**APPLICATION/REQUÊTE N° 10474/83**

Otto VEIT v/the FEDERAL REPUBLIC OF GERMANY

Otto VEIT c/RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE

**DECISION** of 6 May 1986 on the admissibility of the application

**DÉCISION** du 6 mai 1986 sur la recevabilité de la requête

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***Article 6, paragraph 1 of the Convention*:**

*a) Question of the time required by a party to civil proceedings to study an expert opinion prior to a hearing.*

*b) Length of civil proceedings during which 4 1/2 years passed between the appointment of an expert and the submission of his report (Complaint declared admissible).*

***Article 25, paragraph 1 of the Convention**: The continuation of the examination of an application after the death of the person who introduced it depends on the intentions expressed by his successor and the nature of the complaints. Recognition of the right of action of a widow and sole heir with regard to civil proceedings concerning an action of a pecuniary nature.*

***Article 6, paragraphe 1, de la Convention*:**

*a) Question du temps nécessaire à une partie à un procès civil pour étudier un rapport d'expertise avant l'audience.*

*b) Durée d'une procédure civile au cours de laquelle 4 1/2 ans se sont écoulés entre la nomination d'un expert et la remise de son rapport (Grief déclaré recevable).*

***Article 25, paragraphe 1, de la Convention**: La poursuite de l'examen d'une requête introduite par une personne qui est décédée par la suite dépend de l'intention exprimée par l'ayant-droit et de la nature des griefs. S'agissant d'une procédure civile portant sur un litige d'ordre pécuniaire, qualité pour agir reconnue à la veuve et unique héritière.*

## THE FACTS

*(français : voir p. 121)*

The facts of the case as they have been submitted by the parties may be summarised as follows.

The applicant, a German citizen and businessman, resided in Stuttgart. He died on 7 February 1982. His widow who resides in Stuttgart is the sole heir.

The applicant was represented before the Commission by Mr. H.J. Pohl, a lawyer practising in Mannheim, who is now also representing the applicant's widow before the Commission.

The applicant was the owner of a warehouse in Stuttgart-Wangen, which was built by the firm Gebrüder Albert und Ernst Waiss by virtue of a contract concluded on 12 March 1970. The contract stipulated that the applicant would pay over 2.3 million DM for the construction, of which he initially paid 1.7 million DM.

I.

On 17 May 1971 the Waiss company brought an action before the Stuttgart Regional Court (Landgericht) in which it requested from the applicant the remaining payment for the construction expenses (Werklohn) of the warehouse in the amount of 628,440 DM. The applicant refused to pay and put forward counter-claims of more than 1 million DM. He based these counter-claims on alleged deficiencies caused by dampness in the construction work that the company had carried out.

By partial judgment (Teilurteil) of 10 September 1971 the Stuttgart Regional Court ordered the applicant to pay to the company a sum of 600,000 DM, excluding interest. The action was rejected to the extent of 3,226 DM and judgment was reserved as to the remainder of the plaintiff's claim and as to costs.

The company was permitted to offer the applicant during the execution a directly liable bank guarantee as security amounting to 660,000 DM including interest. This bank guarantee would have been the only asset available to the applicant to satisfy his claims if his subsequent appeal proved to be successful and the Waiss company had meanwhile gone bankrupt.

The Waiss company, which was then a company under civil law (bürgerliches Recht), later became a limited partnership (Kommanditgesellschaft). On 16 February 1977 the company and the solely liable partner filed bankruptcy petitions which were rejected by the Stuttgart District Court on 1 and 2 March 1977 due to lack of the bankrupt's estate. The company and its partner were, when the application was filed, without means and in liquidation.

II. a.

On 15 November 1971 the applicant appealed against the decision of 10 September 1971 to the Stuttgart Court of Appeal (Oberlandesgericht). The reasons for the appeal were submitted by letter of 28 January 1972.

A first hearing was held on 11 July 1972. On 21 July 1972 the applicant submitted new evidence. By an order of 28 July 1972 concerning the taking of the evidence (Beweisbeschluss) the Court entrusted an engineer, Dr. A., with the task of providing the Court with an expert opinion regarding the alleged deficiencies in the construction work. The Court also ordered the hearing of witnesses and stated that it would visit the scene together with Dr. A. The Court determined that the expert opinion should be submitted after the visit to the scene.

On 1 August 1972 the documents were sent to Dr. A. to enable him to assess the probable costs of his opinion. He replied on 1 September 1972 that these would amount to 12,000 DM. Both parties accepted this.

The Court passed a further order concerning evidence on 13 November 1972, whereupon on 11 January 1973, the Court visited the scene together with Dr. A. and thereby also questioned four witnesses.

On 26 February 1973 the Court supplemented its order to take evidence by requesting Dr. A. to comment on allegations by the applicant concerning deficiencies of material and damage caused by dampness.

On 1 March 1973 the file was sent to Dr. A. However, on 16 May and 8 June 1973 the applicant submitted new facts concerning deficiencies caused by water. The Court therefore requested Dr. A. on 13 June 1973 to return the file.

On 22 June 1973 the Court ordered a new visit to the scene and determined that Dr. A. should prepare his opinion thereafter. However, on 11 July 1973 the Court told Dr. A. that the planned visit could only take place after the Court holidays.

On 28 June and 11 July 1973 the applicant announced further deficiencies of the warehouse caused by water. Also on 11 July 1973, the Court informed the expert that a new date for the taking of evidence would be determined after the summer recess.

On 18 July 1973 Dr. A. told the Court that in view of teaching obligations he could only be available on a few days in autumn for a visit to the scene.

On 24 September 1973 the Court fixed 5 November 1973 as the new date for the taking of evidence.

On 1 October 1973 the applicant submitted two expert opinions, one prepared by the Stuttgart Institute for Examining Materials (Materialprüfungsanstalt), the other by a private expert, Mr. D. These opinions commented on certain deficiencies of the warehouse and were transmitted by the Court to Dr. A. on 4 October 1973.

On 5 November 1973 the Court executed the order to take evidence in its extended form of 22 June 1973 by visiting the scene and hearing five witnesses. The documents were then transmitted to Dr. A.

On 30 November 1973 the applicant supplemented his previous submissions by mentioning new deficiencies, in particular new cracks and new damage caused by water. He also announced that he would furnish proof of these points by means of a supplementary opinion of the Stuttgart Institute. He requested the opportunity to submit this opinion as well as an extension of the time-limit to produce further documents.

On 4 December 1973 the Court sent the file to Dr. A. and instructed him to prepare the opinion on the basis of the Court's orders of 28 July 1972, 26 February 1973 and 22 June 1973, and to take into consideration the applicant's statements of 30 November 1973.

On 7 December 1973 and 8 January 1974 both parties submitted additional statements alleging new deficiencies. These were transmitted to Dr. A. On 11 January 1974 the latter was requested by the Court to undertake a supplementary visit to the scene in January. Dr. A. then fixed 28 January 1974 for the visit.

On 21 January and 2 April 1974 the Court received further contradictory statements by the parties concerning the possibilities of repairs.

On 3 May 1974 the plaintiff company reminded the Court of its interest in an early preparation of the expert opinion. On 13 May 1974 the presiding judge requested Dr. A. to submit his opinion early.

The applicant then submitted a further opinion of the Stuttgart Institute which the Court transmitted to the expert Dr. A. on 30 May 1974.

Dr. A. informed the Court on 1 June 1974 in reply to its inquiry of 13 May 1974 that he had waited with the preparation of his opinion until he had received the supplementary opinion of the Stuttgart Institute. He now intended to prepare his opinion in July 1974. This letter was transmitted by the Court to both parties.

On 8 August 1974 the applicant requested the Court to remind Dr. A. that his opinion should be prepared at an early date. The Court transmitted this request to Dr. A. on 3 September 1974. On 2 October 1974 the applicant asked the Court whether Dr. A.'s opinion had been submitted. On 9 October 1974 the Court again requested the expert to deliver his opinion promptly.

On 16 October 1974 the applicant filed photographs allegedly showing new deficiences of the warehouse which had only become evident in October 1974. He also announced the submission of further photographs to evidence the development of new cracks in the walls of the warehouse. Thereupon, on 18 October 1974, the Court instructed the plaintiff to comment on these new statements until 4 November 1974. The applicant was told to produce the further photographs as soon as possible.

These photographs were submitted by the applicant on 25 October 1974 together with an opinion of his private expert, Mr. D. A copy of the opinion had been sent directly to Dr. A.

After a further extension of the plaintiff's above time-limit, the latter submitted on 9 November 1974 a statement containing an opinion of the company's own private expert, Mr. S., on the opinion of the applicant's private expert, Mr. D. The plaintiff also requested an early preparation of Dr. A.'s opinion.

From 12 November 1974 onwards, a new lawyer represented the applicant.

In an order of 13 November 1974 the Court instructed Dr. A. also to consider the new deficiencies alleged by the applicant and to comment on the possibilities and expenses of repairs as well as on a possibly diminished value of the warehouse.

On 15 November 1974 the Court again sent the file to Dr. A. together with the photographs and the new private expert opinions.

On 10 December 1974 the Court received a statement by the applicant in respect of the alleged new deficiencies. This was communicated to Dr. A.

On 26 May 1975 the applicant suggested to the Court that it remind Dr. A. that his opinion was overdue and that "consideration might be given to setting the expert a formal time-limit". On 28 May 1975 the Court transmitted this statement to Dr. A. who at the same time was urgently requested speedily to submit his opinion.

Meanwhile, the Court appointed a new rapporteur who on 16 September 1975 asked Dr. A. when he would submit his opinion. The latter replied on 2 October 1975 that he would probably do so in spring 1976. Dr. A. explained that the recession in the building industry had resulted in an unpredicted wave of proceedings for preserving evidence, and that all his normal engagements as court expert had been disrupted. In the instant case he had therefore been obliged to postpone the opinion. He also requested the Court and the parties to consider that he had been involved as expert in other building proceedings which would occupy him until the end of 1975.

On 3 February 1976 the plaintiff requested the Court to set a time-limit for the submission of Dr. A.'s opinion. The Court answered that the conditions therefore were, as yet, not met inasmuch as Dr. A. himself had announced that the opinion would be ready by spring 1976; this announcement had not been opposed by either of the parties. Nevertheless, Dr. A. had been instructed to keep within this time-limit. If this did not happen, the Court would give a ruling on the application for a time-limit to be set.

On 23 March 1976 Dr. A. told the Court that he would make a "technical" visit to the scene which eventually took place on 27 April 1976 with the parties and their private experts, Messrs. D. and S., but not the judge, being present.

Also on 29 April 1976 Dr. A. told the Court that he needed further information concerning the issue of diminution of value. For these purposes the parties exchanged further pleadings and made contradictory statements on 12 May and 28 June 1976.

On 12 July 1976 Dr. A. explained to the Court that the heat wave of the past weeks had delayed the conclusion of his opinion.

On 11 and 18 August 1976 the applicant submitted further opinions of his private expert, Mr. D., upon which the plaintiff commented on 30 August and 21 September 1975. The plaintiff also submitted an opinion of its private expert Mr. S.

On 29 September 1976 Dr. A. informed the Court that he was in the final stages of preparing the opinion and was including therein the parties' submissions of the current year. However, until the end of October 1976 he would be abroad. This information was passed on to the parties on 30 September.

On 4 October 1976 the applicant requested the Court that the expert be urged to submit his opinion.

On 16 November 1976 Dr. A. told the Court's rapporteur that the opinion would be ready before Christmas.

On 19 October, 25 November and 15 December 1976 both parties submitted further statements and evidence. On 15 December the plaintiff requested the Court to send to Dr. A. an expert opinion prepared by the expert Mr. P. concerning a different case.

On 13 January 1977 Dr. A. personally delivered to the Court his opinion dated 29 December 1976 of 38 pages. The applicant's representative received a copy on 19 January 1977.

II. b.

On 4 January 1977 the Court ordered a hearing to be held on 22 March 1977 at which the parties were to be present. On 19 January 1977 the applicant objected to the use of the opinion of P.

On 14 February 1977 the applicant's representative requested to see the case-file on the ground that certain documents might have been lost due to the applicant's change of representatives. The file was then made available to the applicant's representative from 18 to 23 February 1977.

On 10 March 1977 the plaintiff criticised the amount of diminution of value as determined by Dr. A. The Court then granted the plaintiff's request to invite Dr. A. to the hearing. On 15 March 1977 the plaintiff submitted an opinion by the private expert Mr. S. on the opinion of Dr. A.

On 16 March 1977 the applicant requested a postponement of the hearing in order sufficiently to prepare the hearing and to enable his private expert, Professor Dr. Dr. L., to study Dr. A.'s opinion. In view of the importance of the opinion to the outcome of the proceedings, the time available for preparing the hearing on

22 March was not sufficient. Moreover, L. had considered that A.'s opinion contained incorrect assessments. Due to L.'s illness the latter could not appear at the hearing. The applicant also announced that he would present other expert opinions and requested the Court to appoint L. as court expert. He also requested the Court to hear his expert D. at the hearing.

On 17 March 1977, the Court refused the applicant's request for postponement on the ground that the applicant had had sufficient time to prepare for the hearing.

At the hearing of 22 March 1977 the applicant submitted a further statement, dated 21 March 1977, with four annexes and requested them to be taken into account by the Court. These submissions presented *inter alia* the provisional views of the applicant's private expert, Prof. L., on the opinion of the court expert. The applicant again requested a postponement of the hearing.

The Court refused the postponement and reserved its decision as to the issue whether or not the statement and annexes should be utilised. The Court also refused the applicant's request to appoint L. as court expert.

At the hearing the Court then heard Dr. A., and the parties put questions to the latter. A witness of the plaintiff was also heard. The applicant's representative was also able to include in his submissions Prof. L.'s provisional criticism of Dr. A.'s opinion. The applicant's private expert D. was also present. The pronouncement of judgment was announced for 31 March 1977.

On 24 March 1977 the applicant requested the judges of the Court to visit the scene since the Court, in its present composition, had not yet personally seen the warehouse.

On 31 March 1977 the Stuttgart Court of Appeal pronounced its judgment in which it partly altered the lower court's judgment and arrived at new conclusions. The judgment which was made available on 7 April and numbered 110 pages rejected on the basis of Dr. A.'s opinion the applicant's appeal in its essential parts. The judgment also referred to the opinion submitted by the plaintiff which had been prepared by the expert Mr. P. and concerned a different case. In respect of the applicant's request to appoint L. as court expert and to postpone the hearing the Court stated:

(Translation)

"The Senate has considered the written statements of the defendant of 21 March 1977 handed in at the hearing (reference) together with annexes (reference). The Senate has declined to request the preparation of an opinion by the expert Professor Dr. L. In particular, the opinion of the court expert Dr. A. which coincides in all essential parts with the opinion of the expert Mr. P. had in connection with the detailed questioning of the expert during the hearing led to an exhaustive clarification of the contested deficiencies of construction. Both experts have to a large extent taken over the factual

statements made by the official Institute for Examining Construction Materials (Forschungs- und Materialprüfüngsanstalt für das Bauwesen) and have convincingly assessed them on the basis of their high level of expert knowledge. The Senate did not regard a third visit to the scene as necessary in view of the fact that all alleged deficiencies had been sufficiently documented by extensive photographic material submitted by the plaintiff. The result of the two visits to the scene conducted by the Senate in an earlier stage of the proceedings has been extensively and clearly mentioned in the minutes of the sessions of 11 January and 5 November 1973 (references). Finally, the applicant has mentioned in the above mentioned statement (reference) that the existing deficiencies had in part been repaired and could now no longer be easily determined" (p. 106/7).

The amount the applicant had to pay to the company was fixed at 571,924 DM and his counter-claims were not accepted, since the Court arrived at the conclusion, on the basis of Dr. A.'s opinion, that there were not, on the whole, any deficiencies in the construction work of the kind the applicant had alleged.

On 23 May 1977 the applicant's expert, Prof. L., prepared an opinion of 14 pages in which he stated, *inter alia*, that the decision of the Court of Appeal diverged strongly from the facts, and that Dr. A. had insufficiently considered deficiencies and damages which had been irrefutably evidenced by the applicant's private expert Mr. D.

III.

The applicant's further appeal on points of law (Revision) to the Federal Court of Justice (Bundesgerichtshof) was rejected on 19 January 1978.

The applicant lodged a constitutional complaint with the Federal Constitutional Court (Bundesverfassungsgericht) on 29 January 1981. Therein he complained of violations of his rights to a hearing in accordance with the law, as guaranteed by Article 103 para. 1 of the Basic Law (Grundgesetz), to equality before the law (Article 3 para. 1) as well as of the guarantee of recourse to the courts (Article 19 para. 4). In respect of the complaint that he was not granted sufficient time to comment on the opinion of Dr. A., his statement to the Federal Constitutional Court contained the following reference to the length of the proceedings: "The expert required 4 1/2 years for his opinion. This shows how difficult the investigation was. The appellant has expressly complained (reference) that as a businessman he could not comment on the results of the opinion in such a short time."

Following a decision of 11 June 1980 by the plenary Federal Constitutional Court, the first chamber (Senat) of the Court decided on 18 November 1980 to refer the case back to the Federal Court of Justice on the ground that the latter had not sufficiently motivated its rejection of the appeal on points of law and, in particular, had not expressed its opinion on the question whether the appeal had any prospect of success.

IV.

On 18 December 1980 the Federal Court of Justice again rejected the appeal on points of law stating that the case did not involve any point of principle and did not offer any prospect of success.

The applicant then again filed with the Federal Constitutional Court a constitutional complaint. Therein he complained again of violations of Article 103 para. 1, Article 3 para. 1, and Article 19 para. 4 of the Basic Law. The complaint continued:

(Translation)

"The fact that the initial proceedings were instituted in the year 1971 and only came to a provisional, formal conclusion by means of the impugned decision of the Federal Court of Justice of 18 December 1980, also amounts to a breach of Article 6 of the Human Rights Convention. This long duration of the proceedings is mainly accounted for by the fact that the appeal proceedings before the Stuttgart Court of Appeal lasted over 5 1/2 years. This is extraordinary if not unique. Quite clearly the respective members of the (court) senate who were dealing with the case did not have 'the courage' to treat the matter on account of its volume and the difficulty of the subject-matter. So it happened that the expert appointed by the Stuttgart Court of Appeal could take over 4 1/2 years to prepare his opinion. Yet the appellant was expected to study the opinion within the shortest time. He was not given the opportunity to call on expert advice in respect of the content of (Dr. A.'s) opinion. For this reason, the appellant must rightly feel that he has been 'run over' by the Stuttgart Court of Appeal. Such a manner of proceedings amounts to a breach of Article 6 of the Human Rights Convention" (p. 8/9).

The constitutional complaint was rejected by the Federal Constitutional Court on 5 March 1981 as not offering sufficient prospect of success. The Court stated *inter alia* that there were more than eight weeks between the day on which the applicant received the expert opinion and the date of the hearing. This period of time was not so short as to infringe the applicant's right to state his views about the opinion. Nor was it a breach of the constitutional rights that the Court had not ordered a further expert opinion. To the extent that the applicant had invoked Article 6 of the Convention, the Court rejected the appeal as being inadmissible inasmuch as a constitutional complaint could not be based on provisions of the Convention. The decision was served on the applicant's representative on 10 March 1981.

V.

On 16 February 1973 the Stuttgart Regional Court delivered final judgment in the litigation between Waiss Brothers and the applicant (cf. I above). The applicant was ordered to pay an additional sum of 17,661 DM, together with the interest thereon, as remuneration for work expenses. The remainder of the plaintiff's claim was dismissed.

Upon appeal the applicant claimed compensation and diminution of value to the extent of approximately 1,000,000 DM. As proof of the deficiencies in the warehouse, the applicant relied on experts' reports and submitted a report dated 23 May 1977 prepared by L. In a further pleading, the applicant set up a counter-claim according to which the Waiss company were to pay him 660,000 DM together with the interest thereon. On 6 June 1978 the Stuttgart Court of Appeal dismissed the appeal and the counter-claim as being unfounded. The applicant's appeal to the Federal Court of Justice and his subsequent constitutional complaint were both unsuccessful.

**COMPLAINTS**

1. When introducing the application the applicant complained under Article 6 para. 1 of the Convention that the proceedings in which he was involved were not terminated within a "reasonable time". In particular, the expert opinion which was ordered by the Stuttgart Court of Appeal on 28 July 1972 was not received by him until 4 1/2 years later on 19 January 1977.

2. The applicant also complained under Art 6 para. 1 of the Convention that, after having received the voluminous expert report on 19 January 1977, he did not have sufficient time to examine it and to prepare for the hearing which was fixed to take place two months later. The Stuttgart Court of Appeal did not postpone the hearing and did not hear the applicant's expert D. Nor did the Court grant the applicant's request to appoint Prof. L. as court expert. The applicant submitted that he did not enjoy the right to a fair hearing.

.....

**THE LAW**

1. The applicant's widow submitted in her letter of 18 April 1984 that, after the decease of the applicant, her husband, she wished to take over and continue the application which he had introduced before the Commission. In her submissions [...] the applicant's widow argues that, had the Stuttgart Court of Appeal taken evidence more speedily, the expert, Dr. A., would not, after 4 1/2 years, have stood under the pressure of submitting his opinion; the Court would not have stood under the pressure of an imminent change of judge; and the applicant would have been able adequately to present his objections to the alleged errors in the expert opinion. As a result, the Court of Appeal would presumably have rejected the action brought against the applicant.

The applicant would then have been able to satisfy his claims against the plaintiff on the basis of the security provided by the latter amounting to 660,000 DM. In fact, as the applicant was unable to satisfy his claims, his damages amounted to 660,000 DM. After his death, the applicant's estate fell to the applicant's widow as the sole heiress. She therefore claims that she is now a victim within the meaning of Article 25 of the Convention.

The respondent Government contest, also with reference to the case-law of the Convention organs, the admissibility of the application under Article 25 of the Convention inasmuch as the applicant's widow wishes to continue the proceedings after her husband's decease. In their submissions [...] the Government contend *inter alia* that, even if the time spent in taking evidence had been considerably shorter, this in itself would not have enabled recourse to the security, and the applicant has not shown how the judgment would then have differed. In any event, the Court of Appeal, in its judgment of 31 March 1977, explained in detail in 110 pages the reasons why most of the applicant's counter-claims were unfounded.

The Government point out that, as a result, the plaintiff's bank guarantee expired upon the entry into force of the judgment, and the applicant no longer had a claim to this security. For want of any material damage the applicant's widow cannot now assert that a compensation claim forming part of the estate is due to her on account of the excessive length of the proceedings. Finally, the applicant's widow does not appear to have suffered non-material damages and the application is also not of general interest. The Government therefore request the Commission to strike the application off its list of cases.

Under Article 25 para. 1 of the Convention the Commission "may receive petitions ... from any person ... claiming to be a victim of the rights set forth in (the) Convention".

The Commission recalls the case-law of the Convention organs according to which the fact that an applicant dies does not in itself dispose of his complaint. In principle, it falls to the Convention organ before which the case is pending to decide whether the application should be further examined or whether it should be struck off the list of cases. In the examination of this question, special consideration should be given to the intentions expressed by the applicant's legal successor as well as to the nature of the complaint (cf. Eur. Court H.R., Deweer judgment of 27 February 1980, Series A no. 35 para. 37; Kofler v. Italy, Comm. Report 9.10.82, D.R. 30 p. 5).

In the present case the applicant's widow has expressed the wish to continue the proceedings. Moreover the Commission notes that the outcome of the appeal proceedings before the Stuttgart Court of Appeal at issue directly concerned the applicant's fortune and, consequently, his estate. Hence, he had a considerable interest in the manner in which these proceedings were conducted. Therefore, the applicant had, and his widow as sole heiress now also has, sufficient legal interest in the outcome of the proceedings before the Convention organs insofar as the latter can determine whether or not the domestic proceedings complied with the Convention.

In these circumstances the Commission concludes that the applicant's widow may take over and continue the proceedings instituted by the applicant before the Commission. Accordingly, the Commission is now called upon to deal with the separate complaints raised in the application.

2. The first complaint which relates to Article 6 para. 1 of the Convention is that the civil proceedings in which the applicant was involved were not terminated within a reasonable time. In particular, the expert opinion which was ordered by the Stuttgart Court of Appeal on 28 July 1972 was not received by him until 4 1/2 years later on 19 January 1977.

Article 6 para. 1 of the Convention states *inter alia*:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

a) In their submissions [...], the respondent Government contend that for two separate reasons the applicant has in respect of the present complaint failed to exhaust domestic remedies within the meaning of Article 26 of the Convention.

i. The Government first contend that the applicant has not shown what efforts he undertook in order effectively to accelerate the proceedings before the Court of Appeal and to prevent in time the alleged violation of the Convention. In particular, while the applicant politely suggested to the Court to fix a time-limit for the expert, he did not formally file an application requesting the Court to undertake any relevant measures. He also did not invoke Article 6 para. 1 of the Convention. Upon such an application the Court of Appeal could for instance have set a time-limit for delivery of the report and threatened to impose a coercive fine upon the expert.

However, the Commission observes that the applicant frequently filed requests to the Court of Appeal. Thus, on 8 August 1974 he requested the Court to remind the expert of the preparation of his opinion. On 2 October 1974 he asked the Court whether the opinion had already been submitted. On 26 May 1975 he suggested to the Court to consider setting the expert a time-limit. On 4 October 1976 the applicant requested the Court to urge the expert to submit his opinion. The plaintiff equally filed similar requests, for instance on 3 May and 9 November 1974 as well as on 3 February 1976.

The Commission is therefore satisfied that the applicant had in sufficiently unequivocal terms complained to the Court of the time required by the expert for the preparation of his opinion. In this respect therefore the Commission finds that the applicant has complied with the condition as to the exhaustion of domestic remedies within the meaning of Article 26 of the Convention.

ii. The Government also submit that the applicant failed to file with the Federal Constitutional Court a constitutional complaint while the evidence proceedings were being conducted by the Stuttgart Court of Appeal. The case-law of the Federal Constitutional Court demonstrated that such a complaint would not have been completely without prospect of success.

However, the Commission recalls its case-law according to which it will suffice in cases such as the present one if a constitutional complaint is filed with the Federal Constitutional Court after the proceedings have been concluded (see X. v. the Federal Republic of Germany, No. 8961/80, Dec. 8.12.81, D.R. 26 p. 200). The Commission also notes that the Federal Constitutional Court did not declare the applicant's constitutional complaint of 29 January 1981 inadmissible on the ground that the applicant should have formulated his complaints in respect of the length of proceedings already while the Court of Appeal was taking evidence. Accordingly, the Commission finds that the applicant has also in this respect exhausted domestic remedies within the meaning of Article 26.

iii. It is true that the applicant's constitutional complaint of 29 January 1981 was declared partly inadmissible by the Federal Constitutional Court on 5 March 1981 inasmuch as the applicant had based his complaint upon Article 6 para. 1 of the Convention. However, in his constitutional complaint the applicant had expressly and substantially mentioned the complaint concerning the length of the proceedings which he subsequently raised before the Commission. The Commission is therefore satisfied that also in this respect the applicant has exhausted domestic remedies within the meaning of Article 26.

b) In addition, the respondent Government submit that, according to the principle of party disposition governing civil court proceedings, the parties to the proceedings have the means to determine their commencement and termination. In the present case, which concerned difficult issues, the parties themselves caused delays in the proceedings until November 1974 by constantly filing new submissions of facts, and afterwards by tacitly accepting the successive announcements of the expert as to the prospective dates for the preparation of his opinion, and the reasons he gave when explaining the delay. It was also clear that the expert on account of his eminence in the field could not have been given a time-limit, and the imposition of a fine did not appear justified in the circumstances. Nominating a new expert would have further prolonged the proceedings, and the preparation of a partial opinion would have served little use. For these reasons [...] the Government conclude that any delays in the proceedings at issue were not attributable to the German courts or authorities.

The Commission considers that the complaint concerning the length of the proceedings raises difficult questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. This part of the application is therefore not manifestly ill-founded and must be declared admissible, no other grounds for declaring it inadmissible having been established.

3. Another complaint is that the applicant did not enjoy the right to a fair hearing. Thus, after having received the expert opinion of 38 pages on 19 January 1977, he did not have sufficient time for a thorough re-examination of the opinion before the hearing took place before the Court of Appeal on 22 March 1977 and the evidence

proceedings were finally concluded. The period of nine weeks at the applicant's disposal was also insufficient for him adequately to prepare for the hearing.

Moreover, the Court of Appeal did not postpone the hearing in order to hear the applicant's private expert L. Nor did the Court accept his request to appoint a further expert. Apparently in view of the imminent replacement of a judge the Court had in fact insisted on terminating the proceedings and not even considered the statement which the applicant and his private expert had been able provisionally to prepare until 21 March 1977. In this respect also, the applicant relies on Article 6 para. 1 of the Convention.

The respondent Government have submitted that the question whether or not a party's right to a fair trial has been violated can only be resolved in the light of the particular circumstances of the case and that individual stages of the case or particular incidents should not be considered in isolation. The parties concerned should have had the opportunity to influence the proceedings and their outcome and to make submissions on the facts before the court gives a decision.

In this respect the Government point out that the length of time spent in taking evidence did not in itself entitle the applicant to a longer period for the preparation of the final hearing before the Court of Appeal. Both the applicant and the plaintiff had made frequent submissions, including private experts' opinions, while evidence was being taken. Consequently the applicant was not confronted for the first time in January 1977, after 4 1/2 years, with the points at issue and the Court of Appeal was thus able to assume that the parties were adequately prepared for the final hearing.

The Commission observes at the outset that the applicant filed numerous submissions including private expert opinions during the 4 1/2 years while Dr. A.'s opinion was being prepared, and that on 19 January 1977 when he received the opinion he was well acquainted with the points at issue. Indeed, it has not been contested by the applicant that already on 30 September 1976 he was informed by the Court of Appeal that Dr. A. was then in the final stages of preparing the expert opinion, and the applicant has not shown that the time between the communication of Dr. A.'s opinion to the parties (19 January 1977) and the final hearing (22 March 1977) was insufficient for him to study the expert opinion, to consult an expert of his own and generally to prepare himself for the hearing.

Moreover, the Commission notes that, after the parties had received Dr. A.'s opinion and a hearing had been fixed for 22 March 1977, the plaintiff was able to submit by 15 March 1977 an opinion of his private expert S. On the other hand the applicant did not request a postponement of the hearing and the appointment of a further court expert until 16 March 1977, i.e. six days before the hearing.

Furthermore, the applicant was indeed able to elaborate on the expert opinion of Dr. A. in his statement to the Court of 21 March 1977 and the attached annexes.

Therein he was already able to include the outline of the criticism of the court expert opinion propounded by his own expert L. At the hearing on 22 March 1977 the applicant was free, through his lawyer and in the presence of his private expert D., to put questions to the court expert Dr. A. who was present at the hearing and to make further oral submissions.

In its judgment of 31 March 1977 the Court of Appeal extensively considered the parties' submissions. The Commission finds in this respect that it was primarily the task of the Court to decide on the relevance to the proceedings of the various submissions made. It does not appear unreasonable if the Court found it unnecessary to appoint a further expert or to postpone the hearing in view of the fact that A.'s opinion coincided with the opinion of the other expert P.; that both these opinions in turn took over factual statements made by the official Institution for Examining Construction Materials; that the parties had been able at the hearing to seek further clarifications by putting questions to Dr. A.; and that therefore the contested issues had, in the Court's view, been exhaustively analysed. The Court referred in this respect also to extensive photographic material submitted by the plaintiff in respect of the alleged deficiencies; to the previous two visits to the premises undertaken by the Court; and to the applicant's statement that the existing deficiencies had in part been repaired and could therefore no longer easily be determined.

Finally, the Commission finds that in any event the applicant has not demonstrated that his written statement of 21 March 1977 and his oral submissions at the hearing on 22 March 1977 were not considered by the Court, or that the manner in which the Court conducted the hearing, including the discussion of Dr. A.'s opinion, was otherwise unfair.

As a result, the Commission finds no evidence to indicate that the applicant, who was represented by a lawyer and assisted by an expert throughout the appeal proceedings, could not present his case properly or that the Court conducted the proceedings unfairly.

Accordingly, these complaints do not disclose any appearance of a violation of Article 6 para. 1 of the Convention. The Commission concludes that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission

DECLARES ADMISSIBLE, without prejudging the merits, the complaint concerning the length of the court proceedings

DECLARES INADMISSIBLE the remainder of the application.