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Contractual Litigation before the EU Courts: The Interplay between National and EU Laws

1. Introduction

Under article 272 TFEU "[t]he 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, whether that contract be governed by public or private law".[1] Through such a clause, the parties decide to let the EU Courts decide on the contractual liability of the European Union or of its counterparties. Since the entry into force of Decision 2004/407/EC[2] the entirety of the applications lodged on the basis of an arbitration clause fall within the jurisdiction of the General Court.

Article 272 TFEU appears, to a large extent, neglected by academic literature.[3] This lack of interest is somehow curious since the "arbitration clause" litigation includes many unique features that could have triggered the interest of academics, specialists of EU law, private international law or contractual law alike. Being at the junctions of issues belonging to these three areas, this topic appears particularly suited to celebrate judge Czúcz, who prior to becoming an eminent judge and president of chamber at the General Court had a distinguished career as Professor and Dean of the University of Szeged.

Contractual litigation based on an arbitration clause before the EU Court is exceptional in several respects.

In the first place, it constitutes an exception to two fundamental and related principles: first, to article 19 TEU which allocates to the EU Courts the function of interpreting and

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1 It should also be noted that under article 273 TFEU, "The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties". So far no case law has been developed on the basis of this provision.

2 Council Decision of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ L 132, , p. 5)

3 Among the limited literature available see notably: E. NEFRAMI : *"Le contentieux des clauses compromissoires"*, in S. Mahieu (ed.) *Contentieux de l'Union européenne*, Larcier 2014. pp. 561–581; D.GRISAY : *La Cour de Justice face au contentieux des contrats conclus entre particuliers et autorités communautaires*, J.T.D.E., 2004. p. 225.; K. LENAERTS, I. MASELIS & K. GUTMAN : *Procedural law of the European Union*, OUP, 2014, pp. 686/697; T. HEUKELS : *"The contractual liability of the European Community revisited"* in T. HEUKELS, A. MCDONNELL (ed.) *The Action for Damages in Community Law*, Kluwer Law International, 1997. pp. 89–108.

applying European Union law; secondly, to article 274 TFEU according to which "[s]ave where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States". In view of such principles, it is clear that the EU Courts' function is to interpret and apply EU law and that contractual litigation in which the EU institutions and organs are involved normally falls within the ambit of national courts.

In the second place, it is at odds with the other areas of jurisdiction of the General Court, which are all, directly or indirectly, connected with the assessment of the legality of actions or inactions of institutions or organs of the EU. This is evidently so in relation to applications for annulment either based on article 263 TFEU or on article 65 of regulation 207/2009 (the trade mark regulation)[4] as well as applications for failure to act under article 265 TFEU. If contractual litigation is more comparable to actions relating to the extra contractual responsibility of the Union or to the unlimited jurisdiction of the General Court in relation to fines and penalty payments, in the sense that they possess a "subjective" dimension, it remains that both actions for damages[5] and the unlimited jurisdiction of the General Court[6] are by their very nature complementary to the assessment of the legality of the institutions and organs' exercise of their powers. Such a complementary nature does not exist in relation to the jurisdiction based on article 272 TFEU in which the exercise by the Union institutions of their administrative responsibilities is not at stake.

Last but not least, contractual litigation differs from all other remedies inasmuch as it involves adjudicating on the basis of the law chosen by the parties and – in the absence of any 'federal' contract law – on the basis of national law.

This contribution focuses on this last aspect, that is to say the role of national law and its interplay with EU law in the course of proceedings before the EU Courts based on an arbitration clause.[7] The circumstance that national law is being applied by the EU Courts should not overshadow the relevance of EU law in the adjudicating process based on article 272 TFEU. According to a generally recognized principle each court applies its own procedural rules, including rules on jurisdiction.[8] Consequently, while the substantive examination of the parties' claim is governed by the elected national law (3), the examination of the General Court's jurisdiction (2) as well as the examination of the legal status afforded to national law itself before the EU Courts (4), are questions that fall within the ambit of EU law.

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4 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (2009 OJ L 78, p. 1).

5 Case T-180/00, *Astipesca v Commission*, ECLI :EU:T:2002:249 at paras. 139–142.

6 See the order in Case T-252/03 *FNICGV v Commission*, ECLI:EU:T:2004:326 at paras. 21–25.

7 In relation to other questions related to the extent of the General Court's jurisdiction under article 272 TFEU and notably the division of jurisdiction between contractual liability, extra-contractual liability and application for annulment against acts "detachable" from contracts, see E. NEFRAMI, *op. cit.*

8 Joined Cases T-168/10 and T-572/10 *Commission v SEMEA and Commune de Millau*, EU:T:2012:435, at para.118 ; see also the opinion AG Lenz in Case C-209/90, *Commission* v *Feilhauer* EU:C:1991:403, at para. 18.

2. The jurisdiction of the General Court to decide in Contractual Litigation: a question of EU Law

One of the clearest and more in-depth statements concerning the principles governing the extent of the General Court's jurisdiction is probably to be found in the judgement *Commission v SEMEA and Commune de Millau* in which judge Czúcz was both president of chamber and reporting judge.

The factual circumstances of the case lent themselves to an explication of such principles. Rather than concerning solely the assessment of a failure to fulfil the contractual obligations or an overestimation of the costs of the project financed by the European Union, they raised, *inter alia*, the question of the jurisdiction of the General Court *vis-à-vis* a legal entity that was not a party to the contract in which the arbitration clause had been inserted. Indeed, the contract had been concluded between the Commission and a semi-public company which, by the time the proceedings were introduced, had been liquidated and its assets transferred to its main shareholder, the local authority, *Commune de Millau*.

After restating the well-recognised principle that a restrictive interpretation must be favoured of the jurisdiction of the General Court under article 272 TFEU[9] and dismissing as irrelevant the qualification of a contract as being governed by public or private law, when it comes to the question of jurisdiction[10], the General Court established its competence following a reasoning distinguishing between the examination of, on the one hand, the contract and, on the other hand, the arbitration clause.

In the first place, the General Court underlined that "as for the law under which it is necessary to verify whether a valid arbitration clause has been concluded between the parties to the dispute […] the Court's jurisdiction to hear the case concerning a contract pursuant to an arbitration clause is determined, as a general rule, solely with regard to the provisions of Article 272 TFEU and the stipulations of the arbitration clause itself [; t]hat approach is consistent with the generally recognised principle that each court applies its own procedural rules, including rules on jurisdiction."[11]

This point had already been expressed on several occasions in the case law.[12] The importance of the judgement lies more in the logical consequences that it drew from this statement, by conducting an interpretation of the arbitration clause in view of the general principles of contract law deriving from the legal orders of the Member States,[13] rather than the ones relating to the sole law governing the contract. This led the General Court to held, on the one hand, that an arbitration clause could be stipulated in favour of a third party, by reference to the position adopted by the Court of Justice in relation to Article 17 of the Brussels Convention and Article 23 of Regulation No 44/2001 in *Gerling Konzern*

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[9] *Commission v SEMEA and Commune de Millau* at para. 115–116, Case 426/85 *Commission* v *Zoubek* ECLI :EU:C:1986:501, para. 11.

[10] *Ibid*. para. 10.

[11] *Commission v SEMEA and Commune de Millau*, at paras. 117–119.

[12] See for instance *Commission* v *Feilhauer*, at para. 13.; see also case C-564/13 P *Planet v Commission*, ECLI:EU:C:2015:124 at para. 21.

[13] *Commission v SEMEA and Commune de Millau, at* para. 134.

Speziale Kreditversicherung[14] and, on the other hand, that arguments based on a possible prohibition of such a stipulation in the law governing the contract were irrelevant since "Article 272 TFEU should be regarded in the same way by all courts as a specific provision taking precedence over divergent national law".[15]

In the second place, the judgement is also of importance inasmuch as it underlines that national law is not in all circumstances irrelevant in relation to questions of jurisdiction. Indeed for the General Court to be competent, the arbitration clause must be inserted in a contract, which is governed by the elected law. In circumstances in which the existence of a contract between the parties to the judicial proceedings is uncertain, the determination of the jurisdiction might involve an examination of national law.[16]

3. The substantive examination of the parties' claim: a question of National Law

As it has been observed,[17] the use of the expression "arbitration clause" is "somewhat misleading since the parties are not submitted they dispute to any sort of arbitration, but rather to normal judicial proceedings". Because the EU Courts do not decide *ex aequo et bono*, together with the arbitration clause, it is incumbent on the parties – explicitly or implicitly – to identify the law which governs their contractual relationship. This choice of law also governs the type of arguments the parties can raise in the course of their pleadings, since they can only put forward arguments based on the violation of the contract or of the elected law, and not arguments or principles of EU law which solely concern the validity of the institution's use of their administrative powers.[18]

The election of a given set of rules of law raises two series of questions.

The first one is whether the elected law should always be the one of a Member State.

Article 340 TFEU draws a clear distinction between the non-contractual liability of the Union for which reference is made to the "general principles common to the laws of the Member States" and its contractual liability which "shall be governed by the law applicable to the contract in question". Yet it could be argued that this expression, while certainly encompassing the national law of a Member State, could also include transnational bodies of legal principles, such as, for instance, the Principles of European Contract Law or the UNIDROIT principles on commercial contracts.[19] Even if such principles are not binding *per se*, they could become so, through the parties' choice to use them as the law applicable to

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[14] Case 201/82 *Gerling Konzern Speziale Kreditversicherung and Others*, 201/82, ECLI:EU:C:1983:217, at para. 10–20; *Commission v SEMEA and Commune de Millau*, at para. 136.

[15] *Commission v SEMEA and Commune de Millau*, at para. 148; See also *Commission* v *Feilhauer*, at para.12–14.

[16] *Commission v SEMEA and Commune de Millau*, at paras 124-125.

[17] K. LENAERTS, & K. GUTMAN , "Federal Common Law" in the European Union : a comparative perspective from the United States", (2006), 54 Am. J. Comp. L. 1 at p. 103;

[18] Case T-106/13 *Synergy Hellas v Commission*, ECLI:EU:T:2015:860, at para. 67 ; Case T-116/11 *EMA v Commission*, ECLI:EU:T:2013:634 at para. 250; Order in case C-433/10 P *Mauerhofer v Commission*, ECLI:EU:C:2011:204 at para. 83; Order in case T-97/07 2008, *Imelios v Commission*, T-97/07, EU:T:2008:105 at para. 28.

[19] On this two sets of transnational legal principles, see for instance: M.J. BONELL & R. PELEGGI, "The UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law : a synoptical table", *Uniform Law Review* vol IX (2004), p. 315.

the contract. So far such a possibility seems to be excluded by the case law of the EU Courts which favours a narrow interpretation of article 340 TFEU, deemed to refer "as regards the law applicable to a contract, to the Member States' own laws and not to the general principles common to the legal systems of the Member States."[20]

This does not mean, however, that such general principles might never be of use to the EU Courts. Indeed, the examination of judgements delivered on the basis of article 272 TFEU tends to demonstrate that the EU Courts do refer to such principles.[21] This is necessary in circumstances in which no election of national law is associated with the arbitration clause.[22] They may also be used in an "ancillary" fashion, in addition to the elected law. This was observed, *inter alia*, in relation to the rules governing the interpretation of contracts,[23] the principle that they should be applied in good faith[24] or the consequences that must be drawn from their resolution.[25]

The second question concerns the extent of the freedom of the parties to determine which law should govern their contractual relationship. There has not been, so far, in the case law any refusal by the EU Courts to acknowledge the choice made by the parties. The only reservation ever expressed was that the application of the chosen law should "not prejudice the scope and effectiveness of [EU] law".[26] This view, stated in the context of a contractual litigation before a national court under article 274 TFEU, is equally relevant when the General Court has jurisdiction under article 272 TFEU.[27]

It could be argued that the preservation of the scope and effectiveness of EU law implies that the choice of law be compatible with the provisions of the "Rome I" Regulation on the law applicable to contractual obligations.[28] Its rules differ from the ones included in the previous Rome Convention in the sense that they are now enacted in a Regulation binding on all Member States (save Denmark[29]) as well as the EU Institutions. Since its entry into force, it is difficult to see how the choice of law in contracts concluded between the Commission and legal persons in the European Union could be decided without due consideration being given to this regulation.[30]

Once the governing law has been identified, its application presents two key features.

The first one concerns the extent of the analysis by the EU Courts of the elected law.

Certain elements of the case law could give the impression that the law chosen by the parties is rather a "supplementary tool", in the sense that the privileged approach is to resolve the disputes on the sole basis of the contractual provisions, and only when this is not

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[20] Joined Cases C-80/99 to C-82/99, *Flemmer and Others*, ECLI:EU:C:2001:525 at para. 54.

[21] D.GRISAY, *op.cit.* at pp. 228-229 See also T. HEUKELS, *op.cit.*, who refers to "a slight tendency in the case law of the Court of Justice to have recourse to community law concepts when ruling on the contractual liability of the EC" at p.106.

[22] Case T-134/01, *Hans Fuchs v Commission*, ECLI:EU:T:2002:246.

[23] Case C-167/99, *Parliament v SERS and Ville de Strasbourg*, ECLI:EU:C:2003:215, at para. 95.

[24] Ibid at. para. 116.

[25] Case 426/85, *Commission v Zoubek*, ECLI:EU:C:1986:501. See D. Grisay, op. cit., at p. 229.

[26] *Ibid.* at para. 57.

[27] K. LENAERTS, I. MASELIS & K. GUTMAN , *op.cit*, p. 39.

[28] European Parliament and Council Regulation (EC) No 593/2008 of the of 17 June 2008 on the law applicable to contractual obligations (Rome I), (OJ 2008, L 177, p. 6).

[29] *Ibid*. recital 46.

[30] On this question see J.-S. BERGÉ, La Cour de Justice, juge du contrat soumis à la loi étatique choise par les parties, RDC – Avril 2005, p. 463 at p. 465.

possible considerations are given to the law governing the contract. This is reflected in the settled case law according to which "disputes arising from the performance of a contract must be resolved, in general, on the basis of the contractual provisions".[31] Consequently, an interpretation "of the contract in the light of provisions of national law is justified only where there is doubt on the content of the contract or on the meaning of some of its provisions, or where the contract alone does not enable all aspects of the dispute to be resolved [; t]herefore, the assessment of the merits of the application must be carried out in the light of the contractual provisions alone and recourse must be had to the applicable national law only if those provisions do not enable the dispute to be resolved".[32]

Rather than evidence of an inclination of the EU Courts not to enter too deeply into considerations of national law, this approach appears the mere consequence of the nature of "law of the parties" of the contract which, consequently, constitutes the primary source of contractual adjudication. Indeed, in circumstances in which the dispute cannot be resolved on the sole basis of the contractual provisions, the willingness of the Courts to examine the contents of national law can be seen in several judgements which include an in-depth analysis of the relevant provisions of national law.[33]

The second feature concerns the interaction between national law and the relevant rules of EU law.

It could be argued that the choice of national law by the parties should not prevent the application of such rules and notably the ones included in the EU financial regulation[34] and its rules of application.[35] Indeed, payments made by the European Union or due to the European Union are sums falling within the ambit of the EU budget and hence governed by the financial regulations and its rules of application. Moreover, these two legal instruments are enacted in the form of regulations, and thus are directly applicable in all Member States. They form an integral part of national law.

Yet, it could be argued that the relevance of the financial regulations for the resolution of the dispute at stake is not always fully reflected in the case law. This is apparent in relation to the determination of the default interest rate applicable to sums for which payment has been delayed. Priority appears to be given to the contractual rate and, if the contract is silent in this respect, to the law governing the contract.[36] The EU financial regulation is taken into account only if the elected national law is also silent,[37] if the contract includes an explicit reference to its

[31] See for instance Case T-220/10, *Commission v EU Research Projects*, ECLI:EU:T:2012:551 at para .30 ; Case T-29/02, *GEF v Commission*, ECLI:EU:T:2005:99, at para. 108 ; Case T-68/99, *Toditec v Commission*, ECLI:EU:T:2001:138, at para.77

[32] See for instance Case T-136/09, *Commission v Gal-Or*, ECLI:EU:T:2010:429 at para.46 ; *Commission v SEMEA and Commune de Millau* at para 55; Case T-317/07, *Commission v B2 Test*, ECLI:EU:T:2008:516 at para. 77 and f.; Case C-41/98, *Commission v TVR*, ECLI:EU:C:2001:20 at para. 40 and f.

[33] See for instance *Commission v B2 Test*, para.77, 98-99.

[34] European Parliament and Council Regulation No 996/2012 of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012, L 298, p.1).

[35] Commission Delegated Regulation No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union. (OJ 2012 L 362, p.1).

[36] See for instance case C-524/03, *Commission v Gianniotis*, ECLI:EU:C:2004:588, para. 35-41.

[37] See for instance Case T-170/08, *Commission v ID FOS Research*, ECLI:EU:T:2014:772.

provisions[38] or if the Commission expressly asked in its written pleading for the "EU" default interest to be applied and its rate is lower than the one of the elected law.[39]

While it appears legally sound to give effect to the contractual rate, provided legal interest rates do not constitute mandatory provisions, the focus, in the absence of a contractual rate, on the national legislation is more questionable. The amount of interest that is due in case of late payment of sums falling under the EU budget is addressed by the EU financial regulations and its rules of application.[40] Consequently, it could be argued that the relevant national law is, in reality, constituted by the financial regulation and its rules of application, which should not be disregarded. At least one judgement of the General Court seems to have favoured this approach.[41]

4. The Legal Status accorded to National Law: a question of EU Law

The presence of national law in the judicial process of the EU Courts raises three series of questions linked to its legal status. The first one concerns the rules governing its interpretation. The second one, the rules governing the determination of its contents, that is to say whether this task belongs essentially to the parties under the standard rules on evidence and what role, if any, may the General Court play in that respect. The third is related to the extent of the review that the Court of Justice exercises over findings of national law in the course of an appeal (*pourvoi*).

A straightforward answer can be provided to the first question. Indeed, according to a settled case law "the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts".[42] In relation to the rules governing the determination of the contents of national law (*infra* section 4.2) as well as to the extent of the appellate review of the Court of Justice (*infra* section 4.3), the answer depends, to a large extent, on whether national law is qualified as a question of law or of fact (*infra* section 4.1).

4.1 National law as a question of law or of fact?

The relevance of the qualification of national law as a question of fact or of law in relation to rules on evidence can be deduced from the formula *da mihi factum, dabo tibi jus*, according to which it is for the parties to prove questions of fact and for the Court to deal with questions of law.

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[38] See for instance Case T-552/11, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro v Commission*, ECLI:EU:T:2013:349, para.74.

[39] See for instance Case C-523/03, *Commission v Biotrast*, ECLI:EU:C:2004:788, at para.32.

[40] See Article 78 of Regulation 996/2012 and Article 83 of Regulation 1268/2012.

[41] Case T-366/09, *Insula v Commission*, EU:T:2012:288 at para. 261-265.

[42] According to a settled case law, see, inter alia, Case C-433/13, *Commission v Slovakia*, C-433/13, ECLI:EU:C:2015:602, Case C-490/04, *Commission* v *Germany*, ECLI:EU:C:2007:430, para. 49, Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others v Konstantinidis and Others* ECLI:EU:C:1992:517, para.39.

Yet, while generally true, this first impression must, to a certain extent, be corrected, since such a maxim does not fully reflect the allocation of role between the EU Courts and the parties.

On the one hand, the task of proving of a factual situation does not exclusively belong to the parties. If, indeed, the party who rely on a factual element carry the burden of proof in that respect, it might be assisted by the EU Courts which tend to play an active role in fact-finding, through the adoption of measures of inquiry and measures of organization of procedure.[43]

On the other hand, it would equally be exaggerated to consider that questions of law are of the sole responsibility of the EU Courts, and that the arguments on points of law raised by the parties can merely be "influential". First, there exist only a limited number of pleas in law that a Court can raise of its own motion, that is to say independently from the parties' arguments. Second, under article 76 (d) of the rules of procedure of the General Court an applicant must include in its request "the subject-matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law". According to a settled case law this implies that, for a plea in law to be admissible, "the information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary, without any other supporting information".[44]

Thus, the allocation of roles between the parties and the EU Courts in relation to questions of facts and of law, rather than black and white, constitutes a variation of gradation of grey. It is only the emphasis which shifts: predominantly, yet not exclusively on the parties in relation to questions of fact, and on the courts in relation to questions of law.

The qualification of national law as a question of fact or of law appears also *prima facie* highly relevant to determine the extent of the control that the Court of Justice may exercise over the application by the General Court of national law, in the course of an appeal. Indeed, the jurisdiction of the Court of Justice on appeal against a judgment of the General Court does not, in principle, include questions of facts.[45] The Court of Justice may review factual findings of the General Court only if their substantive inaccuracy is apparent from the document submitted to it.[46]

In relation to national law, an additional difficulty lies in the wording of article 58 of the statutes of the Court of Justice which limits an appeal "on the grounds of […] infringement of *Union law* by the General Court" (emphasis added). This limitation raises doubt as to the possibility for the higher court to review the interpretation or application of national law by the lower court in the course of an appeal, in the same manner as it would in relation to EU law.

Both the importance and the difficulty of the question whether national law should be treated as questions of law or of fact may explain why different Advocates Generals have favoured different solutions.[47]

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[43] K. LENAERTS, I. MASELIS & K. GUTMAN: *Procedural law of the European Union*, op. cit. at p. 765.

[44] See for instance in relation to article 44(1)(c), of the former rules of procedure of the General Court, which drafting is equivalent to the one of article 76 (d) of the new rules of procedure: case T-123/04, *Cargo Partner* v *OHIM (CARGO PARTNER)*, ECLI:EU:T:2005:340, para. 26 and the case-law cited.

[45] See for instance C-378/90 P, *Pitrone v Commission*, ECLI:EU:C:1992:159, at paras. 12-13.

[46] See for instance C-413/06 P, in *Bertelsmann et Sony Corporation of America/Impala*, ECLI:EU:C:2008:392, at para. 29.

[47] See the positions, on the one hand, of Advocate General KOKOTT in *Edwin v OHIM*, C-263/09 P, ECLI:EU:C:2011:30 at paras. 70–79 as well as in case C-531/12 P *Commune de Millau and SEMEA v*

Yet, when national law is relevant for the General Court in the framework of article 272 TFEU the approach favoured by the EU Courts is consistent. Both in relation to rules on evidence and on the extent of appellate review of the Court of Justice, national law appears to be treated as a question law.

4.2. Legal Status of National Law: Rules on evidence

Indeed, the allocation of roles between the parties and the General Court as to the determination of the content of national law does not seem to differ from the one applicable in relation to rules of EU law, in the sense that there does not seem to exist any extra burden on the parties to explain the content of the elected law.[48]

The EU Courts' approach is slightly more systematised in another type of litigation in which provisions of national law are relevant before the General Court, that is to say when they are "incorporated" in EU law.[49] Regulation 207/2009 is a good example of such incorporation. Indeed, several of its provisions include a reference to national law.[50] For instance, under article 53 (2) of regulation 207/2009 a "Community trade mark shall […] be declared invalid […] where the use of such trade mark may be prohibited pursuant to another earlier right under the Community legislation or national law governing its protection […]." In such a context, it might not be possible for the General Court to decide whether an application against a decision of OHIM to declare invalid a trade-mark is well founded without ascertaining the existence of an earlier right under the national law of a Member State.

In this context, the determination of the content of the relevant provisions of national law seems to involve a shared responsibility between the parties and the General Court.

First, under Rule 37 of the implementing regulation[51] there exists a clear obligation on the party who relies on an earlier right protected under national law to provide particulars showing that the party is entitled under this law to lay claim to that right. That is to say "not only [the] particulars showing that he satisfies the necessary conditions, in accordance with the national law of which he is seeking application, in order to be able to have the use of a Community trade mark prohibited by virtue of an earlier right, but also particulars establishing the content of that law".[52]

Secondly, it is evident from the case law of the Court of Justice, that the General Court cannot adopt a "passive approach" by treating national law as a purely factual matter, the

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Commission, ECLI:EU:C:2014:1946 at paras. 76–77 and, on the other hand,of Advocate General MENGOZZI *in Evropaïki Dynamiki v ECB*, C-401/09 P, ECLI:EU:C:2011:31 at paras. 66 and f.

[48] See however the position of the Court of Justice in *Commission* v *Feilhauer* at para. 18: "*With respect to the alleged problems in connection with the Energiewirtschaftsgesetz, it suffices to note that the defendant has not explained precisely how the provisions of that law actually stood in the way of the implementation of the project".*

[49] Formula used by Advocate General Mengozzi in *Evropaïki Dynamiki v ECB*, at para. 72.

[50] See articles 8 (4), 53 (1) (c) and 53 (2) of Regulation 207/2009.

[51] Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ L 303, p.1).

[52] Case C-530/12 P, *OHIM v National Lottery Commission*, ECLI:EU:C:2014:186 para.34; Case C-263/09, *Edwin v OHIM*, ECLI:EU:C:2011:452 at para. 50; case T-579/10, *macros consult v OHIM – MIP Metro (makro)*, ECLI:EU:T:2013:232, paras. 58-59.

existence of which should only be established on the basis of the evidence brought by the party.[53] It was held essential that the General Court "is not deprived, due to possible lacunae in the documents submitted as evidence of the applicable national law, of the real possibility of exercising an effective review [; t]o that end, it must therefore be able to confirm, beyond the documents submitted, the content, the conditions of application and the scope of the rules of law relied upon by the applicant for a declaration of invalidity".[54]

It could be argued that this "sui generis" approach reflects well the particular nature of national law when applied by the EU Courts. It serves the function of a rule of law and hence its contents and meaning must be mastered by the General Court so as to be applied as properly as possible to the circumstances on the case. Yet, it remains a foreign element for the EU Courts. This justifies a higher threshold of obligations on the part of the parties when they present their arguments.

As mentioned above, this approach finds its origin in rule 37 of the implementing regulation applicable in the first place in front of OHIM and, in turn, before the General Court when the litigation reaches this stage.[55] However, it could be argued that a similar approach could be extended to contractual disputes based on article 272 TFEU. In the first place, the General Court can impose an appropriate threshold of requirement on the party relying on national law, in relation to the determination of its content, through the medium of the applicant's obligation under article 76(d) of its rules of procedure. In the second place, the General Court is in position to gain the necessary knowledge of the relevant national law to confirm "beyond the documents submitted, the content, the conditions of application and the scope of the rules" invoked by the parties by making use, if necessary, of the service of the research and documentation department of the Court of Justice, which is staffed with experts on the national law of the Member States.

4.3. Legal Status of National Law: Extent of review exercised by the Court of Justice

An examination of the case law of the Court of Justice seems to lead to the conclusion that questions of national law – whenever they take place within the framework of article 272 TFEU – are treated in the same manner as questions of EU law, and thus subject to a full review.[56]

This approach has also been favoured by the Court of Justice in the course of the review of a judgement which, although based on an application for annulment, was strongly linked with contractual litigation, since what was challenged was a decision of the Commission to set off (compensate) its respective contractual claims with the applicant.[57] After an examination of the national law of the legal order governing one of the claims, the Court of Justice reached the conclusion that the General Court disregarded such law and hence set aside the judgement under appeal.[58]

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[53] Case C-530/12 P, *OHIM v National Lottery Commission*, ECLI:EU:C:2014:186, para.37.
[54] *Ibid*. para 44.
[55] Opinion of Advocate General KOKOTT in *Edwin v OHIM* at para. 54.
[56] See for instance case C-317/09, *ArchiMEDES v Commission*, ECLI:EU:C:2010:700.
[57] Case C-87/01 P, *Commission v CCRE*, C-87/01 P, ECLI:EU:C:2003:400
[58] *Ibid*. at para. 64.

It is worth noting that, in that respect as well, the legal status of national law when incorporated in EU law differs. The Court of Justice then favours a level of scrutiny intermediary between the one applicable to questions of facts and the one applicable to questions of law.

This level of scrutiny finds its origin in the case of *Edwin v OHIM*, in which the Court of Justice held that:

"As 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".[59]

An equivalent formula was used by the General Court when reviewing the Civil Service Tribunal use of national law in the case of *Thomé v Commission*:

"in relation to the control that the General Court must exercise over the findings of the first instance court which do not relate to EU law, but to the interpretation and the application of national law of a Member State which conditions the legality of decisions challenged before that Court, it should be observed that it is only in the sole hypothesises in which such findings would be based on a distortion of the relevant rules of national law or would represent a manifest error in their interpretation or application that they must be overturned".[60]

Such a level of review goes one step further than the one applicable to factual element in the sense that it is not limited to the sole hypothesis of a distortion of the contents of national law but also encompasses a review of its application by the General Court. As Advocate General Bot observed, with this test "it may be stated that the Court extended its review in the context of an appeal beyond the distortion of the evidence presented to the General Court, by acknowledging the existence of a review of manifest errors of assessment [;a]lthough it is not easy to determine the possible extent of a judicial examination of legality in the context of that review, the view may be taken that the review of the distortion of facts and that of manifest errors of assessment will probably differ from one another not only by their intensity but also in terms of their subject-matter,

[59] *Edwin v OHIM*, at para. 53.

[60] Case T-669/13 P, *Commission v Thomé*, ECLI : EU:T:2014:929 at para. 46, translated from french : "S'agissant du contrôle que le Tribunal doit exercer sur des appréciations du juge de première instance qui ne portent pas sur le droit de l'Union, mais sur l'interprétation et l'application du droit national d'un État membre conditionnant la légalité des décisions contestées devant ce dernier, il convient d'observer que ce n'est que dans les seules hypothèses où de telles appréciations reposeraient sur une dénaturation des règles de droit national pertinentes ou correspondraient à une erreur manifeste dans leur interprétation ou leur application qu'elles doivent être censurées".

with the former focussing on the actual content of the national law and the latter potentially covering the interpretation and analysis of that law".[61] Yet the extent of this review does not reach the intensity applicable to rules of EU law, since it is carried out within the constraints of the manifest error of assessment standard.

Arguments for and against both approaches can be found. On the one hand, the respect of the letter of article 58 of the statutes of the Court of Justice tends to justify the carrying out of a limited review.[62] On the other hand, considerations linked with the right to effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights, tend, on the contrary, to favour a comprehensive review.[63] Indeed, the right of appeal might be considered significantly diminished if the higher court is not in a position to control the interpretation and the use of the applicable rules by the lower court.

What is less easy to apprehend is the existence of a diversity of status afforded to national law whenever it is applied in the course of an arbitration clause or due to its incorporation within an EU law rule. The one possible justification for a difference of approach would be to consider that national law when incorporated in EU law becomes a question of EU law, while when relevant within the framework of an arbitration clause, it remains a "*foreign element"* for the EU Courts, and hence falls outside the terms of article 58 of the statutes. Yet, the application of such division criterion is not in accordance with the current state of the jurisprudence of the Court of Justice, since it would, at most, imply a limited review, on appeal, over findings of national law when used in the framework of an arbitration clause and a "comprehensive" one when national law is incorporated in an EU law rule.

In view of the importance of the right to an effective judicial protection enshrined in article 47 of the Charter, one may consider that the end to such a "diverse" approach should not be searched in the lowest common denominator, through the generalisation of the *Edwin* test to the review of findings of national law in the framework of article 272 TFEU. Rather, it could be considered that the more in-depth review could be extended to all circumstances in which rules of national law serve as the basis for the litigation before the first instance court, even if it requires a "dynamic" interpretation of article 58 of the statutes, by considering that any violation by the General Court of the law it applies may be qualified as an infringement of EU law within the meaning of this provision, and thus fall within the jurisdiction of the Court of Justice.

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[61] Opinion of Advocate General BOT in case C-530/12 P, *OHIM v National Lottery Commission*, ECLI:EU:C:2013:782 at para. 84 See also L. COUTRON, 'De l'irruption du droit national dans le cadre du pouvoir', *Revue trimestrielle de droit européen*, 2012, p. 170 who underlined that a "repeated mention of a review of manifest errors rather encourages [the national law] to be regarded … as a point of law at the appeal stage" quoted by Advocate General BOT op.cit at FN 39.

[62] Advocate General KOKOTT in *Edwin v OHIM* at paras. 70-79 as well as *Commune de Millau and SEMEA v Commission* at paras. 76–77.

[63] See the opinion of Advocate General MENGOZZI *in Evropaïki Dynamiki v ECB*, at para. 75.

MIRO PREK

CONTRACTUAL LITIGATION BEFORE THE EU COURTS: THE INTERPLAY BETWEEN NATIONAL AND EU LAWS

(Summary)

Article 272 TFEU provides the General Court with the jurisdiction to hear contractual disputes between the EU and its counterparties. While largely ignored by academic literature, the litigation based on this provision nonetheless includes several interesting features, and notably the application by the EU Courts of the national law elected by the parties to govern their contractual relationships. Yet this adjudication based on national law takes place within the framework of the EU law that governs the jurisdiction of the EU Courts and the procedure before them. This contribution examines how national and EU laws interact in the course of this specific type of litigation.