Neutral Citation Number: [2018] EWCA Civ 1740

Case No: A3/2017/1700

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
HIS HONOUR JUDGE WAKSMAN QC
[2017] EWHC 1013 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2018

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE GROSS
and
THE RIGHT HONOURABLE LORD JUSTICE FLOYD

- -

Between:

DEUTSCHE BANK AG	**Claimant/ Appellant**
- and -	
COMUNE DI SAVONA	**Defendant/ Respondent**

- -
- -

Ms Sonia Tolaney QC, Mr Rupert Allen & Mr Andrew Lodder (instructed by **Allen & Overy LLP**) for the **Claimant/Respondent**
Mr Jonathan Davies-Jones QC & Mr Christopher Burdin (instructed by **Seddons**) for the **Defendant/Applicant**

Hearing dates: 10th & 11th July 2018

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Approved Judgment

Lord Justice Longmore:

Introduction

1. This is an appeal about two theoretically competing jurisdiction clauses. One's natural reaction is that it should be possible to assign any particular dispute to one or other such clause and that there should be no overlap between them. Thus in a judgment handed down on 22nd January 2015 Popplewell J said in Monde Petroleum S.A. v Westernzagros Ltd [2015] 1 Lloyd's Rep 330 at paras 35-36:-

> "35. Where there is more than one agreement between the same parties, and they contain conflicting dispute resolution provisions, the presumption of one stop adjudication dictates that the parties will not be taken to have intended that a particular kind of dispute will fall within the scope of each of two inconsistent jurisdiction agreements. They will fall to be construed on the basis that they are mutually exclusive in the scope of their application, rather than overlapping, if the language and surrounding circumstances so allow …
>
> 36. Nevertheless the possibility of fragmentation may be inherent in the scheme of the parties' agreements and clear agreements must be given effect to even if this may result in a degree of fragmentation in the resolution of disputes between the parties."

2. In cases with a European law context it is necessary to consider Article 25 (ex Article 23) of what I will call the recast regulation i.e. Regulation (EU) No. 1215/2012 which provides for it to apply where the parties have agreed that a court has jurisdiction over:-

> "disputes which have arisen … in connection with a particular legal relationship."

In that context in a judgment handed down on 18th March 2015 I said in Deutsche Bank v Petromena [2015] 1 WLR 4225 at paras 85-86:-

> "85. English law cannot, however, be decisive of the matter in the European context. It is important to note that Article 23 is itself confined to agreements to settle disputes "which have arisen or which may arise in connection with a particular legal relationship." The emphasis on the "particular legal relationship" shows that a dispute arising from a second relationship is not likely to be included in an agreement for resolving disputes in an earlier, and different, relationship. The European Court of Justice made exactly this point in Powell Duffryn Plc v M Petereit (case C-214/89) [1992] ECR 1-1745. Powell Duffryn was an English company which subscribed for shares in a German company which increased its capital but subsequently went into liquidation; the liquidator (Mr Petereit) sued Powell Duffryn in Germany for sums due in respect of the increase in capital and for dividends paid by mistake, relying on

> a clause inserted into the company statutes on a show of hands in a general meeting by which it was said that any shareholder submitted to the jurisdiction of the courts ordinarily competent to entertain suits against the company. Powell Duffryn asserted that it should be sued in the courts of its domicile. The Court of Justice was asked to rule on a number of questions including: "Does the jurisdiction clause satisfy the requirement that the dispute must arise in connection with a particular legal relationship within the meaning of Article 17 of the Brussels Convention?" [which later became Article 23 and is now Article 25].
>
> 86. The court held at para 34 that the requirements of Article 17 would be satisfied if the clause "may be interpreted as referring to the disputes between the company and its shareholders", leaving it to the domestic court to determine whether the clause was to be so construed or not. In reaching that conclusion it said at para 31 that the requirement that the dispute arise in connection with a particular legal relationship:
>
> "is intended to limit the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. Its purpose is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made.""

3. To similar effect in a judgment handed down on 30th April 2015 Beatson LJ said in Trust Risk Group SpA v AmTrust Europe Ltd [2016] 1 All ER (Comm) 325:-

> "[48] … In short, what is required is a careful and commercially-minded construction of the agreements providing for the resolution of disputes. This may include enquiring under which of a number of inter-related contractual agreements a dispute actually arises, and seeking to do so by locating its centre of gravity and thus which jurisdiction clause is "closer to the claim". In determining the intention of the parties and construing the agreement, some weight may also be given to the fact that the terms are standard forms plainly drafted by one of the parties.
>
> …
>
> [59] … If the conclusion is that the parties made two contracts at different times which contain jurisdiction agreements for different countries, there is no presumption that the provisions in the more recent contract are intended to capture disputes … in the earlier contract even if the effect is a risk of fragmentation of the overall process for the resolution of disputes."

4. These statements of principle (probably made in ignorance of each other's existence), helpful as they are, do not give much guidance in cases where it is genuinely difficult, or actually impossible, to assign a particular dispute to one jurisdiction clause or another. Conceptually it must be a possible conclusion that a dispute falls within the ambit of both jurisdiction clauses. The fact that the competing jurisdiction clauses are governed by different laws makes that possibility not unlikely. In that event the true position may be that the parties have agreed that either jurisdiction clause can apply rather than that one clause must apply to the exclusion of the other.

Facts

5. On 22nd March 2007 the London branch of Deutsche Bank A.G. ("the bank") and Comune di Savona ("Savona") made a written agreement pursuant to which the bank agreed to provide certain services to Savona until 31st December 2008. The judge held that these services included advisory services. The agreement was called "the Convention" and clause 13 provided:-

> "GOVERNING LAW AND JURISDICTION
>
> This Agreement shall be regulated and interpreted in conformity with Italian Law and disputes relating to it must be referred to the exclusive jurisdiction of the Court of Milan."

6. About two months later on 6th June 2007, the bank and Savona entered into a 1992 multicurrency ISDA Master Agreement with a schedule attached. Clause 13 provided:-

> "GOVERNING LAW AND JURISDICTION
>
> a) Governing Law. This Agreement will be governed by and construed in accordance with [English Law]
>
> b) Jurisdiction. With respect to any suit, action or proceedings relating to this Agreement … each party irrevocably:
>
> i) submits to the jurisdiction of the English courts."

7. The Master Agreement (as amended by the schedule) contained important provisions two of which were the "no advice clause" and the entire agreement clause which it is convenient to set out:-

> "3(h) with respect to each party:
>
> i) **Non-Reliance**. It is acting for its own account, and it has made its own independent decisions to enter into that Transaction and as to whether that Transaction is appropriate or proper for it based upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into that Transaction; it being understood that information and explanation related to the terms and conditions of a Transaction shall not be considered to be investment advice or a recommendation to enter into that

> Transaction. No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of that Transaction.
>
> ii) **Assessment and Understanding**. It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts the terms and conditions and risks of that Transaction. It is also capable of assuming, and assumes, the risks of that Transaction.
>
> iii) **Status of Parties**. The other party is not acting as a fiduciary for or adviser to it in respect of that Transaction….
>
> …
>
> 9(a) **Entire Agreement**. This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto."

Other clauses together with the Declarations sought by way of relief are set out in the Appendix to this judgment.

8. On 14th June 2007 the bank and Savona executed swap confirmations confirming that Savona had made two interest rate swap transactions ("the Transactions"). The confirmations stated that they were subject to the terms of the ISDA Master Agreement. Clause 7 of the confirmations repeated the no advice clause in terms.

9. The obligations of the Transactions have been fulfilled by the parties who are continuing to fulfil them.

10. Years after the conclusion of the Transactions, an Italian institution known as the Court of Auditors interested itself in them and, on 18th April 2016, published a decision which criticised Savona's entry into the Transactions. The decision envisaged possible legal action to consider the validity of the Transactions and the bank's role in relation to Savona's decision to enter into the Transactions.

11. This prompted the bank to issue a Claim Form in the Commercial Court in London on 3rd June 2016 seeking a number of declarations as set out in the Appendix. In broad terms many of the declarations sought relate to the validity of the Transactions but in most cases they carefully track relevant clauses of the Master Agreement which are also set out in the Appendix. On 30th September 2016 the bank served the Claim Form and Particulars of Claim on Savona via its process agent in England. Savona filed an Acknowledgement of Service on 17th October stating that it intended to contest the jurisdiction of the English court over part of the bank's claim. On 12th December Savona issued its application to challenge the English Court's jurisdiction in relation to certain of the declarations sought by the bank; that challenge now relates to the (7th-10th) and the (12th) declarations and is made pursuant to Article 25 of the recast regulation which provides:-

> "If the parties, regardless of their domicile, have agreed that a court or courts of a Member State are to have jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction."

Savona's application came before HHJ Waksman QC sitting as a Judge of the Commercial Court; on 5th May 2017 he acceded to that application and declared that the English Court did not have jurisdiction in relation to declarations (7-10) or (12); he accordingly dismissed the claims for those declarations. There is now an appeal.

The Judgment

12. The judge began by setting out the terms of the Italian Convention, the provisions of Italian law on which Savona relied and the proper characterisation of Savona's Italian claim. He referred briefly to Article 25 and the relevant law and then turned to the proper interpretation of the jurisdiction clauses. He began by interpreting the Italian clause which required a comparatively lengthy consideration of Italian law. He proceeded to interpret the English jurisdiction clause reciting the common ground that it would capture any dispute about the parties' obligations under the swaps and any dispute about whether they were binding or valid as a matter of English law. He then said:-

> "78. As a matter of language and in a vacuum, the words are obviously capable of including wider disputes, for example misrepresentation which led to the making of the Swaps or breach of some other duty where the end result was the making of the Swaps. Many things could be said to "relate to" the Swaps. But that does not take account of the particular contractual context here. If one does take account of it, then it seems to me from first principles, and bearing in mind the injunction to avoid construing different clauses so that they overlap, that as the Convention is concerned with DB as adviser … and as the Swaps themselves are concerned with DB simply as counterparty, a dispute which is essentially concerned with DB's role as adviser (whether by reason of the Convention or operative financial provisions) is much more naturally within the Italian Clause than the English Clause. And that is quite apart from the fact that this is the effect of the Italian law evidence described above."

13. The judge next distinguished the decision of Mr Ali Malek QC sitting as a Deputy High Court Judge in Dexia v Brescia [2016] EWHC 3261. In that case the relevant swaps incorporating the ISDA Master Agreement had been preceded by a Mandate Agreement under which Dexia had agreed to evaluate and organise the management of Brescia's debt and liquidity. The mandate contained an exclusive jurisdiction clause for the court in Rome. Brescia had begun proceedings for breach of the mandate and Dexia began proceedings for declarations in the English court pursuant to the jurisdiction clause in the ISDA Master Agreement. Mr Malek held that the declarations sought fell within the English jurisdiction clause because the declarations were directed at representations reflected in the ISDA Master Agreement and there was no reason to accept the "demarcation" proposed by Brescia between preparatory steps leading to the conclusion

of the swaps and the terms of the swaps themselves. HHJ Waksman QC relied on the fact that the declarations sought in Dexia were similar to declarations (1) to (5) in the present case which Savona conceded fell within the English jurisdiction clause. He also said:-

> "89. … it does not follow that, if some claims for declaratory relief fall outside of the English Clause, then it must also follow that any claim for misrepresentation will always be outwith it as well, a consequence which the Judge thought would be undesirable. A claim for misrepresentation may or may not be outwith the English Clause, depending on the scope of the other clause and the nature and extent of the misrepresentation claim. For example, if the representation is akin to a recommendation that the Swap was suitable for the client's needs and arose out of some earlier actual or deemed advisory duty especially where there was a previous advisory contract in place, that misrepresentation claim may well fall outwith the English Clause and be governed by the other clause. On the other hand, if the representation concerned some particular technical feature of the swap or how it would operate once in place, then that claim might much more readily fall within the English Clause."

14. In paragraph 93 the judge disagreed with the bank's contention that the entire agreement clause cut down the ambit of the Italian clause because (as the judge put it) that clause was "all about excluding collateral warranties". It followed that Savona's challenge to the jurisdiction of the English court in respect of declarations (7) – (10) and (12) was successful and he dismissed those claims for those declarations.

The proper scope for foreign law evidence of construction on jurisdiction applications

15. I must confess to considerable unease about the proliferation of expert evidence of foreign law on jurisdiction applications which are supposed not to be excessively complicated and to be capable of determination in hours rather than days, see Spiliada v Cansulex [1987] A.C. 460, 465F per Lord Templeman. In a case in which the main, let alone the only, issue is as to the construction of a foreign jurisdiction clause as opposed to an English jurisdiction clause, the only relevance of evidence of foreign law is to inform the court of any difference of law in relation to the principles of construction, see King v Brandywine [2005] 2 All E.R. (Comm) 1 para 68 per Waller LJ and Vizcaya Partners Ltd v Picord [2016] 1 All E.R. (Comm) 891 para 60 per Lord Collins. It is not to have competing arguments as to how the highest court in the foreign jurisdiction would decide the question whether a claim brought in England would (or would not or would also) fall within the foreign jurisdiction clause. The task of the English court is merely to inform itself of any relevant different principles of construction there might be in the foreign law and, armed with such information, look at both jurisdiction clauses and decide whether the English claim falls within the English clause. That should be a comparatively straightforward exercise.

16. The court asked the parties (1) whether the permission of the Commercial Court had been sought or granted for expert evidence to be adduced by Savona and (2) whether the principles of construction of documents in Italian law were different from those of English law for the purpose relevant to this case. The answers were (1) that no

permission had been sought by Savona and (2) that there was no difference on the principles of construction between Italian and English law. I venture to think that, if permission had been sought and it had emerged that there was no difference in the principles of construction, permission would not have been granted and the jurisdiction application could have been disposed of rather more shortly and much less expensively. This is a matter which could usefully be considered by the Commercial Court Users Committee with a view to stating in the Commercial Court Guide that the permission of the court should be obtained before expert evidence of foreign law can be adduced on interlocutory applications. (The position at trial is, of course, catered for in CPR 35).

The submissions

17. Ms Sonia Tolaney QC for the bank did not contend that the court should look only at the English claim and determine whether it fell within the English clause; she accepted that it was right to have regard to both the Italian contract and the English contract and, when one did that, one found that the Convention (under which incidentally the bank was to receive no remuneration) contemplated that any contract proposed by the bank and accepted by Savona would be the subject matter of a separate contract; one found further that the English swap contracts specifically provided in the entire agreement clause that the swap contracts superseded all oral communications and prior writings. In these circumstances all the declarations sought raised disputes which arose in connection with the relationship set out in the swaps contracts within the wording of Article 25 and the English court accordingly had jurisdiction to entertain them. There was no essential difference from declarations (1) – (6) which Savona accepted there was jurisdiction to determine. Declarations (7) – (10) tracked the wording of the swaps contract just like the others; they raised questions about the absence of representations (and non-reliance on them) which were just as much part of the relationship formed by the swaps contracts as the earlier declarations. Declaration (12) was no more than a logical follow-up to the other declarations.

18. She also drew attention to the decision of Knowles J in BNP Paribas S A v Trattamento Rifiuti Metropolitani SpA [2018] EWHC 1670 (Comm). In that case the ISDA Master Agreement and subsequent swap contracts were preceded by a Financing Agreement with BNPP which it was said "gave rise to significant legal duties on BNPP under Italian law". That agreement had an exclusive jurisdiction clause for Turin. The bank in that case started English proceedings for declarations in respect of the Master Agreement and the swaps contracts. There were also Italian proceedings but Knowles J said (para 21) he was only concerned with the argument that there was no jurisdiction to entertain the English proceedings. He also pointed out (para 42) that the allegations in the Italian proceedings were not part of the context in which the jurisdiction clauses were agreed and could not therefore contribute to the task of interpreting the ISDA Master Agreement. With regard to the decision of HHJ Waksman QC in the present case and his consideration of how the English declarations could act as defences in Italy, he said that that risked taking the focus away from what needed to be decided, namely whether the English court had jurisdiction to grant the declarations sought. Knowles J preferred to follow Dexia v Brescia rather than the decision in the present case.

19. Mr Davies-Jones QC for Savona submitted:-

1) the judge was engaged in an evaluative exercise of identifying the relevant dispute for the purpose of Article 25; his decision that declarations (7) – (10) and (12) were not disputes coming within either the ISDA Master Agreement or Article 25 should not therefore be disturbed unless there were some error of law or relevant considerations had been omitted or irrelevant considerations included in the evaluation;

2) that it was essential to give a mutually exclusive construction to the competing jurisdiction clauses and that the demarcation between them espoused by the judge in paragraph 78 of his judgment was correct;

3) the fact that there were separate contracts did not resolve the question of jurisdiction because each contract had to be considered individually; the suggestion that the Convention was superseded by the ISDA Master Agreement and the swaps was wrong because it was not supported by the Italian law expert; if it did supersede the Convention it would mean that the Convention would suddenly become governed by English law which was absurd; moreover the no advice clause as repeated in the confirmations was expressly preceded by the bracketed words "absent a written agreement between the parties that expressly imposes affirmative obligations to the contrary for this Transaction" and the Convention was precisely such an agreement; and

4) negative declarations should always be treated with caution and it was necessary to find the positive mirror image in order to see what they truly were; once one did that, it was apparent that the positive mirror image was a bad advice claim which the declarations were trying to negate. Any such bad advice claim could only be brought in the courts of Milan.

Comparison of the Convention and the Swap contracts

20. The judge set out the material terms of the Convention. For present purposes the most important terms are:-

> "Agreement between the Municipality of Savona and Deutsche Bank AG for the preparation and setting of operations of active management of the debt and for the provision of rating advisory services.
>
> (1) SUBJECT OF THE AGREEMENT
>
> The municipality of Savona (the "Municipality") entrusts in a non-exclusive way Deutsche Bank AG (the "Bank") as advisor for the provision and setting of operations of active management of the debt of the Municipality (the Agreement), included the provision of support and advice with regard to the following activities:-
>
> (a) Analysis of the debt situation of the Municipality;
>
> (b) advice for the active management of the debt of the Municipality, with the aim of identifying from time to time the financial instruments more

appropriate for optimizing this management and the most efficient forms of debt;

(c) Identification of the financial instruments, including derivatives, appropriate for the Municipality, and analysis of the costs and benefits connected to the choice of different financial instruments, as well as their placement on the market;

…

(2) IMPLEMENTATION OF THE AGREEMENT

(a) The Bank will provide the services mentioned by this Agreement both on its own initiative and upon request from the Municipality.

(b) The Agreement does not involve any obligation for the Municipality to carry out the financial transactions proposed by the Bank, it being understood that in any case any transaction shall be submitted to the Municipality, for prior approval for the determination of the relevant terms and conditions, and will be the subject matter of separate contracts.

(c) The provision of any kind of service or expert advice from the Bank, apart from financial advice (for instance, advice on legal, regulating, accounting or tax issues) will have to be the subject of specific agreements between the Municipality and other specialized advisors and the Bank will not be by any means responsible or obliged for the services and the advice provided to the Municipality by other advisors;

(d) This agreement does not establish any right in favour of third parties who are not part of it, against the Bank; the Municipality is only authorized to rely on the declarations and services provided by the Bank in the frame of this Agreement.

(3) DECLARATIONS MADE BY THE MUNICIPALITY

With regard to the activities covered by this Agreement or connected to it, including the operations in each single case proposed, the Municipality declares that:

(a) Every initiative and decision of the Municipality shall be meant to be adopted irrespectively of any (written or oral) notice received by the Bank and shall not be deemed to be a recommendation to invest or to carry out any financial transactions or as legal or tax advice, nor finally as an assurance or guarantee of the expected results;

(b) The municipality is able to fully assess the terms, conditions and risks of the financial instruments, the structures and financial operations which are the subject of this Agreement: …

…

(8) LENGTH OF THE AGREEMENT

> (a) This Agreement has been conferred in a non-exclusive way until 31/12/2008 …
>
> (9) BANK'S RESPONSIBILITIES
>
> The Bank's responsibility towards the Municipality with regard to the activities covered by this agreement is limited to losses, damages or liability: (i) judicially ascertained with definitive judgement and (ii) due to wilful misconduct or gross negligence (a) in the implementation of the agreement, to be assessed according to the professional due care requested of the Bank with regards to the bank's duty of professional diligence or (b) in case of the Bank's breach of the regulation applicable to it …"

21. The most natural reading of this agreement is that the bank agrees to provide its expertise in helping Savona to manage its debt and identify appropriate financial instruments for that purpose. That is the "particular legal relationship" for the purpose of Article 25. By contrast, if a contract or transaction is subsequently proposed between the parties, it is to be submitted to Savona for prior approval and, if approved, will then be the subject-matter of a separate contract. If separate contracts are proposed and approved then the relationship agreed in that contract will then be the "particular legal relationship" envisaged by Article 25. Any proceedings "relating" to that contract to use the word in the English jurisdiction clause will then be a dispute in connection with that particular relationship for the purposes of Article 25. The demarcation between the two relationships is thus between the generic relationship set out in the Convention and the specific interest rate swap relationship set out in the swap contracts incorporating the ISDA Master Agreement. To my mind this is a more natural and reasonable demarcation than that expressed in paragraph 79 of the judgment between advice on the one hand and being a "counterparty" (whatever that may precisely mean) on the other.

22. This seems to me to be the position when one compares the two contracts (the Convention and the Swap Contracts) even apart from the existence of the entire agreement clause. But the existence of that clause is a strong confirmation that the swap contracts are indeed separate contracts and that any dispute relating to them is to come within the jurisdiction clause of those contracts. The clause does not, with respect to the judge, exist just for the purpose of excluding collateral warranties; it exists just as much for the purpose of expressing the parties' understanding that the swap contracts are self-contained contracts to be interpreted in accordance with their terms regardless of other prior relationships between the parties. Nor does the fact that the express repetition of the no advice clause in the confirmations of the swap contracts is preceded by the phrase

> "(absent a written agreement between the parties that expressly imposes affirmative obligations to the contrary for this Transaction)"

affect the position on the facts of this case. On no view does the Convention expressly impose any such affirmative obligation for the swap transactions, however generously one may be tempted to construe it.

23. I would therefore conclude in general terms that disputes relating to the swap transactions have to be determined by the English courts and the only remaining question is therefore whether the particular declarations that are challenged in the present case raise disputes which do relate to the swap transactions.

The particular declarations

24. Declarations (7) and (8), as set out in the Appendix, can be taken together. They track with precision the no advice clause in the ISDA Master Agreement and the swap contracts themselves. It is, to my mind, self-evident that they raise a dispute which relates to the swap contracts. It would only be if one formed the view that all questions of advice and reliance on such advice in relation to the swap contracts had to be determined in Milan that the contrary would be arguable. But that would fly in the face of the express terms of the swap contracts themselves and, as I have explained, that is not how I would read the Convention and the swap contracts when they are considered together.

25. To the extent that it may be helpful to consider the positive mirror image of the declarations that are being sought, that positive mirror image would be an allegation that in entering the swaps Savona was not acting for its own account, had not made its own independent decision based on its own judgment or that of its advisers and had understood that the bank had recommended the transaction. Such a claim would be as much within the terms of the English jurisdiction clause as the claim now made by the bank.

26. The same consideration applies to declaration (9) which seeks a declaration that Savona was capable of understanding and understood the swap transactions and assumed the risk of the transactions. It likewise tracks the terms of the English contract (namely clause 3(h)(ii)); its positive side would be an assertion that Savona did not understand what it was doing by entering the transactions and had therefore assumed no risk. That is a dispute relating to the Transactions.

27. Declaration (10) similarly tracks clause 3(h)(iii) of the Master Agreement; its positive counter-assertion would be that the bank did give advice "in respect of the Transactions" and would, therefore, raise a dispute in relation to the contracts contained in the transactions and a dispute "in connection with the relationship" contained in the transactions.

28. Declaration (12) is different because it does not track any individual clause in the swap contracts or the ISDA Master Agreement. Before the judge Miss Tolaney recognised that in its original form it could theoretically invite the English court to construe the terms of the Convention which would thus trespass on the ambit of the Convention and be a matter for the court in Milan. She therefore amended it to read as it now appears in the Appendix. As so amended, it does in my judgment do no more than make explicit the alleged consequences of the other declarations. It comes, therefore, within the jurisdiction of the English court; whether the trial judge would think it right to make the declaration at the end of the day is, of course, another matter.

29. Mr Davies-Jones made the point that Savona was not claiming in Italy that the swap contracts were invalid or should be set aside for misrepresentation. It was merely claiming damages in respect of supposedly wilful misconduct or gross negligence or

breach of Italian statutory duty which would (hopefully) result in an order for damages to be assessed by reference to the amount which Savona has so far paid the bank for being "out of the money" to use the common phrase and an order that no more be paid. The result of this would be to reverse the effect of the swaps. This way of putting the case, however, is still a claim which relates to the swap contracts within the English jurisdiction clause and arises in connection with the particular relationship of banker and customer on either side of the interest rate swap.

Mutually exclusive construction?

30. It is, of course, desirable that potentially conflicting jurisdiction clauses should be given a mutually exclusive construction as indicated by the authorities to which I have referred at the beginning of this judgment. If the demarcation I have described in paragraph 21 above is correct, the two clauses in this case do have a mutually exclusive construction and no more needs to be said.

31. But as I also indicated it may be unrealistic if not impossible, always to ensure a mutually exclusive construction. If necessary the court should not shrink from recognising that situation and should certainly not adopt a convoluted construction merely to ensure that the two clauses are mutually exclusive. As Popplewell J said in Monde Petroleum, one stop adjudication is only a presumption (though generally an important presumption) and Mr Davies-Jones, in my judgment, put the position too high by saying that there must invariably be a mutually exclusive construction of conflicting jurisdiction clauses.

Unappealable evaluative exercise?

32. For my part, I do not think that the judge was engaged in an evaluative exercise when he implicitly concluded in paragraph 95 and expressly concluded in paragraph 105 that the challenged declarations did not fall within the terms of the English jurisdiction clause. There is no sign that he himself thought he was engaging in any evaluative exercise; his concern was (rightly) to construe the respective jurisdiction clauses. He recognised that he was giving a narrower construction to the English clause than "might prevail in other circumstances". Questions of construction are not matters of evaluation but require a decision to be made as to the correct construction. While according all appropriate respect to the construction that to a Commercial Judge appears to be the correct one, if an appellate court differs on that question it is its duty to say so.

33. All questions of construction must depend on the terms of the individual contracts. The contracts in Dexia v Brescia and BNP Paribas v TRM were in different terms from the contracts in the present case and it would not therefore be appropriate either to approve or disapprove the decisions in those cases. I would merely say that I agree in principle with the approach of Knowles J which was to focus on the question whether the English court has jurisdiction rather than to try to predict whether the declarations, if made, would act as defences in another jurisdiction.

Conclusion

34. For these reasons I would respectfully differ from the judge and hold that the English court does have jurisdiction to entertain the challenged declarations. The order of this court should so declare.

Lord Justice Gross:

35. I entirely agree with the judgment of Longmore LJ and add only a very few words of my own.

36. In particular, I prefer the demarcation outlined by Longmore LJ at [21] – [22] above to that favoured by the judge. As it seems to me, the Convention governed the background or generic relationship between the parties but, as clause 2(b) thereof made plain, not the individual swap contracts subsequently proposed and entered into by the parties. These were to be governed by separate agreements with separate terms, here the ISDA Master Agreement, a view reinforced by the entire agreement clause contained in the Master Agreement.

37. This conclusion accords with the transaction between the parties seen as a whole (UBS v HSH Nordbank [2009] EWCA Civ 585; [2010] 1 All ER Comm 727, at [83]), treating it in a commercially rational way (Deutsche Bank v Sebastian Holdings (No. 2) [2010] EWCA Civ 998; [2011] 2 All ER Comm 245, at [50]).

38. For my part, it would be startling if the bank's claims falling squarely under the swap contracts could not be brought in the forum selected by the parties through the jurisdiction clause under those agreements, namely that contained in the ISDA Master Agreement. *A fortiori*, if and to the extent that such an outcome might be said to turn on subsequent proceedings which Savona chose to initiate: *cf.,* Sebastian Holdings (No. 2), at [63]. A conclusion to this effect would be highly damaging to market certainty and I would not agree to it unless driven to do so.

39. With respect, I fear that the Judge was led astray by Savona's expert evidence of Italian law very substantially exceeding its proper ambit, as explained by Longmore LJ (at [15] and following, above), adduced without either the leave or control of the Court. I too would welcome this matter being considered by the Commercial Court Users Committee and, more generally, by the Rules Committee.

Lord Justice Floyd:

40. I agree with the judgments of Longmore LJ and Gross LJ.

APPENDIX			
Declarations Sought		**Relevant Term of Master Agreement**	**Challenge or No Challenge**
1)	The Defendant's obligations under the Transaction Documents constituted and constitute its legal, valid and binding obligations enforceable in accordance with their terms.	3(a)(v) **Obligations Binding**. Its obligations under this Agreement and any Credit Support Document to which it is a party constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms (subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar laws affecting creditors' rights generally and subject as to enforceability to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law)).	**No**
2)	The Defendant has and at all material times complied in all material respects with all applicable laws if failure so to comply would materially impair its ability to perform its obligations under the Transaction Documents.	4(c) **Comply with Laws**. It will comply in all material respects with all applicable laws and orders to which it may be subject if failure so to comply would materially impair its ability to perform its obligations under this Agreement or any Credit Support Document to which it is a party.	No

3)	The Defendant has and at all material times had the power to execute and deliver the Transaction Documents and to perform its obligations under the Transaction Documents and it has and had at all material times taken all necessary action and made all necessary determinations and findings to authorise such execution, delivery and performance.	3(a)(ii) **Powers**. It has the power to execute this Agreement and any other documentation relating to this Agreement to which it is a party, to deliver this Agreement and any other documentation relating to this Agreement that it is required by this Agreement to deliver and to perform its obligations under this Agreement and any obligations it has under any Credit Support Document to which it is a party and has taken all necessary action to authorise such execution, delivery and performance.	No
4)	The execution and delivery of and the performance of its obligations under the Transaction Documents by the Defendant does not and did not at any material time violate or conflict with any law applicable to the Defendant.	3(a)(iii) **No Violation or Conflict**. Such execution, delivery and performance do not violate or conflict with any law applicable to it, any provision of its constitutional documents, any other order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets.	No
5)	The Transactions were entered into in conformity with Decree no. 389 of 1 December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and the Ministry of Interior and published in the Official Gazette no. 28 of 4 February 2004.	3(g)(1) **Non-Speculation**. This Agreement and the Transactions hereunder will be entered into for purposes of managing its borrowings or investments and not for purposes of speculation, pursuant to Article 3, paragraph 3, of Degree no. 389 of 1st December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and the Ministry of Interior and published in the Official Gazette no. 28 of 4 February 2004 (the **"Decree"**).	No

6)	The Transaction Documents constituted and constitute the entire agreement and understanding of the parties with respect to their subject matter and supersede all oral communication and prior writings with respect thereto.	9(a) **Entire Agreement**. This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto.	No
7)	In entering into the Transactions, the Defendant was acting for its own account and had made its own independent decisions to enter into the Transactions and as to whether the Transactions were appropriate or proper for it based upon its own judgment and upon advice from such advisers as it had deemed necessary.	3(h)(i) **Non-Reliance**. It is acting for its own account, and it has made its own independent decisions to enter into that Transaction and as to whether that Transaction is appropriate or proper for it based upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into that Transaction; it being understood that information and explanations related to the terms and conditions of a Transaction shall not be considered to be investment advice or a recommendation to enter into that Transaction. No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of that Transaction.	Yes

8)	In entering into the Transactions, the Defendant did not rely on any communication (written or oral) of the Claimant as investment advice or as a recommendation to enter into the Transactions, it being understood that (i) information and explanations related to the terms and conditions of the Transactions would not be considered to be investment advice or a recommendation to enter into the Transactions, and (ii) no communication (written or oral) received from the Claimant would be deemed to be an assurance or guarantee as to the expected results of the Transactions.	As above,	Yes
9)	Prior to and when entering into the Transactions, the Defendant was capable of assessing the merits of the understanding (on its own behalf or through independent professional advice) and understood and accepted, the terms, conditions and risks of the Transactions and the Defendant was capable of assuming and assumed the risks of the Transactions.	3(h)(ii) **Assessment and Understanding**. It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts the terms and conditions and risks of that Transaction. It is also capable of assuming, and assumes, the risks of that Transaction.	Yes
10)	The Claimant did not act as a fiduciary for or an advisor to the Defendant in respect of the Transactions.	3(h)(iii) **Status of Parties**. The other party is not acting as a fiduciary for or adviser to it in respect of that Transaction.	Yes

11)	The Transactions were entered into by the Defendant for the purposes of managing its borrowings or investments and not for the purposes of speculation.	3(g)(1) **Non-Speculation**. This Agreement and the Transactions hereunder will be entered into for purposes of managing its borrowings or investments and not for purposes of speculation, pursuant to Article 3, paragraph 3, of Degree no. 389 of 1st December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and the Ministry of Interior and published in the Official Gazette no. 28 of 4 February 2004 (the **"Decree"**).	No
12)	For the purpose of any issue concerning the entry into, validity, enforceability, interpretation or performance of the Transactions, the ~~The~~ Claimant has to date complied with and/or discharged each and all of its relevant obligations arising out of or in connection with the Transactions (including, for the avoidance of doubt, any obligations arising prior to the execution of any of the Transaction Documents as a result of pre-contractual negotiations between the Claimant and the Defendant or otherwise) and accordingly the Claimant has not caused and/or is not liable to the Defendant (whether in or pursuant to contract, tort, statute or otherwise) in respect of any loss or damage arising out of or in connection with the Transactions which may have been suffered or incurred by the Defendant.	No equivalent.	Yes