Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 27 February 2014[1]

Case C-531/12 PCommune de Millau and

Société d'économie mixte d'équipement de l'Aveyron (SEMEA)
v

European Commission

(Appeal — Arbitration clause — Grant contract for a local development action — Recovery of undue payments — Limitation — Enforceability of an arbitration clause — Stipulation for the benefit of a third party)

I – Introduction

1. In the present appeal proceedings, the Court will have to take a position on questions which are in part specific but in part also matters of principle.

2. First, the appeal provides an opportunity to clarify whether, and if so in what circumstances, an appeal originally lodged without authority to act is capable of producing legal effects in the light of the Court's new Rules of Procedure, which entered into force on 1 November 2012, when the authority to act is subsequently submitted in the course of the proceedings.

3. Secondly, the question arises whether, and in what circumstances, third parties not party to a contract may be caught by an arbitration clause within the meaning of Article 272 TFEU, with the result that the courts of the European Union have jurisdiction in proceedings brought concerning those third parties too.

4. Thirdly, consideration must be given to whether, and if so in what circumstances, the Court of Justice may review the application of national law undertaken by the General Court in the proceedings at first instance on the basis of a choice made by the parties.[2]

5. Fourthly, the question arises as to whether EU law, in particular the right to good administration, supports the inference of a principle to the effect that recovery of payments may be excluded when the creditor EU institution has not used its best endeavours to recover its debts, although the claims to those payments may not yet be time-barred.

1 — Original language: German.

2 — ? This question was left unanswered in my Opinion in Case C-263/09 P *Edwin* v *OHIM* [2011] ECR I-5853, points 84 to 86, because it was not material to the judgment in that case.

II – Legal context

A – *Primary law*

6. Article 41(1) of the Charter of Fundamental Rights of the European Union governs the 'right to good administration' and provides:

'Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.'

7. The second subparagraph of Article 256(1) TFEU provides:

'Decisions given by the General Court … may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.'

8. Article 272 TFEU reads:

'The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, [3] whether that contract be governed by public or private law.'

9. The first paragraph of Article 58 of the Statute of the Court of Justice reads:

'An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court.'

B – *Rules of Procedure of the Court of Justice*

10. Article 119 of the Rules of Procedure provides:

'…

2. Agents and lawyers must lodge at the Registry an official document or an authority to act issued by the party whom they represent.

…

4. If those documents are not lodged, the Registrar shall prescribe a reasonable time-limit within which the party concerned is to produce them. If the applicant fails to produce the required documents within the time-limit prescribed, the Court shall, after hearing the Judge-Rapporteur and the Advocate General, decide whether the non-compliance with that procedural requirement renders the application or written pleading formally inadmissible.'

11. Article 168 of the Rules of Procedure provides:

'…

(2) Articles 119, 121 and 122(1) of these Rules shall apply to appeals.

3 — ? In Article 238 EC, the predecessor to Article 272 TFEU, and in Article 181 of the EEC Treaty, the material provision at the time when the contract was concluded, reference is made to the 'Community'.

…

(4) If an appeal does not comply with paragraphs 1 to 3 of this Article, the Registrar shall prescribe a reasonable time-limit within which the appellant is to put the appeal in order. If the appellant fails to put the appeal in order within the time-limit prescribed, the Court of Justice shall, after hearing the Judge-Rapporteur and the Advocate General, decide whether the non-compliance with that formal requirement renders the appeal formally inadmissible.'

C – *Rules of Procedure of the General Court*

12. Article 44(5a) of the Rules of Procedure of the General Court provides:

'An application submitted under Article 272 TFEU pursuant to an arbitration clause contained in a contract governed by public or private law, entered into by the Union or on its behalf, shall be accompanied by a copy of the contract which contains that clause.'

III – Background to the dispute

13. In July 1990, the European Economic Community, represented by the Commission of the European Communities, concluded a grant contract for the performance of a local development project with the Société d'économie mixte d'équipement de l'Aveyron (Aveyron semi-public installations company) ('SEMEA'), which was 50% owned by the Commune de Millau (Municipality of Millau) (France). The parties agreed, on the one hand, that the grant contract would be subject to French law and, on the other hand, that, 'failing an amicable settlement', the Court of Justice would have 'exclusive jurisdiction to rule on any dispute concerning the contract and arising between the contracting parties'.

14. Nevertheless, in agreement with the European Commission, the further performance of the development project was undertaken not by SEMEA, but by an association set up to implement the project. That association did not, however, become a party to the grant contract, with the result that SEMEA continued to be the party to the contract with the Community.

15. After finding that the Community had made overpayments, in 1993, the Commission claimed recovery from SEMEA of the sum of ECU 41 012 ('the disputed debt'). Although SEMEA did not respond to that request for payment, the Commission did not initially issue any further letters of formal notice.

16. It was not until 2005, that is to say some twelve years later, that the Commission resumed its claim for payment. SEMEA informed the Commission that the company was now being wound up. In addition, SEMEA maintained that the association entrusted with the performance of the subsidised project had assured it that the Commission had waived the disputed debt, which, moreover, had now become time-barred. The Commission disputes that it had in any way waived the disputed debt. Despite further exchanges of correspondence and letters of formal notice, SEMEA did not make any payments. In February 2008, the Commission sent it a final demand for payment.

17. On 21 November 2008, the Extraordinary General Meeting of SEMEA took formal note of the decision of the Commune de Millau, its main shareholder, to take over its assets and liabilities and decided to pay the sum of EUR 82 719.76, representing SEMEA's available liquidity, to the Commune de Millau. The liquidation report submitted by the liquidator made reference to the disputed debt.

18. On 9 December 2008, SEMEA's liquidator concluded the winding-up of the company and had SEMEA removed from the Commercial and Companies Register. On 18 December 2008, the municipal council of the Commune de Millau confirmed that it had taken over SEMEA's assets and liabilities. The disputed debt owed to the Commission was mentioned as one of the liabilities and reference was made in that connection to the fact that SEMEA had claimed the debt to be time-barred and that the creditor had ceased to pursue its demand for payment. That step had not been approved by the Commission.

IV – Judgment under appeal

19. In order to allow the disputed debt to be pursued before the courts despite SEMEA's removal from the Commercial and Companies Register, the Commission asked the Tribunal de commerce de Rodez (Rodez Commercial Court) (France) to appoint an ad hoc agent to represent SEMEA.

20. Once that appointment had been made, the Commission, acting in its own name, brought before the General Court, on the one hand, in April 2010, an action against SEMEA (Case T-168/10) and, on the other hand, in December 2010, an action against the Commune de Millau (Case T-572/10), which, in the Commission's view, is jointly and severally liable for the disputed debt, since the municipality had assumed SEMEA's liabilities. On account of the connection between them, the two cases were joined for the purposes of a common judgment.

21. The defendants raised a plea alleging expiry of the limitation period. Furthermore, the defendant municipality at the outset challenged the jurisdiction of the General Court, on the grounds that the arbitration clause in the grant contract giving the European Union courts jurisdiction was not enforceable against it. In the alternative, if the Commission's demand for payment of the disputed debt were to be granted, the defendants brought a counterclaim based on Article 340 TFEU and Article 41 of the Charter of Fundamental Rights. In their submission, by letting so much time elapse before pursuing the disputed debt, the Commission had failed in its duty of sound administration and breached the principle of legal certainty, thus entitling the defendants to claim compensation equal to the amount sought by the Commission, so that in the end the defendants' obligation to pay would be extinguished.

22. By judgment of 19 September 2012 ('the judgment under appeal'), the General Court essentially upheld the actions brought by the Commission and dismissed the defendants' counterclaims. SEMEA and the Commune de Millau, as joint and several debtors, were ordered to pay the Commission EUR 41 012 together with default interest.

23. The General Court found that it had jurisdiction over the municipality on the ground that, 'by means of a stipulation for the benefit of a third party between SEMEA and the Commune de Millau, the latter is subject to an arbitration clause in favour of the Union'.[4] It is apparent from the general principles of contract law that '[t]he existence of … a provision in favour of a third party may also arise from the purpose of the contract or the circumstances of the case'.[5] The municipality had 'with full knowledge of the facts'[6] — and without expressing a reservation with regard to the arbitration clause in the grant contract — intended to take on SEMEA's liabilities and thus rendered itself subject to the arbitration clause in the grant contract.

4 — ? Paragraph 132 of the judgment under appeal.

5 — ? Paragraph 138 of the judgment under appeal.

6 — ? Paragraph 139 of the judgment under appeal.

V – Appeal

24. In November 2012, the law firm that had represented SEMEA and the Commune de Millau before the General Court lodged with the Court of Justice an appeal by which it, acting in the name of the defendants at first instance, claimed in essence that the judgment under appeal should be set aside or, in the alternative, pursued the counterclaim brought at first instance.

25. Attached to the appeal of 19 November 2012 was an extensive collection of annexes. Among these was an authority to lodge an appeal issued by the Commune de Millau and a letter from the ad hoc agent appointed to represent SEMEA in the proceedings at first instance, Maître B, to one of those lawyers. That letter is dated 15 November 2012. In that letter, although Maître B approves the lodging of an appeal against the judgment at first instance, he does at the same time acknowledge that his appointment as SEMEA's ad hoc agent had ended in August 2012.

26. In view of that temporal discrepancy, in October 2013, the Registry of the Court of Justice asked the law firm concerned to produce evidence of the authority to act on SEMEA's behalf in the appeal proceedings. In November 2013, the law firm, within the time allowed, produced an order of the Tribunal de commerce de Rodez of 5 November 2013 which shows that, on 29 October 2013, those lawyers instructed Maître B to act as SEMEA's ad hoc agent for a period of six months for the purposes of the appeal proceedings pending.

27. The appellants raise four grounds of appeal against the General Court's judgment.

28. First, the Commune de Millau claims that the European Union courts do not have jurisdiction to hear and determine the application brought against it. In its submission, it is impossible for a legal person governed by French public law to conclude an arbitration clause by means of a stipulation for the benefit of a third party. Nor does any such agreement exist.

29. Secondly, SEMEA claims that, by transferring its assets to the municipality, a solvent legal person governed by public law, while it was being wound up, it was properly relieved of its liabilities.

30. Thirdly, the appellants complain that the General Court erred in law in its application of the French rules on limitation periods.

31. Fourthly, the appellants claim that the General Court failed to take into account the fact that the Commission's failure to take any action for 12 years constituted an infringement of Article 41 of the Charter of Fundamental Rights of the European Union. It was therefore impossible for the appellants to take measures in due time to satisfy the Commission's claim. The amount of the default interest sought is thus linked to the Commission's failure to recover the disputed debt promptly, with the result that there is a causal link between the alleged harm and the Commission's conduct.

VI – Assessment of the appeal

32. This appeal raises questions of procedural and substantive law. First of all, with regard to SEMEA, the question is whether an appeal was validly lodged on behalf of that company. That question must be examined first (see A below). The question raised by the first ground of appeal, that is to say, whether the European Union courts had jurisdiction at all, particularly in relation to the action brought by the Commission against the Commune de Millau (see B below), falls to be considered next. Consideration must then be given to the grounds of appeal based on substantive law, in so far as this proves to be relevant (see C and D below). First, here, the question arises whether, and if so to what extent, the application of national law by the General Court may be subject to review by the Court of Justice on appeal.

A – *Was SEMEA's appeal properly lodged?*

33. It must be assumed from the documents before the Court that, when the lawyers representing SEMEA lodged the appeal in November 2012, they were not properly authorised to do so. This is because the appointment of the ad hoc agent representing SEMEA had ended in August 2012, which means that the consent that agent gave in November 2012 for the lodging of the appeal does not constitute an 'authority to act' within the meaning of Article 119, read in conjunction with Article 168 of the Rules of Procedure of the Court of Justice. The lawyers have, therefore, albeit unconsciously, acted as counsel without any power of representation. [7]

34. After the lack of authority to act had been noted by the Court about a year after the appeal had been lodged, those lawyers asked the competent commercial court to appoint an ad hoc agent for the appeal proceedings. The agent appointed was Maître B, who had approved the lodging of an appeal on behalf of SEMEA in November 2012, even though he had no authority to lodge such an appeal at that time.

35. It must be examined whether, in the light of the foregoing, it can be considered that the appeal was properly lodged by SEMEA.

36. Article 119 of the Rules of Procedure of the Court of Justice, which, in accordance with Article 168 of those Rules, [8] also applies to appeal proceedings, primarily governs cases of failure to submit instruments of authority to act. Article 119(4) of the Rules of Procedure deals only with 'documents' that have not been lodged, but says nothing about substantive defects vitiating the authority to act. That provision is therefore concerned, in appeals, principally with the situation of a lawyer who, when he lodged the appeal, had in fact been given authority to do so by his client but did not attach proof of that authority to the notice of appeal. In accordance with Article 168(4) of the Rules of Procedure, that proof may be produced within a reasonable time-limit prescribed by the Court Registry. If that is not done, the Court is to decide 'whether the non-compliance with that procedural requirement [renders the appeal] formally inadmissible'.

37. The legal consequences not only of failing to produce to the Court the document conferring authority to act but also of the lawyer's having no power of representation cannot be directly deduced from the Rules of Procedure. Nor does the wording of those provisions shed any light on the question whether an appeal lodged without an authority to act may be authorised *ex post* by the party in question, so remedying retroactively a substantive defect vitiating the authority to act. That, however, is the very question at issue in the present case.

38. At first sight, there would seem to be good reason to consider that, when an appeal is lodged without an authority to act, there exists a defect that can no longer be remedied. The Court has repeatedly held that the conditions for admissibility must, in principle, have been satisfied when the proceedings were instituted before the Court. [9]

7 — ? The fact that, under French national law, a lawyer may be regarded as being sufficiently authorised even without specific proof of authority to act (*mandat ad litem*) is irrelevant so far as proceedings before the courts of the European Union are concerned.

8 — The legal framework was different under the old Rules of Procedure, in force until the end of October 2012. See, in this regard, Article 38(5)(b) thereof which, as the Court observed in its judgment in Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 15, was not applicable to appeals.

9 — ? Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-03319; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others* v *Commission* [2011] ECR I-04727, paragraphs 31 and 36 to 40; and Case C-77/12 P *Deutsche Post* v *Commission* [2013] ECR, paragraph 65. In this connection, Article 119(4) of the Rules of Procedure has the character of a derogating provision.

39. It is true that, in cases involving more than one applicant, the Court has considered it to be sufficient for the purposes of the admissibility of the proceedings as a whole if, at the time when the action was brought, only one of the applicants was entitled to bring proceedings, [10] but it explained this by reasons of procedural economy. [11] Those reasons are not, however, transposable to the case of SEMEA. On the one hand, the grounds of appeal raised by the two appellants in the present case are not the same, so that considerations of procedural economy would therefore militate more in favour of not examining SEMEA's appeal at all if that appeal were shown to be inadmissible. On the other hand, an appeal lodged without authority to act constitutes a much more serious defect than a mere lack of *locus standi*. A party without *locus standi* will even so have duly instructed his representative to lodge an appeal on his behalf and must also bear the consequential costs if that appeal is unsuccessful. That legal consequence could not readily be transposed to the case in which there is no authority to act, quite the contrary: if an appeal is lodged by a representative without power of representation acting on his own authority, it would be strange if any consequential costs were to be borne by the supposed appellant; they would have to be borne by the unauthorised agent. Furthermore, it would be absurd to adjudicate on the merits of an appeal the lodging of which could not be attributed to the supposed party, for want of authority.

40. However, the Court's case-law also contains some evidence to sustain the inference that, on a broad construction of their wording, Articles 119(4) and 168(4) of the Rules of Procedure might be applicable not only to the production of missing proof but also to the remedying of a substantive defect vitiating the authority to act.

41. Thus, in a case in which there were doubts as to whether the lawyer representing the party had been duly authorised to act, the Court held it to be sufficient that the power of representation in question had been confirmed by the competent party after the proceedings had been instituted. [12] The Court did not object to the fact that the document affording such confirmation was issued only after the proceedings had been brought. In connection with the provision equivalent to Article 119(4) of the Rules of Procedure, in force at the time, Advocate General Darmon pointed out that 'it would be excessively formalistic to reserve the benefit of that provision exclusively for cases where, after the lodging of the application, an instrument of an earlier date is produced'. [13]

42. On that basis, Article 119(4) of the Rules of Procedure, read in conjunction with Article 168(4) of those Rules, could be construed as meaning that that provision not only governs the subsequent submission of a proof of authority to act when that document was missing at the time the appeal was lodged but also makes it possible to remedy the lack of authority to act, particularly by means of a subsequent 'confirmation' of the lodging of the appeal.

43. An interpretation of Article 119 of the Rules of Procedure which is so broad as to include substantive defects has correspondingly extensive results. On the one hand, it makes it possible to remedy defects vitiating the authority to act, whether they relate to the law of evidence or to substantive law, according to a uniform regulating rationale, thus preventing any problems of delimitation and ensuring the uniform handling of such matters at the level of EU law free of national preconceptions. On the other hand, because the Court is left in control of the proceedings and the swift resolution of problematic cases is assisted by means of the appropriate time-limits prescribed, the interests of legal certainty and the proper administration of justice are duly safeguarded.

10 — ? Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-01125, paragraph 31.

11 — ? In paragraph 38 of the judgment in *Comitato 'Venezia vuole vivere' and Others* v *Commission* (cited in footnote 9), the Court held in this regard that '[t]hat case-law is based on the consideration that, in such a situation, it is in any event necessary to examine whether the action is well founded, so that the question whether all the applicants actually have the capacity to bring an action is irrelevant'.

12 — ? Joined Cases 193/87 and 194/87 *Maurissen and Union syndicale* v *Court of Auditors* [1989] ECR 1045, paragraph 33.

13 — ? Point 42 of the Opinion of Advocate General Darmon in the case cited in footnote 12.

44. In the case of the appeal lodged on behalf of SEMEA, at the invitation of the Court of Justice, the authority ultimately responsible for the regularity of the authority to act, that is to say, the commercial court, appointed an ad hoc legal representative for SEMEA after the appeal had been lodged. Like the 'confirmation' in the case outlined in point 41, that appointment was made with a view to permitting SEMEA to pursue the appeal proceedings in hand. In this way, the law firm's lodging of the appeal became attributable to SEMEA, particularly since the ad hoc representative appointed was none other than the person who, a year before, had given his consent for the lawyers to lodge an appeal on behalf of SEMEA. Because the appointment of Maître B as SEMEA's ad hoc representative must thus to be regarded as confirmation of the lodging of the appeal, it must be assumed that the defect in the authority to act that had originally vitiated the lodging of the appeal was thereby remedied, in accordance with Article 119 read in conjunction with Article 168(4) of the Rules of Procedure.

45. Thus, not only the appeal lodged by the municipality but also that lodged by SEMEA were duly lodged.

46. It must next be examined whether the Commission could base its actions against SEMEA and the municipality on the arbitration clause in the SEMEA contract.

B – *Relevance of the arbitration clause in the present proceedings*

47. Whether the Commission is able to rely on the arbitration clause in the grant contract is questionable for two reasons. This is because, formally, neither the defendant municipality nor the Commission, which brought the action, is party to the grant contract containing the arbitration clause at issue.

48. The Commission, which brought actions against SEMEA and the municipality in its own name, appeared in the grant contract as the representative of the European Economic Community. For that reason, on the one hand, there are doubts about its legal interest in bringing proceedings in the case in question (which has not been challenged in the circumstances), and, on the other hand, it is not obvious that it can derive a right of action of its own from the arbitration clause in the grant contract. The latter issue must be examined by the Court of its own motion as a procedural requirement (see 1 below).

49. The municipality, for its part, was not involved in the grant contract at all, but the arbitration clause in that contract can nevertheless be relied upon against it, according to the judgment under appeal, in accordance with the principles of a stipulation for the benefit of third parties. Whether this is a tenable line of argument will have to be examined after the question of the admissibility of the Commission's action (see 2 below).

1. May the Commission rely on the arbitration clause in the SEMEA contract in proceedings brought in its own name?

50. This question seeks ultimately to clarify who may be party to actions based on arbitration clauses: the European Union, as the contracting party, or the institution representing it when the contract was concluded?

51. The wording of Article 272 TFEU does not give a clear indication of the answer to that question, although there is some support for the view that, in proceedings brought 'pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, [14] whether that contract be governed by public or private law', the European Union as such must assume the role of party in any

14 — ? In the present case, as the direct successor in law to the European Economic Community.

related legal proceedings.[15] However, the very opposite appears to be common practice,[16] for generally, in the application and in the introduction to the subsequent judgment, it is not the European Union itself that appears as the party but rather that one of its institutions participating in the relevant contract containing the arbitration clause.[17]

52. The judgment under appeal does not rule in this regard. The question of the correct designation of the parties does not ultimately have to be settled here, however. In the instant case, the point is simply whether the Commission could rely on the arbitration clause at issue in the action it brought in its own name. If the case-law on the European Union's status as a party before the courts of the European Union is considered as a whole,[18] the answer to be given to that question must be affirmative, for there is in that case-law a tendency to consider that an incorrect designation of the party representing the European Union is not serious, provided that, from the point of view of the defendant, the subject-matter of the dispute is clearly defined and that, consequently, the defendant's procedural rights are not prejudiced. There can be no doubt that both those conditions are satisfied in this instance.

53. Consequently, the Commission could at all events rely upon the arbitration clause in the SEMEA contract in the proceedings brought in its own name, at least against SEMEA.

54. It is, however, still necessary to clarify whether the arbitration clause was enforceable not only against SEMEA but also against the municipality.

2. Is the arbitration clause in the SEMEA contract enforceable against the municipality?

55. This question, being a matter of an absolute bar to proceedings, must be examined ex officio, independently of the complaints raised in the grounds of appeal. Four factors must be looked at: first, the wording of the clause in the SEMEA contract; secondly, the post-contractual events; thirdly, the criteria stemming from Article 272 TFEU; and fourthly, the evidential requirements in relation to the arbitration clause arising from the Rules of Procedure.

a) Wording of the arbitration clause in the SEMEA contract

56. Under the SEMEA contract, the Court of Justice 'has exclusive jurisdiction to rule on any dispute … arising between the contracting parties'. First of all, therefore, that clause is binding only on the contracting parties — SEMEA and the European Union — and cannot be relied upon against the Commune de Millau.

15 — ? See also Article 335 TFEU.

16 — ? See, for example, Case C-334/97 *Commission* v *Montorio* [1999] ECR I-3387; judgment of 13 November 2008 in Case C-436/07 P *Commission* v *Alexiadou*; and judgment of 18 November 2010 in Case C-317/09 P *ArchiMEDES* v *Commission*.

17 — ? See in this regard *Karpenstein* in Grabitz/Hilf/Nettesheim, Article 272 TFEU, paragraph 9, who considers this to be 'no cause for concern' 'provided that it is made clear that the institutions in question have acted as representatives …'.

18 — ? As far as the identification of the Union as a party is concerned, the issue arising under Article 272 TFEU appears in the same way in staff cases (Article 270 TFEU) and in actions for damages (Article 340 TFEU), regard being had to the wording of those provisions, which refers succinctly to 'the Union'. In the decisions in staff cases, contrary to the wording of the provision in question (as also for arbitration clauses), reference is in general made to the institution of the appointing authority. In contrast, as far as Article 340 TFEU is concerned, the case-law varies: see judgments in Case T-572/93 *Odigitria* v *Council and Commission* [1995] ECR II-2025, paragraph 22, in which it was the institution that was considered to be a party to the proceedings, and in Case T-246/93 *Bühring* v *Council and Commission* [1998] ECR II-171, paragraph 26, in which it was the Community that was considered to be a party to the proceedings.

b) Post-contractual events

57. It must be pointed out first of all that the Commission was not party to any post-contractual agreement relating to the arbitration clause. Nor is there any documentary evidence of a contract between SEMEA and the municipality, but only of separate resolutions adopted by the Extraordinary General Meeting and the municipal council respectively. The General Court,[19] however, refers to the general principles of contract law and arrives at the conclusion that the municipality's resolutions concerning a taking over of SEMEA's liabilities, considered in conjunction with SEMEA's transfer of its assets to the municipality, must, in the light of their purpose and taking into account the overall circumstances, be regarded as a stipulation for the benefit of the European Union. The General Court finds that the municipality and SEMEA wished to create a debt owed to the European Union by the Commune de Millau, and that the latter intended, 'with knowledge of the dispute … concerning the disputed debt', to submit itself to the arbitration clause in the SEMEA contract. The fact that, failing the creditor's consent, the taking over of the debt did not have the effect of releasing SEMEA from its liabilities, as the parties had intended, is immaterial in this regard.

c) Assessment of those post-contractual events by reference to the criteria arising from Article 272 TFEU

58. Crucial to answering the question whether an arbitration clause binding upon the municipality had been agreed in this way are the criteria stemming from Article 272 TFEU,[20] which, Article 272 TFEU being a derogating provision, must, furthermore, be given a restrictive interpretation.[21]

59. The General Court[22] considers it possible for an arbitration clause to be agreed in accordance with the principles of a stipulation for the benefit of third parties without any involvement whatsoever on the part of the European Union; that would in fact not be a contract concluded by the European Union, but at all events a 'contract concluded … on its behalf' within the meaning of Article 272 TFEU.

60. That view is questionable. A contract concluded on behalf of the European Union affects material interests of the European Union and, particularly because Article 272 TFEU, as a derogating provision, must be given a restrictive interpretation, may be concluded only by institutions, bodies, offices and agencies authorised to act on behalf of the European Union. It may not be done by external third parties. A contract concluded exclusively between third parties having no connection to the European Union and not on the initiative of European Union bodies, as is the case with the post-contractual agreements between SEMEA and the municipality in the present case, does not therefore satisfy the requirements of Article 272 TFEU.

61. Nor, apart from that, is it apparent that the municipality intended to make itself subject to an arbitration clause within the meaning of Article 272 TFEU. Such an intention by that party — a *sine qua non* for the conclusion of an arbitration clause — cannot, on the one hand, be inferred from the general context of the post-contractual agreements between SEMEA and the municipality, nor, on the other hand, automatically be assumed. This is all the more true because, as is clear from the documents which chart the course of the winding-up of SEMEA, the very existence of the arbitration clause was never mentioned by SEMEA or expressly noted by the municipality. On the contrary,

19 — ? See in particular paragraphs 132 to 143 of the judgment under appeal.

20 — ? The seminal judgment in this regard is that in Case 23/76 *Pellegrini* v *Commission and Flexon-Italia* [1976] ECR 1807.

21 — ? See inter alia Case T-271/04 *Citymo* v *Commission* [2007] ECR II-1375, paragraph 53, and paragraph 116 of the judgment under appeal.

22 — ? See in particular paragraphs 133 to 136 of the judgment under appeal.

neither the municipal council resolution of 18 December 2008 nor the liquidation report of 21 November 2008 contains any references to it. In fact, they indicate, perhaps misleadingly, that the SEMEA grant contract in question is governed by French law, which certainly does not immediately suggest that jurisdiction over the disputed debt may lie with the courts of the European Union.

62. In the light of all the foregoing considerations, it cannot be considered that SEMEA and the municipality agreed an arbitration clause in the form of a stipulation for the benefit of third parties enforceable by the Commission against the municipality.

63. However that may be, even if such an agreement had existed between SEMEA and the municipality, there was still the question, to be examined below, whether the evidential requirements laid down in Article 44(5a) of the Rules of Procedure of the General Court were satisfied in the case of the arbitration clause.

d) Evidential requirements applicable to the arbitration clause under Article 44(5a) of the Rules of Procedure of the General Court

64. In accordance with Article 44(5a) of the aforementioned Rules of Procedure, a copy of the contract which contains the arbitration clause must be submitted with the application. In other words, therefore, the Commission must adduce documentary evidence of the existence of the arbitration clause.

65. As far as the Commune de Millau is concerned, the Commission did not produce that evidence, and, moreover, could not produce it because the purported agreement of an arbitration clause for the benefit of the Commission can be inferred, as the General Court concedes in the judgment under appeal, [23] only 'from the purpose of the agreement between SEMEA and the Commune de Millau and from the circumstances of the case', [24] and would, therefore, if it did exist, have the character of an unwritten and purely implied agreement. This does not satisfy the evidential stipulations laid down in Article 44(5a) of the Rules of Procedure of the General Court, which require the submission to the Court of a copy of the agreement, in other words, a document containing the arbitration clause in question.

66. It is true that, in its case-law, the Court has interpreted that provision broadly and considered it to be sufficient for an unsigned draft agreement and the correspondence referring thereto to be submitted [25] or for the parties to refer to documents not forming part of the agreement. [26] Article 44(5a) of the Rules of Procedure would, however, become meaningless if no account at all were taken of the core element of that provision: that is to say, the requirement to submit a written copy of the clause in question that makes it immediately apparent which parties have agreed in relation to which contract that jurisdiction is to lie with the courts of the European Union. The submission of documents that simply permit conclusions to be drawn as to the existence of any oral or implied agreements without setting out the content of those agreements in writing cannot be sufficient for these purposes, for undocumented circumstances are hardly to be regarded as a 'copy' of a contract. [27] Article 44(5a) of the Rules of Procedure of the General Court must be viewed in close

23 — ? See in particular paragraphs 138 to 141 of the judgment under appeal.

24 — ? Paragraphs 140 and 141 of the judgment under appeal.

25 — ? *Pellegrini* v *Commission and Flexon-Italia*, cited in footnote 20, paragraph 10.

26 — ? Case 318/81 *Commission* v *CO.DE.MI.* [1985] ECR 3693, paragraphs 9 and 10.

27 — ? The judgment in *Citymo* v *Commission* (cited in footnote 21, paragraph 56), on the other hand, is too lenient. It states that the requirement in question is fulfilled 'where the documents produced by the applicant provide the Community court with sufficient information on the agreement between the parties to the action to remove the dispute between them from the purview of the national courts and to submit it to the Community courts'. Undocumented circumstances must not be considered material.

conjunction with the status of derogating provision that attaches to Article 272 TFEU as an exceptional rule of jurisdiction and must therefore, in relation to its essential elements, be interpreted strictly and not as meaning that it is unnecessary to produce a document clearly and expressly containing the arbitration clause in question.

67. To that extent, the requirement laid down in Article 44(5a) also serves to guarantee legal certainty and, as is clear *a contrario* from Article 44(6) of the Rules of Procedure of the General Court, may not, unlike the formalities set out in Article 44(3) to (5), be remedied *ex post facto* by the later submission of the missing documents. Consequently, if a copy of the arbitration clause is not provided when the action is brought, the latter must be dismissed as inadmissible.

68. In the circumstances of the case, because the Commission did not, with reference to the Commune de Millau, submit a copy of the arbitration clause sufficient to satisfy Article 44(5a) of the Rules of Procedure of the General Court, the General Court had no jurisdiction to hear and determine the action brought against that municipality. In so far as the General Court none the less held the action brought against the municipality to be admissible, the General Court therefore erred in law.

69. In consequence, the appeal lodged by the Commune de Millau must be upheld. The judgment under appeal, in so far as it finds the municipality to be jointly and severally liable and orders it to pay the costs, must be set aside and the action brought against it must be dismissed, in accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, since the state of the proceedings so permits.

70. In the light of that interim conclusion, I shall from now on look only at the grounds of appeal put forward by SEMEA. In so far as those grounds of appeal allege, with respect to the French rules on limitation and liquidation, that national law has been incorrectly applied, the first question that arises is whether and, if so, to what extent the Court of Justice is empowered to review, on appeal, the application of national law undertaken by the General Court. If it should prove not to be so empowered or only to a limited extent, detailed examination of the grounds of appeal raised in this regard can be deferred. These questions will be considered below.

C – *The grounds of SEMEA's appeal alleging that the General Court incorrectly applied national law*

71. It must first of all be determined whether the pleas relating to national law are relevant on appeal.

72. The review the Court of Justice carries out in appeal proceedings is defined in Article 58 of the Statute, which provides that '[a]n appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court'.

73. The raising, on appeal, of claims concerning any errors in law which the General Court may have made in the application of national law would therefore seem, prima facie, to be precluded. Errors of law of such a kind would, in principle,[28] constitute an infringement, not of EU law but of national law alone. In the light of the exhaustive grounds of jurisdiction set out in Article 58 of the Statute, the Court of Justice has no jurisdiction to review national law in appeal proceedings.[29]

28 — ? On the special case of national law that is 'incorporated' into a legal act of the European Union, see the Opinion of Advocate General Mengozzi in Case C-401/09 P *Evropaïki Dynamiki* v *ECB* [2011] ECR I-4911, points 71 to 74.

29 — ? For more detail on this point, see my Opinion in *Edwin*, cited in footnote 2, points 70 to 78.

74. In the case of the arbitration clause provided for in Article 272 TFEU, as the law now stands it must be held, on the one hand, that following the bringing of the action at first instance, the General Court must, where appropriate, carry out a comprehensive examination by reference to the national law applicable by virtue of the choice of law made. On the other hand, however, in the light of Article 58 of the Statute, in the appeal proceedings following the judgment at first instance the Court of Justice may not, in principle, examine grounds of appeal concerned only with the incorrect application of national law by the General Court.

75. Nevertheless, in the Court's settled case-law there are certainly judgments in which the Court has, on appeal, and principally in the context of arbitration clauses,[30] reviewed the application of national law at first instance without however specifying in detail its grounds for doing so under Article 58 of its Statute.

76. I propose that the Court reconsider this line of case-law. On the one hand, it is not compatible with the clear wording of Article 58 of the Statute of the Court of Justice. On the other hand, it is to some extent at odds with the judgment of the Grand Chamber in *Edwin*,[31] in which the Court, albeit in the context of a dispute relating to trade mark law and without explicit reference to Article 58 of the Statute, summarised its power to review national law on appeal as follows: '[a]s regards the examination, in the context of an appeal, of the findings made by the General Court with regard to that national law, the Court of Justice has jurisdiction to determine, first of all, whether the General Court, on the basis of the documents and other evidence submitted to it, distorted the wording of the national provisions at issue or of the national case-law relating to them, or of the academic writings concerning them; second, whether the General Court, as regards those particulars, made findings that were manifestly inconsistent with their content; and, lastly, whether the General Court, in examining all the particulars, attributed to one of them, for the purpose of establishing the content of the national law at issue, a significance which is not appropriate in the light of the other particulars, where that is manifestly apparent from the documentation in the case-file'.[32] When ruling in its appellate jurisdiction, the Court of Justice therefore considers it appropriate to correct the application of national law only in cases of distortion or where the General Court has made a manifest error of law.[33]

77. The foregoing is not contrary to Article 58 of the Statute, the wording of which excludes national law entirely from the scope of review by the Court of Justice. Rather, the Court of Justice transposes *mutatis mutandis* to the treatment of national law the method of review it applies, also on appeal, in relation to distortion of facts that is objectionable *at the level of EU law*.[34]

78. That method of review enables the Court of Justice, in the event of a manifest misapplication of national law by the General Court (but only in such cases), dealing with the corresponding ground of appeal, to take action and set aside the defective judgment.[35]

79. Taking into account its wording and substance, that solution, which was developed in *Edwin* for the purposes of trade mark law, lends itself to more general application and there are good reasons for transposing it to, inter alia, appeals in cases concerning arbitration clauses. The curtailment of judicial protection on account of the fact that not every infringement of national law by the General Court is such as to constitute grounds for setting aside at second instance the judgment given at first

30 — ? See, for example, Case C-87/01 P *Commission* v *CEMR* [2003] ECR I-7617, paragraphs 56 to 64, and *ArchiMEDES*, cited in footnote 16, paragraph 51 et seq.

31 — ? Cited in footnote 2.

32 — ? Paragraph 53.

33 — ? See in this regard the Opinion of Advocate General Bot in Case C-530/12 P *OHIM* v *National Lottery Commission* [2013] ECR, points 78 to 87.

34 — ? In the Opinion cited in footnote 33, Advocate General Bot is critical of this view.

35 — ? Its approach is therefore similar to the restrictive criterion which certain national courts of appeal, too, apply when reviewing the application of foreign law. See, in that regard, footnote 40 of my Opinion in *Edwin*, cited in footnote 2.

instance, must be accepted, having regard to the unambiguous provisions of Article 256 TFEU in conjunction with Article 58 of the Statute of the Court of Justice. This could be remedied only by the EU legislature. There is no danger that this solution will create a situation which is problematic from the point of view of effective judicial protection. On the one hand, the principle of effective legal protection does not necessarily require more than one level of judicial review. On the other hand, even in its appellate jurisdiction, the Court of Justice retains the power, in the case of manifest misapplication of national law, to set aside a judgment at first instance when dealing with the corresponding ground of appeal.

80. Starting from that premiss, as regards the present dispute, the question arises on the one hand whether it can be held that this is a case in which manifest misapplication of national law may be pleaded on appeal. On the other hand, if that first question were to be answered in the affirmative, the further question would arise whether the objection raised by SEMEA on appeal was supported by an adequately substantiated ground of appeal that ought to be allowed on its merits.

81. Because the first question must, in the circumstances, be answered in the negative, there is no need to examine the second. The General Court did in fact carry out a thorough examination of the French legal position and case-law on the problematic issues of time-barring and liquidation, providing clear solutions that cannot be shaken by allegations of distortion or manifest inaccuracy.

82. The grounds of appeal raised by SEMEA in this regard must therefore be rejected.

83. Finally, the ground of appeal raised by SEMEA in connection with the dismissal of its counterclaim must be examined. That ground of appeal is based in essence on Article 41 of the Charter of Fundamental Rights. It is therefore shaped by EU law and must be examined fully.

D – *SEMEA's counterclaim*

84. By its counterclaim, SEMEA seeks, in the alternative, compensation for loss equal to the amount of the disputed debt claimed by the Commission, together with interest, and bases its claim in essence on the non-contractual liability of the European Union and on the right to good administration, guaranteed as a fundamental right. It contends that the Commission infringed Article 41 of the Charter by its lack of diligence in pursuing payment of its debt and, in particular, by allowing a period of some 12 years to elapse between the first and second letters of formal notice. In this way, a significant amount of default interest was accumulated that could otherwise have been avoided.

85. The situation in the present case essentially raises the question whether and, if so, under what conditions the Commission's tardiness in the recovery of its debts is open to criticism from the point of view of the right to good administration, and whether, for that reason, the Commission's right to repayment of its debts may be extinguished, irrespective of time-barring. That SEMEA raises those issues in the form of a counterclaim may be ascribable to the fact that the legal institute of forfeiture [of rights through failure to exercise them], as derived in German law from the principle of good faith, is unknown in French law.[36] Ultimately, however, the counterclaim is concerned in substance with objections, founded on fundamental rights, to the applicant's principal and subsidiary claims. Accordingly, the counterclaim must be assessed in the light of those considerations.

86. It is therefore necessary to examine how the fundamental right to good administration could be relevant in a context of the law of contract, and whether it could lead to the extinction of contractual claims or whether, as a plea of invalidity, it could preclude the accrual of default interest.

36 — ? For an in-depth comparative-law analysis, see Ranieri, F., 'Verwirkung et renonciation tacite', Mélanges en l'honneur de Daniel Bastian, Librairies techniques, Paris 1974, pp. 427 to 452.

87. First of all, the Commission was free to manage its assets as it saw fit under the national law as agreed with SEMEA, and also to make use of the limitation periods laid down by law. Article 41 of the Charter cannot readily be construed as replacing the clear limitation periods to which contractual claims are subject with the less specific blanket requirement of action within a 'reasonable time'. This would serve neither legal certainty nor the interests of all the parties. In other words, in matters of contract, time-limits are to be regarded as 'reasonable' within the meaning of the Charter if, first and foremost, they have been contractually agreed by the parties.

88. When, however, the Commission proceeds with the recovery of the debts owed to it, it must, being subject to the Charter, expedite that matter, which also concerns the other party to the contract, within a reasonable period. Moreover, that position is not altered by the fact that the other party to the contract has no obligations vis-à-vis the Commission under the Charter. The Commission still cannot evade the obligations imposed on it by fundamental rights by 'taking refuge in private law'.

89. In the present case, the Commission's conduct is problematic from the point of view of reasonableness, in that, on the one hand, by issuing the request for payment of 27 April 1993, it set time running with respect to default interest, while, on the other hand, by its silence of some 12 years, it lulled the debtor into a sense of security, only then to begin, from 18 November 2005, a sustained process of pressing for payment of the outstanding debts together with considerable interest, the amount of which, as SEMEA states without being contradicted, now actually exceeds the amount of the principal sum.

90. The Commission being subject to an obligation, in accordance with fundamental rights, to pursue its claim promptly, an obligation it did not fulfil until 18 November 2005, its lack of diligence in pursuing recovery must be regarded as conduct directly connected by a causal link to the default interest accrued during that period.

91. That the General Court none the less dismissed the counterclaim in its entirety, in relation to the interest too, for want of a causal link, on the ground that the non-payment was attributable to SEMEA alone,[37] and did not adequately assess the infringement of Article 41 of the Charter, does not therefore stand up to legal scrutiny. Rather, dismissal of the counterclaim on appeal is justified only regards the principal sum claimed and the interest accumulated since 18 November 2005. Furthermore, the application made by SEMEA by its counterclaim leads ultimately to a corresponding reduction of the applicant's claim.

92. Finally, consideration must be given to the question of costs.

E – *Costs*

93. Since the appeal lodged by the Commune de Millau was well founded, the Commission must pay the costs incurred by the municipality. Since, in its appeal, SEMEA has succeeded on some and failed on other heads, it and the Commission must each bear their own costs (Article 184(2) in conjunction with Article 138(2) and (3) of the Rules of Procedure of the Court of Justice).

37 — ? See paragraphs 108 to 111 of the judgment under appeal.

VII – Conclusion

94. In the light of all the foregoing, I propose that the Court should:

(1) set aside the judgment of the General Court of 19 September 2012 in Cases T-168/10 and T-572/10 *Commission* v *SEMEA and Commune de Millau* in so far as it orders the Commune de Millau, as a debtor jointly and severally liable with SEMEA, to pay EUR 41 012 together with default interest to the European Commission and to bear its own costs and the Commission's costs in Case T-572/10;

(2) set aside the judgment of the General Court of 19 September 2012 in Cases T-168/10 and T-572/10 *European Commission* v *SEMEA and Commune de Millau* in so far as it orders SEMEA to pay default interest from 27 April 1993 to 18 November 2005;

(3) dismiss the action brought by the Commission against the Commune de Millau in Case T-572/10 as inadmissible;

(4) dismiss SEMEA's appeal as to the remainder;

(5) order the Commission to bear the costs incurred by the Commune de Millau and its own costs, and order SEMEA to bear its own costs.