JUDGMENT OF THE COURT (Third Chamber)

12 May 2011 *

In Case C-144/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Kammergericht Berlin (Germany), made by decision of 8 March 2010, received at the Court on 18 March 2010, in the proceedings

Berliner Verkehrsbetriebe (BVG),

v

JPMorgan Chase Bank NA, Frankfurt Branch,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, D. Šváby, E. Juhász, G. Arestis and T. von Danwitz, Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 10 March 2011,

after considering the observations submitted on behalf of:

— Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts, by C. Stempfle and C. Volohonsky, Rechtsanwälte, and T. Lord, Barrister,

— JPMorgan Chase Bank NA, Frankfurt Branch, by K. Saffenreuther and C. Schmitt, Rechtsanwälte,

— the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

— the United Kingdom Government, by H. Walker, acting as Agent, and A. Henshaw, Barrister,

— the European Commission, by A.-M. Rouchaud-Joët, S. Grünheid and M. Wilderspin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 22(2) and 27 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 reference has been made in proceedings between Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts ('BVG'), and JPMorgan Chase Bank NA ('JPM'), Frankfurt Branch, concerning a financial derivative contract.

Legal context

3 Recital 11 in the preamble to Regulation No 44/2001 states:

'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. The domicile of a legal person must be defined autonomously so as to make the … rules more transparent …'

4 Article 1(1) of Regulation No 44/2001 provides:

'This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.'

5 Article 2(1) of the regulation 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.'

6 Article 22(1), (2) and (4), which form part of Section 6 of Chapter II of the regulation, state:

'The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

...

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

...

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

...'

7 Article 23 of the regulation 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....

...

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.'

8 Article 25 of the regulation is worded as follows:

'Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.'

9 Article 27 of the regulation states:

'1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'

10 Article 33(1) of the regulation provides:

'A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.'

11 Article 35(1) of the regulation is worded as follows:

'Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.'

12 Article 38(1) of the regulation states:

'A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.'

13 Article 60(1) of the regulation provides:

'For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat, or

(b) central administration, or

(c) principal place of business.'

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

14 According to the order for reference, on 19 July 2007 JPM, an American investment bank whose company seat is in New York (United States) and which has various branches and subsidiaries in Europe, including in Germany and the United Kingdom, and BVG, a legal person governed by public law whose seat is in Berlin (Germany) and which provides public transport services in the *Land* of Berlin, concluded, by means of a trade confirmation, an 'Independent Collateral Enhancement Transaction'

involving, inter alia, a contract ('the JPM Swap Contract'). This contract contains a clause conferring jurisdiction on the English courts.

15 It is apparent from the documents before the Court that, under the terms of the JPM Swap Contract, BVG agreed inter alia to pay JPM sums of up to USD 220 million in the event of default on payment by certain third-party companies and that BVG received a premium of approximately USD 7.8 million in return.

The proceedings brought in England by JPM and its United Kingdom subsidiary

16 JPM submits that since September 2008 some of the third-party companies covered by the JPM Swap Contract have been unable to meet payments and it therefore demanded that BVG pay the sums due under that contract. Since BVG refused to pay those sums, on 10 October 2008 JPM's London branch and its United Kingdom subsidiary brought proceedings against BVG in England before the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court) ('the High Court'), the court having jurisdiction under the terms of the JPM Swap Contract and therefore, in principle, under Regulation No 44/2001, by virtue of Article 23 thereof. That action sought the payment of approximately USD 112 million under BVG's payment obligations arising from the JPM Swap Contract, or the award of damages of the same amount, and the grant by the court of a series of declarations establishing, essentially, that the JPM Swap Contract had been freely entered into by BVG, without reliance on its part upon advice from JPM or its United Kingdom subsidiary, and that that contract was consequently valid and enforceable.

17 BVG opposed the action brought by JPM and its subsidiary by stating that it had no obligation to pay since JPM had given it poor advice as regards the JPM Swap Contract. BVG subsequently put forward other arguments in its defence, submitting that the JPM Swap Contract was not valid because it had acted *ultra vires* when that contract was concluded and that the decisions of its organs which had led to the conclusion of that contract were therefore null and void.

18 BVG also requested the High Court to decline jurisdiction in favour of the German courts, which, in its submission, have exclusive jurisdiction to adjudicate upon the case, under Article 22(2) of Regulation No 44/2001. By judgment of 7 September 2009 the High Court dismissed that application. Following an appeal brought before it by BVG, the Court of Appeal of England and Wales (Civil Division) upheld that judgment by a judgment of 28 April 2010, without awaiting the outcome of the present reference for a preliminary ruling. Leave was granted to appeal to the Supreme Court of the United Kingdom. By decision of 21 December 2010, received at the Court on 7 February 2011 and registered under number C-54/11, the Supreme Court made a reference for a preliminary ruling in those appeal proceedings.

The proceedings brought in Germany by BVG

19 On 9 March 2009, BVG brought an action against JPM's branch in Frankfurt-am-Main before the Landgericht Berlin (Regional Court, Berlin, Germany), asking that court (i) to declare that the JPM Swap Contract is void because its subject-matter is *ultra vires* in the light of BVG's statutes, (ii) in the alternative, to order JPM to release it from any obligation stemming from that contract, as compensation in respect of its right to damages by reason of the incorrect advice given by JPM, and (iii) to order JPM to pay it damages.

20 In this action BVG contends, in particular, that the Landgericht Berlin, the court seised second, has exclusive jurisdiction under Article 22(2) of Regulation No 44/2001. Thus, that court must conduct the proceedings brought before it without taking account of the proceedings brought in England and it is not entitled to stay the proceedings pursuant to Article 27(1) of Regulation No 44/2001. However, by order of 26 May 2009, the Landgericht Berlin decided to stay the proceedings. By a 'sofortige Beschwerde', BVG appealed against that decision to the Landgericht Berlin itself. Since that court did not grant the appeal, the case was brought automatically before the Kammergericht Berlin (Higher Regional Court, Berlin, Germany), in accordance with the applicable rules of German procedural law.

21 The Kammergericht Berlin took the view, like the Landgericht Berlin, that the proceedings brought in England and Germany have given rise to a situation of *lis pendens* for the purposes of Article 27(1) of Regulation No 44/2001. It was in those circumstances that the Kammergericht Berlin decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the scope of Article 22(2) of [Regulation No 44/2001] also extend to proceedings in which a company or legal person objects, with regard to a claim made against it stemming from a legal transaction, that decisions of its organs which led to the conclusion of the legal transaction are ineffective as a result of infringements of its statutes?

2. If the [first question] is answered in the affirmative, is Article 22(2) of Regulation No 44/2001 also applicable to legal persons governed by public law in so far as the effectiveness of the decisions of its organs is to be reviewed by civil courts?

3. If the [second question] is answered in the affirmative, is the court of the Member State last seised in legal proceedings required to stay the proceedings pursuant to

Article 27 of Regulation No 44/2001 even if it is claimed that, because a decision of the organs of one of the parties is ineffective under its statutes, an agreement conferring jurisdiction is likewise ineffective?'

Consideration of the questions

22 It is to be observed at the outset that in the present case three questions have been asked relating to the interpretation of Regulation No 44/2001, in the context of main proceedings between BVG and JPM concerning the JPM Swap Contract, which is a financial derivative contract. After JPM brought an action before the English courts designed essentially to enforce the contract, on the basis of a clause conferring jurisdiction contained in the contract, BVG brought a parallel action asking the German courts to declare the same contract void on the basis, in particular, that its subject-matter is said to be *ultra vires* in the light of BVG's statutes.

Question 1

23 By its first question, the national court asks, in essence, whether Article 22(2) of Regulation No 44/2001 must be interpreted as applying to proceedings in which a company pleads that a contract cannot be relied upon against it because a decision of its organs which led to the conclusion of the contract is supposedly invalid on account of infringement of its statutes.

24 The national court asks this question on the basis of the finding that BVG pleads that its own decisions are invalid as a collateral or preliminary issue. It states that the proceedings brought in England and Germany have given rise to a situation of *lis pendens* under Article 27(1) of Regulation No 44/2001 because both sets of proceedings concern the existence of the same right to payment alleged to result from the JPM Swap Contract, whose validity must therefore be examined in each of them.

25 Thus, according to the national court, the subject-matter of both of those sets of proceedings comprises the contractual claim based on that right to payment. The national court explains that its first question concerns the applicability of Article 22(2) of Regulation No 44/2001 in the context of 'a review, necessary only as a collateral question, of the effectiveness, under the statutes, of decisions of organs [of a company]'.

26 As regards the wording of Article 22(2) of Regulation No 44/2001, there is a certain divergence among the various language versions of that provision. According to some of the language versions, the courts where a company or other legal person or an association of natural or legal persons has its seat have exclusive jurisdiction 'in the matter of' the validity of its constitution, its nullity or its dissolution or of the validity of the decisions of its organs. By contrast, other language versions provide for such jurisdiction where proceedings have such a question as their 'object' or 'subject-matter'.

27 The second of those forms of wording suggests, unlike the first, that only proceedings in which the validity of a company's constitution or of a decision of a company's organs is raised as the primary issue are covered by that provision of Regulation No 44/2001.

28 However, it is well-established case-law that the various language versions of a text of European Union law must be given a uniform interpretation and hence, in the case of divergence between the language versions, the provision in question must

be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (see, in particular, Case C-341/01 *Plato Plastik Robert Frank* [2004] ECR I-4883, paragraph 64, and Case C-340/08 *M and Others* [2010] ECR I-3913, paragraph 44).

29 Article 22(2) of Regulation No 44/2001 is therefore to be interpreted by taking account of matters other than its wording, in particular of the purpose and the general scheme of that regulation.

30 In this regard, it is to be recalled that the jurisdiction provided for in Article 2 of Regulation No 44/2001, namely that the courts of the Member State in which the defendant is domiciled are to have jurisdiction, constitutes the general rule. It is only by way of derogation from that general rule that the regulation provides for special rules of jurisdiction for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Member State (see Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 22 and the case-law cited). The Court has thus adopted a strict interpretation in respect of Article 22 of Regulation No 44/2001 (Case C-372/07 *Hassett and Doherty* [2008] ECR I-7403, paragraphs 18 and 19). It has held that, as they constitute an exception to the general rule governing the attribution of jurisdiction, the provisions of Article 16 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36; 'the Brussels Convention'), which are identical in essence to those of Article 22 of Regulation No 44/2001, must not be given an interpretation broader than is required by their objective (see Case 73/77 *Sanders* [1977] ECR 2383, paragraphs 17 and 18; Case C-8/98 *Dansommer* [2000] ECR I-393, paragraph 21; and Case C-343/04 *ČEZ* [2006] ECR I-4557, paragraph 26).

31 That approach should be applied in the present context, in which the question of the applicability of Article 22(2) of Regulation No 44/2001 is raised (see, to this effect, *Hassett and Doherty*, paragraphs 18 and 19; Case C-167/08 *Draka NK Cables and Others* [2009] ECR I-3477, paragraph 20; and Case C-292/08 *German Graphics Graphische Maschinen* [2009] ECR I-8421, paragraph 27).

32 It is true that Article 23(5) of Regulation No 44/2001 provides that agreements conferring jurisdiction are to have no legal force if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22 of the regulation. However, this primacy of Article 22 cannot justify a broad interpretation of its provisions. On the contrary, a strict interpretation of Article 22(2) which does not go beyond what is required by the objectives pursued by it is particularly necessary because the jurisdiction rule which it lays down is exclusive, so that its application would deny the parties to a contract all autonomy to choose another forum.

33 A broad interpretation of Article 22(2) of Regulation No 44/2001, under which it would apply to any proceedings in which a question concerning the validity of a decision of a company's organs is raised, would be contrary, first, to one of the general aims of the regulation, laid down in recital 11 in its preamble, namely to seek to attain rules of jurisdiction that are highly predictable, and second, to the principle of legal certainty.

34 If all disputes relating to a decision by an organ of a company were to come within the scope of Article 22(2) of Regulation No 44/2001, that would in reality mean that legal actions brought against a company — whether in matters relating to a contract, or to tort or delict, or any other matter — could almost always come within the jurisdiction of the courts of the Member State in which the company has it seat (see, to this effect, *Hassett and Doherty*, paragraph 23). It would be sufficient for a company to plead as a preliminary issue that the decisions of its organs that led to the conclusion of a contract or to the performance of an allegedly harmful act are invalid in order for exclusive jurisdiction to be unilaterally conferred upon the courts where it has its seat.

35 The aforementioned objective of predictability would not be attained if the applicability of a jurisdiction rule founded on the nature of the dispute could thus vary — in the absence of an express provision to that effect in Regulation No 44/2001 — according

to whether a preliminary issue, capable of being raised at any time by one of the parties, exists, on the ground that this would alter the nature of the dispute.

36 It must also be stated that another aim of the jurisdiction rules which result from Article 22 of Regulation No 44/2001 is to confer exclusive jurisdiction on the courts of a Member State in specific circumstances where, having regard to the matter at issue, those courts are best placed to adjudicate upon the disputes falling to them, because there is a particularly close link between those disputes and the Member State.

37 Thus, Article 22(2) of Regulation No 44/2001 confers jurisdiction to adjudicate on disputes which relate to the validity of a decision of a company's organs upon the courts where the company has its seat. Those courts are best placed to adjudicate upon disputes which relate exclusively, or even principally, to such a question.

38 However, in a dispute of a contractual nature, questions relating to the contract's validity, interpretation or enforceability are at the heart of the dispute and form its subject-matter. Any question concerning the validity of the decision to conclude the contract, taken previously by the organs of one of the companies party to it, must be considered ancillary. While it may form part of the analysis required to be carried out in that regard, it nevertheless does not constitute the sole, or even the principal, subject of the analysis.

39 Thus, the subject-matter of such a contractual dispute does not necessarily display a particularly close link with the courts where the party which pleads that a decision of its own organs is invalid has its seat. It would therefore be contrary to the sound administration of justice to confer exclusive jurisdiction for such disputes upon the courts of the Member State in which one of the contracting companies has its seat.

40 Nor would a broad interpretation of Article 22(2) of Regulation No 44/2001 be consistent with the specific objective of that provision, which consists simply in centralising jurisdiction to adjudicate upon disputes concerning the existence of a company or the validity of the decisions of its organs, in order to avoid conflicting judgments being given (see, to this effect, *Hassett and Doherty*, paragraph 20). That objective is limited solely to disputes with this subject-matter and Article 22(2) is thus not designed to centralise jurisdiction to adjudicate upon all disputes concerning a contract involving a legal person which pleads as a ground of defence that the decisions of its own organs are invalid.

41 As has been observed in paragraph 38 of the present judgment, any question concerning the validity of a decision to enter into a contract taken by organs of one of the parties thereto must be considered ancillary in the context of a contractual dispute. Such a dispute is not, in principle, liable to give rise to conflicting judgments by courts of different Member States since counterclaims or parallel claims founded on the same contract involve, in principle, an instance of *lis pendens* covered by Article 27(1) of Regulation No 44/2001 and the judgments given by the court having jurisdiction must be recognised and enforced in all the Member States, in accordance with Articles 33(1) and 38(1) of Regulation No 44/2001.

42 It follows from all of the foregoing that a broad interpretation of Article 22(2) of Regulation No 44/2001, under which it would apply to any proceedings in which a question concerning the validity of a decision of a company's organs is raised, would extend the scope of that provision beyond what is required by the objectives pursued by it.

43 The Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1), which comments upon the provisions of the Brussels Convention and the conclusions of which are relevant, by analogy, for the purposes of interpreting the provisions of Regulation No 44/2001, confirms the appropriateness of a strict interpretation of Article 16(2) of the convention and, therefore, of Article 22(2) of the regulation. According to the

report, Article 16(2) of the convention provides for exclusive jurisdiction in proceedings which are 'in substance' concerned with the validity of the constitution, the nullity or the dissolution of the company, legal person or association, or with the validity of the decisions of its organs.

44 Thus, the divergence noted in paragraph 26 of the present judgment between the language versions of Article 22(2) of Regulation No 44/2001 is to be resolved by interpreting that provision as covering only proceedings whose principal subject-matter comprises the validity of the constitution, the nullity or the dissolution of the company, legal person or association or the validity of the decisions of its organs.

45 This conclusion is not contradicted by the judgment in Case C-4/03 *GAT* [2006] ECR I-6509, mentioned in the order for reference, where the Court held that Article 16(4) of the Brussels Convention, a provision essentially identical to Article 22(4) of Regulation No 44/2001, applies to any proceedings in which the validity of a patent is put in issue, be it by way of an action or a plea in objection, thereby conferring exclusive jurisdiction on the courts of the State in which the patent was registered.

46 That case-law cannot be applied to proceedings in which a question concerning the validity of a decision of a company's organs is raised. Since the validity of the patent concerned is an essential premiss, in particular in any infringement action, it is in the interests of the sound administration of justice that exclusive jurisdiction to adjudicate upon any dispute in which the patent's validity is contested is accorded to the courts of the Member State in which deposit or registration of the patent has been applied for or has taken place, they being best placed to adjudicate upon the dispute. As has been pointed out in paragraphs 37 to 39 of the present judgment, that is not so

in the case of the courts where a company party to a contractual dispute has its seat if it pleads that the decision to enter into the contract taken by its own organs is invalid.

47 In light of all the foregoing considerations, the answer to the first question is that Article 22(2) of Regulation No 44/2001 must be interpreted as not applying to proceedings in which a company pleads that a contract cannot be relied upon against it because a decision of its organs which led to the conclusion of the contract is supposedly invalid on account of infringement of its statutes.

Questions 2 and 3

48 In light of the answer given to the first question, there is no need to answer the second and third questions referred.

Costs

49 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 (Third Chamber) hereby rules:

Article 22(2) 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 not applying to proceedings in which a company pleads that a contract cannot be relied upon against it because a decision of its organs which led to the conclusion of the contract is supposedly invalid on account of infringement of its statutes.

[Signatures]