JUDGMENT OF THE COURT (Sixth Chamber)
10 April 2003 *

In Case C-167/99,

European Parliament, represented by T. Millett and O. Caisou-Rousseau, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Société d'aménagement et d'équipement de la Région de Strasbourg (SERS), established in Strasbourg (France), represented by G. Alexandre, avocat,

and

Ville de Strasbourg, represented by B. Alexandre, avocat,

defendant,

* Language of the case: French.

APPLICATION, firstly, by the European Parliament under Article 181 of the EC Treaty (now Article 238 EC) for annulment of the opinion of the committee of conciliators to which the parties appealed, and for the payment of penalties for late performance, and, secondly, as a counterclaim, by Société d'aménagement et d'équipement de la Région de Strasbourg (SERS) and Ville de Strasbourg for annulment in part of that opinion,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen (Rapporteur), V. Skouris, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 January 2002, at which the European Parliament was represented by O. Caisou-Rousseau and D. Petersheim, acting as Agent; Société d'aménagement et d'équipement de la Région de Strasbourg (SERS) by G. Alexandre and A. Friederich, avocat; and Ville de Strasbourg by B. Alexandre,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2002,

gives the following

Judgment

1 By application lodged at the Registry of the Court of First Instance of the European Communities on 20 April 1999 and received at the Registry of the Court of Justice on 4 May 1999, the European Parliament brought an action under Article 181 of the EC Treaty (now Article 238 EC) for annulment of the opinion of the committee of conciliators to which the parties had appealed and for the payment of penalties for late performance of the contract between it and Société d'aménagement et d'équipement de la Région de Strasbourg (SERS) and Ville de Strasbourg (City of Strasbourg, 'the City'). In their defence, the latter counterclaimed for annulment in part of that opinion.

Facts and legal background

2 According to the documents in the case, the Parliament, the City and SERS signed on 31 March 1994 a contract ('the framework contract') defining the conditions of the long lease and option to purchase relating to a property complex ('the buildings') which SERS undertook to construct for the Parliament on land transferred for that purpose by the City, and the relationship between the parties during construction of the buildings.

3 Under clause 3.1 of the framework contract, the lease concluded between SERS and the Parliament was to take effect only on confirmation of completion of the buildings.

4 Clause 3.2 of the framework contract stipulates that completion of the buildings 'is expected to take place by 31 December 1997 at the latest'.

5 Under clause 3.3 of the framework contract:

'The work on the superstructure of the buildings is expected to start on 1 October 1994. SERS shall have an estimated period of 36 months to complete the buildings 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. That shall apply *inter alia* in the event of:

— additional modifying work requested by the European Parliament;

— delay in obtaining administrative authorisation(s) 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* or accidental occurrence 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.'

6 Clause 4 of the framework contract provides:

'The buildings shall be regarded as completed either on the date of acceptance if there is only one, or on the date of the last acceptance if they are successive or partial, except in the case of an objection by the European Parliament duly founded on non-compliance with the programme documentation in its entirety. In the latter case, the date of completion shall be the subject of agreement between the parties or, failing that, a decision of the competent French court. Acceptance means acceptance within the meaning of Article 1792-6 of the French Civil Code.

...

SERS shall, by registered letter sent at least 10 calendar days before the date proposed, invite the European Parliament to a site visit prior to each acceptance and to the acceptance(s). SERS undertakes not to issue one or other acceptance without taking account of any observations and comments the European Parliament may make which are duly founded on compliance with the programme documentation in its entirety.

Failing agreement between SERS and the undertakings on fixing the date of one or other acceptance, it shall be the date fixed judicially pursuant to Article 1792-6 of the French Civil Code, and this is expressly accepted by the parties. In the event of an application for judicial acceptance to be delivered, SERS undertakes to inform the European Parliament thereof forthwith.

...'

7 Clause 5 of the framework contract, headed 'Time-limits and penalties for delay', provides:

'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 formalities 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 works 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.

5.2 The period provided for in clause 3.2 shall be extended in the event of:

— *force majeure* or accidental occurrence duly confirmed;

— decision 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 authorisation(s) 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.

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.

For each such work, the additional periods must be fixed in accordance with the procedures defined in the protocol.'

8 Clause 6.3 of the framework contract reads as follows:

'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 or the confirmed investment cost for the sums not taken into account in the intermediate investment cost statement(s).

In this respect, interim interest shall apply in particular between the date when a payment is first due and the actual date of payment.

It shall be calculated according to the rates and conditions which appear to be the best on the financial markets, which SERS shall explore constantly for that purpose, following the procedure laid down in clause 6.4.

The calculations concerning the calculation of days and capitalisation of interest shall be done in accordance with banking methods the description of which shall be an integral part of the financing contract mentioned in clause 6.4.

For determining the provisional investment cost, the interim interest has been fixed at an indicative rate of 7.3%.

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.'

9 Clause 21.1 of the framework contract provides that the communication of documents or information shall take place officially by exchange of correspondence between the managing director of SERS and the director-general of the administration of the Parliament, or in their absence by a person duly delegated, neither party being able to rely on an oral decision or oral agreement of the other party or on a document in writing not signed by one of those two persons or their expressly appointed delegates.

10 Under clause 22.1 of the framework contract, SERS is to draw up a detailed report on the progress of the project every month.

11 Under clause 25 of the framework agreement, the general timetable annexed thereto must be observed and SERS must transmit, with the monthly report referred to above, the site timetables and identify and explain any delays. In the

event of delay, the Parliament must be informed of adequate remedial measures which SERS intends to implement, that being without prejudice to the application of the provisions of clause 5 of the framework contract.

12 Clause 28 of the framework contract states that the law applicable to the contract is French law.

13 Under clause 29 of the framework contract:

'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, pursuant to Article 181 of the EEC Treaty, Article 153 of the ECSC Treaty and Article 42 of the Euratom Treaty.'

14 As may be seen from the case-file, the parties exchanged a large number of letters and documents. It is apparent from the documents before the Court *inter alia* that on 22 November 1994 the Parliament communicated to SERS a consultant's opinion on monthly report No 6 drawn up by SERS. In a letter of 20 December 1994, SERS replied to the criticisms in that opinion, stating in particular that it had been agreed since August 1994, in other words before the invitation to tender for the contract for the structural work, that the undertakings for the structural work could have been designated by the beginning of January 1995 and that the reopening of consultations entailed a delay making it possible to stay well within the time-limits provided for in the framework contract, since the margin allowed for by SERS in relation to the objective of the contract was not used up and was still largely available.

15 By an amending memorandum (PEU 008) dated 28 September 1995, the Parliament asked for certain changes to be made to the layout of the hemicycle. As regards the influence of those modifications on the time-limit for completion, the memorandum provides that the postponement of the completion date for the work is to be equal to the period between 31 August and the date of receipt by SERS of approval by the Parliament.

16 By letters of 1 March, 11 April and 9 July 1996 and 3 February, 9 April and 13 August 1997, SERS communicated to the Parliament various reports on bad weather which necessitated extending the period for completion of the buildings, pursuant to either clause 3.3 or clause 5.2 of the framework contract. The reports concerned a total of 152 working days.

17 The Parliament replied, by letters of 18 March, 21 June and 18 July 1996, firstly, that to be able to rely on clause 3.3 of the framework contract SERS had to demonstrate that the bad weather in question had actually caused delay in the general progress of the site. It stated, secondly, that the period provided for in clause 5.2 of the framework contract could be extended only on the basis of common agreement or a judicial decision, and there was no provision for an exception to that procedure in the case of bad weather.

18 Having regard to the delay attributable to the installation of a computer network which had been the subject of another amending memorandum (PEU 055), the Parliament decided on 29 July 1997 to allow SERS an additional period of five working days for completion of the buildings.

19 In a letter of 10 December 1997, the Secretary-General of the Parliament restated the Parliament's position as to the taking into account of bad weather in calculating the period for completion of the buildings, and formally called on

SERS to communicate to it the intermediate investment cost, as provided for in clause 6.2(c) of the framework contract, within three weeks from the receipt of that letter.

20 In its reply of 16 January 1998, SERS stated that the position adopted by the Parliament was contrary to clauses 3.3 and 5.2 of the framework contract. It said that it could not comply with the Parliament's request because, as the buildings had not yet been completed, clause 6.2 of the framework contract was not yet in force. The Parliament's position was moreover completely contradictory, in that it wanted, on the one hand, to bring into account penalties for delay because of non-completion and, on the other, to consider the buildings completed within the meaning of clause 6.2(c) of the contract.

21 By registered letter of 14 December 1998, SERS informed the Parliament that it had accepted the buildings on 18 November 1998 and that the latter date constituted the date of completion for the purposes of clause 4 of the framework contract.

22 On 16 December 1998 the Parliament replied that it objected to the buildings being regarded as completed on the date of the acceptance by SERS.

23 On 14 January 1999 the City and the Parliament signed three agreements, which were also signed by SERS on 19 January 1999. These were:

— a supplement to the framework contract ('the supplementary contract'), supplementing clause 29 and concerning the establishment of a committee of

conciliators ('the conciliators') strictly for the purpose of resolving the dispute on the differences of interpretation and application as regards the fixing of the contractual date of completion of the buildings on the basis of clauses 3, 5, 6 and 25 of the framework contract;

— a conciliation protocol, in which the parties decided to submit to the opinion of the conciliators the dispute as defined in the supplementary contract;

— a document recording completion of the buildings, in which the parties agreed *inter alia* that the completion date provided for in clause 4(1) of the framework contract was fixed at 15 December 1998 and that the lease concluded between SERS and the Parliament consequently took effect on that date on the terms provided for in that contract.

24 In accordance with clause 1(2) of the supplementary contract, the conciliators were to give their opinion exclusively as a point of law, on the basis of the provisions of the framework contract. In addition, each party was bound to comply with that opinion, without prejudice to the right of either to make an application, within 30 days from notification of the Opinion, to the court referred to in clause 29 of the framework agreement.

25 Before the conciliators, SERS claimed that the following delays had occurred:

— 25 working days caused by the additional works resulting from the modifications requested in amending memoranda PEU 008 and 055;

— 128 working days due to the failure of the first call for tenders for the contract for the structural works;

— 180 working days because of bad weather;

— 106 working days because of defaults of undertakings;

— 4 working days because of a strike;

— 16 working days as a result of road closures because of bad weather and the setting up of road barriers in thaw conditions;

— 20 working days as a result of administrative orders;

— 81 working days because of the abandonment of the site by the DRE-Lefort-Francheteau consortium ('DRE') and the undertaking doing the plastering work.

26 On 22 March 1999 the conciliators gave the opinion sought ('the Opinion') and notified it to the parties.

27 In Title V.3 of the Opinion, the conciliators stated as follows:

'...

... the contract contains two groups of terms which are quite distinct, those of clause 3.3 relating to the estimated period and those of clauses 3.2 and 5 concerning the completion date;

... the contract makes provision for grounds of postponement which are themselves different for the estimated period and the completion date;

... the contract consistently attaches the date of completion fixed in clause 3.2 to the grounds of postponement provided for in clause 5.2 (see clauses 5.1, 6.3, 7.2);

... clause 5.1 provides that:

"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 formalities being required... for a... penalty".

That latter provision, notwithstanding the incorrect inflectional endings on the French word *prorogé* (postponed) which confuse its interpretation but which the parties have agreed to accept as mistakes, can only have the following meaning: any delivery of the work beyond the time-limit fixed by clause 3.2 extended solely by the grounds of postponement in clause 5.2 gives rise to payment of the penalties for delay laid down in the contract, even if the estimated period fixed in clause 3.3 has been exceeded as a result of legitimate grounds of delay provided for in clause 3.3 but not repeated in clause 5.2.

Consequently, the very terms of clause 5.1, combined with the provisions which associate clause 3.2 (completion date) with clause 5.2 (grounds of postponement of the completion date), require a distinction to be drawn between the estimated period in clause 3.3 and the date of completion.

In those circumstances, the College... is of the opinion that the contractual date of completion is the date of 31 December 1997, possibly postponed in accordance with the effects only of the grounds of postponement provided for in clause 5.2. That is therefore the date from which the penalties for delay are due.'

28 Title VI of the Opinion, concerning the question of the conditions under which the respective grounds of postponement mentioned in clauses 3.3 and 5.2 of the framework contract are capable of being implemented, reads as follows:

'...

Having regard to the terms of clause 3.3, the grounds of postponement it lists can apply only in so far as they have arisen before 31 December 1997 and can be taken into account only within the three-month limit which follows from clause 3.2 in conjunction with clause 3.3.

In this respect, it is apparent from the document produced by the European Parliament at the meeting on 5 March 1999 (points 24 and 25) that it recognised, implicitly but necessarily, that that three-month limit was properly used by SERS pursuant to clause 3.3.

However, the European Parliament does not make clear which of the grounds put forward by SERS it relies on in accepting that extension of the estimated period. It is not possible for the same ground of postponement to be used twice, once to extend the estimated period of 36 months, and again to postpone the contractual date of completion.

We... therefore recommend the parties to come together to determine the grounds of postponement of the period of 36 months, while of course giving priority to the grounds of postponement allowed under clause 3.3 but not allowed under clause 5.2.

It thus follows from the above that the only remaining disagreement between the parties concerns the grounds of the postponement of the completion date beyond 31 December 1997 under clause 5.2.

We... consider that the grounds of postponement in clause 5.2 for their part entail a postponement of the completion date provided for in clause 3.2 (31 December

1997) to the due extent, whatever their date of occurrence and even if they occur after 31 December 1997, provided that they take place during a period of postponement which is permitted under clause 5.2.'

29 In Title VII of the Opinion, the conciliators expressed their view on the various grounds of delay which could be taken into account for determining the contractual date of completion of the buildings. With respect to the events relied on by SERS which could be regarded as cases of *force majeure*, Title VII.1, Chapter A, Section 2(a) of the Opinion reads as follows:

'The first event capable of being a case of *force majeure* is constituted by the delay resulting from the unsuccessful outcome of the call for tenders for the contract relating to the structural work, based on the assumption of agreement between the tendering undertakings and on the need to carry out another call for tenders in order to award that contract.

...

However, it must be observed that the letter dated 20 December 1994 addressed by [the] managing director of SERS to [the] director-general of the administration of the European Parliament suggests that SERS will observe the time-limit laid down in the framework contract notwithstanding the restart of consultations and the time wasted as a result of that serious incident.

We... consider, however, that the elements which constitute a case of *force majeure* are objective in nature; they must therefore be assessed in themselves independently of the way, which may be incorrect, in which they may have been assessed by a party at a time when not all the consequences of the event had as yet manifested themselves.

In those circumstances, our position... is to invite both parties to come together to examine together *a posteriori* the actual effect of the event in question on the progress of the site from the point of view of the obligation of diligence on the part of SERS.

They will have to decide on the basis of that examination whether to reject or to accept in whole or in part that event as a ground of postponement of the completion date.'

30 In Title VII.1, Chapter A, Section 2(d) of the Opinion, the conciliators examine in the following terms the defaults of undertakings relied on by SERS to justify a postponement of the date of completion of the buildings:

'...

* In general, such acts are not regarded as cases of *force majeure* in that they cannot, in principle, be regarded as unforeseeable. Defaults on the part of undertakings are comparatively common in the course of carrying out works and are regarded by the case-law as normal hazards of a building site.

** However, the default of the [DRE] group assumes a particular aspect in view of the circumstances in which it took place. That group, after tendering in the context of a call for tenders and having its tender accepted, refused to sign the contract itself.

That situation, taken in itself, could count as *force majeure*, provided that the considerable delay it led to is accepted as insurmountable by the parties for whom it is to examine this point.

Were they to decide it by accepting that there was *force majeure*, we... would, however, take the view that in this very special case the payment of penalties for delay could not be avoided. Exemption from such payment would amount to exonerating the group of undertakings in default from the consequences of its default and making the European Parliament bear a loss which was undoubtedly suffered by SERS, but for which SERS can obtain compensation from that group.

Our opinion is, however, based on the assumption of default on the part of the DRE group which refused to honour its commitments. If the competent court before which SERS brought the matter reached a contrary conclusion, the question of *force majeure* would then have to be reconsidered by the parties in the light of that judicial decision.

...'

31 According to Title VII.1, Chapter D of the Opinion, concerning the modifications and additional works:

'...

The operating protocol constituting Annex 5 to the framework contract provides that:

"For the application of clause 5.3 of the framework contract, and with respect to modifications having consequences for the planning, SERS shall inform the European Parliament of the effects of the proposed modifications on the overall time scale.

Countersignature of the modifications by the European Parliament shall automatically to the appropriate extent entail postponement of the time-limit referred to in clause 3 of the framework contract."

We... consider that, pursuant to that provision, the delays resulting from additional works or modifications requested or accepted by the Parliament must be taken into account in their entirety for postponement of the completion date, where the conditions laid down in clause 3.2 of the operating protocol are satisfied.

This must all the more be so as it is apparent from the documents in the case that the delays resulting from [amending memorandum] PEU 055 — Conference network — were taken into account by the European Parliament and those resulting from [amending memorandum] PEU 008 — Modification of the hemicycle — were expressly accepted by it, as may be seen from that amending memorandum.'

32 As regards the conditions for taking into account the grounds of postponement of the contractual date of completion of the buildings, the conciliators considered, in Title VII.2 of the Opinion, that clause 5.2 of the framework contract, which provides that the grounds of postponement specified there can bring about a

postponement of that date only if SERS informs the Parliament thereof as soon as it becomes aware of their occurrence, must be applied in good faith and 'excluding any unnecessary formalism once the information has been brought to the knowledge of the Parliament in a sufficiently explicit manner'.

33 As regards interim interest, Title VIII of the Opinion states as follows:

'...

It appears [from the provisions of the final paragraph of clause 6.3 of the framework contract] that the system of interim interest is independent of the system of penalties for delay; that is attributable to their different objectives.

It follows that the European Parliament may benefit from an exemption from the obligation concerning the payment of interim interest only if two conditions are fulfilled:

— first, the actual date of completion of the buildings is later than their contractual completion date;

— second, that slippage is attributable to fault on the part of SERS or is the result of a delay not recognised as justified by the court mentioned in clause 29.

We... consider that fault on the part of SERS must be understood as a personal fault of SERS, excluding *inter alia* faults attributable to its contracting parties or their subcontractors.

As regards the "delays not recognised as justified by the court mentioned in clause 29", the contract gives no criterion of assessment and refers the matter to the Court of First Instance.

We... have consequently raised the question of what criteria that court or the parties, prior to bringing the matter before the court, could rely on to determine whether or not a delay relied on by SERS is justified.

We consider that, since the grounds of postponement listed in clause 5.2 have already been taken into account simply because of the wording of the final paragraph of clause 6.3, it is those listed in clause 3.3, which it should be remembered is not an exhaustive list, which could be of relevance in this respect.'

Procedure

34 The Parliament's application was lodged at the Registry of the Court of First Instance on 20 April 1999.

35 By letter of 21 April 1999, the Registrar of the Court of First Instance acknowledged receipt of the application and, after pointing out that the Court of First Instance had no jurisdiction to rule on an application by an institution by

virtue of an arbitration clause under Article 181 of the Treaty, informed the Parliament of his intention to transmit the application to the Registrar of the Court of Justice, pursuant to the first paragraph of Article 47 of the EC Statute of the Court of Justice, unless the Parliament informed him before 3 May that its intention was indeed to apply to the Court of First Instance.

36 On 28 April 1999 the Parliament replied that it had no objection to its application being transmitted to the Registrar of the Court of Justice.

37 The application was lodged, by the Registrar of the Court of First Instance, at the Registry of the Court of Justice on 4 May 1999 and registered on the following day.

38 By separate document lodged at the Registry of the Court of Justice on 23 July 1999, the City and SERS raised a plea of inadmissibility, pursuant to Article 91(1) of the Rules of Procedure of the Court, on the ground that the application had been brought out of time and that its transmission to the Court was irregular.

39 By decision of 7 December 1999, the Court, after hearing the Advocate General, pursuant to Article 91(4) of the Rules of Procedure, joined the plea of inadmissibility to the substance.

40 On 7 April 2000 the Parliament made an application for a stay of proceedings in accordance with Article 82a(1)(b) of the Rules of Procedure, on the ground that negotiations between the parties were taking place.

41 By letter of 17 April 2000, SERS and the City opposed that request, on the ground that SERS had not taken part in the negotiations to which the Parliament referred.

42 In those circumstances, on 10 May 2000, the Court, after hearing the Advocate General, decided not to stay the proceedings.

43 By application lodged at the Court Registry on 11 October 2002, SERS and the City asked for the oral procedure, which had been closed on 26 September 2002 following the delivery of the Advocate General's Opinion, to be reopened. That request was dismissed by order of the Court of 3 February 2003.

Forms of order sought

44 With respect to the plea of inadmissibility, the City and SERS claim that the Court should:

— declare the plea admissible and well founded, pursuant to Article 91 et seq. of the Rules of Procedure of the Court;

— hold and declare that the predetermined period of 30 days for making an application to the competent court against the Opinion had expired on the date on which the Court of Justice was seised, namely 5 May 1999;

— declare that the Opinion has become final and irrevocable;

— order the Parliament to pay the costs and to pay each of them a procedural indemnity of EUR 20 000;

— in the alternative, and in the highly unlikely event of the Court deciding either to join the plea to the substance or to reject the plea by separate decision, to grant the City and SERS the necessary time to make submissions on the substance.

45 With respect to the plea of inadmissibility, the Parliament contends that the Court should:

— dismiss the plea of inadmissibility as unfounded;

— dismiss the claim of the City and SERS for payment of a procedural indemnity of EUR 20 000;

— order those parties to pay the costs;

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

46 With respect to the substance, the Parliament claims that the Court should:

— order SERS to pay penalties for delay from 9 January 1998, the contractual date of completion of the buildings, until 14 December 1998 inclusive, the day before the date of confirmation of the completion of the buildings, or else, in the alternative, order SERS to pay penalties for delay as from the contractual completion date fixed by the Court;

— declare unjustified the delays after 9 October 1998, the contractual date of completion of the buildings, and consequently declare that the Parliament is not liable to pay interim interest from that date until 14 December 1998 inclusive, the day before the date of confirmation of completion of the buildings, or else, in the alternative, declare that the Parliament is not liable to pay interim interest as from the contractual completion date fixed by the Court;

— annul the Opinion;

— order the City and SERS to pay the costs;

— declare inadmissible the purported counterclaim brought by those parties

against the Opinion;

— dismiss the claim by those parties for payment of a procedural indemnity of FRF 300 000;

— dismiss all the other claims of those parties.

47 With respect to the substance, the City and SERS contend that the Court should:

— take note that they make submissions on the substance only subject to the plea of inadmissibility of the Parliament's application, without abandoning that plea, and on the contrary maintaining it;

subject to that reservation:

— take note that they bring a counterclaim against the Opinion, in so far as the conciliators considered that the period for completion expired on 31 December 1997 and was extended only on the grounds referred to in clause 5.2 of the framework contract;

— hold that the time-limit of 31 December 1997 is merely an estimated time-limit which may be postponed for any reason justified under clause 3 of the framework contract in all its provisions, which constitutes an indivisible whole;

and, as regards the Parliament's application:

— dismiss that application;

— hold that the Court has no other power 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 a completion date concerning questions of fact not within the competence of the conciliators and the Court, which is hearing the case on the basis of the devolutive effect of the Parliament's application;

— confirm the Opinion on all points not the subject of the counterclaim by the City and SERS;

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

Admissibility of the application by the Parliament

Arguments of the parties

48 The plea of inadmissibility raised by the City and SERS against the Parliament's application is based on two distinct pleas in law.

49 In support of their first plea in law, based on the expiry of the period for making an application, they submit that, although the Court of First Instance received the Parliament's application within the applicable period of 30 days, it was not seised of a proper action registered before the expiry of that period, since, on finding that the Court of First Instance lacked jurisdiction to rule on the application, the Registrar of the Court of First Instance took no further steps. Moreover, bringing an action before a court which lacks jurisdiction cannot stop the running of a period for bringing proceedings. They further argue that, at the date on which the application was registered by the court with jurisdiction, the period had expired. That delay is accentuated by the fact that it was only on 28 April 1999, after the time-limit had expired, that the Parliament agreed to its application being transmitted to the Court of Justice.

50 In support of their second plea in law, based on the irregularity of the procedure by which the application was transmitted to the Court of Justice, the City and SERS submit, first, that a case cannot be brought before the Court of Justice by a mere letter. Next, the Registrar of the Court of First Instance cannot bring an action before the Court of Justice in lieu of the applicant. Finally, the Registrar of the Court of First Instance acted wrongly and with no legal effect in transmitting the application to the Registrar of the Court of Justice, pursuant to the first paragraph of Article 47 of the EC Statute of the Court of Justice. That article refers only to cases where 'an application or other procedural document

addressed to the Court of First Instance is lodged by mistake with the Registrar of the Court of Justice' and vice versa. In the present case there was no mistake, as the application was addressed to the Court of First Instance and was lodged with the Registrar of that Court. In those circumstances, it was for the Court of First Instance to decide the question of jurisdiction by making an order pursuant to the second paragraph of Article 47 of the EC Statute of the Court of Justice.

51 With respect to the first plea, the Parliament submits that the Court of Justice and the Court of First Instance do not belong to separate judicial systems but constitute a single Community institution provided for as such by the EC Treaty. It follows, moreover, from the wording of the first paragraph of Article 47 of the EC Statute of the Court of Justice that the time-limit for bringing an application is suspended if the application is transmitted from one registry of that institution to another. An action is validly brought where the application is lodged within the applicable period with one of the institution's registries. That is so in the present case, since the application was lodged with the Registry of the Court of First Instance before expiry of the period of 30 days.

52 With respect to the second plea, the Parliament submits that the argument put forward by the City and SERS is based on an over-formalistic interpretation of Article 47 of the EC Statute of the Court of Justice. Given that the Court of First Instance and the Court of Justice are two courts which share the exercise of the jurisdiction of a single institution, it is neither necessary nor favourable to the proper administration of justice for the procedures laid down in that provision to be applied with excessive rigidity. In any event, it is apparent from the letter with which the Parliament lodged the application that it did not have the fixed intention of bringing the case before the Court of First Instance rather than the Court of Justice. The Registrar of the Court of First Instance could therefore legitimately consider that the lodging of the application with the Court of First Instance was the result of a mistake which the Parliament had seen as probable and accepted the necessary consequence, namely the transmission of the application to the Registry of the Court. In the alternative, should the Court nevertheless hold that the transmission was irregular, the Parliament asks for the case to be remitted to the Court of First Instance for that Court to be able formally to declare that it lacks jurisdiction and refer the case to the Court of Justice.

Findings of the Court

53 As regards the first plea in law, concerning the date of lodging of the application to be taken into account for ascertaining whether the time-limit for bringing the application was complied with, it should be noted that where, pursuant to the second paragraph of Article 47 of the EC Statute of the Court of Justice, the Court of Justice refers an action to the Court of First Instance, the action is validly brought before the latter even if the time-limit for bringing the action has expired (see, to that effect, the order in Case C-72/90 *Asia Motor France* v *Commission* [1990] ECR I-2181, paragraphs 16 to 20). The same principle applies where the Court of First Instance refers a case to the Court of Justice.

54 Consequently, the first plea must be rejected as unfounded.

55 As regards the second plea, alleging that the procedure by which the application was transmitted by the Court of First Instance to the Court of Justice was irregular, it must be observed that, under the second paragraph of Article 47 of the EC Statute of the Court of Justice, the Court of First Instance should in any event have found that it did not have jurisdiction to hear the Parliament's application, which falls within the jurisdiction of the Court of Justice, and it would then have had to refer it to the Court of Justice, without it thereby becoming inadmissible as out of time, as follows from paragraph 53 above. Consequently, the fact that the Registrar of the Court of First Instance himself transmitted the application to the Registrar of the Court of Justice cannot have any effect on its admissibility.

56 The second plea must therefore be rejected as of no effect.

57 In the light of the above considerations, the plea that the Parliament's application is inadmissible must be rejected.

Admissibility of the counterclaim of the City and SERS

Arguments of the parties

58 The Parliament has raised a plea of inadmissibility against the counterclaim brought by the City and SERS in their defence. It submits that on 8 March 2000, when the defence was lodged at the Registry of the Court, the period for bringing an action against the Opinion had expired. Since the counterclaim does not concern the annulment of a point of the Opinion contested by the Parliament, it is inadmissible.

59 The City and SERS contend that their counterclaim is admissible because they were not informed of the Parliament's application until after the period laid down in clause 1(2) of the supplementary contract had expired and the right to bring such a claim is closely bound up with the concept of a fair hearing and the principle of 'equality of arms'.

Findings of the Court

60 It is apparent from clause 1(2) of the supplementary contract that the opinion to be given by the conciliators was to be binding on the parties unless one of them

brought an action against it before the competent court. Such an action may thus be assimilated to an appeal against a decision of a court or tribunal. The Rules of Procedure of the Court do not prevent the bringing of a counterclaim in such a context, where certain conditions are fulfilled.

61 Article 116(1) of the Rules of Procedure, applicable by analogy in the present case, provides:

'A response may seek:

— to dismiss, in whole or in part, the appeal or to set aside, in whole or in part, the decision of the Court of First Instance;

— the same form of order, in whole or in part, as that sought at first instance and shall not seek a different form of order.'

62 In the present case, the form of order sought in the defence submitted by the City and SERS fulfils those criteria, since it seeks annulment in part of the Opinion and is aimed at upholding the claim submitted to the conciliators as regards the determination of the contractual date of completion of the buildings.

63 As regards the period during which such a counterclaim must be brought, it should be observed that Article 115(1) of the Rules of Procedure provides that the period for lodging a response is two months from service of notice of the appeal.

64 Since that time-limit was complied with in the present case, the counterclaim must be declared admissible.

Devolutive effect of the application by the Parliament

Arguments of the parties

65 The City and SERS submit that, contrary to the Parliament's submissions in the application, the Court cannot order them to pay penalties for delay, as the application brought by the Parliament does not have devolutive effect and the Court has no more powers than the conciliators had. Since the conciliators were only to give a ruling in law on the interpretation of certain provisions of the framework contract, the Court can neither order a party to the proceedings to pay any sum of money nor rule on the facts and the calculation of the extensions to the period for completion of the buildings or the postponement of the contractual date of their completion. The City and SERS say that, since the parties decided to settle their dispute amicably by appealing to conciliators, the Court cannot acquire jurisdiction over the contract if an application is made to it challenging the Opinion.

66 The Parliament contends, on the other hand, that under clause 29 of the framework contract and clause 4 of the conciliation protocol not only does the Court have jurisdiction to rule on the part of the application which seeks annulment of the Opinion, it may also rule, as the court with jurisdiction over the contract, on the facts and the actual application of the framework contract.

Findings of the Court

67 It should be observed, first, that it is apparent from clause 29 of the framework contract that the court referred to in that clause has jurisdiction to hear all disputes relating to that contract. That clause conferring jurisdiction thus covers both disputes concerning the payment of a sum of money and disputes between the parties concerning the classification in law of certain facts or concerning the determination of the date of completion of the buildings which SERS undertook to construct.

68 Second, neither the fact that the supplementary contract provides that the parties are to appeal to conciliators with a mandate to resolve the dispute between them on the interpretation and application of clauses 3, 5, 6 and 25 of that contract nor the fact that in accordance with clause 1(2) of the supplementary contract the conciliators' opinion is to have binding effect on the parties unless proceedings are brought against it is capable of preventing the Court from exercising full jurisdiction, since no provision agreed between the parties expressly or impliedly limits the extent of the jurisdiction conferred on the Court by the arbitration clause in clause 29 of the framework contract.

69 Accordingly, the Court has full jurisdiction in the present case.

The Opinion

Arguments of the parties

70 In the Parliament's submission, it follows from clauses 3.2 and 3.3 of the framework contract, read together, that the contractual date of completion of the buildings is 31 December 1997. That date constitutes one of the terms of an obligation of result, and, in order for it to be complied with, the framework contract expressly provided for protective provisions, in clauses 3.2, 5.1, 5.2 and 25.

71 As regards the penalties for delay, the Parliament submits that, in view of the fact that the conditions laid down in clauses 3.2 and 3.3 of the framework contract are not satisfied in the present case, SERS is liable, simply because the time-limit for completion was not observed, automatically and without any formalities, to pay the penalties for delay provided for in clause 5.1 of the framework contract. However, it adds that, under amending memorandum PEU 055, it allowed SERS an additional five working days for completing the buildings. The penalties for delay are thus due only from 9 January 1998. Alternatively, should the contractual completion date be set at a date later than 9 January 1998, the Parliament submits that SERS should be ordered to pay the penalties for delay from that date until 14 December 1998, the day before the date on which completion of the buildings was confirmed.

72 As regards the interim interest, the Parliament submits that under clause 6.3 of the framework contract it is exonerated from payment of that interest between the contractual date of completion of the buildings and the date of confirmation of completion, where the postponement of the completion date is the result of fault on the part of SERS or of a delay not accepted as justified by the court referred to in clause 29 of the framework contract. In this context the word 'postponement' refers to passing the contractual completion date.

73 As to the second alternative, namely delay which is not accepted as justified by that court, the Parliament submits that clause 6 of the framework contract allows a delay to be accepted as justified only under conditions which are independent of the remainder of the framework contract. Since the final paragraph of clause 6.3 of that contract is intended to apply only after the contractual date of completion of the buildings, whether or not a delay is justified can follow only from clause 5.2 of the contract, which determines the postponement of that date. It follows that a delay is justified, within the meaning of clause 6.3 of the framework contract, only on condition that:

— the Parliament has been informed by SERS, as soon as SERS became aware thereof, of the occurrence of any possible ground of delay referred to in clause 5.2 of the framework contract;

— an extension of the contractual date of completion of the buildings has been requested by SERS and then agreed between the parties; and

— SERS has indicated to the Parliament the adequate remedial measures envisaged for remedying the delay.

74 In the present case, the information was not provided in due and proper form and the Parliament's agreement was not sought in accordance with the procedure laid down, since the information communicated was incomplete and that on the adequate remedial measures to be taken was absent.

75 In those circumstances, apart from the delay resulting from the additional work needed to take account of amending memorandum PEU 055, all delay beyond 31 December 1997 was unjustified.

76 As to the first alternative, namely where the delay is due to fault on the part of SERS, the Parliament observes that SERS, as main contractor, had to play an essential part in carrying out the project of construction of the buildings. In that function, it should in particular have made sure of the proper progress of the project and paid the undertakings and other creditors in strict accordance with the due dates agreed. It also had to give the instructions necessary for carrying out the project and take responsibility for it, those obligations essentially constituting the basis of the remuneration it was to receive from the Parliament.

77 According to the Parliament, SERS did not take on those obligations satisfactorily and did not really manage the site. Thus the absence of remedial measures capable of remedying the delays and the inadequacy of the workforce on the site caused frequent postponements of the date of completion of the buildings. The deficiencies observed in the conduct of the project are clearly apparent, moreover, from several audits carried out on behalf of the Parliament.

78 In those circumstances, the Parliament submits that fault on the part of SERS, within the meaning of clause 6.3 of the framework contract, has been sufficiently

shown, and it is not therefore liable to pay interim interest for the period from 9 January to 14 December 1998, or, alternatively, for the period between the contractual date of completion of the building adopted by the Court and 14 December 1998.

79 As regards Title VII.1, Chapter A, of the Opinion, concerning *force majeure*, the Parliament submits, in the first place, that the delay resulting from the unsuccessful nature of the call for tenders concerning the contract for the structural work cannot be put down to *force majeure*. First, since it was only after the establishment of the committee of conciliators that SERS requested to benefit from 128 days of delay in this respect, that request was not made within the period prescribed by the framework contract, and is therefore manifestly inadmissible.

80 Second, given that SERS admitted in a letter of 20 December 1994 that, despite the unsuccessful outcome of the call for tenders in question, the margin allowed for completion of the buildings enabled it to remain well within the time-limits provided for in the framework contract, and that the delay relied on in this respect was not mentioned in the reports on the progress of the work submitted regularly to the Parliament, the position taken by SERS in that letter cannot, contrary to the conciliators' view, result from an incorrect assessment of the situation.

81 It follows, according to the Parliament, that the delay which resulted from the failure of the call for tenders for the contract for the structural work was neither insurmountable nor irresistible. By regarding that delay as a case of *force majeure*, the conciliators classified the facts incorrectly in law.

82 The Parliament submits, in the second place, that the conciliators made a further error by classifying the default of DRE as *force majeure*, in Title VII.1, Chapter A, Section 2(d) of the Opinion. In that the contracts concluded by SERS are, in

principle, to result from calls for tenders, the refusal of a company whose tender has been accepted to sign the relevant contract cannot, contrary to the conciliators' view in the Opinion, constitute default of a special kind, since any default on the part of an undertaking giving rise to its withdrawal from the site required SERS to find a replacement for that company within the conditions laid down by the framework contract.

83 The Parliament adds that SERS has brought proceedings against DRE for compensation for the loss caused by its conduct, which constitutes an additional indication that the delay relied on by SERS was caused not by *force majeure* but by the fault of a third party. It is therefore for SERS to seek reimbursement in full of the expense it incurred through the fault of DRE, including the proportion of the penalties for delay to which it was exposed as a result of DRE's default and the proportion of the interim interest which it will be obliged to bear because of that default.

84 As regards Title VII.1, Chapter D, of the Opinion, the Parliament submits that amending memorandum PEU 008 examined there does not contain any indication as to a delay in connection with the additional works described in the memorandum. Contrary to what the conciliators stated in the Opinion, that memorandum cannot thus amount to an express acceptance by the Parliament of a delay of 20 days under clause 5.3 of the framework contract. Furthermore, the Parliament does not accept that the work carried out to take account of the modifications asked for in the memorandum caused the slightest delay. The timetables notified to the company responsible for doing the work in question before the memorandum was drawn up were no different from those notified subsequently. The Opinion should therefore be annulled on this point as well.

85 With respect to the Parliament's application, the City and SERS submit, in the first place, that, while the Parliament indeed asks for the contractual completion date to be fixed at 9 January 1998, it does not contest Title V.3 of the Opinion

relating to the determination of the contractual date of completion of the buildings. The Parliament's application should therefore be dismissed for want of any meaningful challenge to the Opinion.

86 They submit, in the second place, that, as regards the grounds of delay capable of extending the contractual period for completion of the buildings, the Parliament has not contested the part of the Opinion relating to the grounds of delay relied on by SERS. It confined itself to asserting that such grounds may be relied on only on condition that it has been informed of their occurrence, the additional period has been determined by common agreement, and SERS has adopted adequate remedial measures.

87 First, however, the Parliament was informed by means of the monthly reports of the occurrence of all the grounds of delay relied on, and the presence on the site of several of its officials enabled it to have sufficient information on the progress of the work. Second, agreement of the parties as to an additional period is not indispensable, since under the framework contract the court referred to in clause 29 of that contract also has jurisdiction to rule on the point, the Parliament not having a discretion to refuse justified postponements. Third, it has not been shown that SERS did not adopt adequate remedial measures to absorb the delays. On this point, the Opinion is therefore entirely correct.

88 The City and SERS submit, in the third place, that it follows from clause 6.3 of the framework contract that there is no automatic link between the penalty taking the form of an obligation to pay penalties for delay and that consisting in the suspension of the obligation to pay interim interest. The latter can apply only if fault on the part of SERS is shown and the court referred to in clause 29 of the framework contract decides that the delay is not justified.

89 As to the first condition, the College rightly found that it was for the Parliament to establish the existence of fault on the part of SERS and that this fault had to be a personal fault of SERS, not a fault of one of the undertakings entrusted with carrying out the works. That approach is consistent with the principles governing the liability of the main contractor in French law. Moreover, there is a fault to be taken into consideration under clause 6.3 of the framework contract only where the material and mental elements are both present and there is a causal link between the fault and the delay.

90 As to the second condition, the City and SERS submit that, even in the case of personal fault on the part of SERS, the court referred to in clause 29 of the framework contract may, as the conciliators rightly pointed out in the Opinion, decide that that fault may be excused and should not have any effect on the payment of interim interest.

91 In support of their counterclaim, the City and SERS submit, in the first place, that it follows from the use of the term 'expected' in clauses 3.2 and 3.3 of the framework contract, and from its provisions relating to legitimate grounds of delay, that the date of 31 December 1997 is only an estimated date and that the period for completion of the buildings is not mandatory and determined irrevocably. That period can be extended for numerous reasons, as is shown by the use of the expression '*inter alia*' in clause 3.3 of the framework contract. The argument that the date in clause 3.2 of the framework contract is only an estimated date is supported by the wording of clause 5.3 of that contract, which shows that that date does not take account of additional work or modifications requested or accepted by the Parliament.

92 The City and SERS submit, in the second place, that it is not logical that the penalties for delay can have a starting point earlier than the contractual time-limit for completion of the buildings, or that those penalties can start running in the

absence of breach of that time-limit. Having regard to those considerations, clause 5.1 of the framework contract must be interpreted as meaning that the penalties for delay are due only where passing the estimated date of 31 December 1997 is not justified and there is no legitimate ground for extending the estimated period expiring on that date. The conciliators' analysis in the Opinion amounts to 'the paradox of confirming a contractual deadline of 31 December 1997 which cannot be extended on the grounds in clause 3 but which may give rise to penalties even if not exceeded... except on the grounds exhaustively set out in clause 5'.

93 The City and SERS further submit that the conciliators' interpretation of clause 5.2 of the framework contract is 'illegitimate, uncertain and contrary to logic' in that it makes it possible to determine the contractual completion date without taking account of the estimated completion period and the possible grounds of extension of that period. Moreover, it is contradictory that SERS can, on the basis of the framework contract, complete the buildings after 31 December 1997 while being liable to pay penalties for delay.

Findings of the Court

94 It should be observed that it is apparent both from the procedure before the Court and from that before the conciliators, first, that the Parliament is not calling into question the fact that the maximum extension of three months of the period for completion of the buildings provided for in clause 3.3 of the framework contract was properly made use of by SERS and, second, that the dispute does not concern the determination of that period but the determination of the contractual completion date referred to in clause 3.2 of that contract and the period in respect of which the Parliament may be exonerated from payment of interim interest.

The counterclaim of the City and SERS

95 As regards the determination of the contractual date of completion of the buildings referred to in clause 3.2 of the framework contract, it must be stated that, where a provision in a contract such as that at issue in the present proceedings is to be interpreted, that provision must not be considered in isolation but must be interpreted in relation to the general structure of the contract of which it forms part. The interpretation must therefore, as far as possible, be consistent with the other provisions of the contract and must not deprive them of their effectiveness.

96 In the present case, the interpretation of clause 3.2 of the framework contract advanced by SERS and the City would deprive clause 5.1 of the contract of effectiveness, in that it would have the consequence that the date from which the penalty clause in that provision is to apply would no longer be certain, which would call into question the automatic application without formalities of the penalties provided for in that provision. The interpretation put forward by the Parliament, on the other hand, is perfectly consistent with the other provisions of the contract.

97 The latter interpretation is therefore the one which must be accepted.

98 That conclusion is not invalidated by the use of the verb 'is expected' in clause 3.2 of the framework contract, in so far as that verb is also a synonym of the verb 'is fixed', so that the date mentioned in that clause must therefore be regarded as constituting a fixed date. Having regard to the structure of the framework contract and the objective in particular of clause 5.1 of that contract, it is clear that the verb used must be understood in that sense.

99 It follows that the date mentioned in clause 3.2 of the framework contract must be regarded as constituting a predetermined date which can be postponed only under certain conditions.

100 In this respect, the only grounds capable of affecting the date provided for in clause 3.2 of the framework contract are those listed in clauses 5.2 and 5.3 of that contract.

101 First, it is apparent from the wording of clause 3.3 of the framework contract that the non-exhaustive list of grounds of postponement in that provision is intended to apply only to the completion period of 36 months mentioned there.

102 Second, it follows from clauses 5.2 and 5.3 of the framework contract that the causes of postponement listed exhaustively there are those which may have an effect on the contractual date of completion of the buildings fixed in clause 3.2 of that contract.

103 It follows that the contractual date of completion of the buildings is 31 December 1997 and that it may be postponed on the grounds set out in clauses 5.2 and 5.3 of the framework contract.

104 Consequently, the counterclaim of the City and SERS must be rejected as unfounded.

The Parliament's application

105 As regards the interpretation of clause 6.3 of the framework contract and the conditions under which the Parliament is released from its obligation to pay interim interest, it must be observed that that provision does not contain any indication as to the grounds which may be relied on to justify postponing the actual completion date of the buildings.

106 Contrary to the Parliament's submissions, those grounds are not limited to the cases set out in clause 5.2 of the framework contract. First, as may be seen from the wording of that provision, the latter are intended to apply only to the contractual completion date. Second, exoneration from the obligation to pay interim interest laid down in the final paragraph of clause 6.3 of the framework contract constitutes an exception to the system established by that clause, and the narrow interpretation which must be given to such an exception precludes, in view of the fact that the provision is silent, the grounds which may be relied on to prevent the exception applying from themselves being given a narrow interpretation.

107 Consequently, the conciliators did not err in considering, in Title VIII of the Opinion, that the grounds of postponement capable of being relied on to reduce the period during which the Parliament is exempted from the payment of interim interest are not those set out in clause 5.2 of the framework contract, and must rather be sought among those provided for, non-exhaustively, in clause 3.3 of that contract.

108 It follows that the Parliament's plea relating to this part of the Opinion must be rejected.

109 As regards the actual application of the framework contract and the assessment of the various grounds put forward by SERS, under clause 5.2 of that contract, to justify the delay in completion of the buildings, the justification based on the impact of bad weather on the progress of the project should be examined first. In this respect, it must be remembered that it is for SERS not only to prove the existence of the grounds of delay it relies on, but also to show that they affected the date of completion of the works.

110 SERS has failed to establish the extent to which that bad weather actually caused delay. Moreover, SERS has not proved that it adopted, as it is obliged to under clause 25 of the framework contract, adequate remedial measures to correct that delay, nor shown that the Parliament was informed of the occurrence of the bad weather in accordance with the form and time-limit laid down in clauses 5.2 and 21.1 of the framework contract.

111 The bad weather cannot therefore be taken to constitute a ground of postponement within the meaning of clause 5.2 of the framework contract.

112 With respect, in the second place, to the cases of *force majeure* relied on by the City and SERS, namely the failure of the first call for tenders for the structural work, the default of certain undertakings, the closure of roads because of bad weather and the setting up of road barriers in thaw conditions, and the strike which affected the site, it must be recalled that under French law, which applies to the framework contract, the concept of *force majeure* is characterised by three constituent elements, namely that it must be external, unforeseeable and irresistible. Whether the facts relied on constitute *force majeure* must therefore be determined by reference to those three criteria.

113 It must also be observed that, according to the case-law of the French Conseil d'État, clauses in contracts relating to *force majeure* are to be applied strictly in

administrative law. Thus, for example, if he has not put it forward as justification within the period provided for in the contract, a contracting party may not plead *force majeure*. However, it also appears from that case-law that if the administrative authority has necessarily been aware of the facts in question, a failure to comply with the formalities laid down in the contract cannot be relied on by it to avoid having to draw the consequences.

114 Since clause 5.2 of the framework agreement provides that if it has not informed the Parliament immediately SERS may not rely on possible cases of *force majeure*, and clause 25 of that contract provides that the Parliament must be informed monthly of the progress of the site and delays which have occurred must be clearly identified, it is in the light of those clauses that it must be assessed whether the failure of the first call for tenders for the contract for the structural work, which allegedly produced a delay of 128 working days, may be relied on as a case of *force majeure*.

115 It is clear that, while the Parliament was informed, by a letter dated 20 December 1994 at the latest, that the call for tenders in question had failed, it was nevertheless only in its memorandum to the conciliators dated 2 March 1999, in other words over four years after that failure and outside the period laid down, that SERS first relied on it as *force majeure*. Moreover, SERS asserted in its letter of 20 December 1994 that the restart of consultations following the failure of the call for tenders would not prevent it from remaining well within the time-limits provided for in the framework contract. The fact that it considered that that failure would not have any effect on the progress of the work is confirmed by the general timetables submitted to the Court, which do not mention any delay produced by the failure of the call for tenders.

116 In those circumstances, having regard to the principle that contracts must be performed in good faith, the conduct of SERS prevents it from being still able to rely on the failure of the first call for tenders concerning the contract for the structural work as a case of *force majeure*.

117 The Parliament's application must therefore be granted in so far as it relates to the annulment of Title VII.1, Chapter A, Section 2(a) of the Opinion.

118 As regards the second series of cases of *force majeure* relied on by SERS, namely the default of certain undertakings and especially the withdrawal from the site of both DRE and the undertaking carrying out the plastering work, which are said to have caused a total delay of 187 working days, it must be said that the circumstances in which those defaults took place are not such as to confer unforeseeability on them, since the main contractor must know, even before the start of work, that there may be a certain number of defaults by undertakings, and it is up to him to take that into account when determining the period and completion date of the work in question.

119 In those circumstances, without it being necessary to determine whether the request for the default of DRE to be accepted as a case of *force majeure* was submitted within the period prescribed by the framework contract, it must be concluded that the defaults of undertakings relied on by SERS do not constitute cases of *force majeure*, and do not thus justify a postponement of the date laid down in clause 3.2 of the framework contract.

120 Title VII.1, Chapter A, Section 2(d) of the Opinion must therefore also be annulled.

121 As to the closure of roads because of bad weather and the consequent setting up of road barriers in thaw conditions, it must be said that, while those events may in certain cases be capable of constituting cases of *force majeure*, SERS has failed to show, first, that the duration of the road closures was exceptional for the

Strasbourg region and, second, that the consequences for the site could not have been remedied. Since it has not therefore been shown that the facts relied on were unforeseeable and insurmountable, they cannot be regarded as constituting cases of *force majeure*.

122 As regards the final ground of *force majeure* relied on by SERS, namely a strike which allegedly caused a delay of four working days, SERS has not submitted to the Court any element capable of showing that that strike satisfied the criteria of *force majeure*. It follows that it cannot be taken into account under clause 5.2 of the framework contract.

123 With respect, in the third place, to the delay of 20 working days allegedly caused by administrative orders, it suffices to state that SERS has not produced any evidence to prove even that such orders existed.

124 With respect, in the fourth place, to the modifications requested or accepted by the Parliament which may, in accordance with clause 5.3 of the framework contract, be relied on, under certain conditions, to obtain a postponement of the completion date fixed in clause 3.2 of that contract, it should be observed, firstly, that the Parliament acknowledges having under amending memorandum PEU 055 allowed SERS an additional period of five working days for completion of the buildings, and asks for the contractual completion date to be fixed at 9 January 1998.

125 It is clear, secondly, from amending memorandum PEU 008 that the postponement of the completion date of the works as a result of the modifications requested therein is equal to the period between 31 August 1995 and the date of

receipt by SERS of approval of that amending memorandum. As the documents in the case show that SERS received the memorandum in question on 28 September 1995 at the earliest, it must be concluded that it may claim a postponement of the date of completion of the buildings of 20 working days.

126 Contrary to the Parliament's submission, SERS does not have to prove that the works connected with the modifications requested actually caused a delay, since it follows from clause 2.3 of the operating protocol annexed to the framework contract that the countersignature of the modifications by the Parliament entails, automatically and for the number of days laid down by the amending memorandum, a postponement of the completion date mentioned in clause 3.2 of the framework contract.

127 In those circumstances:

— the contractual date of completion of the buildings must be fixed at 6 February 1998;

— SERS must be ordered to pay the penalties provided for in clause 5.1 of the framework contract from that date, in accordance with the conditions laid down by that provision.

128 As regards determination of the period for which the Parliament is exonerated from paying interim interest, it must be noted that, in accordance with the final paragraph of clause 6.3 of the framework contract, that exemption applies only if the postponement of the actual completion date results from fault on the part of SERS or from a delay not accepted as justified by the Court.

129 On this point, it is clear, contrary to SERS's argument, that those two conditions are not cumulative, as the use of the word 'or' in that provision shows. The Parliament is not therefore required, in order to be released from its obligation to pay interim interest, to prove that the late completion of the building is due to fault attributable to SERS. It suffices that the delay in question is not regarded by the Court as justified. It must be recalled that, as may be seen from paragraphs 106 and 107 above, the grounds which may be relied on by SERS to justify postponing the actual completion date of the buildings are not only those listed in clause 5.2 of the framework contract.

130 Those are the considerations which must be borne in mind in establishing the period during which the Parliament is exonerated from paying the interim interest provided for in clause 6.3 of the framework contract.

131 As regards the first condition, fault on the part of SERS, it must be stated that, while the conduct of which SERS is accused, which is not cast doubt on by the material before the Court, is capable of constituting fault and undoubtedly contributed to the buildings not being completed on the date provided for, the Parliament has nevertheless failed to show that the delay in question was due exclusively to that fault. In the absence of a direct causal link between the alleged fault and the delay which is said to have resulted, SERS cannot be held liable for the whole of that delay.

132 As to the condition relating to whether or not the postponement of the actual completion date is justified, it should be recalled that SERS is entitled to rely on any ground which has not already been taken into account under clause 5.2 of the framework contract. Since it is only the modifications requested or accepted by the Parliament which postponed the contractual completion date, it must be examined whether and to what extent the other grounds put forward by SERS are capable of justifying, in the context of the application of clause 6.3 of the framework contract, the delay which accumulated on completion of the buildings.

133 As regards, first, the delays allegedly caused by a strike and by administrative orders, it suffices to say that SERS has not produced any evidence to show even that those facts existed. Consequently, those delays cannot be considered justified.

134 As regards, next, the delays relied on in respect of bad weather and its consequences and defaults of undertakings, SERS has not shown that those facts, which are among the usual hazards that may affect any building site and must be taken into account when drawing up the timetable of works, were of an exceptional nature by reason *inter alia* of their number or their consequences, nor that the resulting delays could not be absorbed. It follows that those delays cannot be considered justified either.

135 As regards, finally, the delay due to the failure of the call for tenders relating to the contract for the structural work, it must be stated that such an event, with which an operator is only very exceptionally confronted, is liable to produce substantial delay in the completion of a site. As the documents in the case show, that conclusion is moreover not contested by the Parliament, which was aware from October 1994 of the fact that that failure would very probably have a negative influence on the progress of the site, and reminded SERS at that time that it was important to comply with the time-limits laid down in the framework contract.

136 With respect to the formalities which must be complied with for a delay to be regarded as justified within the meaning of clause 6.3 of the framework contract, it must be stated that, contrary to the Parliament's submissions, that contract does not provide that such a delay must be notified within the time-limit and in the form laid down in clause 5.2 or clause 25 of that contract. It follows that the fact that an event causing delay was not communicated immediately to the Parliament or that SERS considered, when such an event occurred, that the timetable of the works would not be affected by it is not such as to prevent the consequent delay from being regarded as justified within the meaning of clause 6.3 of the contract.

137 As regards the delay allegedly caused by the failure of the first call for tenders, 128 working days, it must be stated that, while a delay of some six months on work which is to extend over 36 months may at first sight seem impossible to catch up, the fact remains that, since in the present case that delay was prior to the start of work, SERS had the entire anticipated duration of the works available to attempt to absorb part of it.

138 In so far as the case-file does not contain any indication as to the measures which were or could have been taken to reduce the delay or any assessment of the proportion of the delay which could have been made up, the delay which SERS could reasonably have made up, having regard to the time when the cause of delay occurred and the comparatively long period available to SERS to take measures which could mitigate the effects on the timetable of works of the failure of the call for tenders, should be assessed at half the delay relied on, namely 64 working days.

139 It should be added that it appears all the fairer not to uphold the Parliament's claim that the delay in question should be rejected in its entirety in that it is apparent from the documents in the case that the renewal of the call for tenders for the contract for the structural work principally benefited the Parliament, in that it made it possible to reduce substantially the cost of the structural work and to comply with the financial envelope within which the project was to remain.

140 In those circumstances, the application by SERS must be granted in part, and it must be allowed to rely, in the context of the application of clause 6.3 of the framework contract, on a delay of 64 working days on the basis of the failure of the call for tenders for the structural work.

141 Consequently, it must be held that the Parliament is exonerated from the payment of the interim interest provided for in clause 6.3 of the framework contract for the period from 10 May to 14 December 1998.

Costs

142 Under the second paragraph of Article 69(3) of the Rules of Procedure, the Court may order a party, even if successful, to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur. In the present case, the City and SERS have asked the Court to order the Parliament to pay costs and expenses and to pay procedural indemnities of EUR 20 000 and FRF 300 000. Apart from the fact that they have not given reasons for that claim, it must be stated that the application brought by the Parliament is neither vexatious nor unreasonable and has been successful in part. There is thus no reason to order the Parliament to pay an indemnity under that provision.

143 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 69(3), however, the Court may order that the costs be shared or that the parties bear their own costs, if each party is unsuccessful on one or more heads. Since all parties have been unsuccessful in part, they must be ordered to bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that the application of the European Parliament and the counterclaim of Ville de Strasbourg (France) and Société d'équipement et d'aménagement de la Région de Strasbourg (SERS) are admissible;

2. Declares that the Court has full jurisdiction in the case;

3. Dismisses the counterclaim;

4. Annuls Title VII.1, Chapter A, Section 2(a) and (d) of the opinion of the committee of conciliators of 22 March 1999;

5. Fixes the contractual date of completion of the buildings referred to in the contract of 31 March 1994 between the European Parliament, Ville de

Strasbourg and Société d'équipement et d'aménagement de la Région de Strasbourg (SERS) at 6 February 1998;

6. Orders Société d'équipement et d'aménagement de la Région de Strasbourg (SERS) to pay the penalties provided for in clause 5.1 of that contract from 6 February 1998 in accordance with the conditions laid down in that provision;

7. Exonerates the European Parliament from payment of the interim interest provided for in clause 6.3 of that contract for the period from 10 May to 14 December 1998;

8. Dismisses the remainder of the application;

9. Orders the parties to bear their own costs.

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 10 April 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber