# OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 26 September 2002 [1]

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## I — Introduction: history of the case

1. A dispute has arisen between the European Parliament (hereinafter: 'the Parliament'), on the one hand, and the Société d'aménagement et d'équipement de la région de Strasbourg (hereinafter: 'SERS') and the City of Strasbourg, on the other, over the interpretation and application of certain conditions of a framework contract concluded between them on 31 March 1994. This contract relates *inter alia* to relations between the parties during the construction of a collection of buildings which SERS is to build for the Parliament.

2. Earlier, on 5 October 1992, the City of Strasbourg had decided to provide a site for the buildings. The construction and operation of the building was awarded to SERS by contract of 31 August 1993. SERS is a company known as a 'société d'économie mixte' and was established by the City of Strasbourg to develop and implement property projects on behalf of the city. The framework contract concluded on 31 March 1994 and the annexes thereto govern mutual relations between the parties during construction, when the new building is completed and accepted, and following the acceptance thereof. This case concerns in particular the provisions of the framework contract relating to the date for completion, delays in the construction process likely to result in deferment of that date, the penalties for late completion and, in connection therewith, liability to so-called 'interim interest'.

3. For various reasons the construction process was delayed with the result that the building was not completed until almost one year after the date of 31 December 1997 laid down in the contract. SERS took the view that these reasons justified a date later than that set out in the contract. The Parliament took the view that this was not the case. Initially the disagreement centred primarily on the interpretation of the provisions of the framework contract relating to the date for completion, the penalties for late completion, and the liability to interim interest for the period between the contractual date for completion and the actual date of completion (15 December 1998).

4. In order to settle their disagreements over the actual date of the completion and acceptance of the building, and on the contractual date for completion, the Parliament and the City of Strasbourg concluded, on 14 January 1999, three agreements which were subsequently also signed by SERS on 19 January 1999.

There were:

— an addendum to Clause 29 of the framework contract establishing a committee of conciliators with the sole task of resolving the disagreement between the parties as to the interpretation and application of Clauses 3, 5, 6 and 25 of the abovementioned contract in relation to the contractual date for completion;

— a conciliation protocol in which the parties decided to submit their disagreement, as set out in the abovementioned addendum, to the conciliators for their opinion;

— a document recording completion of the building in which the parties agreed that the date of the actual completion of the building, as provided for in the first paragraph of Clause 4 of the framework contract, was fixed as 15 December 1998 and that, consequently, the emphyteutic lease concluded between SERS and the European Parliament would enter into force from that date, subject to the conditions laid down in that contract.

5. On 22 March 1999 the committee of conciliators issued the opinion requested from it. The European Parliament, which did not agree with certain parts of this opinion, appealed against it by an action, lodged at the Registry of the Court of First Instance, pursuant to Clause 1(2) of the addendum to the framework contract referred to at point 4 above.

## II — The relevant contractual provisions

### A — *The framework contract of 31 March 1994*

6. The following provisions of the framework contract are of relevance to this case:

Clause 3.2

'Completion of the building is expected to take place by 31 December 1997 at the latest.'

Clause 3.3

'Work on the superstructure of the building is expected to start on 1 October 1994. SERS shall have an estimated period of 36 months to complete the building starting from that date.

The period for completion within the meaning of this subclause shall, however, be extended appropriately in the event of delay duly justified by SERS. This shall apply inter alia in the event of:

— additional modifying work requested by the European Parliament;

— delays in obtaining administrative authorisations attributable to the authorities responsible for examining or issuing them or to third parties;

— consequences of the putting into administration or judicial winding up of one (or more) of the parties contracting with the main contractor;

— *force majeure* as defined in the case-law and legal writing;

— strike affecting the site;

— administrative or judicial decision or order ordering work to stop;

— vandalism, bad weather, natural disaster, war, terrorism, archaeological excavations;

— failure to reply or delay in replying on the part of the European Parliament beyond three weeks from the date of communication.'

Clause 5.1

'Even if the period of 36 months referred to in Clause 3.3 extends beyond the date provided for in Clause 3.2, possibly postponed under Clause 5.2, SERS shall be liable as from the date referred to in Clause

3.2, possibly postponed under Clause 5.2, automatically and without any formality being required, solely because of that extension, for a daily penalty of ECU 28 000 subject to a ceiling of 3% of the confirmed cost of construction (amount of the actual work plus consultants' fees).

...

The daily penalty — or reduced penalty mentioned above — shall cease to run on the date of confirmation of completion referred to in Clause 4, and in any event when the ceiling is reached.'

Clause 5.2

'The period provided for in Clause 3.2 shall be extended in the event of:

— *force majeure* or accidental occurrence duly confirmed;

— decisions of an administrative or judicial body ordering work to stop;

— natural disaster, war, terrorism, archaeological excavations;

— bad weather recognised by the "Caisse des congés payés du bâtiment de Strasbourg";

— delay in obtaining administrative authorisations attributable to the authorities responsible for examining or issuing them, excluding those within the competence of the City of Strasbourg.

In such cases an additional period shall be laid down by common agreement of the parties or, failing that, by the court referred to in Clause 29.

SERS shall inform the European Parliament, as soon as it becomes aware thereof, of the occurrence of any possible cause of delay. If it does not do so, it may not rely thereon to obtain an additional period.'

Clause 5.3

'The date provided for in Clause 3.2 does not take account of additional or modifying

works requested or accepted by the European Parliament.

...'

Clause 6.3

'Interim interest shall apply to all the items of expenditure in the financial statement as from the date of payment by SERS until the date of drawing up the first intermediate investment cost statement...

...

Interim interest shall not be due from the European Parliament for the period between the completion date provided for in Clause 3.2, possibly postponed under Clause 5.2, and the actual completion date if the postponement of the completion date derives from fault on the part of SERS or a delay not accepted as justified by the court referred to in Clause 29.'

Clause 25

'The general timetable (Annex 6 to the contract) shall be observed and SERS shall transmit, with its monthly progress report, the timetables for the construction work. Any delays must be stated and explained. In such an event SERS shall inform the European Parliament of adequate remedial measures which SERS intends to implement, without prejudice to the application of Clause 5.'

Clause 29

'In the absence of prior amicable agreement, all disputes relating to this contract shall be brought before the Court of First Instance of the European Communities...'

B — *The supplementary contract of 14 January 1999*

7. Clause 1 of the supplementary contract is of relevance to this case. It provides as follows:

'1. Supplementary to Clause 29 of the framework contract, and exclusively

and solely to resolve the dispute on the differences of interpretation and application of Clauses 3, 5, 6 and 25 of the framework contract as regards fixing the contractual date of completion, a committee of conciliators shall be constituted in accordance with the procedures laid down in the "Conciliation Protocol" attached as Annex I to this supplementary contract.

2. The committee of conciliators shall issue an opinion on the abovementioned dispute which, pursuant to the framework contract, shall be limited solely to questions of law.

Both parties are bound to comply with this opinion without prejudice to their right to appeal against this decision, within 30 calender days of its notification, before the court referred to in Clause 29 of the framework contract.'

III — Procedure and forms of order sought the parties

8. After the Parliament had lodged the application at the Registry of the Court of First Instance on 20 April 1999, the Registrar acknowledged receipt thereof by letter of 21 April 1999. In that letter he pointed out that the Court of First Instance did not have jurisdiction, by virtue of an arbitration clause, to give judgment pursuant to Article 181 of the Treaty (now Article 238 EC) on an action brought by an institution and subsequently informed the Parliament of his intention to transmit the action to the Registrar of the Court of Justice in accordance with the first paragraph of Article 47 of the Protocol on the Statute of the Court of Justice, unless the Parliament stated by 3 May 1999 that it was in fact its intention to bring the case before the Court of First Instance.

9. On 28 April 1999 the Parliament confirmed that it had no objection to its application being transmitted to the Registrar of the Court of Justice. Thereupon the application was finally lodged at the Registry of the Court of Justice on 4 May 1999 where it was registered the following day.

10. On 23 July 1999 SERS raised a formal objection of inadmissibility to the action pursuant to Article 91(1) of the Rules of Procedure of the Court of Justice.

11. By order of 7 December 1999, the Court of Justice, after hearing the Advocate General, reserved its decision on the objection of inadmissibility for the final judgment in accordance with Article 91(4) of its Rules of Procedure.

12. On 7 April 2000 the Parliament requested that proceedings be stayed in accordance with Article 82a(1)(b) of the Rules of Procedure on the ground that negotiations between the parties were in progress. SERS and the City of Strasbourg objected to this by letter of 17 April 2000, which was subsequently received at the Registry on 20 April, on the ground that SERS had not been party to the negotiations to which the Parliament referred. Thereupon a decision was taken not to stay proceedings.

13. On 24 January 2002 the parties were heard at the hearing.

14. As regards the plea of inadmissibility, the Parliament claimed that the Court should:

— dismiss as unfounded the plea of inadmissibility;

— dismiss the application by the applicants pleading inadmissibility for payment of a procedural indemnity of EUR 20 000;

— order the applicants pleading inadmissibility to pay the costs;

— continue the principal proceedings or, in the alternative, remit the case to the Court of First Instance.

15. As to the substance, the Parliament claimed that the Court should:

— order SERS to pay penalties for late completion from 9 January 1998, the contractual date for completion of the IPE IV building, until 14 December 1998 inclusive, the day before that building was declared to be completed, or, in the alternative, order SERS to pay penalties for late completion from such contractual date for completion as the Court may decide;

— declare the delays after 9 January 1998, the contractual date for completion of the IPE IV building, unjustified, and, accordingly, declare that the European Parliament is not liable to interim interest from that contractual date for completion of the IPE IV building until 14 December 1998 inclusive, or, in the alternative, declare that the European Parliament is not liable to interim interest from such contractual date for completion as the Court may decide;

— annul the opinion of the committee of conciliators;

— order the defendants to pay the costs.

— declare inadmissible the counterclaim brought by the defendants against the opinion of the committee of conciliators;

— dismiss the defendants' application for payment of a procedural indemnity of FRF 300 000;

— dismiss all the defendants' other claims.

16. As regards the plea of inadmissibility, SERS and the City of Strasbourg contended that the Court should:

— declare admissible and well founded their plea of inadmissibility raised against the action of the European Parliament pursuant to Article 91 et seq. of the Rules of Procedure of the Court of Justice;

— declare that the prescribed period of 30 days within which to appeal against the opinion of the conciliators before the court having jurisdiction had expired on the date on which the Court of Justice was seised (5 May 1999);

— declare that the opinion of the conciliators has become definitive and irrevocable;

— order the European Parliament to pay the costs of the proceedings and to pay each of the pleading parties, SERS and the City of Strasbourg, a procedural indemnity of EUR 20 000;

— in the alternative, and in the unlikely event that the Court reserves its decision on the plea for the final judgment or dismisses it by separate decision, grant SERS and the City of Strasbourg fresh periods within which to present their claims relating to the substance.

17. As to the substance, SERS and the City of Strasbourg claim that the Court should:

— allow SERS and the City of Strasbourg to bring a counterclaim against the opinion of the conciliators, in so far as the conciliators have taken the view that the date for completion was 31 December 1997 and that this can be deferred solely on the grounds set out in Clause 5.2 of the standard contract;

— rule that the time-limit of 31 December 1997 is merely a provisional time-limit which can be extended on any of the grounds justified under any of the provisions of Clause 3 which form an indivisible whole;

Furthermore, with regard to the application made by the European Parliament:

— dismiss that application;

— hold that the Court has no other or no more power than the conciliators;

— hold that the Court can rule only on the principles of law applicable to the dispute, to the exclusion of any analysis of the facts and, *a fortiori*, that the Court cannot order or fix the date for completion since the case concerns questions of fact unconnected with the conciliation and outside the competence of the Court, which is giving judgment on the basis of the devolutive effect of the Parliament's application;

— confirm the opinion of the conciliators on points other than those which form the subject-matter of the action brought by SERS and the City of Strasbourg;

— order the European Parliament to pay the costs of the proceedings and a procedural indemnity of FRF 300 000.

## IV — Appraisal

### A — *Preliminary remarks*

18. Three sets of questions have to be assessed in this case:

— questions relating to admissibility;

— questions relating to the interpretation of certain provisions of the framework contract concluded between the European Parliament, SERS and the City of Strasbourg;

— questions relating to the application of the relevant provisions to the factual context of the construction process.

19. Below I will appraise the various aspects of this case thus grouped and in the above order.

B — *Questions relating to admissibility*

20. In the forms of orders sought, the parties raised three distinct questions relating to inadmissibility.

(a) The formal objection of inadmissibility raised pursuant to Article 91(1) of the Rules of Procedure by SERS and the City of Strasbourg against the action brought by the European Parliament.

(b) The plea raised by the European Parliament alleging inadmissibility of the counterclaim brought by SERS and the City of Strasbourg against the opinion of the committee of conciliators.

(c) The implicit objection of inadmissibility raised by SERS and the City of Strasbourg against the form of order sought by the European Parliament seeking judgment on the application of the framework contract to the factual context of the construction work. The defendants take the view that the action brought by the European Parliament devolves upon the court hearing the appeal and is therefore restricted *ratione materiae* to the subject-matter of the opinion of the committee of conciliators. Consequently, the Court should give judgment on the action brought by the European Parliament only in so far as it relates to questions of law examined in the opinion of the College of conciliators. Conversely, it can therefore be concluded that they consider that the action brought by the European Parliament is inadmissible in so far as it also concerns the application of the framework contract to the factual context.

(a) The objection of inadmissibility

21. The two pleas which SERS and the City of Strasbourg put forward in support of the inadmissibility of the action brought by the Parliament can be summarised in brief.

22. Firstly, they contend that the fact that the application was not lodged at the Registry of the Court of Justice, as the court having jurisdiction, until 5 May 1999 means that it was not brought in good time. This finding is not altered by the fact that the application had already arrived at the Registry of the Court of First Instance on 20 April 1999, that is to say within the 30-day time-limit for bringing actions.

23. Secondly, the Registrar of the Court of First Instance could not have transmitted the file to the Registrar of the Court of Justice by an informal letter. This simple procedure, for which provision is made in the first paragraph of Article 47 of the Statute of the Court of Justice (hereinafter 'the Statute'), can be applied only in cases in which an application addressed to the Court of Justice is lodged by mistake with the Registrar of the Court of First Instance (and vice versa). However, there was no question of any mistake in the present case. The application was addressed to the Court of First Instance and lodged at the Registry thereof. The Court of First Instance should have applied the second paragraph of Article 47 of the Statute.

24. The Parliament's defence against the first plea centres on the view that the way in which the Court of First Instance and the Court of Justice correct, between themselves, the actions brought before them has no effect on the time-limit for bringing actions itself. This follows from the wording of Article 47 of the Statute itself which does not contain a single provision relating to a time-limit or the expiry thereof. If an action is lodged in good time at one of the registries of the institution that is the 'Court of Justice', the time-limits applicable to an action are thereby observed.

25. As regards the second plea, the Parliament notes that it is based on an excessively formal interpretation of Article 47 of the Statute. Rigid application of the procedures provided for in the first and second paragraphs of the abovementioned Article 47 is not conducive to the flexible and proper administration of justice. Moreover, it is clear from the letter inviting tenders attached to its application that the Parliament took account of the fact that this application might have been addressed incorrectly. Having regard to this possibility, the Parliament asked the Registrar of the Court of First Instance to transmit the application to the Registrar of the Court of Justice. If the Court of Justice takes the view that the transmission was not effected properly in the present case, the Parliament claims, in the alternative, that it should remit the case to the Court of First Instance so that this court can formally decline jurisdiction and remit the case back to the Court of Justice.

26. I can be brief in my assessment of the first plea. It follows from the wording of the second paragraph of Article 47 of the Statute that where an action is referred by an order from the Court of Justice to the Court of First Instance and, vice versa, from the Court of First Instance to the Court of Justice, the case has been duly brought before the second court, even if, on the date on which the order to refer the case is adopted, the time-limit for bringing the action has elapsed. I therefore conclude that the decisive factor in assessing whether or not the action was brought in good time is the date on which the application was first lodged at either the Registry of the Court of First Instance or that of the Court of Justice.

27. Furthermore, this interpretation is confirmed by Article 3(6) of the Instructions to the Registrar of the Court of First Instance which states that where the Registrar of the Court of Justice transmits an application to the Registrar of the Court of First Instance, the date of lodging which must be entered in the register is the date on which the application was lodged with the Registrar of the Court of Justice. Although there are no specific instructions for the Registrar of the Court of Justice in this respect, he follows the same procedure based on the second paragraph of Article 47 of the Statute.

28. Therefore, the first plea contesting the admissibility of the action brought by the Parliament is unfounded.

29. The same is true of the second plea. If it is established that the action was brought in good time, the manner in which the incorrectly addressed application was transmitted from the Court of First Instance to the Court of Justice has no bearing on the admissibility of the action. The first and second paragraphs of Article 47 of the Statute must be interpreted in this light.

30. From the point of view of procedural economy, it would be preferable to place a broad interpretation on the scope of the first paragraph of Article 47 of the Statute by including thereunder not only cases in which an application is 'lodged by mistake' at the wrong registry but also cases in which an application is addressed by mistake to the wrong registry when it is evident *prima facie* that it should have been sent to the other registry. The procedure set out in the first paragraph of Article 47 of the Statute is by far the most appropriate procedure for rectifying such 'technical' mistakes. Thus, it is also employed in practice by the Registrars of the Court of First Instance and the Court of Justice.

31. The more rigorous procedure set out in the second paragraph of Article 47 of the Statute was intended for cases in which it is not evident at first sight that the application has been addressed incorrectly. In such cases it must, following a prior examination, be declared by an order that the Court of First Instance (or, where applicable, the Court of Justice) does not have jurisdiction to hear and determine the action.

32. In the present case there could be no doubt that the action lodged by the Parliament should have been brought before the Court of Justice. In his letter of 21 April 1999 the Registrar of the Court of First Instance correctly pointed out that, under Article 3(1)(c) of the Decision establishing a Court of First Instance,[2] the Court of First Instance does not have jurisdiction to give judgment by virtue of an arbitration

2 — Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1998 L 319, p. 1; corrigendum OJ 1989 L 241, p. 4; published afresh in its entirety in OJ 1989 C 215, p. 10), as most recently amended by Council Decision 1999/291/EC, ECSC, Euratom of 26 April 1999 amending Decision 88/591 to enable it to give decisions in cases when constituted by a single judge (OJ 1999 L 144, p. 52).

clause under Article 238 EC where an action is brought by a Community institution. His intention in that respect to transmit the application to the Registrar of the Court of Justice, in accordance with the first paragraph of Article 47 of the Statute, was the logical consequence thereof.

33. Therefore, the second plea contesting the admissibility of the action raised by the Parliament is also unsuccessful.

(b) Admissibility of the counterclaim brought by SERS and the City of Strasbourg

34. I consider untenable the plea raised by the Parliament alleging that the counterclaim brought by SERS and the City of Strasbourg against the opinion of the committee of conciliators is inadmissible on the ground that it is belated in that it was not lodged at the Registry until 8 March 2000.

35. The opinion of the committee of conciliators was binding on the parties save where it had been appealed against. The content of such an opinion may be acceptable to an interested party even if it does not find completely in his favour. However, if another party, for reasons of its own, appeals against such a ruling with the associated possibility that the final outcome will prove to be even less favourable to the party which initially acquiesced therein, it follows from the principle of equality of opportunity for the parties to proceedings that the latter party must also be granted an opportunity to raise objections to the binding opinion contested in the appeal.

36. In this connection I also refer to the second indent of Article 116(1) of the Rules of Procedure which in appeal proceedings grants defendants a similar power to counterclaim. [3] The case-law of the Court confirms that such a counterclaim is possible even if the initial time-limit for an appeal has lapsed. [4] I therefore conclude that the counterclaim brought by SERS and the City of Strasbourg, which, moreover, is consistent with the pleas raised before the College of conciliators, is admissible.

37. For what it is worth, I should also note that under French law of administrative

3 — Case C-265/97 P *VBA* v *Florimex and Others* [2000] ECR I-2061.

4 — Case C-136/92 P *Commission* v *Brazelli Lualdi and Others* [1994] ECR I-1981, paragraphs 69 to 73.

procedure, if it were applicable,[5] the present counterclaim would be possible.

(c) Admissibility of the form of order sought by the Parliament relating to application of Clauses 5.1 and 6.3 of the framework contract in connection with the exceeding of the contractual date for completion

38. There is no basis in Clause 29 of the framework contract or the supplementary contract of 14 March 1999 for the position taken by SERS and the City of Strasbourg, namely that the action brought by the Parliament must be restricted to the subject-matter of the opinion of the committee of conciliators.

39. Under the first paragraph of Clause 1.1 of the supplementary contract the parties agreed to refer to a committee of conciliators questions of law on which they disagreed regarding the interpretation and application of Clauses 3, 5, 6 and 25 in relation to fixing the contractual date for completion. Under the second paragraph of Clause 1.2, they are bound by the opinion of the committee, save where they appeal against it in good time before the court having jurisdiction referred to in Clause 29 of the framework contract.

40. However, the binding nature of the opinion does not extend *ratione materiae* further than the questions of law set out in Clause 1.1 of the supplementary contract. Beyond those questions the parties retain their power to refer other disputes relating to implementation of the framework contract to the court referred to in Clause 29.

41. The Parliament contends, in my view on good grounds, that a view which results in the Court ruling on the objections to the opinion of the committee of conciliators and then on the other disputes relating to implementation of the framework contract in separate proceedings is untenable from the point of view of procedural economy.

42. Moreover, the questions of law relating to the interpretation and application of the framework contract which were submitted to the committee of conciliators are, in terms of substance, very closely linked to the form of order sought by the Parliament in which it claims that the Court should give judgment on the date on which the new building should have been completed under the framework contract and the associated legal consequences arising from Clauses 5.1 and 6.3 thereof.

5 — The question whether the Court has jurisdiction to hear and determine a counterclaim and to consider whether it is admissible must be assessed solely in the light of Article 238 EC and the Rules of Procedure. See, to that effect, Case 426/85 *Commission* v *Zoubek* [1986] ECR 4057, paragraph 10. As regards French law, see A. de Laubadère, F. Moderne and P. Delvolvé, *Traité des Contrats Administratifs*, Volume 2, 2nd ed., Paris 1984, p. 1027.

43. I therefore take the view that in these proceedings the Court may, without restriction, examine and rule on the substantive claims raised by Parliament.

C — *Interpretation of Clauses 3.2, 3.3, 5 and 6.3 of the framework contract*

1. Opinion of the committee of conciliators

44. The parties to the framework contract submitted to the committee of conciliators the following two questions relating to the interpretation of Clauses 3.2, 3.3, 5 and 6.3 of the framework contract:

— What is the mechanism laid down in Clauses 3.2, 3.3 and 5 of the framework contract for fixing the contractual date for completion of the building?

— In particular, as regards the exemption clause relating to the payment of interim interest by the European Parliament which is contained in the final paragraph of Clause 6.3 of the framework contract: what is to be understood by the terms 'fault on the part of SERS' or 'delay not accepted as justified by the court referred to in Clause 29'.

45. As regards the first question, there was a fundamental difference of interpretation between the Parliament and SERS which was summed up in section V.2 of the opinion of the committee.

46. In the view of the Parliament, a distinction must be drawn between the provisions of Clauses 3.2 and 5, on the one hand, and those of Clause 3.3, on the other. Clause 3.2 fixes the contractual date for completion which can be deferred only on the grounds for extending the time-limit listed in Clause 5.2. In that regard, the grounds for extension listed in Clause 3.3 must be disregarded. This provision is merely intended to fix a provisional time-limit for completion of the work. Consequently, within the contract Clause 3.3 is intended:

— on the one hand, to lay down the provisional time-limit on the basis of which the date for completion has been fixed (36 months);

— on the other, to specify the possible grounds for extending this time-limit, but with a fixed period of three months which is to end, in any event, on 31 December 1997.

Thus, the date of 31 December 1997 which appears in Clause 3.2 was arrived at by adding together the provisional period for

the construction process and the additional period which had been granted to SERS on condition that it was duly justified by one of the grounds for extension, open to broad interpretation, set out in Clause 3.3.

47. In the view of SERS, the provisions of Clauses 3.3 and 5.2 must be applied cumulatively to fix the contractual date for completion. It takes the view that the date for completion is in reality specified in Clause 5.1 since it refers to 'the 36-month period referred to in Clause 3.3'. This interpretation is effectively that the contractual date for completion must be fixed on the basis of the 36-month period from 1 October 1994, supplemented by a fixed period of three months, all of which may possibly be extended on the grounds for extension listed in Clauses 3.3 and 5.2.

48. In this regard, the committee held in section V.3 of its opinion that the relevant parts of the contract had to be interpreted in a manner which avoided certain terms being rendered meaningless or regarded as redundant. This led to the committee finding as follows:

— firstly, that the contract contains two quite distinct sets of terms, that is to say those of Clause 3.3 relating to the provisional time-limit for construction and those of Clauses 3.2 and 5 concerning the date for completion;

— secondly, the contract sets out grounds for extension which differ in themselves as regards the extension of the provisional time-limit and the deferment of the date for completion;

— thirdly, the contract consistently links the date for completion fixed in Clause 3.2 to the grounds for deferment thereof set out in Clause 5.2. This is the case *inter alia* in Clauses 5.2, 6.3, and 7.2;

— and fourthly, Clause 5.1 provides that:

> '*même au cas*[6] où le délai de 36 mois visé à l'article 3.3 dépasserait la date prévue à l'article 3.2 éventuellement prorogé[e][7] en vertu de l'article 5.2, la SERS sera redevable, à partir de la date visée à l'article 3.2 éventuellement prorogé[e][8] en vertu de l'article 5.2, de plein droit et sans formalité, d'une pénalité...'

The committee takes the view that, notwithstanding the incorrect agreement between the noun 'date' and the adjectival past participle 'prorogé', which does inter-

6 — Underlined in the original.
7 — Brackets in the original.
8 — Brackets in the original.

fere with the interpretation of this provision but which the parties agree is a mistake, this provision could have no meaning other than the following: any completion of the building [after] the time-limit laid down in Clause 3.2, possibly extended on the grounds for extension set out in Clause 5.2, give rises to payment of penalties for delay provided for in the contract even if the provisional time-limit laid down in Clause 3.3 has been exceeded on the legitimate grounds for extension set out in Clause 3.3 but not reproduced in Clause 5.2. Consequently, the provisions of Clause 5.1, in conjunction with the provisions which associate Clause 3.2 (date for completion) with Clause 5.2 (grounds for deferment of the date for completion), require that a distinction be drawn between the provisional date set out in Clause 3.3 and the date for completion. On the basis thereof the committee of conciliators considers that the contractual date for completion is that of 31 December 1997, possibly deferred on the sole grounds for deferment set out in Clause 5.2. The penalties for delay are due as from that date.

49. As regards the interpretation of the final paragraph of Clause 6.3 of the framework contract, the committee of conciliators notes in section VIII of its opinion that the provision relating to interim interest is independent from that relating to penalties for delay. This is explained by the fact that the subject-matter of the two provisions is different. Under the final paragraph of Clause 6.3, the exemption from liability to interim interest is subject to a two-fold condition:

— one, that the actual date of the completion of the building must be later than the contractual date for completion;

— two, that the discrepancy must be attributed to fault on the part of SERS or result from a delay which is not accepted as justified by the court referred to in Clause 29.

The committee of conciliators takes the view that a 'fault' on the part of SERS must be understood as meaning a personal fault on the part of that organisation with the exception of those attributable to its co-contractors or sub-contractors. As regards use of the phrase 'delays which are not regarded as justified by the court referred to Clause 29', the committee considers that the parties must seek a connection with the grounds for deferment listed in Clause 3.3, in so far as they are broader than those set out in Clause 5.2.

2. Pleas in law and arguments of the parties

50. In their counterclaim SERS and the City of Strasbourg principally contest section V of the opinion concerning the fixing

of the contractual date for completion under Clauses 3.2 and 5.1 of the framework contract.

51. They maintain their view, which they had also set out previously before the committee of conciliators, that the contractual date for completion should be determined from the 36-month construction period referred to in Clause 3.3, increased by the fixed three-month period which could subsequently be extended on the grounds for delay listed in Clauses 3.3 and 5.2. This view is essentially based on their interpretation of Clauses 3.2 and 3.3, in accordance with which the consistent use of the term 'prévu' (expected to) indicates that the date of 31 December 1997 is only a 'date prévisionelle' (provisional date) which, consequently, is incapable of constituting a binding and irrevocable date for completion.

52. They contend, moreover, that this interpretation is confirmed by the list of legitimate grounds for extending the provisional 36-month construction period which, in view the use of the term 'notamment' (in particular) in the opening paragraph, is not exhaustive.

53. According to this interpretation, according to which the date for completion of 31 December 1997, which is described as 'prévisionelle', can be deferred on the grounds set out in Clause 3.3, Clause 5.1 can be interpreted as meaning that the penalties for delay are due only where no legitimate ground exists for extending the abovementioned time-limit for completion of the building. Taking 31 December 1997 as the starting date for the application of Clause 5.1, read in conjunction with Clause 5.2, leads to the paradoxical result that SERS can complete the building after that date under the framework contract and nevertheless owe penalties for delay.

54. The Parliament, which concurs with the opinion of the committee of conciliators in section V.3 of the opinion, contends that it is clear from Clause 5.1 that the date of 31 December 1997 is hard and fast. This follows from the automatic application of the penalty provided for by this clause where this date is exceeded. The fact that this date can be deferred under Clauses 5.2 and 5.3 does not alter the unconditional nature thereof. That is because even the extensions to the date for completion made possible by these provisions are calculated from 31 December 1997.

55. The Parliament points out that the committee of conciliators has stated few reasons for the interpretation it placed on Clause 6.3 of the framework contract. Under the final paragraph of Clause 6.3, no liability to interim interest exists in the event of delay — that is to say completion after the contractual date for completion — which is either a result of a fault on the part of SERS or a delay which is not accepted as justified by the court referred to in Clause 29.

56. As regards the second alternative, that is to say the case of a delay which is not accepted as justified by the court having jurisdiction, the Parliament contends that Clause 6 of the framework contract does not contain a single provision under which a delay may be deemed unjustified other than as provided elsewhere in the contract. Since the final paragraph of Clause 6.3 can only give rise to legal consequences after the contractual date for completion, the Parliament continues, the justification or otherwise for the delay must be established on the basis of Clause 5.2. The final contractual date for completion is first established by applying this provision.

57. It follows from the foregoing that a delay within the meaning of Clause 6.3 of the framework contract is justified only if:

— SERS notified the Parliament of any possible ground for delay recognised in Clause 5.2, and did so as soon as it arose, and thereby sought to reach agreement on a specific period by which the contractual date for completion is deferred;

— this specific period was fixed by mutual consent;

— and SERS informed the Parliament of appropriate measures to make up the delay which occurred.

58. As regards the case in which the delay results from a fault on the part of SERS, the Parliament argues that SERS must, as the commissioning authority, play a fundamental role in the implementation of the project. In this capacity SERS should have made certain that the project was developing properly, that the construction work was progressing, and that payments were being made to the contractors. Where necessary, SERS should also have issued the works foremen and the undertakings involved in the construction with the necessary instructions and thus accepted liability for all the consequences thereof. Moreover, it received substantial remuneration from the Parliament for assuming this liability.

59. SERS and the City of Strasbourg contend that there is no automatic link between the penalties for delay and exemption from payment of interim interest referred to in Clause 6.3 of the framework contract. They claim that such exemption is applicable only where fault on the part of SERS can be proven and where the court having jurisdiction does not deem justified the grounds for delay. With regard to the first condition, the committee of conciliators correctly took the view that the Parliament must prove the existence of fault on the part of SERS and that the fault must be attributable to SERS itself. More-

over, this approach is consistent with the principles which apply in French law to the liabilities of the commissioning authority. With regard to the second condition, the defendants point out that even in the case of a fault which must be imputed to SERS itself, the court referred to in Clause 29 can rule that this fault was excusable. In support of their contention they refer to the opinion of the committee of conciliators.

3. Assessment

60. As the committee of conciliators has already stated in its opinion, the framework contract is not, in terms of its wording and scheme, a model of clarity and can consequently give rise to very different interpretations.

61. Nevertheless, if the somewhat unfortunate wording used in Clauses 3.2 and 5.1 is disregarded, it is clear that there is a substantive link between Clause 3.2, on the one hand, and Clause 5.1, read in conjunction with Clauses 5.2 and 5.3, on the other.

62. Clause 3.2 stipulates 31 December 1997 as the final date for completion of the building. The fact that this is not a provisional date but a 'hard and fast' obligation to achieve a result follows from the actual wording of this provision: 'est prévu pour le 31 décembre 1997 *au plus tard*'. [9] The use of the term 'prévu' is not — as SERS and the City of Strasbourg argue — intended to confer conditional character on this provision in the sense that it is a scheduled or planned date. In legal usage this term normally means 'specified'. [10] The fact that this meaning is intended here is clear from the addition 'au plus tard'. Thus, there is no doubt that the time-limit for construction was laid down.

63. Furthermore, the nature of 31 December 1997 as a hard and fast, unconditional deadline is confirmed by Clause 5.1. According to this provision, the period over which penalties for delay are due commences in principle on 31 December 1997 ('la date visée à l'article 3.2').

64. Although the date of 31 December 1997 can, as the time from which the abovementioned penalties are due, be deferred on the grounds listed in Clauses 5.2 and 5.3, it remains the reference point for this penalty clause because the extensions to the contractual date for completion permitted under Clauses 5.2 and 5.3 are calculated from this date. [11]

9 — Italics added.

10 — In this connection see also, for example, Clause 5.1: 'la date prévue à l'article 3.2'.

11 — I therefore concur with the committee of conciliators that the word 'prorogé' refers to 'la date prévue' and must therefore be read as *prorogée*.

65. If this date were only conditional in nature, and could be deferred on any of the grounds referred to in Clause 3.3, as the defendants contend, the penalty clause would have, from the outset, been rendered meaningless as a sanction for exceeding the contractual date. However, the wording of Clauses 5.1 and 3.3 provides no grounds at all for such an interpretation contrary to the purpose of the clause.

66. Clause 3.3, which relates to the provisional ('prévisionnel') 36-month period for construction, ending in principle on 1 October 1997, stipulates that the date for completion under this subclause ('au sens de ce sous-article') may be deferred on a number of grounds listed, not exhaustively, therein. Consequently, the grounds for extension laid down in Clause 3.3 can apply only within the scope of that clause. Therefore, they relate only to the period between 1 October 1997 (the date on which the 'provisional' 36-month period for construction expires) and 31 December 1997 (the date on which the period for completion ends, notwithstanding Clauses 5.2 and 5.3).

67. On the basis of the foregoing, I come to the same conclusion as that reached by the committee of conciliators in its opinion, namely that the contractual date for completion is that of 31 December 1997, as possibly deferred on the grounds set out in Clauses 5.2 and 5.3. Penalties for late payment are due as of this date.

68. Therefore, I conclude that the counterclaim brought by SERS and the City of Strasbourg against section V.3 of the opinion of the committee of conciliators is unsuccessful.

69. The Parliament's arguments against section VIII of the opinion of the abovementioned committee are likewise unconvincing.

70. Although the opinion of the committee is, at that point, of a succinctness worthy of the Roman historian Tacitus, it contains irrefutable reasoning.

71. Under the final paragraph of Clause 6.3 of the framework contract, the period during which the Parliament is exempt from its liability to interim interest commences on the contractual date for completion as laid down pursuant to Clauses 3.2 and 5.1, read in conjunction with Clauses 5.2 and 5.3.

72. However, the exemption is subject to two alternatively worded conditions:

— the delay which occurred after the contractual date for completion must be attributable to fault on the part of SERS

*or* [12]

— it must be deemed unjustified by the court referred to in Clause 29.

73. I do not agree with the Parliament that only the grounds listed in Clause 5.2 should be deemed 'justified' and that it must therefore be concluded *a contario* that other grounds must be deemed to be unjustified.

74. On the contrary, the possible grounds for or causes of delay in completion following the contractual date for completion must be assessed separately in order to establish whether or not they disclose fault on the part of SERS or are otherwise justified.

75. If the opinion of the committee of conciliators is understood in this way, I consider it to be correct.

76. Consequently, I conclude that the Parliament's objections to section VIII of the opinion of the committee of conciliators are unfounded.

12 — Italics added.

D — *Application of Clauses 3.2, 3.3, 5.1, 5.2, 5.3 and 6.3 of the framework contract to the facts of the case*

1. Factual context

77. The file shows that a number of incidents occurred after the signing of the framework contract which affected the progress of the construction work. According to the file, some of these incidents formed the subject-matter of an exchange of correspondence which was sometimes followed by closer consultation between the Parliament and SERS. In other cases this was not so. This is evident primarily from the documents exchanged before the committee of conciliators.

78. The first call for tenders, launched in the spring of 1994, for the basic structure of the new Parliament building fell through on account of price-fixing agreements between the tendering construction undertakings. The Parliament was informed of this. It is clear from the subsequent exchange of correspondence between the Parliament and SERS (letters of 6 October 1994 and 5 January 1995) that the Parliament was concerned about the consequences thereof on the time-limits laid down in the framework contract and that SERS was less perturbed by this. SERS let it be known that the delay which had

occurred could be kept well within the time-limits laid down in the framework contract.

79. However, in its statement of 2 March 1999 to the committee of conciliators, SERS stated however that the final call for tenders had not taken place until 2 February 1995 and that the actual work on the construction site commenced on 3 April, that is to say with a delay of more than six months. As a result, it requested an extension of the construction period of 128 working days.

80. In the same document SERS states that one of the undertakings to which a proportion of the work had been awarded, namely DRE-Lefort-Francheteau, decided after the award not to content itself with the agreed price and, on the pretext that no valid agreement had been entered into, decided to cease work on the construction site on 6 September 1995. The need to issue a fresh call for tenders resulted in a delay of 53 working days. The other documents in the file do not show that the Parliament was informed of this incident in good time.

81. On 1 March, 11 April, 9 July 1996, 3 February, 9 April and 13 August 1997 SERS informed the Parliament of adverse weather conditions which, in its view, necessitated deferment of the date for completion. In these letters it referred in part to Clause 5.2 of the framework contract and in part to Clauses 3.3 and 5.2 thereof. In total SERS requested an 80-day extension to the time-limit for completion in connection with adverse weather conditions.

82. The Parliament responded to this correspondence by letters of 18 March, 25 March, 21 June, 10 July and 18 July 1996. In each of these letters it stated that extension of these time-limits was not automatic but required mutual consent. Furthermore, any delay as a result of weather conditions had to be duly justified. In these letters SERS was invited to state in which respect and to what extent the weather conditions had affected the work and what the effects thereof had been on the general progress of construction.

83. A much later letter from the Parliament to SERS dated 10 December 1997 shows that it was agreed in December 1997 that talks would be held to establish whether a compromise could be reached on extending the time-limits. As far as can be ascertained, these talks did not produce any result.

84. On 27 June 1995 the competent director-general of the Parliament signed *fiche modificative PEU 008* concerning certain

modifications to the debating chamber. It is clear from the content thereof that it would give rise to a delay in the critical timetable of 20 working days.

85. By letter of 29 July 1997 the Parliament approved *fiche modificative PEU 055* relating to the installation of a computer network. This would require an additional five working days.

86. In the statement which SERS presented to the committee of conciliators it also mentioned specific delays due to:

— default by subcontractors: 106 working days;

— strike action: 4 working days;

— consequences of bad weather and road closures due to frost: 16 working days:

— administrative orders: 20 working days;

— suspension of work on the construction site by the plasterer: 28 working days.

Furthermore, the file documents do not show that SERS notified the Parliament of these delays or that any consultation was held on this matter.

87. Two reports by the engineering firm Bovis, which advised the Parliament during the construction process, are also relevant to the factual context. The first report of 20 August 1997 states that the number of personnel on the construction site was far too inadequate to enable the work to be completed by the then provisional date for completion of mid-April 1998. This gave the Parliament cause to express its concern in this regard to SERS and the City of Strasbourg by letters of 16 September 1997 and to urge that the necessary steps be taken to ensure that the exceeding of the time-limit remained limited.

88. The second Bovis report of 19 November 1997 found that the delay in the work schedule had increased and that, at the present work rate, even the date

for completion which had since been moved to 25 May would not be met. In two letters to SERS of 6 April and 5 May 1998 the Parliament stated that even this date appeared impossible to meet and pointed to the logistical and budgetary problems which that posed for it. In the file it is not possible to find any response by SERS to the Parliament's criticism that the turnover and use of personnel and the level of payments since June 1997 were far too inadequate to ensure the timely completion of the building or even to limit any exceeding of the time-limits laid down.

89. In the meantime the Parliament had pointed out to SERS, by the letter of 10 December 1997 referred to at point 83 above, that the contractual period for completion would expire on 31 December 1997. In this letter the Parliament also observed that SERS' letters giving notice of adverse weather conditions could not alter this fact because no or insufficient reasons for the delays had been stated therein. Furthermore, in the absence of an agreement in that respect between SERS and the Parliament, as referred to in Clause 5.2 of the framework contract, the date of 1 January 1998 had to remain the contractual date for completion.

2. Assessment

(a) Preliminary remarks

90. In assessing the various facts and circumstances put forward by SERS and the City of Strasbourg which, in their view, justify reference to the legitimate grounds for delay set out either in Clause 3.3 or Clause 5.2, it must first be noted that the file is incomplete in this respect. That is the case at any rate as regards the alleged delays connected with the departure from the construction site of the group DRE-Lefort-Francheteau and the plastering undertaking. It is also the case as regards the alleged delays connected with the defaulting undertakings, strike action, the consequences of adverse weather conditions and frost, and administrative orders.

91. Even though it must be conceded that these facts and circumstances constitute legitimate grounds for applying either Clause 3.3 or Clause 5.2, it is not possible to determine, on the basis of the factual information contained in the file, the extent to which they actually affected the progress of work on the construction site.

92. The foregoing also applies to delays connected with adverse weather conditions. Although the file contains extensive correspondence in this regard, the documents submitted with it provide insufficient infor-

mation to be able to establish whether, and if so to what extent, these events and circumstances actually delayed the construction work. I shall return to this matter below.

93. My second observation relates to the contacts between the Parliament and SERS concerning the facts and circumstances which could, under the framework contract, justify reference to Clauses 3.3 and 5.2. In this regard both Clause 3.3 and Clause 5.2 provide for contacts and consultations between the parties. Under Clause 3.3, reasons must be duly stated for any reference to the grounds set out therein. Under Clause 5.2, possible extensions to the date for completion pursuant to this provision require mutual consent. Although in its correspondence with SERS the Parliament repeatedly referred to them and pushed for them, the file contains no indications, save for one exception to be referred to below, that such contacts and consultations actually took place.

94. Thirdly, it is not evident from the file, again save for one exception, that SERS informed the Parliament, in its progress reports, of any initiative to make up the delays which had arisen in connection with the causes relevant to these proceedings. Nor did it do so when the Parliament informed it in the second half of 1997 of the undermanning on the construction site and the delays which could be expected as a consequence.

95. Fourthly, it can be inferred from the pleas and arguments of the Parliament that it implicitly accepted that the three-month margin for exceeding the provisional 36-month construction period resulting from Clause 3.2 and Clause 3.3 read in conjunction was no longer relevant in these proceedings. Therefore, the Court need only examine what consequences the facts and circumstances listed at points 77 to 89 above have on the application of Clause 5.1 of the basic contract, read in conjunction with Clauses 5.2, 5.3 and 6.3 thereof.

96. Under Clause 5.2, the contractual date for completion of 31 December 1997 can be deferred on the following grounds:

'1. *force majeure* or accidental occurrence duly confirmed;

2. decisions of an administrative or judicial body ordering work to stop;

3. natural disaster, war, terrorism, archaeological excavations;

4. bad weather recognised by the Caisse des congés payés du bâtiment de Strasbourg;

5. delay in obtaining administrative authorisations attributable to the authorities responsible for examining or issuing them, excluding those within the competence of the City of Strasbourg.'

97. As regards the above facts, reference may be made — possibly — to the grounds set out under 1, 2 and 4. I will assess the facts in that order. I will then examine whether and to what extent there are grounds for applying Clause 5.3 in connection with deferment of the date for completion. Finally, I will consider the application of Clause 6.3 in the factual context set out above.

(b) *Force majeure*

98. In French academic writing on administrative law the concept of *force majeure* is characterised by three elements:

— *extériorité*, meaning that the event is beyond the control of the party by whom it is pleaded;

— *imprévisibilité*, meaning that the event must have been unusual and unforeseeable;

— *irrésistibilité*, meaning that the consequences could not have been avoided even if all due care had been exercised. [13]

13 — See A. de Laubadère, F. Moderne and P. Delvolvé, *Traité des Contrats Administratifs*, Volume 1, 2nd edition, Paris 1983, pp. 727 to 731; F. Llorens, *Contrat d'Entreprise et Marché de Travaux Publics*, Paris, 1981, pp. 506 to 507. *Force majeure* is defined in a similar manner in the case-law of the Court, *inter alia*, in Case 145/85 *Denkavit* [1987] ECR 565, paragraph 11.

99. The first event invoked by SERS which can be regarded as *force majeure* is the failure of the first call for tenders which it claims gave rise to a delay of 128 working days.

100. In that respect the committee of conciliators observed in its opinion that this event had been beyond the control of SERS. Moreover, this event had been unforeseen because SERS, as the contracting authority, could not have reasonably expected that potential tenderers would commit an offence by entering into a price-fixing agreements.

101. As far as the committee of conciliators is concerned, the principal difficulty has to do with the avoidability of the consequences of the failure of the call for tenders. It notes that this resulted in the commencement of the work being delayed for approximately six months and that such delay is difficult to make up in an overall construction period of 36 months. In that connection it points to the statement by the Parliament's representative that the failure of the first call for tenders could possibly have given the Parliament grounds to defer the contractual date for the commencement of work and thus to defer accordingly the contractual date for completion if SERS had requested that it do so. The committee also points to the fact that the fresh call for tenders was beneficial for the Parliament because it enabled the building costs to be reduced considerably.

102. Although by its letter of 20 December 1994 SERS informed the Parliament that it would meet the time-limits laid down in the framework contract despite the delays which had occurred, the committee does not regard this letter as decisive. It takes the view that the factors which are decisive in a case of *force majeure* are objective in nature. Therefore, they must be assessed per se, irrespective of the, possibly incorrect, appraisal thereof by one of the parties to the contract at a time when all the consequences of this event may not yet be clear.

103. On the basis of this reasoning, the committee takes the view that the parties must agree subsequently to make a joint assessment of the effects on the progress of the construction process of the failure of the first call for tenders. On the basis of this assessment they will then have to determine whether, and to what extent, this event can serve as a ground for deferment of the contractual date for completion (point VII.1A.2(a) of the opinion).

104. The Parliament disputes this view of the committee, putting forward the following arguments:

— SERS' request for 128 working days to be taken into account to defer the contractual date for completion was belated. It was not until after the

conciliators were appointed, that is to say long after the actual event had occurred, that the Parliament was informed thereof;

— the fact that SERS itself conceded in its letter of 20 December 1994 that, despite the failure of the first call for tenders, the time available to it to complete the building was entirely adequate for it to fulfil its contractual obligations concerning the date for completion. Furthermore, the delay which is now being invoked is nowhere to be found in the monthly reports on the work timetable. For example, it is evident from monthly report No 34 of 6 February 1997 — that is to say less than 11 months prior to the contractual date for completion — that according to the work schedule of 31 October 1996 no case of the time-limits being substantially exceeded was foreseen even though delays other than that in question had already arisen by that time. In the light thereof it cannot be maintained, as the committee does, that SERS gave, in its letter of 20 December 1994, an incorrect assessment of the effects of the failed call for tenders.

105. In the view of the Parliament, it follows from the foregoing that the committee was wrong to conclude that the effects of the first call for tenders were unavoidable and insuperable.

106. It is evident from the documents in the case file that the failure of the first call for tenders for the basic structure was notified to the Parliament and that that event resulted in consultations between the parties. In its letter of 6 October 1994 the Parliament expressed its concern at the situation which arose from the failure of the first call for tenders. In that letter the Parliament stressed the need to observe the time-limits laid down in the framework contract, otherwise the contractual penalties for delay would apply.

107. SERS's response thereto in its letter of 20 December 1994 sought to dispel the Parliament's concern. In that connection, the express statement was made that 'the deferment resulting from the resumption of consultations should remain well within the time-limits laid down in the framework contract'. It reveals no reference to any delay justified under Clause 5.2.

108. Furthermore, the general timetable of 1 January 1995 submitted by the Parliament shows that at that time, that is to say over six months after the failure of the first call for tenders, the plan still provided for completion of the works for the month of October 1997 at the latest.

109. The invocation of *force majeure* by SERS in its statement of 2 March 1999 to

the committee of conciliators on account of the failure of the first call for tenders for the new building must be assessed against this factual background.

110. In this respect I should first note that, according to established case-law of the French Conseil d'État, the contractual clauses concerning *force majeure* must be complied with strictly. Where *force majeure* is not invoked in good time, the party concerned can no longer invoke it in relation to the other contracting parties. [14]

111. Although SERS informed the Parliament of the failure of the first call for tenders in good time, there is nothing in the documents to show that it invoked in any respect *force majeure* at that time. On the contrary, it can be concluded that, irrespective of the effects thereof, this event gave it no cause to do so. Under these circumstances, the invocation of *force majeure* before the committee over four years later can be regarded as nothing other than belated. That is because, under Clause 5.2 of the framework contract, any events on account of which the grounds set out in this provision are invoked to defer the contractual date for completion must be notified immediately. Although the events were notified, it is not evident that any of the grounds for deferment were invoked at the same time.

112. Even if it were assumed that *force majeure* was invoked in good time, I consider incorrect the committee of conciliators' view that in the given circumstances the effects of the failed call for tenders were such that SERS could not have dealt with them adequately in its letter of 20 December 1994. This letter was written over six months after the event had occurred and at a time when preparations for the second call for tenders were already so advanced that the consequences, in terms of time, for the construction process could easily have been assessed. The general work schedule referred to at point 108 above confirms that fact. In the light thereof it cannot be argued that the effects of the failure of the first call for tenders prevented SERS from meeting the contractual date for completion in an unavoidable and insuperable manner.

113. In the light of the foregoing, I consider that SERS' invocation of *force majeure* on account of the failure of the first call for tenders for the basic structure is belated, inadmissible and, in the alternative, unfounded.

114. In one section of its opinion the committee of conciliators considers the invocations by SERS of *force majeure* in

14 — See A. De Laubadère, F. Moderne and P. Delvolvé (cited in footnotes 5 and 13), loc. cit., p. 739 and the comprehensive case-law of the Conseil d'État cited therein.

connection with the default of various undertakings, including the departure from the construction site of the group DRE-Lefort-Francheteau and the plasterer (point VII.1A.2(d)).

115. The committee notes that in general such cases cannot be covered by the notion of *force majeure* because they do not satisfy the criteria of unforeseeability. Default by undertakings occurs relatively frequently in the course of large building projects and therefore in case-law is regarded as a normal risk in the construction process.

116. However, the committee makes an exception in the case of the group DRE-Lefort-Francheteau on account of the particular circumstances in which it arose. In this case an undertaking refused to sign the relevant contract after it had been awarded the work. As the contracting authority SERS cannot have foreseen such an occurrence. Therefore, it can be regarded as *force majeure* if the parties concerned regard as insuperable the substantial delay which results from it. They must come to an agreement in this respect.

117. However, if the parties do conclude that a case of *force majeure* has arisen in this case, the committee takes the view that this per se does not exempt SERS from its liability to payment. Such an exemption would effectively indemnify the defaulting group from the effects of its wrongful conduct as a result of which the Parliament would ultimately have the bear the damage. However, this damage is, in the first instance, sustained by SERS which can obtain reimbursement from the abovementioned group.

118. If the court having jurisdiction rules that DRE-Lefort-Francheteau has not acted wrongfully in this case, the parties will have to reach a fresh agreement on whether or not there is *force majeure* in this case in the light of that court judgment.

119. The Parliament disputes this section of the opinion in so far as it relates to the group DRE-Lefort-Francheteau. It puts forward two arguments in this respect. Firstly, it follows from Clause 24 of the framework contract that the contracts concluded by SERS are a direct result of the call for tenders which it carried out. Consequently, the refusal by an undertaking to sign the contract for which its tender had been accepted by the contracting authority amounted to a form of default which did not differ in any way from other forms of default. In such a situation SERS should, as in any other case in which an undertaking leaves the construction site, have ensured that the undertaking concerned was replaced, subject to the conditions laid down in the framework contract.

120. Secondly, the Parliament notes that SERS brought an action for compensation against the abovementioned group. It is therefore evident that this case relates not to *force majeure* but to wrongful conduct on the part of third parties.

121. In respect of this plea of *force majeure*, in so far as the committee of conciliators regards it as such, I should point out that it was, in all probability, belated. The case file does not show that the underlying events, which occurred between 3 February and 5 September 1995, were notified immediately to the Parliament or that they were the subject, during this period, of consultations between the parties for the purpose of applying Clause 5.2 of the framework contract. If that is the case, the invocation of *force majeure* in relation to this case in SERS' statement of 2 March 1999 must be regarded as inadmissible.

122. As to the substance, I take the view that this case cannot be regarded as constituting *force majeure*. Although it is rather unusual for an undertaking to fail to fulfil the obligations stemming from a completed tendering procedure in the way that the group DRE-Lefort-Francheteau has, it does not differ fundamentally from the way in which undertakings involved in a construction project otherwise default. Since default by undertakings can, as such, occur frequently in the course of large construction projects for whatever reason, and therefore can be foreseen by the contracting authority (maître de l'ouvrage), and which it can consequently take into account when entering into obligations to achieve a result in respect of the date for completion, the occurrence of such an eventuality cannot, irrespective of the particular circumstances, provide grounds for invoking *force majeure*.

123. My view is confirmed by French legal academic writing and case-law which is extremely restrictive as regards the acceptance of *force majeure* in cases in which default by a party to a contract under public law is due to a subcontractor or a third party. [15]

124. I therefore conclude that the invocation of *force majeure* in relation to the default by the group DRE-Lefort-Francheteau is inadmissible or, in the alternative, unfounded.

125. As regards the other two cases in which SERS invoked *force majeure*, that is to say strike action and road closures due to frost, I can be brief. In this regard the committee of conciliators stated at points VII.A.2(b) and (c) that this could be accepted only in exceptional circumstances. Furthermore, the file does not show that

15 — See A. De Laubadère, F. Moderne and P. Delvolvé, loc. cit., p. 733; idem F. Llorens, loc. cit. pp. 510 to 512 (cited in footnote 12).

SERS informed the Parliament thereof in good time with a view to invoking Clause 5.2 or that any consultations on the matter were held between the parties.

126. In any event, as SERS did not present to the committee or the Court any particular circumstances which could provide grounds for these invocations of *force majeure*, I take the view that they are in any event unfounded.

(c) Bad weather

127. As regards SERS' contention that the contractual date for completion should be deferred by 80 days on account of bad weather which delayed the progress of the construction work, the committee of conciliators noted as follows at point VII.1B.

128. It is established that, under Clause 5.2 of the framework contract, bad weather can be invoked as a legitimate ground for deferring the contractual date for completion, provided that it is recognised as such by the Caisse des congés payés du bâtiment de Strasbourg. The committee goes on to state that it is an implicit condition for the application of Clause 5.2 that the events referred to therein must genuinely affect the actual progress of the work.

129. Therefore, the parties should agree to examine what the actual effects of the bad weather recognised by the Caisse des congés payés du bâtiment de Strasbourg were on the progress of the construction project.

130. At the hearing before the Court the Parliament stressed that SERS appeared, in its correspondence with the Parliament, to have assumed incorrectly that the mere notification of days of delay on account of bad weather was sufficient almost automatically to defer the contractual date for completion. This view is erroneous in law because Clause 5.2 stipulates that mutual agreement between the parties, and thus consultation, is necessary. Moreover, under Clause 25 SERS is required to state the measures it intends to take to make up the delays.

131. The Parliament contends that SERS' view is also substantively incorrect. Not every situation in which bad weather occurs results in the work as a whole having to be suspended. Therefore, consultations between the parties must determine what the actual effect has been on the progress of the work.

132. It is a generally recognised fact that construction work in the open air is vulnerable to bad weather such as frost and snow, heavy rainfall and strong winds. Clauses governing the effects of bad weather are therefore part and parcel of construction contracts. In this regard Clause 5.2 of the framework contract is not unusual.

133. I concur with the committee of conciliators that Clause 5.2 contains the implicit condition that the mere occurrence of delay on account of bad weather per se does not automatically provide grounds for extending the contractual period for completion. Only the actual effects of the bad weather on the building process are of relevance.

134. Not every form of bad weather has the same effects. A storm, for example, can render certain wind-sensitive activities on a construction site dangerous or impossible, whereas other activities taking place in the shelter of the structure are impeded to a lesser extent. It is also the case that, as construction progresses, the vulnerability of the project to bad weather decreases. Normally, a building will first be made rain-proof, then wind-proof, and finally frost-proof. In this respect it should be noted that the construction process per se can be made more or less vulnerable to bad weather, depending on precautionary measures taken. Finally, the effect of delay on account of bad weather must be assessed on the basis of the extent of the delay in relation to the overall work on the construction site and the impact thereof on the critical timetable of the project.

135. In the light of the foregoing, a through analysis of each case of delay on account of bad weather which occurs is necessary in order to be able to assess whether and, if so, to what extent there are grounds for invoking it in order to obtain deferment of the contractual date for completion. The provision in Clause 5.2 of the basic contract under which the parties must agree on this matter is effective and necessary in this respect.

136. It is clear from the relevant sections of the file that the parties communicated with one another but did not hold consultations. SERS regularly informed the Parliament of bad weather that had occurred, at the same time submitting attestations from the Caisse des congés payés du bâtiment de Strasbourg, *inter alia* by letters of 1 March,

11 April, 9 July 1996, and 3 February, 9 April and 13 August 1997. The Parliament responded *inter alia* by letters of 18 March, 25 March, 21 June and 18 July 1996. The tenor thereof was invariably that the Parliament could not accept any deferment of the date for completion of the building without prior mutual agreement between the parties. However, the file reveals nothing about the necessary consultations between the parties.

137. The fact that such consultations were necessary is however clear from the file. Various documents attached to SERS' letters show that payments for delay were made to a small number of employees. This is true, for example, in respect of the attestation of SMAC ACIEROID of 6 June 1997 which has between three and eight employees. At first glance it would appear unlikely that such numbers on a construction site, where hundreds and sometimes over a thousand employees were working, could have resulted in the complete cessation of construction work.

138. I am unable to assess how complete the file is. However, it is clear that, as it has been presented to the Court, it does not enable it to give a well-founded, even approximate, judgment on the factual questions to be answered before it can address the question of the extent to which the adverse weather conditions cited by SERS provide grounds for application of Clause 5.2 of the framework contract.

139. In this regard I therefore conclude that the Court should, by way of interim judgment, appoint an expert to provide answers to the following questions:

— Did the cases of adverse weather conditions notified by SERS have a significant negative impact on the critical building schedule, having regard to the fact that completion was planned for 31 December 1997 at the latest?

— If so, how great was this delay measured in working days?

The parties will have to provide the expert with all information he needs to form his opinion.

(d) Administrative orders

140. The committee of conciliators rejected SERS' request for extension of the period for completion by 20 working days, arguing that this ground for extension of the period for completion is provided for in Clause 3.3 of the framework contract, but not in Clause 5.2 thereof (section VII.1C. of the opinion).

141. I concur with this view which, moreover, has not been expressly refuted by the parties concerned.

(e) Additional work and modifications (Clause 5.3 of the framework contract)

142. Under Clause 5.3, additional work or modifications requested or accepted by the Parliament are to be regarded as separate grounds for deferring the date for completion. In respect of any such modifications the additional time-limits for the contractual completion of the building are to be laid down in accordance with the procedure laid down in the protocol attached as Annex 5 to the framework contract.

143. Under that protocol, SERS must inform the Parliament of the effects which the modifications to the specifications will have on the overall time-limit for construction. Countersigning by the Parliament *ipso jure* triggers a corresponding extension of the period for completion laid down in Clause 3.

144. As regards *fiche modificative PEU 008*, the committee of conciliators concluded that the explicit acceptance thereof by the Parliament, which is evident from the signing thereof by a competent official, had the effect of extending the contractual date for completion by 20 working days (section VII.1.D. of the opinion).

145. The Parliament disputes this view, contending that the relevant fiche provides no indication as regards the resultant delay. Furthermore, in the view of the Parliament, the work to carry out the modifications requested did not in fact give rise to any delay.

146. I consider that the Parliament's view is untenable. On reading the relevant *fiche modificative PEU 008*, a copy of which the Parliament submitted as Annex XVIII to its application, it can be seen, under the heading 'anticipated delay', that the delay resulting from this work will, as regards the critical timetable, be the same as the period

which expired between 31 August 1995 and the date on which the fiche approved by the Parliament was returned to SERS. The Parliament's Director-General for Administration signed this fiche on 26 September 1995. It was returned to SERS on 28 September 1995. The Parliament expresses no reservation in the fiche itself or on any attachment to it.

147. I should also note that in this regard the Parliament's argument that the actual work carried out to make the modifications did not give rise to any delay is irrelevant. Under the protocol to the framework contract, approval by the Parliament of a proposed modification triggers *ipso jure* an extension of the period for completion by the period referred to in that proposal.

148. I therefore conclude that the signing of *fiche modificative PEU 008* on behalf of the Parliament triggers an extension of the period for completion referred to in Clause 3.2 of the framework contract by 20 working days.

(f) Application of Clause 6.3 of the framework contract

149. As I concluded at point 71 above, it follows from the final paragraph of the framework contract that the Parliament is exempt from the liability to interim interest from the contractual date for completion as ultimately fixed by the combined application of Clauses 3.2 and 5.1 read in combination with Clauses 5.2. and 5.3.

150. The question which still remains to be answered in this regard is whether the exceeding of this date is a consequence of wrongful conduct or a failure which can be ascribed to SERS itself or whether the Court should rule that there is no justification for thus exceeding that date.

151. Having regard to the system of the framework contract, which, firstly, gives SERS, in Clause 3.3, a broadly defined series of grounds on which the 'extra' period of three months can be granted and which, secondly, provides, in Clauses 5.2 and 5.3, a number of further possibilities for securing deferment of the final contractual date for completion of the building, I consider that the final paragraph of Clause 6.3 must be interpreted and applied strictly. Otherwise, the protection which the Parliament is able to derive from this provision would be illusory.

152. Such an interpretation means that reasons other than those referred to in Clause 5.2, which could provide grounds for exceeding the contractual date for completion, must be clear, that is to say manifest and consequential. SERS has not put forward such reasons. Its arguments concerning the interpretation and application of the provision in question are aimed primarily at restricting the scope thereof.

153. I am likewise unable to find in the file any bases for concluding that, when it became clear that the building would be completed — far — beyond the date of 31 December 1997, SERS took the initiative to start consultations with the Parliament on the difficulties it was having finishing the building. It merely invoked the grounds for deferment listed in Clause 5.2 without consulting the Parliament further.

154. In that connection I consider particularly relevant the letters of 16 September 1997, 6 April and 5 May 1998 in which the Parliament expressed, apparently with good reason, its concern over the effects that this might have on the scheduled and increasingly deferred date for completion. They went unanswered or at least did not result in a noticeable response in SERS' actions as the contracting authority. Meanwhile the financial consequences for the Parliament of further deferment became greater.

155. Since there are no manifest and consequential grounds for a further deferment of the date for completion as fixed pursuant to Clauses 5.2 and 5.3, I consider that the Parliament is exempt from its liability to interim interest from that date which must be determined more precisely.

(g) Costs

156. In their objection of inadmissibility SERS and the City of Strasbourg claimed that the Court should order the Parliament to pay the costs and a procedural indemnity of EUR 20 000. In their applications as to the substance they claimed that the Court should order the Parliament to pay the costs and a procedural indemnity of FRF 300 000.

157. The Parliament contended that the Court should order SERS and the City of Strasbourg to pay the costs.

158. In this regard I should note that under Article 69(3) of its Rules of Procedure, the Court may order a party to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur. Since SERS and the City of Strasbourg have not substantiated their applications with facts and arguments and the course of the proceedings provides no grounds for any complaint against the Parliament, these applications must be dismissed.

159. Since the judgment which the Court gives in these proceedings will not terminate this case, the decision on costs must be deferred until the final judgment.

## V — Conclusion

160. In the light of the foregoing, I conclude as follows:

1. Admissibility

(a) The objection of inadmissibility raised pursuant to Article 91(1) of the Rules of Procedure of the Court by the Société d'aménagement et d'équipement de la région de Strasbourg (SERS) and the City of S

(b) The counterclaim by SERS and the City of Strasbourg against the opinion of the committee of conciliators is admissible.

(c) The action by the Parliament is also admissible in so far as it goes beyond the appeal against the opinion of the committee of conciliators.

2. Substance

(a) The contractual date for completion of the IPE IV building is that of 31 December 1997, as possibly deferred on the grounds set out in Clauses 5.2 and 5.3 of the framework contract between the European Parliament, on the one hand, and SERS and the City of Strasbourg, on the other. Therefore, the counterclaim brought by SERS and the City of Strasbourg against point V.3 of the opinion of the committee of conciliators is unfounded.

(b) Under the final paragraph of Clause 6.3 of the framework contract, the period during which the Parliament is exempt from its liability to interim interest commences on the contractual date for completion as fixed pursuant

to Clauses 3.2 and 5.1, read in conjunction with Clauses 5.2 and 5.3. However, this exemption is subject to two alternatively worded conditions:

—the delay which occurred after the contractual date for completion must be attributable to a fault on the part of SERS

or

—it must be deemed unjustified by the court referred to in Clause 29, in this case the Court of Justice.

(c) SERS and the City of Strasbourg cannot invoke *force majeure*, as referred to in Clause 5.2 of the framework contract, in relation to:

—the failure of the first call for tenders for the basic structure of the IPE IV building;

—default by the undertakings involved in the construction, including by the group DRE-Lefort-Rocheteau;

—strike action;

—road closures due to frost.

(d) SERS and the City of Strasbourg may invoke bad weather as referred to in Clause 5.2 of the framework contract. The Court should, by way of interim judgment, appoint an expert to advise it on the following questions:

—Did the cases of bad weather notified by SERS have a significant negative impact on the critical building schedule, having regard to the fact that completion was planned for 31 December 1997 at the latest?

—If so, how great was this delay measured in working days?

(e) SERS and the City of Strasbourg may not invoke administrative orders for the purpose of applying Clause 5.2 of the framework contract.

(f) Fiche modificative PEU 008, which was duly signed on behalf of the Parliament, grants SERS a 20-day deferment of the contractual date for completion pursuant to Clause 5.3.

(g) SERS cited no grounds which are sufficiently manifest and consequential to provide grounds for a further deferment of the date for completion to be fixed pursuant to Clauses 5.2 and 5.3. Therefore, the Parliament is, under the final paragraph of Clause 6.3, exempt from its liability to interim interest from that date, which must be determined more precisely.