract. It maintains that in fact its tender of 4 December 1979 specified that the Commission should carry out the removal of the existing covering, and therefore the preparation of the surface on which the new covering was to be laid. It considers that it cannot be held responsible for failures of planning or execution attributable to the Commission.

5. By an internal memorandum dated 8 November 1979, the department for which the television studio was intended informed Mr Gibbels that the 'new covering should be level and without joins and sufficiently strong to bear the weight of cameras and their dollies'. The Commission was therefore aware that it was necessary for the surface to be flat.

The only documents made available to the Court which have contractual force are the purchase order of 14 December 1979 and Fadex's tender of 4 December 1979 to which it refers. No mention is made of the requirement in either of those documents and there is nothing to suggest that Fadex was aware of it or even that it should have been. Neither document requires Fadex to carry out the prior preparation of the surface; indeed the only reference to such preparation is the statement that it was for the Commission to carry out the 'removal of the existing covering'.

On the basis of those documents, Fadex was under a duty to supply and to lay a covering. Except in connection with the requirement that the base should be level, which does not seem to have been contractually binding on Fadex, it has not been established or even seriously alleged that the company failed to fulfil that duty correctly. The Commission cannot therefore raise the objection of non-performance.

The Commission should therefore be ordered to pay the applicant the amount claimed, namely BFR 150 480 plus interest from 11 June 1980, the date of the formal demand, at the legal rate provided for under Belgian law, which is applicable pursuant to Article 17 of the Commission's General Terms and Conditions.

**The penalty clause**

6. Fadex's claim in this connection is based on Article 13 of its own General Conditions

of Sale. The Commission is therefore well founded in its contention that the Court should dismiss that claim since by virtue of an express condition in the order of 14 December 1979 the disputed transaction was subject to the provisions of the Commission's General Terms and Conditions (Reference 10.070/IX/69), Article 2 (1) of which provides that

'The submission of a tender ... entails the tenderer's:

(i) ...

(ii) waiving his own conditions of sale ...'.

Accordingly I propose that the Court should

1. Order the Commission

   to pay Fadex NV, a public limited liability company incorporated under Belgian law, BFR 150 480 with interest at the legal rate provided for by Belgian law from 11 June 1980; and

   to pay the costs of these proceedings;

2. Dismiss the applicant's remaining claims.