



Neutral Citation Number: [2022] EWHC 2410 (Comm)

Case No: CL-2021-000605

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**COMMERCIAL COURT (KBD)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 27/09/2022

**Before:**

**Peter MacDonald Eggers KC**  
**(sitting as a Deputy Judge of the High Court)**

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**Between:**

**DEXIA CREDIOP SPA**

**Claimant**

**- and -**

**PROVINCIA DI PESARO E URBINO**

**Defendant**

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**Mr Jasbir Dhillon KC and Mr Geoffrey Kuehne (instructed by Bonelli Erede Lombardi Pappalardo LLP) for the Claimant**

**The Defendant did not appear**

Hearing date: 8th September 2022

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**JUDGMENT**

## **Peter MacDonald Eggers KC:**

### **Introduction**

1. The Claimant (“**Dexia**”), an Italian company carrying on banking business, and the Defendant (“**Pesaro**”), a municipal authority in the Marche region of Italy, entered into two interest rate swap transactions in 2003 and 2005. Each of the transactions was subject to a 1992 International Swap Dealers Association (“ISDA”) Master Agreement, Multicurrency - Cross Border, (“**the Master Agreement**”) and the Schedule thereto (“**the Schedule**”) which the parties concluded in 2002.
2. On 25th June 2021, Pesaro commenced legal proceedings in Italy seeking to unwind or set aside these transactions.
3. In October 2021, Dexia commenced the current proceedings in England seeking a number of declarations to the effect that the transactions were valid, lawful and binding on the parties.
4. The proceedings instituted in England by a claim form issued on 13th October 2021 were served on Pesaro. Pesaro acknowledged service of the proceedings but indicated an intention to contest the Court’s jurisdiction. Notwithstanding that intention, no application to contest jurisdiction was made.
5. Pesaro has taken no active part in the proceedings, with some limited exceptions.
6. Dexia has applied for summary judgment in respect of a number of its claims for declaratory relief. To that end, Dexia has also made applications for permission to amend its Particulars of Claim and to adduce expert evidence of Italian law in support of its application for summary judgment.
7. Having been satisfied that the proceedings and the relevant applications were properly served upon Pesaro, during the course of the hearing on 8th September 2022, where Dexia was represented by Mr Jasbir Dhillon KC and Mr Geoffrey Kuehne and Pesaro did not appear, I granted permission to Dexia to amend the Particulars of Claim and to adduce expert evidence. I set out my reasons for granting permission for these applications in this judgment.

8. The major part of this judgment is concerned with Dexia's application for summary judgment.

### **The Swap Transactions**

9. On 5th March 2002, the Provincial Council of Pesaro ("**the Provincial Council**") approved new Accounting Rules, Article 93 of which permitted Pesaro's use of derivative financial instruments such as interest rate swaps and options "*to hedge interest rate risks and manage liabilities arising from bond issues, loans and other forms of recourse to the financial markets permitted under the law*", provided such use was not for speculative purposes.
10. On 26th June 2002, by Resolution No. 2164/2002, Pesaro acting by the Division Manager of its Financial Planning and Information Systems Division, Mr Marco Domenicucci ("**the FPIS Division Manager**"), appointed Dexia to provide assistance with respect to possibilities for derivative transactions for interest rate swaps.
11. On 11th July 2002, Dexia confirmed by letter that it accepted the appointment for the provision for the "*definition of strategies for the transformation of existing indebtedness and for the assistance, advice and management of related transactions (interest rate swaps and options)*".
12. On 12th July 2002, pursuant to Resolution No. 201/2002, the Executive Board of Pesaro ("**the Board**") resolved to approve Pesaro entering into the Master Agreement and Schedule with Dexia and entering into a fixed rate swap transaction under the Master Agreement in the nominal amount of €30,962,807.18 ("**the 2002 Swap**").
13. On 16th July 2002, Pesaro and Dexia entered into the Master Agreement and Schedule.
14. The Master Agreement opens by recording that the parties "*have entered and/or anticipate entering into one or more transactions (each a "Transaction") that are or will be governed by this 2002 Master Agreement, which includes the schedule (the "Schedule"), and the documents and other confirming evidence (each a "Confirmation") exchanged between the parties or otherwise effective for the purpose of confirming or evidencing those Transactions*".
15. The material terms of the Master Agreement are as follows:

## **“1. Interpretation**

...

*(b) Inconsistency. In the event of any inconsistency between the provisions of the Schedule and the other provisions of this Master Agreement, the Schedule will prevail. In the event of any inconsistency between the provisions of any Confirmation and this Master Agreement, such Confirmation will prevail for the purpose of the relevant Transaction....*

*(c) Single Agreement. All Transactions are entered into in reliance on the fact that this Master Agreement and all Confirmations form a single agreement between the parties (collectively referred to as this “Agreement”), and the parties would not otherwise enter into any Transactions ...*

## **3. Representations**

*Each party represents to the other party (which representations will be deemed to be repeated by each party on each date on which a Transaction is entered into and, in the case of the representations in Section 3(f), at all times until the termination of this Agreement) that:-*

### **(a) Basic Representations**

- (i) **Status.** It is duly organised and validly existing under the laws of the jurisdiction of its organisation or incorporation and, if relevant under such laws, in good standing;*
- (ii) **Powers.** It has the power to execute this Agreement and any other documentation relating to this Agreement to which it is a party, to deliver this Agreement and any other documentation relating to this Agreement that it is required by this Agreement to deliver and to perform its obligations under this Agreement and any obligations it has under any Credit Support Document to which it is a party and has taken all necessary action to authorise such execution, delivery and performance;*
- (iii) **No Violation or Conflict.** Such execution, delivery and performance do not violate or conflict with any law applicable to it, any provision of its constitutional documents, any 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;*
- (iv) **Consents.** 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; and*
- (v) **Obligations Binding.** Its obligations under this Agreement and any Credit Support Document to which it is a party constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms (subject to applicable bankruptcy, reorganisation, insolvency,*

*moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law)) ...*

- (d) **Accuracy of Specified Information.** *All applicable information that is furnished in writing by or on behalf of it to the other party 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 ...*

### **9. Miscellaneous**

- (a) **Entire Agreement.** *This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto ...*

### **13. Governing Law and Jurisdiction**

- (a) **Governing Law.** *This Agreement will be governed by and construed in accordance with the law specified in the Schedule.*
- (b) **Jurisdiction.** *With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement ("Proceedings"), each party irrevocably:-*
- (i) *submits to the jurisdiction of the English courts if this Agreement is expressed to be governed by English law or to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City, if this Agreement is expressed to be governed by the laws of the State of New York; and*
  - (ii) *waives which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such a party ..."*

16. The material terms of the Schedule to the Master Agreement included Part 4, clause (h) which provided that "**Governing Law.** *This Agreement will be governed by and construed in accordance with the laws of England*".

17. The Schedule provided at Part 5, clause (4) that:

**Relationship between Parties.** *Each party will be deemed to represent to the other party on the date on which it enters into a Transaction that (absent a written agreement between the parties that expressly imposes affirmative obligations to the contrary for that Transaction):*

*(a) **Evaluation and Understanding.** 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 that Transaction. It is also capable of assuming, and assumes, the financial and other risks of that Transaction.*

*(b) **Status of the Parties.** The other party is not acting as a fiduciary for or an advisor to it in respect of that Transaction.”*

18. In addition, the Schedule provided at Part 5, clause 5(ii) that Section 3(a)(ii) of the Master Agreement would be amended as follows:

*“**Powers.** It has the power to execute this Agreement and any other documentation relating to this Agreement to which it is a party, to deliver this Agreement and any other documentation relating to this Agreement that it is required by this Agreement to deliver and to perform its obligations under this Agreement and any obligations it has under any Credit Support Document to which it is a party and has taken all necessary action and made all necessary determinations and findings to authorize such execution, delivery and performance.”*

19. In addition, the Schedule amended the Master Agreement by including the following representation at Section 3(g):

*“**Non-speculation.** 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”*

20. The Schedule also inserted a further representation at Section 3(i) of the Master Agreement which included a “no-reliance” clause by stating that:

*“**No reliance.** Each party represents to the other (which representation will be deemed to be repeated by each party on each date on which a Transaction is entered into or amended, extended or otherwise modified) that it is acting for its own account, and has made its own independent decisions to enter into this Agreement and any Transaction hereunder and as to whether this Agreement and any Transaction hereunder is appropriate or proper for it based on its own judgment and upon advice from such advisors as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into this Agreement or any Transaction hereunder, it being understood that information and explanations related to the terms and conditions of this Agreement and any Transaction hereunder shall not be considered investment advice or a recommendation to enter into this Agreement or any Transaction hereunder. No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of any Transaction hereunder”*

21. I set out below a summary of the transactions made under the Master Agreement and Schedule. A number of the relevant documents were created and written in the Italian language, but I have relied principally on English translations made of these documents.
22. On 3rd September 2003, Dexia sent Pesaro a presentation (“**the First Presentation**”) outlining potential derivative transactions by which Pesaro could seek to hedge its interest rate risk arising from its existing debt.
23. On 12th September 2003, by Resolution No. 3390/2003, the FPIS Division Manager approved the making to Dexia of an irrevocable proposal for an interest rate swap the terms of which corresponded to those indicated in the First Presentation, with a total outstanding (nominal) amount of approximately €19,990,951.72. The Effective Date of the transaction was 30th June 2003 and the Termination Date was 30th June 2013. The irrevocable proposal was said to have been made pursuant to Article 1329 of the Italian Civil Code, that the transaction was to be entered into in accordance with the Master Agreement and Schedule, and included the following terms:

“... ”

*Market risk*

*It should be noted that in this type of swap, in the period from December 31st, 2003 to June 30th, 2005 if 6-month Euribor recorded 10 Target Business Days prior to the End Date of each Rate Period (6-month Euribor set in arrears) becomes lower than or equal to 2.00%, the Authority shall pay an amount to the bank counterparty, which will be higher as the 6-month Euribor, recorded at 2 Target Business Days prior to the Start Date of each Rate Period (standard 6-month Euribor) will be lower than 1.85% ...*

*Therefore, entering into such a transaction does not completely mitigate the exposure to the interest rate that the Authority has in relation to the underlying bonds which are subject to this swap transaction ...*

*The Authority represents that it entered into this IRS transaction not for speculative purposes, but solely for the purpose of hedging interest rate risk and for the management of its own liabilities resulting from bond issues, bad loans and other forms of recourse to the financial market permitted by law ...”*

24. Resolution No. 3390/2003 confirmed amongst other things that:
  - (1) The Provincial Council, through Resolution No. 33/2003 which approved the 2003-2005 Budget and Planning Report, had also identified the completion of

derivative finance transactions as one of the objectives of Pesaro's operational guidelines to *“improve the profitability of the assets and financial resources as well as increase the efficiency and effectiveness of the Administration”*.

- (2) Resolution No. 3390/2003 was *“adopted in full compliance with the applicable current legislation”*.
  - (3) There was a market risk depending on the Euribor rate: *“[e]ntering into this transaction does not, therefore, completely get rid of the interest rate risk that [Pesaro] has with respect to the underlying bond issuances covered by this swap transaction”*.
  - (4) Pesaro entered into the swap *“not for speculative purposes but solely for the purpose of hedging interest rate risks and managing its liabilities arising from bond issuances ...”*.
  - (5) The Province was able to understand, assess and accept, and accepted, the risks associated with each transaction, the completion of which did not constitute an assurance or guarantee of the financial performance.
  - (6) Pesaro received from Dexia the Document on the General Risks of Investments in Financial Instruments (Annex no. 3 of Consob Regulation No. 11522 of 1 July 1998) and Dexia has requested, and Pesaro provided, information on its experience in investments in financial instruments, its financial situation, its investment objectives and its risk appetite.
25. On 15th September 2003, Dexia wrote to Pesaro confirming its unconditional acceptance of the proposal which resulted in **“the First Transaction”**. Together with Resolution No. 3390/2003, Dexia's letter constituted the Confirmation of the First Transaction, which had an Effective Date of 30th June 2003 and a Termination Date of 30th June 2013.
26. On 2nd August 2004, by Resolution No. 2906/2004, Pesaro, acting by the FPIS Division Manager, exercised its option to terminate the 2002 Swap, which as of 30th July 2004, had a positive mark-to-market value of €110,000.



27. Between October and December 2005, at Pesaro's request, Dexia presented Pesaro with possible solutions for the restructuring of the First Transaction, on the basis of the same underlying debt positions.
28. On 20th December 2005, by Resolution No. 4733/2005, the FPIS Division Manager approved, among other things, the discharge of the First Transaction and Pesaro's entry into a second transaction ("**the Second Transaction**"), being a replacement interest rate swap transaction involving a variable rate and a variable rate with a collar, in respect of the same underlying debt position.
29. On 20th December 2005, pursuant to the authorisation granted by Resolution No. 4733/2005, Pesaro wrote to Dexia making the authorised irrevocable proposal for the termination of the First Transaction and the parties' entry into the Second Transaction, which was an interest rate swap the terms of which corresponded to those indicated in the First Transaction, with a total outstanding (nominal) amount of approximately €19,201,081.68. The transaction had an Effective Date of 30th June 2005 and a Termination Date of 31st December 2025. The irrevocable proposal was said to be made pursuant to Article 1329 of the Italian Civil Code and expressly stated that the transaction was to be made under the Master Agreement and Schedule.
30. Pesaro's letter confirmed, *inter alia*, that:
  - (1) "*The Authority declares that it has decided to enter into this IRS [interest rate swap] not for speculative purposes but solely for the purpose of hedging interest rate risk and managing its liabilities arising from bond issuances, loans and other forms of recourse to the financial markets as permitted by law*".
  - (2) The Second Transaction was being "*carried out on underlying amounts that are actually due by the Authority*" which it undertook to maintain for the duration of the Second Transaction, keeping an underlying indebtedness that financially matched the Second Transaction.
  - (3) Pesaro had received from Dexia the "*Document on the General Risks of Investments in Financial Instruments*" and that, at Dexia's request, Pesaro had provided "*information on its experience in investing in financial instruments, its financial situation, its investment objectives and its risk inclination*".

31. Resolution No. 4733/2005:
- (1) Recorded that the use of derivative financial instruments by local authorities was now expressly provided for by Law No. 448 of 28th December 2001 (Financial Law 2002) and noted the Decree of the Italian Ministry of Economy and Finance No. 389 of 1 December 2003 and the subsequent Explanatory Circular of 27th May 2004.
  - (2) Acknowledged that Pesaro had decided to enter into the Second Transaction “*not for speculative purposes, but solely for the purpose of hedging interest rate risk and managing its own liabilities arising from bond issuances, loans and other forms of recourse to the financial market permitted by law*”, and that the Second Transaction would be “*therefore carried out on underlying amounts that are actually due by [Pesaro], which undertakes to maintain for the entire duration of the [Second Transaction] an underlying indebtedness that is very similar to that of the [Second Transaction] with particular regard to the duration and type of rate*”.
32. On 22nd December 2005, Dexia confirmed its unconditional acceptance of the proposal for the termination of the First Transaction and its replacement with the Second Transaction.
33. I shall refer to the First Transaction and the Second Transaction, together with the Master Agreement and the Schedule, as “**the Transaction Documents**”.

### **Procedural history**

34. On 25th June 2021, Pesaro commenced the Italian Claim in the Court of Pesaro, First Civil Division, by serving its writ of summons on Dexia.
35. By the Italian Claim, Pesaro alleges that:
- (1) Dexia failed to comply with the obligations it allegedly assumed to Pesaro pursuant to the mandate concluded in June-July 2002 in allegedly advising Pesaro to enter into the Transactions because, *inter alia*, the Transactions allegedly did not comply with applicable Italian laws and because Dexia allegedly failed to provide to Pesaro certain information about the Transactions

prior to their conclusion, in particular as to their “*mark-to-market*” values, their implicit costs, and as to probable future outcomes.

- (2) Dexia has pre-contractual and/or non-contractual liabilities to Pesaro pursuant to Articles 1337, 1338, and 1440-2043 of the Italian Civil Code and Article 21 of the Italian Consolidated Law on Finance (“**TUF**”) in relation to its advice to Pesaro to enter the Transactions.
  - (3) The Second Transaction is null and void on various alleged grounds under Italian law, including because it is alleged that the Second Transaction required specific approval by the Provincial Council pursuant to Article 42 of TUEL. I discuss the grounds of alleged invalidity of the Transactions as a matter of Italian law more fully below.
36. By the Italian Claim, Pesaro claims damages for loss allegedly consisting of the moneys paid by Pesaro to Dexia to date pursuant to both Transactions, and a sum representing the current negative “*mark-to-market*” valuation of the Second Transactions, and a declaration that any sums due to Dexia under both Transactions are unenforceable and ineffective against Pesaro; alternatively, restitution of the sums paid by Pesaro to Dexia pursuant to the Second Transaction only, and a declaration that no further sums are or will be due to Dexia under the Second Transaction.

### **Service of the Claim Form and the Court’s jurisdiction**

37. On 13th October 2021, Dexia issued its Claim Form, which was served on Pesaro by email, as certified by an email dated 30th November 2021 sent by Avv. Giuseppe Massimiliano Danusso, Dexia’s Italian lawyer (paragraph 12 of the first witness statement of Mr Michael Hawthorne dated 13th May 2022).
38. On 20th December 2021, Pesaro acknowledged service of the Claim Form by its solicitors, Spencer West LLP (who were subsequently permitted to come off the record as solicitors for Pesaro by an order of Moulder, J on 8th March 2022). In the acknowledgment of service, Pesaro indicated its intention to contest the jurisdiction of the Court.

39. However, Pesaro made no application to challenge the Court’s jurisdiction in accordance with CPR Part 11. Accordingly, by CPR rule 11(5), Pesaro is to be treated as having accepted that the Court has jurisdiction to try Dexia’s claim. In these circumstances, Pesaro’s acknowledgment remains effective (unlike for example where a defendant issues an application to challenge the Court’s jurisdiction but fails in the challenge: CPR rule 11(7)).
40. On 23rd February 2022, Pesaro wrote to Dexia’s Italian lawyers (Bonelli) and then English solicitors (Pinsent Masons) providing details of a postal and email address “*to which notices shall be sent as per the “Instructions for the defendant”, attached to the Claim Form filed on 13 October 2021 in the interest of Dexia Crediop Spa ...*”. The email address provided was “*provincia.pesarourbino@legalmail.com*”.
41. However, on 15th March 2022, Maria Beatrice Riminucci of Pesaro informed Avv. Giuseppe Massimiliano Danusso, Dexia’s lawyer, that all future communications should be sent to a different email address: “*provincia.pesarourbino@legalmail.it*”. The difference was the change from “.com” to “.it”.
42. Later, by letter on 18th May 2022, Pesaro informed Dexia that it took objection to the English Court’s jurisdiction and the validity of service of the Claim Form on Pesaro. I do not decide whether there is substance in Pesaro’s comments on the validity of service. However, in circumstances where I am satisfied that Pesaro received the Claim Form and understood its contents, acknowledged service of the Claim Form, and did not object to the Court’s jurisdiction in accordance with CPR Part 11, I am also satisfied that the Court has jurisdiction in respect of this action.

### **The statements of case**

43. On 24th March 2022, Dexia served its Particulars of Claim upon Pesaro by email, being a valid form of service of formal proceedings in Italy (paragraphs 12-14 of the first witness statement of Mr Michael Hawthorne dated 13th May 2022).
44. Any Defence by Pesaro had to be served by 21st April 2022 (being 28 days after the service of the Particulars of Claim), but Pesaro did not serve a Defence and did not ask for an extension of time in which to file a Defence (paragraph 14 of the first witness statement of Mr Michael Hawthorne dated 13th May 2022).

## **Service of Dexia's applications**

45. On 13th May 2022, Dexia issued its first application notice seeking permission to amend the Claim Form and applying for summary judgment in respect of some of its claims for declaratory relief (declarations no. 1, 3-6, 8-16). This application was served by email on Pesaro on 16th May 2022.
46. On 13th May 2022, Dexia requested the Court by email to direct that an expedited hearing of its application take place. This email was copied to Pesaro.
47. On 18th May 2022, Pesaro sent a letter to Dexia and also to the Court stating that it had *“received yours and took note that Dexia intends to accelerate the English trial to obtain a sentence from the English judge in order to try to verify the case Italian”*. This appears to be a reference to Dexia's first application notice (for permission to amend the Claim Form and for summary judgment), although it refers to service having taken place on 17th May 2022. In any event, it is clear to me that Pesaro had received Dexia's first application notice.
48. On 23rd May 2022, Cockerill, J directed that a hearing of the application be listed in September 2022 and the Court indicated that it could accommodate a hearing on 1st, 2nd or 8th September 2022. Later that day, Pesaro informed the Court that *“In agreement with Dexia's lawyers, we would like to inform you of our preference for the date of 8 September”*.
49. On 27th July 2022, Dexia issued its second application notice seeking permission to rely on the expert report of Italian law prepared by Professor Aurelio Gentili dated 27th July 2022 and, in addition, seeking summary judgment in respect of an additional claim for declaratory relief (declaration no. 7).
50. The second application notice was served by email upon Pesaro on 28th July 2022. There was no response by Pesaro to the service of this application. However, as the email was sent to the same recipient at *“provincia.pesarourbino@legalmail.it”*, there is no reason to think that the application was not received by Pesaro.
51. I am therefore satisfied that Pesaro received the first and second application notices issued by Dexia. In addition, the appointment for the hearing of the application for

summary judgment was fixed having regard to Pesaro's own preference. Nevertheless, at the hearing of Dexia's applications on 8th September 2022, Pesaro did not appear and was not represented. Further, although Pesaro had been represented by English solicitors, it has chosen not to instruct other solicitors. Pesaro has not indicated that it required further time in which to appear at the hearing of the applications. I must conclude therefore that Pesaro has voluntarily and knowingly waived its right to appear.

52. In these circumstances, I consider that it is appropriate to continue to proceed with the hearing in the absence of Pesaro and I consider that there is a public interest in doing so (*R v Hayward, Jones and Purvis* [2001] EWCA Crim 168; [2001] 2 Cr App R 11, para. 22.5; *HC Trading Malta Limited v Savannah Cement Ltd* [2020] EWHC 2144 (Comm), para. 4). I am conscious that Pesaro has not articulated a complete response to Dexia's applications, but it has given some indication of its position in its letter dated 18th May 2022 and in the allegations and case it has advanced before the Italian Court. Notwithstanding, whether or not Pesaro has set out its position in response to the applications fully, I do not consider that this is a reason not to proceed with the hearing given the fact that Pesaro has, in my judgment, knowingly chosen not to appear or be represented at the hearing, which was fixed having regard to Pesaro's own stated preference.

### **The application for permission to amend the Claim Form**

53. Dexia has applied for permission to amend the Claim Form so that the declarations therein set out reflect the precise terms of the declarations claimed in the Particulars of Claim. The proposed amendments are said to be closely related to the declaratory relief originally sought; there are also additional declarations sought as to the absence of an Event of Default, an entitlement to an indemnity in respect of any claim brought against Dexia in breach of other declarations sought, and as to such claims being time-barred. These latter declarations do not arise for consideration upon the applications for summary judgment considered below.
54. The declarations claimed in the Particulars of Claim are known to Pesaro by reason of the fact that the Particulars of Claim have been served on Pesaro.
55. I was concerned momentarily that the declaratory relief claimed in the Particulars of Claim may have gone outside the scope of the relief claimed in the Claim Form.

However, I do not see that of itself to be an objection to allowing Dexia permission to amend. In any event, the Claim Form as originally served in its unamended form claimed additional relief as follows “*Further or other relief (including further or other declaratory relief)*”.

56. I can see no reason why the application for permission to amend should not be permitted, given that Pesaro is fairly on notice of the proposed amendments, the proposed amendments reflect the claims for declaratory relief already pleaded in the Particulars of Claim and there is no identifiable prejudice to Pesaro if the application were allowed. I therefore allow Dexia to amend the Claim Form in the manner set out in the draft amendments attached to the first application notice.

### **The summary judgment application**

57. Dexia applies for summary judgment in its favour in respect of its claim for a number of declarations. Although Dexia’s application notices originally sought permission to make the summary judgment application, as Pesaro has filed an acknowledgment of service, no such permission is required (CPR rule 24.4(1)).
58. In considering applications for summary judgment, the Court has regard to the following principles as have been set out and explained on numerous cases (notably in *Easyair Ltd (trading as Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch), para. 15). Recently, in *Abaidildinov v Amin* [2020] EWHC 2192 (Ch); [2020] 1 WLR 5120, at para. 25, Robin Vos, J succinctly outlined the relevant principles as follows:
- (1) The Court must consider whether the defendant has a realistic as opposed to a fanciful prospect of successfully defending the claim or issue.
  - (2) A realistic prospect of success is one which carries some degree of conviction. The defence must be more than merely arguable.
  - (3) The Court should not conduct a mini trial.
  - (4) This does not mean that the Court must take at face value and without analysis the defendant’s evidence.

- (5) The Court should take into account not only the evidence actually placed before it but also any evidence that could reasonably be expected to be available at trial.
  - (6) The Court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.
  - (7) Disputed facts must generally be assumed in the defendant's favour.
  - (8) Where an application gives rise to a short point of law or construction and the Court is satisfied that it has before it all of the evidence necessary to decide that question, it should do so.
59. The application for summary judgment is made in respect of Dexia's claim for declaratory relief. There has traditionally been some reluctance to grant declaratory relief in applications for default judgment on the basis that declaratory relief should be granted only after argument between the parties or in the clearest of cases; the key consideration is whether declaratory relief can be granted without injustice to the defendant (*Equitas Ltd v Wave City Shipping Co Ltd* [2005] EWHC 923 (Comm), para. 17; *Goldcrest Distribution Ltd v McCole* [2016] EWHC 1571 (Ch), para. 43).
60. Of course, the present application is not for a default judgment, but summary judgment, which involves the Court considering the merits, rather than merely granting relief by reason of the defendant not having acknowledged service of a claim form or not having filed a defence. I do not see that any especial consideration applies for the purposes of disposing of a summary judgment application where the claimant's claim is not for an order for the payment of money, but for a declaration. Of course, declarations by nature are discretionary remedies, but the Court also has a discretion when deciding whether to grant summary judgment even if the requirements of CPR rule 24.2 are satisfied.
61. Having regard to Pesaro's letter dated 18th May 2022 and its case advanced before the Italian Court, the following issues arise for consideration by the Court in connection with Dexia's application for summary judgment:



- (1) **The governing law:** What is the governing law of the transactions (paragraphs 20-22 of the Particulars of Claim)?
- (2) **Compliance with Italian law:** What is the true construction of the representation made by Pesaro by Section 3(a)(iii) of the Master Agreement and pleaded at paragraph 23(2) of the Particulars of Claim? Did the execution, delivery and performance of the Transaction Documents violate or conflict with any laws or regulations applicable to Pesaro, including the Italian Laws (if and to the extent that they are applicable) (paragraph 41(1) of the Particulars of Claim)? This issue relates principally to Declaration 7 claimed by Dexia.
- (3) **Validity of the Transactions:** Were/are the transactions valid, legal and binding obligations enforceable against Pesaro in accordance with their terms (paragraph 40 of the Particulars of Claim)?

(1) The governing law of the Transactions

62. Dexia's case is that the transactions are governed by English law by reason of express choice of law provisions in the Master Agreement and Schedule.
63. In the Italian proceedings commenced by Pesaro, it is asserted that

*"... the parties undoubtedly indicated that they considered the negotiations on the 2005 Swap to be subject to Italian law.*

*The willingness to subject the 2005 Swap to Italian law (which is expressly permitted by Article 3(2) of the Rome Convention of 1980) can be inferred both from the reference to and compliance with Consob Regulation No. 11522/1998, and from the references to Law No. 448/2001 and Ministerial Decree No. 389/2003, and, finally, from the same correspondence through which the parties entered into the derivative contracts, formulating the relevant agreements with express reference to Article 1329 of the Italian Civil Code and therein agreeing that "in the event of discrepancy and limited to the new transaction, the clauses of the confirmation itself shall prevail over the provisions of the ISDA Framework Agreement". All the foregoing therefore indicates with reasonable certainty that the parties never intended to disapply Italian law which, indeed, also on the basis of Article 3(2) of the Rome Convention of 1980 in force at the time, is certainly to be regarded as the law applicable to the transaction in question ...*

*The 2005 Swap, therefore, is a transaction which, by the parties' intention, is subject not to English law but to Italian law, so that the first requirement of clause 13 of the ISDA Master Agreement is not fulfilled and English jurisdiction is*

*therefore (at most) concurrent with, and certainly not exclusive of, Italian jurisdiction ...”*

64. The issue of identifying the applicable law is a matter for the EEC Convention on the Law Applicable to Contractual Obligations (“**the Rome Convention**”) which was incorporated in the law of the United Kingdom by the Contracts (Applicable Law) Act 1990. The 1990 Act applies to contracts concluded between 1st April 1991 (when the 1990 Act came into force) and 17th December 2009 when the Rome I Regulation (EU) entered into force. The Transactions were concluded in 2003 and 2005.
65. Mr Jasbir Dhillon KC, on behalf of Dexia, submitted that:
- (1) The Transaction Documents were expressed to be governed by English law, being originally chosen by the parties in the Master Agreement and Schedule. There was no subsequent choice of a different governing law pursuant to Article 3(2) of the Rome Convention.
  - (2) There can be no suggestion that there was any express choice of law in the Transaction Documents other than that in favour of English law.
  - (3) As Article 3(1) of the Rome Convention indicates, a choice of law may nevertheless be implied if demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.
  - (4) Contrary to Pesaro’s contention in the Italian Claim, the Second Transaction Confirmation provides no proper basis from which to infer a choice of Italian law:
    - (a) Two of the provisions identified by Pesaro are not in fact referred to in the Second Transaction Confirmation at all.
    - (b) One provision is merely a reference to a provision of the Italian Civil Code which provides for the formation of contract by means of the exchange of proposal and acceptance, which is (as a matter of fact), how the parties chose to conclude the Second Transaction Confirmation.
    - (c) The final provision is the confirmation that Pesaro had received from Dexia the Document on the General Risks of Investments in Financial

Instruments (Annex no. 3 of Consob Regulation No. 11522 of 1 July 1998). This does no more than reflect the obligations on Dexia as a financial intermediary providing investment services in Italy and cannot sensibly be construed as implying an agreement that the Second Transaction be subject to Italian law (contrary to the agreement in Section 13 of the Master Agreement and the Schedule).

66. The relevant provisions of the Rome Convention are as follows:

**“Article 3**

***Freedom of choice***

1. *A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.*
2. *The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.*
3. *The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called ‘mandatory rules’.*
4. *The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11 ...*

**Article 8**

***Material validity***

1. *The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid ...*

67. In my judgment, the Transaction Documents are plainly governed by English law for the following reasons.

68. First, the Master Agreement and the Schedule expressly and without any qualification provide that the Agreement (which by Section 1(c) of the Master Agreement comprises all of the Transaction Documents) is to be governed by and construed in accordance with English law.
69. Second, the only factors which I understand that Pesaro relies on as counteracting that express choice of English law are the references to certain provisions of Italian law in the Pesaro proposals, which were accepted by Dexia, or elsewhere, namely:
- (1) Consob Regulation No. 11522/1998, which makes provision for the manner in which a financial intermediary undertakes business in Italy.
  - (2) Article 1329 of the Italian Civil Code, which provides that if an offer is made and is said to be irrevocable for a certain period of time, it cannot be revoked during that relevant time.
  - (3) Law No. 448/2001 and Ministerial Decree No. 389/2003 were both referred to not in the Transaction Documents, but in Resolution No. 4733/2005 which authorised Pesaro to enter into the Second Transaction.
70. I do not consider any of these references are sufficient to displace the express choice of English law, because the first two provisions are not concerned with the terms and performance of the Transaction Documents themselves, but with the circumstances leading up to the conclusion of the relevant contractual arrangements, and because the latter two provisions are not located in the Transaction Documents at all.
71. Further, even if these references could be said to be concerned with the terms and performance of the Transaction Documents, they are not sufficient either to demonstrate with reasonable certainty that Italian law was being chosen as the governing law and they are not sufficient to lead to the conclusion that the parties had overridden their stated choice of English law either expressly or in any other way demonstrable with reasonable certainty.
72. In addition, if the parties' intention had been to choose Italian law in the Second (or First) Transaction as the new governing law to replace the choice of English law in the Master Agreement and Schedule, in accordance with Article 3(2) of the Rome

Convention, the parties would have used language which was far more explicit to that end, for example by stating that the choice of law in the Master Agreement and Schedule is replaced by the choice of Italian law recorded in the Second Transaction. However, there is no such provision nor indeed a provision which comes arguably close to such a provision.

73. Indeed, the Master Agreement contemplates - and the First and Second Transactions both provide - that the First and Second Transactions are entered into under and/or in accordance with the terms of the Master Agreement and Schedule. This, in my judgment, puts paid to any suggestion of the First and Second Transactions being subject to a governing law other than English law.
74. Mr Dhillon KC postulated an argument which might have been advanced by Pesaro had it appeared at the hearing of the summary judgment application, namely that notwithstanding the express choice of English law as the governing law, which is effective in accordance with Article 3(1) of the Rome Convention, any mandatory provision of Italian law might still be applicable pursuant to Article 3(3).
75. Article 3(3) provides that “*The fact that the parties have chosen a foreign law ... shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called ‘mandatory rules’*”.
76. Mr Dhillon KC met this possible argument as follows:
- (1) The effect of Article 3(3) is to privilege “*mandatory rules*” of Italian law only if all elements relevant to the situation at the time of the Transactions (other than the choice of English law) are connected with Italy only.
  - (2) If there was an “*international element*”, Article 3(3) will not be engaged, and therefore there is no need to investigate the question of mandatory rules.
  - (3) In the present case, there was plainly an international element, namely (a) the Transactions were documented using standard international documentation, in the form of the ISDA Master Agreement, emphasising in addition the use of the

multi-currency version of the form, and the use of an English-language form by Italian parties, (b) Dexia, as was usual and reasonably foreseeable to Pesaro, hedged its exposure under the Transactions by entering into back-to-back swaps with market participants outside of Italy, namely Barclays Capital and Goldman Sachs International. See paragraphs 21(1)-(3) of the Particulars of Claim.

- (4) It follows that Article 3(3) is not engaged and were Pesaro to have contended that “*mandatory rules*” of Italian law were applicable to the Transaction, that case would have been bound to fail.

77. In putting forward these submissions, Mr Dhillon KC relied on the decision of the Court of Appeal in *Dexia Crediop SpA v Comune di Prato* [2017] EWCA Civ 428; [2017] 1 CLC 969. In that case, the Court of Appeal considered the application of Article 3(3), which was similarly concerned with a swap transaction made pursuant to the ISDA 2002 Master Agreement. The Court of Appeal referred to its earlier decision in *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267; [2017] 1 WLR 1323. The Court said at para. 126-137:

*“126. The Banco Santander case went to the Court of Appeal [2016] 2 CLC 980; [2017] 1 WLR 1323 in which Mr Ali Malek QC (for the investors in that case) submitted that Blair J was wrong to hold that elements relevant to the situation could include factors of an international kind which did not point to another country. That argument was rejected. Etherton MR (with whom Sir Martin Moore-Bick and Longmore LJ agreed) said:*

*‘46. I accept the judge’s analysis, and Santander’s case, that article 3(3) is properly to be approached as a limited exception to the policy or principle or starting point of party autonomy and, as such, it is to be construed narrowly.*

...

*53. If it had been intended that “elements relevant to the situation” in article 3(3) should be confined to factors of a kind which connect the contract to a particular country for the purpose of identifying the proper law in the absence of an express choice, the drafter could have used the familiar and simple conflict of laws language of “close connection”, which one finds in article 4. The marked difference between the language of article 3(3) and of article 4(1) is striking and supports an interpretation of article 3(3) in accordance with the natural and ordinary meaning of its words. That striking difference is also apparent from other language versions of the Convention, such as the French, Italian and Spanish versions.*

54. *In so far as Paul Walker J in the Dexia case [2015] EWHC 1746 (Comm) reached a different conclusion on the proper interpretation of article 3(3), that is to say by confining “elements of the situation” to those with a connection to a particular country in a conflict of laws sense, I respectfully disagree with him. ....’*

...

128. *We are bound by the decision of this court in Santander and must therefore decide that the judge proceeded on a wrong basis when he concluded that the matters relied on by Dexia were not elements relevant to the situation.*

129. *That is by no means the end of the matter since it still remains a question whether all other elements relevant to the situation of the parties at the time of the contract were located in a country other than England. That calls for an evaluative judgment but, since the judge proceeded on a wrong basis, this court must now conduct that evaluation itself.*

#### *Relevant elements*

130. *In the Banco Santander case Blair J considered eight possibly relevant factors in great detail (paragraph 409) and set out his conclusions in paragraph 411:*

*‘411. Summarising the main points made above, because of the right to assign to a bank outside Portugal, the use of standard international documentation, the practical necessity for the relationship with a bank outside Portugal, the international nature of the swaps market in which the contracts were concluded, and the fact that back-to-back contracts were concluded with a bank outside Portugal in circumstances in which such hedging arrangements are routine, the court’s conclusion is that article 3.3 of the Rome Convention is not engaged because all the elements relevant to the situation at the time of the choice were not connected with Portugal only. In short, these were not purely domestic contracts. Any other conclusion, the court believes, would undermine legal certainty.’*

*This court declined to interfere with what it called the judge’s ‘evaluative exercise’ (paragraph 67).*

131. *The present case, is, of course, distinguishable in as much as the swap contracts with which this court is concerned did not contain any specific right to assign the contract to a bank outside Italy and there was no ‘practical necessity’ for a relationship between the investor and a bank outside Italy but two of the other three elements, considered by Blair J to be important, are present namely the use of standard international documentation, in the form of the ISDA Master Agreement and the routine back-to-back contracts concluded with banks outside Italy. The third element, the international nature of the swaps market in which contracts were concluded, is perhaps somewhat less obvious in this case than in Banco Santander.*

132. *In relation to the ISDA Master Agreement, signed by the parties in 2002 and expressly incorporated by the penultimate paragraph of Dexia's acceptance of Prato's proposal, the following factors are important:*

*(1) it is the standard form of master agreement of the International Swap Dealers Association Inc. There is thus at once an international element rather than a domestic element associated with any particular country;*

*(2) the form is the Multi-currency – Cross Border form; there is a 'Local Currency – single Jurisdiction form' albeit, as we were told, a form used almost entirely in the United States rather than elsewhere. The form thus contemplates more than one currency and the involvement of more than one country; and*

*(3) the form signed by the parties was in the English language, despite that not being the first language of either party.*

133. *In relation to the back-to-back contracts, Prato submitted that, unlike the investors in Santander, who accepted that it was foreseeable that the bank would enter back-to-back contracts, there was no finding that Prato foresaw any back-to-back hedging arrangements whether with other Italian banks or (as in this case) with banks outside Italy. For Blair J in Banco Santander it was the fact that the back-to-back contracts were 'routine' that was important (paragraph 411). It is true that the Master of the Rolls in paragraph 65 of his judgment called them 'routine and foreseeable'. No doubt they were (objectively) foreseeable because they were routine. The back-to-back arrangements in the present case were equally routine and the fact that they were made with banks outside Italy shows just how international the swaps market actually is.*

134. *It seems to us that each of these two factors is enough on its own to demonstrate an international and relevant element in the situation such that it is impossible to say that 'all elements (other than the choice of law) relevant to the situation' are located in a country other than England such as (in this case) Italy. The international dimension precludes any such assertion. The use of the ISDA Master Agreement is self-evidently not connected with any particular country and is used precisely because it is not intended to be associated exclusively with any such country.*

135. *We also consider that the presence of back-to-back contracts is highly significant. If the mandatory local laws of a party are to be applied to any individual swap contract, there is a real risk that the back-to-back security will quickly become illusory. If for example the law of one country requires (as does Italian law) a right of withdrawal to be accorded to the investor for seven days after execution but the law of another country governing a back-to-back contract has no such requirement or, say, a 28-day right of withdrawal, the back-to-back contracts will cease to be useful. It is this sort of consideration that led Blair J to emphasise the need for certainty in paragraph 411 of Banco Santander and we agree with him*

...



*137. Mr Davies-Jones made a sustained submission in relation to the lengthy paragraph 409 of the judgment of Blair J with its detailed consideration of eight possibly relevant factors in that case and then compared them in equal detail to the facts of this case. In our judgment this approach was misplaced. It should be possible for parties to swap contracts to know where they are in relation to art. 3(3) of the Rome Convention without the detailed comparison of the facts of one case with the facts of another case. Once an international element comes into the picture, art. 3(3) with its reference to mandatory rules should have no application. It is true that Banco Santander had at least two additional elements pointing away from Portugal (the right to assign and the necessity for a relationship with a non Portuguese bank) and that, in this sense, the present case is not as obvious as Banco Santander; but it is, in our view, obvious enough.”*

78. Therefore, given the nature of the Transaction Documents being based on the ISDA Master Agreement, there is no scope for allowing any mandatory rules of Italian law - should there be such laws - to displace, under Article 3(3), the express choice of English law made by the parties in the Master Agreement and Schedule, under and in accordance with which the First and Second Transactions were concluded.
79. I should add that the second international element relied on by Dexia was the fact that Dexia had hedged its exposure under the Transactions by entering into back-to-back swaps with market participants outside of Italy. I did not have those swap transactions before me and therefore I am unable to rely on that as importing a sufficient international element so as to avoid the application of Italian mandatory laws. Nevertheless, the first international element referred to above is sufficient to achieve the same end.
80. In my judgment, the Transaction Documents are governed by English law in accordance with Article 3(1) of the Rome Convention.

(2) Compliance with Italian Law and Declaration 7

81. Declaration 7 claimed by Dexia is of added complexity because in order to seek summary judgment for that claim it seeks the Court’s permission to rely on expert evidence, namely the report dated 27th July 2022 of Professor Aurelio Gentili, Emeritus Professor of Civil Law at Università Roma Tre.
82. The grounds of the application are set out in paragraphs 46-51 of the first witness statement dated 27th July 2022 of Mr Giuseppe Massimiliano Danusso, namely that the proceedings are of considerable importance to Dexia, the adduction of such evidence is

proportionate, there is no prejudice to Pesaro, given that it has been put on notice of the application to adduce this evidence and it has chosen not to participate in the proceedings, and the Court will benefit from the assistance of this evidence. The application expressly noted that this evidence would be relied on by Dexia in support of its application for summary judgment (paragraph 46 of Mr Danusso's witness statement).

83. During the course of the oral hearing, I allowed Dexia permission to adduce this evidence for the reasons relied on by Dexia.
84. The representation pleaded by Dexia at paragraph 23(2) of the Particulars of Claim relies on Section 3(a)(iii) of the Master Agreement. As pleaded, the representation is that such execution, delivery and performance do not, and did not at any material time, violate or conflict with any law applicable to Pesaro, 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.
85. At paragraph 24 of its Particulars of claim, Dexia pleads that on its true construction, the representation means, alternatively there is an implied representation, that the execution, delivery and performance of the Transaction Documents did not violate or conflict with any Italian laws or regulations applicable to Pesaro, including to the extent that they are applicable to the Transactions:
  - (1) Article 119(6) of the Italian Constitution;
  - (2) Article 41 of the Italian Legislative Decree No. 448/2001;
  - (3) Article 3 of Ministerial Decree no. 389 of 1 December 2003 ("**Decree 389**") issued by the Treasury Department of the Italian Ministry of Economy and Finance and published in the Official Gazette no. 28 of 4 February 2004;
  - (4) Circular of the Ministry of Economy and Finance of 27 May 2004 ("**the 2004 Circular**"); and
  - (5) Article 42 of the Local Entities Act (Testo Unico Enti Locali) ("**TUEL**"); and

(6) Article 30(15) of Law no. 289/2002.

86. At paragraph 41 of the Particulars of Claim, Dexia pleads that it was in fact the case that the execution, delivery and performance of the Transaction Documents did not violate or conflict with any laws or regulations applicable to Pesaro, including those set out above.
87. Dexia's application for summary judgment is in respect of its claim for a declaration that the Transactions conformed with each of these provisions of Italian law.
88. I will address this application relying principally on the expert evidence of Professor Gentili.

(a) Article 119(6) of the Italian Constitution and Article 30(15) of Law no. 289/2002

89. Article 119(6) of the Italian Constitution stipulates that "*Municipalities, provinces, metropolitan cities and regions have their own assets, which are allocated to them pursuant to general principles laid down in State legislation. They may resort to indebtedness only as a means of funding investments. State guarantees on loans contracted by such authorities are not admissible.*"
90. At paragraph 4.23 of his report, Professor Gentili stated that "*The Constitutional Court stated that "it should be noted that the last paragraph of Article 119 of the Italian Constitution establishes a limiting financial balance, which takes the form of allowing local authorities to borrow, but only to finance their investment expenditure".*"
91. In its claim before the Italian Courts, Pesaro has contended that the Transactions represent a form of indebtedness which was not aimed at financing investments, including due to the alleged imposition of certain "*implicit*" costs which were not fully disclosed by Dexia. Pesaro relies on the decision of the Supreme Court of Italy in *Cattolica*, which (according to Pesaro's case) held that derivative transactions such as the Transactions should be regarded as a form of indebtedness for the purpose of Article 119.
92. Article 30(15) Law no. 289/2002 provides that a contract entered into in breach of Article 119(6) of the Constitution shall (as a matter of Italian law) be considered null and void (Professor's Gentili's report, at para. 4.42-4.45).

93. Mr Dhillon KC on behalf of Dexia submitted that any such argument, if it were advanced before the English Court, would be bound to fail. The decision in *Cattolica* held that, although derivative contracts in general do not constitute indebtedness, certain types of derivatives may have the effect of creating indebtedness if they: (i) provide for an upfront payment; (ii) extinguish pre-existing underlying loans; or (iii) significantly modify existing loans (see paragraph 4.31 of Professor Gentili’s report; *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm), para. 325). However, it is apparent from the terms of the Transactions that they did not involve an upfront payment or extinguish pre-existing underlying loans. It is also plain that the Second Transaction - an interest rate collar - was a hedging transaction, which did not affect Pesaro’s underlying borrowing. The position is identical to that considered in *Deutsche v Busto*, at para. 342, and, as in that case, the Second Transaction cannot be said to involve any significant modification of Pesaro’s borrowing.

94. At paragraph 4.33 of his expert’s report, Professor Gentili stated that:

*“... even assuming that the Cattolica Decision correctly reflects Italian law, under the law as explained in that decision, only derivative contracts involving an upfront payment and those which terminate or significantly modify pre-existing loans should be considered “indebtedness”, and as such may be relevant for the purpose of Article 119(6) of the Italian Constitution. I note on this point that there is no indication by the Court in the Cattolica Decision as to what the “significant modifications” to existing indebtedness could be or how such modifications are to be identified. In any case, in my view, the entering into of a plain vanilla derivative transaction which simply has the effect of hedging the interest rate risk to which a local authority is exposed on its indebtedness, without modifying the duration or amount of such indebtedness, cannot be regarded as a significant modification in the sense indicated under the Cattolica decision, even despite the lack of clarity from the Court in that judgment as to what might constitute a “significant modification”.”*

95. It follows, argues Dexia, that as there is no violation of Article 119, Article 30(15) is not engaged, and any defence based on this provision has no prospect of success.

96. I am prepared to accept that Italian law is as explained by Professor Gentili and as accepted by this Court in the earlier decision of *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm) (as to which Dexia tendered notice under section 4 of the Civil Evidence Act 1972).

97. There is no evidence before the Court that the Transactions had any of the three factors which would have rendered them as forms of indebtedness as identified by the Supreme Court of Italy in the *Cattolica* decision. In my judgment, there is no real prospect of the Transactions being treated as void on this ground.

(b) Article 42 of TUEL

98. Article 42 of TUEL requires certain “*fundamental acts*” to be approved by the Provincial Council (rather than another body, such the Executive Board, or an officer of the Province) in order to be considered valid. Such fundamental acts include, among other things, “*loans*” and “*expenditures which bind budgets for the following years*”.

99. The Italian Supreme Court in *Cattolica* held that certain interest rate swaps required authorisation by the City Council under TUEL Article 42(2) if their characteristics are such as to constitute indebtedness, which they will on the three bases identified above, namely: (i) the inclusion of an “*upfront*” premium/loan, (ii) the extinguishment of existing loans, or (iii) the significant modification of existing loans so as to give rise to new indebtedness (paragraph 4.60 of Professor Gentili’s report; *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm), para. 325, 331, 335-337).

100. Mr Dhillon KC submitted that, assuming for the purposes of the summary judgment application, that the decision in *Cattolica* represents a correct statement of the law,

(1) The Transactions did not require authorisation by the Provincial Council under Article 42(2) TUEL, for the same reasons that they did not constitute indebtedness for the purposes of Art 119(6) of the Italian Constitution.

(2) Even if Provincial Council approval was required, that requirement was satisfied by Resolution No. 33/2002 and Resolution No. 33/2003 (pleaded at paragraph 6 of the Particulars of Claim), by which the Council expressed the intention to manage its floating rate debt through the conclusion of certain swap transactions.

(3) Professor Gentili concluded at paragraph 4.101 of his report that:

*“For the sake of completeness, I must also point out that, if, contrary to my opinion, City Council approval was required, then what was required was approval in the form that I have described before at para 4.63. I am*

*instructed that in the present case, 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. My opinion is that such City Council resolutions would be sufficient to comply with Article 42 TUEL, consistently with the role played by the City Council within the legal framework of TUEL (i.e., policy-making and political-administrative control). As such, in these circumstances Article 42 TUEL would not be violated because there was a City Council resolution which approved the entering into of derivative contracts, such as the Transactions.*

- (4) This analysis accords with the conclusions reached in *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm), para. 357-364, where Cockerill, J held that if City Council approval was required (contrary to her earlier conclusion that it was not), it was given. However, I observe that the approvals considered by the Court in that case were not the same instruments which arise in the present case.

101. In my judgment, the submissions advanced by Dexia must be upheld. The Transactions were not of the type which required the approval of the Provincial Council and even if they were, such approval had been obtained by reason of Resolution No. 33/2002 and Resolution No. 33/2003. There is no real prospect of the Transactions being treated as contravening Article 42 of TUEL.

(c) Article 41 of Law No. 448/2001

102. Article 41 of Law No. 448/2001:

- (1) Granted the Ministry of Economy and Finance (“**the MEF**”) the power to coordinate local authorities’ access to the capital markets for the purpose of limiting the cost of debt of local authorities and to monitor public finances (and it did so through the issuance of Ministerial Decree no. 389 of 2003) (paragraph 4.66 of Professor Gentili’s report), and
- (2) Authorised local authorities to restructure their existing indebtedness subject to the requirements set out in that provision. Relevantly, Article 41(2) provided that local authorities may refinance loans either by issuing new bonds or by

novation of the loans, provided that the transaction was “*economically advantageous*” for the local authority (*i.e.*, the local authority must do so “*under refinancing conditions that allow a reduction of the financial value of total liabilities to be paid by the bodies themselves*”) (paragraph 4.68 of Professor Gentili’s report).

103. Dexia’s case is that at the time of the Transactions, Article 41 of Law No. 441/2001 did not impose on local authorities any specific requirements regarding the entering into derivative contracts (paragraph 4.70 of Professor Gentili’s report).
104. In the Italian proceedings, Pesaro contends that the Transactions did not comply with Article 41(2) in that they did not meet the economic convenience requirement (*i.e.*, they were not “*economically advantageous*”), due to the fact that the Transactions included certain “*implicit costs*” to Pesaro.
105. Mr Dhillon KC on behalf of Dexia submitted that Pesaro’s contention is “*doubly misconceived*” in that:
  - (1) As the text of Article 41(2) indicates, and Professor Gentili confirms (at paragraph 4.102 of his report), it is concerned only with the refinancing or restructuring of existing loans (whether by borrowing or novation). The Transactions did not constitute a refinancing or restructuring of any existing indebtedness, and so are outside of its ambit entirely and are not subject to the economic convenience test.
  - (2) In any event, even if Article 41(2) was not limited to “*restructuring*” transactions, Pesaro’s contention in the Italian Claim assumes that the Transactions are a form of indebtedness, which for the reasons already submitted in connection with Article 119(6) of the Italian Constitution, they are not.
106. I accept these submissions. I do not see that Pesaro has any realistic basis for contending that there was non-compliance with Article 41 of Law No. 448/2001. There is no evidence before the Court to the contrary.

(d) MEF Regulation No. 389/2003 and MEF Circular of 27 May 2004

107. As already explained, Article 41(1) of Law No. 448 of 2001 gave a power to the MEF to coordinate local authorities' access to capital markets.
108. Pursuant to that power, Decree 389 set out certain technical rules on the use of derivatives by local authorities. Article 3(2) of Decree 389 set out a list of the types of derivative instruments which local authorities were permitted to enter into in accordance with the MEF Regulation, including:
- (1) A collar IRS transaction (Article 3(2)(d)). That is significant, since the Second Transaction was a collar IRS. Importantly, therefore, the Transactions were of a type which was specifically permitted by the Decree 389.
  - (2) *“Other derivative transactions aimed at the restructuring of borrowing, but only when the maturity date does not exceed that associated with the underlying liability”, provided that “the flows received by the interested parties are equal to those paid with regard to the underlying liability, at the time they are entered into [and] do not involve an increasing trend in terms of the current values of the individual payment flows, with the exception of a possible discount or premium to be settled when the transactions are concluded, not exceed 1% of the notional amount of the underlying liability.”* (Article 3(2)(f)).
109. On 27th May 2004, the MEF issued the 2004 Circular providing guidance as to the interpretation of the MEF Regulation. This guidance (among other things) provided that:
- (1) *“Implicit in the purchase of the collar is the purchase of a cap and the simultaneous sale of a floor, which is permitted solely for the purpose of financing the protection against rising interest rates provided by the purchase of the cap”*. Therefore, the guidance stated that a local authority could sell a floor option only for the purpose of funding the purchase of a cap option.
  - (2) In relation to Article 3(2)(f), the prohibition of a derivative transaction aimed at restructuring of an underlying liability which involves an *“increasing profile of*



*present values*” is intended to prevent derivative transactions in which the payment flows from the local authority are concentrated close to maturity.

- (3) A derivative transaction may be renegotiated (or “*readjusted*”) in the event of a change in the underlying debt to which the derivative relates, provided that does not result in a “*loss*” for the entity (meaning a worsening of the local authority’s existing indebtedness).

110. In the Italian proceedings, Pesaro has alleged that the Transactions were entered into in breach of Decree 389, because:

- (1) Contrary to Article 3(2)(f), the Second Transaction embedded within its economic terms the negative mark-to-market of the First Transaction and from a financial perspective this was equivalent to the payment of a premium for an amount exceeding 1% of the notional amount of the underlying indebtedness.
- (2) Contrary to Article 3(2)(d), the cap and the floor did not have the same financial value, as the Circular would otherwise require; and
- (3) Contrary to the contents of the 2004 Circular, the First Transaction was restructured even though the underlying indebtedness had not been modified or amended.

111. Mr Dhillon KC on behalf of Dexia submitted that each of these contentions is without merit:

- (1) As to Article 3(2)(f), it is clear as a matter of fact that the Second Transaction did not involve an “*increasing profile of present values*” by which the payment flows from Pesaro to Dexia increased towards maturity. To the contrary, Annex A to the Second Transaction Confirmation indicates that the Notional Amount of the Second Transaction was to decrease towards maturity (falling from €19,201,081 in the first semi-annual period, to €7,487,721 in the final semi-annual period).
- (2) As to Article 3(2)(d), neither Decree 389 nor the 2004 Circular requires an equivalence of value between the cap and floor elements of a collar swap (paragraph 4.80 of Professor Gentili’s report). That is unsurprising, since (as

Professor Gentili points out) such a rule would be unworkable, given that there no single, objective method of valuing a component of a derivative transaction. That conclusion as a matter of Italian law is reflected in three English decisions: *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298, para. 75; *Dexia Crediop SpA v Comune di Prato* [2015] EWHC 1746 (Comm), para. 188-190; and *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm), para. 312-316. I observe however that Dexia did not issue a notice pursuant to section 4 of the Civil Evidence Act 1972 in respect of the decisions in *Piemonte v Dexia* or *Dexia v Prato*. Accordingly, I do not regard myself as free to consider these decisions as evidence of Italian law, whereas I consider myself able to have regard to the decision in *Deutsche v Busto* because a relevant notice was issued in respect of that decision.

- (3) As to the suggestion that it was impermissible for the First Transaction to be restructured even though the underlying indebtedness had not been modified or amended:
- (a) Nothing in the 2004 Circular suggests that a derivative transaction may only be restructured in circumstances where the underlying indebtedness has been modified.
  - (b) The 2004 Circular does provide that where there has been a change in the underlying indebtedness, the corresponding derivative may be “*readjusted*” on the condition that it does not result in a loss for the local authority. But there is nothing in the text of the Circular to suggest that it was intended to provide an exhaustive statement of the circumstances in which a derivative may be restructured.
  - (c) In fact, it was plainly appropriate for the First Transaction to be replaced by the Second Transaction because, unlike the Second Transaction (a collar), the First Transaction provided for a fixed interest rate with a threshold, which was not amongst those included in the subsequent Decree 389. The Executive Determination by which Pesaro entered into the Second Transaction (Resolution No. 4733/2005), expressly stated

that the proposed transaction was “*in line with*” Decree 389 and the 2004 Circular.

- (d) In any event, the 2004 Circular is guidance, rather than a source of law, and there is no suggestion that Decree 389 itself imposes any limitation on the circumstances in which a derivative of a type permitted under Article 3(2) of Decree 389 may be restructured.

112. However, Mr Dhillon KC referred me to Professor Gentili’s discussion (at para. 4.84 of his report) of a decision of the Court of Appeal of Milan (decision no. 2393 of 2020) which has been followed in three subsequent decisions, namely Court of Appeal of Milan decision no. 4712/2018, Court of Appeal of L’Aquila decision no. 576/2021 and Court of Venice decision no. 696/2022 which suggests that there must be an equivalence of value between the cap and floor elements of a collar swap. Professor Gentili, at paragraphs 4.84-4.92 of his report, considers that this line of authority cannot be taken as a correct statement of Italian law. At paragraph 4.83, Professor Gentili questions the basis of these earlier decisions in light of the Supreme Court’s decision in *Cattolica*:

*“... I should note that Court of Cassation in the Cattolica Decision acknowledged in paragraph 4.6 that swaps in general always have a negative mark to market at inception for one of the parties. The Court further held in paragraph 9.8 that certain elements, such as the mark-to-market, probabilistic scenarios and hidden costs must be disclosed by the bank to its customer in order to comply with mandatory requirements (such as “causa” and “oggetto”) required for the validity of a contract governed by Italian law. As such, the Supreme Court acknowledged that even in a scenario where a local authority is a party to a derivative contract the mark-to-market of the transaction at inception is never equal to zero. This means that if on the one hand as we have seen above local authorities were permitted to enter into “collar” swaps, and on the other hand, if the mark-to-market at inception is never equal to zero, there could never be an equivalence between the value of the floor and cap options. This is because a negative mark-to-market at inception presupposes a financial difference between the value of the floor and cap options in a collar swap.”*

Conclusion on compliance with Italian law

113. I have considered the evidence of Professor Gentili and the submissions made on behalf of Dexia by Mr Dhillon KC in connection for the claim for Declaration 7.

114. I have reached the conclusion that there is no real prospect of Pesaro successfully contending that the Transactions did not comply with the Italian laws identified above, based on the evidence before the Court.
115. However, in respect of the arguments relating to article 3(2)(d) of Decree 389 (and the 2004 Circular insofar as it relates to Decree 389), there are a number of aspects in connection with this claim for Declaration 7 which gives me pause in disposing of the same on a summary judgment application. In particular:
- (1) Whether there is in fact a requirement for there to be an equivalence of value between the cap and floor elements of a collar swap as suggested by a number of decisions of the Italian Courts, with which Professor Gentili takes issue (perhaps rightly).
  - (2) At a trial, the issues which have been identified might be dealt with differently and the Court might well have the benefit of the oral evidence of Dexia's expert witness, even if Pesaro did not attend.
  - (3) Although there are decisions of the English Court touching on these issues, they were given after a trial, not on a summary judgment application, notably *Dexia Crediop SpA v Comune di Prato* [2017] EWCA Civ 428; [2017] 1 CLC 969, para. 50-64.
116. Accordingly, insofar as compliance with article 3(2)(d) of Decree 389 is concerned, I am not minded to grant summary judgment. Given the conflict in the opinion of Professor Gentili and a number of decisions of the Italian Court, it seems to me appropriate that this should be left over for trial.
117. The other issues of Italian law are, in my judgment, summarily determinable on the grounds that there is no real prospect of success on the part of Pesaro in establishing these arguments, based on the evidence before the Court.
118. Even if I am wrong in this respect, as discussed below, I do not consider that these grounds relate to the capacity of Pesaro, but instead the material validity of the Transactions, and so is a matter for English law. Accordingly, as there are no grounds

of invalidity suggested by Pesaro as a matter of English law, the Transactions - in particular, the Second Transaction must be treated as valid.

(3) Validity of the Transactions

119. The question is whether the Transactions are valid or not. If this were a matter of English law, being the governing law of the Transactions in accordance with Article 3(1) of the Rome Convention, there is no identified reason why the Transactions or the Transaction Documents should be regarded as invalid. Accordingly, by the application of Article 8(1), the material validity of the Transactions is to be assessed by reference to English law.
120. However, if the legal grounds of invalidity relied upon by Pesaro in the Italian proceedings as a matter of Italian law relate to Pesaro's "capacity" or power to enter into the Transactions, that is a matter for Italian law (*Dicey, Morris & Collins on The Conflict of Laws* (16th ed., 2022), Rule 187 and para. 30-021 - 30-023). The matter of the capacity of a body corporate or unincorporate is excluded from the scope of the Rome Convention by Article 1(c).
121. In *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] QB 549, Aikens, LJ said at para. 38, 47-48:

*"38. The objective of conflict of laws rules is to enable a court to decide which system of law is to be applied to resolve a legal question when there is a foreign, ie non-English, element, involved in an issue. In the present case the legal question is: by which system or systems of laws do you decide whether a contract, putatively governed by English law, between a Norwegian legal entity and an Irish one, is valid and binding on the Norwegian legal entity when it is alleged that the Norwegian legal entity did not have the "power" or the "capacity" to enter into the contract because of the terms of a Norwegian statute concerning the ability of kommunes to conclude contracts of loan? I have deliberately used both "powers" and "capacity" in the last sentence. The issue to be resolved is, ultimately, whether the contract is valid or void in the circumstances described ...*

*47. So, I return to the question: in what sense must we interpret the word "capacity" in Dicey's rule? Counsel have found no authorities in which there is any discussion of the meaning of the word for the purposes of the rule. None of the cases cited in the footnotes to Dicey assist on this point. It appears to be a novel issue. How the word "capacity" is interpreted for the purposes of the rule is, as Etherton LJ has stated in his judgment, ultimately a matter of policy. In my view it is important to remember the purpose of the rule, which is to determine*

*which systems of laws will be used, under English conflicts rules, to decide whether a “corporation” has the ability to exercise the legal right to enter into a binding contract with a third party. If that accurately summarises the rule’s purpose, then I think, following the approach of Auld LJ in the Macmillan case [1996] 1 WLR 387, 407 that the concept of “capacity” has to be given a broader, “internationalist”, meaning and must not be confined to the narrow definition accorded by domestic English law. In my view it should be interpreted as the legal ability of a corporation to exercise specific rights, in particular, the legal ability to enter a valid contract with a third party. So I agree with the approach of Tomlinson J; for the purposes of English conflicts of laws, a lack of substantive power to conclude a contract of a particular type is equivalent to a lack of “capacity”, to use English terminology.*

*48. For similar reasons, it seems to me that the concept of a corporation’s “constitution” must be given a broad, “internationalist” interpretation. It is not a question of just trying to find some document, like a royal charter, or the memorandum and articles or some other written description of what the corporation is and can do. For the purposes of this English conflict of laws rule it is necessary to examine all the sources of the powers of the corporation under consideration. This will include any constitutional documents but also relevant statutes and other rules of law of the country where the corporation was created.”*

122. In the Italian proceedings, Pesaro contends that the Second Transaction is void for the following reasons:

- (1) Infringement of Articles 23 of TUF and 30 of Consob Regulation No. 11522/1998: given the circumstance that in this case the Entity is classifiable as a “*retail client*”, the absence of a financial intermediation contract pursuant to Articles 23 TUF and 30 of Consob Regulation No. 11522/1998 must be observed - “*which is not how we can unambiguously define the ISDA Master Agreement*”.
- (2) Infringement of Articles 30 to 32 of TUF: the Second Transaction was signed by the parties by means of an exchange of correspondence; the bank official who acted by using techniques of distance communication with the client was not qualified as a financial adviser. It follows that Articles 30 and 32 of TUF have been infringed, with the relevant legal consequences in terms of the nullity of the contract.
- (3) Absence of rational risk (as defined by Italian Supreme Court, Joint Civil Divisions, Divisions No. 8770/2020): the Second Transaction Swap does not contain any information on mark-to-market at the time of stipulation,

measurement of the implicit costs applied and representation of the probabilistic scenarios associated with the contract, with consequent nullity of the transaction in relation to the lack of agreement between the parties on the actual allocation of the risk and costs and consequent nullity under Articles 1322, 1325.2, 1346 and 1418 of the Italian Civil Code.

- (4) Nullity for breach of Article 42 of the Consolidated Law on Local Authorities and/or for the ultra vires nature of the executive determination by which the Province approved the contract and also pursuant to Article 30(15) of Law No. 289/2002: in this respect, nullity can be traced back to the defects affecting the formative process of the will of the Body, which meant that it did not approve the conclusion of the contract in question through the Provincial Council and that it also implemented an operation without economic advantage and/or to be treated as an operation constituting indebtedness outside the limits allowed by Article 119, paragraph 6, of the Italian Constitution, TUEL, Article 41 of Law 448/2001 and Ministerial Decree 389/2003. Article 30, paragraph 15 of Law No. 289/2002 provides that *“if the local authorities resort to borrowing to finance expenditure other than investment expenditure, in violation of Article 119 of the Italian Constitution, the relevant acts and contracts are null and void”*.
- (5) Infringement of mandatory rules concerning the content of derivative contracts of local Authorities (Article 41 of Law 448/2001, Article 3 of Ministerial Decree 389/2003 and the MEF Circular of 27 May 2004), with regard to the lack of economic advantage of the Second Transaction and/or the unsuitability of the swap to be regarded as a mere hedging contract and/or the difference between the IRS in question and the contracts authorised under Article 3 of Ministerial Decree 389/2003 and the MEF Circular of 27 May 2004, with the consequent nullity under Article 1418 of the Italian Civil Code for infringement of the abovementioned mandatory rules.

123. On this issue, Mr Dhillon KC submitted as follows:

- (1) Pesaro puts forward these arguments as a reason for the voidness or invalidity of the Second Transaction; it does not refer to its lack of capacity to enter into

the Transactions, save in one instance where it alleges, in accordance with the *Cattolica* decision, “*the public limits to the general private-law capacity of [Pesaro] have been infringed*”.

- (2) The infringement of Articles 23 of the TUF (Consolidated Law on Finance) and/or Article 30 of Consob Regulation No. 11522/1998: The purported requirement for and absence in this case of a “*financial intermediation contract*” is a matter going to material validity; there is no suggestion in the Italian Claim that these rules affect Pesaro’s capacity to enter into the Second Transaction.
- (3) The alleged infringement of Articles 30 and 32 of TUF (Consolidated Law on Finance) (by, it is said, failing to indicate the right of Pesaro to withdraw from the contract). In common with Pesaro’s reliance on Article 23 of TUF, its arguments based upon Articles 30 and 32 relate to material validity and it is not alleged in the Italian Claim that these matters go to Pesaro’s capacity.
- (4) The alleged absence of “*rational risk*” as defined in the *Cattolica* decision: although the Italian Claim does not set out Pesaro’s case in any detail, it is nevertheless clear that Pesaro seeks to rely on Section 9 of the *Cattolica* decision, which provided the basis for the conclusion in that case that the transactions in question (which were governed by Italian law) were ineffective under Articles 1325, 1343, 1346 and 1418.2 of the Italian Civil Code. However, Cockerill J in *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm), para. 211 and 263, concluded “*by a clear margin*” that Section 9 of *Cattolica* was not concerned with capacity; rather, it was concerned with material validity, and accordingly is inapplicable to English-law governed transactions.
- (5) As to the alleged breach of Article 42 of TUEL, Article 42 was not breached in this case, since the Transactions did not require authorisation, but were in any event duly authorised by the Provincial Council. In *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm), para. 372-373, Cockerill, J concluded that TUEL Article 42(2) did not place a limit on capacity and, accordingly, is not relevant to the validity of the Transactions under English conflicts of laws rules.



- (6) As to the alleged infringement of “*mandatory rules*” concerning the content of derivative contracts entered into by local authorities, namely Law No. 448/2001, Decree 389, and the 2004 Circular, this argument could not prevail, because such mandatory rules are to be disregarded by Article 3(3). In any event, a breach of these provisions does not give rise to a lack of capacity; rather (if the provisions apply) a breach is sanctioned by nullity under the Italian Civil Code: *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm), para. 316. In any case, the Transactions were not contrary to Law No. 448/2001, Decree 389, or the 2004 Circular.
124. Of these matters, the provisions which came closest to being concerned with Pesaro’s capacity is Article 42 of TUEL, although in *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm), para. 372-373, Cockerill, J decided that this provision did not place a limit on capacity. Whether that is so or not, in my judgment, the appropriate approvals had been provided. I do not consider that the other grounds relied on by Pesaro, even if proved, would deprive Pesaro of the capacity to enter into the Transactions.
125. Accordingly, as these matters either do not concern Pesaro’s capacity or, if they do, they cannot be sustained on the evidence, I have reached the conclusion that Pesaro did not lack capacity and there was no issue undermining the material validity of the Transactions under English law.

#### Conclusion on the summary judgment application

126. Subject to one exception, namely the issue of compliance with article 3(2)(d) of Decree 389, I am satisfied that Pesaro has no real prospect of successfully defending Dexia’s claim on the grounds that the Transactions are not governed by English law (but instead by Italian law), that the Transactions did not comply with Italian law, and the Transactions were invalid.
127. I have reached these conclusions based on the evidence before the Court and the absence of any contradictory evidence. There is further no indication that Pesaro might adduce such contradictory evidence at some future time. There is no other compelling reason why the claims in question should be disposed of at trial.

## Declarations on a summary judgment application

128. The principles underlying the grant of declaratory relief by the Court was summarised by Cockerill, J in *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2020] EWHC 2436 (Comm), at para. 78, and in *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2022] EWHC 219 (Comm), at para. 8. In *Deutsche v Busto*, Cockerill, J said:

*“The Court’s approach to the exercise of its discretion is succinctly summarised at paragraph 78 of the BNPP judgment:*

- i) The touchstone is utility;*
- ii) The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose;*
- iii) The prime purpose is to do justice in the particular case. Justice includes justice not only to the claimant, but also to the defendant;*
- iv) The Court must consider whether the grant of declaratory relief is the most effective way of resolving the issues raised. In answering that question, the Court should consider what other options are available to resolve the issue;*
- v) This emphasis on doing justice in the particular case is reflected in the limitations which are generally applied. Thus:*
  - a) The Court will not entertain purely hypothetical questions. It will not pronounce upon legal situations which may arise, but generally upon those which have arisen.*
  - b) There must in general be a real and present dispute between the parties before the Court as to the existence or extent of a legal right between them.*
- c) If the issue in dispute is not based on concrete facts the issue can still be treated as hypothetical.*
- vi) Factors such as absence of positive evidence of utility and absence of concrete facts to ground the declarations may not be determinative. However, where there is such a lack in whole or in part the Court will wish to be particularly alert to the dangers of producing something which is not only not utile but may create confusion.”*

129. Mr Dhillon KC on behalf of Dexia submitted that this is an appropriate case for declaratory relief, because:

- (1) There is plainly a real and present dispute between the parties regarding the validity and effectiveness of the Transactions: Pesaro explicitly contends in the Italian Claim that the Second Transaction is null and void. This is not an arid question, since, if Pesaro is correct, it claims to be entitled to €8.75m in damages from Dexia.
- (2) In those circumstances, the relevant Declarations would serve a useful purpose: they relate to the circumstances of the entry into of the Transactions, the purpose of the Transactions, their terms, or the validity, effectiveness or enforceability of the Transactions and/or Pesaro's obligations thereunder. These are matters which Pesaro has put in issue in the Italian Claim, which the evidence indicates may well be finally determined by the Court of Pesaro at a hearing to be heard on 3rd October 2022. Dexia would wish to use the relevant Declarations by way of defence to the Italian Claim. A judgment from this Court as to Pesaro's obligations under the Transactions will be capable of recognition by Dexia in Italy and/or will be of assistance to the Italian Court, especially on issues of English law. It is no answer to the foregoing submission that the Italian Court could decide those issues because that would be inconsistent with Pesaro's acceptance that this Court has jurisdiction to determine those issues.
- (3) The relevant Declarations are necessary to do justice to the parties. For Dexia, the declarations are necessary in order to give effect to its contractual rights under the Transactions. For Pesaro, there is no injustice in the Court making the relevant Declarations without the benefit of evidence or argument from Pesaro, in circumstances where that position is entirely, and deliberately of Pesaro's own making.

130. I accept Mr Dhillon KC's submission, which in my judgment underwrites the utility and justice of the declarations to be made, in principle.

131. I now turn to the individual declarations for which Dexia claim in these proceedings.

#### **Dexia's claim for specific Declarations**

132. The claims for declarations for which Dexia applies for summary judgment are set out in Dexia's Particulars of Claim and in its amended Claim Form.

133. The declarations sought by Dexia are as follows (the highlighted corrections reflect the amendments made by Dexia to its Claim Form, which I have permitted as explained above):

- (1) Declaration 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. This reflects the representation made by Pesaro at Section 3(a)(v) of the Master Agreement. A similar declaration was made in *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298, para. 23-24 and in *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2022] EWHC 219 (Comm), para. 17. I am satisfied that this declaration can be granted.
- (2) Declaration 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; ~~and/or~~. This declaration reflects the representation made at Part 5, clause 5(ii) of the Schedule. A similar declaration was made in *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2022] EWHC 219 (Comm), para. 24. I am satisfied that this declaration can be granted.
- (3) Declaration 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, 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; ~~and/or~~. This reflects the representation made by Pesaro at Section 3(a)(ii) of the Master Agreement. A similar declaration was made in *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2022] EWHC 219 (Comm), para. 27. I am satisfied that this declaration can be granted.

- (4) Declaration 5: All governmental and other consents that were to have been obtained by the Defendant with respect to the Transaction Documents have been obtained and ~~were~~ are, or were at all material times, in full force and effect and all conditions of any such consents have been complied with; ~~and/or~~. This reflects the representation made by Pesaro at Section 3(a)(iv) of the Master Agreement. I am satisfied that this declaration can be granted, especially as an issue has been raised by Pesaro that the appropriate Council approval has not been obtained and I have decided otherwise.
- (5) Declaration 6: All applicable information that was furnished in writing by or on behalf of the ~~defendant~~ Defendant to the Claimant and was identified for the purpose of Section 3(d) of the ~~ISDA~~ Master Agreement was, as of the date ~~on which~~ of the information ~~was provided~~, true, accurate and complete in every material respect; ~~and/or~~. This declaration reflects Pesaro's representation at Section 3(d) of the Master Agreement, which refers to the specified documents in the Schedule, *i.e.*, "*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*", "*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 "*Duly certified copy of Provincial Board's Resolution ratifying the execution of this Agreement*". I am satisfied that this declaration can be granted, especially as an issue has been raised by Pesaro that the appropriate approval or authority has not been obtained and I have decided otherwise. There were other documents identified in the Schedule, but this was not identified as being relevant to the claim for this declaration; I therefore limit the terms of this declaration to the documents referred to.
- (6) Declaration 7: The Transactions were entered into in conformity with (ia) Article 119(6) of the Italian Constitution; (iib) Article 41 of Law no. 448/2001; (iiic) 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 (the "Decree"); (ivd) Circular of the

Ministry of Economy and Finance of 27 May 2004; and (v~~e~~) Article 42 of the Local Entities Act (Testo Unico Enti Locali), and (f) Article 30(15) of Law no.289/2002; ~~and/or~~. I have discussed Declaration 7 separately above. I am prepared to grant this declaration save in respect of article 3(2)(d) of Decree 389 and the 2004 Circular insofar as it relates to that article.

- (7) Declaration 8: The Transactions were entered into by the Defendant ~~in accordance with its the authorized policies~~ solely for the purposes of hedging interest rate risk and for managing its borrowings and liabilities resulting from bond issues, loans and other forms or investments recourse to the financial markets permitted by law and not for ~~the~~ speculative purposes ~~of speculation pursuant to Article 3, paragraph 3 of the Decree~~. This declaration relates to the representation made at Section 3(g) of the Master Agreement, as amended by the Schedule. A similar declaration was made in *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2022] EWHC 219 (Comm), para. 50-51. I am satisfied that this declaration should be granted because the purpose of Pesaro entering into the Transactions was consistently set out in the First Presentation, Resolution No. 3390/2003 and Resolution No. 4733/2005, and in the irrevocable proposals made by Pesaro.
- (8) Declaration 9: The Transactions were carried out in respect of underlying amounts that were, or are, actually due from Pesaro. This declaration reflects the content of Resolution No. 3390/2003 and the irrevocable proposal for the Second Transaction. I am satisfied that this declaration should be granted.
- (9) Declaration 11: The execution of the Transactions did not constitute an assurance or guarantee of financial results. This declaration reflects Section 3(i) included in the Master Agreement by the Schedule. The terms of that representation were that “*No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of any Transaction hereunder*”. It seems to me that as the execution of the Transactions would be such a communication, the declaration claimed can be granted.

- (10) Declaration 12: The Transaction Documents constituted 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; ~~and/or~~. This declaration reflected Section 9(a) of the Master Agreement. A similar declaration was made in *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298, para. 23-24 and in *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2022] EWHC 219 (Comm), para. 32-34. I am satisfied that this declaration should be granted.
- (11) Declaration 13: 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; ~~and/or~~. This reflects the representation made in Section 3(i) of the Master Agreement as amended by the Schedule. A similar declaration was made in *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298, para. 23-24. However, in *Deutsche Bank AG Ltd v Comune di Busto Arsizio* [2022] EWHC 219 (Comm), para. 35-41, Cockerill, J declined to make such a declaration, because the declarations could be misunderstood as suggesting that the Court has made factual findings about the circumstances surrounding the conclusion of the Transactions that might be argued to exclude or limit any claim under a Mandate, which was governed by Italian law with the courts of Milan having exclusive jurisdiction. In the event, Cockerill, J was prepared to grant a declaration that a representation was made to this effect. I was informed by Mr Dhillon KC there was an Italian law mandate in the present case, which was not before the Court. In those circumstances, I am prepared only to grant a declaration that the representation was made in the terms of Section 3(i).
- (12) Declaration 14: 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; ~~and/or~~. This reflects the representation made in Section 3(i) of the Master Agreement as amended by the Schedule. For the reasons given in respect of Declaration 13, I am prepared only to grant a declaration that the representation was made in the terms of Section 3(i).

(13) Declaration 15: 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~~ 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 financial and other risks of the Transactions; ~~and/or~~. This declaration reflects the representation made in Part 5, clause (4) of the Schedule. For the reasons given in respect of Declaration 13, I am prepared only to grant a declaration that the representation was made in the terms of Part 5, clause (4) of the Schedule.

(14) Declaration 16: The Claimant did not act as fiduciary for or advisor to the Defendant in respect of the Transactions; ~~and/or~~. This declaration reflects the representation made in Part 5, clause (4) of the Schedule. For the reasons given in respect of Declaration 13, I am prepared only to grant a declaration that the representation was made in the terms of Part 5, clause (4) of the Schedule.

## **Conclusion**

134. For the reasons explained above, I allow Dexia's application for summary judgment

- (1) In respect of Declarations 1, 3, 4, 5, 8, 9, 11 and 12.
- (2) In respect of Declaration 6, being limited to the documents referred to in Section 3(d) of the Master Agreement, which refers to the specified documents in the Schedule, 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 Agreement”.*

- (3) In respect of Declaration 7, except in respect of article 3(2)(d) of Decree 389 and the 2004 Circular insofar as it relates to that article.
- (4) In respect of Declarations 13-16, the declarations should be limited to the fact that representations were made.