Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

20 April 2016*

(Reference for a preliminary ruling — Regulation (EC) No 44/2001 — Area of Freedom, Security and Justice — Concept of 'irreconcilable judgments' — Actions having different subject-matters brought against several defendants domiciled in various Member States — Conditions for the prorogation of jurisdiction — Jurisdiction clause — Concept of 'matters relating to a contract' — Verification of the lack of a valid contractual link)

In Case C-366/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 28 May 2013, received at the Court on 1 July 2013, in the proceedings

Profit Investment Sim SpA, in liquidation

v

Stefano Ossi,

Commerzbank Brand Dresdner Bank AG,

Andrea Mirone,

Eugenio Magli,

Francesco Redi,

Profit Holding SpA, in liquidation,

Redi & Partners Ltd,

Enrico Fiore,

E3 SA,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the Chamber, F. Biltgen, A. Borg Barthet, M. Berger and S. Rodin (Rapporteur), Judges,

Advocate General: Y. Bot,

* Language of the case: Italian.

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 5 March 2015,

after considering the observations submitted on behalf of:

— Profit Investment SIM SpA, in liquidation, by L. Gaspari, acting as court-appointed liquidator, assisted by P. Pototschnig and F. De Simone, avvocati,

— Commerzbank Brand Dresdner Bank AG, by E. Castellani and G. Curtò, avvocati, and by C. Gleske, avocat,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by L. D'Ascia, avvocato dello Stato,

— the United Kingdom Government, by L. Christie, acting as Agent, assisted by B. Kennelly, Barrister,

— the European Commission, by F. Moro, A.-M. Rouchaud-Joët and E. Traversa, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 April 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation 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 (OJ 2001 L 12, p. 1).

2 The request has been made in proceedings between Profit Investment SIM SpA, in liquidation ('Profit'), and Mr Stefano Ossi, Commerzbank Brand Dresdner Bank AG ('Commerzbank'), Mr Andrea Mirone, Mr Eugenio Magli, Mr Francesco Redi, Profit Holding SpA, in liquidation, Redi & Partners Ltd ('Redi'), Mr Enrico Fiore and E3 SA.

Legal context

3 Pursuant to Article 68(1) of Regulation No 44/2001, which entered into force on 1 March 2002, that regulation is to supersede, as between the Member States, with the exception of the Kingdom of Denmark, the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36).

4 Recital 2 of Regulation No 44/2001 states that the purpose of that regulation, in the interest of the sound operation of the internal market, is:

'... to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation …'.

5 Recitals 11 and 12 of Regulation No 44/2001 explain, as follows, the relationship between the various rules of jurisdiction and their normative objectives:

‘(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. …

(12) In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.’

6 Article 2(1) of Regulation No 44/2001, which comes under Section 1 of Chapter II, entitled ‘General provisions’, is worded as follows:

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

7 Article 5 of Regulation No 44/2001, which comes under Section 2 of Chapter II, entitled, ‘Special jurisdiction’, provides, in its first paragraph:

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

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
   (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

   — in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

   — in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
   (c) if subparagraph (b) does not apply then subparagraph (a) applies;

…’

8 Article 6(1) of Regulation No 44/2001, which also comes under Section 2 of Chapter II, 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 proceeding;

…’

9 Article 23(1) of Regulation No 44/2001, which comes under Section 7 of Chapter II, entitled 'Prorogation of jurisdiction', is worded as follows:

'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 an 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.

…'

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

10 In May 2004, Commerzbank, formerly Dresdner Bank AG, a German commercial bank active in the 'structured finance' sector, launched on the market a programme for the issue of bonds indexed to a credit risk ('the bonds'), known as the 'Credit Linked Note Programme' ('the issuing programme'). In the context of that issuing programme, Commerzbank could issue bonds amounting to a maximum total value of EUR 4 billion.

11 The general rules governing the programme and the economic and legal conditions of the bonds were set out in the issuing prospectus ('the prospectus'). In the present case, that prospectus was approved in advance by the Irish Stock Exchange, which, incidentally, has never been contested by the parties concerned. That prospectus remained available to the public on the website of the Irish Stock Exchange.

12 Paragraph 16 of the 'Terms and conditions of the Notes' contains a jurisdiction clause, according to which the courts of England have exclusive jurisdiction to settle any dispute arising from or connected with the bonds.

13 In September 2004, Commerzbank, in the context of the issuing programme, began to issue bonds linked to those previously issued by E3 ('the E3 bonds'), entitled 'Dresdner Total Return Notes linked to E3 SA' ('the bonds in question'), with a total value of EUR 2 300 000.

14 On 27 October 2004, Redi, a company licensed to operate as a financial intermediary by the United Kingdom Financial Services Authority, subscribed, on the 'primary' market, for all of the bonds in question issued by Commerzbank.

15 On the same date, Redi, after subscribing for those bonds, sold a part thereof, amounting to EUR 1 100 000, to Profit on the 'secondary' market.

16 In spring 2006, E3 failed to meet its payment obligation in respect of the tranche of interest due on 15 April 2006 on the E3 bonds. Commerzbank consequently gave notice of that credit event and, on 5 July 2006, cancelled the bonds in question by issuing to Profit the corresponding number of E3 bonds.

17 That credit event in relation to the bonds in question brought about the compulsory administrative liquidation of Profit, a company governed by Italian law, which brought an action before the tribunale di Milano (Milan District Court, Italy) against Commerzbank, Profit Holding, Redi and E3, as well as Mr Ossi and Mr Magli, a member of the board of directors and the managing director of Profit, respectively, and against Mr Fiore, a partner of E3, seeking, in essence:

— a declaration of nullity of the agreements pursuant to which it acquired the bonds in question issued by Commerzbank and sold by Redi, on the grounds of an imbalance of the contract, insufficient or a lack of consideration, and consequently, the recovery of sums paid but not due, namely the restitution of the sum paid in order to execute that purchase;

— a declaration of the liability of its parent company, also governed by Italian law, Profit Holding, on the basis of Article 2497 of the Codice civile (Italian Civil Code), in that Profit Holding infringed the principles of sound administration of companies and businesses by leading its subsidiary to conclude the transactions in question and is therefore required to make good the damage allegedly suffered by Profit as a result of that mismanagement. That claim for compensation is also made jointly and severally against Redi, as well as Mr Ossi, Mr Magli and Mr Fiore, on the basis of the premiss that those persons cooperated in various ways with Profit Holding in order to cause the unjustified damage to Profit.

18 Mr Ossi and Commerzbank, as well as Mr Mirone, who was joined as a party to the proceedings by Commerzbank, contended that the Italian court lacked jurisdiction, because, inter alia, the jurisdiction clause contained in the prospectus assigned jurisdiction to the English courts. Profit therefore applied to the Corte suprema di Cassazione (Supreme Court of Cassation, Italy) for a preliminary determination of jurisdiction.

19 In those circumstances, the Corte suprema di Cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice 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 and 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 [prospectus] 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)(c) 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 contractual 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?’

Consideration of the questions referred

20 Observations were submitted by Profit, Commerzbank, the Italian Government, the Government of the United Kingdom and the European Commission.

21 Before examining the first question referred, it is necessary to respond to the second and third questions. As the Advocate General pointed out in point 29 of his Opinion, if, on the basis of the answer given to the second question, the referring court were to conclude that the jurisdiction clause at issue in the main proceedings may be validly enforced against Profit, it would therefore necessarily have to declare that the Tribunale di Milano (Milan District Court) does not have 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.

The second question

22 By its second question, the referring court asks, in essence, whether Article 23(1)(a) and (c) of Regulation No 44/2001 must be interpreted as meaning that a jurisdiction clause, such as that at issue in the main proceedings, satisfies the formal requirements laid down in Article 23(1)(a) where (i) it is contained in a prospectus produced by the bond issuer concerning the issue of bonds, (ii) it is enforceable against third parties who acquire those bonds through a financial intermediary and (iii), in the event that the first two parts of the second question are answered in the negative, it corresponds to a usage in the field of international trade or commerce for the purpose of Article 23(1)(c).

23 As a preliminary point, it must be stated that, as regards the conditions for the validity of a jurisdiction clause, Article 23(1) of Regulation No 44/2001 sets out in substance the formal requirements and mentions only one substantive condition relating to the subject-matter of the clause, which must concern a particular legal relationship. Therefore, the wording of that provision does not indicate whether a jurisdiction clause may be transmitted, beyond the circle of the parties to a contract, to a third party, who is a party to a subsequent contract and successor, in whole or in part, to the rights and obligations of one of the parties to the initial contract (see, inter alia, judgment of 7 February 2013 in *Refcomp*, C-543/10, EU:C:2013:62, paragraph 25).

24 However, Article 23(1) of Regulation No 44/2001 clearly indicates that its scope is limited to cases in which the parties have ‘agreed’ on a court. As appears from recital 11 of that regulation, it is that consensus between the parties which justifies the primacy granted, in the name of the principle of the freedom of choice, to the choice of a court other than that which may have had jurisdiction under that regulation (judgment in *Refcomp*, C-543/10, EU:C:2013:62, paragraph 26).

25 In order to respond to the first part of the second question, it must be determined whether a jurisdiction clause contained in a prospectus unilaterally produced by the bond issuer concerning the issue of bonds meets the ‘in writing’ requirement laid down in Article 23(1)(a) of Regulation No 44/2001.

26 The Court has already held that that requirement is not fulfilled where a jurisdiction clause is included among the general conditions of sale of one of the parties, printed on the back of a contract, unless the contract contains an express reference to those general conditions (judgment of 14 December 1976 in *Estasis Saloti di Colzani*, 24/76, EU:C:1976:177, paragraph 10).

27 In addition, according to settled case-law, 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 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, ensuring the real consent of the parties is one of the aims of that provision (see, inter alia, judgment of 7 February 2013 in *Refcomp*, C-543/10, EU:C:2013:62, paragraph 28 and case-law cited)

and that, consequently, that provision imposes on the court before which the matter is brought the duty of examining whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated (see, inter alia, judgments of 9 November 2000 in *Coreck*, C-387/98, EU:C:2000:606, paragraph 13 and the case-law cited, and of 7 February 2013 in *Refcomp*, C-543/10, EU:C:2013:62, paragraph 27).

28 In the main proceedings, the clause conferring jurisdiction on the English courts is contained in the prospectus, a document produced by the bond issuer. It is not entirely clear from the order for reference whether that clause was included, or expressly referred to, in the contractual documents signed upon the issue of the bonds on the primary market.

29 The answer to the first part of the second question is therefore that, where a jurisdiction clause is included in a prospectus concerning the issue of bonds, the formal requirement laid down in Article 23(1)(a) of Regulation No 44/2001 is met only if the contract signed by the parties upon the issue of the bonds on the primary market expressly mentions the acceptance of that clause or contains an express reference to that prospectus, which it is for the referring court to verify.

30 If so, it is also for the referring court to determine whether the contract signed by Redi and Profit upon the sale of the bonds on the secondary market also mentions the acceptance of that clause or contains such a reference. If that is the case, that clause must be regarded as enforceable against Profit.

31 It is only if that is not the case that the second part of the second question arises, namely whether a jurisdiction clause, validly agreed in the contract concluded between the issuer of a bond and the subscriber for that bond, may be enforceable against a third party who acquired that bond from that subscriber, without expressly consenting to that clause, and who has brought an action for damages against that issuer.

32 The Court, in paragraph 33 of its judgment of 7 February 2013 in *Refcomp* (C-543/10, EU:C:2013:62), held, in the context of an action for damages brought by the sub-buyer of goods against the manufacturer of those goods, that, in the absence of a contractual link between them, 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.

33 However, adjudicating on matters relating to maritime transport contracts, the Court acknowledged that a jurisdiction clause incorporated in a bill of lading may be relied on against a third party to that contract if that clause has been adjudged valid between the carrier and the shipper and 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. It is as a result of that relationship of substitution between the shipper and the third party holder of the bill of lading that, by acquiring that bill, the third party holder is bound by the jurisdiction clause. If there is, under national law, such a relationship, there is no need for the court hearing the case to ascertain whether that third party accepted that jurisdiction clause. In that respect, the Court has emphasised the very specific nature of bills of lading, which are instruments of international commerce intended to govern a relationship involving at least three persons. Thus, the bill of lading is a negotiable instrument which allows the owner to transfer the goods, en route, to a purchaser who becomes the holder of all the rights and obligations of the shipper in relation to the carrier (see, to that effect, judgments of 19 June 1984 in *Russ*, 71/83, EU:C:1984:217, paragraph 24; of 16 March 1999 in *Castelletti*, C-159/97, EU:C:1999:142, paragraph 41; of 9 November 2000 in *Coreck*, C-387/98, EU:C:2000:606, paragraphs 23 to 27, and of 7 February 2013 in *Refcomp*, C-543/10, EU:C:2013:62, paragraphs 34 to 36).

34 Furthermore, the Court has also held, in relation to a subscription for shares in a company, that, by becoming a shareholder, the shareholder agrees to be subject to all the provisions appearing in the statutes of the company, including a clause conferring jurisdiction contained in those statutes, and is

bound by that clause, provided that the statutes are lodged in a place to which the shareholder may have access, such as the seat of the company, or are contained in a public register (see, to that effect, judgment of 10 March 1992 in *Powell Duffryn*, C-214/89, EU:C:1992:115, paragraphs 19 and 28).

35 In the main proceedings, the question that arises is whether Commerzbank, the issuer of the bonds in question, may rely on the jurisdiction clause included in the prospectus against Profit, the last acquirer of those bonds, which acquired them through a contract concluded with Redi.

36 In view of the case-law set out in paragraphs 33 and 34 of the present judgment, that question must be answered in the affirmative if it is established, which it is for the referring court to verify, that (i) that clause is valid in the relationship between Commerzbank and Redi, the first subscriber for those bonds, (ii) Profit, by acquiring those bonds on the secondary market from Redi, succeeded to the latter's rights and obligations attached to those bonds under the applicable national law and, (iii) Profit had the opportunity to acquaint itself with the prospectus containing that clause, which implies that that prospectus is readily accessible.

37 Consequently, the answer to the second part of the second question is that Article 23 of Regulation No 44/2001 must be interpreted as meaning that a jurisdiction clause contained in a prospectus produced by the bond issuer concerning the issue of bonds may be relied on against a third party who acquired those bonds from a financial intermediary if it is established, which it is for the referring to verify, that (i) that clause is valid in the relationship between the issuer and the financial intermediary, (ii) the third party, by acquiring those bonds on the secondary market, succeeded to the financial intermediary's rights and obligations attached to those bonds under the applicable national law, and (iii) the third party had the opportunity to acquaint himself with the prospectus containing that clause.

38 As regards the third part of the second question, the referring court asks the Court, in the event that the first two parts of that question are answered in the negative, about the potential existence of a usage in international trade or commerce known to the parties.

39 It follows from the case-law that one of the aims pursued by Article 23(1)(c) of Regulation No 44/2001 is to ensure that there is real consent on the part of the persons concerned, so as to avoid jurisdiction clauses, incorporated in a contract by one party, going unnoticed (see, to that effect, judgments of 20 February 1997 in *MSG*, C-106/95, EU:C:1997:70, paragraph 17, and of 16 March 1999 in *Castelletti*, C-159/97, EU:C:1999:142, paragraph 19).

40 The Court has added, however, that Article 23(1)(c) makes it possible to presume that such consent exists where commercial usages of which the parties are or ought to have been aware exist in this regard in the relevant branch of international trade or commerce (see, to that effect, judgments of 20 February 1997 in *MSG*, C-106/95, EU:C:1997:70, paragraph 19, and of 16 March 1999 in *Castelletti*, C-159/97, EU:C:1999:142, paragraphs 20 and 21).

41 In that respect, the Court has indicated 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 practice in the branch of international trade or commerce in which the parties are operating and whether they were aware or are presumed to have been aware of that practice. The Court should nevertheless indicate the objective factors needed in order to make such a determination (see, to that effect, judgments of 20 February 1997 in *MSG*, C-106/95, EU:C:1997:70, paragraph 21, and of 16 March 1999 in *Castelletti*, C-159/97, EU:C:1999:142, paragraph 23).

42 As regards the first point, it is common ground that, in the main proceedings, the contract is one forming part of international trade or commerce.

43 As to the second point, the Court has already explained that whether a usage exists is not to be determined by reference to the law of one of the Contracting Parties or in relation to international trade or commerce in general, but in relation to the branch of trade or commerce in which the parties to the contract operate (judgments of 20 February 1997 in *MSG*, C-106/95, EU:C:1997:70, paragraph 23, and of 16 March 1999 in *Castelletti*, C-159/97, EU:C:1999:142, paragraph 25).

44 The Court has added that there is a usage in the branch of trade or commerce in question where, in particular, a certain course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type (judgments of 20 February 1997 in *MSG*, C-106/95, EU:C:1997:70, paragraph 23, and of 16 March 1999 in *Castelletti*, C-159/97, EU:C:1999:142, paragraph 26).

45 The Court has therefore concluded that it is not necessary for such a course of conduct to be established in specific countries or, in particular, in all the Contracting States. The fact that a practice is generally and regularly observed by operators in countries which play a prominent role in the branch of international trade or commerce in question can be evidence which helps to prove that a usage exists. The determining factor remains, however, whether the course of conduct in question is generally and regularly followed by operators in the branch of international trade or commerce in which the parties to the contract operate (judgment of 16 March 1999 in *Castelletti*, C-159/97, EU:C:1999:142, paragraph 27).

46 In that respect, the Court has also stated that since Article 23 of Regulation No 44/2001 does not contain any reference to forms of publicity, it must be held that, although any publicity which might be given in associations or specialised bodies to the standard forms on which a jurisdiction clause appears may help to prove that a practice is generally and regularly followed, such publicity cannot be a requirement for establishing the existence of a usage (judgment of 16 March 1999 in *Castelletti*, C-159/97, EU:C:1999:142, paragraph 28).

47 Moreover, a course of conduct satisfying the conditions indicative of a usage does not cease to be a usage because it is challenged before the courts, whatever the extent of the challenges, provided that it still continues to be generally and regularly followed in the trade with which the type of contract in question is concerned (see, to that effect, judgment of 16 March 1999 in *Castelletti*, C-159/97, EU:C:1999:142, paragraph 29).

48 It follows from the case-law that actual or presumed awareness of a usage on the part of the parties may be made out, in particular, by showing 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, 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, so that it may be regarded as being an established practice (judgments of 20 February 1997 in *MSG*, C-106/95, EU:C:1997:70, paragraph 24, and of 16 March 1999 in *Castelletti*, C-159/97, EU:C:1999:142, paragraph 43).

49 In order to determine, in the main proceedings, whether the insertion into the prospectus of a jurisdiction clause constitutes a usage in the sector in which the parties operate, of which those parties were aware or ought to have been aware, the referring court must take into account, inter alia, the fact that that prospectus was approved in advance by the Irish Stock Exchange and made available to the public on the latter's website, which does not seem to have been contested by Profit in the proceedings on the merits. In addition, the referring court must take account of the fact that it is undisputed that Profit is a company active in the field of financial investments as well as of any commercial relationships it may have had in the past with the other parties to the main proceedings. The national court must also verify whether the issue of bonds on the market is, in that sector, generally and regularly accompanied by a prospectus containing a jurisdiction clause and whether that practice is sufficiently well known to be regarded as 'established'.

50 Consequently, the answer to the third part of the second question is that the insertion of a jurisdiction clause into a prospectus concerning the issue of bonds may be regarded as a form which accords with a usage in international trade or commerce, for the purpose of Article 23(1)(c) of Regulation No 44/2001, allowing the consent of the person against whom it is relied upon to be presumed, provided inter alia that it is established, which it is for the referring court to verify, (i) that such conduct is generally and regularly followed by the operators in the sector concerned when contracts of that type are concluded and (ii) 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 conduct in question is sufficiently well known to be considered an established practice.

51 In the light of all the foregoing considerations, the answer to the second question referred is that Article 23 of Regulation No 44/2001 must be interpreted as meaning that:

— where a jurisdiction clause is included in a prospectus concerning the issue of bonds, the 'in writing' requirement laid down in Article 23(1)(a) of Regulation No 44/2001 is met only if the contract signed by the parties upon the issue of the bonds on the primary market expressly mentions the acceptance of that clause or contains an express reference to that prospectus;

— a jurisdiction clause contained in a prospectus produced by the bond issuer concerning the issue of bonds may be relied on against a third party who acquired those bonds from a financial intermediary if it is established, which it is for the referring to verify, that (i) that clause is valid in the relationship between the issuer and the financial intermediary, (ii) the third party, by acquiring those bonds on the secondary market, succeeded to the financial intermediary's rights and obligations attached to those bonds under the applicable national law, and (iii) the third party had the opportunity to acquaint himself with the prospectus containing that clause; and

— the insertion of a jurisdiction clause into a prospectus concerning the issue of bonds may be regarded as a form which accords with a usage in international trade or commerce, for the purpose of Article 23(1)(c) of Regulation No 44/2001, allowing the consent of the person against whom it is relied upon to be presumed, provided inter alia that it is established, which it is for the referring court to verify, (i) that such conduct is generally and regularly followed by the operators in the particular trade or commerce concerned when contracts of that type are concluded and (ii) 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 conduct in question is sufficiently well known to be considered an established practice.

The third question

52 By its third question, the referring court asks, in essence, whether Article 5(1)(a) of Regulation No 44/2001 must be interpreted as meaning that the action seeking the annulment of a contract and the restitution of the amounts paid on the basis of a document the nullity of which is established must be regarded as 'matters relating to a contract', within the meaning of that provision.

53 In order to answer that question, it must be recalled at the outset that the concept of 'matters relating to a contract', within the meaning of that provision, cannot be taken to refer to the classification under the relevant national law of the legal relationship in question before the national court. That concept must, on the contrary, be interpreted independently, regard being had to the general scheme and objectives of Regulation No 44/2001, in order to ensure that it is applied uniformly in all the Member States (judgments of 17 June 1992 in *Handte*, C-26/91, EU:C:1992:268, paragraph 10; of 14 March 2013 in *Česká spořitelna*, C-419/11, EU:C:2013:165, paragraph 45, and of 28 January 2015 in *Kolassa*, C-375/13, EU:C:2015:37, paragraph 37).

54 It follows from the case-law resulting from the judgment of 4 March 1982 in *Effer* (38/81, EU:C:1982:79) 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 under Regulation No 44/2001. If that were not the case, the provisions of Article 5 of Regulation No 44/2001 would be in danger of being deprived of their legal effect, since it would be accepted that, in order to defeat the rule contained in those provisions, it is sufficient for one of the parties to claim that the contract does not exist. On the contrary, respect for the aims and spirit of Regulation No 44/2001 demands that those provisions should be construed as meaning that the court called upon to decide a dispute arising out of a contract may examine, even of its own motion, the essential preconditions for its jurisdiction, having regard to conclusive and relevant evidence adduced by the party concerned, establishing the existence or the non-existence of the contract.

55 Furthermore, as regards the link between the action for a declaration of nullity and the recovery of sums paid but not due, it suffices to note, as the Advocate General pointed out in point 80 of his Opinion, that, 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.

56 In the main proceedings, if there is no doubt that Profit and Redi are linked by a contract, the referring court will have to verify, as set out in paragraph 36 of the present judgment, whether Profit succeeded to Redi's rights and obligations attached to those the bonds under the applicable national law, with the result that there is a contractual relationship between Profit and Commerzbank.

57 It follows from paragraphs 54 and 55 of the present judgment that, in a case such as that in the main proceedings, Profit may invoke in its relations with Redi and — subject to the verifications to be carried out by the referring court as mentioned in the previous paragraph — in its relations with Commerzbank, the jurisdiction of the courts of the place of performance of the contract pursuant to Article 5(1) of Regulation No 44/2001, even if the formation of the contract that gave rise to the action is a matter of dispute between the parties.

58 In view of the foregoing, the answer to the third question referred is that Article 5(1)(a) of Regulation No 44/2001 must be interpreted as meaning that actions seeking the annulment of a contract and the restitution of sums paid but not due on the basis of that contract constitute 'matters relating to a contract' within the meaning of that provision.

The first question

59 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 where two actions — which have different subject-matters and bases and which are not connected by a link of subordination or incompatibility — are brought against several defendants, the fact that the upholding of one of those actions is potentially capable of affecting the extent of the right whose protection is sought by the other action suffices to give rise to a risk of irreconcilable judgments within the meaning of that provision.

60 First of all, it must be observed that Article 6(1) of Regulation No 44/2001 provides, in order to avoid irreconcilable judgments resulting from separate proceedings, 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.

61 As regards its purpose, the rule of jurisdiction in Article 6(1) of Regulation No 44/2001 meets, in accordance with recitals 12 and 15 of that regulation, the wish to facilitate the sound administration of justice, to minimise the possibility of concurrent proceedings and thus to avoid irreconcilable outcomes if cases are decided separately (see, inter alia, judgments of 1 December 2011 in *Painer*, C-145/10, EU:C:2011:798, paragraph 77, and of 12 July 2012 in *Solvay*, C-616/10, EU:C:2012:445, paragraph 19).

62 Moreover, that special rule of jurisdiction must be interpreted in the light, first, of recital 11 of Regulation No 44/2001, according to which the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different connecting factor (see, inter alia, judgments of 11 October 2007 in *Freeport*, C-98/06, EU:C:2007:595, paragraph 36, and of 12 July 2012 in *Solvay*, C-616/10, EU:C:2012:445, paragraph 20).

63 That special rule of jurisdiction, because it derogates from the principle stated in Article 2 of Regulation No 44/2001 that jurisdiction be based on the defendant's domicile, must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by that regulation (see, inter alia, judgments of 1 December 2011 in *Painer*, C-145/10, EU:C:2011:798, paragraph 74 and the case-law cited, and of 12 July 2012 in *Solvay*, C-616/10, EU:C:2012:445, paragraph 21).

64 Furthermore, the Court has held that it is for the national court to assess whether there is a connection between the different claims brought before it, that is to say, a risk of irreconcilable judgments if those claims were determined separately and, in that regard, to take account of all the necessary factors in the case-file (see, inter alia, judgments of 11 October 2007 in *Freeport*, C-98/06, EU:C:2007:595, paragraph 41; of 1 December 2011 in *Painer*, C-145/10, EU:C:2011:798, paragraph 83, and of 12 July 2012 in *Solvay*, C-616/10, EU:C:2012:445, paragraph 23).

65 The Court has however stated in this connection that, in order for judgments to be regarded as at risk of being irreconcilable within the meaning of Article 6(1) of Regulation No 44/2001, it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the same situation of fact and law (see, inter alia, judgments of 13 July 2006 in *Roche Nederland and Others*, C-539/03, EU:C:2006:458, paragraph 26; of 11 October 2007 in *Freeport*, C-98/06, EU:C:2007:595, paragraph 40; of 1 December 2011 in *Painer*, C-145/10, EU:C:2011:798, paragraph 79, and of 12 July 2012 in *Solvay*, C-616/10, EU:C:2012:445, paragraph 24).

66 In order to assess, in a situation such as that at issue in the main proceedings, whether there is a connection between the various claims brought before it and therefore a risk of irreconcilable judgments if those claims were determined separately, it is for the national court to take into account, inter alia, as the Advocate General emphasised in paragraphs 95 to 100 of his Opinion, the factual and legal differences between, on the one hand, the procedure for damages on the ground of mismanagement and, on the other, the procedure for a declaration of nullity of one of the contracts and restitution of sums paid but not due, the results of which are independent. In that respect, the mere fact that the result of one of the procedures may have an effect on the result of the other — in particular the potential impact of the amount to be repaid in the context of a claim for a declaration of nullity and restitution of the sums paid but not due on the evaluation of the potential loss suffered in the context of a damages claim — does not suffice to characterise the judgments to be delivered in the two procedures as 'irreconcilable' for the purpose of Article 6(1) of Regulation No 44/2001.

67 In view of the foregoing considerations, the answer to the first question is that Article 6(1) of Regulation No 44/2001 must be interpreted as meaning that where two actions — which have different subject-matters and bases and which are not connected by a link of subordination or incompatibility —

are brought against several defendants, the fact that the upholding of one of those actions is potentially capable of affecting the extent of the right whose protection is sought by the other action does not suffice to give rise to a risk of irreconcilable judgments within the meaning of that provision.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) rules 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 jurisdiction clause is included in a prospectus concerning the issue of bonds, the formal requirement laid down in Article 23(1)(a) of Regulation No 44/2001 is met only if the contract signed by the parties upon the issue of the bonds on the primary market expressly mentions the acceptance of that clause or contains an express reference to that prospectus;**

   — **a jurisdiction clause contained in a prospectus produced by the bond issuer concerning the issue of bonds may be relied on against a third party who acquired those bonds from a financial intermediary if it is established, which it is for the referring to verify, that (i) that clause is valid in the relationship between the issuer and the financial intermediary, (ii) the third party, by acquiring those bonds on the secondary market, succeeded to the financial intermediary's rights and obligations attached to those bonds under the applicable national law, and (iii) the third party had the opportunity to acquaint himself with the prospectus containing that clause; and**

   — **the insertion of a jurisdiction clause into a prospectus concerning the issue of bonds may be regarded as a form which accords with a usage in international trade or commerce, for the purpose of Article 23(1)(c) of Regulation No 44/2001, allowing the consent of the person against whom it is relied upon to be presumed, provided inter alia that it is established, which it is for the referring court to verify, (i) that such conduct is generally and regularly followed by the operators in the particular trade or commerce concerned when contracts of that type are concluded and (ii) 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 conduct in question is sufficiently well known to be considered an established practice.**

2. **Article 5(1)(a) of Regulation No 44/2001 must be interpreted as meaning that actions seeking the annulment of a contract and the restitution of sums paid but not due on the basis of that contract constitute 'matters relating to a contract' within the meaning of that provision.**

3. **Article 6(1) of Regulation No 44/2001 must be interpreted as meaning that where two actions — which have different subject-matters and bases and which are not connected by a link of subordination or incompatibility — are brought against several defendants, the fact that the upholding of one of those actions is potentially capable of affecting the extent of the right whose protection is sought by the other action does not suffice to give rise to a risk of irreconcilable judgments within the meaning of that provision.**

[Signatures]