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# CAPITAL MARKETS AND THE MARKET FOR JUDICIAL DECISIONS: IN SEARCH OF CONSISTENCY

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ABSTRACT: The allocation of jurisdiction in securities litigation is a key factor in ensuring investor protection and legal certainty in international capital markets. Jurisdictional rules determine the litigation setting and its costs, and are therefore an element issuers and investors consider when deciding the cost of debt and equity capital. Ideally, such rules should be based on grounds of efficiency and predictability and should specify when the parties can deviate from them. This would allow an understanding of the extent jurisdiction agreements can contribute to the development of a market for judicial decisions and when, on the contrary, mandatory rules protecting weak parties thwart this result by prohibiting a more liberal approach. Unfortunately, recent CJEU cases – *Kolassa v. Barclays*; *Profit Investment SIM v. Commerzbank* – show that the EU regime on jurisdiction (Brussels I-*bis* Regulation) falls short of delivering this scenario for securities litigation. As for the default heads of jurisdiction, CJEU rulings and AG opinions stick to a formalistic interpretation of market transactions that does not draw any distinction between retail investors (or consumers) and professional investors, thereby harming issuer confidence at the indirect expense of non-litigating shareholders. As for opt-outs, a misguided concept of the economic function performed by tradable securities and other financial instruments extends the scope of mandatory provisions, thus curbing the possibility of contracting around default rules. This prevents issuers and (even professional) investors from ensuring predictability through private ordering solutions and from tailoring jurisdictional rules according to their own preferences. All in all, the legal framework rules out the opportunity to develop a market for judicial decisions even when this would be beneficial to issuers and investors alike, and is therefore likely to increase the cost of capital. An alternative system can instead be conceived where retail investors (or consumers) enjoy better protection, while professionals can play by their own rules. Although appropriate interpretation could in principle reach such an outcome *de lege lata*, consolidated CJEU case law makes some legislative amendments essential to ensure efficiency.

KEYWORDS: capital markets, bonds, jurisdiction, Brussels I-*bis* Regulation, MiFID 2, contractual liability, tortious liability, investor protection.

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## 1. *Jurisdictional issues, capital markets, and corporate governance*

Due to its high technicality, the allocation of jurisdiction among EU courts often entails complex legal questions. This complexity is exacerbated by the need for a common set of rules in civil and commercial matters that are applicable EU-wide, so that the wording of the Brussels I Regulation[1] sometimes refers to legal concepts whose interpretation inevitably varies across different legal traditions.

This paper claims that recent and prospective ECJ case law on the establishment of jurisdiction may prove problematic for the smooth functioning of capital markets. The analysis focuses on the circulation of financial instruments and how it affects the allocation of jurisdiction in disputes between issuers and their investors, whether professional or retail. The scope of the paper covers both securities – such as shares and bonds – and derivative contracts – such as credit default swaps (CDS) or credit linked notes (CLN).[2]

The allocation of the power to decide a dispute is the result of a legal interpretation process that applies the abstract rules set forth by the Brussels I Regulation to specific facts raised before a national judge. In order to assess whether such result is satisfactory, one might simply examine its consistency with the system of the Brussels I rules and with the relevant case law. This paper generally employs this "top-down" evaluation, as it checks whether relevant ECJ decisions or Advocate General's opinions represent a proper conclusion in the light of Brussels I and previous case law. However, the paper also advances thinking by assessing whether the trends in recent ECJ case law adequately support proper functioning of capital markets. On the one hand, a decision whose consequences – however consistent with Brussels I – are inefficient may suggest the necessity to review the applicable rules. On the other hand, the wording of Brussels I is often so broad that more than one interpretation is possible. In such circumstances, the interpretation that better strikes the balance between the competing interests of issuers and investors should be preferred.

In general, individual investors naturally prefer to file claims at their domicile as this reduces their litigation costs: not only might they be more used to local rules, but proximity reduces costs (at least *ex ante*) and allows possible home biases of judges to be exploited. To the contrary, institutional investors would sometimes

[1] Unless otherwise specified, reference is made in this paper to Reg. (EU) No 1215/2012 (Brussels I recast). Similarly, "jurisdiction" refers to international jurisdiction, unless otherwise specified.

[2] Whenever a characteristic that is specific to a particular kind of financial instrument or of investor may be relevant for determining a different allocation of jurisdiction, a proper specification is made.

choose other venues, for example because they favour efficiency over proximity, or because they hope to take advantage of local procedural rules that may determine a favourable decision, such as those concerning access to evidence.

Of course, satisfying claimants' preferences would increase investor protection from an individual perspective, but this might not always hold true from a collective standpoint. If the litigation costs for issuers were excessive, the cost of capital would also increase to the shareholders' detriment: jurisdictional issues are therefore one element of the broader problem of circularity that typically affects shareholder lawsuits.[3] Similarly, shareholders – a subset of the broader group of investors – may prefer a system where litigation between issuers and bondholders were decided at the issuer's domicile, in order to increase their return on investment, but this choice might negatively affect the interest rate creditors will demand to cover such risk. Along the same reasoning, one may further distinguish between controlling shareholders, who are less likely to be involved in a dispute with the company, and outside investors (being either shareholders or bondholders), who might have different preferences if they were more prone, or simply averse, to litigation risk.

All in all, estimating how shareholder value is affected by the allocation of jurisdiction would require an assessment of the equilibrium between the decrease in the cost of capital ensured by enhanced investor protection, on the one hand, and increased returns fostered by reduced litigation costs, on the other hand.[4] Both costs and returns are influenced by the relative efficiency of the alternative litigation venues and by the probability that lawsuits are commenced in such venues.[5] In turn, these factors depend on issuer-specific elements, including their particular commercial activity and their ownership structure. Issuers operating in innovative sectors may be prone to higher organization risks and to ensuing litigation. At the same time, while a relatively concentrated control would reduce the side effects of circularity, thus making a broad distribution of potential litigation venue less problematic, concentration of shareholders in countries where

[3] See John C. Coffee, Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534 (2006), 1556 ff.

[4] Litigation risk may be substantial in critical circumstances (Peter Kurer, Legal and Compliance Risk, Oxford, 2015, 14 ff.).

[5] Issuers' freedom to opt-out of default rules on jurisdiction can better serve investors' interests (see Verity Winship, Shareholder Litigation by Contract, forthcoming Boston University Law Review, where a similar reasoning is also extended to invoke the possibility that companies craft their own procedural rules).

civil and commercial proceedings are notoriously inefficient would increase the positive effects of exclusive jurisdiction in a different country.[6]

Any analysis of the competing interests among shareholders, and between shareholders and other investors (bondholders and bearers of other non-equity securities), can only be sketched out here, but it has salient consequences for corporate governance. Jurisdictional rules determine the litigation setting and its costs, and are therefore an element issuers and investors consider when deciding the cost of debt and equity capital. Diverging investors' powers and incentives may suggest default rules on jurisdiction which vary depending on the security holders involved. By the same token, the lack of homogeneity in investors' preferences may require a tailored set of rules on the possibility to bargain around such default provisions by way of jurisdiction (or choice-of-court) agreements, whether included in the company's charters or in the securities' terms and conditions (T&Cs). Overall, a rational system should offer default rules that are likely to be suitable for the majority of cases, while allowing alternative solutions when this would permit an efficient equilibrium should issuer-specific conditions so require.[7] At the same time, when investors are in special need of protection, mandatory rules should thwart this liberal approach by curbing contractual freedom. All in all, the market for judicial decisions[8] (or the lack thereof) is a key factor in ensuring investor protection and legal certainty in international capital markets.

The importance of determining the litigation venue through choice-of-court clauses is, of course, far from being exclusively European, although the European legal framework for jurisdictional issues in securities litigation is clearly unique. In the United States, issuers' concern to avoid dispersion of litigation and to concentrate disputes in courts of their choice explains some recent amendments to the Delaware General Corporation Law.[9] The new rules provide legal basis to

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[6] On the importance of a detailed mapping of shareholders' geographical distribution see R. Balotti, J. Finkelstein, G. Williams, Meetings of Stockholders, Aspen Publishers, New York, 2007 7-26 s..

[7] F. Easterbrook and D. Fischel, The Economic Structure of Corporate Law, Harvard University Press (1991) 15.

[8] H. Kronke, The New York Convention Fifty Years on: Overview and Assessment, in N. Port et al. (eds.), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Alphen aan den Rijn 2010, 16 (Brussels I Regulation is a uniform law instrument "developed to achieve legal certainty within a 'common market for judicial decisions'").

[9] See new Sec. 115 DGCL (allowing bylaws to confer upon Delaware courts exclusive jurisdiction on internal corporate claims). As Professor David Skeel noted, this new legislation also reflects the desire of Delaware to retain a significant amount of caseload in order to maintain its competitive edge in delivering meaningful case law on corporate matters, as also demonstrated by contextual restrictions to fee-shifting clauses under Sec. 102(f) DGCL (D. Skeel, Federal Law and State Law

forum selection clauses that have recently become more common in company bylaws as a response to increasing multiple forum securities lawsuits.[10]

The remainder of the paper proceeds as follows: Sec. 2 delineates the current default jurisdictional regime applicable to disputes involving issuers and investors. Sec. 3 considers the legal framework for derogating such rules, so as to evaluate to what extent issuers and investors can contract out of default allocation of jurisdiction when this proves inefficient. Sec. 4 submits that an alternative framework could better serve to afford protection to retail investors (or consumers) while leaving professionals to play by their own rules. Although proper interpretation could in principle reach such an outcome *de lege lata*, consolidated ECJ case law makes some legislative amendments essential to ensure efficiency.

## 2. *The Brussels I default jurisdictional regime on securities litigation*

This Section addresses the default jurisdictional regime for matters pertaining to securities litigation.[11] After displaying the heads of jurisdiction that may come into play depending on the disputed matter (Sec. 2.1), the analysis moves on to the selection criteria the ECJ recently adopted in the *Kolassa* case (Sec. 2.2) and shows some possible drawbacks of the ECJ approach (Sec. 2.3).

### 2.1. *Competing default rules*

For certain company law matters – such as the validity of deliberations adopted by the internal bodies and the existence or continuity of the company itself – Brussels I ensures that actions may be brought only in one country. This is the result of exclusive jurisdiction mandated by Art. 24 No 2, which refers to the place of the company's seat being determined according to the applicable private international

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Regulating Corporations in the U.S, speech delivered at the Conference "Rules for the Market and Market for Rules. Corporate Law and the Role of the Legislature", Venice, Italy, November 13-14, 2015).

[10] See Winship, cit.

[11] For the sake of simplicity, in this paper "securities litigation" or "litigation" refers only to disputes arising from alleged violation of securities law (such as the provision of misleading information in a prospectus – Dir. 2003/71/EC – or in any other mandatory disclosure document – Dir. 2004/109/EC and Reg. (EU) No 596/2014 – Market Abuse Regulation) perpetrated by the issuer, and therefore belong to companies' external affairs. On the contrary, disputes concerning company law, and namely internal corporate affairs, are not considered unless otherwise specified (see infra, text accompanying fn. 16).

law.[12] The following analysis does not deal with matters falling within the scope of mandatory exclusive jurisdiction pursuant to Art. 24 No 2. Suffice to say that this rule is particularly important in the EU for shareholder litigation, as actions seeking voidance of corporate bodies' decisions are often filed as a partial substitute of derivative suits, which are less common in Europe than in the United States.[13] Despite the apparent clarity of its wording, Art. 24 No 2 raises some complex jurisdictional issues,[14] but the combination of statutory rules and case law is quite clear in leaving broad room to choice-of-court agreements in companies' charters,[15] thereby allowing clarification through party autonomy. To the contrary, the validity of decisions taken by organs of a company is less likely to come into play in litigation involving bondholders (as well as holders of other non-equity financial instruments), as the typical claims here invoke liability for false or misleading information or breach of securities T&Cs. Hence, the practical implications of a legal analysis on Art. 24 No 2 would be more limited in this case.[16]

Outside matters covered by Art. 24 No 2, the general principle that the defendant's domicile determines international jurisdiction (Art. 4 Brussels I) can also concentrate securities litigation in favour of issuers, as these are in most cases[17] playing the role of defendants challenged by shareholders or other investors. This holds true despite that, for the purposes of Art. 4, issuers could alternatively be sued, depending on the plaintiff's choice, in the country where the issuer has either its registered office, or its central administration, or the principal place of business (Art. 63). Not only will these three connecting factors often be located in the same country, but the decision to take advantage of the incorporation doctrine offered by some Member States' company law[18] in order to split the legal and the real seat between two different countries is still up to the issuers' themselves and, ultimately, to their shareholders.

[12] I.e., according to the law applicable in light of the registered seat of the company, which normally determines the applicable law, including the relevance to be attached to the real seat (see S. Grundmann, European Company Law, Intersentia, Antwerp, 2011, 588 ff.).
[13] See M. Gelter, Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?, 37 Brooklyn Journal of International Law 843 (2012), 881 f.
[14] See recently M. Lehmann, Exclusive Jurisdiction, in A. Dickinson and E. Lein (eds.), The Brussels I Regulation Recast, OUP, Oxford (2015), 268 f.
[15] See below fn. 87 and accompanying text.
[16] For a recent complete analysis see however M. Houben, Giurisdizione e legge applicabile ai prestiti obbligazionari, Rivista delle società 617 (2015), 619 ff.
[17] A notable exception are claims concerning consideration for not fully paid shares (see ECJ, 34/82, *Martin Peters*, 22 March 1983; C-214/89, *Powell Duffryn*, 10 March 1992).
[18] See e.g. F. Wooldridge, Uberseering: Freedom of Establishment of Companies Affirmed, 14 European Business Law Review 227 (2003); J. Borg-Barthet, The Governing Law of Companies in EU Law, OUP, Oxford (2012), 50 ff.

However, the defendant's domicile seldom represents, in securities litigation, the relevant head of jurisdiction, other criteria being invoked more often. Individual investors tend to refer to their consumer capacity (if applicable) in order to attract jurisdiction to their domiciles pursuant to Arts. 17 and 18 Brussels I. When these provisions do not prove helpful because one or more of their requirements are not fulfilled, issuers' tortious liability is often invoked to achieve a similar result (Art. 7 No 2), as this gives the claimant the opportunity to bring action before the courts where the harmful event has occurred. For establishing jurisdiction, this can be the place where either the wrongful conduct (*Handlungsort*) or the damage itself (*Erfolgsort*) has occurred.[19] The ECJ has conveniently curtailed the possibility that jurisdiction be established in places where only indirect damages are suffered (*Schadensort*) such as the domicile of the claimant where her financial assets are concentrated.[20] However, investors can normally rely on the place of the account[21] where the relevant securities are held in book-entry form or, as the case may be, where the money spent to buy such securities came from.[22]

Besides consumers' domiciles and the place where the damage occurred, the place of performance of the issuer's obligations may come into play as a substitute for the defendant's domicile. This head of jurisdiction applies when the relationship between the concerned issuer and investor qualifies as "contractual" pursuant to Art. 7 No 1(a) Brussels I. Remarkably, in the absence of a contractual relationship the claim for damages is normally deemed to qualify, for the purposes of establishing jurisdiction, as tortious (*tertium non datur*).[23] To what extent Art. 7 No 1(a) would bring jurisdiction to the issuer's domicile is however uncertain, absent clear precedents in ECJ case law clarifying how to locate the place of performance of obligations constituting a financial instrument.

[19] ECJ, 21-76, *Mines de Potasse d'Alsace*, 30 November 1976, § 17 ff.

[20] ECJ, C-364/93, *Marinari*, 19 September 1995; C-168/02, *Kronhofer*, 10 June 2004. See also C-220/88, *Dumez*, 11 January 1990.

[21] See e.g. Art. 9(2) Dir. 98/26/EC (on settlement finality) and Art. 9(1) Dir. 2002/47/EC (on financial collaterals). The place of the securities account might be difficult to determine as securities are usually held in an immobilized or dematerialized form. Normally, such place is considered to be the place where the first intermediary from the point of view of the investor is located, a criterion known as Place of the Relevant Intermediary Approach (PRIMA) or, with some slight variations, Place of the Relevant Account Approach (PRACA) (M. Haentjens, Harmonisation of Securities Law, Alphen aan den Rijn, Kluwer Law International, 2007, 38 f. and 240; P. Paech, Market needs as paradigm – breaking up the thinking on EU securities law, in P.-H. Conac, U. Segna, L. Thévenoz (eds.), Intermediated Securities, Cambridge, CUP, 2013, 36 f.).

[22] See ECJ, *Kronhofer*, cit. See also ECJ, C-375/13, *Kolassa*, 28 January 2015, § 55.

[23] T. Pfeiffer, Jurisdiction, in Hess, Pfeiffer, Schlosser (eds.), Report on the Application of Regulation Brussels I in the Member States, Heidelberg, 2007, 89. See also ECJ, C-189/87, *Kalfelis*, 27 September 1988, § 17; C-548/12, *Brogsitter*, 13 March 2014, § 20.

### 2.2. *Selecting among competing default rules: the ECJ decision in* Kolassa

The above analysis shows that the default heads of jurisdiction may sometimes ensure that the allocation of the power to adjudicate is clearly identified in advance (as is the case for consumer's domicile), or at least that it is sufficiently recognizable once litigation has commenced (as is the case for the place where the damage occurred, in tort claims). However, applying default rules to financial market transactions may prove difficult in other circumstances, namely when the need arises to locate the place of performance in claims pertaining to a contractual matter.

This section will analyse the interpretation the ECJ has recently adopted in the *Kolassa* case when selecting the applicable default rules among those listed in Sec. 2.1. The next section will assess such interpretation and will show that the default connecting factor the Court has (somewhat ambiguously) selected, while ensuring a relatively easy identification of jurisdiction after a dispute has arisen, has a weak legal grounding and may be inefficient in some circumstances. At the same time, such default connecting factors, when proving inefficient, are hard to contract around (Sec. 3.2).

The dispute in *Kolassa* arose out of a financial scam uncovered in Germany in 2009. In 2005, the British bank Barclays allotted through its German branch some certificates – qualified as bearer securities under paras 793 ff of the German BGB – to a limited number of institutional investors. Far from being restricted to the placement, the same certificates were also offered to the public through a base prospectus, which shows the non-equity nature of such securities.[24] The prospectus was approved by the German BaFin and subsequently published in other countries, including Austria – Mr Kolassa's home country – under the passport regime of Directive 2003/71/EC. DAB Bank AG, a German bank, bought some of the certificates and endorsed them in favour of its Austrian subsidiary, direktanlage.at AG. In turn, direktanlage.at entered into a contract with Mr Kolassa, a retail investor domiciled in Austria, who thereby had the right to receive payments based on the certificates' cash flow. Direktanlage.at held the certificates in its own name on a securities account opened in Munich, operating as a trust in favour of Mr Kolassa, who had the right to receive the securities' cash flow.

As the value of the assets underlying the bearer securities plummeted, Mr Kolassa filed a lawsuit in Austria against Barclays claiming damages on the basis of both contractual and tort liability. In the plaintiff's opinion, contractual liability was

[24] Art. 5(4) Dir. 2003/71/EC.

grounded on the violation of the certificates' T&Cs and on the breach of pre-contractual duties of care and information, while tortious claims hinged upon prospectus liability (for false information and breach of control obligations).

In its reasoning, the Court excluded Mr Kolassa from taking advantage of the Brussels I consumer protection regime, as this would require that a contract be concluded between Mr Kolassa and Barclays. The facts clearly showed that Mr Kolassa was not the bearer of the bond, which prevented him from qualifying as a bondholder vis-à-vis the issuer.[25] This particular of the case at hand stems from the holding technique typically adopted by Austrian banks for foreign securities and might have been sufficient to exclude applicability of Art. 17 Brussels I.[26] While in some countries intermediaries holding securities on behalf of the account holder often operate as mere custodians without any property interest in the registered securities, in other jurisdictions they may have some legal entitlements on securities held on behalf of investors, so that the holding chain creates multi-tiered entitlements on the same financial instruments: this latter is especially the case when the legal regime governing the relationship between custodians (or between the investor and a custodian) follows the rules of trust as inspired by the Anglo-Saxon tradition.[27] In this context, while the beneficial owner retains the equitable interest linked to her economic exposure, the custodian at the top of the chain has the formal legal ownership vis-à-vis third parties, including the issuer. Although the custodian model prevails in continental Europe, the holding in trust model may also be adopted in civil law countries on a case-by-case basis, as *Kolassa* shows.

Rather than directly refer to the holding technique adopted by direktanlage.at, the ECJ noted that "the requirement of a conclusion of a contract with the professional" is not matched "when there is a chain of contracts through which certain rights and obligations of the professional in question are transferred to the consumer".[28] Although not necessary to rule out the Art. 17 consumer protection regime (Mr Kolassa was not, in any event, the bearer of the bonds), this reference to the chain of contracts seems crucial in excluding that the action could be considered as pertaining to a contractual matter under Art. 7 No 1. The ECJ case law is consistent in requiring, for such purpose, that the claim be grounded on an obligation freely assumed by a party with respect to another. According to the

[25] ECJ, *Kolassa*, cit., § 26.
[26] European Commission, EU Clearing and Settlement. Legal Certainty Group – Questionnaire. Horizontal answers, Brussels, 2006, 458.
[27] For an analysis of the U.K. system see E. Micheler, Property in Securities. A comparative Study, CUP, Cambridge (2007), 119 ff.
[28] ECJ, *Kolassa*, cit., § 30.

ECJ, however, no "legal obligation freely consented to by Barclays Bank with respect to Mr Kolassa" existed, "even if, under the national law applicable, Barclays Bank [had] certain obligations towards Mr Kolassa".[29]

The decision is not crystal clear in grounding such statement. There are indeed two reasons why no contractual relationship could be identified between Mr Kolassa and Barclays: one relates to the circulation of shares on the market, the other to the holding system adopted by direktanlage.at. If the reference is to the fact that bonds were handed over through one or more other transactions before reaching the litigant bondholder,[30] it would appear that no purchase carried out on the secondary market can ever entail a contractual relationship between issuers and investors. If the ECJ were instead considering the holding chain through which the securities were held,[31] then final investors would be denied a direct contractual claim towards issuers only when, being deprived of legal ownership, they qualify as mere beneficial owners, as was the case in *Kolassa*.

An authoritative answer to such question has been recently provided in the *Profit SIM* case[32] by Advocate General Bot, who reads *Kolassa* in the sense that a direct contact is needed between the two parties for a contractual claim to arise.[33] This is prevented by transfers taking place on the secondary market even in cases where investors do not hold financial instruments in an (intermediated and) indirect form. Hence, the first alternative would appear to be correct, and negotiations on a secondary market would represent an insurmountable obstacle to the applicability of Art. 7 No 1 Brussels I.[34]

Having ruled out the applicability of the consumer protection regime and of the rules concerning matters relating to a contract, the only remaining alternative, and the one the ECJ adopted, was therefore to qualify the claim as tortious, as per Art. 7 No 2. This gives the plaintiff the opportunity to bring action, at her choice, before the courts of the country where either the harmful event or the damage has occurred.[35] It goes without saying that, in the vast majority of the cases,[36]

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[29] ECJ, *Kolasssa*, cit., § 40.
[30] I have elsewhere referred to this perspective as the "horizontal dimension" of securities trading: see M. Gargantini, Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities: The Advocate General's Opinion in *Kolassa v. Barclays*, Riv. dir. int. priv. e proc., 2014, 1097.
[31] This being instead a "vertical" dimension of securities holding: *ibid*, 1097 f.
[32] Case C-366/13, *Profit Investment SIM*, Opinion of AG Bot, 23 April 2015.
[33] See AG Opinion in *Profit Investment SIM*, cit. § 51 and fn. 34.
[34] The alternative reading is suggested in Gargantini, cit.
[35] See supra fn. 19 and accompanying text.
[36] If the place where the damage has occurred is in the country where the defendant is domiciled, special grounds of jurisdiction under Art. 7 do not apply, instead, and the identification of the national competent court is left to national rules.

claimants will find it convenient to opt for the latter location, as this is normally closer to their domiciles.

### 2.3. *The limits of tortious liability as a criterion for establishing jurisdiction*

Albeit clear in referring to tortious liability as the preferential qualification of disputes like the one at stake, *Kolassa* leaves some questions open and might leave some room for uncertainty in the future.

The decision does not clearly answer the question whether the relevant account to be considered, when identifying the place where the damage occurred, is the securities account where the financial instruments are registered or the bank account from where the money spent for the acquisition of the certificates originates. As the ECJ seems to have conceded that Austrian tribunals had jurisdiction, one can assume the second alternative, as the relevant securities were held in a German securities account while the money paid for consideration was probably transferred out of an Austrian bank account. However, such a solution would seem at odds with the importance the ECJ attached to the place of the security account in *Kronhofer*.[37]

Although not the option clearly adopted as ECJ case law, determining jurisdiction pursuant to Art. 7 No 2 Brussels I on the basis of bank (as opposed to securities) accounts could be sensible for cases where the invoked damage results from investing in financial products that were already overpriced at the time they were bought[38] – either on the primary or on the secondary market – but would not easily fit with other issuers' (or gatekeepers') misbehaviours taking place at a later stage. Imagine a case where a credit rating agency improperly downgrades a bond and, before the rating is fixed, the investor divests. Should the damage be

[37] The German legal doctrine, supported by national case law, has however advocated a flexible interpretation of *Kronhofer* in order to allow establishment of jurisdiction at the investor's domicile: J. von Hein, Anmerkung zu EuGH, 28.1.2015, Rs. C-375/13, Kolassa ./. Barclays Bank plc., 70 Juristenzeitung 946 (2015), 948 f. See also M. Lehmann, Where Does Economic Loss Occur?, Journal of Private International Law, 2011, 545 (place of the account to which money has been sent may establish jurisdiction, but only if such transfer was made intentionally and consciously). For a more restrictive interpretation of *Kronhofer* see the Advocate General Opinion in the *Melzer* case: A.G. Opinion, case C-228-11, 29 November 2012, §§ 31 f. (financial damages occur where securities are located, not where the money originates from).

[38] See e.g. M. Lehmann, Civil Liability of Rating Agencies: An Insipid Sprout from Brussels, LSE Legal Studies Working Paper No. 15/2014, 23 (investor damage for misleading rating consists of the loss of money paid for securities that are of less value than the rating suggests. As this loss occurs in the bank account from which he has paid the cost of the instruments, the damage should be located in the country where this bank account is managed).

correspondingly located in the bank account because less money is credited there? If so, should the place where the damage occurred then vary depending on the investors' decision to sell, or not to sell? In such circumstances one would rather opt for the securities account, as this is the place where the financial instruments at stake were held at the time their price fell.[39] Adopting a different criterion for the parallel case of overrated securities might increase legal uncertainty, because "following the money"[40] irrespective of the location of securities at the time the misbehaviour emerged and affected the securities' would make jurisdiction less predictable.[41] The ECJ will soon have the opportunity to answer such questions in the *Universal Music* case.[42] In this dispute, a Dutch court has submitted a request for a preliminary ruling addressing the distinction between the initial (or direct) financial damage and the consequential (or derived) financial damage in a case where the price of shares was inflated because of a clerical error by a law firm. Although the litigation involves the buyer of such shares and the law firm, the awaited ruling can shed light on the distinction between the place of direct and indirect damages (*Erfolgsort* and *Schadensort*) in financial disputes.

In any event, whether one opts for the securities or the bank account as a connecting factor,[43] the risk exists that retail investors are under-protected if the relevant account is abroad, while the opposite may hold true for professionals. It is the legal framework on consumer protection that should in principle ensure weak parties are safeguarded: if such rules are ill-conceived or prone to misinterpretation, bending other provisions to achieve the same result will easily involve false positives and false negatives.

To be sure, cases where securities and bank accounts are located in different countries might not be very common, and in the vast majority of cross-border investments the *Kolassa* ruling will provide clear guidance in spite of its

[39] P. Mankowski, Art. 5, in U. Magnus and P. Mankowski (eds.), Brussels I Regulation, Selp, Munich (2012), 255 (market values may be considered as the primary damage).

[40] See *ibid*., 254 ("No 'money pocket rule' (along the line 'the damage was suffered in my pocket') applies").

[41] In favour of establishing jurisdiction on the basis of the place where securities accounts are held T. Arons, On Financial Losses, Prospectus, Liability, Jurisdiction (Clauses) and Applicable Law, in Nederlands Internationaal Privaatrecht 377 (2015), 380 (who believes the expression "bank account" used in *Kolassa* is just an inaccurate wording for "securities account").

[42] ECJ, C-12/15, *Universal Music International Holding*.

[43] From the point of view of investor protection, focusing on securities or bank accounts would seem equivalent, *ex ante*. Adopting securities accounts as a connecting factor might admittedly reduce investor protection when, like in *Kolassa*, only bank accounts are kept at the investor's domicile, while the relevant securities are deposited or registered abroad. And the same criterion would overprotect professional investors in such conditions, as these should in principle be aware of the technicalities of investing in securities issued abroad. However, this situation would not seem more likely than its symmetrical equivalent, where the bank account is held abroad and the security account at the investor's domicile.

ambiguities. On top of the shortcomings summarised above, however, *Kolassa*'s major drawback seems to be in excluding that claims based on bonds' T&Cs fall within contractual matters. As long as the plaintiffs invoke a violation of the prospectus rules, there is no doubt that tortious liability may represent the proper qualification of the claim: not only would such opinion reflect the practice of some national jurisdictions, but it may also be justified by the autonomous interpretation of Brussels I the ECJ has adopted in the past concerning the violation of the duty to act in good faith during the negotiations.[44] While this paper focuses on breach of securities T&Cs, it is worth stressing that the consequences attached to the qualification of a claim based on violation of information duties as "non-contractual" may have a weak basis in financial markets law. In particular, enabling claimants to bring action where the alleged damaged occurred is usually justified as this may favour proximity between the judge and the evidence concerning occurrence and magnitude of the damage.[45] However, ascertaining the size of the damage occurred as a consequence of securities' depreciation does not normally entail complex factual appraisals, as a certificate by the relevant bank or securities custodian will suffice in the majority of the cases. One may therefore wonder whether there should be any room at all for this head of jurisdiction – at least when the place where the damage occurred does not bring any proximity of litigation to investors in need of protection –, or at least whether the strictly chronological criterion set forth by Art. 30 Brussels I is a proper solution as it entails dispersion of jurisdiction when plaintiffs claim breach of T&Cs and violation of information duties at the same time.

Violation of information duties aside, the exclusion of claims directly based on a breach of securities T&Cs from contractual matters can have relevant practical shortcomings.

*Kolassa*'s *pars destruens* concerning Art. 7 No 1 is indeed quite broad, as it apparently refers to all the claims raised by the plaintiff (violation of bond T&Cs, breach of information and control obligations, prospectus liability). On the contrary, its *pars construens* is narrower in declaring that jurisdiction should be allocated according to the rules on tort, as only prospectus liability and breach of other information obligations are mentioned.[46] Hence, it is not entirely clear what

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[44] ECJ, C-334/00, *Tacconi*, 17 September 2002, §§ 25 f. Supporting such interpretation M. Lehmann, Special Jurisdiction, in A. Dickinson and E. Lein (eds.), cit., 146 (also in the light of Art. 12 and Recital 30 Rome II Regulation); critically P. Mankowski, Art. 5, in Magnus and Makowski, cit., 138 f.

[45] ECJ, C-189/08, *Zuid-Chemie*, 16 July 2009.

[46] The ruling states that an investor may not invoke jurisdiction under the consumer protection regime "for the purposes of an action brought against the issuer of the bond on the basis of the bond conditions, breach of the information and control obligations and liability for the prospectus"

would happen when no securities fraud is alleged because the claim is grounded on violation of securities' T&Cs. This litigation strategy may be sometimes adopted even if a prospectus was published, for instance where no evidence of false or misleading statements in the prospectus is available. Some hedge funds reportedly identify investments on the basis of their potential for litigation: this investment strategy includes an analysis of bond indentures with the aim of exploiting uncertainties in the issuance terms or undetected default events that normally either go unnoticed or remain unenforced – typically because normal bondholders and their trustee have no incentive to take action – and lodge claims to obtain payment for violation of securities T&Cs.[47]

Furthermore, relying on tortious liability might disadvantage investors on the merit in some jurisdictions, especially in consequence of less favourable regimes on the burden of proof. This would not be a problem as far as different qualifications are possible for the same action, so that that a claim is regarded as non-contractual under the autonomous interpretation of the Brussels I Regulation for establishing jurisdiction, and as contractual under the applicable national law when it comes to the merit.[48] However, the risk of losing on the jurisdictional ground might still influence the plaintiff in the formulation of the legal and factual basis underpinning the claim.[49] In such cases, a clearer answer to the question concerning issuer liability could provide a safer legal basis for the selection of the legal strategy.

More importantly, a clearer solution is needed for cases where a prospectus was not published, for instance because the original offer was a private placement or it fell within any of the exceptions under Art. 4(1) Prospectus Directive.[50] In spite of

(§ 35; a similar statement applies to contractual claim under Art 7 No 1 Brussels I). However, the ruling also declares that the rule on tortious liability (Art. 7(2)) "must be interpreted as applying to an action seeking to put in issue the liability of the issuer of a certificate on the basis of the prospectus relating to it and of breach of other legal information obligations binding on the issuer, in so far as that liability is not based on a matter relating to a contract" (§ 57; see also § 42, where this is extended to the "breach of other legal information obligations incumbent on the issuer", but not to the violation of bond conditions). That the proper head of jurisdiction for claims based on securities T&Cs is to be determined according to Art 7(2) must be inferred by exclusion.

[47] M. Kahan and E. Rock, Hedge Fund Activism in the Enforcement of Bondholder Rights, 103 Northwestern University Law Review 281 (2009), 297-301 (describing how hedge funds increasingly scrutinize debt indenture and corporate performances with a view to detecting possible violation of the applicable terms and enforce them before courts).

[48] See ECJ, *Tacconi*, cit.

[49] For example, an investor may decide to invoke direct violation of the issuance T&Cs to enjoying a more favourable treatment on the merit. Would then she miss her hedge on the establishment of jurisdiction at the place where the damage occurred?

[50] The scope of the exemptions from the duty to publish a prospectus is due to broaden in the aftermath of the EU Commission's Action Plan on Building a Capital Markets Union (COM(2015) 468 final), 30 September 2015, 12: see Arts 1(3)(d) and 3(2) EU Commission Proposal for a

the uncertainties affecting *Kolassa*, that a request for damages in such cases would fall within the scope of Art. 7 No 2 Brussels I seems a fair reading of the ruling, since Art. 7 No 1 is deemed inapplicable to such cases.[51] However, this would cause a multiplication of the competent fora – whenever the connecting factor is located in a jurisdiction other than the defendant's[52] – even in cases where issuers never accepted the risk of being sued in other countries, as opposed to what happens when they request the notification of a prospectus in a specific country in order to enjoy the passport regime set forth by Art. 17 Prospectus Directive. Such a dispersion of lawsuits throughout the European Union in the absence of any activity addressed abroad makes litigation costs less predictable for issuers,[53] as they have no control on the circulation of securities[54] and cannot therefore guess where investors may suffer alleged damage.[55] This outcome is far

Regulation on the prospectus to be published when securities are offered to the public or admitted to trading (COM(2015) 583 final), 30 November 2015 (mandatory threshold below which Member States cannot require publication of a prospectus raised from 100.000 to 500.000 euros; optional threshold below which Member States may exclude mandatory publication of a Prospectus raised from 5 million to 10 million euros, if the prospectus is not passported in other countries).

[51] The general connecting factor of the defendant's domicile would be irrelevant, instead, in case of damage claims: *supra* fn. 23. At the same time, referring to the general criterion of the defendant's domicile pursuant to Art. 4 would deprive consumers of any protection for claims based on violations of securities T&Cs even when an offering prospectus was published.

[52] See supra, fn. 36.

[53] Similar issues affect the identification of the applicable law, and hence of the liability regime: F. Villata, Remarks on the 2012 Greek Sovereign Debt Restructuring: Between Choice-of-Law Agreements and the New EU Rules on Derivative Instruments, Riv. dir. int. priv. e proc. 325 (2013), 340.

[54] This approach marks a difference with the U.S. principle that judges have personal jurisdiction over a defendant from another State only if there are minimum contacts between the defendant and the State of the judges. For damages brought about by products circulating among different States, it is normally required that the producer targeted the State of the judge where the plaintiff brought action, while mere predictability that goods might reach such State is deemed insufficient (stream-of-commerce doctrine; for an analysis see C. Mariottini, U.S. jurisdiction in product liability in the wake of McIntyre: an impending dam on the stream-of-commerce doctrine?, in A. Lupone, C. Ricci and A. Santini (eds.), The right to safe food towards a global governance, Giappichelli, Turin (2013), 491 ff.).

[55] Nor can national laws easily find a remedy. For instance, the Dutch Act on Collective Settlements (WCAM) allows some concentration of litigation in one place, but investor opt-out is always possible. The WCAM provides a mechanism for judicial approval of binding settlement agreements and concentrates litigation on the basis of Art. 8 No 1 Brussels I, which allows suing multiple defendants in the courts of the place where any one of them is domiciled whenever separate proceedings may deliver irreconcilable judgments (Amsterdam Court of Appeal, *Shell Petroleum N.V. v. Dexia Bank Nederland N.V*, 29 May 2009, NJ 2009/506; *Scor Holdings AG (Converium Holdings AG)*, 12 November 2010, NJ 2010/683, and 17 January 2012, NJ 2012/355). Class members qualify as defendants in a procedure initiated by the debtor with the aim of binding all the interested counterparties to give away their rights to initiate an individual claim B. Hess, Collective Redress and the Jurisdictional Model of the Brussels I Regulation, in A. Nuyts and N. E. Hatzimihail (eds.), Cross-Border Class Actions. The European Way, Munich, Selp, 2014, 64 ff.). This ensures action can be brought in the Netherlands for all the parties, to the extent that at least one among the co-defendants is Dutch (X. Kramer, Securities Collective Action and Private

from satisfactory, if one considers that predictability of jurisdiction is one of the guiding principles of the Brussels I framework (Recital 15). However, jurisdiction agreements may represent a viable private ordering solution to such problems.

### 3. *Jurisdiction agreements: relevance and legal framework*

The previous analysis has shown that rules on jurisdiction do not always ensure predictability of litigation venues and that, from the corporate governance viewpoint, this lack of legal certainty may affect the allocation of litigation costs among stakeholders.

Drawbacks affecting the current regulatory framework and its interpretation might be reduced if the parties could easily contract out of default rules and devise the jurisdiction framework that best suits them. As the Coase theorem suggests, low transaction costs make the initial allocation of rights less important, because private incentives will tend to redistribute rights in a more efficient fashion.[56] This shows the importance of jurisdiction agreements and of their legal regime in enabling private ordering solutions to unsatisfactory default rules. This section addresses the regulatory framework for choice-of-court agreements, and points out how prospective ECJ case law (Sec. 3.1) may fail to strike a good balance between investor protection and party autonomy (Sec. 3.2).

In Brussels I,[57] jurisdiction agreements are particularly powerful tools, as they grant priority to the selected court even in cases where the validity or the scope of the agreement is challenged (Art. 31(2) and (3); Recital 22).[58] Even when forum selection simply reproduces the applicable law it is useful to avoid torpedo actions that frustrate enforcement: this should remove incentives to instrumentally file

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International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries, Global Business & Development Journal, 2014, 235 ff).

[56] See R. Coase, The Problem of Social Cost, 3 Journal of Law and Economics 1 (1960).

[57] The Hague Convention of 30 June 2005 on Choice of Court Agreements is not taken into account, as this paper is only concerned with disputes between parties having habitual residence in the EU (see Art. 26 of the Convention; F. Garcimartin, Prorogation of Jurisdiction, in Dickinson and Lein, cit., 283 f.).

[58] This regime was introduced in the Brussels I recast as a remedy to the opposite stance taken by the ECJ in its previous case law, which confirms jurisdiction of the court first seized on the existence of a choice-of-court agreement (ECJ, C-116/02, *Gasser*, 9 December 2003) and excluded anti-suit injunction can interfere with the decision of such court (ECJ, C-159/02, *Turner*, 27 April 2004): see I. Queirolo, Prorogation of Jurisdiction in the Proposal for a recast of the Brussels I Regulation, in F. Pocar, I Viarengo, F. Villata (eds.), Recasting Brussels I, Cedam, Padua (2012) 191 f..

requests for negative declaratory relief before courts that might take a long time before declaring they lack jurisdiction.[59]

However, jurisdiction agreements are also subject to some stringent limits. For consumers, prorogation of jurisdiction may deviate from the special protection regime only by way of an agreement entered into after the dispute has arisen (Art. 19 Brussels I), and the capacity of choice-of-court agreements to prevent torpedo actions is curbed as well (Art. 31(4)).[60] Remarkably, such limitations do not apply to jurisdiction agreements addressing consumers that cannot take advantage of the Art. 17 protection regime.

For other investors – and for consumers not enjoying the Art. 17 protection regime – jurisdiction agreements can predate litigation, but they must be either in writing (or evidenced in writing, including in electronic form through a durable medium) or in a form which complies with international trade usages (Art. 25(1)(a) and (c)).[61]

Unfortunately, interpretations diverge as to what "written form" precisely means for the purpose of jurisdiction agreements, partially because the function of the requirement is debated. Although the law accepts mere written evidence as a ground for the validity of jurisdiction agreements, formal requirements are often understood as a legal device aimed at ensuring an actual and genuine agreement between the parties.[62] This makes it quite difficult to understand when the condition is fulfilled through standard contract terms – as is substantially the case for securities T&Cs – because there is no easy way to assess whether both parties have actually agreed on each of the clauses in a form that includes a jurisdiction agreement. A precise reference to the jurisdiction agreement is required when it is contained in T&Cs detached from the document signed by the parties,[63] but less clear is whether a specific signature or at least a separate mention of the jurisdiction agreement are needed. In part, this lack of clarity stems from the fact that such question is not entirely immune from the law governing the (rest of the) contract[64] even for matters falling outside the material validity of the agreement,

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[59] See B. Hess and M. Gargantini, International Financial Disputes in the Aftermath of the Crisis: New Litigation Techniques and Enforcement Strategies, Working Paper, on file with the authors.
[60] This is reflected in the abovementioned prospectus practice limiting the effect of jurisdiction agreements to non-consumers only: see supra fn. 92 and accompanying text.
[61] Less relevant for this analysis is the possibility for the parties to set, by way of a framework contract, the form for future jurisdiction agreements (Art. 25(1)(b)).
[62] ECJ, C-150/80, *Elefanten*, 24 June 1981. R. Hausmann e I. Queirolo, Art. 23, in T. Simons and R. Hausmann (eds.), Regolamento « Bruxelles I », IPR Verlag, Munich (2012), 480 f.; U. Magnus, Art. 23, in Magnus and Mankowski, cit., 480.
[63] ECJ, C-24/76, *Estasis*, 14 December 1976.
[64] A. Briggs, Agreements on Jurisdiction and Choice of Law, Oxford, OUP (2008), 253 f. See also High Court of England and Wales, Goldman Sachs International v Novo Banco SA [2015] EWHC

for which reference to national law is now made explicit by Art. 25(1) Brussels I.[65] As a consequence, the risk cannot be avoided that a jurisdiction clause is deemed inapplicable to a party who is bound by, and takes advantage of, other provisions of the same contract.[66]

Furthermore, different standards can apply in this respect to jurisdiction agreements, on the one hand, and to the rest of the contract, on the other hand.[67] A choice-of-court agreement which is part of a contract shall indeed be treated independently from the other terms of the same contract, so that its validity cannot be challenged on the mere basis that the contract is invalid under the applicable national law (Art. 25(5) Brussels I). This rule enables the judge selected by the parties to retain jurisdiction on the validity of the jurisdictional clause, thus avoiding easy circumventions of the agreement.[68] Moreover, severability of the jurisdiction agreement from the rest of the contract is the natural consequence of Brussels I autonomous interpretation, which adds to doubts concerning the very nature of such agreements as contractual terms:[69] if an homogeneous interpretation of the Regulation is needed across Europe, it may be the case that

2371 (Comm) (7 August 2015) § 76 ("the question whether a jurisdiction agreement is enforceable against someone other than the original party to the contract involves an inquiry as to whether that second party has succeeded to the right and obligations of the original part. That is an issue governed by the applicable national law"). According to U. Magnus, Art. 23, in Magnus and Mankowski, cit., 445, the boundary between questions falling within the autonomous scope of the Brussels I regime on jurisdiction agreement and those which are regulated by national law is far from clear; in favour of a broad the application of national conflicts and substantive rules A. Layton and H. Mercer, European Civil Practice, Sweet & Maxwell, London (2004), 691 ff.

[65] F. Garcimartin, Prorogation of Jurisdiction, in Dickinson and Lein, cit., 294 ff. and 297 (although reference to national law in Art. 25(1) concerns only substantive or material validity, as opposed to formal validity and the effective consensus (agreement), the dividing line between the two aspects is not crystal clear; the ECJ has in the past referred to national law also for issues concerning the succession of a third party in the agreement (ECJ, C-387/98, *Coreck*, 9 November 2000)).

[66] C. Heinze, Choice of Courts Agreements, Coordination of Proceedings and Provisional Measures in the Reform of Brussels I Regulation, 75 RabelsZ 581 (2011), 586 (separating jurisdiction agreements form the law applicable to the main contract would create problems for third party succession, as it could lead to a third party being bound to the contract, but not to jurisdiction agreement).

[67] A. Briggs, cit., 240 ff. and 258 ff. (Art 25 does not require a contractual agreement, it rather being grounded on the need to ascertain a common understanding by the parties); Id., What Should Be Done about Jurisdiction Agreements?, 12 Yearbook of Private International Law 311 (2010), 312 f. (on the relationship between traditional contractual tools, such as privity and assignment, and jurisdiction agreements).

[68] ECJ, C-269/95, *Benincasa*, 3 July 1997, § 29.

[69] A. Briggs, cit., 61 ff. and 82 ff. (the need to keep the choice of court effective when the validity of the rest of the contract is challenged explains severability of jurisdiction agreements; however, severability may be abused when used to challenge the validity of a jurisdiction agreement when the rest of the contract remains applicable).

all requirements are met for jurisdiction agreement under EU law while the rest of the contract is invalid for the *lex fori*, and vice versa.[70]

The list of uncertainties affecting the legal framework for prorogation of jurisdiction goes beyond Brussels I. Limitations to the validity of a jurisdiction agreement under Art. 19 overlap, in fact, with the parallel consumer protection framework set forth by the Directive on Unfair Contractual Terms (Dir. 93/13/EEC), which should remain applicable as per Art. 67 Brussels I.

Directive 93/13/EEC establishes that contractual terms causing a significant imbalance in the parties' rights and obligations are inapplicable if professionals and consumers have not negotiated them individually (Art. 3). A series of contractual terms that judges may prima facie regard as unfair is listed by the Directive itself, with the result that a professional party can hardly invoke such agreements if they are included in general T&Cs.

Among the standardized contractual terms for which the (hardly rebuttable) presumption of unfairness applies are all the clauses "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy" (Art. 3(3) and Annex 1(q)).[71] Jurisdiction agreements that prevent a consumer from bringing action in the courts of his country of domicile would be an obstacle to that consumer's procedural rights, and would thus seem to fall under this protective regime.[72]

However, the protective measures set forth by the Directive on unfair contractual terms (individual bargaining) are not compatible with those provided by the Brussels I Regulation (which bans agreements taken before a claim is lodged). The relationship between the jurisdiction agreements regime under Brussels I and the unfair contractual terms rules under Dir. 93/13/EEC is not clarified by any explicit provision.[73]

[70] This latter is the case in *Profit Investment SIM*, according to the Advocate General (see Sec. 3.1 infra).

[71] Other procedural limitations falling within the scope of the provision are terms "requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract".

[72] The ECJ has considered that clauses obliging consumers to litigate before a national court of a city other than that of their domiciles, but in the same country, fall within the scope of Annex 1(1)(q) (joined cases C-240/98 and C-244/98, *Océano Grupo Editorial and Salvat Editores*, 27 June 2000; see also case C-243/08, *Pannon*, 4 June 2009), on the basis that such a provision "obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile" (§ 22). A fortiori, the same reasoning should apply to agreements establishing mandatory jurisdiction in another country.

[73] As opposed to what happens for distance marketing of consumer financial services. Recital 8 of Directive 2002/65/EC explicitly states that no provision within the same Directive "relating to

A viable interpretation, according to both the *lex posterior* and the *lex specialis* criteria, might be that agreements concerning jurisdiction should be treated according to Brussels I, thus being blocked when they move jurisdiction away from investor's domicile. On the contrary, agreements concerning the competence of judges within the national boundaries of consumers' domiciles would fall within the unfair contracts Directive's purview.[74] More detrimental agreements (those forcing consumers to litigate abroad) would hence be subject to stricter requirements, while the parties could enter into less problematic terms (those forcing consumers to litigate before a judge within the same jurisdiction) by way of individual negotiations.

A second possible interpretation is that the Directive on Unfair Contract Terms applies in the residual cases where choice-of-court agreements between consumers and professionals are valid under Art. 19 Brussels I,[75] as is the case for instance when such agreements confer jurisdiction on the courts of the Member State where both parties have their domiciles when the contract is entered into.

A third possibility is that Art. 3 Dir. 93/13/EEC also retains some effects on international litigation because Arts 19 and 25(4) Brussels I do not address all jurisdictional agreements involving consumers, but only those which deviate from the protective regime set forth by Arts 17 and 18 Brussels I. When such regime does not apply because there is no contractual privity between issuer and investors, Art. 3 Dir. 93/13/EEC may still curb the possibility to bind consumers by way of jurisdiction agreements. This might be the case when contracts bind other than the original parties, as long as the party to the contract at the end of the chain of assignments has accepted[76] – but not necessarily individually negotiated – its terms.

Absent a clear rule on the point, divergent national practices exist as to the application of Directive 93/13/EEC to cross-border disputes. For instance, UK courts have assessed clauses establishing exclusive jurisdiction in a country other than the investors' by using the rules on unfair contracts, even in cases where contractual privity existed between the parties.[77] Apparently, this amounts to a cumulative application of national provisions implementing Directive

information about any contractual clause on law applicable to the contract and/or on the competent court" shall affect the applicability of the Brussels I regime.

[74] A. Galič and F. Pesce, Art. 17, in Simons and Hausmann, cit., 376 f.

[75] P. Nielsen, Art. 17, in Magnus and Mankowski, cit., 387.

[76] ECJ, C-265/02, *Frahuil*, 5 February 2004 (authorization to the conclusion of the contract of guarantee is needed in order for the guarantor to enjoy a contractual claim against a third party by way of subrogation).

[77] See Standard Bank London Ltd v Apostolakis, [2001] EWHC 493 (Comm).

93/13/EEC[78] and of the Brussels Convention (now Brussels I Regulation), so that clauses that would be valid under Brussels I should also meet the requirement of contractual fairness in order to be enforceable.[79]

To what extent the two interpretations would produce divergent results for agreements reached by way of reference to standard T&Cs is unclear, at least for contracts entered into before the dispute (by and large the most important scenario), if one considers that the Brussels I regime is narrower than Directive 93/13/EEC.[80]

### 3.1. *The Advocate General's Opinion in* Profit Investment SIM

In *Profit Investment SIM*, the request for a preliminary ruling brought before the ECJ concerned, among other matters, whether a choice-of-court agreement included in a financial instrument's T&Cs bound subsequent holders of such financial instrument. In the case, Commerzbank had issued, in the form of notes, credit derivatives linked to underlying bonds issued by E3, an entity incorporated in Luxembourg. Profit Holding SIM, an Italian investment firm, purchased such credit linked notes through a UK-based investment firm (Redi).[81] The T&Cs of the notes contained a clause stating that the UK court had jurisdiction over every dispute concerning, or arising out of, the notes themselves.

Following E3's default, Profit Investment SIM challenged before the Milan court the validity of the notes for lack of consideration. Commerzbank contested that such court had jurisdiction, and invoked the choice-of-court agreement. The seized judge stayed the proceeding and referred a request for a preliminary ruling to the ECJ in order to ascertain whether the requirement that a jurisdiction agreement be in written form (Art. 25(1)(a) Brussels I) is satisfied where such an agreement is inserted into an offering document unilaterally created by a bond issuer, so that the prorogation of jurisdiction be made applicable to disputes involving future purchasers. The same court also asked whether, in case this question was answered in the negative, the insertion of a choice-of-court

[78] See the Unfair Terms in Consumer Contract Regulation 1999 (1999 No. 2083).
[79] J. Hill, Cross-Border Consumer Contracts, Oxford, OUP (2008) 202 f.
[80] In Standard Bank London v Apostolakis, cit., the Court specifies that Art. 13 and 14 of Brussels Convention (setting the default rules on jurisdiction for disputes involving a consumer) would suffice to exclude the validity of the jurisdiction agreement at stake, but it adds that assessment of validity under the rules on unfair contracts would be material in case Art. 13 and 14 would not be an obstacle (interestingly, Art. 15 of the Convention – prohibiting exclusive jurisdiction agreements entered into before the dispute – is not mentioned in the reasoning).
[81] The description of the facts does not clearly determine whether Redi was operating as a broker or as a dealer.

agreement into the offering document can be considered as a form which accords with usages in international trade or commerce under Art. 25(1)(c) Brussels I.

The Advocate General's opinion recalled that the formal requirement for choice-of-courts agreements are aimed at avoiding that weak parties remain unaware of any modification to default jurisdictional rules. Therefore, in his opinion, the requirement is not met when the agreement is included in a security's T&Cs, unless the intermediary entrusted with the security's placement takes care to refer to such agreement when bargaining with the purchaser.[82] Nor can the agreement simply be imposed on subsequent holders as – according to the Advocate General's argument – *Kolassa* excludes that a contractual relationship exists between the two parties of a financial instrument.[83] It makes no difference that the remaining T&Cs' clauses are binding for the parties, because severability of jurisdictional agreements (Art. 25(5) Brussels I)[84] allows a separate assessment grounded on the special need to ascertain actual consent of the parties.[85]

Finally, the Advocate General dismissed the possibility that choice-of-court agreements can circulate along with the financial instrument as is the case with bills of lading and shares. The relevant case law – *Tilly Russ*[86] for bills of lading and *Powell Duffryn*[87] for company's charters shares – is deemed inapplicable because bills of lading are based on a trilateral relationship that allow ownership of commodities to circulate along with a negotiable instrument, while shares incorporate a residual claim on a company's assets: neither corresponds to non-equity securities, where only two parts are involved and holders have a simple credit towards the company. Therefore, the Advocate General differentiated between bondholders and shareholders, positing that only these latter could be bound by a jurisdiction agreement (embedded in the company's charters), while limits to the circulation of such agreements among sub-buyers of goods should apply to bondholders in line with the *Refcomp* decision.[88]

### 3.2. *The Advocate General's Opinion in* Profit Investment SIM*: a critique*

The Advocate General's Opinion excludes that a jurisdiction agreement contained in bond T&Cs can bind subsequent purchasers of the bonds, as opposed to what

[82] Opinion of AG Bot in *Profit Investment SIM*, cit., § 43 ff.
[83] Ibid., § 51.
[84] See supra fn. 68 and accompanying text.
[85] Opinion of AG Bot in *Profit Investment SIM*, cit., § 53.
[86] ECJ, 71/83, *Tilly Russ*, 19 June 1984; see also ECJ, *Coreck*, cit. See T. Hartley, Choice-of-court agreements under the European and International Instruments, OUP, Oxford (2013), 150 f.
[87] ECJ, C-214/89, *Powell Duffryn*, cit. See Hartley, cit., 152 ff.
[88] ECJ, case C-543/10, *Refcomp*, 7 February 2013.

happens for similar provisions embedded in a company's charter, which are deemed to bind shareholders. This interpretation has a weak basis. The ranking of the claims defines, in itself, only the content of the financial rights attached to a security, and it is difficult to understand why a residual claim should be compatible with the existence of an agreement between the security holder and the issuer, while a fixed claim should not,[89] let alone the increasing number of hybrid financial instruments that blur such a distinction.

To have a clear understanding of the Opinion, as well as of the criticisms expressed in this essay, one should separately focus on the classification of investors as "consumers", and on the existence of a genuine consent on a jurisdiction agreement between the disputing parties.

Classifying investors as consumers affects the possibility that investors be bound by jurisdiction agreements within a company's charter (shareholders) or securities T&Cs (holders of non-equity securities; parties of derivative contracts). While profit-seeking activities do not prevent individuals[90] that carry them out from qualifying as consumers, whether investors can qualify as consumers under Art. 17 when holding financial instruments outside their trade or profession remains partially an open question. *Kolassa* answers in the positive for bondholders,[91] and common drafting of (base) prospectuses for non-equity securities confirms this as the possibility that investors are "consumers" is explicitly taken into account by jurisdictional clauses, whose applicability is restricted accordingly.[92] In contrast, some scholars – and the prospective case law to date[93] – exclude that shareholders

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[89] Such a differentiation (*rectius*, the differentiation between the administrative rights of shares and bonds) might on the contrary be relevant in cases where issues concerning the circulation of the security and its validity are at stake. See infra text accompanying fn. 121 and 124.

[90] Brussels I does not explicitly state that only individuals are protected under the consumer regime. However, legal entities are normally excluded (P. Nielsen, Art. 15, in Magnus and Mankowski, cit., 376; for companies, this opinion may be justified on the assumption that whichever act performed should fall, either directly or indirectly, within the statutory objects of the company).

[91] See *Kolassa*, cit., §§ 23 f.

[92] See e.g. Commerzbank, Base Prospectus Relating to Italian Certificates (filed with BaFin), 23 July 2014, 230 (Frankfurt am Main court has exclusive jurisdiction, but only for merchants and public law entities); Banca IMI, Prospetto di Base Relativo al Programma di Offerta e/o Quotazione di Obbligazioni (filed with Consob), 2 April 2015, 67 f. (Milan court has exclusive jurisdiction, but consumer's domicile prevails); Unicredit, Prospetto di Base 2015-2016 Relativo al Programma di Offerta e/o Quotazione di Prestiti Obbligazionari, (filed with Consob, 10 July 2014, 46 f. (same).

[93] Advocate General's Opinion in *Profit Investment SIM*, cit., § 48.

can qualify as consumers by reason of the unique features of a company's membership,[94] so that the protective regime laid down in Art 19 could not apply.

The residual claims shareholders are entitled to and the powers they enjoy in the company's governance can therefore represent a sign that equity investors partake in the common undertaking. The general framework sketched above in section 1 demonstrates that weaker safeguards for shareholders are not necessarily inefficient because, from a substantive point of view, residual claimants are always on both sides of the dispute, and enhanced protection of shareholders as plaintiffs inevitably results in higher litigation costs for the company.[95] However, distinguishing on the basis of the ranking of investor claims may once again be over-inclusive or under-inclusive. On the one hand, jurisdiction agreements bind small shareholders without any possibility to influence the management of the company, while a large bond fund will always enjoy protection even when *ex ante* private bargaining through jurisdiction agreements may prove helpful to all the parties.

The ranking of the claim determines the intensity of investor participation as to the entrepreneurial risk, so it could be relevant, in principle,[96] when it comes to classifying investors as consumers or non-consumers. However, the Opinion in *Profit Investment SIM* relies on such element for answering the different question of whether genuine consent exists between a professional investor and its counterparty in a derivative contract. Here, the point is to understand whether (i) a security's T&Cs fulfil the requirement of written form (or written evidence of a pre-existing agreement) and, if so, (ii) whether such original agreement also involves subsequent holders of the financial instrument. All in all, the different claims bondholders and shareholders are entitled to (fixed and residual, respectively) do not seem to justify uneven treatment for the ascertainment of a genuine consent, nor does their different voting power.

As for the fulfilment of the written form (i), the Opinion stresses that a narrow interpretation is needed to ensure that the weak party is protected. Therefore, the mere inclusion of a jurisdiction agreement is not deemed sufficient unless the national judge can ascertain that the investment firm entrusted with a security

[94] P. Mülbert, Gerichtsstandsklauseln als materielle Satzungsbestandteile, 118 Zeitschrift für Zivilprozess 313 (2005), 332 ff.; R. Hausmann and I. Queirolo, Art. 23, in Simons and Hausmann, cit., 481.

[95] See supra fn. 3 and accompanying text.

[96] Although such ranking could in principle underpin a distinction between consumers and non-consumers, in sec. 4.1.3 I propose an alternative classification that disregards the divide between fixed and residual claims and focuses on the need of protection, which can be transversal to claimants having different rankings.

placement had made express reference to it in its contract with the buyer. Whether this conclusion can be effectively drawn from ECJ case law might be debatable, but the drawbacks of the Opinion are evident. First, it interprets severability of jurisdiction agreements from the rest of the contract and autonomous interpretation of the "written form" in a way that enables the transfer of claims but not prorogation of jurisdiction. In contrast, the ECJ in the past has discerningly used the Brussels I autonomous interpretation when assessing the effects of choice-of-court agreements *vis-à-vis* third parties. In *Martin Peters* and *Powell Duffryn*, for instance, the autonomous interpretation allowed the Court to qualify a company as a contract in the light of its economic function,[97] while the question of whether a jurisdiction clause inserted in the company's charter binds shareholders was answered also in the light of the applicable national law concerning majority voting on charter amendments and circulation of shares (and of the rights and obligations they represent).[98] In *Powell Duffryn*, the ECJ showed how to uniformly interpret the validity of jurisdiction agreements while, at the same time, allowing this interpretation to adapt to the specific circumstances of the case and, hence, avoiding that severability of jurisdiction agreements can easily break the legal and economic equilibrium of the contract.[99] By the same token, the ECJ stressed that, when under the applicable national law[100] a consignee of a negotiable instrument has succeeded to rights and obligations of the original party, acceptance of the jurisdictional clause become less relevant in ascertaining whether a jurisdiction agreement is binding upon her,[101] because this avoids parties taking advantage of contractual clauses in a selective manner.

Remarkably, the reading proposed by the Advocate General applies to contracts that are normally concluded – either by electronic means or with written confirmation[102] – in the marketplace even between professionals, as is the case in

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[97] ECJ, *Martin Peters*, cit., § 13; *Powell Duffryn*, cit., §§ 16 and 19. In *Martin*, the Court qualified as contractual the shareholders' obligation towards the company for contributions still due (H. Gaudemet-Tallon, Compétence et exécution des jugements en Europe, LGDJ, Paris (2010), 169), but the reasoning is however extended by some scholars to the reciprocal positions of the company towards its shareholders (P. Mankowski, Art. 5, in Magnus and Mankowski, cit., 133). In *Powell* the Court stated that a clause inserted in the company's statutes that confers jurisdiction also binds those who became shareholders after the clause was adopted, as the mere fact of becoming a member showed an agreement to be subject to all the provisions in the statutes. See.

[98] ECJ, *Powell Duffryn*, cit., §§ 17 ff.

[99] For this reading of *Powell Duffryn* and for further considerations on validity of jurisdiction agreements see A. Briggs, cit., 263 f.; F. Villata, L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I, Padua, Cedam, 2012, 64 f., 80 f., 85, 102 f.

[100] See supra fn. 64.

[101] ECJ, Coreck, cit.; J. Newton, The Uniform Interpretation of the Brussels and Lugano Conventions, Hart, Oxford, 2002, 213 f.

[102] The French version of Art. 25 Brussels I requires that the jurisdiction agreement is entered into "par écrit ou verbalement avec confirmation écrite" (Gaudemet-Tallon, cit., 134).

*Profit Investment SIM*, and hence even when there is no weak party in need of protection. In its inability to distinguish between consumers and professional investors, this reasoning may result in a structured exotic financial instrument binding its owner as for its very complex payoff – often displaying mathematical formulas – but not for the jurisdiction agreement, while the relative importance of the two clauses would rather suggest the opposite. Second, connecting prorogation of jurisdiction to the behaviour of the investment firm entrusted with placing the financial instruments[103] – either when it operates as underwriter or where it does not[104] – may be reasonable on the primary market, where investment firms can qualify as issuers' agents in some circumstances,[105] but it would be unworkable for subsequent transfers. Why should a seller having no fiduciary relationship with the issuer bother reminding the buyer that a security's T&Cs include a jurisdiction agreement?

This brings us to the question whether jurisdiction agreements bind subsequent parties (ii). Here, it is difficult to see why the transfer of a share determines the accession of the new holder to the pre-existing company's contract while the same cannot apply, with regard to the original loan or derivative contracts, when bonds or other financial instruments are handed over. The nature of the main claim does not say anything, indeed, about the ability of the remaining elements of the bundle of rights (and obligations) that constitute a financial instrument to circulate among new investors.

Most importantly, ECJ precedents would permit a different reading. *Powell Duffryn* and *Tilly Russ*, on one side, and *Refcomp*, on the other, are not at odds. Rather, they simply refer to different facts. In *Powell* and *Russ*, the Court addressed the question whether the terms set forth by a company's charter and, respectively, a bill of lading could circulate along with the company's shares and, respectively, the bill itself. In contrast, *Refcomp* related to a case where a physical good (an air-conditioning device) circulated with no accompanying document: hence, in this case the Court correctly stated that only the parties to the original contract for sale were bound by the jurisdictional agreement they entered into pursuant to Art. 25 Brussels I. With limited exceptions confined to some jurisdictions,[106] retail purchasers of physical goods would normally not expect to take advantage of, or to be bound by, contractual agreements between producers

[103] ECJ, *Profit Investment SIM*, cit., § 45.
[104] Facts on the point are not clear in *Profit Investment SIM*.
[105] For a restrictive interpretation see however the ECJ ruling in *Kolassa*, § 33, where applicability of *Maletic* is excluded (in *Maletic*, contractual relationship between a tour operator and a consumer was grounded on qualification of the travel agent as agent: see ECJ, C-478/12, *Maletic*, 14 November 2013).
[106] Namely France: see F. Villata, L'attuazione, cit., 75 ff.

and wholesalers, even assuming they know the contents of such agreements. Absent any assignment of contract through transfer of documents (or of any other equivalent electronic support), one would therefore exclude that jurisdictional agreement limitations in chains of contracts[107] apply to the circulation of securities. In this latter case, there is actually an obligation freely assumed by one party (the issuer) towards another (the holder) – the fact that this latter is not identifiable *ex ante* being precisely the purpose of resorting to securities.[108] To put it differently, the reason why no contractual relationship was identified – and rightly so – in *Refcomp* is that in such case the parties to the dispute were not the same parties of the contractual relationship invoked, nor had such contractual relationship been assigned to any of them. On the contrary, securities and other negotiable instruments[109] are structurally aimed at allowing assignment of legal entitlements with no requirement of further approval by their issuers.[110] As the ECJ puts it in *Tilly Russ*, allowing the bearer of a negotiable instrument to remove herself from the compulsory jurisdiction as established by a bill of lading would be alien to the purpose of Art. 19, which is to neutralize jurisdiction clauses that might pass unnoticed in contracts; therefore, holders of the bill of lading become vested with all the rights, and at the same time become subject to all the obligations, mentioned in the bill of lading, including those relating to the agreement on jurisdiction.[111]

All in all, the Advocate General's interpretation prevents issuers from concentrating litigation in the same venue whenever the disputed matter falls outside the scope of exclusive jurisdiction set forth by Art. 24 No 2 Brussels I, unless the relevant dispute involves shareholders. Furthermore, as jurisdiction agreements included in T&Cs of non-equity securities or in other financial instruments would not be enforceable against investors on the secondary market,[112] classification of investors as professionals or consumers as per Art. 19

[107] See *Handte*, mentioned by the Advocate General (case C-26/91, *Handte*, 17 June 1992), and *Refcomp*, cit. See also Gaudemet-Tallon, cit., 167 f. and 175 ff.

[108] The same result can also be reached by relying on the fact that, in order to ascertain the contents of the obligation due, reference must be made to the content of the securities T&C, rather than exclusively to the applicable law (ECJ, *Brogsitter*, cit., §§ 24 ff.).

[109] While the two definitions are interchangeable in some countries (especially in continental Europe: A. Waclawik-Wejman, Of Corporation and Plumbers: Shareholder Voting Rights and Securities Clearing and Settlement in Europe, in K. Alexander and N. Moloney (eds.), Law Reform and Financial Markets, Edward Elgar, Cheltenham, 2011, 195, 199, fn. 13), they are not equivalent in others (such as the U.K.: F. Villata, Gli strumenti finanziari nel diritto internazionale privato, Cedam, Padua, 54 and 154), but this has limited effects for our purposes as both legal tools perform a similar economic function.

[110] For further explanations, see infra text accompanying fn. 121 and 124.

[111] *Tilly Russ*, cit., §§ 24 f.

[112] Advocate General Opinion in *Profit Investment SIM*, cit., § 51.

or 25 Brussels I retains its relevance only for the very limited scope of primary market transactions. On the secondary markets, however, all investors would receive the same treatment, and professional entities – such as *Profit Investment SIM* – may enjoy the privilege of litigating within their domicile jurisdiction in spite of jurisdiction agreements meant to circulate along with the rest of the financial instrument T&Cs.

## 4. *An optimal regime for jurisdictional rules*

This section sketches the features of an efficient and predictable regulatory framework for jurisdiction in securities litigation, and analyses how European rules and case law fall short of delivering such result. Default rules are considered first (Sec. 4.1), together with drawbacks currently affecting rules on professionals (Sec. 4.1.1) and consumers (Sec. 4.1.2). Jurisdiction agreements are then taken into consideration in the light of their capacity to allow private ordering solutions in specific cases where default rules prove sub-optimal (Sec. 4.2).

### 4.1. *Default rules*

A proper combination of law-making and judicial interpretation should ideally meet two conditions, one concerning investors that do not deserve special protection from the risk of litigating abroad, and the other applicable to weak investors (for which such risk would easily result in under-enforcement of individual rights).

As for the first condition, non-consumer claims stemming from a violation of securities T&Cs should be considered contractual for the purposes of Art. 7 No 1, so as to avoid dispersion and unpredictability of litigation. Furthermore, a clear stance should be taken on the place of execution of issuers' financial obligation: this should be located at the seat of either the issuer or the central securities depository (CSD), depending on the applicable substantive law. A harmonized regulatory framework could even try to establish a uniform set of connecting factors: for derivative contracts, this would enable the identification of a single competent court in spite of reciprocal obligations of the parties,[113] or to

[113] Derivative contracts can hardly be classified as contracts for the provision of services or goods, and would therefore seem to fall outside the scope of Art. 7 No 1(b) (P. Mankowski, Art. 5, in U. Magnus and P. Mankowski (eds.), Brussels I Regulation, Selp, Munich, 2012, 149 and, at least for loans not provided by banks, 157 f.; P. Franzina, La giurisdizione in materia contrattuale, Cedam, Padua (2006) 317 ff.). Hence, derivative contracts do not enjoy unification of jurisdiction for different claims stemming from the same contract.

concentrate jurisdiction even when voluntary or mandatory clearing and settlement by a central counterparty would split the initial relationship in two.[114]

Interestingly enough, classifying claims represented by securities (as well as those stemming from other financial instruments) as "contractual matters" might enable the parties to reach a private ordering solution to current uncertainties, because Brussels I takes into account the contractual choice of the place of performance when establishing jurisdiction.[115] Although the wording of the law is explicit on the point only in Art. 7 No 1(b), which refers to the sale of goods and provision of services, the majority of scholars believes that the same applies to other contractual relationships (Art. 7 No 1 (a)).[116] A provision in bond T&Cs identifying the place of execution of the pecuniary obligation would also have the advantage of sidestepping the uncertainties affecting the validity of jurisdiction agreements vis-à-vis subsequent buyers.

As for the second condition concerning weak investors, they should have the right to bring an action against an issuer in their own jurisdiction provided that a prospectus was passported there, and irrespective of the qualification of the claim and of the intensity of the contractual privity between the parties of the dispute. This would be more efficient than simply relying on tortious liability (which could bring similar results on the assumption that the relevant bank or securities account is likely to be in the country of the consumer's domicile), as professional investors could not take advantage of the same benefit by default. Furthermore, the proposed criterion would ensure predictability for issuers, as the publication of a prospectus in a specific country perfectly matches the requirement set forth by Art. 17(1)(c) Brussels I that a commercial or professional activity be directed to the Member State of the consumer's domicile for the consumer protection regime to apply. Whether such investors underwrote securities on the primary market or bought them from intermediaries belonging to the underwriting syndicate, and whether they hold their securities through a direct or an indirect holding system, should play no role in this respect.

#### 4.1.1. *Professional investors and contractual claims*

The Brussels I Regulation and its interpretation in ECJ case law clearly fall short of delivering the optimal default jurisdictional regime presented above in section

[114] See Art. 2 No 1 Reg. (EU) No 648/2012 (EMIR).
[115] See ECJ, C-58/79, *Zelger*, 17 January 1980, §§ 89 ff.
[116] For a review of the relevant literature see P. Mankowski, Art. 5, in U. Magnus and P. Mankowski, cit., 206 and fn. 1008.

4.1. Tortious liability, on which the ECJ heavily relies, can be either overprotective for professional investors – at the expense of issuers and non-litigating shareholders – or excessively punitive for consumers whenever the relevant bank or security account is not at their domiciles.[117] Nor would a narrow reading of *Kolassa* represent an easy shortcut to solve such issue by making sure that investors' claims against issuers are regarded as a contractual matter at least when securities are held in a direct, albeit intermediated, form.[118] Such narrow reading would certainly be preferable because it could allow for the identification of contractual matter for claims arising out of securities bought on the secondary markets, at least when direct holding systems are adopted. However, this interpretation would have shortcomings, too. First, if one takes for granted the position of the Advocate General in *Profit Investment SIM*, trading on secondary markets prevents claims based on securities form being qualified as "matters relating to a contract", irrespective of the holding technique adopted.[119] Second, investor protection should not be made conditional upon the technicalities of the holding system.[120] These are highly dependent on legal qualifications under the applicable law and might therefore cause jurisdiction to be established along different criteria depending on the national context, hence putting the autonomous interpretation of the Brussels I Regulation, and the need for uniformity it reflects, under stress.

The very reason why securities – and more broadly financial instruments – are created is to allow the circulation of contracts (or of the contractual claim they entail, as the case may be) on secondary markets, because the possibility to divest is key in lowering investors' risks in the first place. The cost of capital is therefore normally higher when no liquid markets are available for the relevant securities. In normal market practice, very few would qualify a claim of a bondholder as tortious, for the simple fact that a debt security represents a credit contract that typically provides a direct claim vis-à-vis its issuer.[121] In setting up the conditions

[117] In a system that encourages cross-border provision of banking and custodian services (see Art. 33 Dir. 2013/36/EU (CRD IV) and Art. 34 Dir. 2014/65/EU (Mifid 2)), the duty to litigate in another country represents a hidden cost consumers might not be aware of.

[118] See supra fn. 31.

[119] See supra text accompanying fn. 34.

[120] For instance, the interpretation would exclude transactions carried out on the primary market by investors domiciled in countries, such as the United Kingdom, that rely on trusts for the intermediated holding of securities (see supra, Sec. 2.2). Investors buying securities when placing orders with their banks are however generally unaware of the technicalities that securities holding entails in their own country.

[121] See e.g. L. Thévenoz, Who Holds (Intermediated) Securities? Shareholders, Account Holders, and Nominees, in Uniform Law Review, 2010, pp. 845-846 (company law generally wishes to establish a direct relationship between an issuer and its shareholders, and a similar approach characterizes the relationship between an issuer and its bondholders, where corporate law is less

for developing a secondary market, issuers of transferable securities freely accept that, before payment is due, the identity of the creditor may vary. Depending on the applicable law, assignments of contracts – or other functionally equivalent national legal tools – with obligations on one party only, as well as transfers of unilateral promises, may require approval by the non-assigning party or a notification to the debtor. However, where a contractual obligation circulates with a security a general consent to its tradability is actually given, at the very moment the security is created, so to say, in *incertam personam*.[122] Instead of identifying the counterparty of a contract (e.g., the creditor) by her name, reference is made to the legal requirements the bearer must meet, according to the *lex tituli*, in order to enjoy a claim whose conditions are reported (or incorporated by reference) in the security T&Cs or equivalent instrument.[123] This does not preclude that a legal obligation is freely consented to by the issuer with respect to the bearer:[124] the traditional definition of "matter relating to a contract" as per Art. 7 No 1 is therefore met, as opposed to what *Kolassa* maintains – at least in the Advocate General's interpretation expressed in *Profit SIM*.[125] At the same time, purchase of the financial instrument entails an equivalent acceptance of T&Cs by investors, and any interpretation allowing cherry-picking among clauses within such T&Cs should be grounded on a solid economic and legal rationale.[126]

important while the decisive factor is the contract represented by the securities); M. Siems, The Foundations of Securities Law, 20 European Business Law Review 141 (2009), 152 ("Like a loan, a debt security is a simple credit contract. Therefore it […] confers to its holder a creditor's right against the issuer"). In German law, the relevant *lex tituli* in *Kolassa*, investors have direct claim towards issuers even when bearer bonds are held through intermediaries: European Commission, European Commission, EU Clearing and Settlement, cit., 370-371. The Austrian Supreme Court qualified the relationship between the holder of a sovereign bond and the Greek State as contractual: remarkably, the Court mentioned *Kolassa* and discarded it as grounded on uncertain bases (OGH 30.7.2015, 8 Ob 67/15h; OGH 31.8.2015, 6 Ob 122/15g; OGH 25.11.2015, 8 Ob 125/15p).

[122] This does not exclude that in some countries registration in the company's register is needed for legal title to pass to the buyer, as this does not mean issuers approve transfers (for the U.K. see Micheler, cit., 30). In other countries, transfer of legal ownership on securities does not require any such registration by the company, instead (e.g. Germany: see Id., 219).

[123] These reflections may echo some theories developed by German legal scholars before issues of securities transfers were solved by reference to the law of tangibles (Micheler, cit., 159).

[124] See correctly M. Lehman, Special Jurisdiction, in Dickinson and Lein, cit., 144, with reference to bills of exchange as an example of unilateral engagement: "one must always remember that the interpretation of Art. 7 No 1 has to be autonomous from any concepts of national law. A certain element of voluntariness cannot be denied where someone draws a bill of exchange" (partially criticizing divergent opinions and reporting other doctrinal positions expressing doubts on the qualification as non-contractual of the obligation the creator assumes when drafting and circulating a bill of exchange).

[125] See ECJ, C-26/91, *Handte*, 17 June 1992, §§ 15 f.; C-418/11, *Česká spořitelna*, 14 March 2013, § 48.

[126] See supra, fn. 101 and accompanying text.

It is true that, in some jurisdictions,[127] matters relating to securities or negotiable instruments are sometimes qualified as non-contractual, at least for the identification of the applicable law.[128] Some decisive limitations apply, however.[129] First, said qualification concerns the specific features of securities or negotiable instruments as legal tools permitting the circulation of legal entitlements, while legal entitlements themselves are normally qualified independently, on the basis of the underlying contract (e.g. a loan for bonds or a corporate charter for shares).[130] Therefore, matters labelled as non-contractual rather refer to questions – normally regulated by the *lex tituli* or the *lex chartae sitae* depending on the matter, and on the *lex fori* – concerning ownership over the security, liability of previous bearers, the conditions the bearer needs to satisfy in order to demand payment, the objections the owner can raise, and the like.

This distinction is not unknown to EU law, either. For instance, both Regulation (EC) No 593/2008 (Rome I – Art. 1(2)(d)) and Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II – Art. 1(2)(c)) explicitly exclude from their scope of application obligations and, respectively, non-contractual obligations "arising under […] negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character".[131] While these twin exclusions accommodate to all EU legal traditions on the classification of rights and obligations regulated by the *lex*

[127] According to Villata, Gli strumenti finanziari, cit., 155, doubts on the qualification of securities and other negotiable instruments as contractual – at least when it comes to the identification of the applicable law (see fn. 131) – are mainly a feature of the Italian debate. In Italy, Art. 59 law 31 May 1995 No 218 (on private international law) regulates securities and other negotiable instruments under the heading "non-contractual obligations". Bonds subject to English and German law are normally regarded as contractual, instead (ibid., 79). Lack of legal certainty may also result from the uncertainties affecting the qualification of unilateral promises in private international law (F. Marongiu Bonaiuti, Le obbligazioni non contrattuali nel diritto internazionale privato, Giuffrè, Milan (2013), 213 ff.).

[128] As for jurisdictional issues, doubts on the proper qualification of claims brought by the bearer of securities and negotiable instruments against issuers are expressed by L. Radicati di Brozolo, La legge regolatrice dei tioli di credito, in Banca borsa tit. cred. 434 (1998, I), 445 f (such claims may qualify as contractual but, if not, the scope of tortious liability in Art 5(3) Brussels I – now 7(2) Brussels I – should be broad enough to include them).

[129] These limitations add to the consideration that qualifications for the purposes of Rome I and Rome II Regulations cannot plainly be transposed to the Brussels I regime (as internal coherence should prevail on consistency with other legislative tools): see ECJ, C-45/13, *Kainz*, 16 January 2014, § 20.

[130] Obligations arising out of a negotiable character of the instruments do not include "contracts pursuant to which such other negotiable instruments are issued" (M. McParland, The Rome I Regulation on the Law Applicable to Contractual Obligations, OUP, 2015, 228). See on Italian law M. Stella Richter jr, I titoli di credito nel nuovo sistema di diritto internazionale privato, Banca, borsa tit. cred. 767 (1996, I), 788 f.

[131] Other elements left out of the Rome I and II Regulations concern company law (Arts. 1(2)(f) and 1(2)(d) respectively), including the validity of the decision to issue a security (Arts. 1(2)(g) Rome I).

*tituli* or the *lex chartae sitae*, only the Rome I Regulation further specifies that "rights and obligations which constitute a financial instrument" do not fall within consumer protection rules on applicable law (Art. 6(4)(d)).[132] The second rule only makes sense[133] if one distinguishes between the (uncertain classification of) the obligations that are a direct consequence of the negotiable character of financial instruments and the bundle of (contractual) obligations that make up a financial instrument, this latter being the object of Art. 6(4)(d).[134]

Second, at least some financial instruments are inherently contractual in their nature,[135] as is the case for derivatives according to explicit EU legislative provisions (Annex I, Sec. C, Dir. 2014/65/EU – Mifid 2). Any differentiation between derivatives and transferable securities for the purposes of establishing jurisdiction is hardly justifiable on the basis of the economic function of these legal tools, which is quite homogeneous. Standardized derivatives and transferable securities, being negotiable instruments for the purpose of private international law tools,[136] share the function of facilitating transfer of claims "by delivery and indorsement to a bona fide purchaser for value in such circumstances that he takes free from defects in the title of prior parties".[137] ECJ case law before *Kolassa* consistently confirmed the contractual nature of a claim even if the parties to the procedure became parties to the substantive relationship only after this was created,[138] as the transfer of the claim does not remove its contractual nature.[139] Even when the legal relationship underlying the security is a unilateral obligation, the consistent ECJ interpretation should apply that unilateral promises are contractual matters for the purpose of Art. 7 Brussels I.[140] If one identifies the decisive factor of the ruling in *Kolassa* in securities trading (as opposed to

[132] The reason for the exclusion lies with the need to ensure that the consumer protection regime does not entail the applicability of different laws depending on the qualification of the holder of a financial instrument (or of a transferable security), thus hampering the necessary standardization of financial instruments (see McParland, cit., 566). Such concerns do not extend to issues of jurisdiction, where dispersion does not jeopardize the homogeneity of the applicable rules.

[133] But see M. Lehmann, Financial Instruments, in F. Ferrari and S. Leible (eds.), Rome I Regulation. The Law Applicable to Contractual Obligations in Europe, Sellier, Munich (2009) 93 f. (Art. 6(4)(d) covers all obligations which are indispensable for the transferability and tradability of financial instruments, and is largely superfluous as it covers most of the obligations arising out of the transfer of stocks or bonds).

[134] McParland, cit., 565.

[135] See nonetheless the Advocate General Opinion in *Profit Investment SIM*, cit.

[136] McParland, cit., 221.

[137] *Ibid*.

[138] Remarkably, even the Italian Court of Cassation, in spite of the Italian traditional interpretation of negotiable instruments as non-contractual matters (see supra fn. 127), stated that a contract exists between the parties of a derivative financial instrument, in spite of the circulation thereof (see Advocate General's Opinion in *Profit Investment SIM*, § 33).

[139] See Lehman, Special Jurisdiction, in Dickinson and Lein, cit., 145.

[140] See ECJ, C-180/06, *Ilsinger*, 14 May 2009.

securities holding), it becomes clear, however, that recent EU case law no longer reflects this reasoning and does not underpin the qualification of claims based on securities T&Cs as contractual.

#### 4.1.2. *Professional investors: place of performance for contractual claims*

Moving default litigation on contractual matters away from the professional investor's domicile would only be a first step, though. The potential effects of Art. 7 No 1 on securities litigation are indeed uncertain for various reasons.

First, identification of the place of performance of the obligation falls into the purview of the national judge's competence in the light of the applicable national law.[141] For pecuniary obligations, substantive rules may broadly diverge, especially as a result of the divide between legal systems where pecuniary obligations are by default performed at the creditor's domicile (*portable*) and legal systems where they are performed at the debtor's domicile (*quérable*).[142] Therefore, a uniform solution at EU level can hardly be found, *de lege lata*.

Second, even in national systems identification of the place of performance may prove particularly difficult when securities are issued in dematerialized or immobilized form at a central security depository. In this context, the applicable law cannot always unambiguously answer the question where monetary obligations shall be performed when intermediaries and paying agents take part in the payment process linked to a corporate action (such as dividend or interest payment). As long as corporate action management involves the CSD, a viable interpretation – to be tested against the applicable substantive law – could be that if the obligation is *portable* the issuer performs its monetary obligations (e.g., to repay bond interests and principal) at the central depository, actually its only counterparty in the payment procedure; if the obligation is *quérable* the company's seat could instead determine jurisdiction.

Third, when the financial instrument entails (monetary) obligations for both issuers and investors there might be more than one relevant place of performance. The Brussels I framework avoids such consequence for the sale of goods and the provision of services, because Art. 7 No 1(b) refers, for all the obligations arising from the same contract, to the characteristic performance of that contract.

[141] ECJ, C-12/76, *Tessili*, 6 October 1976. When the disputed matter is regulated by uniform law, this latter shall apply: ECJ, C-288/92, *Custom Made*, 29 June 1994, § 27 ff.

[142] A complete list of the two sets of countries in G. Kaufmann-Kohler, Convention de Lugano et contentieux bancaire, in L. Thévenoz (ed.), Journée 1995 de droit bancaire et financier, Berne, Staempfli (1995), 64.

However, obligations circulating with financial instruments fall outside the scope of Art. 7 No 1(b),[143] so that reference should be made – once again under the hypothesis that a contractual matter is involved – to the place of performance of each of the disputed obligations (as per Art. 7 No 1(a)). For derivatives like credit default swaps (CDS), there can therefore be more than one place of performance, namely one for each of the two obligations of the parties. For instance, in case of default, the place of delivery of the agreed amount of reference bonds – or of the equivalent amount of money in case of cash settlement – by the party that sold protection (thus being long on the underlying asset) and the place where periodic payments by the short party are carried out may diverge. If, instead, the derivative is a contract for difference (CfD), the place of performance should be in principle determined on the sole basis of the obligation to deliver a certain amount of money – as determined by the calculation agent – upon the party that is bound to pay. However, this means that while the place of performance will be only one at a time, such place may vary depending on whether the obligation is upon the seller or the buyer (i.e., on whether the amount of the underlying assets is above or below its amount at the reference date, respectively).

Fourth, when derivatives are cleared through a central counterparty (CCP) – a situation that will be more likely in the near future as a consequence of the EMIR regime[144] – one must consider that, as a matter of fact, each derivative contract is only apparently unitary, it being actually the combination of two underlying contracts between the clearinghouse, on the one hand, and each of the two (long and short) parties, on the other hand. This may affect the place of performance of the periodical payments the parties are bound to perform (or to receive) on a daily basis so as to adjust the margins to be maintained as collateral, as well as final payments at the date of the financial instrument's expiration.

All in all, relying on interpretation to dispel such variability would not ensure legal certainty, and an adequate set of rules could enhance clarity before doubts are brought before the ECJ.[145] A proper normative solution, that would be compatible with the focus of the current regime on the place of performance (Art. 7(1)), might be to clarify that jurisdiction is established where the CSD or the CCP has its central administration whenever securities are issued in dematerialized or immobilized form or, respectively, derivative financial

[143] See supra fn. 113.
[144] N. Moloney, EU Securities and Financial Markets Regulation, OUP, Oxford, 2015, 576 ff.
[145] See Recital 57 Reg. (EU) No 909/2014 on securities settlement and central securities depositories (CSD Regulation).

instruments are centrally cleared.[146] When issuers do not request any centralized clearing or custody of the relevant financial instruments, the place of performance of their obligations towards professional investors should instead be located at their central administration.[147] Finally, if financial instruments are traded on an organized trading venue – it being either a regulated market, a multilateral trading facility (MTF) or an organized trading facility (OTF) – with issuer's approval, the central administration of the company running the trading venue would represent a viable alternative for secondary market purchases performed on such platform.[148]

#### 4.1.3. *Retail investors: an enhanced protective regime*

Fulfilling an efficient regime for weak investors protection – the second condition for an efficient regime submitted in Sec. 4.1 – is even more difficult under Brussels I, both because Art. 17 requires a contractual privity between the parties,[149] and because of the applicable definition of "consumer". As opposed to Art. 7 No 1, an obligation freely assumed by the defendant towards the claimant does not suffice to derogate Art. 4 Brussels I.[150] To this end, a contract must instead be concluded between a consumer and a professional. While a sufficient contractual privity is normally found between an investor and an entity providing investment services (an investment firm or a bank pursuant to Arts 4 and 5 Dir. 2004/39/EC – Mifid; see also Arts 4 and 5 – Mifid 2), this is normally excluded in securities litigation between issuers and investors,[151] at least when securities are purchased on the secondary market. Furthermore, ECJ case law to date has not yet had the opportunity to unambiguously clarify whether investors are consumers, although some *obiter dicta* and scholarly interpretation tend to confine such qualification to bondholders only.[152]

[146] Art. 2(1) No 23 CSD Regulation; Art. 17 EMIR. Reference to the central administration as opposed to the principal place of business avoids uncertainties in cases where IT infrastructures of CSDs, CCPs and trading venues are moved for efficiency reasons, as this should not affect the applicable legal regime.
[147] For the reciprocal case of investors' duties towards issuers see supra, fn. 17.
[148] See Art. 4(1) No 55 Mifid 2. Similar connecting factors – although differently combined – have also been put forward for the identification of the law applicable to violations of securities law: F. Villata, Remarks on the 2012 Greek Sovereign Debt Restructuring, cit., 341 ff.
[149] See e.g. ECJ, *Kolassa*, cit., §§ 28 f. and 38.
[150] See C-375/13, *Kolassa*, Opinion of AG Szpunar, 3 September 2014.
[151] J. von Hein, Verstärkung des Kapitalanlegerschutzes: Das Europäische Zivilprozessrecht auf dem Prüfstand, in Eur. Zeitschrift für Wirtschaftsrecht 369 (2011), 370.
[152] See supra, fn. 93 and accompanying text.

Clarifications of the current regime apart, the possibility of deeply redesigning the definition of consumer should also be considered, especially given the notion already available for investor protection purposes under the well-structured Mifid regime. Standards applicable to business conduct aim to foster proper allocation of financial instruments: investment firms shall make sure that investors have a proper understanding of the investments they are entering into (appropriateness test), while for higher added value services such as financial advice and individual portfolio management the assessment also includes investors' ability to bear the risk of the losses financial instruments may cause as well as the ability of said instruments to match customers' investment objectives (suitability test).[153] When investors qualify as professionals, investment firms may assume that the client has the necessary level of expertise to understand investment risks,[154] and they can even disregard the entire protective regime when providing straightforward execution or transmission of trading orders to – as well as when dealing on their own account towards – a subset of professionals ("eligible counterparties").[155]

Underpinning this tailored protection mechanism is an articulate classification of investor clients into three groups:[156] retail clients, professional clients and eligible counterparties, these latter actually being a subset of the professionals. While some clients – such as institutional investors – are regarded as professionals by default, others may opt into such qualification in order to enjoy reduced costs in exchange for reduced protection. This possibility to opt out of the guarantees granted to retail customers does not apply to individuals and small firms that do not match specific criteria established on the basis of previous investment experience and portfolio size (Mifid 2 Annex II), so that less skilled and less financially resilient investors always enjoy higher protection. A symmetric opt-in is available for professionals, who may decide to be treated as retail investors so as to take advantage of the ensuing standards of protection (at higher costs).[157]

A different dividing line between protected and unprotected investors applies under Brussels I in order to establish jurisdiction when customers litigate with

[153] Article 19(4) Directive 2004/39/EC and Article 35 Directive 2006/73/EC; see now Art. 25 Mifid 2.
[154] Arts 35(2) and 36(2) Dir. 2006/73/EC. For investment advice, the capacity to bear financial risks can also be assumed for clients classified as professional by default (Art. 35(2)(2) Dir. 2006/73/EC; Annex II, Sec. I, Mifid 2).
[155] Art. 30 Mifid 2. For customers other than eligible counterparties, rules of conduct for the provision of "execution-only" services are waived only for execution or reception and transmission of trading orders concerning non-complex financial instruments, when such activities are performed at the initiative of the clients ("execution-only": Art. 25(4) Mifid 2).
[156] For a description see Moloney, cit., 352 ff.
[157] See Art. 30(2)(2) and Annex II, Sec. I, Mifid 2.

their investment firms. Here, protection is granted to individuals[158] acting outside the scope of their professional activity (if any).[159] Such definition, albeit simpler on the books, may be over-inclusive or under-inclusive in some circumstances. On the one hand, high-income individuals with large investment portfolios might not always deserve special protection, especially when they are considered as professionals under the Mifid regime. On the other hand, small undertakings may well be disadvantaged by professionals' bargaining power despite being legal entities.[160] Lawmakers should therefore consider a Mifid-inspired protective regime as an alternative for a more tailored regulation of jurisdiction in litigation concerning financial services.[161] An integrated set of rules[162] would ensure coordination between the definitions relevant for business conduct and for jurisdiction and would intensify the general regulatory trend towards unification of diverging definitions of investors by way of a broader application of the Mifid classification, as was the case, in particular, with the prospectus regime. Still on the model of the prospectus regime, communication duties upon investment firms and credit institutions in favour of issuers would ensure these latter have access to the information they need to ascertain the qualification of the investors they are addressing (Art. 2(e) Dir. 2003/71/EC, as amended).[163]

Aligning definitions relevant for public offers of securities and for jurisdiction agreements would increase consistency and would provide a coherent regulatory framework where safeguards are ensured to the benefit of investors in need of protection both for the purpose of information and litigation. In this scenario, differentiations between shareholders and other investors[164] should be dropped and replaced by a more nuanced "retails v. professionals" divide.

Retail investors – whether shareholders or not – should enjoy strengthened protection when they purchase financial instruments on the primary market, either

[158] See supra fn. 90.
[159] The qualification of consumer cannot be transferred by assignment: ECJ, C-89/91, *Shearson Lehman Hutton*, 19 January 1993, §§ 23 f.
[160] A different question is whether protection ensured in the allocation of jurisdiction would suffice whenever national default rules are client-unfriendly in establishing competence away from the investor's domicile. See also Sec. 3 on the protective measures concerning private bargaining around default competence rules.
[161] Hess and Gargantini, cit.
[162] These rules could be a subset of either the Mifid or the Brussels I regime. While the former alternative would require a specific limitation to Brussels I's scope of application, the latter might be preferable as it would simply require a reference to the Mifid classification system (on the model of Art. 2(e) Dir. 2003/71/EC – Prospectus Directive: see below, in the text) with some limited specifications.
[163] Moloney, cit., 86.
[164] See supra, fn. 87 and accompanying text.

directly from the issuer or from an investment firm operating on its behalf,[165] as this would provide an adequate response to the selling pressure that often affects this market context. In the context of a public offer of securities, this will also ensure protection to consumers who are solicited to invest,[166] rather than actively searching for investment opportunities. Hence, a protective system modelled on Arts 17 and 18 Brussels I should apply whenever issuers (or offerors) passport and publish a prospectus in the Member State of the consumer's domicile and securities are bought during the period when the offer is open.[167] In this respect, no differentiation should be made between cases where securities are bought (from the offeror) or subscribed (vis-à-vis the issuer), on the one hand, and cases where securities are bought from intermediaries charged with the placement, on the other hand. Notwithstanding the restrictive interpretation the ECJ gave to *Maletic* in *Kolassa*, reselling of financial instruments by intermediaries operating as agents of the issuer or the offeror should not prevent the application of such protective regime.[168] Hence, jurisdiction should be established at a consumer's domicile also when a syndicate of financial intermediaries facilitates securities placement by way of firm commitment – which entails underwriting (or buying) securities from the issuer (or the seller) and subsequently reselling them to the investors that have placed their orders on the primary market – just like when placement is performed by way of strict underwriting syndicates, where intermediaries only step in if securities are not underwritten or bought on the market.[169] For public offers of securities, any transaction included in a retail cascade should therefore be considered as directly performed by the issuer or the offeror, as the case may be, when the placement of securities is carried out through financial intermediaries (Art. 3(2)(2), last sentence, Prospectus Directive). Of course, actions based on tort, such as those invoking false or misleading information in the prospectus, would still be treated according to current rules on (non-contractual) claims.

As for the secondary market, admission to negotiations in regulated markets, MTFs or OTFs should be considered as a proxy for issuer willingness (or at least

[165] Direct selling of own financial instrument on the primary market qualifies as execution of orders on behalf of clients as per Art. 4(5) dir. 2014/65/EU (Mifid II).

[166] The possibility that issuers are challenged before the courts of investors' states of domicile only when they have addressed an activity there would resemble, with the due differences, some features of the US stream-of-commerce doctrine: see fn. 54.

[167] See e.g. Annex II § 5.1.3 and Annex III § 5.1.3 Reg. (EC) No 809/2004 implementing Directive 2003/71/EC (for share securities note and securities note related to debt securities respectively).

[168] For a similar solution in the US under the stream-of-commerce doctrine, at least in one of its declinations, see M. Mariottini, cit., 499 f.

[169] Stefano Lombardo, The Stabilisation of the Share Price of IPOs in the United States and the European Union, in European Business Organization Law Review, 2007, 526 f.

acceptance of the risk) that retail investors may have easy access to the relevant financial instruments. This presumption should only apply when issuers request or have requested or approved admission of their financial instruments to trading on such trading venues (see Art. 17(1)(3) Reg. No 596/2914 – Market Abuse Regulation). Hence, where securities are negotiated on a trading platform without issuer approval, the consumer would not be able to take advantage of a protective regime issuers have never accepted to grant, and general rules on jurisdiction should apply. This excludes, for derivatives, that concentration of negotiations on a trading venue mandated according to Art. 32(4) Reg. (EU) No 600/2014 (Mifir) – i.e., concentration taking place after issuance – changes the rules originally applicable to jurisdiction even in the (admittedly uncommon) case that a consumer enters such derivatives. Where consumer protection would not apply, actions on violation of securities T&Cs should be brought before the court competent for contractual claims.[170] Once again, claims alleging violation of ongoing disclosure duties – both ad hoc[171] and periodical[172] – might well instead qualify as tortious in line with the general approach in ECJ case law.

This extension of consumer protection to financial instruments bought on the secondary market might appear excessive. However, such impression should be balanced with other considerations. First, the regime resulting from *Kolassa* has similar implications in allowing dispersion of litigation at the consumer's domicile, so that the hypothetical default regime devised here would be at worst equivalent to the status quo. Second, the possibility exists to exclude such risk by preventing retail investors from having access to financial instruments, also on the secondary market. This result can be achieved not only by the law,[173] but also through private ordering solutions. T&Cs may, for instance, ban purchases of financial instruments by investors not domiciled in issuers' Member States[174] or by retail investors (within or outside a trading venue),[175] as may happen as per stock exchange regulation for bonds negotiated in a market segment reserved to professionals. Such regulations can also prevent stock exchange members from

[170] On the identification of the place of performance see supra, text accompanying fn. 23 and Sec. 4.1.2.
[171] See Art. 17 Market Abuse Regulation.
[172] See e.g. Arts 4 and 5 Directive 2004/109/EC (Transparency Directive).
[173] In Italy, bonds issued in excess of the maximum leverage threshold may be subscribed only by professional investors, and these are *ex lege* responsible for corporate insolvency in case they resell such bonds to retail investors (Art. 2412(2) Civil Code). The rule does not apply if bonds are traded in regulated markets or MTFs (Art. 2412(5) Civil Code).
[174] See Arons, cit., 380.
[175] See TerniEnergia, Admission Document to the Trading of Financial Instruments Called "TerniEnergia 2019" on the Professional Segment (ExtraMOT PRO) of the ExtraMOT managed by the Italian Stock Exchange, 2015, § 3 ("the Notes shall be exclusively placed to, and successively held by and retransferred to, Qualified Investors").

routing trading orders placed by (or on behalf of) retail investors,[176] although the ability of similar provisions to restrict over-the-counter trading would require a ban on reselling to retail investors.[177]

Third and most importantly, jurisdiction agreements may calibrate the litigation setting while avoiding exclusion of retail investors from investment opportunities: such legal tools are therefore crucial in completing the picture.

### 4.2. *Jurisdiction agreements*

Section 4.1 has indicated some possible improvements to the current framework for the allocation of jurisdiction. The proposal is based on a personal assessment of the average preferences of issuer and investors,[178] but it might well not reflect the actual needs of stakeholders in all circumstances. For instance, some issuers may deem that the benefits granted to professional investors as a consequence of their ability to bring disputes at their domiciles will overall exceed the costs stemming from increased risks of litigating in a number of unforeseeable foreign fora. If both such risks and benefits are accurately reflected in the cost of equity capital or in the bond interest rates, enabling litigation at professional investors' domiciles may prove efficient.

While *Kolassa* favours dispersion of litigation across different countries and reduces predictability of jurisdiction for issuers, the Opinion rendered in *Profit Investment SIM*, if confirmed by the Court, might hinder private ordering solutions to such problems. Relying on usages, along with an auspice expressed by the same Advocate General,[179] would allow differentiating between consumers and professionals, as only the latter would be bound by jurisdiction agreement,[180] although in other respects it would be only a second best solution.

First, ascertaining whether the form expressing a contractual clause corresponds to a well-established usage may not be easy.[181] Although the ECJ has stated that repeated challenges to the validity of such forms do not necessarily mean a usage is no longer in force,[182] assessing through litigation whether a practice is regularly

[176] This was the case for Art. 4.1(2) of the Italian Alternative Market Capital Regulation, which required market members to commit not to execute orders routed by non-professional investors.

[177] Proper enforcement of such ban would furthermore require that a commitment be obtained from the professional purchaser to abide to the same limitations.

[178] See supra fn. 7.

[179] Advocate General Opinion in *Profit Investment SIM*, cit., §§ 57 ff.

[180] See T. Arons, cit., 382 f.

[181] ECJ, C-106/95, *Mainschiffharts-Genossenschaft eG (MSG)*, 20 February 1997.

[182] ECJ, C-159/97, *Castelletti*, 16 March 1999, § 29. Remarkably, the case concerned jurisdiction clauses in bills of lading, and the Italian Court of Cassation held, on reconsideration of the case

observed would easily be prone to circularity. The judiciary cannot but determine or reinforce the presence of practices, thus affecting the social phenomenon it is supposed to merely ascertain and skewing market dynamics on the formation and relinquishment of usages.

Second, the problem of determining the relevant market for any identified practice would remain. While inclusion of too broad a set of operations – e.g. by way of a generic reference to financial markets – would likely deprive the exercise of any substance, uncertainty would continue to affect market segments not yet considered by any judicial assessment.

Third, market usages require widespread acceptance and would hardly seem compatible with a flexible system where securities T&Cs – normally incorporated by reference in the negotiable instrument[183] – include jurisdiction agreements only when this accords to the economic transaction underlying the financial instruments and the needs of the parties thereof. On the contrary, rules on parties' leeway should be clear from the outset. Not surprisingly, participants in international markets seldom refer to market practices when they are given the opportunity to do so, and rather prefer to unambiguously select a national law that governs the contract.[184]

Fourth, reference to practices known to the parties would normally prevent jurisdiction agreements from binding consumers. Although trade usages under Art. 25(1)(c) are also relevant for market participants that do not qualify as merchants in their own jurisdiction, only persons acting for professional purposes can be bound by jurisdictional agreements entered into in a form which accords with international market practices.[185]

An efficient regulatory framework should allow instead for more flexibility in the application of jurisdiction agreements to consumers. In theory, Brussels I could allow some calibration, in that Art. 19 bans jurisdiction agreements predating litigation only to the extent that a contract is concluded as per Art. 17 (which requires contractual privity), but not if consumers and professionals are merely bound by obligations pertaining to contractual matters (Art. 7 No 1) in the

after the ECJ decision, that no international market practice could be invoked because there was no evidence that the parties regarded said jurisdictional clauses as binding (A. Layton and H. Mercer, cit., 732).

183 Incorporation by reference is not deemed sufficient for jurisdictional agreements to circulate with bills of lading in international market practices: R, Hausmann and I Queirolo, Art. 23, in T. Simons and R. Hausmann, cit., 505 f.

184 G. Cuniberti, Three Theories of Lex Mercatoria, 52 Columbia Journal of Transnational Law 101 (2014) (modern lex mercatoria hardly meets the needs of international merchants, and empirical evidence shows that they rarely choose its application).

185 U, Magnus, Art. 23, in Magnus and Mankowski, cit., 491.

absence of contractual privity.[186] However, once *Kolassa* – as interpreted by the AG Opinion in *Profit Investment SIM* – held that issuers and bondholders are not parties to a contractual relationship, one cannot but exclude that jurisdiction agreements in securities T&Cs can bind the holders of a debt instrument, be they either professionals or consumers.[187]

A calibrated definition along the lines of the Mifid regulatory framework, as suggested for default rules in section 4.1.3 above, would help tailor the protective regime on actual investors' needs in this respect, too. This regime has in effect the advantage of leaving room to (controlled) individual choices in borderline cases, normally the most problematic from the point of view of false positives and false negatives. On the one hand, no specific protection is needed against jurisdiction agreements for investors that classify as professionals upon request, as their investment experience and financial resilience enable them to assess the risk of litigating abroad. On the other hand, professionals that have decided to be treated like retailers should enjoy strengthened protection vis-à-vis issuers (and intermediaries) not only for prospectus rules, but also for litigation.[188]

By combining in various fashions all the variables (e.g., nature of the investor, issuer role in soliciting investments, trading in an organized venue, and so on), a proper regulatory framework may calibrate different levels of protection depending on the specific context. For instance, the European legislator might design default rules protecting retail investors (or consumers) in a primary market – or in any event in the context of security offerings – as mandatory. Exclusive jurisdiction at investors' domiciles would correspond to issuer capacity to determine whether an offer is also addressed to consumers, on the one hand, and to higher legal (and financial) risks normally associated with the lack of a market price for the shares, or with the impact of the new issue on market prices, as the case may be.

A more lenient approach could be taken for jurisdiction agreements involving consumers that have bought financial instruments outside security offerings. Such case corresponds to the set of contractual obligations Brussels I does not protect, with limitations to jurisdictions agreements predating the dispute even when these are addressed to consumers, for lack of contractual privity. Overall, such set of contractual obligations would therefore be subject to a more protective regime

[186] See supra text accompanying fn. 76.

[187] To be sure, an alternative path could stress that a jurisdiction clause, albeit not a contract, can still bind the security holder if there is a common understanding between this latter and the issuer (see supra fn. 67). However, the ECJ case law has never stressed in clear terms such a distinction between a contract and a mere understanding.

[188] See supra fn. 162 and accompanying text.

than currently in place for equivalent consumer contracts. For over-the-counter transactions on secondary markets, however, the regime would remain the same, as justified by the absence of any issuer activity aimed at promoting financial instruments among retail investors. When financial instruments are traded on a trading venue (regulated market, MTF or OTF) with the issuer's consent,[189] an equally liberal approach to jurisdiction agreements would also be accompanied by a consumer-friendly default rule.

A summary of the possible normative regime submitted above can be found in the following table. Such scheme should be read while bearing in mind that the analysis performed in this paper mostly aims to provide a framework for assessing and devising an efficient jurisdictional regime, while specific solutions to each problem may vary depending on the results of a cost-benefit analysis that cannot be performed here and are, therefore, less important for the purposes of this paper.

| | **D.J.R. for retail investors** | **J.A. for retail investors** | **D.J.R. for professional investors** | **J.A. for professional investors** |
|---|---|---|---|---|
| **Primary market*** | Investor's domicile | No | CSD or issuer's domicile | Yes |
| **Secondary market with issuer consent**** | Investor's domicile | Yes | CSD or trading venue | Yes |
| **Secondary market without issuer consent***** | CSD or issuer's domicile | Yes | CSD or issuer's domicile | Yes |

*Key to symbols.* D.J.R. = head of jurisdiction according to default regime; J.A. = possibility to enter jurisdiction agreements predating litigation; * = including retail cascades and placement of financial instrument through firm commitment syndicates; ** = secondary market purchases on regulated markets, MTF or OTF where financial instruments are traded upon issuer request or approval; *** = secondary market purchases outside regulated markets, MTF or OTF or on regulated markets, MTF or OTF where financial instruments are traded without issuer request or approval.

[189] See supra Sec. 4.1.2.

## 5. *Conclusions*

The allocation of jurisdiction in securities litigation is a key factor in ensuring investor protection and legal certainty in international capital markets. Jurisdictional rules determine the litigation setting and its costs, and are therefore considered by issuers and investors when deciding the cost of debt and equity capital. Ideally, such rules should be based on the grounds of efficiency and predictability and should specify when the parties are free to deviate from them. This would allow an understanding of to what extent jurisdiction agreements can contribute the development of a market for judicial decisions and when, on the contrary, mandatory rules protecting weak parties thwart this result by prohibiting a more liberal approach.

Unfortunately, recent ECJ cases show that the EU regime on jurisdiction falls short of delivering this scenario for securities litigation. As for the default heads of jurisdiction, ECJ rulings and AG opinions adhere to a formalistic interpretation of market transactions that does not draw any distinction between retail investors (or consumers) and professional investors, thereby harming issuer confidence at the indirect expense of non-litigating shareholders. As for opt-outs, a misguided concept of the economic function performed by tradable securities and other financial instruments extends the scope of mandatory provisions, thus curbing the possibility of contracting around default rules. This prevents issuers and (even professional) investors from ensuring predictability through private ordering solutions and from tailoring jurisdictional rules according to their own preferences.

All in all, the legal framework rules out the opportunity to develop a market for judicial decisions even when this would be beneficial to issuers and investors alike, and is therefore likely to increase the cost of capital. This paper submits an alternative regulatory system where retail investors (or consumers) enjoy better protection, while still allowing professionals to play by their own rules. Although appropriate interpretation could in principle reach such an outcome *de lege lata*, consolidated CJEU case law makes some legislative amendments essential to ensure efficiency.