Neutral Citation Number: [2024] EWHC 2967 (Ch)

Claim Nos. FL-2020-000032, FL-2021-000010

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (ChD)

7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 20 November 2024

Before:

THE HONOURABLE MR JUSTICE HILDYARD

Between:

(1) DEUTSCHE BANK AG LONDON
(2) DEXIA S.A.

Claimants

– and –

PROVINCIA DI BRESCIA

Defendant

Richard Handyside KC, **Andrew Lodder** (instructed by **Allen Overy Shearman Sterling LLP** for the **First Claimant** and **Bonelli Erede Lombardi Pappalardo LLP** for the **Second Claimant**)
The Defendant did not appear and was not represented

Hearing dates: 17-18 June 2024

APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10:30 on 20 November 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

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The Honourable Mr Justice Hildyard:

A. Introduction

1. In these proceedings ("the Claims"), which are being jointly case managed and tried together, the Claimants (Deutsche Bank AG London and Dexia SA, individually "DB" and "Dexia", and together "the Banks") seek declaratory relief in respect of two interest rate swap transactions entered into between the Banks and the Defendant (Provincia di Brescia ("Brescia")) on 28 June 2006 ("the First Transaction") and 20 December 2006 ("the Second Transaction", and together, "the Transactions"). The Banks also seek declaratory relief in respect of two settlement agreements between the same parties ("the Settlement Agreements").

2. The Transactions are expressly governed by English law and this Court has exclusive jurisdiction in respect of them. The Settlement Agreements are governed by Italian law but neither contains a jurisdiction clause.

3. After unsuccessfully challenging this Court's jurisdiction over the Claims,[1] Brescia has not participated in the proceedings to date and although it continues to have solicitors on the record (Spencer West LLP), it did not attend the trial.

4. As elaborated later, the Banks have made extensive efforts to ensure that all documents in the Claims (including the Claimants' skeleton argument for these proceedings) and all steps in the proceedings have been brought to Brescia's attention, and Spencer West LLP has been given access to the trial bundle.

5. The Transactions were entered into pursuant to (in the case of each Bank) an ISDA Master Agreement dated 28 June 2006 ("the Master Agreement"), a bespoke Schedule ("the Schedule") and Confirmations dated 28 June 2006 and 20 July 2006 for the First Transaction and 20 December 2006 and 2 January 2007 for the Second Transaction ("the Confirmations" and, together with the Master Agreement and the Schedule, "the Transaction Documents"). There are minor differences in the Transaction Documents for each Bank, but the economic terms of the Transactions are identical.

6. The Transactions were entered into in connection with two floating rate bond issuances by Brescia, the first on 30 June 2006 in the amount of €104,892,000.00 ("the June 2006 Bond") and the second on 22 December 2006 in the amount of €55,832,000.00 ("the December 2006 Bond", and together "the Bonds"). The proceeds of the Bonds were used to refinance a large proportion of Brescia's pre-existing loan portfolio with Cassa Depositi e Prestiti ("CDP"), and to finance new investments.

7. To date, Brescia has complied with and/or discharged its payment obligations under the Transactions.

8. However, after performing the Transactions for nearly 10 years without any suggestion of any issue as to their validity or enforceability, Brescia indicated in November 2015 that it intended to seek suspension or cancellation of the Transactions.

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[1] See [2022] EWHC 2859 (Comm) and [2023] EWHC 959 (Comm).

9. In those circumstances, DB issued a claim against Brescia in England on 10 December 2015 seeking declaratory (and further or other) relief in connection with the Transactions.

10. Thereafter, Brescia commenced proceedings in Italy against the Banks in March 2016 alleging (among other things) that they were liable to pay damages in respect of losses suffered under the Transactions ("the Original Italian Proceedings").

11. On 21 April 2016, Dexia issued its own claim against Brescia in England seeking declaratory (and further or other) relief in connection with the Transactions (together with DB's claim issued on 10 December 2015, "the Original English Proceedings", and together with the Original Italian Proceedings, "the Original Proceedings").

12. The Banks and Brescia subsequently negotiated and entered into Settlement Agreements which, among other things, resolved the Original Proceedings, on 18 September 2017 (Dexia and Brescia) and 25 September 2017 (DB and Brescia).

13. More than two years later, in May 2020, the Joint Sections of the Italian Supreme Court handed down judgment in a case between an Italian bank and the Municipality of Cattolica *("the Cattolica Decision"*).

14. Following the *Cattolica Decision*, the Banks became aware of press reports in June 2020 suggesting that Brescia was seeking to rely on it to set aside the Settlement Agreements and to mount a further challenge to the Transactions in Italy.

15. In light of this, DB sought and obtained permission (by Order of Andrew Baker J on 23 October 2020) to issue a new claim form under CPR 38.7 setting out the present Claim in England on 13 November 2020, seeking similar Declarations as it had previously, together with further Declarations in relation to the effect of its Settlement Agreement on the Transactions.

16. In March 2021, Brescia commenced proceedings against the Banks in the Court of Rome seeking to challenge the Settlement Agreements and the Transactions ("the New Italian Proceedings").

17. On 15 September 2021, Dexia issued a Claim of its own in England, seeking similar relief to DB.

18. In response to the Claims, Brescia issued applications in England seeking to challenge the English Court's jurisdiction to grant the declaratory relief sought by the Banks in respect of the Settlement Agreements (but not the other relief sought by the Banks, which it accepted the English Court had jurisdiction to try). The Court dismissed these applications and declared that the English Court has jurisdiction to determine all of the Banks' claims against Brescia.[2]

19. By their respective Claims, the Banks are seeking declaratory relief in terms that track the wording of the Transaction Documents and the Settlement Agreements, together with certain other relief that the Banks submit follows inevitably from such declaratory relief or is otherwise straightforward. No money claims are advanced by the Banks in these proceedings.

[2] See footnote 1 above.

20. These proceedings are the latest in a series of Business and Property Court cases concerning English-law governed derivative transactions on standard ISDA terms and subject to exclusive English jurisdiction, in which Italian local authorities have sought to challenge derivatives into which they had entered by relying on Italian law arguments as to capacity, authority and/or validity.

21. In previous cases of this kind, the Commercial Court and the Court of Appeal have consistently granted and upheld relief in substantially identical terms to the relief sought by the Banks in respect of the Transaction Documents.

22. Most relevantly, since the *Cattolica Decision*, Cockerill J granted such relief in relation to similar transactions in *Banca Nazionale del Lavoro v Provincia di Catanzaro* [2023] EWHC 3309 (Comm) (*"Catanzaro"*) and *Deutsche Bank AG London v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm); [2022] EWHC 219 (Comm) ("*Busto"*), as did the Court of Appeal in *Banca Intesa Sanpaolo SpA and Dexia Credit Local SA v Comune di Venezia* [2023] EWCA Civ 1482 **(**"*Venice in the Court of Appeal"*) (overturning the decision of Foxton J in [2022] EWHC 2586 (Comm) ("*Venice at first instance"*)) and Peter MacDonald Eggers KC (sitting as a Deputy High Court Judge) in *Dexia Crediop SpA v Provincia di Pesaro e Urbino* [2022] EWHC 2410 (Comm) ("*Pesaro"*). The Banks have filed notices under Section 4 of the Civil Evidence Act 1972 ("the Hearsay Notices") in respect of the relevant findings of Italian law in these cases and certain other previous decisions of this Court.

23. As regards the Master Agreement, the Schedule and the Confirmation together comprising the Transaction Documents in each of the Transactions, the principles recognised in the above cases can (for the most part) be applied in determining the Claims, though I shall have to consider in more detail the effect of small differences in wording.

24. However, the Settlement Agreements are not standard, and none of the previous cases concerned the effect of settlement agreements governed by Italian law. Counsel told me that this will be the first time that an English Court has been called upon to determine the effect of Italian law on settlement agreements governed by that law but entered into in respect of English law derivatives alleged to be void or invalid under Italian law. I note, however, that Brescia agreed thereunder that the Transactions were valid, binding and enforceable and waived the Italian law arguments it is currently advancing in the New Italian Proceedings, which it accepted were incorrect.

25. The Italian law arguments Brescia has raised in the New Italian Proceedings (and could have raised in England if it had continued to participate after losing its jurisdiction challenges) fall into three categories:

    (1) First, Brescia has raised one argument in Italy that could conceivably go to its capacity to enter into the Transactions (although Brescia has not actually put the argument in terms of capacity). That is its suggestion that the Transactions were 'speculative', essentially because the initial mark-to-market ("MTM") was negative for Brescia. The Banks dismiss this as a *non sequitur*. They submit that (a) the Transactions are 'plain vanilla' derivatives, falling within the categories that Brescia was expressly permitted to enter under the relevant Italian legislation, which were expressly designed and intended to hedge Brescia's exposure under

the Bonds; and (b) Brescia has not suggested that it lacked capacity to enter into the Settlement Agreements; and in any case (c) neither of the two recognised limits on the capacity of Italian local authorities applies to the Settlement Agreements.

(2) Secondly**,** Brescia has raised a number of points that are said to go to its authority to enter into the Transactions and the Settlement Agreements. The Banks submit that these points are (a) wrong as a matter of Italian law but also (b) irrelevant insofar as they relate to the English law governed Transactions, and depend upon questions of ostensible authority and ratification which fall to be decided by applying English law; and (c) under English law, it cannot seriously be suggested that the relevant individuals at Brescia did not have ostensible authority to enter into the Transactions, which have in any case repeatedly been ratified by Brescia over a period of nearly two decades. As regards the Settlement Agreements, the Banks submit that Brescia's authority arguments are parasitic on its arguments about the Transactions, or are otherwise untenable.

(3) Thirdly, and finally, Brescia has raised various points said to go to the validity of the Transactions and the Settlement Agreements under Italian law. The Banks submit that (a) those points go nowhere as regards the Transactions, which are governed by English law, as there is no basis for any suggestion that mandatory rules of Italian law apply; and (b) although the Settlement Agreements are governed by Italian law, the points taken by Brescia in the New Italian Proceedings are either parasitic on points about the Transactions and flawed for the same reasons as summarised above, or otherwise untenable.

B. Structure of this Judgment

26. I turn to address these issues in more detail. In doing so, I follow below the same structure and sequence as in the Banks' helpful skeleton argument and in their oral submissions.

27. The structure of the rest of this judgment is as follows:

(1) Section **C** addresses Brescia's non-participation in these proceedings and the trial;

(2) Section **D** introduces the evidence before the Court for the trial;

(3) Section **E** sets out the factual background;

(4) Section **F** addresses the Banks' claims in respect of the Transactions;

(5) Section **G** addresses the Banks' claims in respect of the Settlement Agreements (including jurisdictional issues in that context);

(6) Section **H** deals with the specific declaratory relief sought by the Banks, including in respect of the loss and damage they have suffered as a result of Brescia's breaches of the Settlement Agreements and the Transaction Documents; and

(7) Section **I** is the conclusion.

28. The Banks' Written Opening contained two annexes which I have found to be invaluable in identifying (a) points of distinction between this case and the previous cases which I have identified above and (b) the issues of Italian law to be decided. I annex both to this Judgment without alteration:

    (1) Annex 1 identifies the source in the Transaction Documents and the Settlement Agreements for the declaratory relief sought by the Banks and, in the case of the Transaction Documents, compares the Declarations sought in the Claims with the similar or identical relief granted by this Court in *Busto, Pesaro* and *Catanzaro.*

    (2) Annex 2 identifies the relevant Italian laws relied on by Brescia in the New Italian Proceedings and sets out where these arguments are addressed by their Italian law expert, Professor Emmanuele Rimini ("Prof. Rimini"), and the previous cases relied on by the Banks in the Hearsay Notices.

C. Brescia's non-participation

29. In *Catanzaro* at [2]–[6], Mrs Justice Cockerill considered the principles applicable to an uncontested hearing or trial in very similar circumstances to the present case before deciding to proceed in the absence of the Province of Catanzaro. In summary, CPR 39.3 gives the Court a discretion to proceed with a hearing or trial in the absence of a party. The discretion must be exercised with caution since a party must be afforded a fair opportunity to present its case in court, and to be legally represented to that end. But cases must be brought to a conclusion: and further, it may be obvious that the defendant has no real intention of taking up the opportunity. The court must be reasonably robust, and has the comfort that CPR 39.3 *"furnishes a safeguard in the event of mishap"* (*Williams v Hinton* [2011] EWCA Civ 1123).

30. In this case, I am satisfied that, as in *Catanzaro*, it is appropriate to proceed in Brescia's absence. In particular, it seems to me to be clear from the evidence that:

    (1) Brescia's chosen legal representatives, Spencer West, have confirmed that Brescia has instructed them to remain on the record in both Claims: their decision not to appear must be taken to be considered and deliberate;

    (2) Brescia has been served with all of the relevant documents in the proceedings since its apparent decision not to participate, following the failure of its jurisdiction challenges, including the Order of Mr Justice Andrew Baker dated 8 September 2023 fixing this trial date, the notice of the hearing, and all the witness statements and expert reports supporting the Claims;

    (3) Although Brescia has generally declined to give Spencer West instructions to take further steps in defending the Claims after its failed jurisdiction challenges, it has given instructions when it suits it, and in particular, has consented to an order sought by Dexia on 13 June 2023 on the basis that there be no order as to costs; and

    (4) Spencer West requested access to the trial bundle, demonstrating its continuing active involvement to the extent required by its client;

(5) Brescia has also been sent the Banks' skeleton argument and transcripts of this hearing directly from Opus2 at the same time as the Banks, from which it is apparent (amongst other matters) that the Court has been invited to proceed in its absence: no complaint or indication of objection has been received.

31. Where a trial is undefended, but substantive relief is sought, the required approach of the Court, and the legal representatives of the represented party, is explained in a number of recent authorities, in particular *CMOC Sales & Marketing Ltd v Persons Unknown* [2018] EWHC 2230 (Comm) at [12]–[15] (HHJ Waksman QC, as he then was) and *Lakatamia Shipping Co Ltd v Morimoto* [2023] EWHC 3023 at [12]–[13] (Foxton J).

32. In short, the claimant can prove its case by reference to witness statements and documents, without calling oral evidence (see CPR 32.2(2)(b) and 32.5(1)(b)). In that regard, I was invited before the trial commenced to consider whether I would require any oral evidence and/or cross-examination. I considered it to be unnecessary.

33. However, the Court must be satisfied, on the balance of probabilities, that the claim is made out. The represented parties bear "*an obligation of fair presentation which is less extensive than the duty of full and frank disclosure on a without notice application*" such that they must draw to the attention of the Court "*points, factual or legal, that might be to the benefit of [the unrepresented defendant]"* (*Lakatamia Shipping v Morimoto* at [13]).

34. I confirm that in those circumstances, I have been particularly concerned to consider especially carefully the evidence and arguments put before me, and notwithstanding the additional assistance provided by earlier cases, to assess whether in this particular context, the Claims have been proved and the need for the relief sought established.

35. The Claims have been punctiliously argued. I have been assisted by both a detailed and comprehensive skeleton argument, and also detailed and clear oral submissions. These submissions have carefully identified particular aspects of these Claims (including the particular wording of the relevant Transaction Documents) which differ from previous cases. They have also assiduously sought to identify points that Brescia might have sought to advance. I am grateful to Counsel for the Banks for this admirable assistance.

D. Evidence

36. By paragraph 6 of the Order of Bryan J dated 10 May 2024, the Banks are entitled to rely on the documentary evidence in the trial bundle as evidence of the truth of its contents: and see also Section J.8.5 of the Commercial Court Guide.

37. The Claims are supported by witness statements for the Trial from:

(1) Samir Belarbi ("Mr Belarbi", the Head of Debt Management or Financial Engineering in the Public Finance Division for Dexia at the time of the Transactions), who gives evidence as to (i) the negotiation of and entry into the Transactions, (ii) the Banks' practice and his experience of prevailing market practice in applying the 'economic convenience' test under Article 41 and (iii) the negotiation of and entry into the Settlement Agreements;

(2) Rachel Davison ("Ms Davison", Vice President and Senior Counsel in DB's Litigation and Regulatory Enforcement team), who gives evidence as to (i) the negotiation of and entry into the Settlement Agreements and (ii) the costs incurred by DB in the New Italian Proceedings; and

(3) Giuseppe Massimiliano Danusso ("Mr Danusso", the managing partner of Bonelli Erede Lombardi Pappalardo LLP, solicitors for Dexia), who gives evidence as to the costs incurred by Dexia in the New Italian Proceedings.

38. The Banks also rely on expert reports from:

(1) Prof. Rimini on Italian law; and

(2) Prof. Paolo Cucurachi on technical derivatives analysis ("Prof. Cucurachi").

E. Relevant Factual Background

39. The following statement of the factual background to the Transactions and the Settlement Agreements, in a form intended to be neutral, is taken from the Banks' Skeleton Argument. I am satisfied that each of the factual assertions that follow is supported by the relevant documentary and witness evidence, and I make findings of fact for the purposes of the Claims accordingly. (Unless otherwise expressly stated, the documents were provided to me in the bundles, and the evidence of fact is derived from the witness statement of Mr Belarbi.)

E.1 The engagement of the Banks in financing Brescia's pre-existing indebtedness

40. In November 2005, Brescia had extensive borrowing with CDP from the end of 1996 onwards in the amount of €84,229,834.35. Of this, €67,821,399.36 comprised fixed-rate loans at rates between 4.75% and 6.5% per annum and €16,408,435 comprised floating-rate loans with a spread of 0.18% ("the CDP Loans"). The rates on these CDP Loans were, as confirmed by Mr Belarbi in his witness statement, "*significantly higher than the market rates at the time of our discussions with the Province in 2006"* and made up nearly half of Brescia's total borrowing.

41. Brescia was thus saddled with a large amount of expensive long-term borrowing from CDP, most of it fixed at above-market rates. This meant that it could not benefit from any fall in rates (which in the event occurred). It therefore wanted to reduce the costs of its existing indebtedness by terminating its CDP Loans early and issuing a floating-rate bond, while at the same time hedging its interest rate exposure; and further, as some of the CDP Loans were approaching maturity, Brescia also wanted to reduce its capital repayments and free up cash flows.

42. On 23 November 2005, therefore, Brescia's Provincial Council (which Prof. Rimini has explained in his witness statement is an elected assembly charged with setting policies for the general affairs of the province) passed a resolution authorising an application to CDP for the early repayment of the CDP Loans, as Brescia was permitted to do by Article 41(2) of Law 448/2001 ("Article 41").

43. On 17 March 2006, Brescia's Provincial Council passed resolution no. 12, which approved Brescia's budget for 2006. The Budget envisaged the rescheduling of Brescia's pre-existing indebtedness, with the aim of reducing its effect on the budget.

44. In early 2006, Brescia initiated discussions with several banks in relation to the possible refinancing of the CDP Loans, including Dexia and DB. As regards each of the Banks:

    (1) At this time, Brescia was already one of Dexia's main clients and it carried out annual reviews of Brescia's financial situation.[3] In response to Brescia's invitation for proposals, Dexia submitted a feasibility study in March 2006, which was updated on 27 April 2006. The feasibility study proposed re-financing the CDP Loans pursuant to Article 41 with a floating-rate bond and hedging the interest rate risk with an interest rate collar swap. Among other things, the Dexia feasibility study explained that an interest rate collar would not allow Brescia to benefit in the event that interest rates fell below the floor rate and that, based on the forward curve, this was expected to be the position from 2023 onwards.

    (2) As Brescia was not an existing client of DB, DB wrote a letter of introduction to Brescia on 7 April 2006, explaining its experience in the Italian local authority market and proposing a similar transaction as Dexia had done, i.e. re-financing the CDP Loans pursuant to Article 41 through a floating-rate bond hedged with an interest rate collar.[4]

45. On 2 May 2006, the Provincial Board (which Prof. Rimini has explained is an executive body entrusted with the role of implementing the policies of the Provincial Council) passed Board resolution no. 203, which approved Brescia's Executive Management Plan. The Executive Management Plan included the minimization of the cost of Brescia's outstanding debt by refinancing CDP Loans through the issuance of a bond and the identification of one or more banks to manage the refinancing.

46. On 23 May 2006, the Banks sent Brescia a joint presentation setting out with slides the details of the proposed refinancing of the CDP Loans. The presentation described two options to refinance 206 CDP Loans in an amount of €85,945,847.60: (i) issuance of a variable rate bullet bond in an amount of €90,203,288.50, with a maturity of 30 years and a spread of 20bps above Euribor 12M, together with an amortising swap as required by Article 41 and an interest rate collar to minimise Brescia's exposure to market rate volatility, and (ii) issuance of an amortising bond which directly amortised over time, without the need for an amortising swap.

47. Following discussion of the Banks' proposals and those received from other banks,[5] Brescia's Board passed resolution no. 271 of 24 May 2006, which delegated to Dr Fenaroli ("Dr Fenaroli", the Director of the Financial Services of Brescia Province) the identification of the institutions to be appointed pursuant to a multi-year mandate to assist

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3 That Brescia was one of Dexia's main clients is confirmed by Brescia at paragraph §16.7 of the DB Writ.

4 §4 of the DB Writ confirms that this proposal was presented to Brescia on 7 April 2006.

5 Dr Fenaroli told DB on 13 April 2006 that Brescia was "*considering offers from other banks"*. Brescia's Executive Resolution no. 1380 dated 29 May 2006 stated that "*Brescia has examined the proposals received from the main Credit Institutions operating in the sector in order to identify the institution or institutions to which to confer the assignment*".

Brescia with the active management of its debt and liquidity for a period of up to 36 months.

48. On 29 May 2006, Brescia's Council approved resolution no. 16, which approved a request to CDP for early repayment of the CDP Loans to be financed by the issuance of a bond and amended the 2006 Budget to take account of the proposed refinancing. On the same day, Dr Fenaroli approved Executive Resolution no. 1380, which awarded the mandate for the refinancing to the Banks pursuant to Board resolution no. 271 of 24 May 2006.

49. On 31 May 2006 Brescia entered into a mandate agreement ("the Mandate") with the Banks for a term of 36 months, to provide assistance to the Defendant in relation to the specific matters concerning the management of the Defendant's indebtedness that were expressly identified in Article 1.2 of the Mandate. Those matters included, among other things:

    (1) Providing "*assistance in assessing the cost-effectiveness of the refinancing of the* [CDP Loans] *through the issuance of the* [Bonds] *pursuant to the provisions of* [Article 41]";

    (2) the "*identification of the individual* [CDP Loans] *for which it is convenient to proceed with the repayment and the subsequent refinancing pursuant to* [Article 41], *ascertaining – for each item dealt with – the reduction in the value of the financial burden on* [Brescia]"; and

    (3) providing "*assistance in the organization of active liability management operations, with the aim of financial instruments, including derivative financial instruments and instruments for the management of liquidity, suitable for the achievement of the objectives of* [Brescia] *… and analysis of the costs and benefits associated with the choice of different financial instruments*".

50. Further:

    (1) Pursuant to Article 2.2 of the Mandate, the parties agreed that:

    "*The commitments and responsibilities of the Banks are limited to those specifically set out in this Mandate. In carrying out the activities covered by the Mandate, the Banks will not be required to … arrange financing or investment services other than those referred to in Article 1…*".

    (2) Article 2.4 of the Mandate provided that any transactions to be entered into between Brescia and the Banks "*will be, in in each case, subject to the prior authorization of* [Brescia] *and will be subject to a specific separate contract*".

    (3) Pursuant to Article 3.1 of the Mandate, Brescia expressly represented to and agreed with the Banks that:

    "*…any initiative and decision referred to or in connection with this Mandate shall be deemed to have been taken regardless of any communication (written or oral) received from the Banks and such … communication will not be considered as a recommendation to invest or* [carry] *out financial transactions*"; and

"[Brescia] *is able to assess the terms, conditions and risks of the financial instruments, as well as the financial structures and operations to which this Mandate refers.*"

(4) Article 15 of the Mandate provided that it would be "*governed by and construed in accordance with Italian law*" and that "*Disputes arising from this Mandate shall be subject to the exclusive jurisdiction of the Court of* [Rome]."

51. Accordingly, the Banks' obligations under the Mandate did not include the provision of investment advice, and any transactions entered into between the Banks and Brescia thereafter were to be governed by separate contracts, in this case the Transaction Documents.

E.2 The First Transaction

52. The terms of the First Transaction were negotiated between Brescia and the Banks in the period between the signing of the Mandate and around 20 June 2006. During these discussions, Brescia provided relevant information regarding the key characteristics of its indebtedness, its financial objectives and risk appetite. Brescia (like many local authorities) had a low appetite for risk and was required by law to set aside in its annual budget the estimated expenditure for servicing its debt, which meant it favoured predictability in the cost of its debt. Mr Belarbi's evidence is that the Banks therefore proposed a "*simple and straightforward*" transaction with "*clear capping rates to mitigate the risk of increasing interest rates*".

53. On 9 June 2006, DB sent Brescia a draft of the standard Master Agreement and Schedule commonly used for local authorities, together with Italian translations of them both.

54. Between 12 and 21 June 2006, Brescia negotiated a reduction in the proposed spread from 20bps above Euribor 12M to 19bps.

55. An updated version of the Banks' joint presentation of 23 May 2006 was sent to Brescia on 20 June 2006, together with a spreadsheet summarising the future expected cash flows under the First Transaction based on the current forward curve. The fundamentals of the two proposed refinancing options remained the same as the earlier presentation (see paragraph [46] above). As regards the bullet bond structure that was ultimately adopted, slide 9 of the joint presentation showed that refinancing the CDP Loans with the bullet bond structure would result in savings of around €3.8 million. The slide also showed the outcome of what Prof. Rimini referred to as the 'economic convenience' test under Article 41 and denotes the obligation placed on Brescia by Article 41(2) (rather than its counterparty) to ensure that any refinancing of its existing indebtedness is "*under refinancing conditions that allow a reduction of the financial value of total liabilities to be paid by the bodies themselves*". Mr Belarbi confirms that this was the subject of discussions with Brescia. The First Transaction easily passed the 'economic convenience' test. Slide 11 showed the interest rate collar swap against the prevailing forward rate curve, which indicated that, after the initial fixed rate period, Brescia would be expected to pay a rate between the cap and floor until the last few years of the First Transaction, when it would pay the floor rate.

56. The following day, another version was provided updating the economic information to reflect the latest information. This version reflected the lower 19bps spread negotiated by Brescia and showed expected savings to Brescia of around €4 million from the refinancing.

57. An updated draft of the Master Agreement and Schedule to be signed between Brescia and DB was provided to Brescia on 23 June 2006, together with an explanation of their contents and translations of all the documents into Italian. Dexia provided Brescia with its own version of the Master Agreement and Schedule on 27 June 2006. The covering email made clear that there were minor differences between the DB and Dexia contracts and that the contracts were governed by English law.

58. By Council Resolution no. 20 of 26 June 2006, Brescia approved the issuance of the June 2006 Bond and authorised Dr Fenaroli to enter into the First Transaction. The Council stated that the First Transaction was "*aimed at hedging the interest rate risk and amortising the debt, in accordance with Article 41*". Annex B identified €15,091,787.16 in new investments to be funded by part of the proceeds of the June 2006 Bond.

59. Two days later, on 28 June 2006, Dr Fenaroli signed Executive Resolution no. 1750, which approved the terms of and documentation for the First Transaction and confirmed that it complied with Ministerial Decree no. 389/2003 ("Decree 389"). The Executive Resolution stated that the First Transaction was entered into "*to transform the repayment profile of the* [Bonds] *by Bullet into Amortising as well as in order to contain the risks due to interest rate movements*".

60. In accordance with Executive Resolution no. 1750, Dr Fenaroli signed each of the Master Agreements with DB and Dexia on behalf of Brescia on the same day. DB and Dexia subsequently provided Brescia with the Confirmations for the First Transaction on 28 June 2006. Dexia's confirmation included a statement that Brescia had:

> *"… come to the determination to complete this* [Transaction] *not for speculative purposes but only for the hedging of interest rate risks and for the management of liabilities arising from bond issues, mortgage liabilities and other forms of recourse to the financial market permitted by law. In particular, this* [Transaction] *is therefore carried out on underlying amounts that are actually due by* [Brescia]*, which undertakes to maintain for the entire duration of the* [Transaction] *an underlying debt that has a high financial correspondence with the* [Transaction] *with particular regard to the duration and type of rate.*"

61. Also on 28 June 2006:

    (1) Dr Fenaroli signed a declaration confirming and representing to DB that Brescia was a professional investor (*operatore qualificato*) pursuant to Article 31 of the Italian Regulation no. 11522 of 1 July 1998 issued by the Italian regulator, CONSOB ("the 1998 CR") because it had *"specific competence and experience in financial instrument transactions"*;[6] and

[6] As Mr Belarbi explains in his witness statement, this declaration was issued to DB but Dexia also relied on Brescia having classified itself as a professional investor and, following its standard procedures, "*also verified the Province's actual experience in financial instruments"*.

(2) Dr Fenaroli signed a declaration on behalf of Brescia confirming and representing to the Banks that it had received the document on "*the general risks of investments in financial instruments*" which was in the form that had been approved by CONSOB and as set out at Annex 3 of the 1998 CR.

62. On 30 June 2006, Brescia issued the June 2006 Bond, a floating rate bond in the amount of €104,892,000.00 to refinance its existing indebtedness and to finance new investment. The June 2006 Bond was underwritten in full by DB and Dexia in equal parts. Pursuant to the June 2006 Bond, Brescia agreed to pay interest at a variable rate equal to Euribor 12M plus 0.19% payable annually on 30 June of each year. The principal amount of the June 2006 Bond was repayable by Brescia in full by way of a single bullet repayment on 30 June 2036.

63. For the First Transaction with DB, a revised Confirmation was signed on 20 July 2006.

64. In the case of both Banks, the economic terms of the First Transaction were identical:

(1) the Effective Date was 30 June 2006;

(2) the Termination Date was 30 June 2036;

(3) the initial notional amount was €52,446,000.00 which would decrease in relation to Brescia's payment obligations, but not the Banks, in accordance with the table in the Confirmation for the First Transaction;

(4) Brescia would pay the Banks:

(1) interest on the notional amount from time to time as follows:

(i) at a fixed rate of 4.16% per annum for the period from 30 June 2006 to 30 June 2007;

(ii) at a fixed rate of 4.30% per annum for the period from 30 June 2007 to 30 June 2008;

(iii) at a fixed rate of 4.40% per annum for the period from 30 June 2008 to 30 June 2009;

(iv) at a fixed rate of 4.45% per annum for the period from 30 June 2009 to 30 June 2010; and

(v) at a variable rate equal to Euribor 12M plus 0.19% for the period from 30 June 2011 to 30 June 2036, save that:

(a) from 30 June 2011 to 30 June 2015, the minimum rate and maximum rate payable by Brescia would be 4.50% and 5.75% respectively;

(b) from 30 June 2015 to 30 June 2025, the minimum rate and maximum rate payable by Brescia would be 4.75% and 5.95% respectively; and

(c) from 30 June 2025 to 30 June 2036, the minimum rate and maximum rate payable by Brescia would be 4.75% and 6.25% respectively; and

(2) a fixed amount on 30 June of each year in accordance with the table in the Confirmation for the First Transaction.

(5) the Banks would pay Brescia:

(1) interest on a fixed notional amount of €52,446,000 at a variable rate equal to Euribor 12M plus 0.19% for the period from 30 June 2007 to 30 June 2036; and

(2) a fixed amount of €52,446,000.00 on 30 June 2036.

E.3 The Second Transaction

65. Negotiations for the December 2006 Bond Issuance and Second Transaction began in around September 2006.

66. On 17 November 2006, the Banks sent Dr Fenaroli an analysis of the capital and interest flows from the proposed second Bond issuance to take place in December 2006, with indicative rates of Euribor 12M with a spread of 19bps (which was the same as the First Transaction). The Banks also proposed that, once again, Brescia would enter into an interest rate collar swap to hedge its exposure to market rate volatility under the Bonds, with indicative floor rates of between 4.25% and 4.5% and indicative ceiling rates of between 5.5% and 6%.

67. By Council Resolution no. 38 of 27 November 2006, Brescia approved the early termination of a further tranche of CDP Loans in an amount up €25 million and the amendment of the 2006 budget to provide for new investments of up to €45 million, to be funded by a thirty-year bond issuance of up to €70 million, with a rate of Euribor 12M plus 19bps. In the same Council Resolution, it authorised Dr Fenaroli to enter into any documents necessary to finalise the December 2006 Bond and to enter into the Second Transaction to hedge its exposure under it. The Council stated that its purpose was "*to implement an active management of its indebtedness by using derivative financial instruments (such as interest rate swaps) and renegotiation transactions, in order to restructure its indebtedness, change the interest rate risk profile and optimise the cost of debt*". As with the First Transaction, it identified the Second Transaction as being "*aimed at hedging the interest rate risk and amortising the debt*".

68. On 14 December 2006, the Banks performed an 'economic convenience' calculation for the refinancing which showed that the present value of Brescia's liabilities post-refinancing would be €832,502.52 lower than the present value of the existing indebtedness being re-financed.

69. Later the same day, the Banks made a joint presentation to Brescia in similar terms to the presentation for the First Transaction.[7] Among other things, the presentation set out a proposal to refinance 47 CDP Loans in an amount of €20,524,874.15 and raise financing for new investments of approximately €32 million through the issuance of a bullet bond in an amount of €55 million, with a maturity of 30 years and a spread of 19bps above Euribor 12M, together with an amortising swap as required by Article 41 and an interest rate collar to minimise Brescia's exposure to market rate volatility. The presentation also showed the outcome of the 'economic convenience' calculation, i.e. savings of €832,502.52.

70. On 18 December 2006, Brescia's Provincial Council passed resolution no. 46, approving the issuance of the December 2006 Bond and approving a list of new investments, set out in Annex A to the resolution, in a total amount of €33,329,070.24, to be funded by the proceeds of the December 2006 Bond.

71. On 20 December 2006, the documentary evidence shows that Brescia was sent (among other things) another version of the documentation on the risks of investments in financial instruments, as it was prior to the First Transaction. It was also sent the Term Sheets for the Second Transaction.

72. On 20 December 2006, Dr Fenaroli signed Executive Resolution no. 3784, approving the December 2006 Bond, and Executive Resolution no. 3785, approving the terms of the Second Transaction. As with the First Transaction, the Executive Resolution stated that the purpose of the Second Transaction was "*to hedge the interest rate risk and amortise the debt*".

73. On the same day, Brescia entered into the Second Transaction, to manage its debts under and in respect of the December 2006 Bond. Dexia's Confirmation was provided on 20 December 2006 and DB's Confirmation on 2 January 2007. Dexia's confirmation included the same statement quoted at paragraph 60 above that Brescia had entered into the Transaction for hedging and not speculative purposes.

74. On 20 December 2006, Dr Fenaroli signed a declaration on behalf of Brescia confirming and representing to the Banks that the December 2006 Bond would be issued pursuant to and in accordance with all applicable legislation including, in particular, but without limitation, Article 41.

75. On 22 December 2006, Brescia issued the December 2006 Bond, a floating rate bond in the amount of €55,832,000.00 to refinance its existing indebtedness and to finance new investment. The December 2006 Bond was again underwritten in full by DB and Dexia in equal parts. Pursuant to the December 2006 Bond, Brescia agreed to pay interest at a variable rate equal to Euribor 12M plus 0.19bps payable annually on 22 December of each year. The principal amount of the December 2006 Bond was repayable by Brescia in full by way of a single bullet repayment on 22 December 2036.

[7] As is apparent from an email arranging the meeting at 3pm on 14 December 2006 and also the record of the presentation dated 14 December 2006.

76. The economic terms of the Second Transaction to hedge Brescia's exposure under the December 2006 Bond were again identical for both Banks:

(1) the Effective Date was 22 December 2006;

(2) the Termination Date was 22 December 2036;

(3) the initial notional amount was €27,916,000.00 which would decrease in relation to Brescia's payment obligations, but not the Banks, in accordance with the table in the Confirmation for the Second Transaction;

(4) Brescia agreed to pay the Banks:

(1) interest on the notional amount from time to time as follows:

(i) at a fixed rate of 3.95% per annum for the period from 22 December 2006 to 22 December 2007;

(ii) at a fixed rate of 4.00% per annum for the period from 22 December 2007 to 22 December 2008;

(iii) at a fixed rate of 4.05% per annum for the period from 22 December 2008 to 22 December 2009;

(iv) at a fixed rate of 4.10% per annum for the period from 22 December 2009 to 22 December 2010; and

(v) at a variable rate equal to Euribor 12M plus 0.19% for the period from 22 December 2010 to 22 December 2036, save that:

(a) from 22 December 2010 to 22 December 2015, the minimum rate and maximum rate payable by Brescia would be 4.25% and 5.50% respectively; and

(b) from 22 December 2015 to 22 December 2036, the minimum rate and maximum rate payable by Brescia would be 4.50% and 5.50% respectively; and

(2) a fixed amount on 22 December of each year in accordance with the table in the Confirmation for the Second Transaction.

(5) The Banks agreed to pay Brescia:

(1) interest on a fixed notional amount of €27,916,00.00 at a variable rate of Euribor 12M plus 0.19% for the period from 22 December 2007 to 22 December 2036; and

(2) a fixed amount of €27,916,000.00 on 22 December 2036.

77. The Transactions were subsequently communicated to the Ministry of Economy and Finance ("MEF", the central Italian authority on public finance and public debt), which received them on 20 November 2007.

E.4 Brescia's ratification of the Transactions

78. From 22 December 2006 to the present day, Brescia and the Banks have fully performed their obligations under the Transactions.[8] The payments made are set out in tabular form in Tables 10 and 11 in Prof. Cucurachi's Report. The relevant payments were made (without any suggestion that they were not due) from 2007 until Brescia began the Original Italian Proceedings in 2016 (and have continued thereafter, notwithstanding Brescia's arguments that the Transactions are invalid).

79. Brescia also routinely approved the Transactions after they were entered into. In particular, Brescia's Council each year by resolution approved its financial statements and budgets, which accounted for all of its expenses, including those relating to the Transactions. I have seen examples in the documentary evidence of the information approved in Brescia's annual budgets for 2017 and 2018, each of which include notes setting out the expected financial cash flows arising from the Transactions.

80. The Court of Auditors audited the Bonds and the Transactions in 2011. In response, Brescia resolved to constantly monitor the differential cashflows from the Transactions and report them to the Provincial Council and the Court of Auditors every six months, and to identify resources to meet any negative cashflows in its budgets on an on-going basis. The Court of Auditors did not identify "*any reason for* [the Transactions'] *invalidity nor any wrongdoing by the Banks*".

E.5 The Original Proceedings

81. On or about 25 November 2015, the Banks became aware of press reports published by the Giornale di Brescia in Italy, which stated that Brescia had "*decided to sue*" the Banks in relation to the Transactions, that "*experts*" appointed by Brescia had "*highlighted 'serious issues nullifying the contracts'*" and Brescia intended to seek "*suspension*" and/or "*cancellation*" of the Transactions.[9]

82. In response to these press reports, DB issued a claim against Brescia on 10 December 2015 seeking declaratory (and further or other) relief in connection with the Transactions.

83. On 18 March 2016, Brescia commenced the Original Italian Proceedings against the Banks alleging, among other things, that they had acted in breach of the Mandate in connection with the Transactions and that they were liable to pay damages in respect of losses allegedly suffered by Brescia under the Transactions.

84. On 21 April 2016, Dexia issued its own claim in England against Brescia seeking declaratory (and further or other) relief in connection with the Transactions.

85. In relation to DB's claim in the Original English Proceedings, solicitors for Brescia confirmed in writing on 9 May 2016 that it did not dispute the jurisdiction of the English Court to determine the Original English Proceedings. The parties subsequently filed and

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8 Paragraphs 35 and 42 of DB's Amended Particulars of Claim and paragraphs 34 and 41 of Dexia's Re-Re-Amended Particulars of Claim.

9 Paragraph 26 of DB's Amended Particulars of Claim and paragraph 26 of Dexia's Re-Re-Amended Particulars of Claim.

served their respective Statements of Case and a Case Management Conference was heard on 12 May 2017.

86. In relation to Dexia's claim in the Original English Proceedings, Brescia sought to challenge the Court's jurisdiction over part of the claim by an application dated 26 July 2016. The jurisdiction challenge was rejected by Mr. Ali Malek QC (sitting as a Deputy High Court Judge) on 21 December 2016.[10] The Court ordered Brescia to pay Dexia's costs to be assessed and a payment on account of £190,000. Brescia subsequently acknowledged service and the parties served their respective Statements of Case.

E.6 The Settlement Agreements

87. On 18 September 2017 (Dexia) and 25 September 2017 (DB), after negotiations described by Mr. Belarbi in his witness statement, the parties entered into the Settlement Agreements, in full and final settlement of all "*Disputes*" (as defined in the Settlement Agreement). This included any claim by Brescia against the Banks in relation to the validity and effectiveness of the Transactions, any supposed breach of the Mandate or any liability of the Banks for the losses allegedly suffered by Brescia as a result of entering into the Transactions.

88. Pursuant to the Settlement Agreements, it was agreed that the Original Proceedings were to be discontinued by consent.

89. The terms of the Settlement Agreements are addressed in detail in Section G below.

E.7 The Present Claim and the New Italian Proceedings

90. DB issued its Claim in the present proceedings on 13 November 2020. Brescia acknowledged service on 15 March 2021, stating that it intended to challenge the jurisdiction of the English Court to determine part of the claim.

91. Brescia subsequently commenced the New Italian Proceedings against Dexia by a Writ of Summons in the Civil Court of Rome dated 8 March 2021 ("the Dexia Writ") and DB by a Writ of Summons also in the Civil Court of Rome dated 26 March 2021 ("the DB Writ"), in each case challenging the validity and/or enforceability of the Transactions and the Settlement Agreement. As regards the Transactions, in the New Italian Proceedings Brescia alleges (among other things) that:

    (1) The Transactions violated an Italian law prohibition on public authorities entering into "*speculative"* derivatives, which Brescia says is to be derived from Decree 389, Article 41 and the *Cattolica Decision*;[11]

    (2) The entry into the Transactions was in breach of the requirement of 'economic convenience' in Article 41;

    (3) The Transactions needed to be approved by the Provincial Council under Article 42 of Legislative Decree No. 267/2000 ("TUEL") (because they allegedly

[10] See *Dexia Crediop SpA v Provincia di Brescia* [2016] EWHC 3261 (Comm).

[11] The arguments that the Transactions are null and void in the proceedings against DB tend to be deployed by Brescia indirectly to support its arguments that the Settlement Agreements are null and void, whereas in the Dexia proceedings Brescia attacks the Transactions directly.

involved a resort to indebtedness) but Brescia contends that its Provincial Council did not properly approve them;

(4) The Transactions are ineffective and unenforceable against Brescia under Articles 1703, 1710 and 1711 of the Italian Civil Code ("the ICC") because of alleged prior breaches of the Mandate;

(5) The Transactions are ineffective and unenforceable against Brescia under Article 1337 of the ICC and Article 21 of the Italian Consolidated Law on Finance ("TUF") because of allegedly unlawful pre-contractual conduct by the Banks, including in particular the Banks' alleged failures to provide relevant information to Brescia such as the initial MTM and so-called "*probabilistic scenarios*", meaning the Transactions lacked "*rational risk*";

(6) The Transactions are unenforceable because they should have contained information on the right to withdrawal but did not;

(7) As against DB only, the Transactions breached Article 3(2)(f) of Decree 389 because they involved an upfront premium of more than 1% at inception;

(8) As against DB only, the Transactions are unenforceable because they should have been transmitted to the MEF prior to execution but were not; and

(9) As against Dexia only, the Transactions contained a clause providing for Brescia to extinguish the contracts early, but subject to the payment of a 'penalty fine', which is allegedly contrary to Art 23(2) of TUF.

92. In addition, Brescia contends that the Settlement Agreements are null and void or otherwise invalid for breach of provisions of Italian law on the following basis:

(1) The Settlement Agreements also needed to be approved by the Provincial Council under Article 42 of TUEL but this was not done or not done properly;

(2) The Settlement Agreements are null and void pursuant to Article 1972 of the ICC, in short because they related to allegedly unlawful underlying contracts and so were contrary to public policy and/or because they purported to preserve the effect of contracts that are null and void under Italian law;

(3) As against Dexia only, the Transactions lacked consideration; and

(4) If they are invalid for the above reasons, the Settlement Agreements cannot be ratified under Italian law.

93. As noted above, Brescia's arguments regarding the Transactions are addressed in Section F and its arguments regarding the Settlement Agreements are addressed in Section G.

94. On 6 May 2021, Brescia issued an application seeking to challenge this Court's jurisdiction to grant declaratory relief in respect of Declarations 16–20 of DB's Claim, all of which relate to the Settlement Agreements.

95. On 15 September 2021, Dexia issued its Claim in England, seeking similar relief to DB. On 19 November 2021, Brescia issued a similar application seeking to challenge the English Court's jurisdiction to grant declaratory relief in respect of Declarations 20 to 29 of Dexia's Claim.

96. The Court dismissed Brescia's jurisdiction application in relation to DB on 7 July 2022 and its jurisdiction application in relation to Dexia on 24 April 2023.[12] The English Court thus has jurisdiction to determine the whole of the present Claims. This was recently confirmed by the Brescia Court of Appeal in a judgment on 7 June 2024 rejecting Brescia's challenge to the recognition of the English judgment and affirming that it is fully valid and binding in Italy.

97. As highlighted in Section C above, Brescia's response to the Claims since it lost the jurisdiction challenges has been to refuse to engage, despite having solicitors on the record throughout and being served with all of the relevant documents and advised of all of the procedural steps and hearings in the proceedings. It has failed to file either a revised Acknowledgement of Service or a Defence to the Claims.

F. The Transactions and the Declarations sought in relation to them

98. The relevant terms of the Transaction Documents (as they apply to DB and Dexia respectively) are reproduced in Annex 1 to this judgment. Those terms, the most relevant of which I shall later identify and set out, provide the basis for Declarations sought by DB numbered 1 to 15 and Declarations similarly sought by Dexia numbered 1 to 19 in Annex 1, following the numbering in their respective Particulars of Claim (as amended).

99. The Declarations sought in relation to the Transactions (I address the Settlement Agreements separately later) for the most part either exactly track the contractual wording of the relevant Transactions or (so the Banks submit) follow straightforwardly from those Declarations. The Declarations sought are very detailed: but the Banks submit that that is a consequence of the approach in following as carefully as possible the detailed provisions of the Transactions themselves in order to forestall any later arguments based on the wording of particular provisions.

100. As I shall return to develop later, the further Declarations sought in respect of the Settlement Agreements are, in summary, intended (a) to confirm and stipulate that they are lawful, valid and enforceable and entirely consistent with Italian law, and (b) to pronounce that their effect is to preclude the claims Brescia is seeking to bring in Italy, including Brescia's attempt in the Italian proceedings to set those Agreements aside.

101. It might be thought at first blush, as indeed I raised with Mr Handyside KC at the commencement of the hearing, that since the Settlement Agreements rehearse and appear contractually to bind Brescia to accept the validity and enforceability of the Transactions, it should be sufficient to declare the validity and enforceability of the Settlement Agreements. In this context, it is important to appreciate that the primary relief sought by Brescia in the New Italian Proceedings is setting aside the Settlement Agreements, as it recognises its arguments in Italy cannot succeed if the Settlement Agreements are valid, binding and effective.

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[12] See footnote 1 above.

102. However, the Banks contend that they do need Declarations in respect of the Transactions as well, because the primary basis on which Brescia seek to set aside the Settlement Agreements is that the Transactions are void or unenforceable, and (under Italian law) a settlement agreement cannot be valid if it purports to compromise matters relating to an unlawful and/or void or unenforceable contract. In other words, Brescia's primary basis for setting aside the Settlement Agreements governed by Italian law is that the Transactions to which they relate (governed by English law) are invalid. To that extent, Brescia's arguments in the Italian proceedings are parasitic on their arguments with respect to the Transactions.

103. To return to the terms of the Transaction Documents themselves, their key provisions include the following:

(1) That Brescia had the power to execute and perform the Transaction Documents and had taken all necessary action and made all necessary determinations and findings to authorise such execution and performance: see Section 3(a)(ii) of the Master Agreement, as amended by Part 5(2)(ii) of the Schedule.

(2) That such execution and performance did not violate or conflict with any law applicable to Brescia: see Section 3(a)(iii) of the Master Agreement.

(3) That Brescia's obligations under the Transaction Documents constituted its legal, valid and binding obligations enforceable in accordance with their respective terms: see Section 3(a)(v) of the Master Agreement.

(4) That the Transactions were entered into for the purposes of managing Brescia's borrowing or funding investments and not for the purposes of speculation: see Section 3(g)(1), as added by Part 5(2)(v) of DB's Schedule and Part 5(5)(iv) of Dexia's Schedule.

(5) That each of the Transactions complied with Decree 389: see Section 3(g)(1) and (6), as added by Part 5(2)(v) of DB's Schedule and each of the Dexia Confirmations.

104. However, Brescia maintains that these promises do not bind it. It claims that the Transactions are invalid under Italian law. The arguments advanced by Brescia in the Italian Proceedings, and the further arguments raised by other Italian local authorities in previous cases in the English Courts to support their position that derivatives transactions of this kind are void or not binding upon them, fall into three categories:

(1) Arguments about want of capacity: to the effect that Brescia lacked substantive capacity to enter into the Transactions;

(2) Arguments about want of authority: to the effect that the relevant bodies or individuals within Brescia who approved the transactions and bound Brescia to their terms had no authority to do so;

(3) Arguments about validity: to the effect that the Transactions are invalid as being in breach of Italian law.

105. I shall address each in turn; but there is a preliminary question of the proper characterisation for the purposes of private international law of an issue of capacity raised in respect of a foreign entity such as Brescia, and what is the law applicable.

F.1 Characterisation and Applicable Law

106. What law should be applied in the determination of an issue depends in the first instance on identifying the appropriate categorisation or classification of that issue. In this case, the question of characterisation is whether the basis on which Brescia seeks to set aside the Transactions raises an issue properly classified as an issue of its own "capacity" or whether it raises an issue properly classified as a legal challenge to the validity and efficacy of the Transactions. If the correct characterisation of the relevant issue is that it is an issue of capacity, then Italian law must be applied in the determination of that issue, since it is clear that an issue as to the capacity of Brescia must be determined by the law under which it was brought into being as a legal entity and under which law alone it has its existence. If, however, the correct characterisation is that the issue raised concerns the validity and effect of the Transactions, then it is equally clear that the issue must be determined by the application of English law, which is the law chosen to apply to the Transactions. Only if the issue is characterised as one of capacity can Brescia hope to succeed. The Banks accept that the Transactions would be void if Brescia lacked capacity to enter into them under Italian law.

107. "Capacity" is a word of flexible meaning, which can mean different things in different legal systems The issue of characterisation is governed by English law as the law of the forum. Under English domestic law, there is a crucial distinction between capacity, in the one hand and acts done in excess or abuse of the powers of the company. Lack of capacity (legal impossibility) and abuse of power (impropriety) are distinguished and their effect is different. The capacity of a legal entity is defined and confined by its constitution, and an act without or outside its capacity thus defined as *"ultra vires"* and incapable of having legal effect.

108. Other legal systems, however, take a different approach and, in particular, regard a legal entity's "power of law" to be universal save as expressly restricted under the relevant law, so there is no room for an act to be *"ultra vires".* Those systems have a broader approach to the concept of capacity, extending it to the legal ability of an entity to bring about an event having a legal consequence. On that approach, a lack of substantive power to conclude a contract of a particular type, because prohibited by express provision of law, is equivalent to or comprehended within the concept of "capacity".

109. It has been clarified by the Court of Appeal in *Haugesund Kommune v Depfa ACS Bank*[13] that in the context of private international law, the English Court should give a broader, "internationalist", meaning to the concept, and should not restrict its application to the narrow definition accorded by domestic English law.

110. The effect of *Haugesund* is that the concept of capacity is given a broad "internationalist" meaning which refers to *"the legal ability of a corporation to exercise specific rights, in particular the legal ability to enter into a valid contract with a third party"*.[14] It was held

[13] [2010] EWCA Civ 579; [2012] QB 549.
[14] *Haugesund* at [47].

that *"a lack of substantive power to conclude a contract of a particular type is equivalent to a lack of 'capacity', to use English terminology."*[15]

111. Brescia has not advanced and, given the Italian law, could not advance any argument that it lacked capacity in the narrow (English) sense. There is no general limitation on the capacity of Italian local authorities to enter into private law contracts, such as derivatives transactions, and Italian law has no principle of an act being *ultra vires* the civil law capacity of a local authority: *Venice* at para. [201] and *Busto* at paras. [174] and [251]. It is uncontroversial that Italian local authorities have general civil law capacity and the Italian Supreme Court has held that "*In our legal system there is no rule of nec ultra vires (which characterises the activity of public legal entities in the Anglo-Saxon system) so that both public legal entities and private legal entities have the same legal capacity"*.[16]

112. However, the approach to the capacity of foreign corporations that was adopted in *Haugesund*[17] raises a question of Italian law as to Brescia's capacity (i.e. legal ability / substantive power to enter into contracts). However, the civil law consequences of lack of capacity are determined under the putative applicable law of the relevant contract (i.e. English law in this case). As a matter of English law, the lack of capacity of a party results in the contract being void. The Banks therefore accept that the Transactions would be void if Brescia lacked capacity to enter into them under Italian law.

113. It is important, therefore, that the issue of capacity, albeit in the internationalist sense, must be distinguished from other issues which may affect the validity of a contract, including in particular:[18]

    (1) Authority, i.e. the ability of an agent to bind a corporation as principal. The actual authority of an agent will also be determined by the constitution of the corporation.[19] However, where an agent does not have actual authority to enter into a contract, the agent may nevertheless have ostensible authority and/or the principal may ratify the contract. Issues of ostensible authority and ratification are governed by the putative applicable law of the contract (i.e. English law in the case of the Transactions).[20]

    (2) Material validity. All legal systems have rules which determine the existence or validity of a contract. Under Article 8 of the Rome Convention[21] the material validity of a contract is generally determined under its putative applicable law. Some rules affecting the validity of a contract may be classified as mandatory rules.[22] However, these provisions are nevertheless generally irrelevant where the

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15 *Haugesund* at [47].

16 The quotation is from §7.1 of Supreme Court, Joint Divisions, no. 11656 of 12 May 2008.

17 *Haugesund* at [27]–[30].

18 See the judgment of Lord Leggatt in *SR Properties v Rampersad* [2022] UKPC 24 at [23]–[24] distinguishing between issues of capacity, illegality and authority, which was applied to these Italian law issues in *Venice* at [111] and [315]–[317] and *Venice in the Court of Appeal* at [15].

19 *Integral Petroleum SA v SCU-Finanz AG* [2015] EWCA Civ 144, [2016] 1 All ER (Comm) 217.

20 *Venice* at paras. [113] and [317] and *Busto* at paras. [377] and [382].

21 The Transactions fall within the temporal scope of the Rome Convention rather than the Rome I Regulation.

22 Meaning, in the language of Article 3(3) of the Rome Convention, a *"rule of the law … which cannot be derogated from by contract"*.

parties have chosen the law of a different legal system to govern their contract.[23]

114. In the present case, as the Banks pointed out, only a lack of capacity in the *Haugesund* "internationalist" sense, will lead to the conclusion that the Transactions are not valid, binding and enforceable against Brescia. That is because, as a matter of English law:

(1) The relevant individuals at Brescia plainly had ostensible authority to enter into the Transactions and/or Brescia ratified the Transactions by its subsequent conduct; and

(2) Italian law rules of material validity have no application to the Transactions, which are governed by English law.

F.2 Capacity arguments

115. In this regard, it has been held in previous cases, and Brescia has not contested, that any specific limits on the capacity of Italian local authorities must be specifically prescribed by Italian law: *Venice* at para. [200(ii)] and *Busto* at paras. [177]–[179] [184]–[190]. So the question becomes whether, in Italian law, there is any provision specifically prohibiting Brescia from entering into the Transactions so as to limit its capacity (in the internationalist sense of *"substantive power"*).

116. The only provisions which it has been contended in various prior cases limited Italian public authorities' capacity (in the sense of *"substantive power"*) to enter into derivatives arise out of an Italian law prohibition on such entities entering into *"speculative"* derivative transactions (as opposed to hedging derivative transactions) or resorting to indebtedness for purposes other than financing investment expenditure. These prohibitions arise out of Article 119 of the Italian Constitution as interpreted by the Italian Supreme Court in the *Cattolica Decision.*[24]

117. That contention and the *Cattolica Decision* have been considered in several judgments of the English Court, and, in particular, in *Venice* (both at first instance and on appeal), *Busto*, *Pesaro* and *Catanzaro*. The focus in that regard is on:

(1) a prohibition on Italian local authorities entering into "*speculative*" derivative transactions (as opposed to hedging derivative transactions): *Venice* at paras. [196]–[197], *Venice in the Court of Appeal* at paras. [177]–[179], *Busto* at paras. [277]–[280] and *Catanzaro* at para [76(iii)] ("the Speculation Limit"); and

(2) the requirement under Article 119(6) of the Italian Constitution that Italian local authorities may resort to "*indebtedness*" only as a means of funding investments: *Venice* at paras. [233]–[234] [248]–[252], *Venice in the Court of Appeal* [177]–[179], *Pesaro* at paras. [91]–[97] and *Catanzaro (para* [76(iii)] ("the Indebtedness Limit").

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[23] Article 3(3) of the Rome Convention only applies where all *"elements relevant to the situation"* are connected only with a country other than the one whose law has been chosen by the parties. The correct interpretation of this provision was considered by the Court of Appeal in *Dexia Crediop SpA v Comune di Prato* [2007] EWCA Civ 428, [2017] 1 CLC 969. However, it is clearer still in the present case than it was in *Prato* that the situation falls outside Article 3(3) given (among other things) that DB is a German bank.

[24] See *Catanzaro* at [76(iii)] .

118. In this regard the Banks made four observations:

(1) First, Italian law expressly confers on Brescia a right to enter into the Transactions. Article 3(2)(d) of Decree 389 provides in terms that Brescia may enter into an interest rate swap with a collar. The Banks therefore do not need to rely on Brescia's general civil law capacity; there is no doubt it had the substantive power to enter into a derivative transaction of this type. The only question is whether under Italian law its capacity was restricted by express provisions of Italian law properly characterised as directed to its capacity as distinct from the validity of the Transactions.

(2) Second, it is to be noted that in that context, Prof. Rimini disagrees with the conclusion reached in the English cases that the prohibitions go to capacity, so that Italian local authorities lack capacity to enter into speculative derivatives or to incur indebtedness for purposes other than funding investments. He considers these to be mandatory rules of Italian law, which are sanctioned by nullity pursuant to Article 30(15) of Law no. 289/2002 (the statutory provision that sets out the consequences of a breach of Article 119). Accordingly, his opinion is that the effect of the Limits is to render transactions in breach of the Limits null and void, but do not limit capacity as such (see paragraph 71 of his Report). I confess to have sympathy with that view. However, he acknowledges that *"the Supreme Court in the Cattolica Decision seems to have reached a conclusion on this point"*; and the Banks made clear that they are content that I should proceed on the basis that the Speculation Limit and the Indebtedness Limit are limitations on Brescia's general civil law capacity and its express power to enter into the Transactions under Decree 389. The same approach was taken in the cases in the English Court identified above.

(3) Third, in the New Italian Proceedings, Brescia advances arguments that could potentially be construed as going to the Speculation Limit, namely that the Transactions violated an Italian law prohibition on public authorities entering into "*speculative"* derivatives.[25] In particular, Brescia cites (i) the *Cattolica Decision* and (ii) Article 41 and Article 3 of Decree 389 as the basis for this proposition.[26] In doing so, however, Brescia (like Rimini) puts the argument on the basis that these are mandatory rules of Italian law applicable *"irrespective of the choice of a foreign law"* under Article 3(3) of the on the Law Applicable to Contractual Obligations 1980 ("the Rome Convention"). Thus, Brescia bases its pleaded case that the Transactions are a nullity not on the basis of its own lack of capacity but on the basis of material (in)validity.[27]

(4) Fourth, Brescia does not advance any argument in the New Italian Proceedings based on the Indebtedness Limit. Its argument under Article 41 is that the

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[25] See paragraph [91(1)] above.

[26] Actually, the *Cattolica Decision* does not rely on Article 41 or Decree 389 as the basis for the prohibition on "*speculative derivatives*"; the Italian Supreme Court instead drew this principle from Article 119(4) and (6) of the Italian Constitution, as explained in *Venice* at paras. [187]–[201]. This does not matter for present purposes, as the Banks are content to proceed at trial on the assumed basis that Italian local authorities lack capacity to enter into speculative (as opposed to hedging) derivative transactions.

[27] See e.g. §13.1.4 of the Dexia Writ, which argues that the Transactions are "*governed, under Italian law, by mandatory rules (…Art. 41 l. 448/2001; Art 3 Ministerial Decree 389/2003) applicable irrespective of the choice of a foreign law because [of] Article 3(3) of the Rome Convention of 19 June 1980…"*.

Transactions did not comply with the 'economic convenience' requirement (which is not a requirement arising from Article 119 of the Constitution). Brescia has never argued that the Transactions involved a breach of Article 119(6) of the Italian Constitution.

119. I turn to consider whether (i) the Transactions were *"speculative",* as a matter of Italian law or (ii) the Transactions involved indebtedness otherwise than as a means of funding investment expenditure. No other argument going to capacity has been identified by Brescia in the New Italian Proceedings. Nor has any other capacity argument advanced by any Italian local authority found success in the English Courts.

F.2.1 The Transactions were not speculative

120. As to (i) in the preceding paragraph ([119]), I accept the submission on behalf of the Banks that there is no serious argument that the Transactions were *"speculative"* (as opposed to hedging) as a matter of Italian law.

121. As the Court of Appeal held in *Venice in the Court of Appeal* at paras. [159]–[166], the Italian Supreme Court[28] and the Italian financial regulator, CONSOB, have clarified that a derivative will not be speculative when it satisfies the two conditions set out in Prof. Rimini's Report, being:[29]

(1) The derivative must be entered into expressly for the purpose of reducing the riskiness of other positions held; and,

(2) There must be a high degree of correlation between the technical and financial aspects (maturity, interest rate, type, etc.) of the exposure being hedged and the financial instrument used for that purpose.

122. Although Foxton J had held at first instance in *Venice* at paras. [208]–[209] and [222] that the CONSOB definition was not exhaustive and certain other indicia may be relevant in identifying speculative derivatives, that conclusion was reversed in *Venice in the Court of Appeal* at paras. [159]–[160]. In consequence, I accept that the relevant test is whether the two conditions in the CONSOB test are satisfied; and, in my judgment, they are.

123. The first condition of the CONSOB test is satisfied because the Transactions were entered into by Brescia explicitly on the basis that they would reduce the riskiness of its existing indebtedness. In each case, Brescia expressly stated the purpose of the Transactions was to amortise the bullet repayment and hedge the interest rate risks arising from the Bonds. It was on this basis that Brescia itself took the view, at the time it entered into them, that the Transactions complied with the relevant Italian laws and declared the same to the Banks. As Foxton J held in *Venice* at para. [210], whether a transaction is speculative has to be assessed *ex ante* rather than in hindsight, and Brescia's *ex ante* assessment was that the Transactions reduced its risk exposure.

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[28] Decision 19013 of 2017, as explained in Prof. Rimini's Report at §130–131 and in *Venice in the Court of Appeal* at paras. [160]–[166]. Prof. Rimini also provided a list of other cases which all apply the same test.

[29] The relevant CONSOB determination was exhibited. Prof. Rimini explains that the third condition stated by CONSOB is not relevant for determining whether a derivative has a speculative or hedging function: see also (to the same effect) *Venice* at para. [207].

124. Prof. Rimini has explained that the second condition of the CONSOB test (which is that there must be a high degree of correlation between the derivative and the underlying borrowing being hedged) will be satisfied if:

(1) the notional amount of the derivative instrument matches a portion (or the entirety) of the notional amount of the underlying liability;

(2) the maturity of the derivative instrument matches the maturity of the underlying liability; and

(3) the cash flows received (as either interest or principal amounts) match what is due pursuant to the underlying liability.

125. In his Report, Prof. Rimini has also explained that the above are exemplars, but the CONSOB test is "a high degree" and not exact correlation; and a mismatch which plainly does not suggest that the counterparty is pursuing some other objective than hedging through the derivative transaction should not render a derivative speculative.

126. In the present case, however, there is no mismatch: as Prof. Cucurachi explains, the "*correlation between the financial features of the Bonds (notional, rate, frequency of payments, etc.) and those of the leg of the swaps received by Brescia is perfect, since the Transactions were structured to provide Brescia with the funds needed to pay the cashflows due under the Bonds*". Specifically:

(1) the notional amount under the Transactions exactly matches the notional amount of the Bonds;

(2) the maturity of the Transactions and the underlying debt is identical; and

(3) the cashflows to be received by Brescia, for both principal payments and interest payments, precisely replicate the cashflows due to Bondholders under the Bonds.

127. Furthermore, as Prof. Cucurachi goes on to explain:

(1) As regards the principal amounts, it is clear from the exact definition of the amounts to be paid that every single payment to be made from 2007 to 2036 was known to Brescia with certainty when it entered into the Transactions, meaning there was no element of speculation involved. The total of the amortising principal payments to be made by Brescia from 2007 to 2036 was equal to Brescia's liability to Bondholders for the final bullet repayment when the Bonds matured.

(2) As regards the interest amounts, this was a plain vanilla interest rate swap whereby Brescia hedged its variable rate borrowing under the Bonds with another variable interest rate floating within a range of maximum and minimum interest rates provided for by the cap and the floor of the swap. As Cockerill J held in *Busto* (at paras. [305]–[306]) interest rate collar swaps of this kind were "…*a classic form of hedging – seeking to manage and contain the interest rate risks to which Busto was already exposed on its borrowing"* and *"were not speculative".*

(3) As to cashflow, Prof. Cucurachi notes that, as a result of an unprecedented period of negative interest rates after the global financial crisis and during the Covid pandemic, there were minor discrepancies in the interest amounts paid in three

years from 2020–2022. This followed a decision of the Italian MEF on 21 March 2016 to apply a zero floor to government bonds in an environment of negative interest rates. This led to "*the ex post application of a zero floor to the Bonds that created a discrepancy between the interest payments under the Transactions as compared to Brescia's underlying borrowing. The Transactions would otherwise have perfectly matched the Bonds, even during the negative interest rate period.*" As the Transactions have to be assessed *ex ante*, this point is irrelevant; it has also not been taken by Brescia in the New Italian Proceedings. Even if it were considered relevant, the differences are so small that it remains the case that the interest amounts received by Brescia under the Transactions retain a high degree of correlation with Brescia's debt payment obligations under the Bonds.

128. Against this background, the conclusion urged by the Banks is that the Transactions complied with both limbs of the CONSOB test and were thus hedging transactions. None of the arguments which Brescia has advanced in the New Italian Proceedings seem to me to disturb this conclusion. As to those arguments:

(1) Brescia's principal point in the New Italian Proceedings is that the Transactions had a negative MTM for Brescia on the trade date, which it says made the Transactions "*speculative*" because the expectation of "*losing money is incompatible with the objective of hedging a risk"*.[30] The Banks submit that this is a *non sequitur* and in any event, lacks realism. As Prof. Rimini explains in his Report, the Italian Supreme Court made clear at paragraph 4.6 of the *Cattolica Decision* that derivative transactions are non-par transactions and will always have a negative MTM at inception for one of the parties: this is because anyone offering a derivative will have to cover their costs and would also expect to make a profit. Likewise, the Council of State held in the *Pisa* decision that a negative MTM "*merely stand*[s] *for the value that the swap could have in an abstract and hypothetical (but utterly unrealistic and untrue) negotiation*".[31] Whether the Transaction as a whole, or any of its component parts, has a negative MTM forms no part of, and is irrelevant when applying either limb of, the CONSOB test.

(2) Brescia also argues that various disclosures should have been made by the Banks prior to the Transactions, including in particular the negative MTM for the Transactions and the "*criterion and reference values"* and "*probabilistic scenarios*" for the calculation of the MTM.[32] As Prof. Rimini observes in his Report,[33] and as decided in *Busto* [263] and *Venice* [192]–[201], these arguments do not go to whether a derivative is *"speculative"* (and so to the Speculation Limit on capacity), but rather to material validity under Italian law (see Section F.4 below).

(3) In the New Italian Proceedings between Dexia and Brescia, the experts appointed by the Court suggested that fixing Brescia's payments under the First Transaction 15 days in arrears when the Bank's payments were fixed 2 days in advance meant that the Transactions did not perfectly hedge the June 2006 Bond payments.

30 See e.g. §16.4.2 of the DB Writ and §15.4.2 of the Dexia Writ.
31 Decision no. 5962 of 2012 of the Council of State, as explained by Prof. Rimini in his Report at §96(d)–(e).
32 See e.g. §16.4.5 and 17.3 of the DB Writ and §3.3, 4–6, 14.1.3, 15.2 and 15.4 of the Dexia Writ.
33 Prof. Rimini's Report at §208.

> However, as Prof. Cucurachi explains (and as confirmed by the Appellate Division of the Court of Accounts in decision no. 12 of 2024), this wrongly looks at the correlation between the underlying debt and the leg paid by Brescia; whereas the comparison required by the CONSOB test is as between Brescia's underlying debt (that is, its payments under the June 2006 Bond) and the leg received by Brescia (i.e. the Banks' payments under the June 2006 Transaction), where there is a perfect correlation because both legs are fixed 2 days in advance. Prof. Cucurachi concludes that the First Transaction "*hedges the interest payments under the Bonds perfectly by reference to the same Euribor rate fixed at a different time"* and the choice of a different fixing date for the leg paid by Brescia *"is just a question of selecting a hedging interest rate and has nothing to do with whether the hedge correlates with the underlying borrowing being hedged.*"[34]

129. In summary, I do not accept Brescia's arguments. I agree with the submission made on behalf of the Banks that the Transactions were 'plain vanilla' derivative transactions that effected a straightforward hedge through an interest rate swap with a collar. It follows that, in my judgment, the Speculation Limit in Article 119 of the Italian Constitution was not breached by the Transactions.

F.2.2 The Transactions were for investment purposes

130. As to point (ii) in paragraph [119] above, I have already noted that Brescia has not alleged that the Transactions involved a resort to indebtedness otherwise than as a means to fund investments in breach of Article 119(6) of the Italian Constitution. Nevertheless, the Banks invited me to deal with this point for completeness, as the Indebtedness Limit is the only other limitation on the capacity of Italian local authorities recognised in the cases.

131. Article 119(6) of the Italian Constitution permits local authorities to resort to "*indebtedness*", but only to finance their investment expenditure. The meaning of "*indebtedness"* for this purpose is set in Article 3(17) of Law 350/2003, by way of a list of (apparently exhaustive)[35] transaction types. The list specifically excludes restructuring existing borrowing to improve liquidity in a way that does not involve "*additional resources*",[36] which Cockerill J held in *Busto* was "*apt to cover swaps which restructure borrowing by adjusting the repayment profile"* (at para. [200]). The Transactions in this case adjust Brescia's repayment profile under the Bonds solely by amortising the bullet repayment over the lifetime of the Bonds. The Banks submitted that the Transactions do not involve Brescia incurring any additional borrowing to which it was not already exposed by issuing the Bonds.

132. The list in Article 3(17) was amended from 1 January 2009 (after the Transactions and with prospective effect only) to include the upfront payment component of a derivative, highlighting that derivatives more generally are excluded from the definition of "*indebtedness*" in Italian law (as Foxton J held in *Venice* at para. [233] and Cockerill J held in *Busto* at paras. [195], [280] and [328]).[37]

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34 Prof. Cucurachi's Report at §3.5(k).

35 See *Venice* at paras. [236]–[240], [247] and *Busto* at paras. [198]–[199], [328].

36 Rimini §65–69.

37 See also the Circular issued by the MEF on 22 June 2007, which states in terms that derivatives are classified as "*debt management instruments and not as indebtedness"*: *Busto* [118].

133. In the *Cattolica Decision*, the Italian Supreme Court held that, while derivatives typically do not fall within the definition of indebtedness:

(1) The upfront component of a derivative could constitute indebtedness, even prior to the legislative change that added upfronts to the relevant list of transactions in Article 3(17);[38] and

(2) Derivative transactions that involve either extinguishing or significantly modifying the underlying debt could themselves involve resorting to indebtedness.

134. However, the Banks submit that even if the *Cattolica Decision* is assumed to be correct on these points, it has no bearing on the Claims because no part of the Transactions could potentially constitute indebtedness for the purposes of Article 119(6). In particular the Banks contend that:

(1) The Transactions did not involve the payment of any upfront to Brescia (as Prof. Cucurachi confirmed in his Report).

(2) The Transactions did not affect the underlying debt owed by Brescia to Bondholders. The underlying loans were not extinguished or modified, whether significantly or at all. Brescia still had to make the exact same capital repayment under the Bonds; indeed, Brescia was required by Article 41 to use an amortising swap structure like that provided by the Transactions to ensure it could meet the bullet repayment obligation when it fell due.

(3) It is clear from previous case law, in reasoning with which I agree, that a 'plain vanilla' interest rate swap with a collar does not involve any significant modification to the underlying borrowing being hedged: see *Pesaro* at paras. [93]–[97] and *Busto* at paras. [336]–[342].[39]

135. In *Venice*, Foxton J considered, but did not decide, whether the Indebtedness Limit might apply to derivative transactions that are part of a wider re-financing that involves extinguishing or significantly modifying a local authority's existing indebtedness: see *Venice* at paras. [262]–[267]. The Banks' position is that the requirement applies only to the refinancing element of the relevant transaction (in this case the Bonds) and not to a separate derivative concluded in connection with it; and that accordingly, the Indebtedness Limit applies to a derivative only where the derivative itself involves significant modifications to the local authority's debt, for example a cash flow swap that re-schedules the maturity of the underlying indebtedness or which substantially modifies the profile of the debt.

136. The Banks' position depends on an analysis of the true intent of the relevant part of the decision of the Supreme Court in the *Cattolica Decision.* Like Foxton J, I consider there to be "*scope for argument"* in this context (see especially para. [265] of *Venice*); and like him, I prefer not to reach a final view on the question whether the Indebtedness Limit

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38 *Venice* [190] citing paragraphs [10.1.3]–[10.1.4] of the *Cattolica Decision*. For the reasons given in *Busto* ([200]–[202], [325]–[328] and *Venice* ([255]–[257]), that conclusion is hard to defend, and also has the consequence that the list in Article 3(17) is not exhaustive, despite the plain legislative intention to the contrary.

39 Prof. Rimini agrees.

might apply to derivative transactions that are part of a wider re-financing that involves (in economic terms, even if strictly not in legal terms) extinguishing or significantly modifying a local authority's existing indebtedness such as to require specific Provincial Council approval of the derivative transactions themselves. It is not necessary for me to decide this because I accept the Banks' alternative or further submission as set out in the next paragraph, and that seems to me to be sufficient.

137. That submission is that, even if the Indebtedness Limit were to apply to the Transactions, on the basis of the argument that they were concluded in connection with a re-financing that extinguished the CDP Loans, then it is nevertheless clear that:

    (1) The Transactions were entered into in connection with the re-financing of the CDP Loans under Article 41, which did not involve any "*additional resources"* and thus fell outside Article 119 and Article 3(17) of Law no. 350/2003; and

    (2) All of the new borrowing under the Bonds was for the purposes of funding the investment expenditures identified in the Annexes to the relevant Council Resolutions. Brescia has not suggested otherwise in the New Italian Proceedings.

138. In the circumstances, the Banks submitted that the Transactions did not involve incurring any indebtedness otherwise than for investment purposes and the Indebtedness Limit has no application to them; or alternatively, that even if (contrary to the Banks' case) the Indebtedness Limit does have wider application to the whole re-financing, the Transactions did not form part of a refinancing that involved Brescia incurring any indebtedness for a purpose other than funding investment expenditure. I prefer to determine the issue on that alternative ground.

F.3 Authority arguments

139. Brescia contends in the New Italian Proceedings that the Transactions do not comply with Article 42 of TUEL, which, as Prof. Rimini has explained, reflects *"the general principle of administrative law according to which "policymaking" and "policy implementation/managerial activity" shall be separate and carried out by different organs within the local authority"*. Prof Rimini's Report provides a useful summary of the division of responsibilities and the effect of Article 42. In summary, Italian provinces are generally composed of (i) a Provincial Council, which is an elected assembly, setting out the policies in relation to the general affairs of the province; (ii) a Provincial Board, and trusted with the role of implementing the policies set out by the Provincial Council;; and (iii) senior civil servants, who are mostly directors of the province entrusted with management of public offices and managerial activity. Prof. Rimini spells out the effect of Article 42 of TUEL as being that it "*sets out the division of competences between the Provincial Council and the Provincial Board*", where the Council is the body "*of policy making and political-administrative control*" and "*programmes, plans, statutes and guidelines are adopted by the Provincial Council, while administrative acts and contracts fall within the competence of the Provincial Board and the senior civil servants.*"

140. The real point in issue lies within a narrow compass. Brescia has accepted that the Provincial Council purported to authorise Dr Fenaroli to enter into the Transactions in Resolution 20/2006 (First Transaction) and 38/2006 (Second Transaction); the real essence of its complaint is Brescia's argument that the authorisations given by its Provincial Council (quoted in paragraph [144] below) were too "*generic*" to comply with Italian law and/or combined the authorisation of the amortising swap and interest rate collar in a single approval that Brescia contends was "*equivocal*".[40]

141. The Bank's primary point, which would be conclusive if I accept it, is that on its true characterisation this argument does not go to Brescia's capacity to enter into the Transactions, but rather its authority to do so under Italian law. Substantially the same issue of characterisation was addressed by Cockerill J in *Busto* at paras. [372]–[373] and Foxton J in *Venice* at paras. [304]–[317].[41] Both accepted the Banks' argument: see *Busto* at paras. [377]–[382] and *Venice* at para. [317]. I agree with their analysis. It follows that, in my judgment, these arguments, being properly characterised as raising an issue of authority and not capacity, can be of no assistance to Brescia in defending the Claims because the Transactions are governed by English law, not Italian law, and matters of ostensible authority and ratification are governed by English law.

142. As indicated above, in case I were not to accept their characterisation of the issue, the Banks went on to submit also that Brescia's argument that it lacked actual authority to enter into the Transactions is also wrong as a matter of Italian law. Brescia's argument in this regard appears to depend on whether the Transactions required the approval of the Provincial Council, as Brescia contend was the case.

143. Citing Article 42(2) of TUEL, Prof. Rimini's evidence is that the competence of the Provincial Council includes approving "*expenditures which commit the budgets for subsequent financial years"*. The Bonds, which did commit Brescia to new expenditures over multiple years, were approved by the Provincial Council: and Brescia does not suggest otherwise. The question of whether the Transactions required the approval of the Provincial Council depends on whether the derivatives committed Brescia to new expenditures over multiple years that had not been already included or accounted for in its budget.[42] That is because the Italian Supreme Court made clear in the *Cattolica Decision* that this will only be the case for derivatives "*which involved an upfront, or involved the extinguishment or significant modification of existing loans so as to give rise to new indebtedness*".[43] The Banks contended that this is not the case here, and that it follows that Provincial Council approval was not required for the Transactions.

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40 See e.g. §4–5 of the DB Writ: "*The reference to the two swap contracts thus remained … absolutely generic"* and "*indiscriminately lumps together the amortising of the debt under Article 2 of [Decree 389] and the IRS derivative under Article 3 of the same [Decree 389]"*.

41 See also Rimini §53.

42 Rimini §179.

43 *Busto* at para. [331]. As Cockerill J held in *Busto* at paras. [335]–[343], that essentially equates the question of whether Council approval is required under Article 42 of TUEL with the question of whether the Transactions involved a resort to indebtedness under Article 119 of the Italian Constitution. As Foxton J explained in *Venice* [at para. 285], it is not obvious why that should be so, but he (and I) must accept that this is the effect of the *Cattolica Decision*. The Banks therefore proceed on the basis that the question of whether Council approval is required under Article 42 of TUEL is the same question as to whether the Indebtedness Limit applies, i.e. are they transactions "*which involved an upfront, or involved the extinguishment or significant modification of existing loans so as to give rise to new indebtedness*".

144. In any event, and even if that is wrong, the Banks submit that Article 42 of TUEL was complied with because the Provincial Council authorised the Transactions. Specifically:

(1) By Resolution 20/2006 (First Transaction) and Resolution 38/2006 (Second Transaction), the Provincial Council expressly (and separately in the case of each Transaction):

"*…authorise*[d] *and mandate*[d] [Dr Fenaroli] *to: finalise the financial derivative transactions in respect of the aforesaid bond loan issue aimed at hedging the interest rate risk and amortising the debt, in accordance with Article 41 of Law no. 448 of 28 December 2001 and Ministerial Decree 389/2003; to define, in relation to the previous operations, the technical structures most appropriate to the needs of the Province; to sign everything necessary for the completion of these operations."*

(2) In the case of the Second Transaction, Resolution 38/2006 additionally stated that the Provincial Council:

"…*authorise*[d] *and empower*[ed] [Dr Fenaroli] *to finalise the derivative financial transactions referred to in recital* [X],[44] *proceeding to the identification and definition of the technical structures most suited to the Province's needs, in compliance with the applicable regulations in force.*"

(3) Thereafter, Dr Fenaroli duly purported to act pursuant to the above authorisations of the Provincial Council when he approved the Transactions and the execution of the Transaction Documents. For the First Transaction, Executive Resolution 1750/2006 stated as follows:

"[Brescia] *has authorised and mandated* [Dr Fenaroli] *to:*

– *complete the financial transactions in derivatives against the aforementioned bond loan aimed at hedging the interest rate risk and amortising the debt, in compliance with the provisions of Article 41 of Law 28/12/2001, no. 448 as well as Ministerial Decree 389/2003;"*

(4) For the Second Transaction, Executive Resolution 3785/2006 similarly stated that the:[45]

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[44] The Resolution mistakenly refers to Recital Y, which does not exist and is obviously intended to be a reference to Recital X, which provides that "*it is appropriate to implement an active management of its indebtedness by using derivative financial instruments (such as interest rate swaps) and renegotiation transactions, in order to restructure its indebtedness, change the interest rate risk profile and optimise the cost of debt*". Brescia attempts to make something of this typographical error in §4 of the DB Writ and §5.3 of its First Brief but the point goes nowhere, not least because that is one of two separate paragraphs of the Council Resolution expressly authorising Dr Fenaroli to enter into the Transactions.

[45] Brescia takes a point at §6 of the DB Writ that Executive Resolution 3785/2006 only refers to the amortising swap under Article 2 of Decree 389 and not the interest rate swap. That is to take one recital in isolation and ignore the earlier recitals, which state that the Council "*authorised and empowered* [Dr Fenaroli] *to executive financial derivative transactions in respect of the aforesaid bond loan to hedge the interest rate risk and amortise the debt"*(emphasis added), that Brescia "*intends to continue its policy of active management of its debt also through the use of derivative financial instruments"* and that refer to the "*structure proposed by* [Dexia] *and* [DB]". Paragraphs 1 and 2 of the Executive Resolution then approved *"the confirmation documents relating to the two swap transactions with Dexia and* [DB] *respectively attached to this determination"*, i.e. the draft Confirmations for the Second Transaction.

"*Provincial Council, by Resolution No. 38 of 27 November 2006 … authorised and empowered* [Dr Fenaroli] *to execute financial derivative transactions in respect of the aforesaid bond loan to hedge the interest rate risk and amortise the debt;*"

(5) It thus appears that the Provincial Council understood that it was authorising Dr Fenaroli to enter into derivatives to amortise the bullet repayment and hedge the interest rate risk arising from the Bonds, and to sign everything necessary to that end. It also seems that Dr Fenaroli himself understood that he had been authorised by the very same Council Resolutions to enter into the Transactions, which he promptly did.

(6) On similar facts in *Busto* [352]–[364], Cockerill J reached the same conclusion. Indeed, in that case the Council resolution stated rather more generically that *"[i]n order to remedy this situation, the following fiscal manoeuvre was set for 2007"* and then contemplated and approved the *"use of financial instruments that are useful for debt restructuring through a swap on interest and principal"* (at [358]). I agree with the Banks that that is less specific than the approval in the present case for Brescia to enter into a derivative to amortise the debt and hedge the interest rate risk arising from specified Bond issuances.

(7) In *Pesaro*, the Council resolutions relied on were in even more generic terms still: "*the Municipality of Pesaro, with Council resolution no. 33 of 5 March 2002, amended the accounting rules (regolamento di contabilità) of the province of Pesaro to allow the entering into derivative contracts, and subsequently, with Council resolution no. 33 of 17 March 2003, the province expressed inter alia the intention to manage its floating rate debt through the conclusion of certain swap transactions*." Mr. Peter MacDonald Eggers KC (sitting as a Deputy Judge of the High Court) held (at para. [101]) even this level of approval was sufficient to grant summary judgment on the Article 42 point in that case.

(8) The approvals given by Brescia's Council are, by comparison, far more explicit as to what is to be done and what acts are being authorised, including the signing of the relevant documents for the contemplated derivatives transaction. It follows that, if the approval of the Council were required (which it was not), it was obtained.

145. On that basis, the Banks seek Declarations that the Transactions complied with Article 42 of TUEL, either because it did not apply to them or, if it did, because sufficient Provincial Council approval was in fact obtained for the Transactions.

146. Second, even if that too is wrong, the Banks' alternative case is that Brescia held out Dr Fenaroli as having been properly authorised and/or represented to the Banks that all necessary authorisations had been obtained in compliance with TUEL, and that Dr Fenaroli therefore had ostensible authority as a matter of English law. In addition to the resolutions authorising Dr Fenaroli to enter into the Transactions, which are summarised above, Brescia held out Dr Fenaroli as having such authority in the Transaction Documents, which included, among other things, representations that:

(1) It had the power to execute and deliver the Transaction Documents and to perform its obligations under the Transaction Documents and had taken all necessary action and made all necessary determinations and findings to authorise such execution, delivery and performance;

(2) Its execution and delivery of the Transaction Documents and performance of its obligations under the Transaction Documents did not violate or conflict with any law applicable to it or any provision of its constitutional documents; and

(3) All governmental and other consents that were required to have been obtained by Brescia with respect to the Transaction Documents had been obtained and such consents were in full force and effect and any conditions of them had been complied with.

147. I accept the Banks' two alternative arguments at paragraphs [144] to [146] above; but for reasons similar to those that underlie paragraph [138] above, I prefer not to express a final view on the Banks arguments as summarised at paragraph [143] above (although I tend to consider the Banks have the stronger of the argument).

148. It is not strictly necessary in these circumstances to address the Banks' 'back-stop' argument based on ratification; but I shall do so briefly given that I have set out the acts the Banks rely on in Section E.4 above. Those acts include:

(1) The payments made by Brescia pursuant to the Transactions from 2006 to date, which until at least 2016 were made without any suggestion that the sums were not due; and

(2) Brescia's annual approval of its budgets and financial statements, which included the cashflows from the Transactions and specific information about Brescia's obligations thereunder.

149. I agree with the Banks that any issue as to ratification of a transaction is governed by English law. Cockerill J concluded that very similar conduct amounted to ratification under English law in *Busto* [383]–[386], as did Mr Peter MacDonald Eggers KC in *Pesaro* at paras. [100]–[101]. I agree with their analysis and consider that it applies to this case.

150. In the round, in my judgment, and in agreement with the Banks' submissions, none of Brescia's authority arguments have merit. The Transactions were duly authorised as a matter of Italian law; and, even if they were not, Dr Fenaroli had ostensible authority to enter into them. Furthermore, Brescia repeatedly ratified them by its subsequent conduct over a decade or more.

F.4 Arguments as to transactional invalidity

151. The other arguments set out in paragraph [91] above that are relied on by Brescia to attack the Transactions in the New Italian Proceedings are based on Brescia's contention that the Transactions did not comply with mandatory rules of Italian law. Again, on their true characterisation, these arguments concern, not Brescia's capacity, but its compliance with mandatory rules of Italian law. Thus, it is again important to emphasise at the outset that, although I address these arguments in the interests of

comprehensiveness, none (as Brescia's arguments in the New Italian Proceedings assume) goes to capacity (even in its broader sense), and all go to matters governed, not by Italian law, but by English law. This is clear as matter of analysis; but, with the exception of two of the arguments, it is also confirmed by prior English authority.

152. Thus, I agree with the Banks that:

(1) The argument that the Transactions did not satisfy the 'economic convenience' under Article 41(2) of Law 448/2001 (see para. [81.2] above) does not raise an issue of capacity. The argument that it does was addressed and rejected in *Pesaro* (see para. [117]) and *Catanzaro* (see paras. [100] to [105]). Further, Cockerill J in *Busto* (at paras. [372] to [373]) and *Catanzaro* (at para. [102]) confirmed that the point relates to the material validity of the Transactions (governed by English law) and does not bear on the relevant point, that of capacity (and see also *Pesaro* at para. [118]). For like reasons, in my judgment, the argument is not factually sustainable and in any event is legally beside the point.

(2) The argument that the Transactions breached Article 3 of Decree 389 does not go to capacity either, as was held by Mr. Peter MacDonald Eggers KC (sitting as a Deputy Judge of the High Court) in *Pesaro*, by Cockerill J in both *Busto* and (later) *Catanzaro*, and by Foxton J in *Venice* at first instance.

(3) The argument that the Transactions are unenforceable under Article 1337 of the ICC and Article 21 of TUF because of allegedly unlawful pre-contractual conduct by the Banks, including in particular the Banks' alleged failures to provide relevant information to Brescia such as the initial MTM and so-called "*probabilistic scenarios*", meaning the Transactions lacked "*rational risk*" likewise does not go to capacity: and see *Pesaro* and *Busto.*

(4) The argument that the Transactions are unenforceable because they should have contained information on the right to withdrawal, but did not, obviously cannot bear on capacity, as held in *Pesaro.*

(5) Equally obviously, the argument (raised only against Dexia) that as the Transactions contained a clause providing for Brescia to extinguish the contracts early, but allegedly contrary to Art 23(2) of TUF subject to the payment of a 'penalty fine', is not a matter of capacity: see again *Pesaro*.

153. As to the two further arguments not previously covered by the English Court:

(1) The argument that the Transactions are invalid and unenforceable under Articles 1703, 1710 and 1711 of the ICC because the Banks allegedly breached their obligations under the Mandate has nothing to do with whether Brescia has the capacity to enter into contracts but rather with whether an agent has capacity to do so on its behalf. Prof. Rimini addresses these rules in response to Question 4, concluding that:

"*these are simply statutory provisions establishing general principles that govern an agent-principal relationship under a mandate agreement governed by Italian law*" and that he is "*not aware of any authority suggesting that a transaction*

entered into in breach of these provisions is beyond the power of a local authority".

Brescia itself also describes this as a mandatory rule of Italian law in the New Italian Proceedings.[46]

(2) The argument (against DB only) that the Transactions are unenforceable because, under Article 41(2)-*bis* of Law 448/2001, they should have been transmitted to the MEF prior to execution but were not has nothing to do with capacity. Article 41(2) *bis* of Law 448 of 2001 is part of the same provision of the same statute as the 'economic convenience' requirement, which is a mandatory rule of Italian law. In Prof. Rimini's view, which I accept, the obligation on local authorities to transmit draft contracts to the MEF prior to signature "*is neither a provision affecting the capacity of the local authority, nor a rule of validity*" but rather suspends the legal effects of the contract until the provision is complied with. It is thus in the nature of a condition precedent to enforcement of the contract and, once complied with, the contract has retrospective effect dating back to its execution.

154. Brescia's position in the New Italian Proceedings is that the relevant provisions of Italian law apply by virtue of Article 3(3) of the Rome Convention (which the Banks suggested is, in and of itself, a concession that they are not rules going to capacity). I do not accept the argument that Article 3(3) applies, for the reasons given in *Pesaro* at paras. [77]–[79], *Prato CA* at paras. [126]–[137]; *Venice* at paras. [338]–[342]; and *Catanzaro* at paras. [102]. This is not a case where all the elements relevant to the situation at the time of the choice of law are connected with Italy alone. Giving just two examples, each of which is sufficient on its own:[47]

(1) The ISDA Master Agreement chosen was the 'Multicurrency – Cross Border' agreement rather than the 'Local Currency-single Jurisdiction form' and thus contemplated more than one currency and the involvement of more than one country (see *Venice* at para. [340]), as well as being in the English language; and

(2) One of the parties to the Transactions is a German bank, i.e. DB.

155. Thus, for the purposes of the Claims in this jurisdiction, none of Brescia's validity arguments (which make up all or most of its claims in the New Italian Proceedings) can properly be characterised as an issue of capacity and none under English law has any effect on the validity and enforceability of the Transactions.

F.4.1 Declarations sought in respect of other arguments Brescia is advancing in the Italian Proceedings

156. The Banks are, however, also seeking substantive declaratory relief in respect of some of the Italian law arguments Brescia is advancing in Italy in support of its plea of invalidity. In particular, the Banks seek Declarations in respect of the following Italian laws:[48]

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46 §15.3 of the DB Writ (which refers to "*the mandatory rule of Art. 1972(1) of the Civil Code*").

47 Other factors relied on by Foxton J in *Venice* [341] are also relevant here, in particular the foreseeability of back-to-back hedging contracts with banks outside Italy.

48 As regards DB, see Declarations 7 and 14B in Annex 1. As regards Dexia, see Declarations 11 and 19 in Annex 1.

(1) Decree 389 and the MEF Circular of 27 May 2004 ("the 2004 MEF Circular");

(2) Article 41 (including both the 'economic convenience' test and the requirement for transmission of the contracts to the MEF) and the MEF Circular of 28 June 2005 ("the 2005 MEF Circular");

(3) Article 1(736) of Law no. 296/2006 (including as interpreted by the MEF Circular of 31 January 2007 ("the 2007 MEF Circular"));

(4) Articles 1703, 1710 and 1711 of the ICC; and

(5) Article 31 of the 1998 CR regarding Brescia's status as a professional investor.

157. It is therefore necessary to address some of these points of Italian law in a little more detail. The descriptions in this Section of provisions of Italian law are derived from Prof. Rimini's Report.

F.4.2 Decree 389 and the 2004 MEF Circular

158. Decree 389 comprises the general regulatory framework setting out technical rules on the use of derivative contracts by local authorities. Article 3(1) of Decree 389 deals with foreign currency swaps in cases where the indebtedness of a local authority is in a foreign currency. Article 3(2) lists the different types of derivative instruments that local authorities may enter into; and sub-paragraph (d) of Article 3(2) permits:

> "*The acquisition of an interest rate "collar" whereby the buyer is guaranteed an interest rate level payable, varying between pre-established minimum and maximum levels*".[49]

159. The interpretation and application of these provisions is addressed in the MEF Circular 2004. Prof. Rimini has explained that the MEF is the central Italian authority on public finance and public debt, and its Circulars are the expression of its views on the interpretation and application of the existing law, and an effective tool in the interpretation of Italian law on derivative transactions.

160. Prof. Rimini has explained, and Brescia appears to accept (see its DB Writ), that the Transactions fell within the types described in Article 3(2) of Decree 389.[50] Applying the guidance in the 2004 MEF Circular, the Transactions would be considered to be "*plain vanilla*" derivatives.[51]

161. Brescia only resists the conclusion that the Transactions complied with Decree 389 in two ways:

(1) First, its *"speculation"* argument, which is based in part on Decree 389 and rejected in paragraph [152(2)] above; and

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49 Rimini §107.

50 See §4 of the DB Writ: "*the IRS, which is indeed a derivative provided for by Article 3 of Ministerial Decree No 389/2003*".

51 Rimini §109(a)

(2) Second, Brescia argues in the New Italian Proceedings against DB (only) that the Transactions infringed Article 3(2)(f) of Decree 389, which allows payment of an upfront premium of no more than 1% at the inception of a derivative.[52] There was, however, no upfront component to the Transactions with DB, so this requirement has no relevant application at all.[53] The point is not taken against Dexia, despite the Transactions being identical, which suggests the inclusion of this point in the DB Writ was a mistake.

162. No points are taken by Brescia in the New Italian Proceedings as to its compliance with the directive in Article 3(3) of Decree 389 that it should "*gradually strive*" to ensure that the total nominal amount of transactions entered into with each counterparty does not exceed 25% of the total outstanding transactions. There does not appear to be any evidence to suggest that Brescia was not striving to achieve this over time. In any case, as Prof. Rimini explains:

> "*This is not a formal mandatory requirement in Ministerial Decree 389, but rather a requirement that the local authority endeavor over time to ensure that the credit risk of the counterparty bank is under control and properly managed.*"[54]

163. Decree 389 is augmented by the MEF's guidance in the 2004 MEF Circular. Prof. Rimini explains that the 2004 MEF Circular "*only seeks to explain and to assist with the interpretation of Ministerial Decree 389... It does not impose further requirements on local authorities wishing to enter into derivative transactions and, in any case … it is an interpretative tool which is not binding on a court.*" In any event, Brescia does not suggest in the New Italian Proceedings that the Transactions breached any part of the guidance in the 2004 MEF Circular.

164. It follows that the only two requirements for the Transactions to comply with Article 3 of Decree 389 and the 2004 MEF Circular are that (i) the type of derivative falls within Article 3(2) and (ii) the derivative relates to an existing debt of the local authority.

165. In my judgment, both requirements are satisfied here. Accordingly, the Transactions complied in all respects with Decree 389 and the 2004 MEF Circular. The Banks seek Declarations accordingly.[55]

F.4.3 Article 41 and the 2005 MEF Circular

166. As already noted above, Brescia argues that the Transactions put it in breach of the requirements under Article 41(2), which placed the obligation on Brescia (rather than its counterparty) to ensure that any refinancing of its existing indebtedness is "*under refinancing conditions that allow a reduction of the financial value of total liabilities to be paid by the bodies themselves*". This requires a comparison between "*the present value of the existing liabilities and the present value of the new liabilities"* and "*a refinancing*

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52 See §17.3 of the DB Writ. See also Rimini §104.

53 See also Rimini §109(f), which notes that the 1% limit applies only to restructuring transactions falling within Article 3(2)(f) of Decree 389, not the Transactions, which fall within Article 3(2)(d).

54 Rimini §106.

55 As regards DB, see Declaration 14B(c) in Annex 1. As regards Dexia, see Declaration 19(b) in Annex 1.

is convenient only if there is a reduction of the latter" and is what Prof. Rimini described as 'the economic convenience' test (see especially paragraph [137(1)] above).

167. The Banks submit that Brescia's argument is wrong for at least four reasons:

(1) First, the requirement does not apply to the Transactions. As set out in §94 of Prof. Rimini's Report, to fall within Article 41(2) it is necessary for a transaction to replace existing debt with new debt. As already noted in paragraph [152(5)] above, however, the Transactions do not extinguish or substantially modify Brescia's underlying debt pursuant to the Bonds. It follows that any purported requirement of 'economic convenience' does not apply to them, as recognised in this jurisdiction in *Dexia Crediop SpA v Comune di Prato* [2015] EWHC 1746 (Walker J) ("*Prato"*) at paras. [163]–[181] (Walker J) at first instance and on appeal ("*Prato in the Court of Appeal"*) at paras. [80]–[100]. For the same reason, Mr Peter MacDonald Eggers KC granted Dexia summary judgment on the Article 41(2) point in *Pesaro* at paras. [105]–[106].

(2) Second, even if the 'economic convenience' requirement is required to be applied to the Transactions on the basis that they formed part of a wider suite of contracts to replace Brescia's prior CDP borrowing with the Bonds (i.e., the argument discussed at paragraphs [135] to [136] above), the 'economic convenience' test is nevertheless required to be applied to the Bonds without taking the Transactions into account:

(1) The evidence of both Prof. Cucurachi and Mr Belarbi is that this was the prevailing market practice at the time;

(2) Mr Belarbi's evidence is that it is how the 'economic convenience' calculations were done by the Banks and Brescia for the refinancing at the relevant times;

(3) It is also Prof. Rimini's view and was the approach adopted by the Council of State, Italy's highest court in respect of administrative matters, in the *Pisa* decision;[56] and

(4) As explained at paragraph [185(4)] below, Brescia confirmed when it signed the Settlement Agreements that it had "*independently assessed and verified*" that the re-financing had met the 'economic convenience' requirement under Article 41(2) and that it "*had actually achieved a financial benefit*" therefrom. This confirmation was given on the basis that the Transactions were not to be taken into account for the purpose of the 'economic convenience' test, meaning that, in 2017, Brescia still did not consider that Italian law required the Transactions to be taken into account under Article 41(2).

(3) As applied to the Bonds, and without taking into account the cashflows under the Transactions, the refinancing of the CDP Loans easily satisfied the 'economic convenience' test.

[56] Decision no. 5962 of 2012 of the Council of State, as explained by Prof. Rimini in his Report.

(4) Fourth, even if both of the above points are wrong and the 'economic convenience' test is required to take into account the financial effects of the Transactions, the 'economic convenience' test does not require the entire gross negative MTM of the derivative to be taken into account; rather, the Court is required to make allowance for the ordinary costs incurred by banks in offering derivatives and to factor in only a bank's profit element in the calculation of whether the re-financing is convenient under Article 41(2). On this basis, the re-financing of the CDP Loans through the Bonds still passes the 'economic convenience' test if the negative MTM of the Transactions is taken into account, minus the allowance made by the Council of State in the *Pisa* decision for the bank's costs, according to Prof. Cucurachi's calculations.

168. The Banks' case is that the Transactions thus complied with any 'economic convenience' requirement, either because it did not apply or because the calculations are positive on both of the alternative bases set out by Prof. Cucurachi.

169. Prof. Rimini's opinion is that the 2005 MEF Circular does not strictly apply to the Bonds or to the Transactions. Rather, it provides guidance on Law 311/2004, which concerns the analogous conversion of liabilities with amortising costs imposed on the State. However, Brescia relies on the 2005 MEF Circular in the New Italian Proceedings by way of analogy as setting out the approach to be adopted to a refinancing pursuant to Article 41(2). There is no suggestion in the New Italian proceedings that the Transactions themselves involved any breach of the guidance in the 2005 MEF Circular.

170. However, in relation to DB only, Brescia also contends that the Second Transaction breached Article 41(2) *bis*, which requires local authorities to send draft contracts for derivative transactions to the MEF prior to entering into them. On the basis of Prof. Rimini's evidence, which I accept, there is a short answer to this: Article 41(2) *bis* applied only "*From 1 January 2007"* to draft contracts for any transactions that local authorities proposed to enter into after that date. The Second Transaction was, however, concluded on 22 December 2006. It is irrelevant that the Confirmation was sent to Brescia on 2 January 2007; the transaction was entered into prior to 1 January 2007.

171. I accept the Banks' submission that it follows that the Transactions complied with Article 41 (including Article 41(2) *bis*) and the guidance in the 2005 MEF Circular. The Banks seek declaratory relief accordingly.[57]

F.4.4 Article 1(736) and the 2007 MEF Circular

172. Article 1(736) of Law No. 296/2006 sets out certain general principles and guidance to public officials entering into derivative contracts, and in particular, that such contracts should be aimed at the reduction of the final cost of the debt and minimising exposure to market risks. It provides as follows:

> "*The rules of this paragraph are core principles for the coordination of public finance mentioned in articles 117, third paragraph, and 119, second paragraph, of the Constitution. Debt management transactions that use derivatives, performed by regions and entities referred to in the consolidated act referred to in Legislative*

[57] As regards DB, see Declaration 14B(b) and (d) in Annex 1. As regards Dexia, see Declaration 19(aa) and (c) in Annex 1.

> *Decree no. 267 of 18 August 2000, must be aimed at the reduction of the final cost of debt and at reducing exposure to market risks. Entities may enter into such transactions only on corresponding due liabilities, having regard to the hedging of the undertaken credit risks.*"

173. Prof. Rimini has explained that the relevant assessment is to be made *ex ante* when the Transactions are entered into. Article 1(736) additionally points out that derivatives should be entered into only in respect of liabilities which are actually due, which is a requirement already imposed by Article 3(3) of Decree 389.

174. Article 1(736) was in turn the subject of guidance from the MEF in the 2007 MEF Circular. The 2007 MEF Circular clarifies that there is a balancing exercise between the overall total cost of the derivatives and the market risk being addressed by the derivatives, and that there should be a correlation between the notional amount of the underlying liability being hedged and the derivative transaction. This guidance is what forms the basis for the CONSOB test differentiating between speculative and hedging derivatives, which is considered in Section F.2.1 above.

175. On the basis of Prof. Rimini's evidence, I agree that, as there explained, the Transactions complied with these guiding principles and are hedging transactions within the meaning of the CONSOB test and the 2007 MEF Circular: they were entered into expressly to minimise the market risks arising from Brescia's exposure to floating rate borrowing under the Bonds and were perfectly correlated with Brescia's underlying borrowing so as to function as a hedge in respect of that risk.

176. Declaratory relief is sought by the Banks in respect of Article 1(736) and the 2007 MEF Circular.[58]

F.4.5 Articles 1703, 1710 and 1711 of the ICC

177. Articles 1703, 1710 and 1711 of the ICC are the provisions of the Civil Code that deal with agency relationships in a mandate context. In particular:[59]

    (1) Article 1703 defines a mandate agreement as "*the contract by which one party undertakes to carry out one or more acts on behalf of the other party*";

    (2) Article 1710 sets out the standard duty of care and diligence of an agent in carrying out the activities under a mandate agreement; and

    (3) Article 1711 sets out the limits of the agency and the responsibilities of the agent where he exceeds the mandate.

178. Prof. Rimini explains that these provisions have no application to the Transactions:

    (1) First, because the Transaction Documents are not mandate agreements: the Banks do not agree to act as agents for Brescia under their terms. On the contrary, the Transaction Documents in the case of each Bank expressly state that neither party

[58] As regards DB, see Declaration 14B(e) and (d) in Annex 1. As regards Dexia, see Declaration 19(ca) in Annex 1.

[59] See Rimini §144–153.

is acting as fiduciary for, or adviser to, Brescia, and though that does not in terms refer to agency, a mandate holder would necessarily be a fiduciary.

(2) Second, the Transactions are governed by English law, so Articles 1703, 1710 and 1711 have no application to them. As noted in paragraph [154] above, Article 3(3) of the Rome Convention does not apply to the Transactions, given the multiple international elements engaged.

179. The Banks submit that it follows that the Transactions did not breach Articles 1703, 1710 or 1711: and I agree. The Banks seek declaratory relief in this respect.[60]

F.4.6 Professional Investor

180. Finally in relation to the Transactions, the Banks seek what Mr Handyside described as "the customary declaration" (presumably because it was made in both the *Busto* and *Catanzaro* cases) that Brescia was a professional investor pursuant to Article 31 of the 1998 CR in circumstances where it signed a written self-declaration to that effect prior to entering into the Transactions, as set out in paragraph [61(1)] above.

181. Article 31(2) of the 1998 CR provides that professional investors include "*companies or legal persons possessing specific expertise and experience in matters of transactions in financial instruments expressly declared in writing by their legal representative.*" As Prof. Rimini explains, the effect of this provision is that, when a local authority declares "*in writing its possession of a specific expertise and experience in transactions involving financial instruments, it can be classified as a professional investor for regulatory purposes*" and "*the intermediary has no duty to verify that the written statement rendered by the investor is correct and the burden of provide evidence to the contrary is on the investor*."

182. In the New Italian Proceedings, Brescia argues that it is not a professional investor because it lacked the required experience and the written declaration it provided was incorrect or should be disregarded. However, it appears from Prof. Rimini's Report that the Italian Court of Accounts has already rejected that contention in Italy in accounting proceedings brought by the Public Prosecutor. It found that:

(1) "*the reasons put forward by* [the Public Prosecutor] *to demonstrate the incorrectness of the self-declaration (and, consequently, the qualification of the Province as a "retail" customer) are devoid of evidence capable of undermining the value of simple presumption that the … Supreme Court … recognises to the formal declaration pursuant to Article 31, paragraph 2, of Consob Regulation no. 11522/1998*;" and

(2) "*… no evidence has been produced of the alleged knowledge or awareness of the aforesaid deficiency on the part of the Banks: therefore, the legitimate expectation of* [DB] *and* [Dexia] *that they were in the presence of a qualified investor, which arose with the receipt of the formal declaration issued by the Director of the Provincial Financial Services (which, as per the consolidated principle of the Supreme Court … "is valid to exempt the intermediary from the obligation to carry out further verifications on its behalf in this regard"*)*."*

[60] As regards DB, see Declaration 14B(g). As regards Dexia, see Declaration 19(f).

183. In circumstances where Brescia, having had the plain opportunity to do so, has not adduced any evidence to show that it lacked the relevant experience and expertise in financial instruments, the Banks contend that they are entitled to rely on the declaration that Brescia provided, without more. In any event, Mr Belarbi's evidence is that Brescia was a main client of Dexia, which investigated the position at the time and was satisfied that Brescia was so qualified. I accept the Banks' submissions. The Banks seek declaratory relief in this regard.[61]

G. The Settlement Agreements

184. I turn to the declaratory relief sought in respect of the Settlement Agreements, which were intended to bring an end to all then existing English and Italian proceedings between the parties concerning the Transactions. More particularly, by the Settlement Agreements, the Banks and Brescia agreed to a full and final settlement of all "*Disputes*" between them (as that term is defined in the Settlement Agreements), including (amongst other things) the Original Proceedings (as to which, see E.5 above) and all future disputes in relation to the Transactions. The definition of *"Disputes"* expressly excludes the present Claims, which are:

> "*… disputes and/or proceedings initiated by the Parties after the Signing Date of this Agreement concerning the fulfilment of the obligations arising under this Agreement, the fulfilment of the future obligations arising under the* [Transactions] *and payment of amounts due, or compliance with obligations undertaken, or protection of the rights acquired under this Agreement and the* [Transactions]…"

185. The key provisions of the Settlement Agreements (which are common to both Banks) include the following:

(1) The parties agree that the Transactions are valid, binding and enforceable from the date they are signed pursuant to the provisions of English law applicable to the ISDA Agreement and that the Italian legal and regulatory provisions relied on by Brescia do not give rise to the defects it claimed in the Original Proceedings (clause 2.1);

(2) Brescia "*definitively and irrevocably waives*" its claims against the Banks and "*undertakes not to take legal measures and not to bring any Disputes against* [the Banks]";[62]

(3) The parties agreed to discontinue the Original Proceedings,[63] and as part of that agreement DB further agreed to give credit to Brescia equal to a lump sum of €1.05 million[64] by way of discount on the future payments due under the Swaps, and Dexia agreed to discontinue its detailed assessment proceedings and waive its entitlement to its costs under the orders of the English Court;[65]

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61 As regards DB, see Declaration 13 in Annex 1. As regards Dexia, see Declaration 15 in Annex 1.
62 Clause 3.2 (both Dexia and DB).
63 Clause 4 (both Dexia and DB).
64 Clause 2.3 (both Dexia and DB).
65 Clause 4.7 (both Dexia and DB).

(4) The parties made a series of representations and warranties, which included (among other things) Brescia representing that the refinancing transactions complied with Article 41[66] (and that it had independently assessed and verified that the 'economic convenience' requirement was met)[67] and that the Transactions complied with all relevant Italian laws, including Article 41, Decree 389, the 2004 MEF Circular, the 2005 MEF Circular, and the 1998 CR;[68] and

(5) Brescia represented that it had taken all the administrative measures necessary to obtain the authorisation to sign the Settlement Agreements, that the person signing the contract was authorised to do so and that the Settlement Agreements complied with all applicable laws and regulations.[69]

186. The Banks' case is that the Settlement Agreements are relevant to the Claims in two ways:

(1) First, the Banks submit that they provide a yet further basis for the relief sought by the Banks in respect of the Transactions, since they contain agreements and representations by Brescia that include, among other things, waiving its claims in respect of the Transactions, agreeing that the Transactions are valid, binding, and enforceable and that it had capacity to enter into them, and Brescia's acceptance that its Italian law arguments to the contrary are wrong.

(2) Second, the Banks submit that, on their plain terms, the Settlement Agreements preclude the claims Brescia is seeking to bring in Italy, and/or contain various agreements and representations that fall within the exclusive jurisdiction of the English court. The Banks stress in this context that it is important to appreciate that the primary relief sought by Brescia in the New Italian Proceedings is setting aside the Settlement Agreements, as it recognises its arguments in Italy cannot succeed if the Settlement Agreements are valid, binding and effective.

187. As already noted in paragraph [92] above, Brescia has advanced four arguments of Italian law in respect of the Settlement Agreements in the New Italian Proceedings:

(1) First, that the Settlement Agreements needed to be approved by the Provincial Council under Article 42 of TUEL but this was not done, or not done properly;

(2) Second, that the Settlement Agreements are null and void pursuant to Article 1972 of the ICC, because they related to allegedly unlawful underlying contracts and so were contrary to public policy and/or because they purported to preserve the effect of contracts that are null and void under Italian law;

(3) Third, as against Dexia only, that the Transactions lacked consideration under Article 1965 of the ICC; and

(4) Fourth, that insofar as any of the above arguments is successful, the Settlement Agreements cannot be ratified under Italian law.

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66 Clause 5.2(a) (Dexia) and Clause 5.2(f) (DB).
67 Clause 5.2(h) (Dexia) and Clause 5.2(e) (DB).
68 Clause 5.2(b) (Dexia) and Clause 5.2(a) (DB).
69 Clause 5.2(o) (Dexia) and Clause 5.2(k) (DB).

G.1 Has the English Court jurisdiction to determine the issues raised in respect of the Settlement Agreements?

188. However, before addressing these arguments, I should first address the question of jurisdiction which arises out of the basic fact that the Settlement Agreements are governed by Italian law and in the Italian Proceedings Brescia is seeking to rely on arguments of Italian law to set them aside. In the skeleton argument on behalf of the Banks it is stated that *"the principles to be applied to the declaratory relief sought by the Banks in respect of the Settlement Agreements are the same as for the Transaction Documents and the Court is requested to grant the relief sought on the same basis."* But it seems to me that this does not take into account whether, as Brescia would no doubt argue, issues as to the validity and effect of the Settlement Agreement are caught by the choice of Italian law in the Settlement Agreements.

189. The question whether there is an objection to the grant of Declarations as to the effect and validity of the Settlement Agreements, which (by clause 11.1 of the DB Settlement Agreement and clause 9.1 of the Dexia Settlement Agreement) the respective parties agreed were to be governed and interpreted in accordance with Italian law, has previously been considered by Robin Knowles J (at [2022] EWHC 2859 (Comm)) and by Butcher J (at [2023] EWHC 959 (Comm)) in the context of applications by Brescia for orders that the English Court does not have or should decline to exercise jurisdiction over the claims for such Declarations. Butcher J summarised neatly the issue as being whether the choice of that law in those Agreements "*trumps the English jurisdiction clause* [in the Master Agreements]": see his judgment at [2023] EWHC 959 (Comm).

190. Both Knowles J and Butcher J decided that the Banks had *"the better of the argument"* (the relevant test in such an application, see *Airbus SAS v Generali Italia SpA* [2019] EWCA Civ 805 at paras. [49] to [53]) that the claims for such Declarations fell within the jurisdiction clauses in the Master Agreements (English law and the English Courts in each case). As both of them noted, those jurisdiction clauses provide for the jurisdiction of the English courts and the application of English law *"with respect to any suit, action or proceedings relating to this Agreement."* Both judges also noted that the Settlement Agreement in issue does not itself have a jurisdiction clause. Instead, clause 9 of the DB Settlement Agreement and clause 11 of the Dexia Settlement Agreement provide as follows (the words in [] reflecting the DB Settlement Agreement and the words in {} reflecting the Dexia Settlement Agreement):

> *"This agreement and all contractual and [tort] {non-contractual obligations} arising therefrom shall be governed by and interpreted in accordance with Italian law.*
>
> *However, it [is] {remains} understood that the swaps and the ISDA agreement relating [to them] {thereto} are subject to English law and {subject to} the exclusive jurisdiction of the English courts as contractually provided for."*

191. In my view, it is plain from the latter part of that provision (the expressed understanding as to the continuing application of the choice of law and exclusive jurisdiction in the swaps and the Master Agreements) that the parties accepted that the choice of Italian law in the Settlement Agreement would not *"trump"* the English choice of law and exclusive jurisdiction clauses in the Master Agreements. The issue then becomes what should be taken to be the agreed scope of those clauses.

192. Both Knowles J and Butcher J considered the relevant provision in the Master Agreements to be in very wide terms, amply broad enough to extend to capture any dispute about the Transactions, and to give jurisdiction to the English courts to give declaratory relief to prevent any challenge to the validity of the Transactions, including Declarations intended to confirm that validity and effect under English law by declaring invalid any step to challenge or undermine it, even one governed by Italian law. As Knowles J put it, in a passage quoted and adopted by Butcher J subject to two reservations as regards the specific relief then being sought by Dexia,

> *"the English jurisdiction clause covers the full field of the current proceedings. Read properly, all of the Declarations that are sought…have at their heart the transactions."*

193. On that basis, Knowles J dismissed Brescia's jurisdictional challenge to DB's claims as regards the Settlement Agreement and Butcher J likewise dismissed Brescia's challenge to Dexia's claim, subject in the latter case to two amendments to the Declarations sought (numbered 26 and 29 in Dexia's Claim) in order to ensure (see para. [20] of Butcher J's judgment) that they did not *"trespass on the question of whether Dexia is liable for breach of the mandate, which has an exclusive Italian jurisdiction clause."* (In the event, it appears from Annex 1 (which I have taken to define and confine the Declarations sought) that Dexia no longer seeks either Declaration (numbered 26 and 29)).

194. I agree with the analysis in those two judgments, and propose to apply it. I turn, therefore, to the specific points of Italian law raised by Brescia in the Italian Proceedings in their attempts to set aside the Settlement Agreements

G.2 Article 42 of TUEL

195. The requirements of Article 42 of TUEL are addressed in Section F.3 above: Brescia's argument in the context of the Settlement Agreements (that Provincial Council approval was required because the contracts involved committing it to expenditure over multiple years) echoes the argument it has advanced in respect of the Transactions.

196. As with the Transactions, Prof. Rimini has identified the key question as whether the Settlement Agreements involved "*expenditures which commit the budgets for subsequent financial years"*. This turns on whether the Settlement Agreements created <u>new</u> multi-year liabilities or expenditures for Brescia that were not already included or accounted for in its budget.

197. Prof. Rimini explains that the Settlement Agreements in this case are so-called "*conservative*" settlement agreements under Italian law (as opposed to "*novational"* settlement agreements), meaning that they "*do not alter the terms of any underlying contract and do not otherwise provide for any new expenditure*". In his opinion, such agreements "*by definition do not require the approval of the Council*". Clause 2.3 and Clause 2.6 of the Dexia and DB Settlement Agreements, respectively, provide that the Transaction Documents will remain in full force and effect.

198. Further, Brescia accepts in the New Italian Proceedings that the Settlement Agreements were *"conservative"* in nature. Its argument is that the Settlement Agreements required Provincial Council approval because they were entered into (among other reasons) to settle disputes that had arisen in connection with the Transactions, which themselves required the approval of the Provincial Council.

199. The Banks reject this argument as doubly wrong: first, the Transactions did not require the approval of the Provincial Council, as explained in their argument summarised in paragraph [143] above and elaborated by Prof. Rimini; second, the cases cited by Brescia for the proposition that Council approval is needed for a settlement agreement in respect of underlying contracts that themselves required Council approval do not support that proposition, as explained by Prof. Rimini in his Report. In short, the Banks adopt Prof. Rimini's evidence and submit that:

    (1) Supreme Court decision no. 11632/2010 concerned (unlike the present case) a novational settlement agreement that set out a new payment plan which generated new expenditures not previously contemplated by the underlying contract.

    (2) Deliberation no. 42/2022 of the Court of Accounts for the Lazio Region is also distinguishable, because the underlying transactions involved an upfront payment and therefore resort to indebtedness on the part of the local authority. This appears to have led the Court to conclude on the basis of the *Cattolica Decision* that the settlement agreement also required Council approval. But, the Banks submit, that is a *non sequitur*: the *Cattolica Decision* was not dealing with the question of whether a "conservative" settlement agreement in respect of a contract incurring indebtedness required Council approval. For example, if an underlying contract incurring indebtedness was properly approved by the Council or had been ratified subsequently, there is nothing in the reasoning in the *Cattolica Decision* that would suggest a Settlement Agreement relating to that contract would have to be approved by the Council. In any event, the Court of Accounts was acting in its control rather than its jurisdictional function and the Deliberation is therefore not a judgment and does not have any effect on the civil law validity of the contracts before it, let alone more widely.

    (3) Court of Milan decision no. 7727/2021 involved a novational settlement agreement by which the local authority agreed to make a new payment by way of early termination of the underlying swap transactions, which were therefore ended rather than preserved by the settlement agreement. The Court of Milan held that the settlement agreement therefore did not provide for expenditure binding the local authority's balance sheet in future years and did not require the approval of the Council.[70] Although the case is therefore distinguishable on the facts, it shows that a settlement agreement that does not involve any commitment to new expenditures will not require Council approval.

200. In the present case, Presidential Decree no. 209/2017 contained a statement from Brescia's Financial Director confirming that the Settlement Agreements did not commit Brescia to any unaccounted for expenditure in future years. Further, Brescia's balance sheet at the time included the cash flows arising from the Transactions and identified financial coverage to meet Brescia's liabilities thereunder. The Banks contend that it follows that the Settlement Agreements did not require Provincial Council approval, which is consistent with the representations given by Brescia at the time that it had obtained all the necessary authorisations to enter into the Settlement Agreements.

[70] Rimini §197.

201. As in the case of the Transactions, and having not reached a final determination on the question raised (and see paragraphs [143] and [147] above), I prefer to base my determination on the arguments summarised at paragraph [194] above. I accept those arguments as correct, on the evidence of Italian law submitted to me. I consider later whether to grant the relief sought by the Banks in this regard.

G.3 Article 1972 of the ICC

202. Prof. Rimini has explained that Article 1972 of the ICC deals with the situation where a settlement agreement relates to underlying contracts that are null and void. It provides as follows:

> *"1. A settlement transaction in respect of an illicit contract is void, even if the parties have dealt with its nullity.*
>
> *2. In circumstances where the settlement transaction has been executed in respect of a void title, its nullity may be exclusively claimed by the party who was unaware of the nullity of the title itself".*

203. Prof. Rimini has gone on to explain that the first paragraph of Article 1972 deals with "*illicit"* contracts which are contrary to imperative rules of Italian law, public order and public ethics. There does not appear to be any case law to suggest that the Transactions were illicit in this strict sense and the Banks submit that there can be no serious suggestion that the Settlement Agreements were null and void for this reason. They submit further that, on the contrary, Brescia's complaints relate in all or most cases to questions of material validity under Italian law. Court of Milan decision no. 7727/2021 (discussed in paragraph 199(3) above) is an example of a derivative that failed to comply with the requirements in the *Cattolica Decision*; this was held to fall in the second rather than the first paragraph of Article 1972 of the ICC.

204. The second paragraph applies where a contract is null and void for reasons other than being illicit in the strict sense identified above, but where one of the parties was unaware of the reasons for that at the time of the settlement agreement. Prof. Rimini considers that the various breaches of Italian law alleged by Brescia would fall within this second paragraph. In the present case, the allegations it made in the Original Italian Proceedings make it clear that Brescia knew about the reasons for the alleged invalidity of the Transactions prior to entering into the Settlement Agreements. On that basis, in his opinion, the Settlement Agreements would therefore not be invalid under Italian law. In any event, as the Transactions are governed by English law, not Italian law, the Banks also make the point that the various Italian law arguments raised by Brescia do not apply.

205. On the basis of the Italian law evidence that was presented to me, which seemed to me to be careful, cogent and consistent, I would accept the Banks' case that the Settlement Agreements are not null and void pursuant to Article 1972 of the ICC. Again, however, I shall address later whether the Court should grant the declaratory relief sought by the Banks in respect of Italian law in this regard.[71]

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[71] As regards DB, see Declarations 16–20 in Annex 1. As regards Dexia, see Declarations 20–24 in Annex 1.

G.4 Want of consideration

206. The Banks submit that Brescia's argument that Dexia did not give consideration for the Settlement Agreement is wholly without merit.

207. Prof. Rimini has explained that Article 1965 of the ICC requires that parties make "*mutual concessions*" in an agreement to compromise a dispute. He has cited a considerable amount of authority in Italian law that mutual concessions include the waiver of future litigation, and also the risk of having to pay the other side's costs. This seems hardly surprising. Further, Dexia did not only waive any existing future litigation and its theoretical right to be awarded its costs in respect of the same; it also waived its extant right to payment of its costs of Brescia's failed English jurisdiction challenge pursuant to an order of the English Court, which was the subject of detailed assessment proceedings at the time. Prof. Rimini's view is that this was a concession for the purposes of Article 1965 of the ICC. Again, I have no reason not to accept that analysis, which (as the Banks submitted) also seems unsurprising.

G.5 Ratification

208. It is accepted by the Banks that Italian law does not permit the ratification of a settlement agreement that is null and void pursuant to Article 1972 of the ICC or for want of consideration under Article 1965 of the ICC. The dispute about ratification under Italian law is limited to the situation where the Settlement Agreements are otherwise valid but were required by Italian law to be approved by the Provincial Council under Article 42 of TUEL and were not (contrary to the Banks' arguments as set out in Section G.1 above).

209. Prof. Rimini explains that a breach of Article 42(2) of TUEL results in an administrative act that is affected by "*relative incompetence"* and so is "*annullable"*; and that this means that the administrative act is valid and effective but subject to being declared void by an administrative court or rendered void by self-redress actions taken by the local authority. He goes on to explain that neither is possible here as the time limit for Brescia to take either action has expired;[72] and furthermore, that in any event, annulling an administrative act that was not taken consistently with Article 42 of TUEL would not affect the validity of a civil law contract entered into pursuant to that public administrative act, including the Settlement Agreements.

210. As the Settlement Agreements are governed by Italian law, the question of ratification is also a question of Italian law (unlike the Transactions, which are governed by English law). Prof. Rimini explains that Italian law will recognise ratification where there is any "*behavior [sic] of a party that is clearly inconsistent with the intention of disputing the contract executed by the unauthorised representative*", including performance of the relevant contract. He gives as an example a local authority setting aside in its balance sheet specific funds to comply with the obligations arising from the contract. As explained in paragraph [194] above, this is what Brescia has done.

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72 Rimini §225.

211. I accept the Bank's submission that it follows from Prof. Rimini's evidence that, if Provincial Council approval was required for the Settlement Agreements and was not obtained, Brescia has impliedly ratified the Settlement Agreements by its conduct and so is bound by them nevertheless. Again, that would not be a surprising result if English law were applicable.

H. The specific Declarations now sought

212. The specific Declarations sought by the Banks are in two categories: one category relates to the validity and enforceability of the Transactions which by their terms are governed by English law; the other category relates to the validity and enforceability of the Settlement Agreements which the Banks accept are governed by Italian law.

H.1 Declarations as to the validity and enforceability of the Transactions

213. The relief sought in respect of the Transactions is very similar to that sought and (for the most part) granted in the sequence of cases mentioned above, namely, *Busto, Pesaro, Venezia* and *Catanzaro.* I am satisfied that it would be in accordance with the principles underlying the grant of declaratory relief set out in the decisions of Cockerill J at paragraph [78] of *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2020] EWHC 2436 (Comm) and at para [8] in *Busto* (and rehearsed and followed in *Pesaro* at paras. [128] to [130]) for me to exercise my discretion to grant the relief sought by DB and Dexia respectively in respect of the Transactions.

214. I have considered the wording of each of the Declarations sought, as set out in Annex 1 to the Banks's Skeleton Argument (which is also appended to this judgment). I have focused especially on those of the Declarations sought which either were refused or not sought in any of the previous cases. I address these below.

215. In *Busto* (for the reasons stated in paras. [19] to [21] of her judgment), and also in *Catanzaro* (for the reasons stated in para [114(i)] of her judgment), Cockerill J declined to make a declaration in a form similar to that now sought by DB (by Declaration numbered (2) in its Amended Claim Form) and by Dexia (by Declaration numbered 10) in its Re-re-Amended Claim Form. Her reasons were (in each case) that the declaration as sought in *Busto* was *"not a declaration which tracks a warranty or representation in the contractual documentation. It is essentially a step on from a promise made by the parties. There has been no allegation of breach. There has been no dispute about this. The utility of the declaration sought remains unclear. Further, and importantly, this seems to me to have the potential to go wider than the matters in issue between the parties."* However, Cockerill J went on to note that *"it might be different if Deutsche Bank were seeking Declarations which tracked actual findings as to breaches of law that had been asserted or rejected. Were such a declaration sought it would more properly reflected dispute and have a better claim to utility."*

216. In the present cases, however, the Banks submit that the position is different because the Settlement Agreements include in each case Brescia's representation and warranty that the Transactions did not breach any Italian laws and its waiver of any claim to rely on any deformity with any relevant Italian law: see clause 5.2(a) of the DB Settlement Agreement and clause 5.2(b) of the Dexia Settlement Agreement.

217. Nevertheless, Mr Handyside did not ultimately press for either Declaration because he accepted that DB Declaration numbered (14B) and Dexia Declaration numbered (19) on page 9 of Annex 1 are more precise in their application to the specific laws that Brescia has relied on in the Italian Proceedings. Noting that Cockerill J had granted a similar declaration in *Catanzaro,* Mr Handyside clarified the Banks' position as being that if those Declarations (14B and 19) were granted, they would not pursue DB Declaration (2) nor Dexia Declaration (10); and furthermore, and in order to conform more neatly with the declaration Cockerill J had given in *Catanzaro*. Mr Handyside agreed also to the deletion of the words *"including but not limited to"* in DB Declaration (14B) so as to confine the Declaration to the specific laws identified.

218. Accordingly, I do not propose to make DB Declaration (2) nor Dexia Declaration (10); but I do propose to make DB Declaration (14B) and Dexia Declaration (19) in the amended form explained, though I should perhaps refer back to paragraphs [138] and [147] above (as regards DB Declaration 14B(a) and (f) and (h) and Dexia Declarations 19(b) and (cb) and (h)) as to the basis on which I have determined the Bank's arguments in that regard.

219. The next Declarations to consider specifically are DB Declaration (7) and Dexia Declaration (11) on page 4 of Annex 1. Those Declarations have two limbs: the first limb confirms conformity with Decree no. 389, and the second limb confirms compliance with a limitation that the Transactions should not exceed 25% of the totality of the derivative transactions entered into by Brescia. The second limb has not been considered in the previous cases. In *Busto,* Cockerill J refused a declaration similar to the first limb on the ground that no issue as to Decree No. 389 had been asserted to arise; but a similar declaration was granted in *Pesaro* and *Catanzaro,* Decree No.389 being in issue in both proceedings.

220. I am satisfied that in this case, where the relief sought (as to both limbs) simply tracks the wording in each of the Settlement Agreements which Brescia seeks to set aside in the Italian Proceedings, I should grant the Declarations with a view to preventing Brescia seeking to run arguments in the Italian Proceedings that the Transactions were in breach of Article No 389 in contradiction of what they had agreed (which is their utility).

221. The next Declarations that I should address are DB Declaration (13B) and Dexia Declaration (9) (on page 8 of Annex 1) which were not sought in any previous case. In doing so, I must take into account a material difference of wording between the DB and the Dexia agreements. The Dexia agreement contain language in line with Dexia Declaration (9(b)); but DB's agreements do not. In those circumstances, Mr Handyside told me that DB was content not to pursue in the absence of the express wording prayed in aid by Dexia. That is so even though there is evidence to support that limb of the Declaration as set out in the Annex in the case of DB, just as in the case of Dexia.

222. As to the evidence, Mr Samir Belarbi (an employee of Dexia, as one of its Branch Managers) states in his witness statement that the documents of the type referred to in the Declarations and there declared to have been received by Brescia prior to entering in to the Transaction Documents and the Transactions were indeed provided. Although perhaps the evidence is not as specific in identifying the documents concerned as might have been preferable, I am content to make the Declarations sought (as modified in the case of DB).

223. The next Declarations I must consider are DB Declaration numbered (15) and Dexia Declaration numbered (26) on page 10 of the Annex. As recorded in the third column of the Annex, Cockerill J declined to make a similar declaration in *Busto* and also in *Catanzaro.* In *Busto,* the basis of her decision was that the declaration sought was not *"reflective of the dispute out of which it emanates"* and, in her view, the Declarations were too broad and were premised on allegations which had not yet been pursued and for which there was as yet no evidence, as well as possibly extending to matters referable to a mandate expressly governed by Italian law and agreed to be subject to the exclusive jurisdiction of the Court of Milan. Similarly, in *Catanzaro,* Cockerill J again refused to make a declaration closely comparable to that in *Busto,* on the ground (see para 114(i)) that while tracking an ISDA term, the declaration was *"plainly capable of covering disputes which have not arisen and which I have not considered*."

224. In the present case, the Banks submit that the position is not as it was in *Busto* and *Catanzaro* because Brescia has expressly accepted in the Settlement Agreements that the Banks have no such liability and they seek Declarations accordingly. However, Mr Handyside told me that the Banks would be content not to press these Declarations if they are successful in obtaining the relief they seek in respect of the Settlement Agreements. I turn to that relief now; in light of my conclusions as explained below and Mr Handyside's position as explained earlier in this paragraph, I do not consider it necessary and I would not propose to grant Declarations numbered (15) and (26).

H.2 Declaratory Relief in respect of the Settlement Agreements

225. None of the Settlement Agreement Declarations set out on pages 12 to 17 of Annex 1 has been considered in any previous decisions of the Court. That is unsurprising since the Settlement Agreements are particular to the parties, whereas the Master Agreements are standard forms.

226. Each of the Settlement Agreement Declarations tracks or is closely derived from a clause in the relevant Settlement Agreement itself. The clauses concerned are identified in the footnotes to Annex 1. Mr Handyside took me to the first of the pair of Declarations sought (numbered (16) in the case of DB and (20) in the case of Dexia, both on page 12 of Annex 1) to illustrate this. He showed me that those Declarations track clause 2.1 and 5.1 of the DB Settlement Agreement and clauses 2.1 and 5.1 of the Dexia Settlement Agreement, as noted in footnotes 19 and 20. He took me to a couple of other examples to illustrate the same point and expressly assured me that substantially the same applied to all the Settlement Agreement Declarations sought.

227. Notwithstanding my initial concerns about making any declaration as to the effect of Italian law, I am satisfied that I would not be exceeding my jurisdiction in making the Settlement Agreement Declarations. I am persuaded that all of them *"have at their heart the transactions"* and fall within the express jurisdiction clauses of the DB and Dexia Master Agreements for the reasons given by Knowles J and Butcher J in their respective judgments dismissing Brescia's jurisdiction challenges at an earlier stage in these proceedings (see paragraph [211] above).

228. It seems to me that the utility of the Settlement Agreement Declarations pivots on their relevance to the Italian Proceedings and whether they would be recognised there. The relevance is to my mind plain, since in the Italian Proceedings Brescia accepts that if the Settlement Agreements are valid, that is dispositive of its Italian Proceedings; and it in

effect seeks by its arguments there on the Settlement Agreement to undercut the Transaction Agreements by which it is bound in English law and to undermine the determinations of this Court in respect of the Transactions now elaborated and expressed in the Transaction Declarations. As to recognition, the recent decision of the Court of Appeal of Brescia dated 7 June 2024 dismissing an appeal by Brescia in respect of the decision of Butcher J in respect of Brescia's jurisdictional challenge (see above) seems to me to confirm that recognition will be afforded to the Settlement Agreements Declarations in Italy.

229. Accordingly, with the exceptions I have identified, I propose to make the Declarations sought as set out in Annex 1.

H.3 The Indemnity and Damages Declarations

230. The Banks also seek Declarations that they are entitled to damages for loss and damage (including legal fees incurred both here and in Italy) in respect of breaches of the Settlement Agreements and the Master Agreements and further, that they are entitled to be indemnified under Clause 11 of the Master Agreements. They do not seek quantification of their claims or any money judgment at this stage.

231. The form of the declaratory relief each of the Banks seeks is as follows:

(1) Brescia has commenced the New Italian Proceedings in breach of Clauses 3.1 and 3.2 of the respective Settlement Agreements and/or Clause 13 of the Master Agreement, and so the Banks are entitled to damages in respect of the loss and damage incurred as a result, including the legal fees the Banks have incurred in Italy and England;[73] and

(2) The Banks are entitled to be indemnified by Brescia pursuant to Clause 11 of the Master Agreement in respect of all loss and damage arising out of its breaches of the Transaction Documents, again including the legal fees incurred in Italy and England.[74]

232. As regards the first of the Declarations sought in this regard:

(1) Clauses 3.1 and 3.2 of the Settlement Agreements provide in relevant part:

> *"3.1 The Parties … discontinue the Proceedings that they have brought against each other, acknowledging and agreeing that this Agreement and the implementation of the provisions hereunder constitute the final agreement, entered into in full and final settlement of all mutual claims… and constitute the express, final and irrevocable waiver of all Disputes …*
>
> *3.2* [Brescia] *definitively and irrevocably waives the Disputes … and undertakes not to take legal measures and not to bring any Dispute against* [the Banks] *…* [Brescia] *also definitively and irrevocably waives … any Dispute intended to establish the nullity or to request the annulment or, in any event, to establish the invalidity of the same* [Transactions], *declaring in that regard to have*

[73] As regards DB, see Declaration 21 in Annex 1. As regards Dexia, see Declaration 27 in Annex 1.
[74] As regards DB, see Declaration 22 in Annex 1. As regards Dexia, see Declaration 28 in Annex 1.

already considered all potential cases that, if were grounded, could have caused the invalidity of the [Transactions]."

(2) The Banks submit that Brescia's attempts to rely on the *Cattolica Decision* to renew its attacks on the Transactions are a clear breach of these clauses of the Settlement Agreement, which resulted in the Banks having to bring these Claims and fight the New Italian Proceedings.

(3) Separately, Clause 13 of the Master Agreement is the usual ISDA form exclusive English jurisdiction clause, which requires Brescia to submit to the jurisdiction of the English Courts in respect of all disputes "*relating to this* [Master Agreement]", waive any objection it might have to English jurisdiction and prevents it from bringing proceedings in Italy, such as the New Italian Proceedings. The Banks submit that Brescia's institution of the New Italian Proceedings and its failed challenge to the jurisdiction of the English Court were, again, clear breaches of this Clause.

233. As regards the second of these Declarations:

(1) Clause 11 of the Master Agreement contains an indemnity requiring a "*Defaulting Party*" to "*indemnify and hold harmless the other party for and against all reasonable out-of-pocket expenses, including legal fees and Stamp Tax, incurred by such other party by reason of the enforcement and protection of its rights under this Agreement"*.

(2) A Defaulting Party is defined under Clause 6(a) as a party with respect to which an "*Event of Default*" has occurred. Events of Default are in turn listed in Clause 5(a) of the Master Agreement, and relevantly include breaches of the Master Agreement (Clause 5(a)(ii)) and the falsity of any of the representations given by Brescia (Clause 5(a)(iv)).

(3) In circumstances where Brescia has argued that a number of the representations it has given to the Banks under the Master Agreement are false, the Banks (in the alternative to their position that Brescia's representations in the Master Agreement were true and it should be held to them) submit that they are entitled to be indemnified by Brescia for all expenses incurred in enforcing and protecting their rights under the Master Agreement in respect of any representations that were relevantly false.

234. In their respective Witness Statements, Ms Davison and Mr Danusso have given evidence that the result of Brescia's conduct in breach of the Settlement Agreements and the Transaction Documents has been that the Banks have incurred significant costs in prosecuting the present Claims and defending the New Italian Proceedings. The Banks thus seek Declarations that they are entitled to be paid the costs of doing so and/or to be indemnified by Brescia in respect of the same, for the reasons set out above. I see no reason not to grant such a declaration.

I. Conclusion

235. I have considered carefully the arguments that have been identified or have emerged as ones which might have been raised by Brescia had it participated in the proceedings. Although I have not had the benefit of contrary evidence on behalf of Brescia or cross-examination of the evidence on behalf of the Banks, nor of the arguments being presented by Counsel on Brescia's behalf, that was what I take to have been its deliberate decision (whether on grounds of cost or otherwise). Instead, however, I have had both a fairly clear view of its position from its case in the Italian Proceedings and the assistance of Counsel for DB and Dexia in accordance with their duty to the court as described in paragraph [33] above.

236. I have considered the evidence, particularly the expert evidence, with a critical eye, but I have found it to be (as I have previously mentioned) clear, cogent and comprehensive. None of the conclusions put forward seems to me to be discordant or inconsistent, or indeed surprising.

237. I am quite satisfied, subject to the exceptions and reservations I have mentioned, that the relief sought, though comprising unusually detailed Declarations, is of utility: indeed I consider it necessary in order to assist in bringing home to Brescia what it plainly agreed to, and to ensure as far as possible that their inappropriate resort to litigation in Italy, in furtherance of their attempts to create uncertainty about contractual commitments freely entered into, when there is none, are brought to an end.

238. I would ask Counsel to prepare a draft Order reflecting my decisions. I would suggest that the question of costs can be decided either when the judgment is formally handed down or on the papers.

239. Finally, I am very grateful to Counsel and those instructing them for the careful presentation of detailed documentation, and to the Experts on Italian law for the valuable assistance they have provided to me.

Annex 1: Declaratory Relief in respect of the Transactions

Transaction Document Declarations

In the third column, the text common to all three precedent orders is shown in black, with any material differences between the *Busto*, *Pesaro* and *Catanzaro* judgments shown in blue, red and green respectively.

DB (as amended)	**Dexia (as amended)**	**Previous cases**
(1) The Defendant's obligations under the Transaction Documents constitute, and at all material times constituted, its legal, valid and binding obligations enforceable in accordance with their terms[1]	(4) The Defendant's obligations under the Transaction Documents constitute, and at all material times constituted, its legal, valid and binding obligations enforceable in accordance with their respective terms[2]	(1) The Defendant's obligations under the Transaction Documents constitute, and at all material times constituted, its legal, valid and binding obligations enforceable in accordance with their terms. (1) The Defendant's obligations under the Transaction Documents constituted and, in the case of the Cash Flow Swap, constitute, its legal, valid and binding obligations enforceable in accordance with their terms. (7) The obligations of the Defendant under the Transaction Documents constitute its legal, valid and binding obligations enforceable in accordance with their terms.
(2) The Defendant has and at all material times had complied in all material respects with all applicable laws and orders to which it may be, or was, subject if failure so to comply would materially impair its ability to perform its obligations under the Transaction Documents[2]	(10) The Defendant has, and at all material times had, complied in all material respects with all applicable laws and orders to which it may be, or was, subject if failure so to comply would materially impair its ability to perform its obligations under the Transaction Documents[3]	*Cockerill J declined to make this declaration in Busto for the reasons at [19]–[21] {AB/3.1/5} and in Catanzaro for the reasons at [114(i)] {AB/7/28–29}. It is submitted that the position in the present case is different because the Settlement Agreement includes Brescia's acceptance that the Transactions did not breach any Italian laws and its waiver of any claim to rely on any deformity with any relevant Italian law.*

[1] Clause 3(a)(v) Master Agreement: Brescia represented to the Banks that "*Its obligations under this Agreement … constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms…"* {C/1/3} {C/2/3}.

[2] Clause 4(c) Master Agreement: Brescia agreed that, so long as it has or may have any obligations under the Master Agreement, "*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*" {C/1/4} {C/2/4}.

(3) The Defendant has and at all material times had the power to execute the Transaction Documents and any other documentation relating to the Transaction Documents to which it is a party, deliver the Transaction Documents and any other documentation relating to the Transaction Documents that it was required by the Master Agreement to deliver 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]	(1) The Defendant (a) has, and at all material times had, the power (a) to execute the Transaction Documents and any other documentation relating to the Transaction Documents to which it is a party, (b) to deliver the Transaction Documents and any other documentation relating to the Transaction Documents that it was required by the ISDA Master Agreement to deliver, and (c) to perform its obligations under the Transaction Documents; (b) has taken all necessary action and made all necessary determinations and findings to authorise such execution, delivery and performance as referred to in sub-paragraph 1(a) above[4]	[(2)] [(2)] [(8)] 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.
(4) The execution and delivery of and the performance of its obligations under the Transaction Documents and any other documentation relating to 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, any provision of its constitutional documents, any 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[4]	(2) The execution and delivery of, and the performance of its obligations under, the Transaction Documents and any other documentation relating to 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, any provision of its constitutional documents, any 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[5]	(3) 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[, any provision of its constitutional documents, any 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] (9) The Defendant's execution and delivery of and the Defendant's performance of its obligations under the Transaction Documents does not, and did not at any material time, violate or conflict with any law applicable to the Defendant any provision of its constitutional documents, any order or judgment of any court or other

[3] Clause 3(a)(ii) Master Agreement as amended by the Schedule: Brescia represented to the Banks that "*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 and made all necessary determinations and findings to authorise such execution, delivery and performance*" {C/1/26} {C/2/25}.

[4] Clause 3(a)(iii) Master Agreement: Brescia represented to the Banks that "*Such execution, delivery and performance do not violate or conflict with any law applicable to it, any provision of its constitutional documents, any 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*" {C/1/3} {C/2/3}.

		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
(5) All governmental and other consents that were and are required to have been obtained by the Defendant with respect to the Transaction Documents had and have been obtained and were and are in full force and effect, and all conditions of any such consents have been and are being complied with and the Defendant is obliged to use all reasonable efforts to maintain in full force and effect all such consents[5]	(3) All governmental and other consents that were or are required to have been obtained by the Defendant with respect to the Transaction Documents have been obtained and were at all material times, or are, in full force and effect, and all conditions of any such consents have been, or are being, complied with, and the Defendant is obliged to use all reasonable efforts to maintain in full force and effect all such consents[6]	(4) All governmental and other consents that were to have been obtained by the Defendant with respect to the Transaction Documents have been obtained and are, or were at all material times, in full force and effect and all conditions of any such consents have been complied with. (10) All governmental and other consents that were or are required to have been obtained by the Defendant with respect to the Transaction Documents have been obtained and, at all material times, any such consents have been in full force and effect and all conditions of any such consents have been complied with.
(6) All applicable information that was furnished in writing by or on behalf of the Defendant to the Claimant and was identified for the purpose of section 3(d) of the Master Agreement in the Schedule was, as of the date of the information, true, accurate and complete in every material respect[6]	(6) All applicable information that was furnished in writing by or on behalf of the Defendant to the Claimant and was identified for the purpose of Section 3(d) of the ISDA Master Agreement in Part 3(b) of the Schedule was, as of the date of the information, true, accurate and complete in every material respect[7]	(5) All applicable information that was furnished in writing by or on behalf of the Defendant to the Claimant and was identified for the purpose of Section 3(d) of the Master Agreement, namely (a) "*Certificate or other documents evidencing the authority of the party entering into this Agreement or a Confirmation, as the case may be, together with the relevant specimen signatures*", (b) "*Duly certified copies of the relevant resolutions of the Provincial Board (Giunta Provinciale) and of the Provincial Council (Consiglio Provinciale) authorising this Agreement and each Transaction entered into hereunder*" and (c) "*Duly certified copy of Provincial Board's Resolution ratifying the execution of this*

[5] Clause 3(a)(iv) Master Agreement: Brescia represented to the Banks that "*All governmental and other consents that are required to have been obtained by it with respect to this Agreement or any Credit Support Document to which it is a party have been obtained and are in full force and effect and all conditions of any such consents have been complied with*" {C/1/3} {C/2/3}.

Clause 4(b) Master Agreement: Brescia agreed to "*use all reasonable efforts to maintain in full force and effect all consents of any governmental or other authority that are required to be obtained by it with respect to this Agreement"* {C/1/4} {C/2/4}.

[6] Clause 3(d) Master Agreement: Brescia represented to the Banks that "*All applicable information that is furnished in writing by or on behalf of* [Brescia] *and is identified for the purpose of this Section 3(d) in the Schedule is, as of the date of the information, true, accurate and complete in every material respect*" {C/1/4} {C/2/4}.

		Agreement" was, as of the date of the information, true, accurate and complete in every material respect.
(7) 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 (the "**Decree**"), and that in compliance with Article 3, paragraph 4, of the Decree the Defendant gradually tended towards ensuring that the overall nominal amount of the transactions entered into between the Claimant and the Defendant would not exceed 25% of the totality of the derivative transactions entered into by the Defendant[7]	(11) The Transactions were entered into in conformity with the Decree and that, in compliance with Article 3, paragraph 4, of the Decree, the Defendant gradually tended towards ensuring that the overall nominal amount of the transactions entered into between the Claimant and the Defendant would not exceed 25% of the totality of the derivative transactions entered into by the Defendant[8]	*This declaration was not sought in Busto, Pesaro or Catanzaro but there is a specific bespoke declaration to this effect in the DB Master Agreement and the Dexia Confirmations in this case.*[8]
(8) The Transactions were entered into by the Defendant for the purposes of managing its borrowings or investments and not for the purposes of speculation pursuant to Article 3, paragraph 3, of the Decree[8]	(7) The Transaction Documents and the Transactions were entered into by the Defendant for the purposes of managing its borrowings or investments and not for the purposes of speculation pursuant to Article 3, paragraph 3, of the Ministerial Decree no. 389 of 1 December 2003 issued by the Treasury Department of the Italian Ministry of Economy and Finance and the Italian Ministry of Interior and published in the Official Gazette no. 28 of 4 February 2004 (the "**Decree**")[9]	(7) The Transactions were entered into by the Defendant solely for the purposes of hedging interest rate risk and for managing its liabilities resulting from bond issues, loans and other forms or recourse to the financial markets permitted by law and not for speculative purposes. (12) The Transactions were entered into by the Defendant for the purposes of managing its borrowings or investments and not for the purposes of speculation. (16) The Transaction was entered into by the Defendant for purposes of managing its borrowings and not for purposes of speculation.

[7] Clause 3(g) of the DB Master Agreement as added by the Schedule: Brescia represented to DB that "*(i) Each Transaction will be entered into in conformity with the Decree and (ii) in compliance with Article 3, paragraph 4, of the Decree,* [Brescia] *shall gradually tend towards ensuring that the overall nominal amount of the transactions entered into between* [each Bank] *and* [Brescia] *will not exceed 25% of the totality of the derivatives transactions entered into by* [Brescia]" {C/1/27}. In each Dexia Confirmation, Brescia declared that "*this Interest Rate Swap operation* [is] *carried out in accordance with* [the Decree] *and the* [2004 MEF Circular]; *in particular, with reference to the underlying indebtedness, it is fully in line with Article 3 comma 3 of* [the Decree]*; and with reference to the 25% limit, it is fully in line with Article 3 comma 4 of the* [Decree]" {C/3T/5} {C/5T/5}.

[8] Clause 3(g) Master Agreement as added by the Schedule: Brescia represented to the Banks that "*This agreement has been, and each Transaction hereunder will be (and, if applicable, has been), entered into for purposes of managing its borrowings or investments and not for the purposes of speculation*" {C/1/27} {C/2/26}.

(9) The Transaction Documents 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]	(13) The Transaction Documents 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[10]	[(4)] [(10)] 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. (11) The Transaction Documents 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.
(10) 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 judgement and upon advice from such advisers as it had deemed necessary[10]	(8) In entering into the Transaction Documents and the Transactions, and on each date that a Transaction was amended, extended or otherwise modified, the Defendant: (a) was acting for its own account and made its own independent decisions to enter into each of them and as to whether the Transaction Documents and the Transactions were appropriate or proper for the Defendant based upon its own judgement and upon advice from such advisers as it had deemed necessary;[11]	[(5)] [(11)] [By Section 3(i) of the Master Agreement (as added by Part 5, paragraph 5(vi) of the Schedule), t][T]he Defendant [represented] [made a representation] to the Claimant [in the Transaction Documents] that 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 judgement and upon advice from such advisers as it had deemed necessary. (12) In entering into the Transaction, the Defendant was acting for its own account and had made its own independent decisions to enter into the Transaction and as to whether the Transaction was appropriate or proper for it based upon its own judgement and upon advice from such advisers as it had deemed necessary.
(11) 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	… (b) did not rely on any communication (written or oral) of the Claimant as investment advice or as a recommendation to enter into the Transaction Documents and the Transactions, it being understood	(9) The execution of the Transactions did not constitute an assurance or guarantee of financial results. [(6)] [(12)] [By Section 3(i) of the Master Agreement (as added by Part 5, paragraph 5(vi) of the Schedule), t][T]he

[9] Clause 9(a) Master Agreement: Brescia agreed "*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*" {C/1/12} {C/2/12}.

[10] Clause 3(h) DB Master Agreement and Clause 3(i) Dexia Master Agreement, in each case as added by the Schedule: Brescia represented to the Banks that "*it is acting for its own account, and has made its own independent decisions to enter into* [the Transactions] *and as to whether* [each Transaction] *is appropriate or proper for it based* [up]*on its own judgment and upon advice from such advisors as it has deemed necessary.*" {C/1/27–28} {C/2/26}.

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[11]	that (i) information and explanations related to the terms and conditions of the Transaction Documents and the Transactions would not be considered to be investment advice or a recommendation to enter into the Transaction Documents and 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[12]	Defendant [represented] [made a representation] to the Claimant [in the Transaction Documents] that 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 (a) 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 (b) 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. (13) In entering into the Transaction, the Defendant did not rely on any communication (written or oral) of the Claimant/Dresdner Bank AG (**Dresdner**) as investment advice or as a recommendation to enter into the Transaction, it being understood that (i) information and explanations related to the terms and conditions of the Transaction would not be considered to be investment advice or a recommendation to enter into the Transaction, and (ii) no communication (written or oral) received from the Claimant/Dresdner would be deemed to be an assurance or guarantee as to the expected results of the Transaction.
(12) Prior to and when entering into the Transactions, the Defendant was capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understood and accepted, the terms, conditions and risks of the	(14) When entering into the Transactions, the Defendant: (a) was capable of assessing the merits of and evaluating and understanding (on its own behalf or through independent professional advice), and understood, and accepted, the terms, conditions and risks of the Transactions; and/or	[(7)] [(13)] [By Part 5, paragraph (4), (a) of the Schedule, t][T]he Defendant [represented] [made a representation] to the Claimant [in the Transaction Documents] that prior to and when entering into the Transactions, the Defendant was capable of assessing the merits of [and evaluating and] understanding (on its own behalf or through independent professional advice), and understood and accepted, the

[11] Clause 3(h) DB Master Agreement and Clause 3(i) Dexia Master Agreement, in each case as added by the Schedule: Brescia represented to the Banks that "*It is not relying on any communication (written or oral) of the* [Banks] *as investment advice or as a recommendation to enter into* [the Transactions], *it being understood that information and explanations related to the terms and conditions of* [the Transactions] *shall not be considered to be investment advice or a recommendation to enter into* [the Transactions]. *No communication (written or oral) received from the* [Banks] *shall be deemed to be an assurance or guarantee as to the expected results of* [the Transactions]" {C/1/28} {C/2/26}.

Transactions and the Defendant was capable of assuming and assumed the risks of the Transactions[12]	(b) was capable of assuming, and assumed, the risks of the Transactions[13]	terms, conditions and risks of the Transactions and the Defendant was capable of assuming and assumed the [financial and other] risks of the Transactions. (8) When entering into the Transactions, the Defendant was able to make and did in fact make an informed assessment of the risk of the Transactions and had the information required to enable it to carry out that assessment. (14) Prior to and when entering into the Transaction, the Defendant was capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understood and accepted, the terms, conditions and risks, of the Transaction, and the Defendant was capable of assuming and assumed the risks of the Transaction.
(13) Prior to and when entering into the Transactions, the Defendant had a specific expertise and experience in transactions having as an object financial investments and thereby it is and was at all material times a professional investor (*operatore qualificato*) pursuant to Article 31 of Regulation no. 11522 of 1 July 1998 issued by CONSOB[13]	(15) Prior to and when entering into the Transactions, the Defendant had a specific expertise and experience in transactions having as an object financial investments and thereby it is and was at all material times a professional investor (*operatore qualificato*) pursuant to Article 31 of Regulation no. 11522 of 1 July 1998 issued by CONSOB[14]	(9) Prior to and when entering into the Transactions, the Defendant had a specific expertise and experience in transactions having as an object financial investments and thereby it is and was at all material times a professional investor (*operatore qualificato*) pursuant to Article 31 of Regulation no.11522 of 1 July 1998 issued by Consob. (20) Prior to and when entering into the Transaction, the Defendant had specific expertise and experience in transactions having as an object financial investments and therefore was at all material times a professional investor (*operatore qualificato*) pursuant to Article 31 of Italian Regulation number 11522 of 1 July 1998 issued by CONSOB by virtue of the specific declaration delivered to the Claimant/Dresdner when entering into the Transaction.

[12] Clause 3(h) DB Master Agreement as added by the Schedule and Part 5 paragraph 4(a) of the Dexia Schedule: Brescia represented to the Banks that "*It is capable of assessing the merits of [and evaluating] and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of* [the Transactions]. *It is also capable of assuming, and assumes, the financial and other risks of* [the Transactions]." {C/1/28} {C/2/25}.

[13] Clause 3(g) DB Master Agreement and the separate declaration at {D/208}: Brescia represented that "*it has a specific expertise and experience in transactions having as an object financial investments and thereby it is a professional investor pursuant to Article 31 of* [the 1998 CR]" {C/1/27}.

(13B) Prior to entering into the Transaction Documents and the Transactions: (a) the Defendant received from the Claimant the Document on General Risks involved in the Investments in Financial Instruments ("*Documento sui Rischi Generali degli Investimenti in Strumenti Finanziari*") as established by CONSOB decree n. 11522, attachment no. 3 (Regolamento CONSOB n. 11522 del 1 luglio 1998); (b) the Claimant requested, and the Defendant provided, information regarding its experience in the investment in financial instruments, its financial data, investment objectives, and its risk propensity[14]	(9) Prior to entering into the Transaction Documents and the Transactions: (a) the Defendant received from the Claimant the Document on General Risks involved in the Investments in Financial Instruments ("*Documento sui Rischi Generali degli Investimenti in Strumenti Finanziari*") as established by CONSOB decree n. 11522, attachment no. 3 (Regolamento CONSOB n. 11522 del 1 luglio 1998); (b) the Claimant requested, and the Defendant provided, information regarding its experience in the investment in financial instruments, its financial data, investment objectives, and its risk propensity[15]	*This declaration was not sought in Busto, Pesaro or Catanzaro but there are specific bespoke declarations to this effect in the Master Agreements and the Banks were also given written confirmations as to this in these terms.*[15]
(14) The Claimant did not act as a fiduciary for or an advisor to the Defendant in respect of the Transactions[15]	(16) The Claimant did not act as a fiduciary for, or an advisor to, the Defendant in respect of any of the Transactions[16]	(14) By Part 5, paragraph (4)(b) of the Schedule, the Defendant represented to the Claimant that the Claimant did not act as fiduciary for or advisor to the Defendant in respect of the Transactions. (10) The Claimant and the Defendant made representations to each other in the Transaction Documents (under the heading '*Status of Parties*') that the other party was not acting as a fiduciary for or an advisor to it in respect of the Transactions. (15) The Claimant/Dresdner did not act as fiduciary for or adviser to the Defendant in respect of the Transaction.

[14] Part 3 of the DB Schedule required Brescia to deliver a "*Declaration of having received the Generic Risk Disclosure Statement by* [Brescia]" {C/1/23}. In Clause 3(i) of the Dexia Master Agreement as added by the Schedule, Bresca acknowledged that it had "*received from* [Dexia] *the Document on General Risks involved in the Investment in Financial Instruments* ("*Documento sui Rischi Generali degli Investimenti in Strumenti Finanziari*") *as established by CONSOB decree n. 11522, attachment no. 3 (Regolamento CONSOB n. 11522 del 1 luglio 1998)*" and that "[Dexia] *has requested to* [Brescia],*and* [Brescia] *has provided, the information regarding its experience in the investment in financial instruments, its financial data, its investment objectives and its risk propensity"* {C/2/26–27}. A similar confirmation was repeated in the Dexia Confirmations {C/3T/5} {C/5T/5}. The signed declaration itself is at {D/203}.

[15] Clause 3(h) DB Master Agreement as added by the Schedule and Part 5 paragraph 4(a) of the Dexia Schedule: Brescia represented to the Banks that they were "*not acting as a fiduciary for or advisor to* [Brescia] *in respect of* [the Transactions]*"* {C/1/28} {C/2/25}.

(14B) The Transactions were entered into in conformity with all relevant Italian laws and regulations (as in force at the time the Transactions were entered into) to the extent that they are applicable to the Transactions, including but not limited to: (a) Article 119 of the Italian Constitution; (b) Article 41 of Law No. 448/2001(including if the financial effect of the Transactions is required to be assessed together with the Bonds); (c) The Decree and the Explanatory Ministerial Circular of the Ministry of Economy and Finance of 27 May 2004; (d) The Circular of the Italian Ministry of Economy and Finance of 28 June 2005; (e) Article 1(736) of Law no. 296/2006 (including as interpreted by the Circular of the Minister of Economy and Finance of 31 January 2007); (f) Article 30(15) of Law no. 289/2002; (g) Articles 1703, 1710 and 1711 of the Italian Civil Code; and (h) Article 42 of Legislative Decree No. 267/2000[16]	(19) The Transactions were entered into in conformity with all relevant Italian laws and regulations (as in force at the time the Transactions were entered into) to the extent that they are applicable to the Transactions, including but not limited to: (a) Article 119 of the Italian Constitution; (aa) Article 41 of Law no. 448/2001 (including if the financial effect of the Transactions is required to be assessed together with the Bonds); (b) The provisions of the 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 and its explanatory circular issued by the Treasury Department of the Ministry of Economy and Finance dated 27 May 2004; (c) The Circular of the Italian Ministry of Economy and Finance of 28 June 2005; (ca) Article 1(736) of Law no. 296/2006 (including as interpreted by the Circular of the Minister of Economy and Finance of 31 January 2007); (cb) Article 30(15) of Law no. 289/2002; (f) Articles 1703, 1710 and 1711 of the Italian Civil Code; (g) Article 42 of Legislative Decree no. 267/2000[17]	(6) Save to the extent provided at paragraph 5 of this Order, the Transactions were entered into in conformity with (a) Article 119(6) of the Italian Constitution; (b) Article 41 of Law no. 448/2001; (c) Article 3 of Decree no. 389 of 1 December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and published in the Official Gazette no. 28 of 4 February 2004; (d) Circular of the Ministry of Economy and Finance of 27 May 2004; (e) Article 42 of the Local Entities Act (Testo Unico Enti Locali), and (f) Article 30(15) of Law no.289/2002. (19) The Transaction was entered into in conformity with, to the extent they are applicable to the Transaction, (i) Article 119(6) of the Italian Constitution; (ii) Article 41 of Italian Law number 448 of 2001; (iii) Article 3 of Italian Ministerial Decree number 389 of 2003 (including as interpreted by the Circular dated 27 May 2004 issued by the Italian Ministry of Economy and Finance); (iv) Article 30(15) of Italian Law number 289 of 2002; and (v) Article 1(736) of Italian Law number 296 of 2006 (including as interpreted by the Circular dated 31 January 2007 issued by the Italian Ministry of Economy and Finance).

[16] As identified above, Brescia represented to the Banks in Clause 3(a) that it had the power to execute, deliver and perform the Transaction Documents and that this did not violate or conflict with any law applicable to it, that it had obtained all governmental and other consents necessary and that its obligations under the Transaction Documents are legal, valid and binding {C/1/3} {C/2/3}. It also specifically declared that the Transactions complied with Article 41 {D/286T} and the Decree (see footnote 7 above). However, contrary to these agreements, representations and declarations, it has alleged breaches of all of the law listed in the New Italian Proceedings.

(15) For the purpose of any issue concerning the entry into, validity, enforceability, interpretation or performance of the Transactions, 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 any obligations arising after the execution of any of the Transaction Documents including in either case any relevant obligations arising under or in connection with the Italian Civil Code, Italian Legislative Decree no. 58/1998, Regulation no. 11522/1998 issued by CONSOB, Regulation no. 16190/2007 issued by CONSOB, or any other Italian law) and 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	(26) for the purpose of any issue concerning the entry into, validity, enforceability, interpretation or performance of the Transactions, 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 any obligations arising after the execution of any of the Transaction Documents including in either case any relevant obligations arising under or in connection with the Italian Civil Code, Italian Legislative Decree no. 58/1998, Regulation no. 11522/1998 issued by CONSOB, Regulation no. 16190/2007 issued by CONSOB, or any other Italian law), and 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	*Cockerill J declined to make this declaration in Busto for the reasons at [52]–[59] {AB/3.1/10-12} . See also Catanzaro at [115] {AB/7/29}. However, the Settlement Agreements in the present case contain provisions by which Brescia accept that the Banks had complied with all relevant obligations arising under Italian law, Brescia had not suffered any loss and the Banks had no liability to Brescia in respect of the Transactions.*
N/A	(12) The Transactions were carried out in respect of underlying debts that were actually due and owing by the Defendant and the Defendant undertook to maintain for the entire duration of the Transactions underlying debts having a high correlation with the Transactions, in particular as regards their duration and interest rate[17]	(8) The Transactions were carried out in respect of underlying amounts that were, or are, actually due from the Defendant.
(22) The Claimant is entitled to an indemnity from the Defendant as the Defaulting Party pursuant to Clause 11 of the Master Agreement and/or damages in respect of all loss or damage incurred by the Claimant arising out of, or in respect of, any breach	(28) The Claimant is entitled to an indemnity from the Defendant as the Defaulting Party pursuant to Clause 11 of the Master Agreement and/or damages in respect of all loss or damage incurred by the Claimant arising out of, or in respect of any breach of	N/A

[17] The Dexia Confirmations declared that each Transaction is "*implemented on underlying amounts … actually due by* [Brescia], *which undertakes to maintain an underlying debt throughout the operation, having a high financial correspondence with the swap operation, with particular regard to interest rate duration and category"* {C/3T/4} {C/5T/4}.

of the Transaction Documents and in respect of all reasonable out of pocket expenses, including legal fees (including, but not limited to, costs incurred in the New Italian Proceedings and the present proceedings) and Stamp Tax, incurred in the enforcement and protection of the Claimant's rights under the Transaction Documents, including but not limited to costs of collection[18]	the Transaction Documents and in respect of all reasonable out of pocket expenses, including legal fees (including, but not limited to, costs incurred in the New Italian Proceedings and the present proceedings) and Stamp Tax, incurred in the enforcement and protection of the Claimant's rights under the Transaction Documents, including but not limited to costs of collection[19]	

[18] Clause 11 Master Agreement provides that "A *Defaulting Party will, on demand, indemnify and hold harmless the other party for and against all reasonable out-of-pocket expenses, including legal fees and Stamp Tax, incurred by such other party by reason of the enforcement and protection of its rights under this Agreement… including but not limited to costs of collection"* {C/1/12–13} {C/2/12–13}.

Settlement Agreement Declarations

DB (as amended)	**Dexia (as amended)**
(16) The Defendant's obligations under the Settlement Agreement constitute its legal, valid and binding obligations enforceable in accordance with their terms[19]	(20) The Defendant's obligations under the Settlement Agreement constitute its legal, valid and binding obligations enforceable in accordance with their terms[20]
(17) The Defendant had the authority and powers (including the power to sign) required to enter into the Settlement Agreement and the Defendant carried out all the activities necessary to authorise the signing and performance of the Settlement Agreement[21]	(21) The Defendant had the authority and powers (including the power to sign) required to enter into the Settlement Agreement and the Defendant carried out all of the activities necessary to authorise the signing and performance of the Settlement Agreement;[22]
(18) The Defendant has and at all material times had the power to execute and deliver the Settlement Agreement and to perform its obligations under the Settlement Agreement, 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[23]	(22) The Defendant has, and at all material times had, the power to execute and deliver the Settlement Agreement and to perform its obligations under the Settlement Agreement, 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[24]
(19) The execution of and the performance of its obligations under the Settlement Agreement by the Defendant does not and did not at any material time violate or conflict with any law applicable to the Defendant, any provision of its constitutional documents, any 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[25]	(23) The execution, and performance, of its obligations under the Settlement Agreement by the Defendant does not and did not at any material time violate or conflict with any law applicable to the Defendant, any provision of its constitutional documents, any 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 any of its assets[26]

[19] Clause 2.1 of the DB Settlement Agreement: "*The Parties agree that the* [Transactions] *are valid, binding and enforceable from the date they are signed pursuant to the provisions of English law applicable to the* [Master] *Agreement and all the relevant Italian legal and regulatory provisions in respect to which they do not present any element of discrepancy, and are not affected in any way by the present Agreement and do not present the allegations raised by* [Brescia] *in the context of the Proceedings*" {C/8T/4}. See also Clause 5.1: "*This Agreement creates legal, valid and binding obligations for each of the Parties*" {C/8T/8}.

[20] Clause 2.1 and 5.1 of the Dexia Settlement Agreement {C/7T/4–7} are in similar/identical terms to the DB Settlement Agreement, as extracted in the preceding footnote.

[21] Clause 5.1 of the DB Settlement Agreement: "*Each Party represents and warrants that it has the authority and powers, including the power to sign, required to sign this Agreement and that it has carried out all the activities necessary to authorize the signing and performance of this Agreement*" {C/8T/8}. See also Clause 5.2(k): "*when signing this Agreement: (i)* [Brescia] *has taken all the administrative measures necessary to obtain the authorisation to sign this Agreement, including presidential decree no. 201/2017 of 18 September 2017…; (ii)* [Brescia] *has complied with all applicable laws and regulations, as well as any procedure, obligation or action required for the adoption of the measures; (iii) the Manager signing this Agreement and any other transaction or document entered into in connection herewith, or as a result of this Agreement, has all necessary powers in accordance with the applicable laws and internal rules* [of Brescia]" {C/8T/9}.

[22] Clause 5.1 and 5.2(o) of the Dexia Settlement Agreement {C/7T/7–9}are in similar/identical terms to Clause 5.2 and 5.2(k) of the DB Settlement Agreement, as extracted in the preceding footnote.

[23] See footnote 21 above.

[24] See footnote 22 above.

[25] See footnote 21 above.

[26] See footnote 22 above.

(20) Pursuant to the terms of the Settlement Agreement:	(24) Pursuant to the Settlement Agreement:
(a) the Defendant entered into a full and final settlement of all claims against the Claimant in relation to the Transactions, in accordance with Article 1965 of the Italian Civil Code, which settlement constituted the express, final and irrevocable waiver of all "Disputes" (as defined in the Settlement Agreement) including (inter alia) any claim by the Defendant against the Claimant in relation to the validity and effectiveness of the Transactions[27]	b. the Defendant entered into a full and final settlement of all claims against the Claimant in relation to the Transactions, in accordance with Article 1965 of the Italian Civil Code, which settlement constituted the express, final and irrevocable waiver of the Proceedings and all Disputes, including, *inter alia*, any claim by the Defendant in relation to the validity and effectiveness of the Transactions and any Dispute intended to establish the nullity or to request the annulment or, in any event, to establish the invalidity of the Transactions[28]
(b) the Defendant definitively and irrevocably waived, in accordance with Article 1971 and Article 1972 of the Italian Civil Code, the Disputes against the Claimant and undertook not to take legal measures against the Claimant, including to challenge the validity, enforceability and effectiveness of the Transactions or their full compliance with applicable laws and regulations[29]	f. the Defendant definitively and irrevocably waived, in accordance with Article 1971 and Article 1972 of the Italian Civil Code, the Disputes and undertook not to take legal measures and not to bring any Dispute against the Claimant (and its past, present or future Affiliates and/or its past, present or future representatives, directors, employees or officers), intended to establish the nullity or to request the annulment or to challenge the validity, enforceability and/or effectiveness of the Transactions or their full compliance with applicable laws and regulations[30]
(c) the Defendant agreed that the Transactions complied with all relevant Italian laws and regulations that may be applicable including, but not limited to, Law No. 448/2001, Ministerial Decree No. 389/2003, Explanatory Ministerial Circular of the Ministry of Economy and Finance of 27 May 2004, the Circular of the Ministry of Economy and Finance of 28 June 2005, Legislative Decree No. 58/1998 and CONSOB Regulation No. 11522/1998[31]	i. the Defendant represented and warranted that the Transactions are effective and binding from the time of their execution, both under English law as applicable to the ISDA Master Agreement and under all relevant Italian laws and regulations that may be applicable including, but not limited to, Law No. 448/2001, Ministerial Decree No.389/2003, Explanatory Ministerial Circular of the Italian Ministry of Economy and Finance of 27 May 2004 (published in the Official Journal No. 128 of 3 June 2004), the Circular of the Italian Ministry of Economy and Finance of 28

[27] Clause 3.1 of the DB Settlement Agreement: "*this Agreement and the implementation of the provisions hereunder constitute the final agreement, entered into in full and final settlement of all mutual claims, in accordance with Article 1965 of the Italian Civil Code, and constitute the express, final and irrevocable waiver of all Disputes (including the Proceedings and any rights related to the Disputes and the Proceedings)*" {C/8T/5–6}.

[28] Clause 3.1 of the Dexia Settlement Agreement is in similar/identical terms {C/7T/5}.

[29] Clause 3.2 of the DB Settlement Agreement: Brescia "*definitive and irrevocably waives … to challenge the validity and effectiveness of the* [Transactions] *entered into with DB, as well as their full compliance with applicable laws and regulations*" and "*also definitively and irrevocably waives, also in accordance with Articles 1971 and 1972 of the Italian Civil Code, any Dispute intended to establish the nullity or to request the annulment or, in any event, to establish the invalidity of the* [Transactions], *declaring in that regard to have already considered all potential cases that, if were grounded, could have caused the invalidity of the* [Transactions]" {C/8T/6}.

[30] Clause 3.2 of the Dexia Settlement Agreement is in similar/identical terms {C/7T/5}.

[31] Clause 5.2(a) of the DB Settlement Agreement: "*the [Transactions] are effective and binding from the time of their subscription … under all relevant Italian laws and regulations that may be applicable, including, but not limited to, Law No. 448/2001, Ministerial Decree No. 389/2003, Explanatory Ministerial Circular of the Ministry of Economy and Finance of 27 May 2004 published in the Official Journal No. 128 of 3 June 2004, the Circular of the Ministry of Economy and Finance of 28 June 2005, Legislative Decree No. 58/1998, Consob Regulation No. 11522/1998, with which waives any claim with regards to the existence of any element of deformity and that it will continue to timely and correctly perform them until the relevant contractual deadline*" {C/8T/8}. See also clause 5.2(f) of the DB Settlement Agreement {C/8T/8} specifically in relation to compliance with Article 41 (which is part of Law no. 448/2001).

	June 2005, Legislative Decree No. 58/1998 and CONSOB Regulation No. 11522/1998[32]
(e) the Defendant agreed that, when entering into the Transactions, it had assessed whether the Transactions satisfied its investment objectives without relying on any oral or written communication from the Claimant and without treating any such communication as advice or a recommendation (f) the Defendant agreed that, when entering into the Transactions, it was able to evaluate and understand, and the Defendant did in fact evaluate, understand and accept, the terms, conditions and risks of the Transactions[33]	l. the Defendant represented and warranted that, when entering into the Transactions, it had assessed their compliance with its investment objectives without any reliance on any oral or written communication received from the Claimant, without treating any such communication as advice or a recommendation, and being able to evaluate and understand, as it had in fact evaluated, understood and accepted, the terms, conditions and risks of the Transactions[34]
(g) the Defendant agreed that it had received a copy of the Settlement Agreement before signing it, had read it carefully and fully understood the contents thereof, and, when entering into the Settlement Agreement, it was fully able to understand and evaluate, and had in fact understood and evaluated the characteristics, conditions and effects of the Settlement Agreement independently and/or with the assistance of its trusted legal and financial advisers[35]	r. the Defendant represented and warranted that it had received a copy of the Settlement Agreement before signing it, had read it carefully and fully understood the contents thereof, was fully able to understand and evaluate, and had in fact understood and evaluated the characteristics, conditions and effects of the Settlement Agreement independently and/or with the assistance of its trusted legal and financial advisers[36]
(h) the Defendant agreed that any measure or resolution taken by the Defendant in relation to the signing of the Settlement Agreement and the Transactions had been taken or made solely based on the Defendant's own consideration and assessment, made independently and/or with the assistance of their trusted legal and financial advisers, and without placing any reliance on any oral or written communication from the Claimant[37]	p. the Defendant represented and warranted that any measure or resolution taken in relation to the entry into and execution of the Settlement Agreement and the Transactions had been taken or made solely based on the Defendant's own considerations and assessments, made independently and/or with the assistance of

[32] Clause 5.2(b) of the Dexia Settlement Agreement {C/7T/8} is in similar/identical terms to Clause 5.2(a) of the DB Settlement Agreement, as extracted in the preceding footnote. See also clause 5.2(a) of the Dexia Settlement Agreement, which is in similar/identical terms to clause 5.2(f) of the DB Settlement Agreement (i.e. in relation to compliance with Article 41 specifically).

[33] Clause 5.2(c) of the DB Settlement Agreement: "… *for the purpose of subscribing to the* [Transactions], [Brescia] *assessed their compliance with its investment objectives without making any reliance on any oral or written communication received from DB, without interpreting any oral or written communication received by DB as an advice or investment recommendation, being able to evaluate and understand, as it has in fact evaluated, understood and accepted, the terms, conditions and risks thereof*"{C/8T/8}

[34] Clause 5.2(f) of the Dexia Settlement Agreement {C/7T/8}, which is in similar/identical terms to clause 5.2(c) of the DB Settlement Agreement, as extracted in the preceding footnote.

[35] Clause 5.2(j) of the DB Settlement Agreement: "[Brescia] *received a copy of this Agreement, including the attachments, before signing it, it has read it carefully, and has fully understood the contents thereof, is fully able to understand and evaluate, and has in fact understood and evaluated the characteristics, conditions and effects of this Agreement independently and/or with the assistance of its trusted legal and financial advisors…*" {C/8T/9}.

[36] Clause 5.2(m) of the Dexia Settlement Agreement {C/7T/9}, which is in similar/identical terms to clause 5.2(j) of the DB Settlement Agreement, as extracted in the preceding footnote.

[37] Clause 5.2(i) of the DB Settlement Agreement: "*any measure or resolution taken in relation to the signing of the present Agreement, the Mandate, the* [Transactions] *and more generally the refinancing transactions made through the issue of the Bonds, has been taken or made solely based on* [Brescia's] *own considerations and*

	their trusted legal and financial advisors, irrespective of any oral or written communication received from the Claimant[38]
(i) the Defendant agreed that any such measures or resolutions had been adopted by its competent bodies in accordance with all applicable laws and regulations and all procedures, obligations or actions required for their adoption and the Defendant had taken all the administrative measures necessary to obtain the authorisation to sign the Settlement Agreement[39]	t. the Defendant represented and warranted that, when signing the Settlement Agreement (i) it had taken all the administrative measures necessary to obtain the authorisation to sign the Settlement Agreement (including presidential decree no. 201/2017 of 18 September 2017), (ii) it had complied with all applicable laws and regulations, as well as any procedure, obligation or action required for the adoption of those measures, (iii) the Manager signing the Settlement Agreement (and any other transaction or document entered into in connection with, or as a result of the Settlement Agreement) had all necessary powers in accordance with the applicable laws and internal rules the Defendant, and (iv) also in accordance with Article 41, paragraph 2-bis and 2-ter of Law No. 448/2001 and Article 62, paragraph 7, of Law Decree No. 112/2008, as converted and amended, before the signing of the Settlement Agreement the Defendant had submitted a draft of the Settlement Agreement and its annexes and the documentation referred to in it to the Italian Ministry of the Economy and Finance and provided a copy of that communication to the Claimant[40]

assessments, made independently and/or with the assistance of their trusted legal and financial advisors, irrespective of any oral or written communication received from DB" {C/8T/9}.

[38] Clause 5.2(l) of the Dexia Settlement Agreement {C/7T/9}, which is in similar/identical terms to clause 5.2(i) of the DB Settlement Agreement, as extracted in the preceding footnote.

[39] Clause 5.2(i) of the DB Settlement Agreement: "*These measures and resolutions have been adopted by the competent bodies in accordance with all applicable laws and regulations and all the procedures, obligations or actions required for their adoption…*" {C/8T/9}. Clause 5.2(k) of the DB Settlement Agreement: "*when signing this Agreement* [Brescia] *(i) has taken all the administrative measures necessary to obtain the authorisation to sign this Agreement…*" {C/8T/9}.

[40] Clause 5.2(o) of the Dexia Settlement Agreement: "*when signing this Agreement: (i)* [Brescia] *has taken all the administrative measures necessary to obtain the authorisation to sign this Agreement, including presidential decree no. 201/2017 of 18 September 2017…; (ii)* [Brescia] h*as complied with all applicable laws and regulations, as well as any procedure, obligation or action required for the adoption of the measures; (iii) the Manager signing this Agreement and any other transaction or document entered into in connection herewith, or as a result of this Agreement, has all necessary powers in accordance with the applicable laws and internal rules* [of Brescia]*; (iv) also in accordance with Article 41, paragraph 2-bis and 2-ter of Law No. 448/2001 and Article 62, paragraph 7, of Law Decree No. 112/2008, as converted and amended, before the signing of this Agreement* [Brescia] *has submitted a draft of this Agreement and its annexes and the documentation indicated in the premises to the MEF and a copy of that communication to Dexia;"* {C/7T/9}.

(k) the Defendant agreed that it had independently assessed the costs and financial benefits deriving from the Settlement Agreement and had verified that it met the criteria of advisability and of financial benefit[41]	u. the Defendant represented and warranted that it had independently assessed the costs and financial benefits deriving from the Settlement Agreement and had verified that it met the criteria of advisability and of financial benefit[42]
(m) the Defendant agreed that the Claimant had provided the Defendant with all required information in relation to the Transactions under the applicable legal and regulatory provisions and in compliance with any pre-contractual and post-contractual obligations imposed by those provisions relating to the structuring, negotiation, execution and performance of the Transactions, including with respect to the payments the Defendant would have to make[43]	o. the Defendant represented and warranted that the Claimant had provided it with all the required information under the applicable legal and regulatory provisions and in compliance with any pre-contractual and post-contractual obligations imposed by these legal and regulatory provisions relating to the structuring, negotiation, execution and performance of the Transactions, including with reference to any disclosure obligations relating to the payments that the Defendant would have to make in connection to the Transactions[44]
(n) the Defendant agreed that it was fully aware of, and expressly accepted, the fact that any event that modifies the economic conditions of the Settlement Agreement or renders the reasons that led to the signing of the Settlement Agreement unfounded cannot be invoked to question the validity or effectiveness of the Settlement Agreement itself[45]	s. the Defendant represented and warranted that it was fully aware, and expressly accepted, that any event which modifies the economic conditions of the Settlement Agreement or supersedes the reasons which lead to its signing may not be invoked to challenge its validity and effectiveness[46]
N/A	a. the Defendant acknowledged and agreed that the Transactions (defined in the Settlement Agreement as the Swaps) are valid, binding, effective and enforceable from the date they were signed under English law and in full compliance with all applicable Italian laws and regulations[47]
N/A	d. the Defendant acknowledged that nothing in the Settlement Agreement shall affect or render invalid in any way the payments that have been made or will be

[41] Clause 5.2(l) of the DB Settlement Agreement: "*It has independently assessed the costs and financial benefits deriving from the Agreement and has verified that it this meets the criteria of advisability and of financial benefit*" {C/8T/9}.

[42] Clause 5.2(p) of the Dexia Settlement Agreement {C/7T/9}, which is in similar/identical terms to clause 5.2(l) of the DB Settlement Agreement, as extracted in the preceding footnote.

[43] Clause 5.2(h) of the DB Settlement Agreement: "*DB has provided* [Brescia] *with all the required information under the applicable legal and regulatory provisions and in compliance with any pre-contractual and post-contractual obligations imposed by these legal and regulatory provisions relating to the structuring, negotiation, execution and performance of the* [Transactions]*, including with reference to any disclosure obligations relating to the payments that* [Brescia] *would have to make in connection with the* [Transactions]" {C/8T/9}.

[44] Clause 5.2(k) of the Dexia Settlement Agreement {C/7T/9}, which is in similar/identical terms to clause 5.2(h) of the DB Settlement Agreement, as extracted in the preceding footnote.

[45] Clause 5.2(j) of the DB Settlement Agreement: Brescia agreed "*to be fully aware, and expressly accept, the fact that any event that modifies the economic conditions of the Agreement or renders the reasons that led to its signing unfounded, cannot be invoked to question the validity and effectiveness of the Agreement itself*" {C/8T/9}.

[46] Clause 5.2(n) of the Dexia Settlement Agreement {C/8T/9}, which is in similar/identical terms to clause 5.2(j) of the DB Settlement Agreement, as extracted in the preceding footnote.

[47] See Clauses 2.1 and 3.2 of the Dexia Settlement Agreement {C/7T/4–5}.

	made pursuant to the Transactions, both before and after the execution of the Settlement Agreement;[48]
	e. the Defendant acknowledged that, without prejudice to the validity and effectiveness of the parties' obligations in relation to the performance required under the Transactions, the ISDA Master Agreement will remain in full force and effect;[49]
N/A	j. the Defendant represented and warranted that the Transactions have not caused any damage, of whatsoever nature, to be borne by the Defendant and that no responsibility of whatsoever kind may be charged to the Claimant with reference to the Transactions[50]
	k. the Defendant represented and warranted that it would continue to give the Transactions timely and correct execution until the maturity date provided by the Transaction Documents, irrevocably waiving any right or claim to which it hypothetically has right in relation to the Transaction Documents[51]
N/A	w. the Defendant agreed that the Settlement Agreement contains the entire agreement and any written or oral arrangements reached between the parties in relation to the subject thereof, and declared that, in entering into the Settlement Agreement, it had not relied on representations, written or oral, warranties or other assurances (except as provided in the Settlement Agreement), and waived all of its rights and remedies in this regard[52]
(21) The New Italian Proceedings were commenced by the Defendant against the Claimant in breach of clauses 3.1 and 3.2 of the Settlement Agreement and the Claimant is entitled to damages in respect of all loss and damage incurred by the Claimant arising out of or as a result of the commencement of the New Italian	(27) The New Italian Proceedings were commenced by the Defendant against the Claimant in breach of clauses 3.1 and 3.2 of the Settlement Agreement and the Claimant is entitled to damages in respect of all loss and damage incurred by the Claimant arising out of or as a result of the commencement of the New Italian

[48] See Clause 2.3(a) of the Dexia Settlement Agreement: "*nothing in this Agreement shall affect or render invalid in any way the payments that have been made or will be made pursuant to the* [Transactions]*, before and after the Signing Date*" {C/7T/5}.

[49] See Clause 2.3(b) of the Dexia Settlement Agreement: "*Without prejudice to validity and effectiveness of the obligations of the Parties in relation to the performance required under the* [Transactions]*, the* [Master] *Agreement will remain in full force and effect*" {C/7T/5}.

[50] See Clause 5.2(c) of the Dexia Settlement Agreement: "*the* [Transactions] *have not determined any damage, of whatsoever nature, to be borne by* [Brescia] *and that no responsibility of whatsoever kind may be charged to Dexia with reference to the* [Transactions]" {C/7T/}.

[51] See Clause 5.2(d) of the Dexia Settlement Agreement: "[Brescia] *will continue to give the* [Transactions]*, timely and correct execution until the maturity date provided by contract, irrevocably waiving any right or claim to which it hypothetically has right in relation to the debt restructuring transactions, the Bonds, the Mandate and the* [Transactions]" {C/7T/8}.

[52] See Clause 8.3 of the Dexia Settlement Agreement: "*Each Party hereby confirms that this Agreement contains the entire agreement and any written or oral arrangements reached between the Parties in relation to the subject thereof. Each Party declares that, in subscribing to this Agreement, it has not relied on representations, written or*

oral, warranties or other assurances (except as provided in this Agreement) and waives all rights and remedies as may be available to it in this regard" {C/7T/11}.

Proceedings, including but not limited to legal fees incurred in respect of the New Italian Proceedings and the present proceedings[53]	Proceedings, including but not limited to legal fees incurred in respect of the New Italian Proceedings and the present proceedings[54]

[53] See footnotes 27 and 29 above.
[54] See footnotes 28, 30, 47 and 50 above.

Annex 2: Sources of Evidence on Italian law declarations

Relevant Italian Law	**Declaration sought by the Bank**	**References to Italian Law Report**	**References to cases cited in Banks' CEA Notices**	**Equivalent Declaration in *Busto / Pesaro / Catanzaro***
Article 119(6) of the Italian Constitution {F/3T/4}, which permits Italian local authorities to "*resort to indebtedness only as a means of funding investments*".	DB Declaration 14B(a) and Dexia Declaration 19(a)	§64–84 {B/5/22–30}	*Venice* [196]–[197] [205]–[213] [222]–[267] {AB/5/59–60, 63–67, 69–86} *Venice CA* [159]–[166] [170]–[174] {AB/6/47–51} *Busto* [173]–[265] [275]–[280] [305]–[306] [325]–[342] {AB/7/44–60, 62–63, 66–67, 70–73} *Pesaro* [89]–[97] {AB/4/27–29} *Catanzaro* [75]–[76] [80–95] {AB/7/18–23}	*Pesaro*: "*… the Transactions were entered into in conformity with (a) Article 119(6) of the Italian Constitution…*" *Catanzaro*: "*The Transaction was entered into in conformity with, to the extent they are applicable to the Transaction, (i) Article 119(6) of the Italian Constitution; …"*
Article 41 of Law no. 448/2001 {F/8T}, i.e. the so-called requirement of "*economic convenience*" for Italian local authorities incurring new indebtedness.	DB Declaration 14B(b) and Dexia Declaration 19(aa)	§85–100 and 158–164 {B/5/30–37, 61–62}	*Busto* [307]–[316] {AB/7/67–69} *Prato* [163]–[181] (Walker J) {AB/1/34–40} and [68]–[118] (Court of Appeal) {AB/2/14–23} *Pesaro* [102]–[118] {AB/4/30–37} *Catanzaro* [75]–[76] [100]–[103] [105] {AB/7/18, 25–26}	*Pesaro*: *"… the Transactions were entered into in conformity with … (b) Article 41 of Law no. 448/2001…*" *Catanzaro*: "*The Transaction was entered into in conformity with, to the extent they are applicable to the Transaction, … (ii) Article 41 of Italian Law number 448 of 2001; …*"
Decree 389/2003 {F/10T} and the Explanatory Circular of the Ministry of Economy and Finance of 27 May 2004 {F/12T}, which sets out the derivative transactions into which local authorities are permitted to enter.	DB Declarations 7 and 14B(c) and Dexia Declarations 11 and 19(b)	§101–110 {B/5/37–42}	*Venice* [343]–[350] {AB/5/112–114} *Busto* [307]– [316] {AB/7/67–69} *Prato* [183]–[190] (Walker J) {AB/1/40–42}	*Pesaro*: "*… the Transactions were entered into in conformity with … (c) Article 3 of Decree no. 389 of 1 December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and published in the Official Gazette no. 28 of 4 February 2004; (d) Circular of the Ministry of Economy and*

Relevant Italian Law	**Declaration sought by the Bank**	**References to Italian Law Report**	**References to cases cited in Banks' CEA Notices**	**Equivalent Declaration in *Busto / Pesaro / Catanzaro***
			Pesaro [102]–[118] {AB/4/30–37} *Catanzaro* [75]–[76], [100]–[104] {AB/7/18, 25–26}	*Finance of 27 May 2004…"* subject to the caveat as to Article 3(2)(d) for the reasons given in the judgment at [115]–[116] {AB/4/36–37} (which has been overtaken by *Venice CA*) *Catanzaro*: "*The Transaction was entered into in conformity with, to the extent they are applicable to the Transaction, … (iii) Article 3 of Italian Ministerial Decree number 389 of 2003 (including as interpreted by the Circular dated 27 May 2004 issued by the Italian Ministry of Economy and Finance); …*"
Circular of the Italian Ministry of Economy and Finance of 28 June 2005 {F/14T}, which sets out analogous requirements to Article 41 in the context of the conversion of liabilities with amortising costs imposed on the State	DB Declaration 14B(d) and Dexia Declaration 19(c)	§111–112 {B/5/42–43}	This point has not been considered in previous English cases.	This relief has not been sought in previous English cases.
Article 1(736) of Law no. 296/2006 {F/15T} (including as interpreted by the Circular dated 31 January 2007 issued by the Italian Ministry of Economy and Finance {F/16T}), which requires that derivative contracts should be oriented towards the reduction of the final cost of the debt and exposure to market risks.	DB Declaration 14B(e) and Dexia Declaration 19(ca)	§113–115 {B/5/43–45}	*Catanzaro* [100]–[103] [106] {AB/7/18, 25–26}	*Catanzaro*: "*The Transaction was entered into in conformity with, to the extent they are applicable to the Transaction, … (v) Article 1(736) of Italian Law number 296 of 2006 (including as interpreted by the Circular dated 31 January 2007 issued by the Italian Ministry of Economy and Finance).*"
Article 30(15) of Law no. 289/2002 {F/9T}, which provides that contracts entered into in breach of Article 119 of the	DB Declaration 14B(f) and Dexia Declaration 19(a)	§71 {B/5/24–25}	See Article 119(6) above (as Professor Rimini explains in the paragraph cited, Article 30(15) is parasitic on a breach of Article	*Pesaro*: "*…the Transactions were entered into in conformity with … (f) Article 30(15) of Law no.289/2002.*"

Relevant Italian Law	**Declaration sought by the Bank**	**References to Italian Law Report**	**References to cases cited in Banks' CEA Notices**	**Equivalent Declaration in *Busto / Pesaro / Catanzaro***
Italian Constitution "*shall be null and void*".			119, so it will have been complied with if Article 119 has been).	*Catanzaro*: "*The Transaction was entered into in conformity with, to the extent they are applicable to the Transaction, … (iv) Article 30(15) of Italian Law number 289 of 2002;…"*
Articles 1703, 1710 and 1711 of the Italian Civil Code {F/2T/2–3}, which are the provisions of the civil code that deal with agency relationships in a mandate context	DB Declaration 14B(g) and Dexia Declaration 19(f)	§143–157 {B/5/56–60}	This point has not been considered in previous English cases.	This relief has not been sought in previous English cases.
Article 42 of the Legislative Decree no. 267/2000 (TUEL) {F/7T/1–2}, which Brescia argues required the City Council to approve the entry into the Transactions and the Settlement Agreements.	DB Declaration 14B(h) and Dexia Declaration 19(g)	§47–53, 173–{B/5/18–19, 66–203}	*Venice* [304]–[317] {AB/5/100–105} *Busto* [317]–[364] [367]–[386] {AB/7/69–80} *Pesaro* [100]–[101] {AB/4/29–30}	*Pesaro*: "*… the Transactions were entered into in conformity with … (e) Article 42 of the Local Entities Act (Testo Unico Enti Locali) …*"
Article 31 of Italian Regulation number 11522 of 1 July 1998 issued by CONSOB {F/5T}, which provides that certain Consob regulations will not apply to professional investors.	DB Declaration 13 and Dexia Declaration 15	§165–172 {B/5/63–66}	*Busto (Consequentials)* [42]–[44] {AB/3.1/9}	*Busto*: "*Prior to and when entering into the Transactions, the Defendant had a specific expertise and experience in transactions having as an object financial investments and thereby it is and was at all material times a professional investor (operatore qualificato) pursuant to Article 31 of Regulation no.11522 of 1 July 1998 issued by Consob."* *Catanzaro*: "*Prior to and when entering into the Transaction, the Defendant had specific expertise and experience in transactions having as an object financial investments and therefore was at all material times a professional investor (operatore qualificato) pursuant to Article 31 of Italian Regulation number 11522 of 1 July 1998 issued by CONSOB by virtue of the specific declaration*

Relevant Italian Law	**Declaration sought by the Bank**	**References to Italian Law Report**	**References to cases cited in Banks' CEA Notices**	**Equivalent Declaration in *Busto / Pesaro / Catanzaro***
				delivered to the Claimant… when entering into the Transaction"
Article 1972 of the Italian Civil Code {F/2T/3–4}, which sets out the rules for settlement agreements dealing with illicit contracts and null and void contracts where one party was unaware of the reason for the nullity	DB Declarations 16 and 20(b) and Dexia Declarations 20 and 24(f)	§204–213 {B/5/77–81}	This point has not been considered in previous English cases.	This relief has not been sought in previous English cases.
Article 1965 of the Italian Civil Code{F/2T/3}, which sets out the requirement for consideration for a settlement agreement	DB Declarations 16 and 20(a) and Dexia Declarations 20 and 24(b)	§214–220 {B/5/81–83}	This point has not been considered in previous English cases.	This relief has not been sought in previous English cases.