OPINION OF ADVOCATE GENERAL LENZ
delivered on 22 October 1991 *

Mr President,
Members of the Court,

A — The facts

1. The parties are in dispute over a claim by the Commission under a contract originally concluded between the European Economic Community and Felix Schulze Isfort-Ekel, a farmer, in which the defendant later took the place of the original party to the contract. In the Commission's opinion, the Court's jurisdiction in the present case is founded on Clause 13 of the contract, which contains the following provision:

'The contracting parties agree that the Court of Justice of the European Communities shall have exclusive jurisdiction over all disputes on the validity, interpretation and application of this contract.'

2. The terms of the contract are based on Council Regulation (EEC) No 1302/78 of 12 June 1978 on the granting of financial support for projects to exploit alternative energy sources, [1] Article 8 of which provides *inter alia* that the Commission is to negotiate and conclude the contracts necessary for the implementation of approved projects.

3. Under Clause 1.1 of the contract, the contracting party undertook to carry out a project which was described as follows:

'Piggery for production of heat required for anaerobic processes using solar energy and conversion of sewage gas (biogas) into heat and electrical energy.'

According to the timetable of works in Annex I (Table 3), the final phase of the project (bringing into operation, demonstration, measurements programme) was to be completed by the end of 1984.

4. In Clauses 1.2 and 3 of the contract the Community undertook to pay the contracting party financial support, defined as 40% of the actual cost of the project, as checked and approved by the Commission, excluding value-added tax and not exceeding DM 240 000.

5. Clause 14 of the contract states that it is governed by German law. The contract further contains *inter alia* a series of detailed provisions concerning situations in

* Original language: German.
1 — OJ 1978 L 158, p. 3.

which the contracting party must repay the financial support in whole or in part. One of these provisions is Clause 8, which the Commission relies on in putting forward its claims. That clause reads as follows:

'In the event of failure by the contracting party to comply with an obligation under this contract, the Commission may rescind this contract, if it has given notice of default to the contracting party by registered letter and he has not complied with the obligation in question within one month. The contract may also be terminated if the contracting party has made false statements in order to obtain the financial support, in so far as he is liable for those statements. In either case the contracting party must repay to the Commission without delay the financial support, together with interest from expiry of the said period of one month. The interest rate shall be that applied by the European Investment Bank in force at the time of the Commission's decision to grant the financial support for the project.'

6. The Commission's principal claim is for repayment of a sum of DM 72 000 which the defendant's predecessor in title received from the Community as part of the financial support which had been agreed, and which he passed on (together with interest) to the defendant after the latter took over the contract. The supplementary contract, concluded between the Community, the defendant and his predecessor in title with a view to the substitution of the party contracting with the Community, stipulates on this point that Mr Schulze Isfort-Ekel 'assigns' to the defendant his rights and obligations under the contract 'including those relating to the financial support already paid by the Commission under this contract'.

7. It is not disputed that the project which was the subject of the contract was not carried out. This resulted in extensive correspondence between the parties, starting in 1985. The Commission first — unsuccessfully — requested the defendant to repay the said amount. In a registered letter of 9 December 1986, received by the defendant on 17 December 1986, it then gave the defendant notice of default and stated that it would rescind the contract in the event that the defendant did not within one month prove that he had land available and had obtained the necessary official permits. The defendant did not produce any of the proof required within that time-limit.

8. In subsequent correspondence — which again proved fruitless — the Commission repeatedly — *inter alia* in a letter of 16 September 1987 — called on the defendant to pay the said sum together with interest. In a letter of 8 July 1988 it stated that legal proceedings would be taken in the event of non-payment. It also confirmed the rescission, firstly in two letters — copies of which were sent to the defendant — of 20 March and 31 July 1987 to the Landrat

(Chief Administrative Officer) of Kreis Neustadt an der Aisch-Bad Windsheim, who had informed the Commission that the defendant now had suitable land available for the project, and then in a letter of 8 December 1988 to the defendant himself.

9. The defendant conceded that the project had failed, but did not make repayment. In a letter of 19 July 1988, he claimed the right to set-off DM 72 000, as he had made considerable purchases of materials in performance of the contract. In this respect, he referred in a later letter to the legal doctrine of *culpa in contrahendo* and an assurance of 30 April 1985 by the Commission that '40% of purchases of materials would be accepted as reimbursable items'. With reference to this letter, the Commission states in its application, without being contradicted by the defendant, that it does indeed mean that the Commission intended to finance 40% of the purchases of materials, but that promise was subject to the condition that the materials had been purchased before 31 December 1984 and the purchases attested by invoices and proofs of payment; the defendant did not however produce any proof.

10. The Commission also puts forward a claim for interest under two heads: interest at 6% from the date when the amount of DM 72 000 was paid to the defendant's predecessor in title, and interest at 11.9% from the expiry of one month after the notice of default in the letter of 9 December 1986.

11. The *Commission* claims that the Court should:

(1) order the defendant to pay the Commission of the European Communities the sum of DM 72 000 together with interest at the rate of 6% from 24 January 1983 and at the rate of 11.9% from 18 January 1987;

(2) order the defendant to pay the costs.

12. The *defendant* contends that the application should be dismissed and the Commission ordered to pay the costs.

13. I will come back to further details of the facts and arguments of the parties, if necessary, as part of my analysis; otherwise I refer to the Report for the Hearing.

B — Analysis

Part 1 — Jurisdiction of the Court of Justice

14. The defendant objected that the Court of Justice lacked jurisdiction, first in an application for an extension of time made even before the lodging of the defence, and again later at the hearing. Under Article 42(2) of the Rules of Procedure, all pleas in law must be contained in the first written pleading (in this case, the defence: see Article 40(1) of the Rules of Procedure).

Subject to Article 42(1), they cannot be introduced later unless they are based on matters of law or of fact which come to light in the course of the procedure. That is not the case here. The defendant bases his argument on the wording of the contract, which has remained unaltered since it was concluded.

15. Although the defendant's objection does not therefore need to be considered (either on the ground that it was not made in due form or was out of time), as it is a question of jurisdiction, I consider it appropriate in this instance for the Court to dismiss the objection on the merits. It should apply Article 92(2) of the Rules of Procedure and state expressly that it has jurisdiction under Article 181 of the EEC Treaty to decide on both the Commission's claim and the defendant's counterclaim.

16. On this point, I would make a number of observations.

17. *1.* In objecting that the Court of Justice lacks jurisdiction to rule on the Commission's claims, the defendant relies on Clause 14 of the contract. The reference in that clause to German law is understood by the defendant as including also German procedural law, in particular the Code of Civil Procedure. Under those provisions, since the defendant is not registered in the commercial register as a trader (*Kaufmann*), he could not validly agree on jurisdiction before the dispute arose.

18. This argument lacks cogency. The defendant's interpretation of Clause 14 of the contract contradicts Clause 13 of the contract, which stipulates that the Court of Justice is to have exclusive jurisdiction. In view of the Community law background of the contract and the possibility of conferring jurisdiction expressly allowed by Article 181 of the EEC Treaty, it must be assumed that the parties intended to base their arbitration clause on that article. As can be seen from the different way it is worded, Clause 14 was intended not to render that clear decision ineffective, but merely to determine the substantive law to be applied to the contract. Moreover, that is consistent with the generally recognized principle that each court applies its own procedural rules, including rules on jurisdiction. [2] The procedural law of the Court of Justice includes Article 181 of the EEC Treaty, but not the (corresponding) provisions in the procedural codes of individual States. Besides, Article 181 should be regarded as a *special* rule applying to all courts equally, taking precedence over divergent provisions of national law, and governing the particular case of the Court's jurisdiction being founded on an arbitration clause. [3] This case is therefore from the outset outside the scope of the *general* rules of the German Code of Civil Procedure referred to by the defendant, which consequently cannot be relied on here. The Court of Justice therefore has jurisdiction under Clause 13 of the contract combined with

2 — Krück, in: von der Groeben/Thiesing/Ehlermann, Kommentar zum EWG-Vertrag, 4th edition, Baden-Baden, 1991, Article 181, point 18, with further references.

3 — The Court also appears to have adopted this approach in Pellegrini (on Article 153 of the EAEC Treaty): see Case 23/76 Pellegrini v Commission [1976] ECR 1807, paragraph 9 et seq.

Article 181 of the EEC Treaty (which does not provide for any requirement of the type mentioned by the defendant) to give a decision on the claims put forward by the Commission, which bases them all on Clause 8 of the contract (either on its own or in combination with supplementary provisions of German law).

19. 2. The jurisdiction of the Court to determine the counterclaim must be recognized, in the light of the principles set out in the *Zoubek* judgment. [4] According to that judgment, the Court can hear and determine under Article 181 of the EEC Treaty only claims arising from the contract concluded with the Community which contains the arbitration clause or claims that are directly connected with the obligations arising from that contract. [5]

20. The defendant initially based his claim for set-off on two grounds: alleged fault on the part of the Commission when concluding the contract (that is, conduct which in German law can found a claim, whose basis in law is taken to be a breach of the good faith demanded in contractual negotiations), and an alleged undertaking by the Commission to finance 40% of the costs of materials (which, as can be seen from the percentage financed, [6] is directly connected with the Commission's contractual obligation to finance the project). Both in this respect and also in respect to the principles of the German law of obligations, referred to at the hearing by the defendant (Paragraph 346 of the Bürgerliches Gesetzbuch (German Civil Code) — BGB, provisions of the law on contracts of employment and contracts for services, Paragraph 242 of the BGB), which lay down the rights and obligations of contracting parties in particular situations in more detail, the connexity required by the Court of Justice is present.

21. It follows from the above considerations that the Court has jurisdiction to determine both the Commission's claims and the defendant's claims for set-off.

Part 2 — Claim by the Commission [7] to the principal sum (DM 72 000) under Clause 8 of the contract

22. *I.* Let me first make a preliminary remark on the application of Clause 14 of

4 — Case 426/85 Commission v Zoubek [1986] ECR 4057.

5 — Zoubek judgment, paragraph 11, referring to Article 6(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

6 — See Clause 3 of the contract in conjunction with Annex I, Part B(1) and (2).

7 — Although in the text of the contract the Community appears as the party with which the defendant is contracting, Clause 8 provides that the sums mentioned there are to be repaid to the Commission. The Commission can therefore bring the claim to repayment in its own name. The problems which might arise therefrom in connection with claims which go beyond the text of Clause 8, or in connection with claims set off by the defendant, are of no relevance here; as explained below, only the claims by the Commission based on the wording of Clause 8 are justified.

the contract. It is indeed true that the parties therein refer generally to German law, but that reference must be considered in its context. The present contract is a public law contract for a subsidy and its purpose is to implement the aims of Regulation No 1302/78. The parties intended by the individual clauses of the contract to regulate this special, by no means typical constellation of interests, and they were unable to refer to a codification of Community law in so doing. In view of those special factors, it is obvious that rules of German law cannot be applied under Clause 14 if their application is not compatible with the nature and purpose of the contract or its individual provisions, as follow from the wording, structure and context of that provision. Clause 14 must therefore be given a restrictive interpretation in this sense. This applies in particular also to the provisions of the BGB, which the parties surely had in mind when referring to 'German law'.

23. Similar considerations appear incidentally to be behind the second sentence of Paragraph 62 of the German Verwaltungsverfahrensgesetz (Law on Administrative Procedure). [8] It contains a general reference, in connection with public law contracts, to the 'provisions of the Civil Code'; however, these apply only by analogy and are therefore not applicable where they are inconsistent with the nature of the public law contract. [9]

24. That interpretation of Clause 14 will therefore be followed below. It is of course unnecessary to discuss the scope of that clause if the conditions for applying the relevant German provision are not met in the first place.

25. In the light of the above considerations, the further question whether Clause 14 refers also to rules of German *public* law, in particular administrative law, need not be examined. Firstly, Clause 14 of the contract corresponds in that regard to the parallel provision of the second sentence of Paragraph 62 of the Verwaltungsverfahrensgesetz, and secondly, the applicability of provisions of German public law is moreover not relevant, as will be explained below.

26. *II.* Since the use of Clause 8 of the contract as the basis for the claim presupposes that the contract was validly concluded between the defendant and the Community, the defendant's arguments must first be considered, in so far as they can be understood as addressing this point.

27. *1.* The defendant maintains to begin with that the project was 'not feasible in Germany'. As can be seen from two letters from the Hassberge local authority, copies of which are annexed to the defence, he founds this argument on problems connected with building regulations which are said to have prevented the project being carried out on a specific piece of land which the defendant intended to use for that purpose. He then goes on to argue that because of the Energiewirtschaftsgesetz

8 — Law of 25 May 1976 (Bundesgesetzblatt (Federal Gazette) I, p. 1253), as amended.

9 — See Stelkens/Bonk/Leonhardt, Verwaltungsverfahrensgesetz, Kommentar, 3rd edition, Munich, 1990, Paragraph 62, point 12.

(Law on Energy Policy) it was impossible to arrange for independence from the public electricity supply or even to feed surplus power produced into the public electricity network.

28. This argument could be understood as referring to Paragraph 306 of the BGB, which states that a contract whose subject-matter is impossible to perform is void. It is accepted that that provision presupposes an impossibility of performance which is original, that is, existing at the time of conclusion of the contract, and objective (not relating only to the specific contracting party). [10] This condition is clearly not fulfilled with respect to the problems regarding building regulations, since they were connected with the situation of the piece of land in question, as the two letters show. It was not, however, agreed in the contract that the project should be carried out on a specified piece of land.

29. As for the questions of energy law, the defendant has not provided any information as to what legal possibilities the project presumed in this respect and in what way this was prevented by provisions of German law.

30. The contract cannot therefore be regarded as invalid under Paragraph 306 of the BGB.

10 — Palandt, Bürgerliches Gesetzbuch, Kommentar, 50th edition, Munich, 1991, Paragraph 306, point 3 (by Heinrichs).

31. *2.* The defendant maintained at the hearing that the contract was 'virtually immoral', since implementation of the project was more difficult for him than for a farmer, but that argument cannot be accepted. The mere fact that performance of a contract is comparatively 'difficult' for the contractor does not mean that it offends against morality and thus does not mean that it is void under Paragraph 138 of the BGB. Moreover, as the defendant's representative stated at the hearing, the scheme was 'more or less the defendant's idea and he drafted and worked out the plan'. He was thus perfectly familiar with the difficulties of the project. For this reason alone the objection of immorality is completely unfounded.

32. *3.* Finally, the defendant complained in his defence that the Commission's staff had 'persuaded' or 'pressurized' him into taking over the rights and liabilities under the contract. The Commission denies this.

33. All these arguments could at most be relevant in the context of Paragraph 123 of the BGB, which states that a declaration of intent can be challenged if the person making it has been induced to do so by deceit or unlawful threats. The defendant has not indicated any facts which could constitute such deceit or threats, nor does it appear that he has challenged the declaration of intent on his part which led to conclusion of the contract. Paragraph 123 of the BGB thus cannot apply in any event.

34. *4.* None of the above aspects thus allows the conclusion that the contract with the defendant is invalid and that corresponds with the position he finally adopted at the hearing, when he stated that the law on unjust enrichment did not apply where there was a contract and that the Commission was, in his opinion, wrong in assuming that the principle of unjust enrichment applied.

35. *III.* It is therefore necessary to examine Clause 8 of the contract, on which the Commission relies. According to that clause, a claim to repayment presupposes the existence of a rescission and various conditions for rescission.

36. *1.* Firstly, as far as the necessary declaration of rescission [11] is concerned, the parties are ultimately in dispute only on the point in time when the defendant received such a declaration, in other words whether it was already contained in the letter of 9 December 1986. The Commission considers that it was, but the defendant argues that that letter merely contains a statement (combined with the notice of default) that the contract would be rescinded, but not yet the rescission itself. However, he conceded on page 3 of his defence and at the oral hearing that the contract was ('indisputably') 'terminated' [12] by a letter of 16 September 1987. It is correct that on that date the Commission, referring to its letter of 9 December 1986, and following a similar letter of 24 June 1987, again called on the defendant to pay, and thereby confirmed that it did not intend to pursue the implementation of the contract but wished to bring it to an end in accordance with Clause 8. If there was no earlier declaration of rescission, that would at any rate be one. For the Court's decision on the principal sum, the date of rescission is not relevant. The above dispute between the parties can therefore be left undecided, as can the question whether there was already a rescission in an earlier letter of 1987 or in any event in a later letter, that of 8 December 1988. If the Commission's letter of 9 December 1986 is to be interpreted as a declaration of rescission, it is also irrelevant whether it could be conditional on proof of certain factual requirements as to performance of the contract and whether it could be combined with the notice of default.

37. *2.* The conditions for rescission in Clause 8 of the contract are:

— failure to comply with an obligation under the contract;

— notice of default given by registered letter;

11 — See the first sentence of Clause 8 of the contract: ... the Commission may rescind this contract ....

12 — This obviously refers to rescission, as maintained by the Commission, rather than termination under Clause 9 of the contract.

— failure by the contracting party to comply with the obligation in question within one month.

38. It is not disputed that the defendant (or his predecessor in title) did not carry out the project described in Clause 1.1 of the contract — contrary to the agreed timetable, which provided for the project to be operational by the end of 1984 — either before initiation of the rescission procedure under Clause 8 of the contract or after the notice of default which, as is likewise not disputed, was contained in the Commission's letter of 9 December 1986. That this letter contained a notice of default for the purposes of Clause 8 of the contract is moreover not called into question by the fact that the Commission, after stating that it was giving notice to the defendant, then indicated that it was rescinding the contract if proof of certain facts was not produced within one month. At most, that could have meant that the Commission would have been precluded from exercising the right of rescission under Clause 8 of the contract if the defendant had produced the said proof within the time-limit; however, this did not happen. In any event, it makes no difference as regards the validity of the notice of default.

39. The second of the three aforesaid conditions (notice of default) was thus undoubtedly fully complied with; with respect to the first and third conditions (failure to comply with a contractual obligation, failure to remedy the breach within one month), it must be stated that these are met, at least objectively.

40. It remains to examine whether the defendant or his predecessor in title can be held responsible for the failure to perform the contract before and after the notice of default. The wording of the contract does not include any special conditions in this respect, and it may thus be presumed that mere objective non-performance is sufficient to found the liability and give the Commission the right to rescind. The result might be different if there was a requirement of fault in this respect. The Commission would then have had to specify the circumstances indicative of fault on the part of the defendant or his predecessor in title, and this it did not do.

41. However, the Commission is rightly of the opinion that the reason for the non-performance by the defendant or his predecessor in title of his contractual obligations is in principle [13] not relevant. The contract is framed in such a way that implementation of the project is the sole responsibility of the party with whom the Community is contracting. Clause 1.1 categorically states:

'The contracting party undertakes to carry out the following project, according to the timetable of works specified in Annex I . . .'

42. In Clause 2, he undertakes to comply with the timetable laid down in Annex 1. Under Clause 4.1 he has 'technical and financial responsibility' for the work to be carried out. In relation to the Commission he is solely liable under Clause 6 for

13 — The case where the Community (negatively) fails to fulfil its own obligations or (positively) prevents or delays performance of the contract is not relevant here and may be left aside.

damage caused to third parties as a result of carrying out the contract.

43. The role of the Community is restricted to the payment of financial support to the contracting party (Clause 1.2) and the receipt of his reports (Clauses 4.3 and 4.4) and information and documentation (Clause 4.5).

44. Under Clause 9, the contract can be terminated by either of the contracting parties if the programme of work specified in Annex I is no longer applicable, in particular because of a foreseeable technical or economic problem or if the estimated costs of the project have been exceeded to an extent which is regarded as unacceptable. The Commission may then in accordance with the terms laid down on commercial use (paragraphs II.1 and II.2 of Annex II to the contract) demand repayment of the amount of financial support, with interest, if the partial implementation of the timetable of works has led to results which make commercial exploitation possible.

45. These provisions taken together yield the principle that in order to obtain the financial support the contracting party was to bear in full the risk involved in carrying out the project and would not retain a claim to that support if the project was not carried out (in accordance with the timetable), whereas the Community on the other hand was not to be exposed to the risk of a failure, even where there was no fault. An exception to this principle, which confirms it and at the same time slightly mitigates its severity, is contemplated in Clause 9 of the contract, but only if the contract is terminated *before* there is a breach of the type mentioned in Clause 8.

46. Finally, this also corresponds to the economic objectives of the contract. The contract, like the other contracts drawn up on the same pattern under Article 8(1) of Regulation (EEC) No 1302/78, was intended to realize the aims of Article 1 of that Regulation, namely to support projects which 'may serve as examples' (and which prior studies and research have shown to offer prospects of industrial and commercial viability). The injection of funds by the Community therefore achieves its aim only if the project is actually carried out. Clause 8 has the function of recovering public funds if the purpose is not achieved. That clause must therefore be understood as not presupposing fault on the part of the contracting party.

47. It follows from the above considerations that the Commission's claim to the principal sum under Clause 8 of the contract is justified both in principle and as to the amount, which is not in dispute.

48. *IV.* It must now be considered whether the claim for this amount should not be dismissed because of the claim which has been made for set-off.

49. It is apparent, however, that the claims put forward by the defendant by way of set-off are unfounded.

50. *1.* With respect to the claim on the basis of fault in concluding the contract, the defendant has not stated what conduct on the part of the Commission is considered to found such fault.

51. *2.* The provisions of the BGB on the law of obligations, cited by the defendant at the hearing, do not found any claim either, so that from this point of view too the claim for set-off fails, quite apart from the procedural question of late submission.

52. (a) Paragraph 346 of the BGB, which the defendant initially relies upon, states that in the event of rescission the parties are obliged to return what they have received from each other. For services performed or for the use of an object, the value must be paid, or monetary compensation if that is determined in the contract.

53. However, it is not evident what consideration in any form the Commission (or the Community) is supposed to have received from the defendant under the contract. Even if the implementation of the project were to be regarded as consideration from the defendant for the financial support of the Community, such implementation did not take place, as stated above.

54. (b) The rules on contracts of employment or for services (Paragraph 611 et seq. and Paragraph 631 et seq. of the BGB), do not, contrary to the defendant's opinion, give rise to any claim in his favour, even if account is also taken of the entitlement under Paragraph 670 to the reimbursement of expenditure, which under Paragraph 675 may be applied in the law on contracts of employment and contracts for services.

55. It is in fact clear from the nature and structure of the contract that the person contracting with the Community was not to have any rights other than those specified in the contract. The financial support from the Community appears in view of the way it is calculated to be a limited reimbursement of expenses, since it is intended as a maximum amount to cover a certain proportion of the costs. However, it also has in part the characteristics of remuneration, in so far as it must be repaid (under Clause 8) if the project is not put into practice. To a certain extent, it also resembles a loan, as it has to be repaid (in part) under Section II of Annex II in the event of commercial use of results of the project.

56. Since the contract is structured in such a specific way which is evidently intended to regulate conclusively all claims between the parties, it would be incompatible with the essence of the contract to take into account other rules which would lead to other claims going beyond those agreed on. They should thus not be applied. [14]

14 — See points 22, 23 and 24 above.

57. (c) Finally, the defendant argues, if I have correctly understood him, that there would be a breach of Paragraph 242 of the BGB if he did not have the right to reimbursement of expenses to the extent claimed. Under that provision, a debtor is obliged to perform a contractual obligation in good faith having regard to accepted practice.

58. However, in view of the abovementioned objectives of the contract, I cannot find in the result objected to by the defendant, namely that he has no such claims, any breach of the principle of good faith.

59. *3.* The defendant also relies on the Commission's promise, which, it does not dispute, was given in its letter of 30 April 1985, to finance 40% of the cost of materials. However, this submission too fails.

60. (a) Firstly, with reference to the claims for administrative fees, travel and accommodation costs and for compensation for time spent, it must be held that, as has been stated by the Commission and not disputed, those items are not covered by the promise. Moreover, the Commission rightly points out that those costs would not have formed part of the financial contribution even if the project had been carried out. It in fact covered only the costs of materials including delivery [15] and assembly costs. [16]

61. (b) As to the costs of equipment, which the defendant puts at DM 44 190, and other costs of materials, which in the defendant's opinion amount to DM 37 083, the Commission admittedly did not argue that they were not covered by its promise. However, the defendant has not even itemized the 'costs of equipment' of DM 44 190 and in particular has not shown any connection between those costs and the project in question. The same is true of the other costs of materials (allegedly amounting to DM 37 083). Furthermore, in accordance with the burden of proof to be applied in connection with this type of promise, the Commission imposed a condition for payment, namely that the purchases of materials should be evidenced by invoices and proofs of payment. But neither before the proceedings nor in his defence (a rejoinder was not submitted in time) has the defendant produced such documents or other evidence to show whether — and if so to what amount — he or his predecessor in title actually incurred the costs claimed. The letter from the Gartner undertaking which has been produced in that connection merely shows that the defendant ordered the materials in question, which is also how he puts it in his defence; neither the letter from Gartner nor the defence refers to delivery or payment.

62. For all the foregoing reasons, the defendant's argument regarding a set-off

15 — See Annex 1 to the contract, Sections B1 and 2, and the description of item 2.1.2 in Table 1 to Annex 1.

16 — As previous footnote, but item 2.1.3.

also fails. The claim for the principal sum must therefore be upheld.

Part 3 — The Commission's entitlement to the interest claimed

63. *I.* Firstly, it must be stated that the Commission is entitled under the contract to interest (on the principal sum) at the rate of 11.9% from 18 January 1987, as claimed. The claim is justified in principle, since under Clause 8 of the contract it is linked to the claim for repayment (of the principal sum) without any further conditions, and is also justified as to quantum, as the rate claimed of 11.9% undisputedly corresponds to the terms of the contract [17] and the time-limit provided for in the third sentence of Clause 8 of the contract, namely one month from the notice of default, [18] expired on 17 January 1987, which corresponds to the Commission's claim that interest is payable from 18 January 1987.

64. *II.* The Commission also claims interest, however, for the period from 24 January 1983 (to 17 January 1987). In its opinion, the contract provides in the event of rescission by the Commission for a restitution procedure intended to restore the *status quo ante.* The Commission considers, referring to *Zoubek,* [19] that this procedure must also embrace the interest which has accrued since payment of the advance. A flat-rate calculation should be carried out to determine the interest rate, the amount of interest actually earned on the principal sum by the defendant being irrelevant. The interest rate generally prescribed in Germany for such cases is 6%. On this point the Commission refers to Paragraph 44a(3) of the Bundeshaushaltsordnung (Federal Budget Code). [20] That provision reflects the principle that the recipient of a subsidy from public funds should not, if that subsidy has to be repaid, retain interest gained on the sum he has been paid.

65. However, the claim finds no support in any of the bases cited by the Commission, nor in any other discernible basis.

66. *1.* With respect to the contract between the parties, it must be stated that the wording of Clause 8 is clear and unambiguous as to the effects of the rescission provided for therein, conferring on the Commission certain precisely specified rights. There is no doubt — nor is it disputed — that this claim for interest is not one of those rights.

67. *2.* It is therefore necessary to examine the Commission's argument, referred to above, that this part of the claim follows from the fact that the restitution procedure under the contract is intended to restore the *status quo ante.*

17 — The interest rate of the European Investment Bank in force at the time of the Commission's decision to grant financial support for the project.

18 — It is not disputed that this reached the defendant on 17 December 1986.

19 — See note 4 above.

20 — Of 19 August 1969 (Bundesgesetzblatt I, p. 1284).

68. There are various possible ways of classifying this argument as a matter of law, and I will return to this below. Whichever is chosen, however, the argument fails in any case, as follows from the interpretation of Clause 8 of the contract.

69. That provision is to be understood as meaning that apart from the claims to interest specified there, no further claims of that type were to be allowed. That Clause 8 of the contract was intended to have such a conclusive character can be deduced from Article 8(1) of Regulation No 1302/78, which defines the competence and procedure for the conclusion of contracts for financial support as follows:

'The Commission shall negotiate and conclude the contracts necessary for the implementation of projects selected pursuant to Article 6. To that end the Commission shall draw up a model contract setting forth the rights and obligations of each party and in particular the procedures for any repayment of amounts of financial support.'

70. Where — as clearly happened in the present case — in accordance with that provision a 'model contract' is to be used which sets forth 'in particular the procedures for any repayment of amounts of financial support', this has a clearly discernible purpose, namely in the likely event of contractual problems to create *clarity* as to the various legal consequences of termination of the contract. Such clarity could only be achieved, however, by means of an exhaustive set of rules, since on the one hand there are no codified — and hence substantively *clear* — Community rules on public law contracts which could be used to fill lacunae, and on the other the application of national law involves a risk of major imponderabilities in view of the non-typical nature of the contract, as the present case indeed shows.

71. Accordingly, the Commission's argument that rescission as defined in Clause 8 of the contract is intended to restore the *status quo ante* is untenable. That is true first of all, with no further explanation being required, if the said argument is to be understood simply as an interpretation of the term 'rescission'. But it is also true if the Commission was thereby referring to a principle which it believed could be found in Community law, applicable to rescission of public-law contracts involving subsidies. Even if such a principle did exist, it would scarcely be of equal rank with the law of the EEC Treaty and legal rules equated thereto, but would rank with secondary Community law and would here be overridden by the provision, based on Article 8 of Regulation No 1302/78, of the contract for financial support.

72. Moreover, in so far as the Commission seems to believe that the existence of such a principle of Community law has already been acknowledged in *Zoubek*, [21] this argument cannot be accepted either. Paragraph 8 of that judgment admittedly states:

'In the event of the termination of a contract, the parties must be restored to the

21 — See note 4 above.

position in which they would have been if they had never entered into the contract. The meaning of the principle of *restitutio ad integrum* is that the parties are under an obligation to return whatever they have received from one another. That obligation extends not only to the asset or sum of money received but also to any yield from that asset or interest generated by the sum received since payment thereof.'

73. This passage should however be understood merely as an interpretation of the contract at issue in that particular case. This follows from the connection with paragraph 6 of that judgment, which states:

'Article 7 of the contract, which stipulates that the Commission may terminate the contract for non-performance or improper performance on the part of the other contracting party, after giving notice to the latter by registered letter, constitutes an expressed termination clause, according to which one party may, as a means of penalizing the other party for improper performance of its obligations, terminate the contract without the intervention of the courts.'

74. There was also evidently a *need* for interpretation of the contract at issue in that case with respect to the interest due on sums repayable in the event of termination. Unlike the contract in this case, it contained no specific provision on the matter. [22] The considerations in the *Zoubek* judgment are thus not transposable to this case, regardless of whether the contract which was the subject of that judgment was even of the same legal nature as the public-law contract in this case.

75. *3.* The Commission's arguments based on German law, which applies subsidiarily, also lack cogency.

76. (a) A general principle, independent of express provisions, [23] that the recipient of a subsidy paid from public funds who is obliged to make repayment may not keep any interest which has been earned on the sum paid over to him, is not recognized in German law. [24] The general rules of German administrative law on the matter — Paragraphs 48 and 49 of the Verwaltungsverfahrensgesetz and Paragraph 44a of the Bundeshaushaltsordnung — which might have yielded such a principle, do not apply to public law contracts in the first place, but only to unilateral acts of the administration. [25] Precisely in the present case of the payment of a subsidy under a public-law contract, the realization of the public interest, which would be the basis of the alleged principle (if such a principle did exist), is thus left to the contracting parties. [26]

22 — Cf. paragraph 3 of the Report for the Hearing, [1986] ECR 4058, and the Opinion of Advocate General Sir Gordon Slynn, loc. cit., p. 4062, at p. 4064.

23 — On provisions relating to interest in certain special laws and regulations, see Die Rückforderung fehlgeschlagener Subventionen — Zugleich ein Beitrag zur Problematik vorläufiger Subventionsbewilligungen, Göttingen, 1987, p. 202 f.

24 — The further issue of what effects the terms of a subsidy contract would have with respect to such a principle thereby becomes otiose.

25 — Cf. with reference to Paragraphs 48 and 49 of the Verwaltungsverfahrensgesetz, in relation to which Paragraph 44a of the Bundeshaushaltsordnung merely contains special provisions in the field of voluntary subsidies, Stelkens/Bonk/Leonhardt, op. cit., Paragraph 62, point 6 and Paragraph 48, point 28.

26 — Subject to mandatory private law rules, which the contract will refer to if necessary.

77. Moreover, a principle as described by the Commission cannot even be deduced from the aforesaid rules of administrative law. For the purposes of annulment of an administrative act which was lawful at the time it was adopted — a case which corresponds (at the level of the granting of subsidy by means of a unilateral administrative act) to the present one, since there is nothing to suggest that the contract between the Community and the defendant was not lawful — such an act is regarded as a 'lawful' administrative act. [27] Under Paragraph 49 of the Verwaltungsverfahrensgesetz it can therefore only be annulled or revoked with *future* effect, which by definition excludes the possibility of interest being payable on the claim to reimbursement for the period before the revocation. [28] Paragraph 44a of the Bundeshaushaltsordnung, the special rule for voluntary subsidies, which specifically provides in subparagraph 3 for interest to be payable on claims to reimbursement from the time when they arise, also makes no provision for retroactive revocation, which would make the claim to reimbursement arise retrospectively from the time when the administrative act was adopted. On the contrary, it is within the administrative authorities' discretion to decide whether to annul the administrative act with future or with retrospective effect. [29] Even in the event of revocation with retrospective effect the claim to interest can be waived in the circumstances stated in the second sentence of Paragraph 44a(3) of the Bundeshaushaltsordnung.

78. It follows that the principle on which the Commission seeks to rely cannot be found in German law.

79. (b) The third sentence of Paragraph 347 of the BGB, which states that in the event of rescission 'interest shall be payable on a sum of money from the time of receipt', is likewise not a possible basis for this part of the claim to interest, since that provision, as the above observations show, is incompatible with the nature of the contract and hence not applicable. [30]

Part 4 — Costs

80. The decision on costs follows from Article 69 of the Rules of Procedure. As in my opinion the Commission's claim for payment of the principal sum should be upheld in full, and its claim for interest upheld at least in part, it appears appropriate to order the defendant to pay the entire costs of the proceedings in accordance with Article 69(2).

27 — Stelkens/Bonk/Leonhardt, op. cit., Paragraph 44, points 7 ff, with further references to the case-law.

28 — This is especially clear if one considers the formulation used by the Bundesverwaltungsgericht that the revocation removes for the future, the legal basis for being allowed to keep the payment (judgment of 11 February 1983 in Case 7 C 70/80, Neue Zeitschrift für Verwaltungsrecht, 1984, p. 36, at p. 38).

29 — See the first sentence of Paragraph 44a(3) of the Bundeshaushaltsordnung.

30 — See points 22, 23 and 24 above.

C — Conclusion

81. For all the above reasons, I propose that the Court rule as follows:

(1) The defendant is ordered to pay the Commission DM 72 000 together with interest at 11.9% from 18 January 1987.

(2) The remainder of the claim is dismissed.

(3) The defendant is ordered to pay the costs.