JUDGMENT OF THE COURT (Fifth Chamber)
26 November 1985 *

In Case 318/81

Commission of the European Communities, represented by Gianluigi Campogrande and Sergio Fabro, members of the Commission's Legal Department, acting as Agents, assisted by Piero Ziccardi, of the Milan Bar, with an address for service at the office of Georges Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Luxembourg,

applicant,

v

CO.DE.MI. SpA, whose registered office is at Milan, represented by Mario Savanco, of the Milan Bar, and Ernest Arendt, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 34 B Rue Philippe-II,

defendant,

applicant by way of counterclaim,

APPLICATION for the cancellation of two public works contracts and compensation for damage resulting from difficulties encountered in the performance of those contracts,

THE COURT (Fifth Chamber)

composed of: Lord Mackenzie Stuart, President, U. Everling (President of Chamber), R. Joliet, O. Due and Y. Galmot, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 19 March 1985,

gives the following

* Language of the Case: Italian.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 23 December 1981 the Commission brought proceedings under Article 153 of the EAEC Treaty and Article 181 of the EEC Treaty for the cancellation of two contracts concluded by it with CO.DE.MI. and for an order that CO.DE.MI. pay compensation for the damage incurred by the Commission as a result of CO.DE.MI.'s failure properly to perform the said contracts.

2 On 14 December and 20 December 1979 the Joint Research Centre of the Commission of the European Communities, represented by its Deputy Director-General, entered into two public works contracts with the Italian company CO.DE.MI. SpA for the construction of two separate buildings within the precincts of the Ispra establishment.

3 The first contract (Contract No 1239-79-12-ISP I) concerned the construction of the building referred to as 'ingresso principale' (hereinafter referred to as the 'IP contract'); the second contract (Contract No 1244-79-12-ISP I) concerned the construction of the building referred to as the 'Management Building' (hereinafter referred to as the 'MB contract').

4 Article 2 of each contract provided that a number of annexed documents, including the general terms and conditions applicable to contracts awarded by the Joint Research Centre (February 1976, XIX/A/50/76-I) (hereinafter referred to as the 'Conditions') were an integral part of the contract.

5 Article 13 of each contract set the price of the works at LIT 1 068 351 682 and LIT 1 370 000 000 respectively for the IP and management buildings. Under Article 15 of each contract those prices were fixed and inalterable for the entire

duration of the works. Article 18 provided that half of the price was to be paid within 60 days following the signing of the contract and the balance within 60 days after the completion of each stage of the work.

6 The works were to be handed over within 450 days and 420 days respectively following the date of the memorandum recording the start of the works on the management and IP buildings. That memorandum was signed on 11 February 1980 for the management contract and on 20 March 1980 for the IP contract. Taking into account the suspension of the works agreed to by the Commission, the periods laid down in the contracts for the completion of the buildings therefore expired on 13 May 1981 in the case of the IP contract and on 30 June 1981 in the case of the management contract.

7 In the meantime the performance of the contracts gave rise to considerable disagreement between the Commission and CO.DE.MI. On 14 April 1981 CO.DE.MI. stopped all work and closed the sites, and informed the Commission of its action by telex on 21 April 1981.

8 By a registered letter dated 1 July 1981 the Commission notified CO.DE.MI. of the termination of the two contracts pursuant to Article 13 (3) of the Conditions, according to which 'without prejudice to any other rights available under the law governing public works contracts, in the event of non-performance by the contractor the Commission may, upon reasonable notice and if the contractor has failed to act, terminate the contract . . . '. The Commission gave CO.DE.MI. 15 days to make any remarks.

9 That letter also referred CO.DE.MI. to the provisions of Article 16 of the Conditions, a jurisdiction clause according to which: '. . . failing an amicable settlement, the Court of Justice of the European Communities shall have exclusive competence in any disputes relating to the performance or the interpretation of the contracts governed by these general terms and conditions. Jurisdiction is thus expressly vested in the said Court of Justice pursuant to Article 153 of the Treaty establishing the European Atomic Energy Community and Article 181 of the Treaty establishing the European Economic Community. No other court whatsoever shall have such competence.'

10 Finally, the letter referred CO.DE.MI. to Article 15 of the Conditions, regarding disputes and experts' reports, which provided that: '... in the event of a dispute arising where verification of the facts or technical examinations are required, either party may obtain an expert's report before bringing any legal proceedings. To this end, either party shall inform the other in writing of the subject of the dispute and shall propose the name of an expert. The other party shall be required to signify within 15 working days whether or not it accepts the proposed expert .... If the two parties do not succeed in reaching agreement, the required expert shall be appointed, at the request of the party which first makes application, by the President of the Court of Justice of the European Communities.' Accordingly, the Commission proposed to CO.DE.MI. the appointment of an expert of its choice to carry out inspections regarding the state of progress of the works.

11 CO.DE.MI. failed to reply within 15 days and the termination of the contracts therefore became final on 18 July 1981; the designation of the expert, however, did not become final, since CO.DE.MI. did not give its agreement as required by Article 15 of the Conditions.

12 The Commission therefore brought these proceedings, claiming in essence that the Court should declare the contracts terminated and order CO.DE.MI. to compensate the Commission for all the damage caused by its failure to perform, or properly to perform, its obligations. In particular, the Commission sought reimbursement of the unearned portion of the advance payment and damages for defects in the partially completed works, for the higher costs which will have to be borne by the Commission and for indirect loss suffered by the Commission.

13 On 31 March 1982 the Commission made a second application to the Court of Justice, requesting an interlocutory order appointing a technical expert in order to determine the quantitative and qualitative state of the operations, works and material on the sites in question and to determine any defects and deficiencies in the works. By order of 28 April 1982 (318/81 R, [1982] ECR 1325), the President of the Court ordered that a survey should be carried out as requested; the expert's report was received at the Court Registry on 8 November 1982.

14 In its defence, lodged at the Court Registry on 3 February 1982, CO.DE.MI. brought a counterclaim, asking in essence that the Court should reject all the Commission's conclusions, order the cancellation of the contracts in question on the ground of 'breach by the awarding authority, the fact that the cost of the work had become excessive or the fact that the alterations requested during the course of the works exceeded the limit of one-sixth of the contract price', and order the Commission to pay the remaining sum due, if any, for the work carried out and in any event to compensate CO.DE.MI. for the damage suffered by it, in particular loss of profit on the portion of the works which was not carried out and excessive site expenses.

15 By an order of 18 May 1983 (381/81 R, not reported), the President of the Court appointed a committee of three experts to prepare a further report intended to provide the Court with information on the following questions:

The determination of the liability incurred with regard to the suspension of the works by CO.DE.MI., the delay in commencing the works, the delay in carrying out the works and any defects in the portions of the works already completed;

The assessment of the damage alleged to have been suffered by each of the parties.

The report was received at the Court Registry on 9 August 1984 and the observations of CO.DE.MI. and of the Commission on the report were lodged at the Court Registry on 17 and 18 September 1984 respectively.

The claim and counterclaim that the Court should order the cancellation of the contracts in question

16 The Court must point out that, as has been stated above, the Commission itself unilaterally terminated the contracts without judicial proceedings on the basis of Article 13 (3) of the Conditions on 1 July 1981, with effect from 18 July 1981. The claims for cancellation of the contracts made by the Commission on 22 December 1981 and by CO.DE.MI. on 3 February 1982 were therefore devoid of any purpose on the date on which the proceedings were brought and on the date on which the counterclaim was made. Those claims must accordingly be dismissed as inadmissible.

The claim and counterclaim for damages

17 The following questions must be examined in succession: first, what law is applicable to the contracts; secondly, whether, under that law, CO.DE.MI. was entitled to terminate its contractual obligations unilaterally and suspend all activity on the site in question; thirdly, what the consequences are with regard to the liability of the parties and compensation for the alleged damage.

The law applicable to the contracts

18 Article 17 of the Conditions, on the applicable law, provides that 'save as may otherwise be expressly provided in the special terms and conditions, the contract shall be governed by Belgian law'.

19 CO.DE.MI. challenges the applicability of that provision on the following grounds:

The Conditions are of a purely general nature, without reference to particular contracts, and it is to such contracts that reference should be made in order to ascertain whether or not a derogation has been made. In each of the contracts at issue CO.DE.MI. inserted above its signature a declaration according to which, pursuant to Article 1341 of the Italian Civil Code, it expressly approved certain provisions of the Conditions; Article 17 was not amongst those provisions.

Since the contracts were concluded at Ispra for work to be carried out in Italy the natural law of the contract is Italian law, and Article 17 of the Conditions must therefore be regarded as a derogation from that law.

Sufficient reference is made in the contract to the provisions of the Italian Civil Code to rule out the conclusion that the parties intended to derogate from Italian law in the implementation of the contracts.

The general attitude of the parties at the time of conclusion of the contracts shows that they took Italian law into account and did not intend to choose Belgian law. The parties to the contracts therefore clearly indicated their intention to apply Italian law.

20 Those arguments must, as the Commission correctly contends, be rejected; Article 2 of each contract expressly states that all the provisions of the Conditions are an integral part of the contract. Article 17 of the Conditions, according to which the contract is governed by Belgian law, unless otherwise provided in the special terms and conditions, is therefore itself an integral part of the contract. The special terms and conditions, that is to say the two contracts in question, contain no express derogation from Article 17. Neither the simple fact that the two contracts contain certain references to provisions of the Italian Civil Code nor an alleged general attitude of the parties can prevail over the clear words of Article 17 and permit the inference that the parties displayed an intention to apply Italian law. That conclusion is all the more compelling inasmuch as the references in the contracts to Articles 1341 and 1664 of the Italian Civil Code are merely intended to prevent disputes over the validity of certain clauses of the contracts. Those references are thus simply a precaution against possible disputes and are not intended to call in question the determination of the law applicable to the contracts as laid down in Article 17 of the Conditions.

21 Furthermore, in the circumstances of this case the place of conclusion of the contract can have no effect on the determination of the applicable law. Contractual provisions expressing the common intention of the parties must take precedence over any other criterion which might be used only where the contract is silent on a particular point.

22 The Court concludes that in accordance with Article 17 of the Conditions, and in the absence of any express derogation in the special terms and conditions, the contracts at issue are governed by Belgian law.

CO.DE.MI.'s entitlement to terminate its contractual obligations unilaterally

23 In this respect reference must first be made to the relevant contractual provisions. Article 19 of each of the contracts provides that: 'No excuse will be accepted in case of delay or suspension of the works, except in case of *force majeure*. Such cases shall be notified to the Commission and approved by it . . . '. Furthermore, under Article 13 of the Conditions only the Commission has the power to terminate the contract unilaterally and without recourse to legal proceedings in

case of non-performance. No such possibility is made available to the other party. Finally, it appears from the combined provisions of Articles 15 and 16 of the Conditions, regarding disputes, experts' reports and jurisdiction, that the parties must first seek to arrive at an amicable settlement of their disputes. It is only where no such settlement is reached that disputes relating to the performance of the contracts are to be submitted to the Court. It thus follows from the general scheme of the contractual provisions that the Commission's contractual partner is prohibited from suspending the works and terminating its contractual obligations unilaterally. Even where the contractor decides to bring proceedings before the competent court, in this case the Court of Justice of the European Communities, it is not excused from continued performance of the contract until such time as the Court gives judgment.

24 Those contractual provisions must, moreover, be considered in the light of Belgian law, which, while arriving at the same solution, lays down certain limits. Examination of Belgian law on public works contracts, in particular the case-law of the courts which have jurisdiction over disputes arising out of such contracts, shows that a person who enters into a contract with a legal person governed by public law is not entitled to terminate the contract unilaterally or to suspend the works. Until such time as a judicial decision has been obtained a contractor is in all cases obliged to continue the works to the full extent of his technical and financial capabilities. It is only where the performance of the obligation would cause him irreparable damage or is made impossible by the failure of the authorities to perform their own obligations (since such a failure may be considered equivalent to a case of *force majeure*) that the contractor is freed of the obligation. That possibility aside, so long as no judgment has been given by a court, a contractor who halts performance of his contractual obligations commits a breach of contract for which he alone is liable.

25 In this case neither the documents before the Court nor the arguments presented to it at the hearing permit the conclusion that the Commission made it technically or financially impossible for CO.DE.MI. to continue the works. It is true that according to the experts' report the Commission was guilty of a number of mistakes or omissions with respect to the contracts, such as a delay in the approval

of variations in the management building, a number of mistakes at the time of the commencement of the works on the IP building, the drawing-up of a work schedule for that building which was not in accordance with the time-limits laid down in the contracts and a delay in approving the final work programme for that building. It appears nevertheless that from the technical point of view CO.DE.MI. was in a position to carry on the works. Furthermore, it is established that CO.DE.MI. was not obliged to abandon the works for financial reasons: first, in accordance with the contractual provisions referred to above it had received substantial advance payments; secondly, as it stated itself in its rejoinder, at the material time its financial position was sound.

26 It is true therefore that CO.DE.MI. could, if it considered that it had grounds for so doing, bring proceedings before the competent court for the cancellation of the contracts in question, make an interlocutory application for an order requiring the Commission to take the administrative decisions officially approving the work schedules or, finally, wait until the works were completed and then claim compensation for the damage it considered itself to have suffered as a result of delays on the part of the Commission; it was not, however, entitled to close the sites and unilaterally discontinue performance of its contractual obligations.

27 It follows from the foregoing that CO.DE.MI. alone was responsible for its decision to terminate the contract unilaterally and to cease all activity on the Ispra sites, since the Commission did not make it impossible for CO.DE.MI. to continue the works and did not subject it to a risk of irreparable damage.

28 CO.DE.MI. must therefore be held entirely liable for the unilateral abandonment of the works. It follows that CO.DE.MI.'s counterclaim for damages in respect of the loss suffered by it as a result of the Commission's alleged breach of contract (loss of profit on the remaining portion of the works and excessive site costs) must be dismissed, and it is not necessary to rule on the Commission's objection of inadmissibility with regard to that counterclaim.

29 The foregoing considerations do not prevent account being taken, in the assessment of the damages due from CO.DE.MI. to the Commission, of actions or omissions on the part of the Commission which, independent of the breach of contract, may have contributed to or aggravated certain elements of the loss suffered.

The Commission's claim for damages

30 The Commission claims damages for four types of loss:

(a) defects in the partially completed buildings;

(b) reimbursement of the difference between the advance payments to CO.DE.MI. and the actual value of the work carried out;

(c) loss resulting from the increased cost of the works necessary for the completion of buildings identical to those envisaged in the original contracts;

(d) indirect loss resulting from the fact that the buildings were not available to it at the end of the period laid down in the contracts.

31 It follows from what was said above that CO.DE.MI., having unilaterally breached the contract, must bear all the consequences. The heads of damage put forward by the Commission are all direct consequences of CO.DE.MI.'s unilateral breach of its contractual obligations. Although the defects in the works came into existence before the breach of contract, it was that circumstance which prevented the Commission from obtaining compensation in the course of the settlement of accounts, which never took place. All the heads of damage put forward by the Commission are therefore matters for which CO.DE.MI. is liable in damages.

(a) *The first head of damage put forward by the Commission: defects in the partially completed buildings*

32 These defects were first described in the preliminary expert's report carried out in 1982; they were again observed during the visits to the Ispra sites of the group of experts appointed by the Court in its order of 18 May 1983. The experts made an assessment of the works necessary for the repair of the defects, referring to the date on which the contracts were entered into, December 1979, in order to obtain

the contract prices and to the date of the Court's order, 18 May 1983, in order to estimate current prices.

The valuation date

33 In order to ensure equitable compensation in respect of this head of damage reference must be made to the date on which the Commission was actually in a position to have the defects repaired. It appears from the documents before the Court that CO.DE.MI. did not vacate the sites until 21 December 1982. In addition, the Commission will have required a reasonable period following that date to carry out an inventory of the site, recalculate all the prices, initiate a new tender procedure and enter into new public works contracts with another undertaking for the completion of the buildings and the repair of the defects. The date of 18 May 1983 proposed by the experts as the valuation date for the 'current prices' should therefore be adopted for the purpose of assessing the damage caused by the defects in the buildings.

The sums due from CO.DE.MI. in respect of the defects

The management building

34 First of all, the experts listed a number of defects in the management building which were not disputed in any way by CO.DE.MI. These defects concern:

Floor surfaces on the ground floor	LIT 22 776 970
Conduits	LIT 13 657 000
Stair risers	LIT 2 546 973
External facings	LIT 2 014 388
Concrete window-frames	LIT 5 324 347
CO.DE.MI. must therefore pay compensation for all those defects, in the total sum of	LIT 46 319 678

35 Secondly, the experts found that in the management building the strength of the concrete was lower than required under the specifications in the contract. That

damage was assessed in the amount of LIT 12 983 366. The experts considered, however, that that defect, consisting in the production of manufactured material of lower strength and thus of lower value in comparison with that provided for in the contract, had no effect on the viability of the building as a whole. The Court takes the view that only such faults in construction as are likely to affect the viability of the building or to render it inappropriate for its purpose and therefore require further repair work by the new contractor should be regarded as defects for the purpose of assessing damages. Since that is not the case here, the inferior strength of the concrete should be disregarded under the heading of defects but should be taken into account in assessing the value of the works carried out by CO.DE.MI.

36 Finally, the third type of defects in the management building reported by the experts concerns the depreciation of the building due to the faulty construction of the floor surfaces in the basement and on the first and second floors, incorrect positioning of prefabricated components and faulty drilling of holes for electrical conduits. The experts estimated the sum necessary for the repairing of those defects, mainly by the installation of false ceilings, at LIT 47 346 000.

37 CO.DE.MI. has argued first of all that the false ceilings constitute a clear improvement in comparison with the original requirements of the contract and, more importantly, that they have already been installed at its expense, in the amount of LIT 47 000 000. It therefore denies liability for this head of damage. That argument cannot be accepted. First, the improvement on the original contract specifications has already been taken into account by the experts, who applied a reduction of 20% on the actual price of installing a false ceiling; furthermore, the experts carried out several inspections of the premises and were in the best position to determine whether such false ceilings were there or not. Their report clearly states that there are no false ceilings, and there is nothing in the documents before the Court to prove the report wrong on that point.

38 However, it appears from the report that, although those defects are a result of CO.DE.MI.'s faulty construction of the prefabricated floors, the attitude of the awarding authority and of the supervising authority, who made no objection while the works were in progress, had a clear effect on the extent of the damage. It

appears that the attitude of the supervising authority was such as to encourage poor workmanship of the nature and extent described. In those circumstances it is appropriate to hold that CO.DE.MI. should be ordered to pay to the Commission the sum of LIT 23 673 000, representing one-half of the loss resulting from these defects.

39 In respect of the management building CO.DE.MI. must therefore be ordered to pay to the Commission the total sum of LIT 69 992 678 in compensation of the loss suffered by the Commission as a result of the defects in that building.

The IP building

40 In the first place the experts state that there is a defect in the concrete façade inasmuch as the concrete was improperly poured and thus does not present a smooth and uniform exterior. It appears from the experts' report, and it is not disputed by CO.DE.MI., that in that respect the building is not in conformity with the contract specifications or with the subsequent variation of those specifications, and has suffered aesthetic damage for which compensation must be paid. The experts held CO.DE.MI. entirely liable for this head of damage, valued at LIT 9 881 758; that figure is not contested.

41 The experts have reported a second type of defect consisting in the use of concrete of lower strength than that required by the original contract specifications and in a reduction in the thickness of the parapets, resulting in reduced strength at the point of maximum stress. The experts declare CO.DE.MI. to be entirely liable for those defects, which they assess together at LIT 1 712 050 without, however, indicating how much of that sum is attributable to each defect.

42 In the first place, as has already been stated, in so far as it does not affect the viability of the building the reduced strength of the concrete used cannot be regarded as a defect but must be taken into account in determining the value of the works carried out by CO.DE.MI. Secondly, with regard to the reduction in the cross-section of the parapets, in its remarks on the experts' report CO.DE.MI. stated, without being contradicted, that although the parapets are in fact thinner in cross-section than was originally envisaged, that reduction was carried out with

the agreement of the supervising authority because of the necessity of including a waterproof facing. It is not therefore a defect, but a variation accepted by the supervising authority, which never made any observations on the matter. Consequently CO.DE.MI. should not be held liable in damages in that regard.

43 It results from all the foregoing that CO.DE.MI. must be ordered to pay to the Commission the sum of LIT 69 992 678 in respect of defects in the management building and the sum of LIT 9 881 758 in respect of defects in the IP building, in total LIT 79 874 436. That sum represents the cost, calculated as at 18 May 1983, of all the defects in those buildings; to that sum should be added interest at the rate of 5%, the rate which the Commission itself submitted should be applied to all damages awarded to it in respect of the loss suffered, from that date until the date of payment.

(b) *The second head of damage raised by the Commission: the difference between the advance payments to CO.DE.MI. and the actual value of the work completed*

44 In their report the experts set out in detail their reasoning: they take the view that the phrase 'works carried out' must refer solely to what was used in the construction of the building or was closely connected with it, so that in drawing up a statement of account for each site neither the value of materials on site nor the cost of repairing defects and deterioration in the buildings is taken into account. On that basis the experts' report arrives at the following results:

Management building:	
Total payments (at contract prices)	LIT 861 380 201
Total work carried out (at contract prices)	LIT 555 838 017
Balance in the Commission's favour (at contract prices)	LIT 305 542 184
IP building:	
Total payments (at contract prices)	LIT 591 396 569
Total work carried out (at contract prices)	LIT 115 609 817
Balance in the Commission's favour (at contract prices)	LIT 475 786 752
Total balance in the Commission's favour	LIT 781 328 936

45 CO.DE.MI. challenges those figures in their entirety, and argues that on the two sites together its expenses amounted to nearly LIT 200 000 000 more than it received from the Commission. That difference is the result of three factors:

(i) When CO.DE.MI. received the Commission's advance payment of 50% for each of the two sites, it in turn made an advance payment of 50% to each of its subcontractors;

(ii) CO.DE.MI. purchased all the materials necessary for the completion of the contract;

(iii) CO.DE.MI. relies on all the expenses incurred by it as recorded in its own cost accounting, and in that regard it has submitted a number of documents which it says constitute a fair and accurate statement of accounts on the two sites.

46 The Commission, on the other hand, agrees with the figures arrived at by the experts, who based themselves on the contract prices and on a quantitative estimate of the work carried out. They then calculated the difference between the initial contract prices and the value at the contract prices of the work carried out.

47 The argument put forward by CO.DE.MI. cannot be accepted. The cost accounting documents which it submitted are purely internal documents of no probative value, especially where an examination of the circumstances by three particularly well-qualified experts shows that the figures produced have no relation to the actual value of the works carried out on the site. Furthermore, even if it is accepted that CO.DE.MI. paid 50% of the value of the subcontracts to all its subcontractors, to no avail, it cannot be heard to complain that because of its own decision to suspend work it paid out those sums without receiving anything in return and is now allegedly unable to recover them. The figures contained in the experts' report, drawn up on the basis of the contract prices, must therefore be taken as the basis of assessment.

48 CO.DE.MI. also submits that the materials left by it on the site should be regarded as goods supplied whose value should be added to that of the works carried out. That submission cannot be accepted as it stands, since those materials do not as such add value to the works carried out. Since, however, the Commission has not disputed that those materials will be useful in further work on the site, their value should be taken into account in assessing the cost of the works which the Commission will have to undertake for the completion of the buildings.

49 Furthermore, as was stated above, in order properly to assess the value of the works carried out by CO.DE.MI. it is necessary to subtract from the experts' calculation of the value of the works carried out at contract prices a sum reflecting the fact that the concrete used is of a lower strength than specified in the contract. That sum must be assessed on the basis of the contract prices used by the experts. In the case of the management building the experts set the reduction of the value of the works at LIT 7 129 800. In the case of the IP building the experts arrived at a figure of LIT 940 170, but that figure represents both the reduction in value resulting from the lower strength of the concrete and the cost of the partial reconstruction of the parapets, without distinguishing the two. In those circumstances it is appropriate to assess the reduction in the value of the works carried out due to the fact that the concrete used was of a strength lower than that specified in the contracts at the sum of LIT 7 500 000 for the two buildings.

50 The Commission submits that the total sum to which it is entitled in respect of the excess payment to CO.DE.MI. should be recalculated at its real value in January 1985. That submission cannot be accepted. That sum, which results from a calculation using contract prices, must remain based on those prices. The Commission became entitled to it, however, on 18 July 1981, the date of termination of the contract. The Commission is therefore entitled to interest on that sum as from 18 July 1981.

51 For all those reasons, the Court must order CO.DE.MI. to pay to the Commission, in respect of advance payments in excess of the actual value of the works carried out, the sum of LIT 781 328 936, plus LIT 7 500 000 (reduced strength of the concrete), that is to say, LIT 788 828 936. For the reasons stated

above, that sum must be accompanied by interest at the rate of 5% from 18 July 1981 until the date of payment.

(c) *The third head of damage raised by the Commission: the increased costs of the works which will have to be carried out in order to complete the buildings in accordance with the original contract specifications*

52 It is clear that the Commission will have to bear increased costs in connection with the completion, under a new tender, of the works not carried out by CO.DE.MI; the increase in costs results primarily from the increase in prices and in labour costs between the date on which the original contracts were concluded and the date on which the Commission was in a position to open a new tender procedure. For the reasons set out above, the Court considers that the additional cost of the remainder of the works must be calculated as at 18 May 1983, the date on which the Commission was in a position to award the completion of the works to another undertaking. CO.DE.MI.'s argument that the loss suffered by the Commission in this respect should be assessed as at 21 December 1982, the date on which the sites were vacated, or even 18 July 1981, the date on which the contracts were terminated, must therefore be rejected.

53 The method used by the experts in ascribing a value to this head of damage is not disputed by the parties. It consisted in the calculation, for each of the buildings, of the original value of the contracts and of the works carried out, without taking into account the additional modifications or the materials on site. The same calculations were then effected as at 18 May 1983. The difference between the two values represents the increased cost to the Commission of the remainder of the works on 18 May 1983. The figure arrived at by that means are LIT 704 263 865 for the management building and LIT 782 201 071 for the IP building, a total sum of LIT 1 486 464 936.

54 It is not possible to accept CO.DE.MI.'s argument that the delay of 45 days in the commencement of the works in respect of the IP building, for which the experts' report ascribed responsibility to the Commission, should be taken into account in calculating the increase in value. It is clear from the same report that, as the Commission rightly pointed out, that initial delay is of little significance when set against the much greater delay on the part of the undertaking in the execution of the works.

55 As was stated above, however, CO.DE.MI.'s argument that the value of the materials abandoned on the site should be subtracted from the cost of the uncompleted works must be upheld. The value of those materials on 18 May 1983 must accordingly be subtracted from the sum of LIT 1 486 464 936. The value of the materials on 21 December 1982 was estimated by the experts at LIT 125 616 769; that figure must therefore be adjusted in accordance with the trend in construction costs in Italy between 21 December 1982 and 18 May 1983. As was proposed by the experts, that adjustment should be carried out on the basis of the change between those two dates in the index prepared by the Istituto Centrale di Statistica (Istat index).

56 For all those reasons CO.DE.MI. must therefore be ordered to pay to the Commission the sum of LIT 1 486 464 936 in compensation for the increased cost to it of the works, less the value on 18 May 1983 of the materials abandoned on the site by CO.DE.MI.. That sum must bear interest at the rate of 5% from 18 May 1983 until the date of payment.

(d) *The fourth head of damage raised by the Commission: the fact that the buildings were not at its disposal on the completion date provided for in the contract*

57 The fact that the Commission was able to enter into possession only at a very late date, and in any event well after the completion date provided for in the contracts, may have entailed loss and interference with its possessory rights for which damages are payable under the provisions of Belgian law applicable to public works contracts if adequate proof of the alleged loss is adduced.

58 The Commission argues primarily that compensation for such damage is payable under Article 19 of each contract, which deals with penalties for delay and provides that a fixed amount is payable for each day of delay. According to the Commission it would be reasonable to hold that these sums are payable in respect of the period ending on 21 December 1982, the date on which CO.DE.MI. vacated the sites, since the damage suffered by it, for which the penalties for late completion were intended to compensate, continued until that date. That is why the Commission proposes that Article 19 of the contracts should be interpreted as meaning that the last date in respect of which penalties must be paid is the date of the termination of relations between the parties, and not the legal termination of the contract. In the alternative, the Commission considers that, if that argument is

not accepted, compensation should nevertheless be paid for the indirect damage in question, the provisions of Article 19 of the contracts being applied by analogy.

59 The Commission's argument cannot be accepted. Article 12 of the Conditions provides that: 'If the time-limit for performance is exceeded, the Commission may impose a penalty for delay on the supplier, in accordance with the procedures laid down in the special terms and conditions of the contract (Article 19). In the event of termination of the contract the aforesaid penalty shall be payable until the date on which the termination takes effect.' It is clear from those contractual provisions and, more generally, from the purpose of penalties for delay in public works contracts that the payment of such penalties is only reasonable where contractual relations have not been broken off. Such penalties are intended to provide fixed compensation for a delay in the performance of the works beyond the completion date provided for in the contract, not to compensate for loss resulting from the delay caused by the termination of contractual relations.

60 Consequently, the question of compensation for the Commission's alleged loss in this respect must be determined in accordance with the general principles of the law of liability. It is thus for the Commission to adduce evidence of the loss suffered and of the causal link between that loss and CO.DE.MI.'s unilateral decision to suspend the works. The Commission has not attempted to show that it suffered loss by reason of the late completion of the buildings, by adducing evidence, for example, that it was obliged to rent alternative accommodation or incurred additional expense in the organization of its departments. The Commission's claim under this head of damage must therefore be rejected.

61 It follows from all the foregoing that CO.DE.MI. must be ordered to pay the Commission:

(a) the sum of LIT 79 874 436 in respect of construction defects in the management and IP buildings, with interest at the rate of 5% from 18 May 1983 until the date of payment;

(b) the sum of LIT 788 828 936 in reimbursement of sums paid in advance in excess of the value of the work actually carried out, with interest at the rate of 5% from 18 July 1981 until the date of payment;

(c) the sum of LIT 1 484 464 936 as compensation for the increased cost of the works, less the value, calculated as at 18 May 1983 on the basis of the Istat index of construction costs, of the materials abandoned on the site by CO.DE.MI., with interest at the rate 5 % from 18 May 1983 until the date of payment.

The remainder of the submissions in the Commission's application and all the submissions in CO.DE.MI.'s counterclaim must be dismissed.

Costs

62 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since CO.DE.MI. has failed in its main submissions it must be ordered to pay:

(a) the costs of these proceedings;

(b) the costs incurred in connection with the expert's report prepared pursuant to the Order of the President of the Court of 28 April 1982 in Case 318/81 R;

(c) the costs incurred in connection with the experts' report prepared pursuant to the Order of the President of the Court of 18 May 1983 in Case 318/81 R.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) **Orders CO.DE.MI. to pay to the Commission the sum of LIT 79 874 436 in respect of construction defects in the management and IP buildings, with interest at the rate of 5% from 18 May 1983 until the date of payment;**

Orders CO.DE.MI. to pay to the Commission the sum of LIT 788 828 936 in reimbursement of sums paid in advance in excess of the value of the work actually carried out, with interest at the rate of 5% from 18 July 1981 until the date of payment;

Orders CO.DE.MI. to pay to the Commission the sum of LIT 1 484 464 936 as compensation for the increased cost of the works, less the value, calculated as at 18 May 1983 on the basis of the Istat index of construction costs, of the materials abandoned on the site by CO.DE.MI., with interest at the rate of 5% from 18 May 1983 until the date of payment;

(2) Dismisses the remainder of the submissions in the Commission's application;

(3) Dismisses CO.DE.MI.'s counterclaim in its entirety;

(4) Orders CO.DE.MI. to pay all the costs of the proceedings, including the costs of the experts' reports prepared pursuant to Order No 318/81 R of 28 April 1982 and Order No 318/81 R of 18 May 1983.

Mackenzie Stuart Everling

Joliet Due Galmot

Delivered in open court in Luxembourg on 26 November 1985.

P. Heim
Registrar

U. Everling
President of the Fifth Chamber