Neutral Citation Number: [2017] EWHC 1013 (Comm) Claim No: CL-2016-000349

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Date: 5 May 2017

B e f o r e :

HIS HONOUR JUDGE WAKSMAN QC

(sitting as a Judge of the High Court)

DEUTSCHE BANK AG

Claimant/Respondent

- and –

COMUNE DI SAVONA

Defendant/Applicant

Jonathan Davies-Jones QC and Christopher Burdin (instructed by Seddons, Solicitors) for the Defendant/Applicant

Sonia Tolaney QC, Rupert Allen and Andrew Lodder (instructed by Allen & Overy LLP, Solicitors) for the Claimant/Respondent

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Hearing dates: 22 and 23 March 2017

INTRODUCTION

1. This application is a yet further instance of the litigation between Italian local authorities and banks or other financial institutions with whom they have entered into substantial swap or derivative transactions. In this case, the Applicant and Defendant to the proceedings here, Comune di Savona ("Savona") seeks to strike out part of the claim made against it by Deutsche Bank AG London ("DB") for a series of negative declarations and to stay the balance of the proceedings pending the decision of the Court of Appeal in the case of *Dexia Crediop v Comune di Prato* [2015] EWHC 1746, which was heard at first instance by Walker J ("*Prato"*).

2. In this case, Savona entered into two interest rate swaps with DB ("the Swaps") pursuant to an ISDA Master Agreement dated 6 June 2007 ("the Master Agreement") and confirmations dated 14 June 2007. The claim brought by DB here was issued on 3 June 2016 with Particulars of Claim dated 30 September 2016. It was made as a result of it becoming aware of a review of the Swaps made by the Court of Auditors for the Liguria Region on 18 April 2016 which was critical of them and the basis on which DB had recommended them. It appeared to presage the possibility of proceedings being brought against DB in Italy. Those proceedings have, eventually, emerged in the form of a Writ issued by Savona against DB on 9 February 2017 which was served on 8 March 2017 i.e. shortly before this application (made on 12 December 2016) was to be heard ("the Italian Claim"). Accordingly, at the time when DB's claim was issued here, the precise form and shape of any Italian proceedings was unknown.

3. The Italian Claim, however, having now been made, provides the appropriate context in which to consider the nature of the dispute in respect of which the negative declarations are sought.

4. Prior to the making of the Master Agreement DB and Savona had entered into a written agreement dated 22 March 2007 known as the "Convention" by which DB agreed to provide, for no consideration, certain advice and assistance in respect of Savona's existing derivative commitments and in relation to the restructuring of its present debts.

5. The Convention is governed by Italian law and contained an exclusive jurisdiction clause in favour of the Italian Court ("the Italian Clause"). The Master Agreement also contained an exclusive jurisdiction clause in favour of the English Court in the familiar ISDA standard form ("the English Clause"). Savona's application therefore raises the stark question as to whether the dispute between the parties to which the challenged negative declarations are to be seen to relate falls within the English or the Italian Clauses and the answer to that question will dictate whether the English Court has jurisdiction for the purpose of Article 25 of the Recast Brussels Regulation.

THE ITALIAN CLAUSE

6. It is common ground that prior to the making of the Convention, DB was already reviewing Savona's derivative investments and commitments. I refer to the relevant parts of the Convention below, save for the jurisdiction clause which states as follows:

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

7. There is a debate before me as to the extent to which the Convention imposed advisory obligations upon DB in respect of the Swaps later entered into. To the extent necessary, I shall deal with that dispute below.

THE ENGLISH CLAUSE

8. Clause 13 of the Master Agreement provides as follows:

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

9. There are also a number of other relevant terms in the Master Agreement which form the basis for the declarations sought by DB and so are referred to below.

THE ENGLISH CLAIM

10. This seeks the following 12 negative declarations. In respect of each of them, I have cited in bold square brackets the term of the Master Agreement which forms the basis for that declaration, save for declaration (12) which, it is accepted, is not to be found in any particular contractual provision.

> "(1) The Defendant's obligations under the Transaction Documents constituted and constitute its legal, valid and binding obligations enforceable in accordance with their terms; **[3 (a) (v)]** and/or
>
> (2) The Defendant has and at all material times had complied in all material respects with all applicable laws if failure so to comply would materially impair its ability to perform its obligations under the Transaction Documents; **[4 (c)]** and/or
>
> (3) The Defendant has and at all material times had the power to execute and deliver the Transaction Documents and to perform its obligations under the Transaction Documents and it has and had at all material times taken all necessary action and made all necessary determinations and findings to authorise such execution, delivery and performance; **[3 (a) (ii)]** and/or
>
> (4) The execution and delivery of and the performance of its obligations under the Transaction Documents by the Defendant does not and did not at any material time violate or conflict with any law applicable to the Defendant; **[3 (a) (iii)]** and/or
>
> (5) The Transactions were entered into in conformity with Decree no 389 of 1 December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and the Ministry of Interior and published in the Official Gazette no 28 of 4 February 2004; **[3 (g) (6)]** and/or
>
> (6) The Transaction Documents constituted and constitute the entire agreement and understanding of the parties with respect to their subject matter and supersede all oral communication and prior writings with respect thereto; **[9 (a)]** and/or
>
> (7) In entering into the Transactions, the Defendant was acting for its own account and had made its own independent decisions to enter into the Transactions and as to whether the Transactions were appropriate or proper for it based upon its own judgement and upon advice from such advisers as it had deemed necessary; **[3 (h) (i)]** and/or
>
> (8) In entering into the Transactions, the Defendant did not rely on any communication (written or oral) of the Claimant as investment advice or as a recommendation to enter into the

Transactions, it being understood that (i) information and explanations related to the terms and conditions of the Transactions would not be considered to be investment advice or a recommendation to enter into the Transactions, and (ii) no communication (written or oral) received from the Claimant would be deemed to be an assurance or guarantee as to the expected results of the Transactions; **[3 (h) (i)]** and/or

(9) 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 Transactions and the Defendant was capable of assuming and assumed the risks of the Transactions; **[3 (h) (ii)]** and/or

(10) The Claimant did not act as a fiduciary for or an advisor to the Defendant in respect of the Transactions; **[3 (h) (iii)]** and/or

(11) The Transactions were entered into by the Defendant for the purposes of managing its borrowings or investments and not for the purposes of speculation; **[3 (g) (i)]** and/or

(12) The Claimant has to date complied with and/or discharged each and all of its relevant obligations arising out of or in connection with the Transactions (including, for the avoidance of doubt, any obligations arising prior to the execution of any of the Transaction Documents as a result of pre-contractual negotiations between the Claimant and the Defendant or otherwise) and accordingly the Claimant has not caused and/or is not liable to the Defendant (whether in or pursuant to contract, tort, statute or otherwise) in respect of any loss or damage arising out of or in connection with the Transactions which may have been suffered or incurred by the Defendant."

11. The terms underlying declarations (3), (5) and (7) to (11) were all amendments to the standard form of Master Agreement.

12. Savona does not contest the English Court's jurisdiction in respect of declarations (1) to (5) and (11). The broad reason for this is that Savona accepts that questions as to the formal validity of the Swaps or as to whether it had the legal capacity to enter into them fall within the English Clause. It has contested jurisdiction in respect of the other declarations. However, in the case of declaration (6) this is, in my judgment, no more than the usual entire agreement clause designed to exclude collateral warranties and the like. It does not seek to exclude claims for misrepresentation or negligent advice and on that basis, as I understand it, Savona is content now not to maintain its jurisdictional challenge. As I also understand it, DB agrees with my characterisation of that clause. Accordingly, I need say no more about it.

13. Therefore, the declarations in issue are those numbered (7)-(10) and (12). I should add finally that DB concedes that any claim for breach of the express provisions of the Convention made against it by Savona is within the Italian and not the English Clause.

14. It is common ground that a claim for negative declaratory relief can fall within an exclusive jurisdiction clause just like any other. The difference between such a claim and one which advances a positive case and relief, for example, a financial remedy, is the practical one which is that, in the latter case, the actual dispute between the parties is normally obvious. In the former case, it is not, which is why the existence of the Italian Claim is important because it provides the context in which the declarations, or some of them, might be deployed.

THE ADVISORY SCOPE OF THE CONVENTION

Introduction

15. DB contends that upon a proper analysis, the Convention has little or no application as far as any advice by DB to Savona to enter into the Swaps, or about them, is concerned. This is because, it is said, the Convention does not impose any advisory obligations in that regard. If that contention is correct, it would be likely to have a significant impact on what the true scope of the present dispute really is. Indeed, it is clear that this contention is the driver for many of DB's later submissions.

16. The Convention is governed by Italian law and must be interpreted according to it. Both sides have adduced what is said to be expert evidence on Italian law, Savona by Prof Antonella Sciarrone Alibrandi, and DB by Mr Giuseppe Danusso. Much of the focus of their evidence has been on the scope of the Italian Clause and some observations about the Italian Claim. That said, Mr Danusso says in paragraph 18 of his witness statement that in his view the Convention contained no advisory obligations on DB insofar as any swaps were concerned. In argument, both sides made their submissions as if there was no material difference between the English and Italian law of contractual construction (which in this regard is probably correct).

17. The material terms of the Convention read as follows (with added paragraph numbering) in translation:

> "Agreement between the Municipality of Savona and Deutsche Bank AG for the preparation and setting of operations of active management of the debt and for the provision of *rating advisory* services.
>
> (1) SUBJECT OF THE AGREEMENT
>
> The municipality of Savona (the "Municipality") entrusts in a non-exclusive way Deutsche Bank AG (the "Bank") as *advisor* for the provision and setting of operations of active management of the debt of the Municipality (the Agreement), included the provision of support and advice with regard to the following activities:
>
> **(a)** Analysis of the debt situation of the Municipality;
>
> **(b)** advice for the active management of the debt of the Municipality, with the aim of identifying from time to time the financial instruments more appropriate for optimizing this management and the most efficient forms of debt;
>
> **(c)** Identification of the financial instruments, including derivatives, appropriate for the Municipality, and analysis of the costs and benefits connected to the choice of different financial instruments, as well as their placement on the market;
>
> **(d)** Support in the structuring and predisposition of bond issuances and related financial operations, or hedging of related risks, and placement on the market;
>
> **(e)** Support in structuring and preparing potential derivatives operations and related placement on the market;
>
> **(f)** Preparation of contractual documentations related or in any case connected to the different operations -carried out by the Municipality from time to time, also in collaboration with legal and/or financial advisers of the Municipality;
>
> **(g)** advice for the identification of financial instruments, suitable for an active management of the liquidity of the Municipality;
>
> **(h)** Assistance as rating advisor, even with the potential support of other companies belonging to the same Banking group, for the procedures needed for attributing a credit rating to the Municipality, included any assistance in the relations with rating agencies and the predisposition of a rating book;
>
> **(i)** Transferring all technical expertise through courses to be held in our legal offices or in the Municipality legal office, and through informative material to be provided to the employees of the

Municipality, in order to allow them to autonomously monitor and examine the portfolio and every new proposal;

(j) Access to the publications made by the corresponding research departments of the Bank.

(2) IMPLEMENTATION OF THE AGREEMENT

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

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

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

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

(3) DECLARATIONS MADE BY THE MUNICIPALITY

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

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

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

(4) FEES AND EXPENSES

(a) No remuneration is provided for the performance of the Agreement;..

(5) INFORMATIVE DUTIES ON BEHALF OF THE MUNICIPALITY...

(6) MUNICIPALITY'S DUTY OF CONFIDENTIALITY

(a) Every opinion, advice and *memorandum* supplied by the Bank, or third parties on behalf of it, in the implementation of the activities covered by this Agreement are to be considered at the exclusive benefit and use of the Municipality, for the purpose of any potential operation that the Municipality will be willing to enter into in the frame of this agreement ...

(7) BANK'S DUTY OF CONFIDENTIALITY...

(8) LENGTH OF THE AGREEMENT

(a) This Agreement has been conferred in a non-exclusive way until 31/12/2008....

(9) BANK'S RESPONSIBILITIES

The Bank's responsibility towards the Municipality with regard to the activities covered by this agreement is limited to losses, damages or liability: (i) judicially ascertained with definitive judgement and (ii) due to wilful misconduct or gross negligence (a) in the implementation of the agreement, to be assessed according to the professional due care requested of the Bank with regards to the bank's duty of professional diligence or (b) in case of the Bank's breach of the regulation applicable to it...."

Analysis

Paragraph (1) – Subject of the Agreement

18. Here, DB is described as "advisor" for the provision and setting of operations of the active management of Savona's debt, including support and advice in respect of the activities set out in the sub-paragraphs. Sub-paragraph (b) is especially important and effectively

says that DB is entrusted with recommending the most appropriate financial instrument for managing the debt. Sub-paragraph (c) equally refers to advice concerning the appropriate financial instrument (including derivatives) for Savona. Sub-paragraph (g) again refers to advice for the identification of financial instruments.

19. Pausing there, it is plain from paragraph (1) that DB was required to advise on the most appropriate way to manage the debt which included advising on the most appropriate financial instrument for Savona to enter into. That, of course, reflected the previous tender invitations requesting a bank to do just that, in a context where the existing Dexia swap was considered too expensive.

Paragraph (2) - Implementation of the Agreement

20. Sub-paragraph (b) makes clear that Savona is not bound to follow DB's suggestions and in any event any proposed transaction had to be specifically approved and would be the subject of a separate contract. In argument, much was made of this clause as if it showed that DB had no advisory role at all. I disagree. All it meant was that Savona had to authorise the transaction proposed and its particular terms. Obviously, this would be in a separate contract since the Convention did not purport to contain the detail of all possible financial instruments, nor could it. But that fact does not in any way alter the role of DB as advising upon the appropriate investment in the first place.

21. Nor does sub-paragraph (c) assist DB because the qualification about, for example, legal or tax advice (which is to be expected) does not apply to "financial advice" which is what the recommendation of appropriate investments is all about.

Paragraph (3)

22. As to sub-paragraph (a), it is clear that something has gone wrong with the translation here. I think that it should read something like "Every initiative and decision of the municipality to invest is deemed to be not relying on any written or oral notice received from the bank…" This is reflective of a similar contractual term to be found in paragraph 3 (h) of the Master Agreement. In other words, it is a purported contractual estoppel. The same is true of sub-paragraph (b).

23. To some extent, these provisions are inconsistent with the clear advisory obligation imposed by paragraph (1) and as purported contractual estoppels they will have to be evaluated in due course in connection with the Italian Claim (wherever that is litigated) under Italian law. What cannot be said at this stage, as DB seeks to do, is that this provision means that there is no advisory duty at all or even that there is a good arguable case that there is no such duty. That would simply fly in the face of the clear terms of paragraph (1).

Paragraph (6) - Municipality's Duty of Confidentiality

24. This is noteworthy simply because it refers to the "advices and opinions" of DB.

Paragraph (9) – Bank's responsibilities

25. This is of some significance because it restricts what would otherwise be DB's professional liability and it makes express reference to its duty of professional diligence. It clearly assumes that there would or might be an advisory liability; it is no answer to suggest, as DB does, that the advisory liability here is confined to DB's other role as Savona's ratings adviser. Paragraph (1) is in no way so limited. Paragraph (9) is also

important because it refers to "regulations" applicable to DB in this context. It is difficult to see that as being to anything other than TUF and Consob (see below).

Conclusion

26. Accordingly, and despite Mr Danusso's view, it is plain to me for present purposes that the Convention did impose clear advisory obligations on DB in respect of the entry by Savona into any putative swap albeit that there are also terms in the Convention seeking to qualify the legal consequences of any such advice. The effect of any such qualifications is a matter of Italian law for whichever court deals with it. Their existence is not such, for present purposes, as to mean that the advisory obligations otherwise clearly stated in the Convention simply disappear. Indeed, all I need to (and do) conclude at this stage is that DB cannot show a good arguable case to the effect that the Convention does not contain the requisite advisory role and duty. Further, and as will be seen below, the Italian Claim clearly relies upon the Convention in that way.

RELEVANT ITALIAN LAW PROVISIONS

27. Before characterising the nature and scope of the Italian Claim it is necessary to set out a collection of Italian law provisions. The first deal with the position of local authorities like Savona in respect of investments and financial commitments ("Administrative Provisions"). The second deals with the position of banks like DB, and other entities involved in investments or financial instruments ("Financial Provisions").

The Administrative Provisions

Article 41 of Law No. 448 of 28 December 2001

28. This provides as follows:

> "1. In order to contain the cost of debt and to monitor public finance developments, the Ministry of Economy and Finance coordinates access to capital markets of provinces, municipalities, unions of municipalities… as well as consortia of local authorities and regions. To this end, these entities regularly send data on their-financial situation to the Ministry. …
> 2. The bodies referred to in paragraph 1 may issue bonds with the reimbursement of capital in a lump sum on expiry, subject to the creation - at the moment of issuance - of a fund for amortizing the debt, or subject to the conclusion of swap contracts for the amortization of the debt. Without prejudice to the provisions in the relevant contractual agreements, the entities may provide for …refinancing conditions that allow a reduction of the financial value of the total liabilities to be paid by the bodies themselves…"

Ministerial Decree 389 of 1 December 2003

29. This was made pursuant to Article 41 of Law 448 and is headed "Rules on access to capital markets by…municipalities…"

30. Article 1, headed **"**Market access coordination" provides that:

> "Under article 41, paragraph 1, Law No 448 of December 28, 2001, the Ministry of Economy and Finance shall coordinate the access to capital markets of the institutions identified in paragraph 1. Coordination is limited to financing operations in the medium and long term, or securitizations of values equal to or exceeding 100 million euros…."

31. Article 3, headed "Derivative Transactions" then provides:

> "1. If borrowing transactions are in currencies other than the euro, coverage of the exchange rate risk must be provided through exchange rate swaps…
>
> 2. In addition to the transactions referred to in paragraph 1 of this article and article 2 of this decree, the following derivative transaction are also allowed:

> a) interest rate swap between two parties taking the commitment to regularly exchange interest flows connected to major financial market parameters according to the procedures, timing and conditions stated in the contract;…
>
> f) other derivative products aimed at restructuring debt, only if they do not have a maturity subsequent to that of the underlying liabilities. These operations are allowed when the flows received by the interested bodies are equal to those paid in the underlying liabilities and do not involve, at the time of their conclusion, an increasing profile of the present values of single payment flows, with the exception of a discount or premium to be paid at the conclusion of the transactions, not exceeding 1% of the notional of the underlying liabilities…"

The Financial Provisions

32. TUF stands for *Testo Unico della Finanza (Consolidated Finance Act).* Article 21 provides:

> "1. In providing investment and non-core services, authorised persons must:
> a) act diligently, fairly and transparently in the interests of clients and the integrity of the markets;
> b) acquire the necessary information from clients and operate in such a way that they are always adequately informed;
> c) organise themselves in such a way as to minimise the risk of conflict of interest and, where such conflicts arise, act in such a way as to ensure transparency and the fair treatment of clients;
> d) have resources and procedures, including internal control mechanisms, likely to ensure the efficient provision of services;
> e) carry out independent, sound and prudent management and make appropriate arrangements for safeguarding the rights of clients in respect of the assets entrusted to them."

Articles 26-30 of Consob Regulation

33. Consob stands for *"Commissione Nazionale per le Societa e la Borsa"* which is the public agency that supervises financial services in Italy. The Consob Regulation is secondary legislation that implements Article 21 TUF. Part II thereof is headed "Regulation of the Provision of Investment and non-core services and of collective asset management services". Article 26 deals with general rules of conduct including to operate so as to keep down the costs borne by investors and obtain the best possible result from each investment service taking into account the level of risk chosen by the investor. Article 27 deals with avoiding conflict of interest. Article 28 deals with communication of information between intermediaries and investors. Article 29 says that authorised intermediaries shall refrain from carrying out transactions on behalf of investors that are not suitable in terms of type object frequency or size.

34. It is common ground that the duties set out in Article 21 of TUF and subsequent standards (i.e. Consob) applied to intermediaries whether or not they were also advisers by reason of a separate prior engagement. However, Prof Sciarrone Alibrandi also opined in her second report (paragraph 9) that the Convention itself would fall within TUF. She does not there state expressly why that is but in argument it was pointed out that this is because Article 21 imposed the duty on those who provide "investment and non-core services" the latter denoted by the Italian words *"servizi accessori"*. A translation of those words in Article 1 of TUF (the definitions section), says that they mean "ancillary services" which are then defined to include "(f) advice on investments in financial instruments".

35. DB contends that this is different from what Prof Sciarrone Alibrandi had said in her first report at paragraph 23 where it is fair to say that she identified the intermediary route to the TUF duties. However there was no expert evidence filed for the hearing to counter this view and it is plain from the Italian Claim that the TUF duties are invoked there in both the intermediary and advisory senses. I can see no basis for DB being able to show a good arguable case that those claims cannot, as a matter of Italian law, be put that way.

36. Following the oral hearing, Savona's solicitors submitted to me a copy of Article 1 because I had asked to see the definition of non-core services as the subject had arisen in

the context of the Italian Claim. There then followed a detailed letter from DB's solicitors submitting that Savona was now raising new points and arguments and that in this case, there could be no advisory source of the TUF duties notwithstanding the reference to ancillary services. They submitted a large amount of further material not previously before the Court in order to attempt to make good that point. Savona, in turn, submitted that DB's position was (a) wrong as a matter of Italian law and (b) not one which it could now take, subsequent to the hearing. I consider that Savona is right on its second point. If DB wanted to argue in detail that there could be no advisory basis for DB's financial duties (as opposed to one deriving from its status as intermediary) it should have done so at the time. I apprehend that the reason it did not do so is because DB's primary submission is that the Convention did not impose any relevant advisory duty in relation to the Swaps anyway. Moreover, it is clear not only from the second report of Prof Sciarrone Alibrandi but from the Italian Claim itself as well as Savona's skeleton argument (see paragraphs 10.1, 21, 31 and 41 thereof) that it had clearly taken the "advisory" point.

37. Accordingly, I am not now going to investigate the further submissions made by DB at this stage, nor is it for me to say whether there are elements of the Italian Claim which are weak or (according to DB) misconceived. I proceed upon the basis that on the materials before me at the hearing, to the extent that any part of the Italian Claim asserts financial duties upon DB by reason of its role as advisers, that is a clearly arguable case and DB cannot show a good arguable case that such claims cannot be put in that way.

THE PROPER CHARACTERISATION OF THE ITALIAN CLAIM

38. I now turn to consider what the Italian Claim is (and is not) about, so as to decide the nature of the present dispute. I do so taking a fair and objective view and assisted where necessary by the expert evidence on Italian law. The Writ is a lengthy and sometimes prolix document and it is necessary to distil its essential components. DB has submitted that it has been "dressed up" so as to create the impression in part of a claim made pursuant to the terms of the Convention when this is unrealistic, or where the claim could have been put just as effectively in a different way. I do not accede to such submissions. I must take the claim as I find it subject only to any points which could be shown to be clearly false or misconceived as a matter of Italian law; that is a judgment which, for obvious reasons, an English court is not going to make lightly.

39. The Italian Claim begins with a history of the relationship between the parties. It recounts Savona's need to find an adviser to assist with the management of its active debts, the selection procedure promulgated on 17 October 2006 and the award of the role of adviser to DB on 20 February 2007. This was followed by the making of the Convention.

40. The Writ notes how DB proposed to restructure the current Dexia swap and restructure Savona's municipal debt by creating a mirror swap to offset the Dexia swap, the cost of which would be paid for with the assistance of a new cash flow swap. The intended role for DB as debt and ratings adviser was prefigured in the proposal of 30 October 2006. Prior to the making of the Convention, DB gave certain assurances about the cost-effectiveness of the new arrangements in terms of restructuring the debt. The Writ then quotes the Convention in full.

41. The subsequent execution of the Swaps is referred to along with complaints that Savona had not been kept fully informed of or involved with some of the terms thereof and that, as its adviser, DB had not given it proper information or explanations. It was also said that once the Swaps were put in place DB failed to provide the other services due under

the Convention and in particular those relating to the rating attribution of Savona. Complaint was then made about the institution by DB of proceedings here in particular that some of the negative declarations sought referred to DB's advisory activity. It also referred to the decisions of the Supreme Court of Cassation United Sections in *Milan v Deutsche Bank AG and others* (2926/2012) ("*Milan*") and *Venice v Merrill Lynch* (1967/2014) ("*Venice*"), which both held that the jurisdiction Clause in the ISDA Master Agreement did not extend to extra-contractual claims (the contract here being the swap) or those relating to advisory contracts and connected arrangements. On that footing, it was stated that the Italian jurisdiction clause covered such claims and accordingly, the Italian Court had jurisdiction.

42. The Writ then proceeded to summarise the administrative provisions referred to above and that DB was at fault because, as the adviser who was to structure and stipulate the form of the derivative contracts pursuant to the Convention, it had failed to consider the purpose and limits imposed by those rules.

43. Section 2 of the Writ deals with the liability of DB as adviser, not only by reference to the structuring and preparation of the derivatives but also by its failure to comply with other obligations in the Convention (some of which are not directly relevant here). It noted that advisory duties existed anyway upon a counterparty to a proposed transaction but said that this was particularly so where there was a specific advisory contract, quoting Article 21 of TUF and it referred in particular to the advisory role as an "ancillary service" which led to the duty to comply with Consob. Breaches of Articles 26-29 of Consob were then alleged.

44. Overall, there were said to be breaches of the statutory provisions and the financial intermediary provisions and a violation of the "behavioural provisions" by reference to the advisorship contract. On a fair reading, therefore, the TUF breaches were levelled against DB *qua* financial intermediary and adviser.

45. There was then an allegation that, due to the acts or omissions of DB, the administrative provisions were violated as a result of Savona entering into the swaps.

46. Finally, a detailed section set out the numerous breaches of the express terms of the Convention.

47. In the section reciting expert evidence on breach of the administrative provisions, it said, among other things, that this meant that as part of the active management strategy advised to Savona by DB, Savona was induced to violate paragraph 6 of Article 119 of the Constitution, namely to incur debt for financial investments only.

48. However the claim was put, the damages sought here were on a continuing basis (there was no claim to terminate, nullify or rescind the swaps) of at least €11m. This was said to be the present cost of entering into the swap. That said, there is no claim to rescind or nullify the Swaps or anything of that kind.

49. Without going any further into the Italian Claim, it is clear to me that the essence of the complaints related to the advice given by DB and a major part of that related to its role as an adviser pursuant to or arising out of the Convention, which itself features prominently (but not artificially) in the Writ. I do not doubt that as a matter of Italian law, certain of the claims could be made without resort to the Convention but the point is not how the claims might have been put or whether they could have been put on a narrower basis. Rather it is how they are put on a fair reading of the Italian Claim. Equally, it appears to

me that the TUF duties on any view are not directed to DB solely as counterparty and without reference at all to its underlying role pursuant to the Convention.

50. I therefore reject the submission made by DB that, in truth, the Italian Claim is in substance not about the Convention at all. That seems to me to be wholly unrealistic having regard to its contents. No doubt, part of the reason why DB made this submission was because of its prior argument that the Convention did not stipulate any advisory role for DB in respect of the swaps anyway, a submission which I rejected in paragraphs 18 - 26 above.

51. Both parties rightly focussed on the Italian Claim because this is what gives the substance to any dispute which would arise by way of Savona's response to the negative declarations challenged here, if it had to respond to DB's claim here.

THE LAW

Article 25

52. Article 25 (1) of the Recast Brussels Regulation provides as follows:

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

53. It is common ground that it is for DB to show that it has a good arguable case that Article 25 applies here in respect of the English Court. In this context, this means that DB must have the better argument; see *Canada Trust v Stolzenberg No 2.* [1998] 1 WLR 547 at 555B-G, as affirmed at [2002] 1 AC 1.

The position where there are two or more jurisdiction clauses

54. Where, as here, there are two jurisdiction clauses in different agreements between the same parties, then, for the purpose of ascertaining which governs the dispute in question, the Court should strive not to construe them as overlapping but rather mutually exclusive in scope. This is so even if it may cause the jurisdictional fragmentation of a particular claim - see the judgment of Popplewell J in *Monde Petroleum v Western Zagroz* [2015] 1 Lloyds Rep. 330 at para. 35-36.

55. Further, there is no presumption that the later clause is intended to cut down the earlier, again, even if this may lead to some fragmentation: see the judgment of Beatson LJ in *Trust Risk v Am Trust Europe* [2015] 2 Lloyds Rep 154 at para. 59.

56. Finally, of course, each clause must be interpreted according to its own governing law. As to the principles of construction, there did not appear to be much difference between English and Italian law in this context although, of course, the construction of the Italian Clause is to be determined principally by reference to the expert evidence on the point. As a matter of Italian law, it appears that one should construe the clause as at the time of its making not at some future date (for example when the subsequent Master Agreement has been made). That must be right as a matter of principle and reflects the earlier point that the later clause is not deemed to cut down the earlier clause by virtue simply of being later.

The status of the English Clause

57. Being part of the well-known and internationally recognised ISDA Master Agreement, it is said by DB that it is essential that the English Clause is given a universal and consistent

interpretation across different cases. That may well be so, as an aspiration, where no other clause is involved but, as always, it is a matter of context. In this case, the English Clause has to be construed in the light of the prevailing legal context which includes the Convention and the Italian Clause. If the effect is that the ambit of the English Clause here is more restricted than might be the case elsewhere, because of the Convention and the Italian Clause, there is no rule of English law which prevents that.

58. In this context, I was referred to the observations of Briggs J (as he then was) in *Lomas v Rixson* [2010] EWHC 3372 at paragraph 53 of his judgment, where he stresses the importance, so far as possible, of construing the standard terms of the ISDA Master Agreement so as to give them clarity and certainty. Quite so, but this case is dealing with a jurisdiction clause which may or may not be accompanied by another one in a related contract, and not with one of the usual ISDA substantive terms.

ANALYSIS

Interpretation of the Clauses

59. I begin with the Italian Clause simply because it was first in time. I agree that the clause ultimately in issue here is the English Clause but that does not remove the need to construe the Italian Clause as well in order to come to a view as to how they work with each other. I reject DB's submission that I should start instead with the English Clause and then decide as appropriate to cut down the Italian Clause. I can see no basis for that approach – there is no reason to assume that objectively the parties must have assumed this.

60. Accordingly, I shall deal with the following matters:

    (1) Interpretation of the Italian Clause as a matter of Italian law;

    (2) Interpretation of the English Clause under English Law;

    (3) Conclusions.

The Italian Clause

61. As noted above, its proper construction is a matter of Italian law. Accordingly, both experts have opined as to whether an Italian Court would consider that the Italian Claim would fall within the Italian Clause either wholly or partly. The answer to that question is significant though, I accept, not wholly determinative of the overall question which is whether the claims made here are to be governed by the English Clause.

Status of the experts

62. Prof Alibrandi is a highly qualified academic as her CV shows, presently teaching in Milan. She is completely independent. Mr Danusso is a partner in the Italian law firm of Bonelli and hence its London office. Until February 2016 he was a partner in the Italian office of Allen and Overy who have conduct of this action on behalf of DB, along with Mr Danusso himself. He is also well-qualified although does not have any substantial academic teaching experience or, if he does, he has not referred to it. He cannot be regarded as a fully independent expert witness, given his connection with DB, and this seems to be recognised by the fact that, unlike Prof Sciarrone Alibrandi, he has not produced a CPR 35-compliant report. Instead he has simply made a witness statement. For these reasons, one has to apply a measure of caution when considering the views which he expresses.

Prof Sciarrone Alibrandi's view

63. Prof Sciarrone Alibrandi has expressed the clear view that, in the light of the claims made by Savona, all of them would fall within the rubric of "dispute relating to" the Convention as set out in the Italian Clause. See paragraphs 23-25 of her first report. She also opines (although of course this is a matter for me) that the English Clause would not cover such claims.

64. In support of her opinion, she cites the decisions in *Milan* and *Venice*. They are directly on point because both concern claims made by an Italian local authority against the bank in respect of derivative transactions where the bank has challenged the jurisdiction of the Italian court by reference to the English Clause in the Master Agreement.

65. In *Milan* the jurisdiction clause was slightly different. It provided that the bank's appointment was "regulated by Italian law. Every controversy among the parties will be judged by the Tribunal of Milan." However, Prof Sciarrone Alibrandi did not see that as making any real difference from our case, and neither do I. The Supreme Court said that it was well established that there could be examples of extra-contractual responsibility in the area of financial intermediation because of breaches of the duties of information of the client and the correct execution of operations. There was an important difference between pre-contractual responsibility which could give rise to compensation for those cases where the breaches were made during the period prior to or coincident with the intermediation contract aimed at regulating the subsequent relation between the parties, as opposed to instances of contractual responsibility for those cases where the breach relates to the financial operation in the implementation of the later contract. The Court noted that, in the instant case, Milan had asked the Court to find the bank liable for breach of obligations by reference to the advisory and arranging contract at the earlier stage. On the other hand, the Court took the view that the phrase in the English Clause "relating to this agreement" was not clear because its literal translation could not encompass all controversies, both contractual and extra-contractual however connected to the derivatives. Finally, the Court noted its earlier decision 3841/2007 where the English Clause was held to govern a compensation claim regarding damages suffered for breach of a different contract of advisorship on financial instruments. But it noted that this was only because that compensation claim was made explicitly subordinate to the prior claim which was aimed at obtaining a declaration of nullity of the derivative contracts. That case therefore followed previous case law which stated that, where the claimant filed against a foreign defendant a main claim and a subordinated one, Italian jurisdiction had to be as assessed with regard to the main claim only.

66. In broad terms, the decision of the Supreme Court in *Venice* was to the same effect.

67. In her second report, Prof Sciarrone Alibrandi pointed to a very recent decision by the Supreme Court in *Lazio v Dexia* 1311/2017 which followed *Milan* and *Venice* and stated that:

> "whenever a public body files is a complex claim for compensation against a number of banks-some of them with a foreign legal head office-based, as a main claim, on the extra-contractual breach consisting of illicit conducts, before entering into a derivative financial instrument, which has caused a serious damage to the public body itself, the Italian jurisdiction must be established… The words 'relating to this Agreement' included in the ISDA Master Agreement cannot be understood as having a wide meaning which would cover tort liability claims..."

68. In that case, there was not an earlier contract with an Italian jurisdiction clause but Italian jurisdiction was established by reference to Article 5 (3) of the Brussels Regulation; but the general thrust of the decision accords with *Milan*.

69. All of the above is strong evidence in favour of Savona.

70. As a footnote, I should record that it was pointed out that in *Prato* Prof Sciarrone Alibrandi was again the expert witness for the local authority. At one stage she had suggested that where there was an advisory agreement, this would raise the level of the Article 21 duty otherwise owed by the bank to the customer; that was rejected by Walker J. However, this is not directly relevant to the issues before me, she did not advance the same suggestion here, and I do not regard this as diminishing the force of her opinion.

Mr Danusso's Evidence

71. Mr Danusso's witness statement does little or nothing to dislodge the above. First, he accepted (as he had to) that a claim solely for breach of the express obligations contained in the Convention would fall within the Italian Clause - see paragraphs 25 and 26. But he said that Italian law would go no further. In paragraph 27 he stated that the approach of the Italian Courts would be to treat breaches of Italian law related to the entry into, validity, and enforceability, interpretation or performance of the Transaction Documents, (including any claims for breaches of non-contractual obligations prior to entry into those contracts) as falling within the Italian Clause. And in paragraph 28 he stated that there were two important recent decisions of the Supreme Court which stated that as a matter of Italian law a non-contractual claim (such as one arising under Italian law including financial services law) where the loss is said to flow from the claimant's entry into a contract (such as the Transaction Documents) must be treated as a claim arising under that contract. Therefore any such claim should fall within that contract's jurisdiction clause. So the Italian courts would therefore consider any non-contractual claims here as falling under the English Clause.

72. However, upon careful examination it is clear that neither of the cases relied upon by Mr Danusso lend any support to the views he expressed. The first, 14188/2016, was not about exclusive jurisdiction clauses at all. It was whether, for limitation purposes, a claim for breach of the duty of good faith on the part of the other party in their dealings and negotiations leading up to the making of a contract, should be regarded as tortious or contractual. If the latter, a more favourable limitation period applied. The Court held that claims for breach of the duty of good faith could be seen as instances of the violation of a "qualified social contract" because protection obligations arise between them. The contractual liability in question was not based on the subsequent contract but on "an actual relationship that produces obligations, the breach of which is comparable to the breach of obligations arising from the contract." Contractual disputes had been held to cover cases where the claimant had alleged the existence of a rule of conduct connected with a "relationship freely undertaken between such party and the other party" and an allegation of breach. So all that this decision held was that the nature of a claim for breach of duty of good faith was to be regarded as "contractual" for limitation purposes. It is of no relevance to the issue before me.

73. The context in the second case, 24906/2011, was closer but still different in important respects. Here, the claimant had issued proceedings against its contracting party in Italy alleging an abuse of dominant position. That abuse was alleged to have occurred during the operation of the contract between them albeit that the claim was not for breach of contract as such. But it related to their contractual relationship. The defendant invoked an

exclusive jurisdiction clause in favour of Switzerland in the contract which covered any dispute "arising from or relating to…" that contract.

74. The court held that the abuse claim fell within the Clause. It said that non-contractual claims arising from the same material facts as contractual claims or during the performance of the contract would fall within the clause. I quite see that, but our case is very different. First, its essence is what DB did before the contract (i.e. the Swap) was entered into (and, in respect of any breaches which were said to have occurred after the Swaps were made they were essentially about the non-provision of services which had been promised expressly in the Convention). Second, in our case, there was a prior contract with its own jurisdiction clause. So again, that case is of no assistance to DB here. Prof Sciarrone Alibrandi made much the same points in paragraphs 15-17 of her second report.

75. Finally, Mr Danusso also referred back to the decision 3841/2007. But, for the reasons cited above, that decision takes the matter no further because the main claim there was to nullify the swap itself albeit that there was a subsidiary claim alleging poor performance of a consultancy agreement (which, it seems, did not have its own jurisdiction clause). However the case before me does not involve any claim to nullity and the primary claim is one which concentrates, in my judgment, on the advisory role of DB and with significant ties to the obligations under the Convention. Once more, see the second report of Prof Sciarrone Alibrandi at paragraph 18.

Conclusions

76. For all the reasons given above, there is really no contest between the opinions of Prof Sciarrone Alibrandi and Mr Danusso. In my judgment it is very clear that from the standpoint of Italian law the Italian Claim would be regarded as falling within the Italian Clause.

Interpretation of the English Clause

77. The relevant expression is "any suit, action or proceeding relating to this Agreement". It is common ground for present purposes that this would capture any dispute as to the performance or otherwise of the parties of their obligations under the Swap, but also any dispute as to whether it was binding or valid as a matter of English law. Furthermore, it is conceded by Savona that the question of compliance of the Swaps themselves with Decree 389 would fall within the English Clause.

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

79. However, DB places great reliance upon the decision of Ali Malek QC sitting as a Deputy High Court Judge in *Dexia v Brescia* [2016] EWHC 3261. This case also concerned

negative declaratory relief sought here by a bank (Dexia) against an Italian local authority, Brescia, in relation to interest rate swaps executed in June and December 2006.

80. The two declarations in issue, from the point of view of jurisdiction, were akin to declarations (4) and (5) in this case although, importantly, those declarations have not been challenged here.

81. Again, as with this case, the parties had entered into a Mandate Agreement on 31 May 2006 which was entitled "award of a multi-year assignment for up to a maximum of 36 months for the evaluation and organisation of the active management of the debt and liquidity of the Province", and as rating advisor. Then, in March 2016, Brescia started proceedings against Dexia in Rome alleging breach of the Mandate Agreement which it said imposed contractual obligations upon Dexia to comply with various Italian statutes. The exclusive jurisdiction clause in the Mandate Agreement said that "this Mandate shall be governed by and construed in accordance with Italian law. The disputes arising from this mandate shall be exclusively subject to the Court of [Rome]". The competing exclusive jurisdiction clause in the Master Agreement is of course the same as the English Clause here.

82. In paragraph 105 of his judgment the Judge held that the disputed declarations fell within the English Clause. Because of the reliance placed upon his reasons for that conclusion I reproduce them below.

> 106. First, it is clear that Declarations (2) and (3) are directed at representations given by Brescia that are reflected in the ISDA Master Agreement. A dispute has arisen about them since Brescia served proceedings in Rome. Accordingly the declarations involve a "suit, action or proceedings relating to the Agreement" within the jurisdiction Clause of the ISDA Master Agreement.
>
> 107. Secondly, Brescia itself recognises that disputes concerning representations given in the ISDA Master Agreement fall within section 13 of that agreement. This is why it has accepted the Court's jurisdiction to given Declarations (1), (4) and (5). Clearly Brescia is right to accept jurisdiction. This is what the parties agreed. Accordingly disputes in relation to these declarations will be decided in the English court applying the law chosen by the parties, namely English law. I do not think there is any basis for saying that Declarations (2) and (3) fall outside the jurisdiction agreement in the ISDA Agreement. The language of Declarations (2) and (3) track the terms of the representations relied upon by Dexia and which are contained in the ISDA Master Agreement or Schedule….
>
> 108. Brescia's argument has extraordinary consequences because some declarations would be decided by the English Court applying English law and others by the Court of Rome. This would result in a degree of fragmentation that the parties could not have intended. It would result in the English court deciding certain representations and the Court of Rome deciding others (presumably applying English law). I consider it is for the English Court to decide whether Dexia is entitled to the declaratory relief it seeks in the English Proceedings.
>
> 109. Thirdly, I can see no basis for modifying Clause 13 of the ISDA Master Agreement by the addition of the word "only" as argued by Brescia. Although in a broad sense Declarations (2) and (3) may involve Italian law issues and the Court of Rome in dealing with the claims under the Mandate may have to consider the same provisions of Italian law or some of them as in the English proceedings, that is not a reason for saying that the Declarations (2) and (3) must fall within the jurisdiction agreement in the Mandate. Declarations (2) and (3) are dealing with issues of Italian law in relation to the Swaps only. They are not dealing with claims under the Mandate. The English proceedings have nothing to do with the issue of the quality of Dexia's endeavours that it undertook in relation to the Mandate.

110. Even if there were overlaps between the claims in England and Italy, this is not sufficient reason for contending that Rome Proceedings should take exclusive jurisdiction in respect of Declarations (2) and (3). Brescia contended that it must have been intended that the Court of Rome would decide issues of Italian law that arose in both sets of proceedings and the matter should be looked at as a matter of substance. To give effect to this intention, it was necessary to add the word "only" so that the English court would have jurisdiction only where there were no overlapping issues of Italian law.

111. I consider that Brescia's construction argument involves the ISDA Master Agreement being rewritten. The same can be said about its implied term argument. Both arguments involve giving primacy to the Mandate (and the Court of Rome) when all the declarations sought by Dexia are concerned with contractual representations under an English law contract. The fact that it might be necessary to consider Italian law when deciding whether or not to grant Declarations (2) and (3) does not displace the jurisdiction Clause in the ISDA Master Agreement. In my judgment there is no legal basis for the addition of the word "only" or for the alleged implied term. English law does not allow contracts to be rewritten in this way....

112. In fact It is entirely possible that the English court could grant Declarations (2) and (3) without making any findings about Italian law. This is because the declarations operate on the basis of a contractual estoppel. I was referred in argument to the decision of the Court of Appeal in *Regione Piemonte v Dexia Credit Spa* **[**2014] EWCA Civ 1298. In that case the Court of Appeal dismissed an appeal from a decision of Cooke J. At [109] Christopher Clarke LJ said:

> *"the Banks were entitled to rely on the principle in Springwell Navigation Corporation v JP Morgan Chase Bank & Ors [2010] EWCA Civ 482 "to the effect that representations such as those made by Piedmont in the Master Agreement give rise to a contractual estoppel which prevents the representor from setting up a different version of the facts from those represented", as Cooke J had summarised the position in paragraph 16 of his judgment".*

113. Brescia has indicated that it will deny that there was any contractual estoppel for a variety of reasons. However this is not a reason for saying that the English Court lacks jurisdiction to grant Declarations (2) and (3).

114. Fourthly, I reject the argument that there was a demarcation of the nature alleged by Brescia between the preparatory steps leading to the conclusion of the subsequent financial transactions and which was governed by the Mandate and the terms of any subsequent financial transactions like the Swaps. There is nothing in the language of either the Mandate or the Swaps that supports this argument. The argument is inconsistent with the terms of representations in the Swaps. Brescia's argument if correct would involve a claim that the Swaps had been induced by misrepresentation being decided by the Court of Rome. There is nothing in the terms of the Mandate or the Swaps supporting this argument.

115. Fifthly, under Issue 3, I will analyse the issue of whether the English Proceedings and the Rome Proceedings involve the same cause of action. I conclude that they do not. The subject matter of the Mandate and the Swaps are different. The fact that the causes of action are not the same provides a further reason for finding that the Declarations (2) and (3) fall within the ISDA Master Agreement and not the Mandate. The agreements are dealing with different matters and have different jurisdiction agreements."

83. Since Savona has conceded that the parallel declarations in this case are governed by the English Clause and since the Judge did not deal with declarations similar to declarations (7) – (10) and (12) here, which are the ones at issue, his decision is not directly on point. Nonetheless, the reasons he gave for taking the view that he did about his declarations (2) and (3) should be considered.

84. As to the first reason, it is true that the declarations at issue were, in his case, and are, in this one, (apart from declaration (12)) drawn from the Master Agreement and it can then be said that the effect of those declarations is disputed because of the claim made in Rome. I see that, but for my part, I do not accept that because the declaration is drawn from a contractual term, then, without any discussion about it, it must fall within the English Clause. That is particularly so in our case where it is accepted that the investigation into the correctness or otherwise of the declarations relied upon will stray into wider questions about the underlying advice given and whether it was acted upon.

85. As to his second reason, the subject-matter and scope of the numerous contractual estoppel provisions in the Master Agreement needs to be looked at separately. For example, a declaration that the local authority had the capacity to enter into the Swaps has a more immediate connection to the Swaps themselves than a declaration which is designed to negate a claim that the bank was in breach of a prior contractual or other duty to advise when it recommended the Swaps for the local authority in the first place. I agree that this analysis could produce some fragmentation. But it does not follow, in all circumstances, that the fact that some declarations may fall within the English Clause and some may fall within the Italian Clause is a consequence which must be avoided at all costs.

86. As for the third reason, that is obviously correct in relation to the declarations in issue before the Judge. But since jurisdiction for those declarations is conceded before me, this takes the matter no further.

87. I agree that the fact that the English Court might in respect of some declarations have to make findings about Italian law is not by itself a reason to say that the English Clause cannot govern it. In our case, for example, Italian law will obviously be required in relation to the correctness or otherwise of declaration (5).

88. As to the fourth reason, this to some extent repeats the notion that if the declaration is founded upon a contractual representation in the Master Agreement then, without more, and regardless of context, or almost so, the declaratory claim must be governed by the English Clause. I do not accept that such a rigid rule can be laid down. Equally, I would accept that one cannot devise a hard and fast rule that says that anything that occurs before the Swaps and leads up to them must necessarily be outwith the English Clause. It all depends on the facts and the context including, critically, the essential nature of the dispute and the nature and scope of any prior contract and jurisdiction clause.

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

90. Accordingly, insofar as the Judge was attempting to lay down a general proposition that any claim for negative declaratory relief which is based upon a contractual representation

in the Swap must be governed by the English Clause, I would respectfully disagree. In fact, I doubt that he was intending to go that far and he did not need to. But to the extent that he did, any such observations would clearly be *obiter* anyway because they did not form a necessary part of his decision. And in terms of the declarations at stake, *Brescia* is clearly distinguishable.

Other points on construction

91. DB contends that any claim which concerns the "entry into" the Swaps must be within the English Clause. But the logic of that position would be that any breach of the Convention's express obligations which led to Savona entering the Swaps would be governed by that clause. Yet Mr Danusso has accepted that such a claim is within the Italian Clause. The fact that on his view, this was not much of a concession because he saw the Convention as containing no relevant advisory duties anyway is beside the point.

92. DB also contended that Savona's distinction between breaches of advisory duty regarding the Swaps on the one hand, and claims for mis-performance of the Swaps or that they are invalid or entered into with no capacity on the other, was illogical but I do not agree.

93. It also contended (in paragraph 67 of its written submissions) that the entire agreement clause at paragraph 9 (a) of the Master Agreement has the effect of cutting down the Italian Clause but again I disagree. As noted above, this provision is all about excluding collateral warranties rather than how one should construe the English and Italian Clauses.

94. Finally, while it is true that the Master Agreement is silent as to the Convention that hardly means that it impliedly cuts it down as a matter of substance or by reference to the Italian Clause.

Conclusions

95. In the light of all of that, and considering, for the moment, the Italian Claim, I have no hesitation in concluding that it is governed by the Italian and not the English Clause. Or to put it strictly, DB can show no good arguable case that a claim like the Italian Claim falls within the English Clause. I agree that this conclusion entails a somewhat narrower interpretation of "relating to" than might prevail in other circumstances but, as I have tried to emphasise, that is simply a feature of the relevant context here. This construction of the English Clause is by no means absurd or uncommercial and it achieves the desired effect of avoiding any overlap between the two clauses and, broadly speaking, enabling them to deal with different things.

96. I accept that because Savona has conceded that any declaratory relief concerning the applicability or otherwise of Decree 389 is governed by the English Clause, a technical examination of, say, whether the swaps complied with the particular requirements laid down by Decree 389 will (subject to any other agreement of the parties) have to be ascertained here. That is unfortunate perhaps, given that the "home" of the Italian claim is otherwise Italy, but it is the sort of fragmentation which can sometimes occur and which the case-law expressly recognises.

97. I should add for the sake of completeness that I do not regard Savona's concession as to declaration (5) as making any inroads into its arguments as to the declarations in issue which must be considered on their own merits. Nor was there advanced any argument based on jurisdictional waiver or anything of that kind.

THE DECLARATIONS

98. The findings above about the correct operative jurisdiction clause for the Italian Claim provides the necessary context for the dispute in respect of which the negative declaratory relief is sought here.

Declarations (7) – (10)

99. All of these declarations are founded upon the various contractual estoppels within the Master Agreement. But as noted above, the mere fact that they are terms of that agreement does not irresistibly mean that the dispute as to whether the declarations are correct is caught by the English Clause.

100. On one level, since they reproduce faithfully the underlying contractual terms it could be argued that if all that DB wished to do was to have a declaration that each of those terms was a valid and binding contractual estoppel as a matter of English law then they could have it (see paragraph 78 of DB's written submissions). But in practice this would be of little or no use because the only function of the estoppels would be to act as defences to the Italian Claim and then the question would be their effect and scope as a matter of Italian law notwithstanding their origin in an agreement governed by English law (see paragraph 80 of DB's written submissions).

101. In fact, Ms Tolaney QC realistically recognised that it would not necessarily be possible to confine the debate over such declarations to a purely legal question of whether they amounted to a contractual estoppel under English law. For example, the debate might well stray into what the underlying reality was and, critically, whether DB had in fact given advice and if so how. For that reason, she was unwilling to accept that any investigation into the correctness or otherwise of those declarations would have to be limited to a very narrow technical issue without recourse to any evidence at all. But once that is accepted, and a wider exercise is conducted, there is a clear incursion, in my view, into the territory of the Italian Clause.

102. On that footing, the "dispute" to which these declarations relate, for the purpose of Article 25, must be regarded as the underlying Italian Claim because this is what would be invoked as against the declarations in issue here. But if so, then the English Clause does not govern it or, to put it more accurately again, DB has not shown a good arguable case that it does.

Declaration (12)

103. This declaration would be unobjectionable if it was confined to the performance of DB's obligations under the Swaps themselves. However, that would be of little use since there is no allegation that I can see in the Italian Claim (which is the only claim) that they were in breach thereof.

104. In fact, declaration (12) goes much wider than that because it includes any pre-Swap obligation, however it arises, and which caused Savona to "enter into" the Swap. That trespasses directly on the obligations which are the subject of the Italian Claim and which are outwith the scope of the English Clause.

Conclusions on the Declarations

105. It follows that, for all the reasons given above, Savona's challenge to jurisdiction in respect of declarations (7) – (10) and (12), claimed by DB pursuant to Article 25, must

succeed. In my judgment no separate point under Article 31 of the Recast Brussels Regulation arises.

THE APPLICATION FOR A STAY

106. Savona submits that, in relation to the remaining declarations, this claim should be stayed pending the decision of the Court of Appeal in *Prato* which is due to hear that appeal shortly. I do not see why. The main points at issue in the *Prato* appeal concern validity and enforceability of the swaps concerned but that is not this case. I was referred by Savona to my own decision in *Barnes v Black Horse Limited* [2012] EWHC 1950 where I ordered a stay. But that case was very different because the forthcoming decision of the Supreme Court was going to be highly relevant to the very many PPI cases then awaiting trial. It is wholly speculative at the moment whether the decision of the Court of Appeal will have any relevance to this case at all. It is not enough to say that it will deal with various matters of Italian law.

107. Accordingly the residue of this case here must now proceed and I will hear the parties on the questions of directions going forward, once judgment has been handed down.

108. I am very grateful to Counsel for all their most helpful submissions.