Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 23 April 2015 [1]

Case C-366/13

Profit Investment SIM SpA, in liquidation,
v
Stefano Ossi,
Andrea Mirone,
Commerzbank AG
(Request for a preliminary ruling from the

Corte suprema di cassazione (Italy))

(Area of freedom, security and justice — Regulation (EC) No 44/2001– Article 23 — Prorogation of jurisdiction — Clause conferring jurisdiction inserted in a prospectus for the issue of credit linked notes — Enforceability against the third-party purchaser of those notes)

1. This request for a preliminary ruling concerns the interpretation of Article 5(1)(a), Article 6(1) and Article 23(1)(a) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [2]

2. The request was made in the course of a dispute between Profit Investment SIM SpA, [3] in liquidation, on the one hand, and Commerzbank AG, [4] Profit Holding SpA, [5] in liquidation, E3 SA, [6] Redi & Partners Ltd [7] and Messrs Ossi, Magli, Redi, Mirone and Fiore, on the other hand, following the issue by Commerzbank of financial instruments subscribed to by Profit and Profit Holding through the intermediary of Redi.

3. The Court has already had occasion to give a ruling on the interpretation of the concept of 'matters relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001, the concept of a connecting link which, in accordance with Article 6(1) of that regulation, permits a co-defendant domiciled abroad to be sued before a defendant's court of domicile, and the conditions governing the validity and enforceability against third parties of the prorogation of jurisdiction clauses provided for in Article 23 of that regulation. This request for a preliminary ruling gives it the opportunity to confirm the main strands of its interpretation while at the same time providing further clarification in this regard.

1 — Original language: French.
2 — OJ 2001 L 12, p. 1.
3 — 'Profit'.
4 — 'Commerzbank'.
5 — 'Profit Holding'.
6 — 'E3'.
7 — 'Redi'.

4. In this Opinion, I shall submit that, where a prorogation of jurisdiction clause is inserted in a prospectus for the issue of securities such as the credit linked notes at issue in the main proceedings, the requirement that that clause should be in writing, laid down in Article 23(1)(a) of Regulation No 44/2001, is satisfied only if the contract signed by the parties mentions their acceptance of that clause or includes an express reference to that prospectus, and that such a clause may be enforced against the third party which purchased the securities from a financial intermediary only if it is established that that third party actually gave its consent to that clause under the conditions set out in that article. I shall argue, however, that that clause may be recognised as being valid and effective if its insertion in the prospectus can be regarded as a form allowed by a usage in international trade or commerce within the meaning of Article 23(1)(c) of Regulation No 44/2001, thus supporting the assumption that the person against whom it is enforced consented to it.

5. I shall also set out the reasons why an action for the annulment of a contract and restitution of the sums paid on the basis of the void act must be regarded as constituting a 'matter relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001.

6. Lastly, I shall show that, in order for there to be a connecting link between two claims brought against a number of defendants within the meaning of Article 6(1) of Regulation No 44/2001, it is not sufficient that the upholding of one of those actions is potentially capable of affecting the extent of the interest whose protection is sought in the other action.

I – **Legal framework**

7. Article 2(1) of Regulation No 44/2001, which forms part of Chapter II, Section 1 thereof, entitled 'General Provisions', provides that '[s]ubject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

8. Article 5 of that regulation, which also appears in Chapter II, Section 2, entitled 'Special jurisdiction', provides that:

'A person domiciled in a Member State may, in another Member State, be sued:

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

…'

9. Article 6(1) of Regulation No 44/2001, which also appears in Chapter II of that regulation, provides:

'A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.

10. Article 23(1) and (2) of Regulation No 44/2001, which appear in Chapter II, Section 7, entitled 'Prorogation of jurisdiction, provides:

'1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".'

II – **The dispute in the main proceedings and the questions referred for a preliminary ruling**

11. In May 2004, Dresdner Bank AG, now Commerzbank, whose registered office is in Germany, launched on the market a programme for the issue of securities indexed to a credit risk, known as 'credit linked notes'.[8] The general rules governing the programme and the conditions of issue were set out in a basic prospectus dated 5 May 2004, known as the 'Information Memorandum',[9] which, according to Commerzbank, was approved by the Irish Stock Exchange.

12. In paragraph 16 of the 'Terms and Conditions of the Notes', that document contained a clause, inserted in point (b), entitled 'Law and jurisdiction', to the effect that the courts of England have exclusive jurisdiction to settle any dispute arising from or connected with the Notes.

13. As part of that issue programme, Commerzbank, on 22 October 2004, placed on the market CLNs, with a total value of EUR 2 300 000, linked to the reference entity E3, whose registered office is in Luxembourg, under the terms and conditions set out in a 'pricing supplement'.

14. Acting through the intermediary of Redi, whose registered office is situated in the United Kingdom and which is licensed to operate as a financial intermediary by the Financial Services Authority, Profit, whose registered office is situated in Italy, purchased CLNs to the value of EUR 1 100 000, and Profit Holding, Profit's parent company, whose registered office is also in Italy, purchased CLN to the value of EUR 1 200 000, on 27 October 2004.

8 — 'CLNs'. CLNs, which were developed by the financial markets, are financial derivatives enabling an issuer, known as the 'protection purchaser', to transfer a credit risk to an investor, known as the 'protection seller', in return for the right to a yield which may exceed the amount obtainable at a risk-free rate. The right to repayment of the capital on maturity is made subject to the non-occurrence of one of the credit risks affecting an underlying entity, known as 'the reference entity'. The securities may be issued with or without a capital guarantee. In the latter case, should the reference entity be affected by a credit event, the purchaser may be reimbursed either on the basis of a recovery rate ('cash settlement') or in securities in the defaulting entity ('physical settlement'). With regard to these instruments, see S.K. Henderson, 'Credit Derivatives', *Credit Derivatives — Law, Regulation and Accounting* Issues, Sweet and Maxwell, 1999, p. 1, and in particular p. 4, paragraph 1.005; T. Bonneau and F. Drummond, *Droit des marchés financiers*, 3rd ed., Economica, Paris, 2010, paragraph 145, p. 218, and A. Gauvin, *Droit des dérivés de credit*, Revue banque, Paris, 2003, p. 103 et seq.

9 — 'The Memorandum'.

15. When, in spring 2006, E3 failed to meet its obligations, Commerzbank gave notice to that effect and, on 5 July 2006, cancelled the CLNs by issuing to Profit the corresponding number of shares in E3, which had become insolvent.

16. After being placed in compulsory administrative liquidation, Profit instituted legal proceedings before the Tribunale di Milano (Italy) against Commerzbank, Profit Holding, Redi and E3, as well as against Messrs Ossi and Magli, a member of the Board of Directors and Managing Director of Profit respectively, and Mr Fiore, a member of E3, all three of whom are domiciled in Italy.

17. Profit brought two claims. The first seeks a declaration as to the nullity of the agreements which led it to purchase the CLNs, on the ground of their imbalance, lack of or inadequate considerations, and restitution of the sums paid. The second seeks a declaration, on the basis of Article 2497 of the Italian Civil Code,[10] as to the liability in damages of Profit Holding, Redi and Messrs Ossi, Magli and Fiore and reparation for the loss suffered.

18. Commerzbank served on Mr Redi, a partner in Redi, and Mr Mirone, who had helped set up and implement the transaction on behalf of Redi, and who is domiciled in the United Kingdom, a third-party notice seeking an order requiring them to make good the loss suffered in the event that Profit's principal claim is upheld.

19. After Commerzbank and Messrs Ossi and Mirone had contested the jurisdiction of the Italian court, Profit asked the Corte suprema di cassazione (Court of Cassation, Italy) to give a preliminary ruling on the question of jurisdiction.

20. Having doubts as to the interpretation of Article 5(1), Article 6(1) and Article 23(1)(a) of Regulation No 44/2001, the Corte suprema di cassazione decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Can the connecting link between different actions referred to in Article 6(1) of Regulation No 44/2001 be said to exist where the subject-matter of the heads of claim put forward in those actions and the basis for the pleas in law raised therein are different and there is no relationship between them of subordination or logical or legal incompatibility, but the upholding of one of those actions is nonetheless potentially capable, in practice, of affecting the extent of the interest on the grounds of which the other action has been brought?

(2) Can the requirement that the agreement conferring jurisdiction be in written form, as laid down in Article 23(1)(a) of Regulation No 44/2001, be said to be satisfied where such an agreement is inserted into the (Memorandum) that has been created unilaterally by a bond issuer, with the effect that the prorogation of jurisdiction is made applicable to disputes involving any future purchaser concerning the validity of those bonds? If not, can it be said that the insertion of that agreement into the document governing a bond issue which is intended for cross-border movement corresponds to a form which accords with usages in international trade or commerce within the terms of Article 23(1)(a) of that Regulation?

(3) Should the expression "matters relating to a contract", as used in Article 5(1) of Regulation No 44/2001, be understood to refer only to disputes in which the applicant intends to assert before the court the binding legal relationship arising from the contract and to disputes which are closely linked to that relationship, or must it be extended so as also to include disputes in which the applicant, far from invoking the contract, disputes the existence of a legally valid and binding relationship and seeks to obtain a refund of the amount paid on the basis of a document which, in its view, is bereft of legal value?'

10 — That article concerns the parent company's liability in the event of infringement of the principles of good management.

III – **My assessment**

A – *Preliminary observations*

1. The method of interpreting the provisions of Regulation No 44/2001

21. It is necessary first of all to recall the three rules governing the interpretation of the provisions of Regulation No 44/2001.

22. First, in so far as Regulation No 44/2001 now replaces, in the relations between Member States, the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,[11] as amended by the successive conventions relating to the accession of new Member States to that Convention,[12] the interpretation provided by the Court in connection with the provisions of that Convention also holds good with respect to the provisions of Regulation No 44/2001, whenever the provisions of those instruments may be regarded as equivalent.[13] This is true of Article 5(1)(a) and Article 23(1) of that regulation in relation to Article 5(1) and the first paragraph of Article 17 of the Brussels Convention respectively.[14] Article 6(1) of Regulation No 44/2001, although it has no equivalent in the Brussels Convention, simply enshrines a principle which the Court inferred from Article 6(1) of that Convention,[15] with the result that the interpretation previously given by the Court is still fully relevant.

23. Secondly, for reasons arising in particular from the need to ensure the uniform application of Regulation No 44/2001, the Court has held that the provisions of that regulation must be interpreted autonomously, by reference to its scheme and purpose.[16]

24. Thirdly, the Court has held that the rules of special jurisdiction contained in Chapter II, Section 2, of Regulation No 44/2001 must be interpreted restrictively and cannot give rise to an interpretation going beyond the cases expressly envisaged by that regulation.[17] Similarly, it has held that the requirements governing the validity of jurisdiction clauses must be strictly construed, in so far as those clauses derogate from the general rules for the determination of jurisdiction.[18]

25. I shall apply those rules of interpretation in order to answer the questions raised by the referring court.

11 — OJ 1978 L 306, p. 60.

12 — 'The Brussels Convention'.

13 — See the judgments in *Refcomp* (C-543/10, EU:C:2013:62, paragraph 18 and the case-law cited) and *Brogsitter* (C-548/12, EU:C:2014:148, paragraph 19 and the case-law cited).

14 — See, as regards Article 5(1)(a) of Regulation No 44/2001, the judgment in *Brogsitter* (C-548/12, EU:C:2014:148, paragraph 19) and, as regards Article 23(1) of that regulation, the judgment in *Refcomp* (C-543/10, EU:C:2013:62, paragraph 19).

15 — See the judgment in *Kalfelis* (189/87, EU:C:1988:459).

16 — See the judgment in *A* (C-112/13, EU:C:2014:2195, paragraph 50 and the case-law cited).

17 — See the judgment in *Kainz* (C-45/13, EU:C:2014:7, paragraphs 21 and 22 and the case-law cited). See also the judgment in *OTP Bank* (C-519/12, EU:C:2013:674, paragraph 23 and the case-law cited).

18 — See, to that effect, the judgment in *Berghoefer* (221/84, EU:C:1985:337, paragraph 13 and the case-law cited).

2. The order in which the questions will be examined

26. The referring court is in no doubt that the action for liability in damages brought against Profit Holding, Redi and Messrs Ossi, Magli and Fiore falls within the jurisdiction of the Italian courts, in so far as several of the defendants in that action are domiciled in Italy. It is more doubtful, however, about whether the action for a declaration as to the nullity of the acts which led to the purchase of the CLNs and restitution of the price paid may fall within the jurisdiction of the Italian courts, given that that action must, in the light of its purpose, be regarded as being directed exclusively against Commerzbank and Redi, both of which have their registered office outside Italy.

27. In the view of the referring court, the answer to that question depends first of all on the existence between those two claims of a close connection, within the meaning of Article 6(1) of Regulation No 44/2001, which would mean that the Italian courts, which have jurisdiction to hear and determine the claim for damages, would also have jurisdiction to give a ruling on the claim for restitution of the price resulting from the alleged nullity of the transactions.

28. It is only in the event that the answer given by the Court has the effect of ruling out the existence of a connection such as to provide justification for hearing both claims together that it is necessary, secondly, to determine whether the claim for restitution of the price paid for the CLNs could not in itself be regarded as falling within the jurisdiction of the Italian courts. The Corte suprema di cassazione suggests that that determination should be carried out in two stages, first by assessing what value is to be attached to the prorogation of jurisdiction clause contained in the Memorandum, and then, if that clause is of no value, by establishing whether the dispute in which the applicant is contesting the existence of a valid contractual relationship and seeking restitution of the amount paid on the basis of an act which, in its view, is bereft of legal value, constitutes a 'matter relating to a contract' within the meaning of Article 5(1) of Regulation No 44/2001.

29. I take the view that, before answering the first and third questions raised by the referring court, which are concerned with optional jurisdiction, it is necessary first of all to examine the second question in so far as it concerns exclusive jurisdiction. In this regard, it follows from case-law that the effect of the prorogation of jurisdiction clause is to exclude both jurisdiction as determined by the general principle laid down in Article 2 of Regulation No 44/2001 and the special jurisdiction provided for in Articles 5 and 6 of that regulation.[19] It follows that, if, on the basis of the answer given to the second question, the referring court were to conclude that the prorogation of jurisdiction clause contained in the Memorandum may be validly enforced against Profit, it would therefore necessarily have to decline jurisdiction to give a ruling on the action for nullity and restitution of the sale price, which would have to be brought before the English courts, even though that action would constitute a matter relating to a contract or exhibit a close connection with the action for liability in damages.

30. The fact that the action seeks, inter alia, a declaration as to the nullity of the transactions that led to Profit's purchase of the CLNs does not call into question the foregoing considerations, in so far as, in accordance with the principle of the autonomy of that clause, the courts of a Contracting State, which have been designated in a contract, also have exclusive jurisdiction where the action seeks a declaration that the contract containing that clause is void.[20]

31. In addition, unlike the European Commission, I do not think it is necessary to examine whether the action for restitution constitutes a 'matter relating to a contract' within the meaning of Article 5(1) of Regulation No 44/2001 before analysing the validity and effectiveness of the prorogation of jurisdiction clause.

19 — See to this effect the judgment in *MSG* (C-106/95, EU:C:1997:70, paragraph 14 and the case-law cited).

20 — See to this effect the judgment in *Benincasa* (C-269/95, EU:C:1997:337, paragraph 32).

32. It is true that, in determining whether the person against whom it is enforced gave his consent to the clause conferring jurisdiction referred to in Article 23 of Regulation No 44/2001, the Court borrows the general and abstract definition of 'matters relating to a contract' developed in the context of the interpretation of Article 5(1) of that regulation, inasmuch as it looks for the existence of a legal obligation freely consented to by one person in respect of another. [21]

33. However, the existence of an overlap resulting from the common requirement of a contractual relationship does not, to my mind, make it necessary to answer the third question first, since it is apparent from the order for reference that the purpose of that question is to dispel the doubts of the Corte suprema di cassazione not with respect to the existence of a legal relationship deriving from a contract, which is presumed to be the case [22] even if that presumption warrants some discussion, but with respect only to whether the fact that the applicant is suing not for performance of the contract but for nullity and restitution of the price paid, removes that action from the scope of matters relating to a contract.

34. I shall therefore start by examining the second question, concerning the effectiveness of the clause conferring jurisdiction inserted in the Memorandum.

35. Since the referring court starts from the premiss that Redi acted as a 'distributor [who] sold' the CLNs issued by Commerzbank to Profit, it is my view that a distinction must be drawn between the relationship between Redi and Profit and Profit's relationship with Commerzbank.

B – *The second question*

36. By its second question, which, although split into two parts, must be divided into three limbs, the referring court asks, in essence, first, whether the requirement of writing laid down in Article 23(1)(a) of Regulation No 44/2001 is satisfied where a clause conferring jurisdiction is contained in a prospectus for the issue of securities, such as the CLNs at issue in the main proceedings, created unilaterally by the issuer of those securities, next, whether that clause may be enforced against any subscriber to those securities and, finally, in the event that the previous two question are answered in the negative, whether the insertion of a prorogation of jurisdiction clause in such a document is consistent with a usage common in international trade or commerce within the meaning of Article 23(1)(c) of Regulation No 44/2001.

37. That tripartite division of the question is necessary in so far as the first limb seems to me to be exclusively concerned with the validity of the prorogation of jurisdiction clause in the relationship between the parties to the contract containing that clause, whereas the second limb relates to whether that clause is transferable to successive purchasers of the securities. The third limb of the question includes both those issues and is concerned more generally with the effectiveness of that clause as against any purchaser or sub-purchaser of the securities.

1. The first limb of the second question

38. Case-law has proved to be unstintingly rigorous in its interpretation of the requirements of form laid down in subparagraph (a) of the first paragraph of Article 17 of the Brussels Convention, and then in Article 23(1)(a) of Regulation No 44/2001, the latter provision making the validity of the choice of forum clause subject to the existence of an agreement concluded 'in writing or evidenced in writing'.

21 — See to this effect the judgment in *Refcomp* (C-543/10, EU:C:2013:62).

22 — As is clear from the wording of the question, since it presupposes the existence of a contract the legal validity of which is being contested.

39. The Court has held that the insertion of a clause conferring jurisdiction contained in the general conditions of sale of one of the parties, printed on the back of a written agreement, satisfies the requirement of writing only if the contract signed by both parties contains an express reference to those general conditions. [23]

40. In the case of a contract concluded verbally, it has taken the view, leaving aside the case of an ongoing trading relationship between the parties, that a prorogation of jurisdiction clause could be effective only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale had been accepted in writing by the purchaser. [24]

41. Focusing exclusively on the existence of consent to the prorogation of jurisdiction, the Court has held, with respect to the first paragraph of Article 17 of the Brussels Convention, that, by making the validity of a jurisdiction clause subject to the existence of an 'agreement' between the parties, that provision imposes on the court before which the matter is brought the duty of examining first whether the clause was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated. [25] In accordance with its teleological method of interpretation, it has held that 'Article 23(1) of Regulation No 44/2001 must be interpreted as meaning that, like the aim pursued by the first paragraph of Article 17 of the Brussels Convention, ensuring the real consent of the parties is one of the aims of that provision'. [26]

42. It therefore follows clearly from that case-law that consent to a prorogation of jurisdiction clause cannot simply be tacit or inferred from the circumstances. Other than in the cases provided for in Article 23(1)(b) and (c) of Regulation No 44/2001, the effectiveness of such a clause is, on the contrary, subject to express consent given by using one of the formal modes of expression provided for in Article 23(1)(a) and (2) of that regulation.

43. However rigorous they may appear to be, those requirements of form are justified in my opinion, in so far as they provide a means of protecting the weaker party against the risk of insertion of a jurisdiction clause to which that party's attention has not been drawn in a sufficiently clear manner. [27]

44. In the light of those requirements, as interpreted by settled case-law, the question raised by the referring court can only be answered in the negative, since the requirement of writing cannot be said to be satisfied solely by the insertion of the clause conferring jurisdiction in the Memorandum created unilaterally by the issuer of the CLNs.

45. As the Commission points out, however, the position might be otherwise if it were established that the clause had been the subject of agreement at the time when the contract between Profit and Redi was concluded. In my opinion, Profit's express acceptance of the clause might follow either from its inclusion in the agreement or from an express reference to it in the Memorandum. I note, however, that it is clear from the order for reference that the conditions that were contained in the Memorandum do not appear to have been specifically included in the contractual documents signed by the purchasers of the CLNs.

23 — Judgment in *Estasis Saloti di Colzani* (24/76, EU:C:1976:177, paragraph 10).

24 — Judgment in *Galeries Segoura* (25/76, EU:C:1976:178, paragraph 12).

25 — See the judgments in *Coreck* (C-387/98, EU:C:2000:606, paragraph 13 and the case-law cited) and *Refcomp* (C-543/10, EU:C:2013:62, paragraph 27).

26 — Judgment in *Refcomp* (C-543/10, EU:C:2013:62, paragraph 28 and the case-law cited).

27 — See to this effect the judgment in *MSG* (C-106/95, EU:C:1997:70, paragraph 17).

46. Consequently, I propose that the Court's answer to the first limb of the second question should be that the requirement of writing laid down in Article 23(1)(a) of Regulation No 44/2001 is satisfied in the case where a prorogation of jurisdiction clause is inserted in a prospectus for the issue of securities, such as the CLNs at issue in the main proceedings, only where the contract signed by the parties mentions the acceptance of that clause or contains an express reference to that prospectus.

2. The second limb of the second question

47. To the question as to whether, in the context of an action for liability brought by the sub-buyer of goods against the manufacturer of those goods, the clause conferring jurisdiction agreed in the contract concluded between the manufacturer of the goods and the purchaser of those goods may be enforced against the sub-buyer, the Court, in its judgment in *Refcomp*,[28] gave a very clear answer, inasmuch as it held that that clause was ineffective as against a sub-buyer who had not consented to it. Taking as its basis the absence of any contractual relationship between the sub-buyer and the manufacturer, it stated that 'they [could] not be regarded as having "agreed" within the meaning of Article 23(1) of Regulation No 44/2001 to the court designated as having jurisdiction in the initial contract concluded between the manufacturer and the first buyer'.[29]

48. In its judgment in *Powell Duffryn*,[30] however, the Court recognised the enforceability against future shareholders of a clause inserted in the statutes of a company limited by shares, in so far as the shareholder's conclusion of the company's statutes creates both between the shareholder and the company and between the shareholders themselves a relationship that must be regarded as a contractual relationship.[31] In its judgment in *Russ*,[32] the Court also accepted, in the context of maritime transport, the enforceability of a clause inserted in a bill of lading against a third party holding the bill of lading, provided that, by virtue of the relevant national law, the third party, on acquiring the bill of lading, succeeded to the shipper's rights and obligations.[33]

49. Given that case-law, are we to conclude, on the basis of the model of a company's statutes or a maritime bill of lading, that the clause conferring jurisdiction contained in the Memorandum transfers to the successive purchasers of the CLNs or, on the contrary, that there is no such transfer in the absence of a contractual relationship between the issuer of the securities and the sub-buyer?

50. To my mind, that question must be answered in favour of the second alternative.

51. To my mind, the principle, constantly reiterated by case-law, that the parties' consent is a condition of the effectiveness of the clause conferring jurisdiction leads inevitably to that solution. After all, the fact that there is no contractual relationship between Commerzbank and Profit, inasmuch as they have not assumed any contractual obligations towards each other, supports the inference that they cannot be regarded as having 'agreed', within the meaning of Article 23(1) of Regulation No 44/2001, to the court designated as having jurisdiction.[34]

28 — C-543/10, EU:C:2013:62.

29 — Paragraph 33.

30 — C-214/89, EU:C:1992:115.

31 — Paragraphs 15 to 17.

32 — 71/83, EU:C:1984:217.

33 — Paragraphs 24 to 26. That case-law was confirmed by the judgment in *Coreck* (C-387/98, EU:C:2000:606, paragraphs 23 to 27).

34 — See to that effect the judgment in *Kolassa* (C-375/13, EU:C:2015:37), given in a particular context relating to the purchase of bearer share certificates.

52. The argument put forward by the United Kingdom Government to the effect that Commerzbank agreed to be bound by the conditions of issue set out in the Memorandum strikes me as ineffective, since the question is not whether Profit may enforce the clause against Commerzbank but, conversely, whether that bank may enforce the clause against Profit. The United Kingdom Government's argument that, by purchasing the securities, Profit is deemed to have consented to the clause conferring jurisdiction is incorrect in my view, since consent must be given expressly and cannot be inferred from the purchase of the securities.

53. Furthermore, contrary to what Commerzbank submits, the enforceability of the clause conferring jurisdiction against the sub-buyer cannot, in my opinion, be inferred from the rule that, where an investor purchases securities, both on the primary market and on the secondary market, it necessarily expresses its wish to accept fully, completely and unconditionally all of the provisions contained in the rules of issue. That analysis is at odds with the particular nature of the choice of forum clause, which obeys specific rules based on the necessary consent of the person against whom it is enforced.

54. I am not unaware of the fact that the Court has been less rigorous in its case-law in the particular case of marine bills of lading and company statutes. In its judgment in *Refcomp*,[35] however, it restricted the scope of that case-law by stating that it was to be assessed by taking account of the very specific nature of bills of lading, which is an instrument of international commerce intended to govern a relationship involving at least three persons and a negotiable instrument which allows the owner to transfer the goods, en route, to a purchaser who becomes, as bearer of the bill of lading, the holder of all the rights and obligations of the shipper in relation to the carrier.[36]

55. That case-law is based on an analysis of the carriage contract as a tripartite contract which cannot, in my opinion, be transposed to the case of the issue of securities such as the CLNs at issue in the main proceedings, which fall within the category of debt securities. The solution arrived at in the case of a company shareholder also cannot be transposed to the holder of a debt security, who, unlike the shareholder, who holds an interest in the company's capital, has only a right *in personam*. The exception in matters relating to companies can be explained by the idea that persons who have become members of a legal person by purchasing shares have also become parties to the contract incorporating that legal person. That justification does not hold good in the context of the purchase of securities such as the CLNs at issue in the main proceedings.

56. These are the reasons for which I am minded to answer the second limb of the second question to the effect that Article 23 of Regulation No 44/2001 must be interpreted as meaning that a clause conferring jurisdiction contained in an information document created unilaterally by an issuer of financial instruments can be enforced against a third party who has purchased those instruments from a financial intermediary only if it is established that that third party actually consented to that clause under the conditions laid down in that article.

3. The third limb of the second question

57. The third limb of the second question does not, to my mind, pose any particular difficulties, in so far as it has to a large extent already been answered by the case-law of the Court.

58. In this connection, with regard to the scope of a finding as to the existence of a usage in international trade or commerce which is known to the parties, the Court has held that consent on the part of the contracting parties as to a jurisdiction clause is presumed to exist where their behaviour is consistent with practices in the branch of international trade or commerce in which they

35 — C-543/10, EU:C:2013:62.

36 — Paragraph 35.

operate and of which they are or ought to have been aware.[37] The existence of a usage of which the parties ought to be aware therefore amounts to a presumption of consent to the clause conferring jurisdiction. The Court has also held, with respect to the finding as to the existence of such a usage, that it is for the national court to determine whether the contract in question comes under the head of international trade or commerce and to find whether there was a usage in the branch of international trade or commerce in which the parties are operating.[38]

59. The Court has nonetheless provided the national courts with general guidelines on how to go about establishing the existence of a usage and whether the parties are aware of it.

60. On the one hand, the existence of a usage, which must be determined in relation to the branch of trade or commerce in which the parties to the contract operate, is established where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type.[39]

61. On the other hand, actual or 'presumptive' awareness of a usage on the part of the parties to a contract is made out where, in particular, they had previously had commercial or trade relations between themselves or with other parties operating in the sector in question or where, in that sector, a particular course of conduct is sufficiently well known because it is generally and regularly followed when a particular type of contract is concluded, with the result that it may be regarded as being a consolidated practice.[40] Thus, contrary to the suggestion given by the Commission at the hearing, it clearly follows from that case-law that awareness of the usage does not have to be proven, since it may be presumed where it is demonstrated that the party against whom it is enforced 'ought' to be aware of it.

62. If those rules are applied to the present case, the answer to the third limb of the second question must be that the insertion of a prorogation of jurisdiction clause in the document intended to define the conditions for the issue of securities such as the CLNs at issue in the main proceedings may be regarded as a form allowed by a usage in international trade or commerce within the meaning of Article 23(1)(c) of Regulation No 44/2001, thus supporting the presumption that the person against whom it is enforced consented to it, provided in particular that it is established, as will have to be verified by the national court, on the one hand, that such a course of conduct is generally and regularly followed by operators in the branch in question when concluding contracts of that type and, on the other hand, either that the parties had previously had commercial or trade relations between themselves or with other parties operating in the sector in question, or that the course of conduct in question is sufficiently well known, with the result that it may be regarded as a consolidated practice.

C – *Third question*

63. By its third question, the referring court asks, in essence, whether an action for the annulment of a contract and restitution of the sums paid on the basis of the void act must be regarded as constituting a 'matter relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001.

64. I shall rule out from the outset the possibility of regarding the action brought by Profit against Commerzbank as being contractual in nature since, in the absence of a contractual relationship between them, the action by the former against the latter cannot, whatever the result it is intended to achieve, be classified as 'relating to a contract'. In my view, that question therefore arises only in the context of the relationship between Profit and Redi.

37 — See the judgments in *MSG* (C-106/95, EU:C:1997:70, paragraph 19) and *Castelletti* (C-159/97, EU:C:1999:142, paragraph 21).

38 — Loc. cit. (paragraphs 21 and 23).

39 — Loc. cit. (paragraphs 23 and 26 respectively).

40 — See the judgment in *MSG* (C-106/95, EU:C:1997:70, paragraph 24).

65. The examination of that question calls for a reminder of the applicable case-law.

66. In its judgment in *Sanders*,[41] which concerned the jurisdiction of the courts of the State where the immovable property is located in matters relating to tenancies, the Court held that exclusive jurisdiction still obtains even in the case of a challenge as to the existence of the contract which is the subject of the dispute.[42]

67. Furthermore, in its judgment in *Effer*,[43] the Court, faced with a request for a preliminary ruling concerned, in essence, with whether the special jurisdiction in matters relating to a contract must obtain where the defendant, who is being sued for performance of a contractual obligation, raises an objection as to lack of jurisdiction while challenging the very existence of the contract, held that 'the national court's jurisdiction to determine questions relating to a contract includes the power to consider the existence of the constituent parts of the contract itself, since that is indispensable in order to enable the national court in which proceedings are brought to examine whether it has jurisdiction'.[44] It inferred from this that 'the plaintiff may invoke the jurisdiction of the courts of the place of performance of the contract … even when the existence of the contract on which the claim is based is in dispute between the parties.[45]

68. The first question that arises is whether that solution, established in the event that the challenge to the existence of the contract is relied on by way of defence against an action for the performance of that contract, may be transposed to the situation of a main action for a declaration as to the nullity of the contract.

69. The second question is to determine, in the event of an affirmative answer to the first question, whether the court that examines whether the contract is void also has jurisdiction to rule on the consequences of its invalidity and, in particular, on the restitution to be effected following its ruling.

70. I propose that the first question should be answered in the affirmative. Five arguments may be put forward in support of that proposal.

71. First, a theoretical argument may be found in the fact that nullity is the penalty for non-compliance with the rules governing the formation of the contract.[46] A claim for nullity based on an infringement of those rules, which are themselves matters relating to a contract, does indeed have a connection with a contract, even though it is aimed at securing not the performance of the contract but a declaration of its nullity. In the words of one legal commentator, 'a dispute concerning the validity of a contract is still a dispute in "matters relating to a contract"'.[47]

72. Secondly, a further theoretical argument may be found in the principle that any court, once seised of a claim, has *ipso facto* jurisdiction to rule on its own jurisdiction. It is often the case that the determination of jurisdiction involves the prior examination of matters of substance, including the existence or validity of the contract. Denying a court called upon to deal with an issue of jurisdiction the possibility of ruling on such a matter would be tantamount to preventing it from ruling on its own jurisdiction. That, moreover, is the argument to which the Court refers when it states, in its judgment

41 — 73/77, EU:C:1977:208.

42 — Paragraph 22, which, it is true, infers the solution from the express terms of Article 16 of the Brussels Convention.

43 — 38/81, EU:C:1982:79.

44 — Paragraph 7.

45 — Paragraph 8.

46 — See G. Cornu, *Vocabulaire juridique*, 9e éd., PUF, Paris, 2011, which defines nullity as a '[s]anction encourue par un acte juridique … entaché d'un vice de forme … ou d'une irrégularité de fond …, qui consiste dans l'anéantissement de l'acte'.

47 — See the note by A. Huet, *Revue critique de droit international privé*, Dalloz, Paris, vol. No 2, 1982, p. 383, in particular p. 398.

in *Effer*,[48] that the assessment of 'the existence of the constituent parts of the contract itself'[49] is 'indispensable in order to enable the national court in which proceedings are brought to examine whether it has jurisdiction',[50] it being immaterial in this regard whether nullity constitutes the claim or the defence.

73. Thirdly, an argument by analogy may be drawn from Article 10(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).[51] According to that provision, which defines the scope of the law of the contract, the existence and validity of a contract, or of any term of a contract, is in principle to be determined by the law which would govern it under that regulation if the contract or term were valid. If, therefore, the conditions governing the validity of the contract are not the subject of a connecting factor and are assessed in accordance with the law of the contract, it is reasonable to take the view, by analogy, that an action for nullity which seeks an order penalising non-compliance with those conditions constitutes a matter relating to a contract.

74. Fourthly, a further argument by analogy may, in my opinion, be drawn from the case-law of the Court concerning jurisdiction in respect of actions for a negative declaration seeking to establish the absence of liability in tort. In its judgment in *Folien Fischer and Fofitec*,[52] the Court included such actions within the scope of 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of Regulation No 44/2001 when it held that the reversal of the normal roles in matters relating to tort or delict was not to be taken into consideration.[53] If the positive action for a declaration of liability and the action for a negative declaration form two aspects of the same matter relating to tort or delict, is it not logical to take the view, by the same token, that an action for performance of a contract and an action for a declaration as to the nullity of that contract are two facets of the same matter relating to a contract?

75. Fifthly, that analysis is corroborated by an argument of expediency. Thus, I do not see any particular reason why the applicant should be deprived of the choice of jurisdiction afforded to him on the pretext that he is suing not for performance of the contract but for a declaration as to its nullity.

76. These are the reasons why I consider that a defendant who sues for a declaration as to the nullity of a contract has the choice of jurisdiction provided for in Article 5(1) of Regulation No 44/2001.

77. I shall also give an affirmative answer to the second question, concerning the possibility for the court to rule on the consequences of the annulment of the contract.

78. The first reason is theoretical. If, as I suggest, a declaration as to the nullity of a contract must be regarded as a ruling in a matter relating to a contract, the same must be particularly true when it comes to drawing the appropriate consequences from that nullity. After all, the right of a party to restitution of a sum promised under contract presupposes that it previously paid the sum, pursuant to that contract, of which it is seeking restitution, with the result that the situation here is indeed a matter relating to a contract within the autonomous meaning attaching to that concept under Regulation No 44/2001.

48 — 38/81, EU:C:1982:79.

49 — Paragraph 7.

50 — Idem.

51 — OJ 2008 L 177, p. 6, and corrigendum, OJ 2009 L 309, p. 87.

52 — C-133/11, EU:C:2012:664.

53 — Paragraphs 43 and 44. See also to this effect the judgment in *Tatry* (C-406/92, EU:C:1994:400), where the Court held that an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss (paragraph 45).

79. Commerzbank considers, however, that the action for restitution, being separate from and independent of the action for nullity, is not based on a contractual obligation freely consented to, given that, being based on the absence of any consideration in return for the pecuniary contribution, it has its source directly in national law.

80. I am not persuaded by that argument. It should be recalled that the expression 'matters relating to a contract' within the meaning of Article 5(1) of Regulation No 44/2001 is to be the subject of an autonomous interpretation which cannot depend on the legal basis for the action under the applicable national law, with the result that it makes no difference whether the action for restitution may have a statutory basis under that law. If there had not been a contractual relationship freely assumed between the parties, the obligation would not have been performed and there would be no right to restitution. That causal link between the right to restitution and the contractual relationship is sufficient to bring the action for restitution within the scope of matters relating to a contract.

81. The second reason is practical. To take the view that a court seised of an action under Article 5(1) of Regulation No 44/2001would, if the contract were void, have to confine itself to declining jurisdiction to rule on the substance of the case, would be tantamount to compelling the applicant to bring the matter before another court in order to be able to bring to bear the practical consequences of that finding. Splitting the dispute between two courts, one of which would establish nullity while the other would draw the appropriate consequences from that nullity, would not be in the interests either of the proper administration of justice or of the individuals concerned.

82. The third reason is based on an analogy. It is taken from Article 12(1)(e) of Regulation No 593/2008, which provides that the law applicable to a contract by virtue of that regulation is to govern, in particular, the consequences of nullity of the contract. As the United Kingdom Government suggests, it seems appropriate to reason by analogy with that provision, which is informed by the EU legislature's wish to make all disputes relating to a contract subject to the same scheme of law, while recognising that, where the applicant elects to exercise its choice of jurisdiction, the action for restitution must be subject to the same jurisdiction as that which governs the contract.

83. Before proposing that the Court should answer the third question raised by the referring court in the affirmative, however, I must examine a practical difficulty that might be presented by the application of the provisions of Article 5(1) of Regulation No 44/2001 to the action seeking annulment.

84. This has to do with the fact that jurisdiction under Article 5(1)(a) of Regulation No 44/2001 is established on the basis of the place where the obligation forming the basis for the claim was or is to be performed. The application of that provision to a claim for a declaration as to the nullity of a contract presents the technical problem of how to identify the obligation forming the basis of the claim for annulment.

85. Such a claim would not be based on a specific obligation, since it would seek the termination of the contractual relationship in its entirety, together with all the obligations associated with it. Consequently, jurisdiction might lie with each of the courts in whose district one of those obligations had been or was going to be performed. Furthermore, if, in the case of a contract of sale such as that at issue in the main proceedings, a specific obligation had to be identified, there would be legitimate uncertainty as between the obligation to deliver the thing sold, which is the defining obligation of the contract, and the obligation to pay the price, which would form the basis for an action for restitution. While I do not deny that that difficulty exists, it strikes me as being a feasible proposition to say that, in the specific case of an action for nullity, the obligation forming the basis of the action is the defining obligation.

86. In my opinion, the referring court was therefore right to observe that, if Article 5(1) of Regulation No 44/2001 were held to be applicable, the matter would then be decided by identifying the place where the CLNs purchased by Profit were or should have been delivered.

87. In the light of those various considerations, I take the view that an action for the annulment of a contract and restitution of the sums paid on the basis of the void act must be regarded as constituting a 'matter relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001.

D – *The first question*

88. By its first question, the referring court asks, in essence, whether Article 6(1) of Regulation No 44/2001 must be interpreted as meaning that, in order for there to be a connecting link between two claims brought against a number of defendants, it is sufficient that the upholding of one of those actions is potentially capable of affecting the extent of the interest on the grounds of which the other action has been brought, even though the subject-matter of those two claims is different and the basis for the pleas in law raised therein are different and there is no relationship between them of subordination or legal incompatibility.

89. More specifically, the difficulty for the Corte suprema di cassazione, is to ascertain whether there is a connecting link between the claim for nullity and restitution of the price paid, which it considers to have been directed exclusively against Commerzbank and Redi, whose registered offices are located in Member States other than the Italian Republic, and the action for damages, which is based on the allegation of bad management on the part of Profit Holding. While pointing out that the claim directed against the latter may hold good irrespective of whether the contract for the sale of the CLNs is valid or, conversely, void, the referring court observes that a decision upholding the action for restitution of the price paid could affect the assessment of the loss actually suffered by Profit. It therefore asks whether the possibility for the court to extend its jurisdiction in the event of there being more than one defendant is dictated by a criterion of pure expediency based on the interest that lies in having a single hearing and a single decision, or on a stricter parameter based on the risk of judgments which are both logically and legally irreconcilable.

90. In that regard, it should be recalled that the Court has on a number of occasions already stated its position on the scope of the rule of special jurisdiction contained in Article 6(1) of Regulation No 44/2001, which derogates from the principle that jurisdiction lies with the courts of the defendant's domicile, laid down in Article 2 of that regulation, by stating that a defendant may be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

91. As regards the assessment of the substance of the connecting link, that is to say the risk of irreconcilable judgments if the claims were heard and determined separately, the Court has held that it is for the national court to assess the existence of that risk and, in that regard, to take account of all the necessary factors in the case-file.[54] To my mind, the Court was wise to lay down that rule, given the extent to which that assessment depends on the specific factual and legal configuration of each claim brought before the national courts.

92. The Court has nonetheless established criteria by reference to which the national court may make its determination.

54 — See the judgment in *Solvay* (C-616/10, EU:C:2012:445, paragraph 23 and the case-law cited).

93. In its judgment in *Roche Nederland and Others*,[55] it held that, 'in order that decisions may be regarded as contradictory, it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise *in the context of the same situation of law and fact*.[56] Further clarifying the criterion to the effect that the legal situations must be identical, in its judgment in *Freeport*,[57] it held that the conditions laid down for the application of Article 6(1) of Regulation No 44/2001 did not include a requirement that the actions brought against the defendants should have identical legal bases.[58]

94. Those general guidelines do not provide a very clear indication of the scope of the condition as to the irreconcilability of judgments. It is true that the assessment of the connecting link depends in large measure on the factual circumstances of each case, which makes it difficult to establish a clear criterion by which to draw the boundary between circumstances that constitute a connecting link such as to justify derogation from the customary ground of jurisdiction and those that do not.

95. I would first of all rule out any possibility for the national court to extend its jurisdiction to co-defendants domiciled abroad solely for reasons of expediency, however legitimate they may be, based on the needs of the proper administration of justice. After all, making an extension of the jurisdiction of the court seised subject to the sole condition that that extension must be justified by the interests of the proper administration of justice would have the effect of rendering meaningless the principle, established by case-law and enshrined in Article 6(1) of Regulation No 44/2001, that an extension of jurisdiction is subject to the condition of there being a risk of irreconcilable judgments. Moreover, that provision reflects the desire of the EU legislature to strike a balance between the demands of the proper administration of justice and the need to respect the general principle that jurisdiction lies with the courts of the Member State in which the defendant is domiciled, enshrined in Article 2(1) of Regulation No 44/2001.

96. I consider, next, that it is not sufficient, in order for two claims directed against a number of defendants to be regarded as connected, that the decision given on one be capable of affecting the decision to be given on the other. The requirement that a divergence must arise in the context of the same situation of law and fact makes it necessary to ascertain whether the decisions that might be given by two different courts have the potential to be inconsistent and contradictory, even if it is not necessary to establish that they will have radically irreconcilable legal consequences.

97. In this regard, I share the view put forward by the referring court to the effect that separate hearings and judgments in the claim for nullity and restitution on the ground of the imbalance of the contract or lack of an insufficient consideration directed against Commerzbank and Redi, on the one hand, and the action for damages directed primarily against Profit Holding on the ground of bad management imputed to that company, on the other hand, do not entail a risk of irreconcilable judgments.

98. For one thing, I doubt that the factual situations are identical, even though both claims are broadly concerned with the consequences of Profit's subscription for the CLNs. After all, the action for damages is, according to the referring court, founded on factual circumstances other than the aforementioned subscription alone, namely that the parent company set up and implemented a transaction in its own interests or in the interests of a third party, thereby intentionally acting to the detriment of the interests of its subsidiary.

55 — C-539/03, EU:C:2006:458.

56 — Paragraph 56. Emphasis added.

57 — C-98/06, EU:C:2007:595.

58 — Paragraphs 38 and 47.

99. Above all, I do not believe that the legal situations are identical, in so far as the actions brought are different not only in terms of their legal basis but also as regards their subject-matter. Thus, as the referring court points out, the action for liability might succeed whether the action for nullity is successful or not.

100. The mere fact that the restitution of the price paid that would be effected if the action for nullity were upheld might have an impact on the extent of the loss suffered by Profit if the latter were awarded damages against Profit Holding, does not, to my mind, represent a risk of irreconcilable judgments.

101. I therefore suggest that the answer to the first question should be that Article 6(1) of Regulation No 44/2001 must be interpreted as meaning that, in order for there to be a connecting link between two claims brought against a number of defendants, it is not sufficient for the upholding of one of those actions to be potentially capable of affecting the extent of the interest on the grounds of which the other action has been brought.

IV – **Conclusion**

102. In the light of the foregoing considerations, I propose that the Court answer the questions raised by the Corte suprema di cassazione as follows:

(1) Article 23 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that:

— where a prorogation of jurisdiction clause is inserted in the prospectus for the issue of securities such as the credit linked notes at issue in the main proceedings, the requirement of writing laid down in paragraph 1(a) of that article is satisfied only where the contract signed by the parties refers to the acceptance of that clause or contains an express reference to that prospectus, and

— a prorogation of jurisdiction clause contained in a prospectus for the issue of securities such as the credit linked notes at issue in the main proceedings which was created unilaterally by the issuer of those securities is enforceable against the third party that purchased them from a financial intermediary only where it is established that that third party actually consented to that clause under the conditions laid down in that article.

However, the insertion of a prorogation of jurisdiction clause in a prospectus for the issue of securities such as the credit linked notes at issue in the main proceedings may be regarded as a form allowed by a usage of international trade and commerce within the meaning of Article 23(1)(c) of Regulation No 44/2001, thus supporting the presumption that the person against whom it is enforced consented to it, provided in particular that it is established, as will have to be verified by the national court, on the one hand, that such a course of conduct is generally and regularly followed by operators in the branch in question when concluding contracts of that type and, on the other hand, either that the parties had previously had commercial or trade relations between themselves or with other parties operating in the sector in question, or that the course of conduct in question is sufficiently well known, with the result that it may be regarded as being a consolidated practice.

(2) An action for the annulment of a contract and restitution of the sums paid on the basis of the void act must be regarded as constituting a ‘matter relating to a contract’ within the meaning of Article 5(1)(a) of Regulation No 44/2001.

(3) Article 6(1) of Regulation No 44/2001 must be interpreted as meaning that, in order for there to be a connecting link between two claims brought against a number of defendants, it is not sufficient that the upholding of one of those actions is potentially capable of affecting the extent of the interest on the grounds of which the other action was brought.