Neutral Citation Number: [2016] EWHC 3261 (Comm)

Case No: CL-2016-000244

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 21/12/2016

Before :

ALI MALEK QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

…	**Claimant**
- and -	
…	**Defendant**

- -
- -

Hearing dates: 6-7 December 2016

- -

Judgment Approved

Mr Ali Malek QC (sitting as a Deputy High Court Judge):

(1) Introduction

1. In its Claim Form dated 21 April 2016 the Claimant seeks declaratory and other relief in relation to interest rate swaps entered into with the Defendant ("*[the defendant]*") in June and December 2006.

2. In its Application Notice issued on 26 July 2016, [the defendant] disputes the Court's jurisdiction under CPR Part 11 in relation to the second and third declarations sought by [the claimant] (Declarations(2) and (3)). The terms of the declarations are as follows:

"(2) Such execution, delivery and performance do not 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;
(3) The Transactions were entered into in conformity with Decree No. 389 of 1 December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and the Ministry of Interior and published in the Official Gazette No. 28 of 4 February 2004 and Article 41 Law No. 448 of 28 December 2001, Article 21 of Legislative Decree No. 58 of 24 February 1998 and Articles 27 to 30 of Consob Regulation No. 11522 of 1 July 1998 (in force at the time the Transactions were entered into), and all relevant Italian laws and regulations, to the extent they are applicable to the Transactions;"

3. In short, [the defendant] contends as follows:

   i) First, as its primary case, that the dealings between the parties were governed by two separate but related contracts, a Mandate providing for the provision of various evaluation, structuring and organisation services by [the claimant] (which includes an exclusive jurisdiction clause in favour of the Court of Rome) and an ISDA Master Agreement governing the terms of two swaps transactions (which includes an exclusive jurisdiction clause in favour of the English courts). The issues which are the subject matter of Declarations (2) and (3), whether the Italian statutory provisions referred to were complied with, relate to the express obligations of [the claimant] contained in the Mandate. They are, therefore, subject to the exclusive jurisdiction clause in the Mandate in favour of the Court of Rome.

   ii) Secondly, if the Court rejects its primary case and concludes that the issues which are the subject matter of Declarations (2) and (3) relate both to the Mandate and the ISDA Master Agreement and so fall within both jurisdiction clauses, then the English Court is required under Article 29(1) of Regulation (EU) No 1215/2012 ("*the Recast Regulation*") to stay its proceedings until such time as the Court of Rome, which was first seised, establishes its jurisdiction.

4. [the claimant] disputes both contentions. Its position can be summarised as follows:

   i) First, it contends that the [the defendant] is unable to dispute the jurisdiction of the Court. It argues that [the defendant] has accepted the jurisdiction of the English Court to determine all declarations sought by [the claimant] and therefore it is unable to separate out Declarations (2) and (3) from the other declarations sought by [the claimant].

ii) Secondly, it contends that all the declaratory relief sought in the Claim Form falls within exclusive jurisdiction clause of the ISDA Master Agreement in favour of the English Court. The declarations derive from representations and terms agreed by the parties in the ISDA Master Agreement.

iii) Thirdly, it contends that [the defendant] cannot rely on Article 29 of the Recast Regulation because the proceedings in England and Italy do not "*involve the same cause of action*". It also says that the English Court has exclusive jurisdiction in respect of the declarations sought in the English Proceedings and therefore there should be no stay in favour of the Court of Rome.

5. From this brief summary it is apparent that there are 3 issues for my determination:

i) First, whether [the defendant] is precluded from disputing the jurisdiction of the Court in relation to Declarations (2) and (3) (Issue 1).

ii) Secondly, whether the Court has jurisdiction in relation to Declarations (2) and (3) (Issue 2).

iii) Thirdly, whether the claims in respect of Declarations (2) and (3) should be stayed until the jurisdiction of the Court of Rome is established (Issue 3).

6. A further issue emerged during the oral submissions before me. [the defendant] indicated that it wished to amend its Application Notice to claim as a further alternative a stay of proceedings under Article 30(1) of the Recast Regulation. The possibility of making an application for a stay (whether under Article 30 or the Court's general powers of case management) was mentioned in [a witness's] third witness statement dated 5 December 2016 but was not relied upon in the Application Notice. On the second day of the hearing I was provided with an Amended Application Notice raising Article 30(1) as well written submissions in support.

7. [the claimant] opposed the application to amend. It contended that it would be prejudiced if I decided that matter now on the basis of materials before me. This is because it wished to introduce evidence that was relevant to the issue of whether a stay should be granted.

8. I consider that there is force in [the claimant]'s argument based on prejudice. Accordingly this judgment does not deal with [the defendant]'s Article 30(1) application. At the end of the hearing, I indicated that I would rule on the issues

raised in application and that on the hand down, the parties could make further submissions to me as to how the Article 30(1) application would be dealt with.

9. [the defendant]'s application under CPR Part 11 was supported by three statements of … who is a Special Counsel and also the statement of …, an Associate-Avvocato.

10. [the claimant] relies on the statement of ….

11. The hearing before me took place on 6-7 December 2016. On 8 December 2016 the Court of Appeal gave judgment in ***Barclays Bank Plc v Ente Nazionale Di Previdenza Ed Assistenza Dei Medici E Degli Odontoiatri*** [2016] EWCA Civ 1261. I received short submissions from both parties on this decision.

12. I turn to the factual background. It is taken from the evidence and skeleton arguments submitted for the purposes of the hearing. Some aspects of the background are or may be in dispute. It is not necessary for me to express any views about the underlying merits of the claims and allegations that the parties have made against each other.

(2) Factual Background

13. [the defendant] is the local authority for the province of [the defendant] within the administrative region of Lombardy in northern Italy.

14. [the claimant] is an Italian bank which specialises in the provision of financial services to Italian public authorities.

15. As at December 2005 [the defendant] had some 188 loans with Cassa Depositi e Prestiti SpA *("Cassa DP")*, of which 170 were subject to fixed interest rates and 18 were subject to variable interest rates ("*the Cassa DP Loans*"). The total value of the Cassa DP Loans was approximately €84 million. As the 6 Month Euribor had fallen sharply since 1997, the applicable fixed interest rates were considerably higher than prevailing market rates and [the defendant] decided to explore the possibility of refinancing with a view to reducing its interest costs. Accordingly, in November 2005 two resolutions were passed, namely resolution 542 by [the defendant]'s Provincial Committee and resolution 43 by [the defendant]'s Provincial Council, authorising a request for non-binding quotations from Cassa DP for the repayment of the Cassa DP Loans so that the financial feasibility of early repayment could be assessed.

16. [the defendant] had had previous dealings with [the claimant], which became a natural point of contact for financing issues. As a result, in March 2006 [the claimant] sent [the defendant] a document entitled "*First Feasibility Study on*

Active Debt Management" which set out detailed proposals for [the defendant] to restructure its debt through a bond issue and an associated interest rate swap (*"the Feasibility Study"*).

17. [the defendant] passed various resolutions clearing the way to proceed with a restructuring. In particular:

    i) On 2 May 2006 [the defendant]'s Provincial Committee passed Resolution number 203 specifying that [the defendant]'s 2006 executive management plan included the objective of minimising the cost of financial obligations by refinancing the Cassa DP Loans through a bond issue.

    ii) On 24 May 2006 [the defendant]'s Provincial Council passed resolution 271 delegating responsibility for identifying banks on which to confer a mandate for active management of [the defendant]'s debt and liquidity to [the defendant]'s Director of Financial Services.

    iii) On 29 May 2006, [the defendant]'s Provincial Council passed Resolution number 16 deciding to make an early repayment request to Cassa DP. On the same day, Dr Fenaroli passed Executive Resolution 1380 by which [the claimant] and [another Bank] were given the mandate for active management of [the defendant]'s debt and liquidity.

18. On 31 May 2006 [the defendant] entered into the Mandate agreement ("the Mandate") with [the claimant] and [the other bank]. It is entitled: *"Award of a multi-year assignment, for up to a maximum of 36 months, for the evaluation and organisation of the active management of the debt and liquidity of the Province, and as rating advisor".*

19. The terms of the Mandate are referred to in detail below but in short [the claimant] and [the other bank] were appointed for a period of up to 36 months in relation to *"the evaluation and organisation of the active management of the debt and liquidity of the Province"*. The first recital to the Mandate records that [the defendant] had decided to assess whether to refinance its existing loans with the Italian public sector lender, the Cassa DP (Deposits and Loans Fund), by raising money from the capital markets.

20. On 26 June 2006 [the defendant]'s Provincial Council passed Resolution no. 20 authorising a bond issue in the total sum of approximately €105 million, to be equally underwritten by [the claimant] and [the other bank]. €90 million thereof was to be used for the early repayment of various Cassa DP loans and the remainder was to be used for specific investments. Dr Fenaroli was authorised to

conclude derivatives in relation to the bond issue aimed at hedging the rate risk to [the defendant] and debt depreciation.

21. On 28 June 2006 [the claimant] and [the defendant] executed a 1992 ISDA Master Agreement (Multicurrency – Cross Border) ("*the Master Agreement*") along with an associated schedule ("*the Schedule*"). As explained below, the Schedule to the ISDA Master Agreement provided by Part 4(h) that the governing law was English law. Section 13(b) of the ISDA Master Agreement provided for the jurisdiction of the English courts. On the same day, [the claimant] and [the defendant] entered into an interest rate swap ("*the First Swap*"), the terms of which were recorded in a Confirmation.

22. On 30 June 2006 [the defendant] carried out an issue of bonds with a nominal value of €104,892,000, which were equally underwritten by [the claimant] and [the other bank] (i.e. €52,446,000 each). The bonds included an exclusive jurisdiction clause in favour of the Court of Rome. [the defendant] made early repayment in the sum of Euro 89,800,477.06 in respect of the Cassa DP Loans.

23. On 27 November 2006 [the defendant]'s Provincial Council passed resolution no. 38 authorising a request to Cassa DP to repay a further 47 loans in the total sum of approximately €22.5 million.

24. On 20 December 2006 [the claimant] and [the defendant] entered into a second interest rate swap ("*the Second Swap*"), the terms of which were recorded in a Confirmation.

25. On 27 December 2006 [the defendant] carried out a second issue of bonds with a total value of €55,832,000. Again this was equally underwritten by [the claimant] and [the other bank]. As with the first bond issue, the bonds included an exclusive jurisdiction clause in favour of the Court of Rome.

26. Subsequently, [the defendant] commissioned a technical analysis of the First and Second Swaps (together, *"the Swaps"*) from Martingale Risk Italia S.r.L *("Martingale"*) in January 2014. Martingale produced a report dated 3 April 2014. The [report/technical analysis] criticised the hedging strategy for [the defendant]. A further report was commissioned from Business Bridge S.r.L which was provided on 10 June 2015. It concluded that the Swaps provided inefficient and inadequate protection for [the defendant].

27. On 25 November 2015 a newspaper report was published in the Journal of [the defendant] reporting that [the defendant] had decided to sue [the claimant] and [the other bank] in relation to the swaps and that [the defendant] would be seeking the suspension and/or cancellation of the transactions.

28. In March 2016 [the defendant] commenced a claim against [the claimant] and [the other bank] seeking damages for breach of the Mandate in the Court of Rome ("*the Rome Proceedings*"). The essence of the claim is that the Mandate imposed contractual obligations upon [the claimant] to comply with various Italian statutes as part and parcel of the services provided under the Mandate. The Rome Proceedings were served on [the claimant] on 18 March 2016 and lodged with the Court of Rome on 24 March 2016. The first hearing of the Rome Proceedings has been listed to take place on 20 December 2016.

29. On 21 April 2016 [the claimant] commenced the present claim against [the defendant] in England.

(3) Contractual Framework

30. As is apparent from the discussion above, the relationship between [the defendant] and [the claimant] is governed by different contractual regimes: the Mandate and the Swaps.

The Mandate

31. The Mandate involves [the claimant] and [the other bank] providing various services to [the defendant] in relation to its debt. It is in the Italian language.

32. The preamble to the Mandate contains six recitals which were expressed to "*form an integral and essential part of this contract*". The recitals provided as follows (as far as is relevant):

i) The first recital set out [the defendant]'s intention as follows:

"…The Province therefore intends: (i) to resort to the issue of a first bond loan for a maximum amount of 159,000,000 Euros … in accordance with current legislation and, in particular, … pursuant to Article 41 of Law No. 448 of 28 December 2001 and Ministerial Decree No. 389 of 1 December 2003; (ii) to follow a policy for the active management of its debt and debt restructuring, through the preparation, structuring and execution of transactions including in derivatives …;

ii) The third recital set out the background to the appointment of [the claimant] (and [the other bank]) as follows:

"… the Regional Council … provided a mandate to the Director of the Financial Services Sector to identify the institutions – amongst those having specific experience in the field of the issuance of bonds of Local and Regional Authorities as well as in transactions in derivatives activated by them for the purposes allowed by law and that are already proposed for the transaction that is the subject of this decision – to award exclusively a multi-year assignment, for up to a maximum of 36 months, for the active

management of the debt and liquidity of the Province, including all services associated with the issuance of bonds … as well as for the completion of any other financial transactions, including in derivatives, that the Province may consider useful to activate, in accordance with the provisions of Ministerial Decree No. 389 of 1 December 2003, and of the Circular of 27 May 2004 of the Ministry of Economics and Finance …"

iii) The fifth recital explained the reason why [the claimant] and [the other bank] had been chosen as follows:

"the Banks are leading international financial institutions with proven reliability that have considerable experience in the field of public finance and, in particular, in the area of operations of refinancing of liabilities and the placement of bond issuances made by Italian local and regional authorities, as well as in transactions in derivatives and cash management effected by these authorities for the purposes allowed by law".

iv) The sixth recital explained the purpose of the Mandate as follows:

"the Parties intend to regulate in detail the mutual relations in relation to the fulfilment of the activities referred to in these Recitals, with a suitable instrument defining the rights and obligations assumed by said Parties".

33. Clause 1.2 of the Mandate set out [the claimant]'s obligations as follows (so far as is relevant):

"In the framework of the Mandate, the Banks undertake to provide services for assistance, structuring and organisation of all the services related to the issue of the Loan and any further bond loans, to be executed in one or more tranches, in relation to:
** assistance with the evaluation of the economic profitability of the operations for the refinancing of the Cassa DP Loans, through the issuance of a bond pursuant to the provisions of Article 41 of Law no 448/2001;*
** the identification of the individual loans which it was convenient to repay and subsequently refinance in accordance with Article 41 of Law no 448/2001, ensuring – for each treated item – the reduction of the financial burden to be borne by [[the defendant]];*
…
** assistance in the organisation of operations for active liability management, involving financial instruments, including derivatives and liquidity management, appropriate for achieving the objectives of [[the defendant]] mentioned in the recitals and analysis of the costs and benefits associated with the choice of various financial instruments".*

34. Clause 2.2 provided:

"The commitments and responsibilities of the Banks are limited to those specifically set out in this Mandate. In the performance of the activities that form the subject of the Mandate, the Banks shall not be required to provide services, to prepare funding or investment services other than those referred to in Article 1 above".

35. The English translation of clause 2.3 of the Mandate gave rise to a translation issue. It was agreed between the parties that it should be translated as follows:

"The obligations assumed by the Banks under this Mandate shall be construed and shall be interpreted as best-endeavour obligations rather than specific-result obligations".

36. Clause 2.4 of the Mandate addressed the inter-relation between the services provided under the Mandate and any subsequent "financial transactions" as follows:

"The awarding of this Mandate does not give rise to any obligation for [[the defendant]] to execute the financial transactions developed and proposed by the Banks, it being understood that the eventual fulfilment of financial transactions and the definition of the relevant conditions and terms shall, in any case, be subject to the prior authorisation of [[the defendant]] and will be the subject of a separate dedicated contract".

37. Clause 3.2 of the Mandate was concerned with possible conflicts of interest and, so far as is material, provided:

"Notwithstanding that the Banks shall act in a way that ensures transparency and fair treatment to the Province, the Province recognises and accepts that, in the performance of this assignment, the Banks could find themselves in a position of direct or indirect conflict of interests, which may include those arising from … their eventual capacity as a counterparty in transactions covered by this mandate…"

38. Clause 4 of the Mandate concerned responsibility for expenses and costs:

    i) Clause 4.1 allocated responsibility for the following expenses to the Banks (i.e. [the claimant] and [the other bank]):

"the expenses for the preparation of the contractual documentation relating to the issuance of the Loan and any other financial transaction (swap contracts or other interest-rate derivative contracts, for the management of the Loan's amortisation and for active liquidity management)…"

    ii) Clause 4.2 allocated responsibility for the following expenses to [the defendant]:

"Any other present or future expenses or costs arising from the issuance of the Loan, or connected to the issuance of the Loan and any other financial transaction (swap contracts or other interest-rate derivative contracts, for the management of the Loan's amortisation and for active liquidity management)…"

39. Clause 15 of the Mandate provided for choice of law and jurisdiction as follows:

"This Mandate shall be governed by and construed in accordance with Italian law. The disputes arising from this Mandate shall be exclusively subject to the Court of [Rome]".

40. The parties agreed that their arguments before me had to take place on the basis of the presumption that Italian law is the same as English law since neither party adduced evidence to the contrary.

The Swaps

41. The Swaps are contained in the ISDA Master Agreement, the Schedule and the Confirmations (which were issued pursuant to section 9(e)(ii) of the ISDA Master Agreement). Clause 1(c) of the ISDA Master Agreement provided:

*"**Single Agreement**. All Transactions are entered into in reliance on the fact that the 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"*

42. As to the First Swap, this provided for:

i) Payments by [the claimant] to [the defendant] throughout the term of the First Swap of a variable rate of 12 month Euribor + 0.19% on a notional sum of €52,446,000;

ii) Payments by [the defendant] to [the claimant] on a notional sum of €52,446,000 amortising over the term of the First Swap (as a result of the capital repayment mechanism referred to below) as follows:

(i) Between June 2006 and June 2007, a fixed interest rate of 4.16%;

(ii) Between June 2007 and June 2008, a fixed interest rate of 4.30%;

(iii) Between June 2008 and June 2009, a fixed interest rate of 4.40%;

(iv) Between June 2009 and June 2010, a fixed interest rate of 4.45%;

(v) Between June 2010 and June 2015, variable interest rates floating between a floor of 4.50% and a cap of 5.75%;

(vi) Between June 2015 and June 2025, variable interest rates floating between a floor of 4.75% and a cap of 5.95%; and

(vii) Between June 2025 and June 2036, variable interest rates floating between a floor of 4.75% and a cap of 6.25%.

iii) Capital payments by [the defendant] and [the claimant] on a notional sum of €52,446,000 as follows:

(i) Specified amortising payments of capital by [the defendant] to [the claimant] throughout the term of the First Swap in accordance with a table set out in the Confirmation of the First Swap; and

(ii) Payment of the full capital sum of €52,446,000 by [the claimant] to [the defendant] upon expiry of the First Swap.

43. The terms of the Second Swap provided for:

i) Payments by [the claimant] to [the defendant] throughout the term of the Second Swap of a variable rate of 12 month Euribor + 0.19% on a notional sum of €27,916,000;

ii) Payments by [the defendant] to [the claimant] on a notional sum of €27,916,000 amortising over the term of the First Swap (as a result of the capital repayment mechanism referred to below) as follows:

(i) Between December 2006 and December 2007, a fixed interest rate of 3.95%;

(ii) Between December 2007 and December 2008, a fixed interest rate of 4.00%;

(iii) Between December 2008 and December 2009, a fixed interest rate of 4.05%;

(iv) Between December 2009 and December 2010, a fixed interest rate of 4.10%

(v) Between December 2010 and December 2015, variable interest rates floating between a floor of 4.25% and a cap of 5.50%; and

(vi) Between December 2015 and December 2036, variable interest rates floating between a floor of 4.50% and a cap of 5.50%.

iii) Capital payments by [the defendant] and [the claimant] on a notional sum of €27,916,000 as follows:

(i) Specified amortising payments of capital by [the defendant] to [the claimant] throughout the term of the Second Swap in accordance with a table set out in the Confirmation for the Second Swap; and

(ii) Payment of the full capital sum of €27,916,000 by [the claimant] to [the defendant] upon expiry of the Second Swap.

44. Under Part 4, paragraph (h) of the Schedule, the ISDA Master Agreement is subject to English law. Clause 13 of the ISDA Master Agreement contains a jurisdiction clause in the following terms:

"(b) Jurisdiction. With respect to any suit, action or proceedings relating to this Agreement ("Proceedings"), each party irrevocably:--
(i) submits to the jurisdiction of the English courts, 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 law of the State of New York; and
(ii) waives any objection 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 party.
Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction (outside, if this Agreement is expressed to be governed by English law, the Contracting States, as defined in Section 1(3) of the Civil Jurisdiction and Judgments Act 1982 or any modification, extension or re-enactment thereof for the time being in force) nor will the bringing of Proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction".

45. This constitutes an exclusive jurisdiction clause in favour of the English Courts within the Convention territories (which includes Italy) for the purposes of the Recast Regulation because of the terms of section 13(b) of the ISDA Master Agreement, Part 4(h) of the Schedule and Article 25 of the Recast Regulation which provides (so far as is material):

"If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise".

46. The ISDA Master Agreement involves each party representing to the other party what are described as "Basic Representations". These are set out in section 3(a) as follows (as amended by Part 5 of Schedule).

i) Section 3(a)(ii) (as modified by Part 5(5)(ii) of the Schedule): *"**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 has taken all necessary action and made all necessary determinations and findings to authorise such execution, delivery and performance".*

ii) section 3(a)(iii): ***No violation or conflict.*** *Such execution, delivery and performance do not violate or conflict with any law applicable to it, any provision of its constitutional documents, or 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".*

iii) section 3(g) (as added by Part 5(5)(iv) of the Schedule): *"**Non-Speculation**. This agreement has been, and each Transaction hereunder will be (and, if applicable, has been), entered into for the purpose of managing its borrowings or investments and not for the purpose of speculation"*

iv) section 3(a)(v): *"**Obligations Binding**. Its obligations under this Agreement and any Credit Support Document to which it is a party constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms…."*

47. Each confirmation contained references to certain provisions of Italian law. For example the Confirmation dated 28 June 2007 relating to the First Swap stated: *"[[the defendant]] declares that this Interest Rate Swap operation carried out in accordance with the Ministerial Decree No. 389 dated 1 December 2003 and the following explanatory Circular dated 27 May 2004, in particular, with reference to the underlying indebtedness, it is fully in line with Article 3 comma 3 of the*

Decree 389/2003, and with reference to the 25% limit, it is fully in line with Article 3 comma 4 of the Decree 389/ dated 1 December 2003".

(4) Italian Laws and Regulations

48. Declaration (3) makes reference to a number of Italian laws and regulations. The parties did not adduce independent expert evidence on their meaning and effect. However there is a discussion of them in the witness statements and I was provided with agreed translations of their texts. In order to understand the issues between the parties, it is necessary for me to consider some of them in broad terms. The focus of the evidence was on provisions of Italian law referred to in Declaration (3) and on the provisions relied upon by [the defendant] in the [the other bank] Proceedings (discussed below).

Article 41 of Law No 488 of 28 December 2001

49. This provision as far as it is relevant provides as follows:

"1 In order to contain the cost of debt and to monitor public finance developments, the Ministry of Economy and Finance coordinates access to capital markets of provinces, municipalities … as well as consortia of local government and regions. To this end, these entities regularly send data on their financial situation to the Ministry. The content and data coordination and transmission methods are established by decree of the Ministry of Economy and Finance …. The same decree approves the rules on debt depreciation and on the use of derivatives by the above entities.
2 The bodies referred to in para 1 may issue bonds with the reimbursement of capital in a lump sum on expiry, subject to the creation – at the moment of issuance – of a fund for amortizing the debt, or subject to the conclusion of swap contracts for the amortization of the debt…"

50. [the claimant's witness] explains the background to Article 41 as being the desire to enable public authorities to restructure their indebtedness and take advantage of low interest rates. Article 41 seeks to coordinate access by public bodies to the capital markets by regulating the use of financial instruments so as to better manage debts incurred by local authorities and the risks associated with those debts thereby limiting the cost of local authority debt and enabling the state of public finances to be monitored.

51. Article 41 is referred to in Clause 1.2 of the Mandate, first bullet point.

52. There is an issue between the parties (which I cannot resolve) concerning the effect of Article 41(2). This article allows local authorities to refinance secured loans entered into after 31 December 1996 either by issuing bonds or by novating the secured loans. Local authorities are permitted to renegotiate the

terms of the loan with their existing lender or to enter into fresh loans with other credit institutions. In either case, Article 41(2) requires that the refinancing should be cost effective (i.e. reduce the financial value of total liabilities to be paid by the local authority). The issue between the parties is whether Mandate imposed an obligation on the part of the Banks to ensure that the management and restructuring of [the defendant]'s debts was consistent with Italian statutes, including Article 41.

Article 3 of Ministerial Decree 389/203

53. Decree 389 is headed "Rules on access to capital markets by provinces, municipalities, etc. as per article 41, Law No 448 of December 28, 2001". The decree adopts a number of rules including the following:

"3 Derivative transactions
1 If borrowing transactions are in currencies other than the euro, coverage of the exchange rate risk must be provided through exchange rate swaps….
2 In addition to the transactions referred to in paragraph 1 of this article and article 2 of this decree, the following derivative transaction are also to be allowed:
a) Interest rate swap between two parties taking the commitment to regularly exchange interest flows, connected to major financial market parameters according to the procedures, timing and conditions stated in the contract
….
c) purchase of an interest rate cap in which the buyer is protected from increases in the interest rate payable above the set level;
d) purchase of an interest rate collar in which the buyer is guaranteed an interest rate to be paid, fluctuating within a predetermined minimum and maximum;
….
f) other derivative products aimed at restructuring debt, only if they do not have a maturity subsequent to that of the underlying liabilities. These operations are allowed when the flows received by the interested bodies are equal to those paid in the underlying liabilities and do not involve, at the time of their conclusion, an increasing profile of the present values of single payment flows, with the exception of a discount or premium to be paid at the conclusion of the transactions, not exceeding 1% of the notional of the underlying liabilities."

54. As [the claimant's witness] points out in his witness statement, Article 3 is exclusively concerned with derivative transactions. Article 3(2) sets out general principles applicable to interest rate swaps. He explains that this article has the effect of prohibiting purely speculative swaps.

Article 21 TUF

55. TUF stands for *Testo Unico della Finanza (Consolidated Finance Act)*. [the claimant's witness] explains that its purpose is to provide a legal framework for financial intermediaries in Italy. Article 21(1) of TUF establishes principles requiring that a financial intermediary is to behave with care, fairness and transparency in the interests of customers and the integrity of markets as well as a duty to prevent, manage and disclose any possible conflicts of interest.

Articles 26-30 of Consob Regulation

56. Consob stands for "*Commissione Nazionale per le Societa e la Borsa*" which is the public agency that supervises financial services in Italy. The Consob Regulation is secondary legislation that implements Article 21 TUF. [the claimant's witness] explains that Articles 26-30 of Consob Regulation apply to intermediary services and activities including the entering into financial transactions such as derivative transactions. The Confirmations each contain statements that [the defendant] had received a document about the general risks of investing in financial instruments pursuant to the Consob Regulation (as required by Article 28(1)(b)).

Articles 30 and 32 TUF

57. These articles are not expressly referred to in Declaration (3) however [the claimant's witness] maintains they come within the language of any other relevant Italian laws and regulations. They concern off-site execution and distance marketing of financial contracts.

(5) The Proceedings

The Rome Proceedings

58. As mentioned above, on 18 March 2016 [the defendant] served the Rome Proceedings upon [the claimant] and lodged them with the Court of Rome on 24 March 2016. In those proceedings [the defendant] seeks damages against both [the claimant] and [the other bank] for alleged breaches of the Mandate.

59. The allegations made against [the claimant] were summarised in the first witness statement of [one of the defendant's witnesses]. She sets out the alleged breaches of duty relating to [the claimant] assistance/ structuring/ organising role of the Mandate. She summarises the claim as follows:

"In summary, the Rome Proceedings are based upon the following breaches of duty relating to [the claimant]'s assistance/structuring/organising role under the Mandate:
(a) that [the claimant] disregarded and failed to comply with clause 1.2 of the Mandate, which required [the claimant] to:

(i)provide counselling regarding economic profitability of the loan refinancing pursuant to article 41 of Law 448 of 2001;

(ii)identify individual loans for which it is convenient to repay and refinance in accordance with article 41 of Law 448 of 2001; and

(iii) provide assistance in organisation of active liability management, including an analysis of the costs and benefits associated with the choice of various financial instruments.

In particular, [the defendant] alleges:

(i) [the claimant] failed to update the information contained in the Feasibility Study, did not take into account other potential refinancing methods, did not evaluate the economic profitability of each relationship, and did not fully carry out the comparative analysis of different financial instruments;

(ii) The requirement for economic profitability was not met;

(iii) [the claimant] failed to assess the products available on the market and offered by other credit institutions; and

(iv) [the claimant] suggested or recommended an interest rate swap that was unbalanced in [the claimant]'s favour without informing [the defendant] of the imbalance or paying an up-front premium.

(b) various allegations of breach of Italian statutes:

(i)breaches of articles 1175, 1375 and 1176 of the Italian Civil Code, which impose general principles of fairness, bona fide and professional diligence;

(ii)breach of article 21 of the Financial Consolidated Act, which requires banks providing investment and ancillary services to act diligently, fairly and transparently in the customer's interests, to keep the customer suitably updated and minimise the risk of conflicts of interest;

(iii) breaches of articles 27-30 of the Consob Regulations 1152/1998 (the Italian equivalent of the FCA's Conduct of Business Sourcebook), which require intermediaries to identify potential conflicts of interest, to know your customer and ensure transactions are suitable in terms of type, object, frequency or size, and to meet the formal and substantive requirements of the contracts entered into with investors;

(v) breach of article 41 of Law 448 of 2001 (implemented by Ministerial Decree No 389 of 2003) and the Explanatory Circular of the Ministry of Economy and Finance dated 27 May 2004, which provide that local authorities may only enter into derivatives that are economically profitable and, in particular, where the rates are consistent with actual market rates and the cost of liabilities prior to the conclusion of the derivatives;

(vi) Breach of article 3 of Ministerial Decree 389/2003 which provides that any initial contractual imbalance must not exceed 1% of the underlying notional value, and where the notional amount of total derivative operations exceed EUR 100 million the total amount concluded with each counterparty should not exceed 25% of the total amount;

(c) an allegation of fraud based upon the deliberate or knowing failure to inform [the defendant] of the imbalance in the Swaps and failure to evaluate economic profitability".

60. [the defendant]'s case is that as a result of the above alleged breaches, it is entitled to declarations that [the claimant] breached the terms of the Mandate and various Italian statutes as well as compensatory damages. It is apparent from this short account that in the Rome Proceedings [the defendant] relies on a number of the Italian law provisions covered in Declaration (3).

61. [the claimant] filed its Appearance and Defence (*Comparsa di Constituzione e Risposta*) on 29 November 2016. It is a 189 page document. It contains a jurisdiction challenge (pages 37-57).

62. The first hearing (*udienza di prima comparizione*) in the Rome Proceedings is listed to take place on 20 December 2016. Nothing in this judgment is intended to affect the Court of Rome's determination of the issues raised in the Rome Proceedings. I am only deciding the issues before the English court.

The English Proceedings

63. The Claim Form was issued on 21 April 2016. It was not accompanied with Particulars of Claim but gave brief details of claim. Having identified the Swaps (defined as "*the Transactions*" and "*the Transaction Documents*" (including the Confirmations)) it stated that [the claimant] sought the following relief:

"1 Declaratory relief, including declarations that:
(1) The Defendant has at all material times had the power to execute and deliver the Transaction Documents and to perform its obligations thereunder and has taken all necessary action and made all necessary determinations and findings to authorise such execution, delivery and performance; and/or
(2) Such execution, delivery and performance do not 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
(3) The Transactions were entered into in conformity with Decree No. 389 of 1 December 2003 issued by the Treasury Department of the Ministry of Economy and

Finance and the Ministry of Interior and published in the Official Gazette No. 28 of 4 February 2004 and Article 41 Law No. 448 of 28 December 2001, Article 21 of Legislative Decree No. 58 of 24 February 1998 and Articles 27 to 30 of Consob Regulation No. 11522 of 1 July 1998 (in force at the time the Transactions were entered into), and all relevant Italian laws and regulations, to the extent they are applicable to the Transactions

(4) The Defendant's obligations under the Transaction Documents constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms; and/or

(5) The Transaction Documents and the Transactions have been entered into for the purposes of managing the Defendant's borrowings or investments and not for the purposes of speculation"

64. On 1 June 2016 [the defendant] filed an acknowledgment of service indicating an intention to contest jurisdiction. On 26 July 2016 [the defendant] issued its application seeking an order to the effect that the English Court did not have jurisdiction in respect of Declarations (2) and (3). In the alternative, a stay was sought under Article 29 of the Recast Regulation in respect of Declarations (2) and (3) until such time as the jurisdiction of the Court of Rome is established. As mentioned above, [the defendant] applied before me to amend its Application Notice (in the further alternative) to seek a stay under Article 30(1) of the Recast Regulation.

The [the other bank] Proceedings

65. The evidence referred to a different set of proceedings involving [the defendant] brought by [the other bank]: ***[the other bank] Bank AG London v Provincia Di [the defendant]*** Claim No CL -2015-000867 *("the [the other bank] Proceedings*") which commenced on 10 December 2015. In those proceedings twelve declarations are sought by [the other bank] including a declaration that various interest rate swaps complied with certain provisions of Italian law. [the other bank] were parties to the Mandate and the interest rate swaps involving [the other bank] and [the defendant] are for practical purposes in the same terms as the Swaps.

66. [the defendant] has not challenged the jurisdiction of the English court to determine the declaratory relief sought by [the other bank].

67. On 27 May 2016 [the other bank] filed Particulars of Claim. On 1 August 2016 [the defendant] filed a Defence and Counterclaim alleging that the swaps entered into with [the other bank] were null and void by reason of the same provisions of Italian law as the subject of [the claimant]'s Declaration (3). In particular it alleges breach of numerous provisions including: Article 41 of Law No 488 of 28 December 2001; Article 3 of Ministerial Decree 389/203; Article 21 of TUF

as well as Consob Regulation No 11522 of 1 July 1998; Articles 28(2), 36(1)(c) and 61(1)(g) and Articles 30 and 32 of Legislative Decree 58 of 1998.

68. On 25 October 2016 [the other bank] filed a Reply and Defence to Counterclaim.

69. There was a dispute before me as to the relevance of these proceedings. [the claimant] contended that [the other bank]'s claim against [the defendant] was in substance the same as its own claim against [the defendant] and yet [the defendant] had not sought to challenge the jurisdiction of the English court in respect of declaratory relief sought in that case. [the defendant] said there were reasons why jurisdiction had not been challenged which could not be stated to me because of legal professional privilege. It also said there were differences between the proceedings. Although the proceedings raise common issues, I consider the fact that [the defendant] did not make any jurisdiction challenge in the [the other bank] Proceedings does not preclude in itself a jurisdiction challenge in the proceedings before me.

(6) Issue 1

70. The first issue is whether [the defendant] has entered an appearance in respect of Declarations (2) and (3) for the purpose of Article 26 of the Regulation and so submitted to the English court jurisdiction.

71. Article 26(1) provides:

"Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24".

[the claimant]'s Arguments

72. [the claimant]'s arguments are essentially these. By reason of [the defendant]'s submission to the jurisdiction in respect of the Declarations (1), (4) and (5), it has necessarily also submitted to the English Court's jurisdiction to decide the Declarations (2) and (3). Although Article 26 does not apply to an appearance for the purpose of disputing jurisdiction, [the claimant]'s claim to uphold the validity of the Swaps (and [the defendant]'s capacity) has subsumed within it any issue which may arise on the way to deciding the Swaps were valid.

73. This is explained by [the claimant's witness] in his witness statement. He refers to the stance taken by [the defendant] in the [the other bank] Proceedings. Declaration (4) is concerned with whether the Swaps constitute legal, valid and

binding obligations on the part of [the defendant]. He points out that in the [the other bank] Proceedings, [the defendant] has alleged breaches of Italian law which concern Declarations (2) and (3). He states his belief *"...that [the defendant]'s submission to the jurisdiction of the English Court in respect of the fourth declaration necessarily means that it has also submitted to the jurisdiction in respect of the second and third declaration*". He goes on to make similar points in relation to capacity and speculation at paragraphs 51-52 of his statement.

74. [the claimant]'s skeleton submission stated as follows:

"The error in [the defendant]' approach was that it was an attempt to ride two horses at once but in opposite directions: [the defendant] wanted to prevent the English Court from ruling on whether the swaps complied with Italian law, while nevertheless reserving the right to argue that non-compliance with Italian law is fatal to the validity of the swaps. [the defendant]'s inescapable difficulty – which no form of drafting could overcome – lay in the need to concede (because the contrary is unarguable) that all questions of the validity of the swaps were within the exclusive province of the English Court."

[the defendant]'s Arguments

75. [the defendant]'s argument in response is as follows. The Court's jurisdiction should be assessed on the basis of the claim and not on any putative or possible defence. It accepts that the issue of the validity of the Swaps falls within the scope of the ISDA Master Agreement. However it contends the issue as to compliance with the various Italian statutes falls within the scope of the Mandate.

76. It is because of its case that Declarations (2) and (3) fall within the scope of the jurisdiction clause in the Mandate and not the jurisdiction clause in the ISDA Master Agreement that it disputed the jurisdiction of the English Court in relation to those declarations and not others. It is entitled to do this otherwise there would have been no way of challenging the Court's jurisdiction in respect of Declarations (2) and (3) which it contends should be determined by the Court of Rome.

Discussion and Analysis

77. There is no dispute on the underlying applicable legal principles.

i) Submission to jurisdiction by entering an appearance prevails over a valid and binding agreement for another court: Elefanten Schuh GmbH v Jacqmain [1981] ECR 1671 at [11]. Article 26 prevails over all other

jurisdictional rules in the Regulation save for Article 24 (exclusive jurisdiction regardless of domicile).

ii) Although the concept of entering an appearance may be an autonomous Regulation concept, how and when this takes place is a matter for national procedural law: ***Briggs, Civil Jurisdiction and Judgments (6th ed)*** at para 2.86.

iii) By CPR 11(5), a defendant who files an acknowledgment of service but does not make an application to challenge jurisdiction within the required period thereafter, "*is to be treated as having accepted that the court has jurisdiction to try the claim*".

78. It is common ground that [the defendant] has entered an appearance in respect of Declarations (1), (4) and (5) in [the claimant]'s Claim Form. It may be unusual to enter into an appearance in relation to some declarations concerning the same contract but not all of them, but I do not think this course is conceptually impossible in a case like the present where it is said that some of the declaratory relief falls under the jurisdiction agreement of a different contract. It would be a surprising result if [the defendant] found itself unable to make its submissions to this effect because it had accepted the Court's jurisdiction by reason of CPR 11(5).

79. I consider Issue 1 is tied up with Issue 2. Issue 2 is concerned with the issue of whether Declarations (2) and (3) are within the jurisdiction of the Mandate or whether they are within the jurisdiction clause of the ISDA Master Agreement. If [the defendant] is right on Issue 2 and establishes that Declarations (2) and (3) must be decided by the Court of Rome then it cannot be said that it has submitted to the jurisdiction of the English Court because of its acceptance that Declarations (1), (4) and (5) fall to be decided by the English Court. If [the defendant] is wrong on Issue 2, then the English Court has exclusive jurisdiction in relation to all the declaratory relief sought by [the claimant] in the Claim Form.

80. It follows from all of this that Issues 1 and 2 cannot be separated and it is therefore necessary to decide Issue 2 because this raises the central issue between the parties as to which jurisdiction clause applies to the disputes concerning Declarations (2) and (3). I therefore decline to find that [the defendant] is precluded from challenging jurisdiction in respect of Declarations (2) and (3) by reason of the fact it entered an appearance.

(7) Issue 2

81. I now turn to the disputed declarations: Declarations (2) and (3). Before doing so, I should briefly look at the other declarations which [the defendant] accepts that the English Courts have jurisdiction over. The Swaps are expressly governed by English law and an exclusive jurisdiction clause in favour of the English courts. In ***Merrill Lynch v Commune di Verona*** [2012] EWHC 1407 (Comm) Teare J held that the Court could satisfied that declarations could properly be made stemming from representations made in a 1992 ISDA Master Agreement on the basis that the defendant was contractually estopped from denying the truth of the representations.

82. There is no dispute between the parties concerning the jurisdiction of the Court to grant Declarations (1), (4) and (5). Declaration (1) tracks the first part of the representation in section 3(a)(ii) of the ISDA Master Agreement (as modified). Declaration (4) tracks section 3(a)(v). Declaration (5) tracks section 3(g) (as added by the Schedule).

83. The dispute between the parties is whether Declarations (2) and (3) fall within the jurisdiction clause (section 13(b)) of the ISDA Master Agreement in favour of the English Court or whether they fall within the jurisdiction clause (clause 15) in the Mandate in favour of the Court of Rome.

84. It is agreed by the parties that in resolving this dispute I have to apply the "*Canada Trust*" test (cf: **Canada Trust Co v Solzenberg (No 2)** [1998] 1 WLR 547, at 555B-G, affirmed [2002] 1 AC 1), namely, who has the better argument.

[the defendant]'s Arguments

85. [the defendant] argued as follows. It does not dispute that Clause 13(b) of the ISDA Master Agreement was agreed between the parties, nor that the formalities of Article 25 of the Recast Regulation have been met. The issue between the parties is whether the subject matter of Declarations (2) and (3) fall within Clause 13(b) as opposed to the competing jurisdiction clause contained in the Mandate.

86. The recitals of the Mandate (referred to above) made it clear that the overall assignment of active management of [the defendant]'s debt and liquidity entailed activities and services including compliance with Italian statutes like Article 41 and Ministerial Decree 389/2003 as well as "*all services associated with….. the completion of….derivatives*". Clause 1.2 of the Mandate provided for [the claimant] to provide "*assistance, structuring and organisation*" services in relation to compliance with Article 41 and the "*the organisation of operations for…derivatives….appropriate for achieving the objectives of the Province*".

87. The Swaps do not refer to and are independent of the Mandate. The ISDA Master Agreement is a "boiler plate" document. It is to be contrasted with the detailed and specifically tailored provisions of the Mandate. There was a clear demarcation between the Mandate and the ISDA Master Agreement reflecting the intention of the parties as it asserted in its skeleton submission *"… to ensure that there was demarcation between on the one hand, (a) all preparatory steps leading up to the conclusion of subsequent financial transactions (such as structuring, organising and even preparing contractual documentation itself), and which was governed by the Mandate, and, on the other hand, (b) the terms and conditions of any subsequent financial transactions themselves*."

88. This demarcation had a temporal element and a qualitative element. As to the temporal element, [the defendant] asserted that all services provided and activities carried out prior to the conclusion of any financial transactions were and are necessarily subject to and governed by the terms of the Mandate. In terms of the qualitative element, all services provided by [the claimant] in its capacity as organiser / structurer / assistant / advisor were necessarily subject to and governed by the terms of the Mandate. By contrast, [the claimant]'s rights and obligations in its capacity as counterparty were subject to and governed by the terms of any relevant separate dedicated contract (ie the Swaps comprising the ISDA Master Agreement and associated Schedule and Confirmations).

89. Moreover, the "*centre of gravity*" (referred to the case law mentioned below) of whether the various Italian statutes and regulations were complied with in respect of the overall debt restructuring is concerned with the Mandate and not the Swaps. It is the Mandate that is at the commercial centre of those issues. The ISDA Master Agreement is a standard term or "*boiler plate*" document that is primarily intended to deal with technical banking disputes as to the operation of the parties' obligations in relation to the operation of the Swaps.

90. The issue of whether a claim falls within a jurisdiction clause is an issue to be decided at the time the proceedings are commenced and not by references to matters that might be pleaded in a defence. It is therefore not permissible to take into account matters alleged in the [the other bank] Proceedings.

91. [the claimant] is using the English proceedings to get rulings on Italian law that will bind the Court of Rome in relation to the disputes under the Mandate. It is unlikely that the parties intended that disputes were to be covered by both jurisdiction clauses and should be tried in both England and Italy. In order to give effect to the parties' intention that disputes concerning Italian law should be determined by the Court of Rome, it is necessary to interpret clause 13(b) of the Master Agreement as if it read "*with respect to any such suit, action or proceedings relating <u>only</u> to this Agreement*". The addition of the word "only"

ensures that the Court of Rome deals with issues of Italian law that are common to disputes under the Swaps and Mandate.

92. The same result could be reached if the Court were to imply a term in the Swaps to the following effect: "For the avoidance of doubt, any disputes arising from the Mandate shall continue to be governed by and determined by the Mandate". In other words, whether by construction or the implication of terms, Declaration (2) and (3) are dealt with under the jurisdiction clause in the Mandate and so by the Court of Rome.

[the claimant]'s Arguments

93. [the claimant] argued as follows. All five declarations are exclusively concerned with the lawfulness and validity of the Swaps. They all fall within the wording of section 13 of the ISDA Master Agreement and involve a "*suit, action or proceedings relating to this Agreement*" and so fall within the jurisdiction of the English Court. The language of "*relating to*" is very broad. None of the declarations fall within the Rome jurisdiction clause in the Mandate. The obligation of [the claimant] and [the other bank] under the Mandate was to use best endeavours and [the claimant] seeks no declaration in the English proceedings as to the quality of the endeavours it undertook in relation to the obligations under the Mandate.

94. Article 25 of the Recast Regulation involves an enquiry having two stages. First, it is necessary to identify the "*particular legal relationship*" with which the claim is concerned. Secondly, it is necessary to identify, as regards that particular legal relationship, whether the parties have agreed that the courts of one or other Member State should have jurisdiction. In the present case, the "*particular legal relationship*" is the relationship between [the claimant] and [the defendant] as parties to the Swaps. The declarations sought by [the claimant] relate only to the Swaps and they follow the express representations in the ISDA Master Agreement. Declaration (2) tracks the representation made by [the defendant] in section 3(a)(ii) of the ISDA Master Agreement. Declaration (3) merely particularises Declaration (2). If it was thought necessary to make this more explicit, Declaration (3) could be revised to state:

"(3) In particular, such execution, delivery and performance do not violate or conflict with any Italian laws or regulations applicable to the Defendant, including, to the extent they are applicable to the Transactions, Decree No 389 of 1 December 2003 issued by the Treasury Department of the Ministry of Economy and Finance and the Ministry of Interior and published in the Official Gazette No 28 of 4 February 2004 and Article 41 Law No 448 of 28 December 2001, Article 21 of Legislative Decree No 58 of 24 February 1998 and Articles 27 to 30 of Consob Regulation No 11522 of 1 July 1998 (in force at the time the Transactions were entered into)".

95. It is inappropriate to look for the "*centre of the relationship*" to support [the defendant]'s arguments. The ISDA Master Agreement is not a "*boiler plate*" document since the parties customised or modified certain provisions of it by means of a 13-page associated Schedule. The addition of "*only*" to section 13(b) and [the defendant]'s alleged implied term are attempts to rewrite the parties' bargain and should be rejected.

96. The alleged demarcation relied upon by [the defendant] is unjustified. Moreover, the subject matter of the Mandate and the Swaps are not the same. The declaratory relief sought in the English Proceedings does not involve the issue of whether the overall refinancing transaction complied with Italian law. Declarations (2) and (3) are much narrower and concerned with the question of whether the "*execution, delivery and performance*" of the swap documentation did not violate applicable law, and the Swaps "*were entered into*" in conformity with any applicable Italian laws.

Discussion and Analysis

Applicable Principles

97. There was little dispute between the parties concerning the applicable principles. I was referred to a number of authorities including ***Credit Suisse Boston (Europe) Ltd v MLC (Bermuda) Ltd*** [1999] 1 Lloyd's Rep 767 (*"**Credit Suisse**"*); ***UBS AG v HSH Nordbank*** [2009] 2 Lloyd's Rep 272 ("***UBS***"); ***Sebastian Holdings Inc v [the other bank] Bank AG*** [2011] 1 Lloyd's Rep 106 ("***Sebastian Holdings***") and ***AmTrust Ltd v Trust Risk Group SpA*** [2015] 2 Lloyd's Rep 154 ("***AmTrust***").

98. It is common ground between the parties that where parties are bound by several contracts which contain different jurisdiction clauses it is necessary to conduct a careful and commercially minded construction of the different dispute resolution agreements. The following extracts from the authorities cited to me indicate the approach to be taken in construing the jurisdiction clauses.

99. In ***Credit Suisse*** Rix LJ said at 777, col 1:

"In one sense all that happened … is part of a single narrative, which it is artificial to divide up into different compartments. On the other hand, where different agreements are entered into for different aspects of an overall relationship, and those different agreements contain different terms as to jurisdiction, it would seem to be applying too broad and indiscriminate a brush simply to ignore the parties' careful selection of palette".

100. In ***Sebastian Holdings***, Thomas LJ (as he then was) reviewed the ***Credit Suisse*** and ***UBS*** cases and summarised the task for the Court (at [50]) as follows:

"I therefore turn to the construction of the agreements in issue focussing on finding the commercially rational construction and giving effect to clear agreements, even if this may result in a degree of fragmentation in the resolution of disputes between parties to the series of agreements".

101. In ***AmTrust*** Beatson LJ reviewed the authorities and summarised the relevant principles as follows (at [48]):

"In short, what is required is a careful and commercially-minded construction of the agreements providing for the resolution of disputes. This may include enquiring under which of a number of inter-related contractual agreements a dispute actually arises, and seeking to do so by locating its centre of gravity and thus which jurisdiction clause is "closer to the claim". In determining the intention of the parties and construing the agreement, some weight may also be given to the fact that the terms are standard forms plainly drafted by one of the parties."

102. **Dicey, Morris and Collins on The Conflict of Laws (15th Ed)** states at para 12-110 (omitting references to supporting authority):

"Material, scope and concurrent jurisdiction clauses. Where a complex financial or other commercial transaction is put in place by means of a number of interlinked contracts, and each has its own provision for the resolution of disputes, the point of departure will be that it is improbable that a jurisdiction clause in one contract even if expressed in ample terms, was intended to capture disputes more naturally seen as arising under a related contract. In some cases the court called upon to disentangle such provisions has guided itself by seeking to identify the particular contract out of which the dispute most naturally arises, or to locate the centre of gravity of the dispute; in others it has preferred to ask whether the claim brought by the claimant was one which a jurisdiction agreement permitted the claimant to bring, whatever else may also have been permitted by other jurisdiction agreements, though these are simply two aspects of the single issue, which is one of contractual interpretation. Even if the effect is that there will be risk of fragmentation of the overall process for the resolution of disputes, this is not by itself sufficient to override the construction, and consequent giving of effect to the complex agreements for the resolution of disputes which the parties have made".

103. There was a dispute between the parties concerning the meaning and effect of para 95 of the judgment of Lord Collins of Mapebury in ***UBS*** in the circumstances of the present case. He said:

"In this case it is not necessary to go so far. Whether a jurisdiction clause applies to a dispute is a question of construction. Where there are numerous jurisdiction agreements which may overlap, the parties must be presumed to be acting commercially, and not to intend that similar claims should be the subject of inconsistent jurisdiction clauses. The jurisdiction clause in the Dealer's Confirmation is a "boiler plate" bond issue jurisdiction clause, and is primarily intended to deal with technical banking disputes. Where the parties have entered into a complex transaction it is the jurisdiction clauses in the agreements which are at the commercial centre of the transaction which the parties must have intended to apply to such claims as are made in the New York complaint and reflected in the draft particulars of claim in England".

104. [the defendant] argued that section 13 of the ISDA Master is a boiler plate provision that is primarily intended to cover technical banking disputes. It also argued that the "centre of gravity" of the issue of whether the various Italian statutes were complied with in respect of the overall debt restructuring (including the Swaps) is the Mandate and not the ISDA Master Agreement. Using the language of Lord Collins, [the defendant] contended that it is the Mandate which is the "commercial centre" of those issues. [the claimant] rejected all these arguments and they are considered below.

105. In my judgment Declarations (2) and (3) clearly fall with section 13 of the ISDA Master Agreement. They do not fall within the jurisdiction clause of the Mandate. I reach this conclusion for the following reasons.

106. First, it is clear that Declarations (2) and (3) are directed at representations given by [the defendant] that are reflected in the ISDA Master Agreement. A dispute has arisen about them since [the defendant] served proceedings in Rome. Accordingly the declarations involve a "*suit, action or proceedings relating to the Agreement*" within the jurisdiction clause of the ISDA Master Agreement.

107. Secondly, [the defendant] itself recognises that disputes concerning representations given in the ISDA Master Agreement fall within section 13 of that agreement. This is why it has accepted the Court's jurisdiction to given Declarations (1), (4) and (5). Clearly [the defendant] is right to accept jurisdiction. This is what the parties agreed. Accordingly disputes in relation to these declarations will be decided in the English court applying the law chosen by the parties, namely English law. I do not think there is any basis for saying that Declarations (2) and (3) fall outside the jurisdiction agreement in the ISDA Agreement. The language of Declarations (2) and (3) track the terms of the representations relied upon by [the claimant] and which are contained in the ISDA Master Agreement or Schedule. I should add that I do not require [the claimant] to amend its Claim Form but the Particulars of Claim when served should make it explicit that Declarations (2) and (3) are based on the same

representation in the ISDA Master Agreement along the lines of the amendment referred to above.

108. [the defendant]'s argument has extraordinary consequences because some declarations would be decided by the English Court applying English law and others by the Court of Rome. This would result in a degree of fragmentation that the parties could not have intended. It would result in the English court deciding certain representations and the Court of Rome deciding others (presumably applying English law). I consider it is for the English Court to decide whether [the claimant] is entitled to the declaratory relief it seeks in the English Proceedings.

109. Thirdly, I can see no basis for modifying clause 13 of the ISDA Master Agreement by the addition of the word "only" as argued by [the defendant]. Although in a broad sense Declarations (2) and (3) may involve Italian law issues and the Court of Rome in dealing with the claims under the Mandate may have to consider the same provisions of Italian law or some of them as in the English proceedings, that is not a reason for saying that the Declarations (2) and (3) must fall within the jurisdiction agreement in the Mandate. Declarations (2) and (3) are dealing with issues of Italian law in relation to the Swaps only. They are not dealing with claims under the Mandate. The English proceedings have nothing to do with the issue of the quality of [the claimant]'s endeavours that it undertook in relation to the Mandate.

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

111. I consider that [the defendant]'s construction argument involves the ISDA Master Agreement being rewritten. The same can be said about its implied term argument. Both arguments involve giving primacy to the Mandate (and the Court of Rome) when all the declarations sought by [the claimant] are concerned with contractual representations under an English law contract. The fact that it might be necessary to consider Italian law when deciding whether or not to grant Declarations (2) and (3) does not displace the jurisdiction clause in the ISDA Master Agreement. In my judgment there is no legal basis for the addition of the word "only" or for the alleged implied term. English law does not allow contracts to be rewritten in this way. This is the same point made by Thomas LJ (as he then was) in ***Sebastian Holdings*** at [65].

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

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

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

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

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

(8) Issue 3

116. Art. 29(1) of the Recast Regulation provides as follows:

"Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member

States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established".

117. Article 31(2) provides:

"Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement".

118. [the defendant] contends that the Court of Rome was first seised in relation to the cause of action or issues contained in Declarations (2) and (3) and that pursuant to Article 29 of the Recast Regulation, this Court is required to stay these proceedings until such time as the Court of Rome's jurisdiction is established.

119. There are two issues that fall to be determined. The first is whether the two sets of proceedings "*involve the same cause of action*" within the meaning of Article 29.

120. There is a second issue between the parties on the effect of Article 31(2). This provision departs from the first seised rule where the court seised is the court designated by a jurisdiction clause. In that case, the designated court has priority.

[the defendant]'s Arguments

121. [the defendant]'s arguments are these. [the defendant] contends that the Rome Proceedings and the English action in relation to Declarations (2) and (3) have the same cause and same object and satisfies the requirements of Article 29(1) of the Recast Regulation.

122. As to same cause, it contends that both sets of proceedings are concerned with the dealings between [the claimant] and [the defendant] in 2006 relating to [the defendant]'s debt restructuring and are concerned with the application of various Italian statutes.

123. As to the same object, it contends that the proceedings are mirror images of each other in that the Rome Proceedings are concerned with obtaining damages for breach of various Italian statutes whereas the English proceedings seek declarations of non-liability in respect of the same statutes.

124. As to the second issue, it relies on the fact that the Court of Rome was first seised pursuant to the jurisdiction clause in the Mandate. It repeats the argument considered under Issue 2 that the Declarations (2) and (3) are within the jurisdiction of the Mandate rather than the ISDA Master Agreement and accordingly the English court must stay the present proceedings (in relation to Declarations (2) and (3)) until the jurisdiction of the Court of Rome is established.

[the claimant]'s Arguments

125. [the claimant] argues that English and Rome proceedings do not *"involve the same cause of action"* within the meaning of Article 29. This is for a number of reasons which can be summarised as follows.

126. First, the proceedings are not founded on the same facts or rules of law. It is alleged that [the claimant]'s claim in England is principally founded on the terms of the ISDA Master Agreement, including the representations made in it by [the defendant], and is concerned exclusively with the Swaps. In contrast, [the defendant]'s Rome claim concerns the refinancing generally, and is founded on alleged breaches of best endeavours obligations in the Mandate. The Rome writ disavows any argument that [the defendant] would have a claim merely because of any failure on the part of [the claimant] to achieve the result expected by [the defendant] (e.g. achieving compliance with Italian law): rather, the claim in Rome is said to be founded on an alleged "*failure in deploying an appropriate degree of diligence*" on the part of the banks.

127. Secondly, the proceedings also do not have the same end in view: [the claimant]'s claim seeks a declaration upholding the validity of the Swaps, and seeks no relief in relation to any liability in damages. In contrast, [the defendant] in the Rome proceedings does not seek a declaration that the Swaps are null, but merely claims damages for [the claimant]'s alleged breaches of the Mandate.

128. Thirdly, [the defendant] claims damages in the Rome proceedings to reflect the extent to which the Swaps have been and will be "out of the money" for it. However, in legal terms, the two outcomes are in no way irreconcilable. On the contrary, an award of damages in [the defendant]'s favour presupposes that the Swaps are valid, since if the Swaps are invalid, [the defendant] will not need to pay anything under them and so will suffer no damage.

129. As to the second issue, [the claimant] contends that if [the defendant] loses on Declarations (2) and (3) and the Court rejects its case that they fall within the Mandate rather than the ISDA Master Agreement, it follows that it will lose on Article 31(2) because the English court will be the designated court for the

purpose of that article and the Court thereby entitled to priority over the court first seised.

Discussion and Analysis

130. It is convenient to deal with the two issues separately: whether the two sets of proceeding "*involve the same cause of action*" within Article 29 and if so, the effect of Article 31(2).

131. The applicable legal principles concerning the issue whether the two sets of proceedings *"involve the same cause of action"* within Article 29 were not in dispute between the parties.

i) In order for proceedings to involve the same cause of action, they must have the same "*objet*" and the same "*cause*" ("*le même objet et la même cause*"). The triple requirement of same parties, same *cause* and same *objet* "*entails that it is only in relatively straightforward situations that art 21 [now Article 29] bites*": Rix J in ***Glencore International AG v Shell International Trading and Shipping Co Ltd***, cited in ***The Alexandros T*** [2013] UKSC 70; [2014] 1 All ER 590 at [28(vii)].

ii) Identity of *cause* means that the proceedings in each jurisdiction must have the same facts and rules of law relied upon as the basis for the action.

iii) Identity of *objet* means that both sets of proceedings must have the same end in view.

iv) The essential question is whether the claims are mirror images of one another, and thus legally irreconcilable, in which case Article 29 applies, or whether they are "*not incompatible*", in which case that Article does not apply: ***The Alexandros T*** at [30].

v) A mere coincidence of issues in the proceedings does not satisfy the requirements of Article 29. In ***The Alexandros T*** at [28] Lord Clarke summarised the seven principles of EU law relevant to what is now Article 29 of which the fifth was that Article 29 "*is not engaged merely by virtue of the fact that common issues might arise in both sets of proceedings*".

132. In ***Barclays Bank Plc v Ente Nazionale di Previdenza Ed Assistenza Dei Medici E Degli Odontoiatri*** [2016] EWHC 2857at [22] Moore Bick LJ stated that the leading authority on Article 27 of the Judgments Regulation (the predecessor of Article 29 of the Recast Regulation) is ***The Alexandros T.*** At [23] he said this:

"The first question for decision was whether the English proceedings and the Greek proceedings involved the same cause of action. In paragraph 28 of his judgment [sc in ***The Alexandros T****] Lord Clarke, with whom Lord Sumption and Lord Hughes (and in this respect Lord Neuberger and Lord Mance) agreed, summarised the relevant principles as follows (omitting reference to supporting authority):*
(i) the phrase "same cause of action" in Article 27 has an independent and autonomous meaning as a matter of European law; it is therefore not to be interpreted according to the criteria of national law;
(ii) in order for proceedings to involve the same cause of action they must have "le même objet et la même cause";
(iii) identity of cause means that the proceedings in each jurisdiction must have the same facts and rules of law relied upon as the basis for the action;
(iv) identity of objet means that the proceedings in each jurisdiction must have the same end in view;
(v) the assessment of identity of cause and identity of object is to be made by reference only to the claims in each action and not to the defences to those claims;
(vi) it follows that Article 27 is not engaged merely by virtue of the fact that common issues might arise in both sets of proceedings".

133. The first matter to consider is whether the English and the Italian proceedings involve the same cause of action. A comparison between the claims in the proceedings in Italy and England shows there is neither identity of "*cause*" nor of "*objet*". I reach this conclusion for the following reasons.

134. First, [the claimant]'s claim in England is based on the representations and terms of the ISDA Master Agreement upon which the Declarations are based. [the defendant]'s claims in the Rome Proceedings are based on different contractual provisions including breaches of the best endeavours obligations under the Mandate.

135. Secondly, although it is possible that there will be overlapping issues of Italian law in the English and Rome Proceedings, this does not mean that they have the same cause. This is well established as a matter of law. As I mentioned above, by reason of the doctrine of contractual estoppel, it may not be necessary for the English Court to make findings on Italian law.

136. Thirdly, the proceedings do not have the same "*objet*". In the English Proceedings, [the claimant] only seeks declaratory relief in relation to the

Swaps. There is no claim for damages. In the Rome Proceedings, [the defendant] does not assert that the Swaps are null but merely claims damages for alleged breaches by [the claimant] of the Mandate.

137. Finally the outcomes of the two sets of proceedings are not irreconcilable. I agree with [the claimant]'s submission that an award of damages in favour of [the defendant] presupposes that the Swaps are valid since if the Swaps are invalid, [the defendant] will have no liability under them and so will not be obliged to pay.

138. Since there is no identity of cause or object in this case, the Court is not bound to stay the proceedings pursuant to Art 29 of the Recast Regulation.

139. In view of my decision that the requirements of Article 29(1) of the Recast Regulation are not met, the issue whether Article 31(2) applies is moot. However since the issue was fully argued it is right I should express my reasoning and conclusion on its application.

140. In its oral argument [the defendant] relied on Recital (22) of the Recast Regulation. This provides:

"(22) However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general lis pendens rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of- court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non- designated court has already decided on the stay of proceedings".

141. In my judgment there is nothing in Recital (22) that assists [the defendant]. Had the Court of Rome jurisdiction over the Declarations (2) and (3) as alleged by [the defendant], it would have been the designated court. However I have concluded under Issue 2 that Declarations (2) and (3) fall within the jurisdiction clause of the ISDA Master Agreement and that the English court has exclusive jurisdiction concerning all the declarations sought in the English proceedings. It follows from this that the English Court is the designated court for the purposes of Article 31(2) and the Court has priority over the Court of Rome

even though commenced first. There is no basis for contending that the English Court should stay its proceedings under Article 29.

Conclusion

142. For all these reasons, I dismiss [the defendant]'s application. However this is subject to its right to apply for a stay under Article 30 of the Recast Regulation.

143. Counsel are requested to draw up an order reflecting the terms of this judgment and other consequential matters including costs. Failing agreement I will consider any outstanding issues.