

OPINION OF ADVOCATE GENERAL COSMAS
delivered on 28 March 1996 *

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* Original language: Greek.

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I — Introductory remarks

1. The present case concerns a dispute arising in the course of the performance of a contract concluded on 31 January 1990 by the Commission of the European Communities with the Netherlands limited company *Intelligente systemen, Database toepassingen, Elektronische diensten* ('IDE'). The dispute was brought before the Court pursuant to the arbitration clause contained in the contract, in accordance with Article 181 of the EC Treaty.

tribution provided for in the contract concluded between the parties and the payment of damages. The Commission's counterclaim is for repayment of the amounts paid by it to IDE, together with interest.

II — Factual and legal context

A — Community activity of which the contract concluded between the parties forms part

2. The action brought by IDE is for payment of the balance of the maximum contri-

3. On 17 July 1987 the Commission published a call for declarations of interest for

pilot/demonstration projects aiming at the development of a Community information services market.¹

B — *The contract at issue*

4. On 12 July 1988 the Commission published an advance notice of calls for proposals for pilot/demonstration projects aiming at the development of a Community information services market.² The Commission was to provide financial support for the projects within the limits of the budgetary appropriations available. The Community's average financial support was to be between 25% and 35% of the total cost of the projects. The priority areas selected by the Commission included intelligent interfaces to electronic information sources.

6. On 31 January 1990 the Commission concluded a contract with IDE which, according to the wording, concerned the development by IDE of software, that is to say, a computer program, consisting in an intelligent interface enabling uniform and user-friendly consultation of various kinds of information, and the setting up of a network giving access to interconnected electronic information sources, in accordance with the specification in the 'technical annex' attached to the contract. The project was to be carried out in collaboration with other organizations in the Member States and IDE was to coordinate their work.

5. In July 1988 the Council of Ministers of the European Communities approved a plan of action for setting up an information services market,³ known as 'Impact', and decided (second paragraph of Article 4) that the contractors should bear a substantial share of the financing amounting to at least 50% of the total cost.

7. According to the contract, IDE's obligation to develop software included that of creating a toolkit in collaboration with the Netherlands research organization TNO and the University of Amsterdam. The adaptation of the software to the specific needs of the information sources and the establishment of the network was to be carried out by a dozen organizations from various Member States, most of which owned agricultural activity databases. According to the Commission, the development of the software amounted to approximately one third of the project's total budget, the remainder being intended for the completion and establishment of the network. At the technical level, development of the network could

1 — OJ 1987 C 188, p. 2.

2 — OJ 1988 C 182, p. 4.

3 — Council Decision 88/524/EEC of 26 July 1988 concerning the establishment of a plan of action for setting up an information services market (OJ 1988 L 288, p. 39).

only commence after an operational version of the toolkit was available to the owners of the databases.

10. Article 2, 'Duration', provides:

"The Contractor undertakes to carry out the Project within 30 months following the date of commencement of work, hereinafter referred to as "the Operative Commencement Date", in accordance with the timetable laid down in Annex I.

8. Both the rights and the obligations of the contractors are defined in the contract and in annexes I, II and III thereto.

The Contractor shall notify the Commission in writing of the Operative Commencement Date within one month of signature of the contract.'

9. Article 1, entitled 'Subject-matter of the contract', provides as follows:

'Within the framework of the Impact programme of the European Economic Community (Council Decision of 26/7/88), the Contractor hereby undertakes to carry out the work set out in Annex I and entitled "Domain Independent Intelligent Information Services Network Interface — Disnet" (hereinafter referred to as "the Project").

11. Article 3, 'Reports and deliverables', provides:

'3.1 The Contractor shall submit to the Commission the following reports, stating the progress of work and the results obtained, together with statements of expenditure incurred during the preceding period:

— first progress report (3 copies) within 6 months of the Operative Commencement Date;

...'

- second progress report (3 copies) within 12 months of the Operative Commencement Date;
- third progress report (3 copies) within 18 months of the Operative Commencement Date;
- fourth progress report (3 copies) within 24 months of the Operative Commencement Date.

In addition, the Contractor shall submit to the Commission:

- Management Reports (3 copies) every 3 months;
- edited progress reports suitable for publication every 12 months after the Operative Commencement Date.

3.2 On completion of the work, the Contractor shall make a demonstration of the successful completion of the Project on the premises of the Commission in Luxembourg, or at an alternative location acceptable to the Commission.

3.3 Within two months of the completion, cessation or termination of the work programme set out in Annex I, the Contractor shall furnish to the Commission a final comprehensive report covering the whole project. It shall be accompanied by a consolidated statement of expenditure together with supporting documents and the accounts will thereby be considered closed.

3.4 Deliverables are any significant outputs of the Project to be submitted in accordance with Annex I.'

12. Article 4 contains the 'Financial provisions':

'4.1 The total estimated costs of the Project are 2 349 400 ECU (two million three hundred forty-nine thousand four hundred European Currency Units), for the work specified in Annex I.

4.2 The European Economic Community shall grant to the Contractor a financial contribution of 38, 74% of the actual cost incurred in carrying out the work specified in Annex I, exclusive of tax, as verified and accepted by the Commission, but shall not in any event exceed 909 900 ECU ...'

and following approval by the Commission of the progress reports to be submitted in accordance with Article 3 of this contract. Periodic payments shall be calculated by reference to the percentage given in Article 4.2 heretofore applied to the approved statement of expenditure and by deduction of 15% representing a proportionate amount of the advance payment. Such payments shall be considered as advances until acceptance of the appropriate deliverables specified in Annex I;

13. Article 5, 'Payments', fixes the timetable for the Commission to fulfil its obligations as regards payments:

'5.1 The European Economic Community shall pay its financial contribution by instalments in ECU as follows:

(c) a retention shall be made of 20% of the total financial contribution. This retention shall be released as required to pay the outstanding balance of the financial contribution after approval by the Commission of all the reports and any other deliverables required by this contract, and of the consolidated cost statement;

(a) an advance payment of 136 485 ECU (15% of the maximum financial contribution) within 2 months after the Commission has been informed pursuant to Article 2 of the Operative Commencement Date;

(b) periodic payments within 2 months in respect of the statements of expenditure

(d) the total of the advance and periodic payments shall not exceed the total financial contribution of the Commission less the amount deducted by way of retention.

5.2 The Commission, after notifying the Contractor, may defer or modify the various payments if verifications of the documents and information provided for in Article 3 and in paragraphs 3 and 4 of Article 5 reveals irregularities, and in particular in the case that the work is not being carried out in accordance with the programme in Annex I, or that the statement of expenditure does not correspond to the work actually carried out or fundamentally deviates from the cost estimates in Annex I. In such cases, payment may be made only after the Contractor has provided satisfactory explanations. Where verification reveals that certain amounts have been wrongly paid to the Contractor, he shall repay them immediately to the Commission.

5.3 The Contractor shall, following the completion of the work, demonstrate, as mentioned under Article 3.2. above, the successful completion of the project to the Commission's representatives. Failing such demonstration, the Commission may request full or partial repayment of the amounts paid as financial contribution together with interest on those amounts from the end of one month following the Commission's request. The rate of interest applied shall be the average over three months of the inter-bank rate for ECUs plus two per cent on the first day of the month of the Commission's request.

5.4 ...'

14. Article 6 of the contract, 'Organization and performance of the work', provides as follows:

'6.1 Technical and financial responsibility

The Contractor shall have technical and financial responsibility for the work specified in Annex I. He shall provide the personnel, facilities, equipment and materials necessary for the proper performance of the contract. In so far as the work is to be carried out by organisations associated with the Contractor for this purpose, the Contractor is responsible for ensuring that the Community financial contribution is shared amongst the participating organisations according to the progress of work and the participation of each organisation.

6.2 Participation of third parties in carrying out the project

6.2.1 The Contractor, acting in accordance with the procedure laid down in Article 6.2.2, may entrust the performance of part of the work programme set out in Annex I to third parties, whether natural or legal persons. He shall not thereby be

released from his obligations to the Community under this contract, in particular as regards his technical and financial responsibility as referred to in paragraph 1 hereof.

6.2.2 The drafts of all subcontracts whereby the Contractor proposes to have part of the work programme carried out by a third party must be notified by registered letter to the Commission, which may, provided it acts within 15 working days following the receipt of such a letter, refuse to approve the subcontracting. If the Commission does not act within the prescribed period it shall be deemed to have approved the subcontracting.

6.2.3 The requirements of the present Article shall not apply to day-to-day orders for materials, equipment and services made in conformity with the work programme set out in Annex I.

6.2.4 With respect to any right of the Commission under this contract and in particular concerning the performance of the work or any technical or financial control, the Contractor shall impose on any sub-Contractor the same obligations as would apply to him under this contract were he to do the work himself.

6.3 Duty to provide information

The Contractor shall, without delay, provide the Commission with full particulars of any incident or event likely to prejudice the performance of this contract.

6.4 Technical and financial control

6.4.1 The Contractor shall, without delay, supply the Commission with any information which the latter may request concerning the implementation of the work programme specified in Annex I and during the five years following its completion or cessation.

6.4.2 The Contractor shall make available to the Commission and to the Court of Auditors of the European Communities the technical and financial documents required to verify that the work programme is or has been carried out; such documents may, if necessary, be verified at the place where they are normally kept.

6.5 ...'

15. Article 7 is entitled 'Ownership and exploitation of results'. Under Annex II, to which Article 7 refers, it is for the Contractor to exploit and circulate the results of the project, since they are its property.

17. Article 9, 'Variations or additions', provides:

'Any variation of or addition to provisions of this contract must be agreed in writing between the parties hereto. The work programme and the timetable set out in Annex I may be modified by agreement between the parties in the light of progress.'

16. Article 8, 'Liability', provides:

18. Article 10, 'Termination in the event of the Contractor's breach', is worded as follows:

'8.1 The Contractor shall be solely liable for any loss, damage or injury suffered by him in or in connection with the performance of this contract.

'In the event of non-performance by the Contractor of one or more of its obligations under this contract the Commission may, by registered post with acknowledgement of service, serve notice upon the Contractor. If on the expiry of one month following such service the Contractor is still in breach of its obligation, the Commission may without further formality terminate the contract. The contract may also be terminated where in order to obtain the subsidy the Contractor has made false statements and may properly be held responsible for such statements. In both cases, the Contractor shall immediately repay to the Commission the amount of the subsidies received by it, together with interest from the end of the period of one month referred to above. The rate of interest shall be the average over three months of the

8.2 The Contractor shall be solely liable for any loss, damage or injury to its employees or to third parties resulting from the performance of this contract. It shall hold the Commission fully indemnified against any award of damage, together with such legal costs as may be awarded with them, made in favour of a third party for loss, damage or injury arising out of the execution of this contract.'

inter-bank rate for ECUs plus two per cent on the first day of the month during which the said period expires.'

Failing a settlement by mutual agreement, the Court of Justice of the European Communities shall have sole jurisdiction to settle any dispute between the contracting parties concerning this contract.'

19. Article 14, 'Annexes', provides:

C — The background to the dispute

'Annexes I, II and III form an integral part of this contract.'

Annex I, 'Disnet Technical Annex', describes in particular the project in detail and contains a workplan. Annex II is entitled 'Ownership, commercial exploitation and circulation of the results of the project'. Finally, Annex III lists the allowable costs.

21. 15 March 1990 was fixed as the date for the launching of the Disnet project. According to the contract, the work was to be completed by 15 September 1992.

20. According to Article 16, 'Applicable law and conferment of jurisdiction':

22. According to the first six-month progress report, the technical programme was being carried out as provided in the contract although, according to the Commission, organizations collaborating with IDE expressed certain unease because the composition of the consortium was unstable and, furthermore, IDE had not paid to those organizations their share of the Community contribution.

'The provisions of the law of the Grand Duchy of Luxembourg shall govern exclusively this contract and shall likewise apply to all rights and obligations of the parties not laid down therein.

23. Following an inspection in October 1991, an expert, whose impartiality is challenged by IDE, found in his report of 3 December 1991 that the project as completed did not fulfil the contractual obligations and he recommended that the Commission should suspend its financial support.

24. In May 1992 the Commission ordered a financial audit of the project. According to the report drawn up on 22 June 1992 by the accountants appointed for the purpose, IDE had, without seeking the Commission's approval, sub-contracted part of the work to Hungarian undertakings. The report, which covered the first 18 months of the project, challenged the statements of expenditure and for that reason proposed to reduce the declared expenditure by 34%.

25. In March and April 1992 the Commission invited IDE to Luxembourg in order to discuss problems which, in its view, had arisen in the performance of the contract. In its correspondence with IDE, the Commission also mentioned the changes in the composition of the group of organizations collaborating with IDE, the delay with which IDE communicated to them the results of the work and various technical failures.

26. As a result, the technical annex to the contract was amended.

27. On 12 February 1993 the Commission and IDE agreed to extend the duration of the contract by six months, that is to say until 15 March 1993.

28. On 11 March 1993 IDE sent the Commission the software it had undertaken to design, taking the view that it had discharged all its obligations as set forth in the contract and its annexes. More specifically, IDE sent the Commission three diskettes labelled 'Disnet final beta release 3' together with a number of documents.

29. In a letter dated 30 April 1993 the Commission pointed out that the product delivered did not comply with the specifications in the technical annex. Moreover, it emphasized that IDE had not paid to the group of companies collaborating with it on the project, the membership of which, according to the Commission, was continually changing, the sums due to them, even though the Commission had already paid to IDE ECU 533 456. It stated that it would not insist on a demonstration of the finished product in order to avoid additional costs and because, in its view, it did not appear that such a demonstration would change its initial negative assessment. Moreover, by way of an amicable settlement, it proposed to limit its contribution to 75% of the maximum amount provided for in the contract (ECU 682 425) and not to pay the remainder (ECU 682 425 less ECU 533 456, that is to say ECU 148 969) until IDE had submitted the final report and a consolidated statement of expenditure and proved that it had fulfilled all its contractual and financial obligations in respect of all its existing and former partners.

30. On 31 May 1993 IDE rejected the Commission's proposal.

31. By letter of 17 June 1993 the Commission, in reliance on the terms of the contract, decided to request IDE to make a demonstration before an 'Evaluation Panel' to establish that the project was duly completed.

32. Although it was prepared to demonstrate the project, IDE expressed reservations on account of the fact that the Commission had already made it known that it did not insist on a demonstration of the results of the Disnet project.

33. The 'Evaluation Panel' was composed of two Commission officials who had not taken part in the Disnet project and an expert who, according to the Commission, had been approved by IDE. The work of the 'Panel' was also followed by two observers, one acting on behalf of the Commission and the other on behalf of IDE.

34. The demonstration took place on 20 July 1993. The software demonstrated was that sent to the Commission on 11 March 1993. However, it appears from the 'Panel's' report that a more recent version, submitted by IDE after the expiry of the contract, was also examined.

35. It appears from the report, dated 30 July 1993, drawn up by the two Commission officials who were members of the 'Evaluation Panel' and from the report dated 2 August 1993, drawn up by the observer appointed by the Commission that, regardless of which of the two versions of the project was to be considered the definitive version, the software presented by IDE was defective.

36. According to the 'Panel's' report, (a) the software only met between 50% and 75% of the specifications in the technical annex to the contract and (b) the network part of the Disnet project was missing.

37. According to the Commission, the third member of the 'Evaluation Panel' concurred with the findings of the report of 30 July 1993. Unlike the observer appointed by the Commission, the observer appointed by IDE did not submit a report.

38. On 7 September 1993 the Commission sent those reports to IDE. In a covering letter it made the following observations: (a) IDE had failed to fulfil its obligations under the specifications in the technical annex to the contract; (b) the final report, dated 17 May 1993, received by the Commission

was unsatisfactory; (c) the statement of expenditure covering the fifth half-year period was not in conformity with the contract; (d) the Commission had not received the statement of expenditure for the sixth half-year; and (e) it had not received the documents necessary to evaluate the total cost of the project. The Commission indicated that it would not make any further payments and that it expected to recover the sums already paid.

39. On 15 and 27 September, IDE informed the Commission of its reservations as to the findings of the evaluation report, insisted that the demonstration had taken place under particularly difficult circumstances and challenged a number of the 'Panel's' technical evaluations.

III — Forms of order sought by the parties

40. By application lodged at the Court Registry on 15 April 1994, IDE sought an order of the Court requiring the Commission to fulfil all its contractual obligations and make good the damage which it caused to IDE as a result of its failure to fulfil those obligations.

41. More specifically, IDE claims that the Court should:

- order the Commission to pay to IDE (a) ECU 376 500,⁴ (b) extrajudicial costs of ECU 37 650, (c) interest at the rate prescribed by law from 31 May 1993 until the day on which full settlement is made and (d) compensation in respect of any other damage suffered by IDE as a result of the Commission's conduct contrary to its contractual obligations;
- order the Commission to pay the costs under Article 69 of the Rules of Procedure.

42. The Commission, first by letter dated 29 June 1994 and subsequently by a counter-claim submitted to the Court on 7 July 1994, sought the repayment of the amounts paid to IDE, together with interest.

⁴ — The amount claimed by IDE is ECU 376 500. This sum together with the amount already received totals ECU 909 956. IDE clearly seeks payment of the maximum contribution (ECU 909 900) provided for in Article 4.1 of the contract.

43. The Commission contends that the Court should:

IV — Admissibility of the counterclaim

— dismiss the action as unfounded;

45. In its reply to the counterclaim made by the Commission, IDE raises the question of its admissibility. It plainly considers that the Court has no jurisdiction to hear and determine the counterclaim.

— order the applicant to pay to the Commission ECU 533 456, together with interest at 7.97% per annum;

— order the applicant to pay the costs of the proceedings.

46. On that point, I would refer to the relevant case-law of the Court,⁵ according to which (a) the conditions governing the admissibility of a counterclaim are to be assessed on the basis of the provisions of the Treaty, that is to say, the question whether it has jurisdiction to hear and determine a counterclaim and, more generally, any question related to its admissibility must be assessed solely in the light of Article 42 of the ECSC Treaty, Article 181 of the EEC Treaty, Article 153 of the EAEC Treaty and the Court's Rules of Procedure and (b) the jurisdiction of the Court to hear and determine claims which arise from a contract concluded with the Community and containing an arbitration clause, or claims that are directly connected with the obligations arising from that contract, means that it also has jurisdiction to hear and determine a counterclaim arising from the same contract or from the facts on which the principal claim is based.

44. With regard specifically to the Commission's counterclaim, IDE contends that the Court should:

— declare the Commission's counterclaim inadmissible or, at least, dismiss it and order the Commission to pay the costs.

⁵ — See Case 426/85 *Commission v Zoubek* [1986] ECR 4057, paragraphs 10 and 11.

47. In view of that case-law and since the Commission's claim derives from the contract which forms the subject-matter of the principal claim, it is clear that the Court also has jurisdiction to hear and determine the counterclaim.

V — Main heads of the principal claim and counterclaim

48. In its counterclaim the Commission, relying on Article 5.3 of the contract, seeks the repayment by IDE of the sums it has paid to it, together with interest. The Commission bases this head of claim mainly on the negative report of the 'Evaluation Panel', according to which the product delivered by IDE did not fully satisfy all the specifications set forth in the technical annex. The Commission considers that the fact that IDE did not fulfil its obligation to supply a product corresponding to all the specifications in the technical annex constitutes sufficient grounds for upholding its counterclaim. Its submissions concerning IDE's failure to fulfil other contractual obligations must be regarded as put forward in the alternative.

49. IDE claims that the 'Evaluation Panel's' report is not reliable, first, because it was not certain that that 'Panel' was objective and, secondly, because its evaluation of the product was erroneous in substance. It also states

that it fulfilled all its obligations and accordingly requests the Court to order the Commission to pay to it the remainder of the contribution, together with interest, and to make good all other damage suffered by it.

50. The respective submissions of the parties should now be dealt with as follows: first, the parties' submissions as regards the objectivity of the 'Evaluation Panel'; secondly, those relating to the evaluation conditions and criteria of the product delivered; thirdly, the parties' respective arguments concerning the extent to which IDE fulfilled its principal obligation, namely to deliver a product in conformity with the specifications imposed; finally, I will deal with the Commission's submissions on IDE's failure to fulfil other contractual obligations and the latter's submissions with regard to the Commission's failure to fulfil its contractual obligations.

A — Objectivity of the 'Evaluation Panel'

51. In the documents it lodged in reply to the Commission's submissions (paragraph 11 of the reply in the main proceedings and in the reply to the counterclaim) and also during the hearing IDE challenged the 'Evaluation Panel's' objectivity on the following

grounds: (a) there was no provision in the contract for its establishment; (b) its composition was decided solely by the Commission; (c) its members were paid by the Commission; (d) the 'Panel' leaned in favour of the Commission, since it had been appointed by it. This means that IDE is challenging the impartiality of the 'Panel' of three members appointed by the Commission to evaluate the results of the Disnet project delivered to it by IDE and is requesting, therefore, that a new experts' report be obtained.

52. Article 5.3 of the contract provides that, on completion of the work, the Contractor is to demonstrate the successful completion of the project to the Commission's representatives. The contract gives the Commission the right to require IDE to carry out such demonstration to its representatives after completion of the work connected with the Disnet project.

53. It is true that the contract does not specify the body before which such a demonstration is to be carried out. However, from the wording of the contract, interpreted in the light of Article 1135 of the Civil Code of the Grand Duchy of Luxembourg,⁶ which is applicable in the present case, it follows that the clause concerning the demonstration carried out on the Commission's premises before the representatives

appointed by it, since they were to represent it, means that the said demonstration was to take place before persons who would comprise, albeit informally, an 'Evaluation Panel' and who would be in possession of the technical knowledge necessary to evaluate the demonstration.

54. The Commission states that it had appointed two of the three members of the 'Panel' itself who were officials of its staff, and that IDE had appointed the third member to act as an independent expert. IDE categorically denied having appointed the third member of the 'Panel' and claimed that the Commission had refused to allow a person appointed by IDE to participate in the 'Panel'.

55. However, since the contract confers on the Commission the power to appoint all of the members of the informal 'Evaluation Panel', there is no particular purpose in ascertaining whether or not IDE appointed one of its members.

56. Moreover, the fact that the third member of the 'Panel' was paid by the Commission, as IDE points out (paragraph 18 of the rejoinder to the counterclaim) is not, of itself, of any particular significance because, since, pursuant to the contract, the Commission appointed the members of the 'Panel', it was obliged *a fortiori* to pay them.

⁶ — According to Article 1135, a contract is binding not only as regards its express terms but also as regards all consequences which, according to its nature, flow from it by virtue of equity, custom or statute.

57. Furthermore, the question whether or not the members of the 'Panel' had been involved in the Disnet project is irrelevant since, according to the contract, the Commission was unfettered as to whom it appointed.

58. Accordingly, the impartiality of the 'Panel' cannot be called in question merely on the grounds that the Commission alone had appointed and paid its members.

59. The Commission points out that the two members of the 'Panel' drew up the report and the third member who, as it maintains, had been appointed by IDE, approved its conclusions by fax. That much is set out in the letter of 30 July 1993 which the two other members of the 'Panel' sent to the Commission official responsible for the supervision of the Disnet project (Annex XV to the application).

60. To this IDE objects the 'Panel' acted with partiality to the benefit of the Commission since, by letter of 30 April 1993, the official whom the Commission had placed in charge of the project had clearly indicated that the Commission no longer insisted on a demonstration of the end product.

61. However, IDE has not substantiated those assertions, which must therefore be disregarded.

62. That the objectivity of the 'Panel' cannot be put in question is also clear from the fact that, of the observers whom the contracting parties had appointed as independent experts for the purposes of following the demonstration, only the Commission's expert drew up a report, dated 2 August 1993 (Annex III to the defence), in which he confirmed the conclusions of the 'Evaluation Panel' on the matter, while the expert appointed by IDE had not submitted a report.

63. IDE's representative stated at the hearing that its observer had not had the chance to participate in the discussion and that was why he had not lodged a report; after a discussion with him, IDE had itself lodged a report. However, the Commission's representative replied that the recording of the conversations during the demonstration proved the opposite.

64. The vague and unsubstantiated assertions put forward by IDE to challenge the impartiality of the 'Evaluation Panel' must therefore be rejected.

65. Moreover, in view of the foregoing analysis, IDE's request that a fresh expert's report should be obtained should also be rejected since the mere fact that the Commission, exercising the rights conferred on it by the contract itself, appointed the members of the 'Panel' does not prove that the latter acted with partiality.

68. In that same letter, IDE's lawyer proposed that the product delivered on 15 March 1993 and an improved later version should be evaluated. The Commission refused (see its letter of 16 July 1993), but finally a later version of the original product was also demonstrated to the 'Panel' as confirmed by the latter in its report.

B — The circumstances in which the product delivered was evaluated and the criteria applied in that evaluation

66. Article 3.2 of the contract provides that, on completion of the work, the contractor is to make a demonstration of the successful completion of the project on the premises of the Commission in Luxembourg, or at an alternative location acceptable to the Commission.

67. IDE requested that the 'Evaluation Panel' should examine the delivered product in a place, at a date and under conditions acceptable to the Commission. Specifically, in his letter of 12 July 1993, attached to the application to the Court, IDE's lawyer proposed that the demonstration take place in Luxembourg at specified premises which, in its view, had the necessary infrastructure. He also requested that someone of its choice should take part in the work of the 'Panel' as an independent expert. The Commission finally agreed to those proposals by letter of 14 July 1993.

69. In the aforementioned letter of 12 July 1993, IDE's lawyer indicated a number of essential aspects which were to be demonstrated. He also mentioned four different options for the demonstration and pointed out a number of possible technical difficulties that the Luxembourg demonstration might present.

70. The Commission pointed out in the abovementioned letter of 14 July 1993 that the evaluation criteria which the 'Panel' would apply in carrying out the duties assigned to it would be the elements set out in the technical annex and that the evaluation would focus on the aspects to which the Commission official in charge of the supervision of the project had objected in his letter to IDE of 30 April 1993 (annexed to IDE's application). It expressly excluded that the evaluation criteria should be unilaterally defined by IDE. It also mentioned a number of technical details intended to ensure that the demonstration took place under the best possible conditions.

71. By letter of 15 July 1993, IDE's lawyer urged that an environment be created in Luxembourg at the site where the demonstration was to take place similar to that which existed during the installation process at the Disnet partners' sites. It appears from a letter from the Commission of 16 July 1993 that special technical facilities had been made available to IDE to enable it to conduct the demonstration of its product successfully.

72. As confirmed in the 'Panel's' report, IDE was authorized to install the day before the demonstration the software it had developed. The 'Panel' also stated in its report that it arrived at its conclusions at the end of the demonstration of five hours' duration presented by IDE on 20 July 1993 and that five hours seemed sufficient to demonstrate the end product. It also observed that, despite a number of technical problems which arose at the beginning of the demonstration, IDE had agreed to continue with the demonstration. None the less, no incidents attributable to the network occurred, according to the 'Panel's' report, once the demonstration had begun or during it.

73. Admittedly, during the demonstration IDE mentioned some technical problems connected with the site of the demonstration and the shortcomings of the local Unix network and the telecommunications links as well as other problems which had a detrimental effect on the demonstration (see p. 4 of IDE's comments of 15 September 1993 on

the evaluation report). Nevertheless, the 'Panel' rejected those assertions and attributed the problems to IDE's product's incompatibility with the Unix environment. Finally, it considered that those problems did not undermine the reliability of the test.

74. In view of the foregoing considerations, IDE's submission that the demonstration took place under extremely unfavourable conditions must be rejected as unfounded.

C — Performance by IDE of its principal obligation

1) The essential clauses of the contract

75. It appears from the wording of the contract and of its technical annex that the Commission and IDE entered into a synallagmatic contract under which the former agreed to pay a sum of money by way of contribution for the performance by the latter of work consisting in the development of the Disnet software, which was to be commercially viable and marketable.

76. IDE was to coordinate the work of a group of organizations from the Member States. The product, that is to say the result of that work, was to remain the property of IDE and the group of partners, as set out in detail in Annex II.

77. The Disnet project was to be carried out under the supervision of the Commission and the contribution was to be paid on condition that IDE fulfilled all its obligations, as is expressly stated in Clause 5.1(c) of the contract. That contribution covered 38.4% rather than the whole of the actual cost of the project.

78. IDE states (at paragraph 13 of its statement in reply to the defence and in answer to the counterclaim) that it was not merely open to but was incumbent on the Commission to pay the whole of the sum agreed. Such payment was not to be made unless IDE fulfilled with all due diligence its obligations under the contract and its annexes.

2) *The subject-matter of IDE's part of the contract*

79. Since Clause 16 of the contract states that the law of the Grand Duchy of Luxembourg is applicable, it is necessary to examine

the provisions of Luxembourg law governing the resolution of disputes relating to the interpretation of the clauses of a contract which concern the subject-matter of the services to be provided. The court adjudicating on the merits may, considering the clauses of a contract in the light of Articles 1134 and 1135 of the Civil Code,⁷ make certain findings regarding the content of the obligations of the parties.

80. IDE undertook to produce a 'domain independent intelligent information services network interface', namely the Disnet software.

81. According to the contract (Clause 1) and the technical annex, the subject of the contract was the production of software, that is to say a computer program, capable of being used in different domains for different purposes. This was to be achieved by means of the installation of a network interface which would allow access to interconnected sources of electronic information.

82. In both the original and the amended versions of the technical annex (p. 3 et seq.), it is provided that there are three end products: (a) the Disnet software, which should be marketable and should run under DOS,

7 — Article 1134 of the Civil Code provides that contracts lawfully entered into have the force of law for the contracting parties. It thus reproduces the principle of Roman law that 'pacta sunt servanda'. It further provides that contracts must be performed in good faith. Article 1135 has already been referred to at footnote 6 above.

Windows 3 and Unix; (b) a network to be set up between a number of European hosts and networks using the Disnet interface; and (c) applications that were to be built using the Disnet interface by a number of organizations participating in the Disnet project.

More specifically, it states that the three objectives of the project were attained. Those objectives consisted in producing Disnet: (a) as a toolkit; (b) as a network; and (c) as a basis for a large range of applications to be built by its partners (p. 2 of the letter of 2 May 1993, which is attached to the application and which IDE sent to the project supervisor appointed by the Commission).

83. It is apparent from the whole of the documents relating to the principal claim and to the counterclaim, as well as from the hearing that in the present case there is a fundamental divergence of views as to the subject-matter of the contract and, consequently, as to whether or not the product delivered to the Commission by IDE was in conformity with the specifications set out in the contract and defined in the technical annex.

86. IDE states (paragraph 9 of its rejoinder in the counterclaim proceedings) that the product which it delivered was commercially attractive enough to be exploited on the market and that external observers had acknowledged as much. At the hearing it described the product as delivered as outstanding, as constituting software which was ahead of its time and as commercially successful.

84. According to the Commission, the product delivered by IDE did not meet the specifications of the contract: it did not have the agreed features because it did not work as expected and was not marketable, as required by the technical annex, that is to say that it was not sufficiently commercially attractive to enable it to be exploited on the market (paragraph 7 et seq. of the statement in rejoinder in the original action and in reply in the counterclaim proceedings).

87. Similarly, IDE, relying on the technical annex, considers (paragraph 1 of its reply in the original action and in its defence to the counterclaim) that it had undertaken to deliver a beta release toolkit, but not a stable software ready for sale on the market, on the ground that that requirement is contrary to the contract itself.

85. IDE refuted those assertions and maintained that it had fulfilled all its obligations.

88. In support of its contention that it was not bound to present a product with the abovementioned features, as required by the

Commission, IDE states that a corresponding increment to the Community contribution had not been provided for (paragraph 1 of the reply in the original action and the defence to the counterclaim).

Commission describes the Disnet project as a pilot/demonstration project.

89. In the light of the foregoing analysis, with regard to the product which IDE had undertaken to deliver, I have to take the view that the term 'marketable product' used in the technical annex with regard to Disnet describes a product with characteristics (such as its stability and fitness for the purpose to be served) such that it is capable of being exploited on the market. Accordingly, IDE's contention that it would run counter to the contract itself to require it to deliver stable software ready for sale on the market is unfounded. However, the fact that the resources made available by the Commission were inadequate, as it claims, does not substantiate its assertions regarding the characteristics of the product which it was to deliver. Moreover, IDE states that the end product, with the improvements it had already incorporated, is commercially successful.

90. IDE also maintains that it was to deliver a pilot/demonstration project (paragraph 8 of its rejoinder in the counterclaim proceedings) and relies on this point on a Commission document, dated December 1992 and attached to that rejoinder, in which the

91. The fact that the Commission describes the Disnet project as a pilot/demonstration project is of no particular significance because it is the contract alone which is binding on the contracting parties. More particularly, the precise characteristics and, more generally, the description of the project are laid down in the contract itself and in its technical annex and the fact that the Commission describes the project in a certain way in some other document unconnected with the contract cannot in itself alter the obligations of the parties.

92. IDE emphasized at the hearing that it was necessary to take into account the development of the software, which is a collection of extremely complex data which is constantly evolving. It pointed out that the final version of Disnet had reached a particularly advanced stage, that it was nearly completed, that it met all the specifications of the contract and took into account technological developments, since the contract had been signed on 31 January 1990. It concluded by saying that the project was in its initial stages and would be completed in the form of a network. That network was ultimately created by the group of organizations collaborating with IDE and belonging to all the Member States of the Community.

93. Those assertions of IDE's are, however, unfounded. The question whether IDE fulfilled all its obligations must obviously be decided on the basis of the provisions of the contract. Accordingly, it is irrelevant that IDE fulfilled them at a later date, after the expiry of the time-limits laid down in the contract.

94. Finally, particular mention must be made of a point on which the Commission and IDE do not agree (paragraph 2 of the statement in reply to the defence and in answer to the counterclaim). In its original wording, the technical annex (p. 2) states in particular that 'a natural language facility using a limited syntax and vocabulary will be offered as extras', whereas, in the later, amended, version, the words 'as extras' and the relevant explanatory note were deleted. I consider that such a change to the wording is significant since it reveals that it was the parties' express wish that the end product should include a natural language facility using a limited syntax and vocabulary.

95. Moreover, in support of its arguments, the Commission lodged (Annex II to the statement in rejoinder in the original action and in reply in the counterclaim proceedings) a document from IDE entitled 'System Design' which deals with the natural

language module which is considered to be an element of the overall project.

96. Accordingly, IDE's assertion that the contract did not expressly provide that it was to develop a natural language processing module is unfounded. The question as to who would ultimately develop that part of the project was left to IDE's discretion, provided that the expected result was attained in conformity with the provisions of the contract. Moreover, IDE points out that that part of the project was ultimately completed, even though the Commission was not satisfied with the final result.

3) *The 'Evaluation Panel's' report*

97. In its report the 'Evaluation Panel' acknowledged that the conceptual basis for Disnet was innovative and raised high expectations. However, it found that the end product as demonstrated did not live up to those expectations, that is to say, it did not meet the specifications set out in the technical annex. It emphasized that that finding held true irrespective of whichever version of Disnet was considered.

98. More specifically, according to the 'Panel', IDE only met the first of its obligations, namely the creation of a toolkit, and then not entirely successfully. The toolkit did not constitute a completed and marketable product; it met only to a limited extent objectives fixed, particularly as regards the knowledge base and the natural language component of the interface. The product as delivered was unstable and required subsequent improvement.

99. Moreover, according to the 'Panel's' report, IDE failed to deliver two products which were also included in the contract: it did not complete the network or the domain-specific applications of the toolkit.

100. In view of the foregoing, the 'Panel' considered that the Disnet project had not been successfully completed and that it met between 50% and 75% of the specifications set out in the technical annex.

101. In a report lodged on 2 August 1993 (annexed to the defence), the expert appointed by the Commission made similar negative observations on the results of the demonstration.

102. In a subsequent report dated 15 September 1993, IDE challenged the findings contained in the 'Panel's' report and in particular the criticisms on which the 'Panel' had based its evaluation of the product which IDE had demonstrated to it. IDE also denied that it had failed to deliver two of the three products referred to in the contract, the network and the domain-specific applications of the toolkit, and maintained that a demonstration which also covered those aspects would have required more time. However, all were agreed that the time allocated for that demonstration had been adequate.

103. It follows from the foregoing considerations that the 'Evaluation Panel's' report is not lacking in objectivity and that its findings must be accepted, namely that IDE did not fulfil its obligations. Moreover, IDE has not furnished any evidence such as to support its argument and thus refute the 'Panel's' unfavourable substantive evaluation according to which the product demonstrated did not meet the specifications set out in the technical annex. Nor did the expert appointed by IDE issue an opinion in writing to the contrary.

4) The question whether IDE failed to fulfil its principal obligation

104. The object of the contract concluded between the Commission and IDE was to create a marketable domain-independent

intelligent information services network interface. As I have observed above, the technical annex, in both its original and amended forms (p. 3 et seq.), provides that the project which IDE was to demonstrate and deliver to the Commission was to comprise the following three end products: (a) the Disnet toolkit; (b) the network, to be set up between a number of European hosts and networks using the Disnet interface; and (c) the applications that could be built, using the Disnet interface, by a number of organizations participating in the Disnet project. Thus, IDE was to provide a service relating to three different products which may be regarded as equally important to the completion of the work.

extent) the specifications in the contract and the technical annex.

- (b) Where, upon the end product's being demonstrated, it is found that the project meets only part of the specifications set out in the contract, the Commission may not call for full repayment of the amounts paid by way of financial contribution but only part repayment. In such a case, the precise amount which the Commission may call to be repaid depends on the measure in which the product demonstrated meets the specification set out in the contract and the technical annex.⁸

105. Article 5.3 of the contract provided that should no such demonstration of the project take place or the demonstration not be successful, the Commission could call for full or partial repayment of the amounts paid as a financial contribution together with interest. From that article, in my opinion, the following inferences may be drawn:

- (a) The Commission may call for total repayment of the amounts paid only where no demonstration takes place or the end product demonstrated does not at all meet (or meets only to a negligible

106. According to the findings of the 'Evaluation Panel', IDE had delivered only the first of the three products which it was to supply. Furthermore, the completed product, that is to say the Disnet toolkit demonstrated, met 50% to 75% of the specifications in the technical annex. In view of this, the Commission may not call for repayment of the full amount of the contribution paid by it but only part of that amount.

8 — That view is confirmed by the fact that, according to Article 3.4 of the contract, the deliverable products are any significant outputs of the completed Disnet project.

107. Under Article 4.2 of the contract the amount which the Commission was to contribute towards the Disnet project was to be ECU 909 900. Two of the three end products were missing from the work submitted by IDE. Accordingly, the amount of the Community contribution should be reduced by two-thirds. Furthermore, in so far as the end product as demonstrated met, albeit in part, the specifications set out in the contract, IDE is entitled to keep a corresponding proportion of the Community contribution. Thus, since the product which was demonstrated met 50% to 75% of the specifications in the technical annex, IDE should keep 75% of the amount of the Community contribution corresponding to the first part of the Disnet project and repay the remainder which it has already received.

7.97% per annum, a figure which IDE does not challenge. Furthermore, interest begins to run from the end of one month following the date (29 June 1994) on which the Commission called for repayment of the amounts already paid, that is to say as from 29 July 1994.

D — Failure to fulfil the other contractual obligations

108. Since in my view the three end products were equally important to the completion of the project as a whole, a third of the ECU 909 900, that is to say ECU 303 300, corresponds to the completion of each of the end products. Thus, since the product delivered attained 75% of the objectives set, according to the evaluation which is most favourable to IDE, the latter should keep solely the amount remaining after subtracting 25% (that is ECU 75 825) of ECU 303 300, corresponding to the first of the three products encompassed by the project. Accordingly, IDE is entitled to keep ECU 227 475 (ECU 303 300 less ECU 75 825) and must reimburse to the Commission ECU 305 981 (ECU 533 456 less ECU 227 475), together with interest. The rate of interest to be applied, fixed in accordance with Article 5.3 (*in fine*) of the contract, is, according to the Commission,

109. For the sake of completeness, I shall consider the Commission's alternative submissions relating to the failure of IDE to fulfil other contractual obligations.

110. These submissions are put forward as an alternative basis, first for the counterclaim for the repayment of the amounts already paid and, secondly, for refuting IDE's assertions that it fulfilled all its obligations and that the Commission should therefore pay it the remainder of its contribution. I shall also consider IDE's arguments alleging failure on the part of the Commission to fulfil its contractual obligations.

1) Failure by IDE to fulfil its obligations to manage the project properly and to keep the Commission informed

111. Under Article 3.1 of the contract, the contractor, that is to say IDE, was to submit to the Commission at regular intervals throughout the duration of the work reports stating the progress of the work and the results obtained, together with statements of expenditure incurred during the preceding period.

112. The Commission states that it was not able to follow the development of the project because IDE failed to keep it informed, an obligation laid down in the contract. In particular, in a letter to IDE dated 7 September 1993 (Annex XV to the application), the Commission states that the statement of expenditure it received for the period 15 March to 15 September 1992 was not in conformity with the contract and therefore not acceptable since it was contrary to the provisions of Annex III to the contract. The Commission has not received since then any corrected version of that statement of expenditure.

113. In the same letter the Commission points out that it has not received the statement of expenditure for the period 15 September 1992 to 15 March 1993.

114. It appears from reports drawn up at the request of the Commission, first, by an independent expert and, secondly, by a firm of accountants (Annexes I and II to the defence), that certain irregularities in the sphere of management were noted in IDE's implementation of the project.

115. First, the report of 3 December 1991, drawn up by the expert appointed by the Commission (pp. 7 and 8), relating to the first 18 months of the contract, refers to significant deviations from the original cost plan and with respect to the overall conduct of the project, discrepancies which were not in accordance with IDE's contractual obligations. The document also mentions that members of the consortium stated that the timetable for the execution of the project was not being observed and the costs had not been properly assessed. Those findings provided grounds for considering that the project ran a serious risk of not being completed in accordance with the agreed timetable and that it was necessary to redefine its objectives, inasmuch as neither the agreed timetable nor the available budget was sufficient. The report proposed, moreover, that the Commission should suspend payment of its financial contribution until IDE put forward a clear strategy for an alternative solution.

116. Secondly, the report of 22 June 1992, drawn up by the firm of accountants, concerned the audit of the progress made by the project in periods 1, 2 and 3 (from 15 March 1990 to 15 September 1991). The audit started on 18 May 1992. According to the report, IDE did not make available the

ledgers for the period in question, reservations were expressed as to the accuracy of the costs statements submitted and a 34% reduction in expenditure was proposed.

2) *IDE did not submit to the Commission the comprehensive final report covering the whole project or a consolidated statement of expenditure*

117. IDE contests the results of the assessment made by the accounting firm in question (paragraph 8 of the statement in reply to the defence and in answer to the counter-claim) and states that it managed its expenditure scrupulously and kept an hourly record of work during the project.

119. Under Article 3.3 of the contract, the contractor, IDE, was, within two months of the completion of the work programme, to furnish to the Commission a final comprehensive report covering the whole project, accompanied by a consolidated statement of expenditure together with final supporting documents.

120. According to the Commission, IDE's comprehensive final report on the project, dated 17 May 1993, does not fulfil the requirements of the contract because it does not explain clearly the objectives and the results of the project and contains statements that are in contradiction with the interim reports (see the letter of 7 September from the Commission to IDE, annexed to the application).

118. Moreover, IDE did not submit half-yearly statements of expenditure for the whole duration of the project and, consequently, has not shown that it fulfilled the relevant obligations incumbent on it under Article 3.1 of the contract. The negative assessment of IDE's accounting made by the firm appointed by the Commission bears out the latter's assertions whereas IDE's assertions to the contrary have not been proved.

121. The Commission further points out that it did not receive a consolidated statement of expenditure accompanied by the requisite supporting documents. It was for these reasons that it ceased paying its financial contribution to IDE.

122. IDE objects by stating (paragraph 16 of its statement in reply to the defence and in answer to the counterclaim) that adjustment of the statement of expenditure already lodged and submission of the comprehensive final report made little sense because the Commission had made known early on its intention not to pay the remainder of its contribution. IDE, however, remained prepared to meet those requirements.

123. Since IDE did not lodge, within two months after the delivery of its work, the comprehensive final report covering the whole project, the consolidated statement of expenditure or the final supporting documents, it is clear that it failed to fulfil its obligations under Article 3.3 of the contract.

3) *The composition of the group of organizations collaborating with IDE was changed without the approval of the Commission*

124. Article 6.2 of the contract provides that the contractor may entrust the performance of part of the work programme to third parties subject to the condition that the drafts of all subcontracts are to be notified by registered letter to the Commission, which may, provided it acts within 15 working days following the receipt of such a letter, refuse to approve the subcontracting. If the Commis-

sion does not act within the prescribed period it is to be deemed to have approved the subcontracting.

125. The Commission maintains that IDE failed to fulfil its contractual obligations because (a) it concluded subcontracts without prior approval and (b) it resorted to the services of Hungarian undertakings for the performance of part of the work programme.

126. In reply to the Commission's assertion that, in the course of the project, the composition of the group of organizations collaborating with IDE had been continuously changed, IDE admitted that changes had in fact taken place but it denied any responsibility in this regard. Those changes, according to IDE (see p. 7 of the letter sent to the Commission on 2 May 1993, referred to above), were due to economic reasons which led certain members of the original group to withdraw or to the irresponsible behaviour of the original partners.

127. However, IDE insists that the Commission approved those changes expressly or tacitly, in conformity with Article 6.2.2, and that all the rights and obligations of the partners who withdrew were transferred to the new co-contractors. This proves, according to IDE, that there was no problem with regard either to the approval of subcontracts by the Commission or to the supervision of

the whole of the work programme, which it was required to undertake in its capacity as coordinator of the work of the group.

128. There is no provision in the contract which places an obligation on IDE to ensure that the composition of the group remains stable from the beginning to the end of the project. That means that IDE could, with the express or implied approval of the Commission, change, for reasons of its own, the composition of the group of organizations collaborating with it. The Commission's assertions to the contrary are therefore unfounded.

129. According to the Commission, contrary to the provisions of the contract, IDE subcontracted, without its prior authorization, certain work to Hungarian undertakings (p. 9 of the defence). It stresses that the Impact programme concerns the Community information services market and that therefore, by subcontracting work to Hungarian undertakings, IDE acted in breach of its contractual obligations.

130. According to Article 1 of the contract between the Commission and IDE, at issue in this case, the contract was concluded in the framework of the Community's Impact programme on the basis of the Council's Decision of 26 July 1988⁹ concerning the

establishment of a plan of action for setting up an information services market. It appears from the recitals in the preamble to and the provisions of that decision that the plan of action was directed at organizations in the Member States of the European Communities and was intended to set up a Community information services market.

131. Moreover, the technical annex (p. 3 of the original version and p. 2 of the amended version) indicates that, during the course of the Disnet project, IDE was to work closely with a number of organizations from seven (original version) or ten (amended version) Member States. As the Commission rightly points out, it therefore excludes non-Community companies from participating in the group entrusted with carrying out the Disnet project.

132. IDE states that all it did use was some Hungarian workers and that, in conformity with Hungarian law, the temporary recruitment of workers must be notified to a specific organization which registers this (paragraph 17 of the rejoinder in the counterclaim proceedings). IDE counters the Commission's assertion that it resorted to subcontracts which were not authorized under the contract by claiming that in each case it notified the subcontracts, as required under Article 6 of the contract, and it produces a registered letter concerning six new partners but not the disputed subcontract with a Hungarian company (Annex VIII to the statement in reply to the defence and in answer to the counterclaim).

⁹ — Referred to in footnote 3.

133. The Commission's assertion, so far as it concerns one Hungarian company, is substantiated by a photocopy of a contract dated 29 August 1990 which it has produced (Annex VI of the statement in rejoinder in the original action and in reply in the counterclaim proceedings). That contract concerned the carrying out of that part of the Disnet project relating to the natural language component. Accordingly, IDE's denial that it concluded a contract with a Hungarian undertaking is untenable.

4) IDE's relations with the other members of the consortium

134. Under Article 6.1 of the contract, the contractor is to have technical and financial responsibility for the work and is to provide the personnel, the facilities, equipment and materials necessary for the proper performance of the contract. In so far as the work is to be carried out by organizations associated with the contractor for this purpose, the contractor is responsible for ensuring that the Community financial contribution is shared amongst the participating organizations according to the progress of work and the participation of each organization.

135. The technical annex (p. 16 of the original version and p. 10 of the amended version) provides that the project has two phases: (a) the building of the intelligent

interface; and (b) the integration of that interface in a number of applications in different sectors and different functions.

136. According to the technical annex, the two phases would normally be executed consecutively. That means that as soon as the intelligent interface was ready it could be used for applications. However, since that would take too much time, the timescale of the Impact I project being two years, certain activities coming under the second phase were to be carried out concurrently as from the commencement of the first phase in order to prepare the participants for the subsequent application and integration of the intelligent interface as a toolkit for their special human interfacing needs.

137. The Commission stresses that IDE, contrary to Article 6.1 of the contract and the terms of the technical annex and although it accepted technical responsibility for the performance of the work, failed to send its partners in good time an operational version of the toolkit. That omission prevented them from starting work in good time on the adaptation of the toolkit in question to the specific requirements of their databases.

138. In support of its assertion, the Commission refers specifically to the letter which one of the members of the consortium sent on 4 June 1993 to IDE (Annex V to the statement in rejoinder in the original action and in reply in the counterclaim proceedings) which describes in detail IDE's omissions in relation to the delivery of the software which would allow it to begin its own work.

139. The Commission also refers to the minutes of the meeting of the 17 partners of IDE in the Disnet project, which took place in Luxembourg on 18 May 1993 (Annex III to the statement in rejoinder in the original action and in reply in the counterclaim proceedings), according to which the progress of the project had been unjustifiably delayed by IDE. The same document also indicates that it was not until February 1993 that IDE's partners received a release of the toolbox which should have been ready by November 1992 and that in July 1993 only a small number of partners had been able to create operational applications with that toolkit.

140. IDE, on the other hand, maintains that it sent in good time, that is to say one year before the expiry of the deadline for the completion of the whole project, the operational version of the toolkit which it was to send to the other members of the consortium so that they could carry out the parts of the project allocated to them.

141. At the same time, IDE states that unforeseen additional work on the natural language module, the telecommunications network and the functions relating to that network overloaded the timetable for the performance of the work.

142. Whether IDE did or did not send to the other members of the consortium an operational version of the toolkit a year before the expiry of the deadline for the completion of the whole project and whether a year was long enough to enable them to carry out their part of the work are questions of evidence. IDE has not furnished any proof of its assertion on those points so that the assessment contained in the abovementioned minutes of IDE's partners' meeting will have to suffice.

143. The Commission further maintains that IDE also failed to fulfil its obligation to allocate the Community contribution between its partners, that is to say that it failed to fulfil its financial obligations under Article 6.1.

144. In support of its assertion, the Commission produced (a) the abovementioned minutes of the meeting on the progress of the Disnet project held on 18 May 1993, where it is stated (at paragraph 3.3) that IDE failed to pay its partners the share of the Community contribution due to them; and (b) letters addressed to IDE containing com-

plaints from two of the members of the group collaborating with it (Annexes IV and V to the statement of rejoinder in the original action and in reply in the counterclaim proceedings). In the first letter, dated 29 September 1993, the company points out to IDE that it would not deliver to it the product which it was to provide until the share of the Community contribution owing to it was paid. Mention is also made in the second letter, of 4 June 1993, of non-payment of amounts owing from the Community contribution.

145. IDE denies having failed to fulfil its obligation to pay its partners the share of the Community contribution due to them and to that effect produces a number of statistical reports (Annex XI to the statement in reply to the defence and in answer to the counterclaim). However, those reports merely prove the existence of a current account for the transactions between IDE and its partners. Moreover, it justifies its conduct by maintaining (at paragraph 16 of the rejoinder in the counterclaim proceedings) that the other members of the group collaborating with it had not received any amounts because the advances paid were set off against the expenditure incurred by it on behalf of the whole consortium and, in any event, because the Commission had not paid it the total amount of the contribution.

146. In particular, IDE considers the complaints made by two of the members of the consortium to be unfounded because, in one case, the partner in question did not deliver the program it was to supply, while in the other case, the amounts which were to be

paid were set off against the expenditure incurred by the training which it had to give to the collaborator from that organization in order to enable him to perform his task in the context of the completion of the programme.

147. Thus, the arguments put forward by IDE in this case, apart from being contradictory, do not fully substantiate its assertions, which must therefore be rejected for that reason.

5) IDE's allegation that the Commission failed to fulfil its contractual obligations

148. Under Article 6.3 of the contract the contractor must, without delay, provide the Commission with full particulars of any incident or event likely to prejudice the performance of the contract.

149. According to IDE (p. 3 of its letter to the Commission of 2 May 1993, referred to above), the Commission failed to meet its responsibilities because it did not reply to IDE's repeated warnings concerning the difficulties encountered in executing the project as a result of the need to carry out unexpected additional work, which gave rise to

the delays in drawing up Disnet project reports for the Community.

150. The contract concluded by the Commission with IDE did not impose any particular obligation on the former to take specific measures where the other party to the contract informed it of financial or technical difficulties in proceeding with the programme.

151. More generally, in conformity with the spirit of the contract, IDE alone is responsible for carrying out the project in its capacity as the other party to the contract with the Community, as Articles 1 and 6.1 of the contract categorically state.¹⁰

152. Accordingly, IDE's assertion, referred to above, that the Commission failed to fulfil its obligations under the contract is unfounded. Moreover, its assertion that such failure on the part of the Commission prevented it from duly performing its obligations has no basis in the contract and must also be rejected as unfounded.

153. Although IDE's assertions do not establish that the Commission's conduct was contrary to the provisions of the contract, in other words, although they find no basis in the contract, they nevertheless leave open the question of the extent to which they may justify the Court's apportioning liability, a matter which I will examine below.

VI — Other claims made in the application

154. In the event that the Court should allow the principal claim in IDE's application and order the Commission to pay it the remainder of the contribution, I will examine next the other heads of claim in the application.

1) *Claim for the payment of extra-judicial expenses*

155. IDE claims the payment of ECU 37 650 to cover extra-judicial expenses which, it explains, it incurred for 'legal advice'.

¹⁰ — See point 41 et seq. of the Opinion of Advocate General Lenz in a similar case: Case C-209/90 *Commission v Feilbauer* [1992] ECR I-2613.

156. It is for IDE to prove that it incurred such costs. However, since it has not produced any supporting documents, the claim in question must be rejected as unsupported by any evidence.

the contract and consisting in the non-payment of the whole amount of the contribution due to it under the contract is admissible and well founded.

2) *Claim for the payment of interest*

(a) Admissibility

157. IDE claims interest at the rate prescribed by law and calculated from 31 May 1993, the date on which it sent a letter to the Commission rejecting a proposal to reduce the amount of the contribution due and demanding payment of the total amount of ECU 376 435.

158. In view of the purely ancillary nature of the abovementioned claim, interest must necessarily also be awarded if the principal claim is allowed.

160. I would observe that, in its originating application, IDE claimed damages to make good the loss suffered by it because: (a) it had come close to insolvency as a result of its unfavourable situation in the market, lost goodwill, restricted its commercial activities and been forced to sell at a low price a large number of its assets (a building and motor cars); (b) it had dismissed most of its staff, which led to the stagnation of its activities and damaging delays on account of the need to train new members of staff; and (c) it suffered the unfavourable consequences of the devaluation of the ECU as against the florin. However, it reserved to a later date the detailed quantification of the exact amount of the damage suffered.

3) *Claim for damages*

159. I will now consider whether IDE's claim for damages to make good the loss it says it has suffered as a result of conduct by the Commission in breach of the terms of

161. Subsequently, in its reply, IDE quantified the amounts as follows: (a) ECU 27 332.61 for the sale at a low price of a building belonging to the undertaking and the removals necessitated thereby;

(b) ECU 3 188.80 for the sale of two company motor cars; (c) ECU 54 554.35 for dismissing most of its staff and being obliged to train new members of staff; and (d) ECU 68 331.52 for the considerable delay in entering the market, resulting in loss of customers and goodwill. It failed, however, to quantify the amount of the damage it suffered as a result of the devaluation of the ECU against the florin.

162. Since IDE has not specified in its application the amount of the damage it suffered, the admissibility of its claim poses a problem. The Court may consider this question of its own motion,¹¹ basing itself, obviously, on its Rules of Procedure, since Article 16 of the contract at issue, relating to the application of Luxembourg law, must be considered to refer only to the provisions of substantive law.¹²

163. Under Article 38(1)(d) of the Rules of Procedure of the Court, the application must state, *inter alia*, the form of order sought by the applicant. The Court has held that, if an applicant includes in his application a request for a declaration with regard to the damage which may result from the contested measure and specifies in the course of the written and oral procedures the subject-matter of

that request and sets a value on the amount of the damage, the claim for compensation for damage formulated in the reply may be regarded as an amplification of the claim contained in the application and therefore as admissible.¹³

164. In its application to the Court IDE satisfactorily defined from the outset the subject-matter of its claim. This means that the fact that it formulated its claim for compensation in the originating application, without quantifying precisely the amount of the damage, which it did in its reply, does not render that claim inadmissible, except for the limb concerning damage suffered as a result of the devaluation of the ECU against the florin but not quantified by IDE.

(b) Substance

165. With regard to the question whether the claim is well founded, the Commission maintains that: (a) IDE must accept liability for the damage suffered by it because this is expressly provided in Article 8.1 of the contract; and (b) there is no causal link between the damage suffered by IDE and any conduct on the part of the Commission (pp. 6

11 — Joined Cases 19/60, 21/60, 2/61 and 3/61 *Fives Lille Cail and Others v High Authority* [1961] ECR 281.

12 — See paragraphs 4 and 10 in *Commission v Zoubek*, referred to in footnote 5. See also point 7 of the Opinion of Advocate General Tesouro in Case C-330/88 *Grifoni v EAEC* [1991] ECR I-1045.

13 — Case 25/62 *Plaumann v Commission* [1963] ECR 95. See also Cases 74/74 *CNTA v Commission* [1975] ECR 533, paragraph 47, and Case 90/78 *Granaria v Council* [1979] ECR 1081, paragraph 6.

and 7 of the defence). On those grounds, it requests the Court to reject IDE's claim.

166. As regards the first of the Commission's arguments, I would observe that according to Article 8.1 of the contract IDE assumes sole responsibility for any damage or injury suffered by it in or in connection with the performance of the contract. That clause refers, however, to damage arising from matters unrelated to the contract. In the present case IDE requests compensation for damage which it claims to have suffered as a result of the fact that the Commission did not fulfil its principal contractual obligation, namely to pay the whole of the agreed contribution. The contract does not appear, *prima facie*, to exclude the Commission's liability in such an event.

167. For it to be held that there is liability on the part of the Commission requiring it to compensate IDE, the three conditions for contractual liability must be met: ¹⁴ (a) the Commission must have failed to fulfil one of its contractual obligations; (b) IDE must have suffered damage; and (c) there must be a causal link between the conduct of the Commission in breach of the contract and the damage suffered by IDE.

14 — For the conditions governing contractual liability in French law, the rules of which are altogether similar to those of Luxembourg law, see Gérard Lègier's analysis in his article 'Responsabilité Contractuelle' in *Dalloz: Encyclopédie Juridique. Répertoire de Droit Civil*, vol. VIII, 2nd ed., 1992, paragraph 17 et seq.

168. The first condition is not met because the Commission has not failed to fulfil any of its contractual obligations. Even if the Court were to find otherwise, the second condition would not be met either because IDE describes the damage which it has suffered by specifying the amounts making up that damage, but does not adduce any evidence as to the actual damage and its extent. That lack of evidence makes it impossible to judge the extent to which there is a causal link between the damage suffered by IDE and the Commission's conduct.

169. In conclusion, even if the Court were to uphold the principal claim formulated by IDE in its application, namely for an order that the Commission pay the remainder of the contribution, its other claim, which is in damages, should be dismissed, first, because it is unfounded and, secondly, because it is unsubstantiated by any evidence.

VII — Possibility of apportioning liability between the Commission and IDE

170. I will now consider whether, in the event that the interpretation of Article 5.3 of the contract which I have proposed above is not accepted by the Court, it is none the less possible, in view of the applicable national law, in this case the law of the Grand Duchy

of Luxembourg, to apportion liability between the two parties, in this case between the Commission and IDE.

A — Conditions governing the apportionment of liability

171. Under the law governing contractual liability, a contracting party who has not fulfilled all his contractual obligations, or has fulfilled them only in part, must make good the damage which his non-performance, be it total or partial, has caused to the other party to the contract. In particular, Articles 1147 and 1148 of the Luxembourg Civil Code indicate when the party who has failed to perform his contractual obligations is exempt from the obligation to pay damages.¹⁵

172. French academic legal writing and French case-law conclude, on the basis of analogous articles of the French Civil Code, whose content is altogether similar to the abovementioned articles of the Luxembourg Civil Code, that the problem of apportionment of liability is to be resolved as follows:

(a) there must exist an obligation to pay damages; (b) the person seeking damages must have contributed through fault (action or omission) on his part to the breach by the defaulting party of his contractual obligations;¹⁶ and (c) that there must exist a causal link between the conduct of the injured party and the origin or aggravation of the damage he has suffered.

173. Where the conduct of the victim of the damage constitutes *force majeure*, that is to say if it is unforeseeable and inevitable, the defaulting party is exempted if no fault attaches to him as a result of his act or omission. However, if it is proven that the conduct of the injured party was neither unforeseeable nor inevitable and contributed to an extension of the damage, then such conduct may lead to a partial exemption of the defaulting party, if such conduct constitutes fault.¹⁷

174. For the most part such conduct (action or omission) of the victim constitutes fault. Most often it concerns 'negligence' or 'a certain lack of care'.¹⁸ If, however, it appears that the conduct ascribable to fault has not given rise to the damage but merely contributed to it, the court holds the defaulting

15 — Article 1147 provides that a defaulting party is to be ordered, where appropriate, to pay damages for non-performance, or late performance of an obligation whenever he fails to show that the breach stems from an external cause which cannot be attributed to him and that there is no bad faith on his part. Article 1148 provides that no damages are to be awarded where, as a result of *force majeure* or unforeseeable circumstances, the defaulting party was prevented from giving or doing that which he was obliged to give or do, or has done that which he was forbidden to do.

16 — See, for example, A. Weil and F. Terré *Droit civil: les obligations*, Paris, Dalloz, 3rd edition, 1980, paragraph 415, p. 483.

17 — *Ibid.*

18 — See Gérard Lédier's analysis in his article 'Responsabilité Contractuelle' (referred to above in footnote 14), paragraph 186, and that of Geneviève Viney, in 'Les Obligations. La Responsabilité: Conditions', in *Traité de Droit Civil* (under the direction of J. Ghestin), vol. IV, Paris, LGDJ, 1982, paragraph 426 et seq. See also the analysis of Henri, Léon and Jean Mazeaud in 'Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle', vol. II, Paris, Montchrestien, 6th edition, 1970, paragraph 1447 et seq.

party to be partially exonerated.¹⁹ With regard to contracts, the case-law does not appear to admit of the partial exoneration of the defaulting party where the injured party's conduct does not amount to fault.²⁰ Once it has been established that the injured party's fault contributed to the occurrence of the damage, the court adjudicating on the merits determines how liability is to be apportioned on the basis either of the gravity of the fault on the part of the defaulting party and the injured party respectively, or of the causal link between each such case of fault and the supervening damage. Accordingly, the findings made by the court adjudicating on the merits with regard to the existence and gravity of the fault and the apportionment of liability are therefore not open to review.

175. Where the defaulting party is required to produce a specific result (obligation of result),²¹ that is to deliver a given product, liability is normally apportioned, where no fault on his part has been proved, on the basis of the causal link existing between the damage and the fault on the part of the injured party, although the courts tend also to take into account the gravity of the fault.²²

B — Proposed solution

176. As I have already said, the Commission and IDE concluded a synallagmatic contract under which the former undertook to pay a certain sum by way of contribution for the performance of work by the latter, namely the creation of Disnet. This means that we are concerned with a contract under which the defaulting party, in this case IDE, is required to obtain a specific result (obligation of result), that is to say that its principal obligation consists in the delivery of a specific product. At the same time IDE was to perform a number of other obligations, of a secondary nature, which, as shown, it did not perform.

177. The Commission paid to IDE a large part of the contribution due. The fact that the work was not successfully completed led to its decision to call for refund of the advance payments together with interest, pursuant to Article 5.3 of the contract.

178. In the present case, the Commission has suffered damage giving rise to an obligation on the part of IDE to repair it, inasmuch as the damage suffered by the Commission is the result of its having paid most of the contribution without receiving from the other party the agreed consideration. This means that there exists a causal link between the damage suffered by the

19 — On the question of liability as apportioned by Luxembourg courts, see the judgments of the Tribunal d'arrondissement (District Court), Diekirch, of 10 May 1988, Case No 5687; of the Tribunal d'arrondissement, Luxembourg, of 21 October 1983, Case No 776/83, of 1 March 1984, Case No 259/84, of 19 December 1984, Case No 832/84, of 10 December 1987, Case No 37251, and of 14 November 1991; and the judgments of the Cour d'appel (Court of Appeal) of 12 December 1984, Case No 7235, of 13 December 1984 (two judgments), and, finally, of 25 April 1985, Case No 7403.

20 — See Gérard Légier's analysis in his article on 'Responsabilité Contractuelle' (referred to above in footnote 14), paragraph 187.

21 — For the distinction to be drawn between the duty to exercise skill and care and obligations as to the results to be achieved, see by way of guidance the analysis by Alex Weil and François Terré in the work referred to in footnote 16, paragraph 396 et seq.; see also Gérard Légier's article referred to at footnote 14, paragraph 188, and Fernand Derrida's analysis in his article 'Obligations' in *Dalloz: Encyclopédie Juridique. Répertoire de Droit Civil*, vol. VII, 2nd edition, 1992, paragraph 47 et seq.

22 — See Gérard Légier's analysis referred to above in footnote 14, paragraph 188.

Commission and IDE's breach of its contractual obligations.

179. None the less, it may not be concluded that the Commission contributed by its fault (action or omission) to IDE's breach of its contractual obligations, which gave rise to the damage. In other words, the necessary causal link between the Commission's conduct and IDE's breach of its obligations, which constitutes the event giving rise to the damage, is lacking. Moreover, the Commission's intention in paying advances on its contribution was, ultimately, to bring about the realization of the objective of the project, and for this reason it would be incorrect to conclude that it acted wrongfully and that liability should therefore be apportioned between itself and IDE.

180. IDE charges the Commission with one fundamental failure to fulfil its obligations. It states that the budget made available to it by the Commission for carrying out the agreed work was inadequate because it did not correspond to the expenditure necessary in order to complete the work required by the Commission (paragraph 1 of the statement in reply to the defence and in answer to the counterclaim). At the same time IDE points out that the unexpected additional work relating to the natural language processing module, the telecommunications links and related functions overburdened the original budget (p. 3 of the letter to the Commission of 2 May 1993, referred to above).

181. The claims put forward by IDE, which are intended to show that the Commission acted wrongfully, are, however, unfounded. In so far as IDE submitted a project with a view to concluding a contract with the Commission involving a financial contribution by the latter towards the work it was to carry out, IDE should have taken into consideration all the factors which might make that project be more costly than expected and, accordingly, requested from the outset a readjustment of the amounts specified in the contract, that is to say the total cost of executing the project and the corresponding contribution by the Commission. None the less, this fact alone does not prove any neglect on the part of the Commission which prevented IDE from fulfilling its obligations and which should be taken into consideration with a view to apportioning liability between the two contracting parties.

182. It is true that although the Commission, as it emphasizes, repeatedly had evidence of the improper manner in which IDE was performing its obligations and was aware, through the reports drawn up by the experts appointed by itself, particularly the report of 3 December 1991 (Annex I to the defence), that the whole programme was not being implemented as agreed, it refrained from taking at an earlier stage certain measures, in particular termination of the contract, as it was entitled to do under Article 10; it waited until IDE had finally completed the whole project.

183. However, it would not be justified to conclude that, in this case, there is a causal

link between, on the one hand, IDE's failure to fulfil its contractual obligations and the resultant damage to the Commission and, on the other, the conduct of the Commission, which continued to pay its contribution notwithstanding the other party's defective performance of its obligations.

VIII — Costs

184. Consequently, I consider that in the present case the requirements for an apportionment of liability are not satisfied, since on the Commission's part there was no fault contributing to IDE's breach of its contractual obligations which was the cause of the damage suffered by the Commission.

185. Under the first subparagraph of Article 69(3) of the Rules of Procedure the Court may order that the parties bear their own costs if each party succeeds on some and fails on other heads. Since, as I have indicated above, the Commission's claims can be upheld only in part, the parties should bear their own costs.

IX — Conclusion

186. For the foregoing reasons I therefore propose that the Court should give judgment in the following terms:

- (1) IDE's application is dismissed.
- (2) The Commission's counterclaim is allowed in part and IDE is ordered to pay to the Commission the sum of ECU 305 981, together with interest at 7.97% *per annum* from one month following the date (29 June 1994) on which the Commission requested reimbursement of the sums already paid, that is to say as from 29 July 1994.
- (3) The parties are ordered to bear their own costs.