Neutral Citation Number: [2019] EWCA Civ 768

Case No: A4/2018/1850

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**THE BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**
**The Honourable Mr Justice Robin Knowles CBE**
**[2018] EWHC 1670 (Comm)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2019

**Before :**

**LORD JUSTICE HAMBLEN**
**LORD JUSTICE FLAUX**
and
**LADY JUSTICE ASPLIN**

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**Between :**

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| **BNP PARIBAS S.A.** | **Claimant/ Respondent** |
| **- and -** | |
| **TRATTAMENTO RIFIUTI METROPOLITANI S.P.A.** | **Defendant/ Appellant** |

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**Adrian Beltrami QC and Christopher Bond** (instructed by **Allen & Overy LLP)** for the **Claimant/Respondent**
**Charles Samek QC and James Bickford Smith** (instructed by **Collyer Bristow LLP**) for the **Defendant/Appellant**

Hearing dates : 9/10 April 2019

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# Approved Judgment

**Lord Justice Hamblen :**

## Introduction

1. This appeal concerns apparently competing jurisdiction clauses.

2. Trattamento Rifiuti Metropolitani S.P.A. ('TRM') appeals against the judgment of Knowles J dated 17 July 2018 whereby he refused TRM's application to dismiss for want of jurisdiction the claim of BNP Paribas S.A. ('BNPP'), issued on 23 September 2016 and served on 10 March 2017 ('the Claim').

3. The issue raised on the appeal is whether the judge was correct to conclude that the claims for declaratory relief sought in the Claim fall within an English jurisdiction clause ('the EJC') contained in a swap transaction between the parties and not within an Italian jurisdiction clause ('the IJC') contained in a financing agreement between them.

4. TRM contends that declarations sought in the Claim fall within the IJC in favour of the courts of Turin in a financing agreement entered into between a syndicate of banks, including BNPP in its capacity as "Mandated Lead Arranger, Lending Bank and Agent Bank", and TRM on 29 October 2008, as subsequently amended ('the FA'). TRM has issued a claim against BNPP in Turin on 14 April 2017 (after service of the Claim) ('the Italian Claim'). The Italian Claim makes claims in respect of alleged breaches by BNPP of the FA and of various alleged advisory obligations.

5. The Claim is for negative declaratory relief in respect of an interest rate hedging transaction entered into on ISDA Master Agreement terms between BNPP, in its capacity as "Hedging Bank", and TRM in March 2010 ('the Swap' or 'the Transaction'). The Swap documentation contains the EJC. The judge held that BNPP has much the better of the argument that the Claim falls within the EJC and that it must therefore be heard in England, pursuant to Article 25 of Regulation (EU) No. 1215/2012 of 12 December 2012 ('the Regulation' and 'Article 25').

## Factual background

6. TRM is a project company incorporated in Italy. BNPP is an international bank, headquartered in Paris, with branches in London and Milan, among other places.

7. In July 2005, TRM received a concession from the Province of Turin to design, build and operate a power plant in Gerbido, Italy ('the Project'). TRM sought to appoint a financial advisor for the Project by way of a call for tenders dated 23 January 2006.

8. On 6 July 2006, TRM entered into a financial advisory contract with a consortium of companies led by Banca OPI SpA ('the FAC'). BNPP was not a party to or otherwise involved in the FAC.

9. In January 2007, pursuant to the FAC, TRM received a preliminary information memorandum ('the PIM'), with recommendations for TRM's financing needs for the Project and to which was appended a preliminary term sheet setting out proposed terms and conditions for the project financing ('the PTS'). On 17 May 2007, TRM initiated a tendering process for financing the Project, and, on 31 October 2007, BNPP was one of ten banks that received an invitation to tender ('the Call for Tender'). The Call for

Tender referred to a further document, the Notes on Tender, which itself referred to the PIM and PTS.

10. BNPP made a tender expressed by reference to its Technical Offer, among other documents. TRM submits that BNPP's Technical Offer dated 23 November 2007 outlined a range of activities that it would undertake on TRM's behalf including designing, advising on and implementing the financing structure for the Project. Those activities included "provision for alternatives for hedging against the risk of interest rate fluctuation and, in accordance with TRM, subsequent definition of the definitive hedging coverage". In the Technical Offer BNPP stated that "with regard to TRM, BNPP … will be able to act as a single reference point for all the activities described … which will be carried out entirely by its Italian branch".

11. TRM's case is that BNPP's agreement, if it won the tender, to act as "single reference point" entailed an assumption of roles and responsibilities which gave rise to significant legal duties on BNPP under Italian law.

12. BNPP won the tender on 19 December 2007.

13. The FA was entered into on 29 October 2008 between TRM and a syndicate of lenders, led by BNPP. BNPP was party to the FA through its Milan branch as "Mandated Lead Arranger, Lending Bank and Agent Bank". The FA defines BNPP as "Hedging Bank" for the purpose of interest-rate hedging arrangements, but BNPP is not party to the FA in that capacity.

14. The FA is governed by Italian law. Article 28.2 is the IJC and provides:

> "Any dispute relating to the interpretation, conclusion, performance or termination of this contract or otherwise relating to it shall be within the exclusive competence of the Court of Turin".

15. Under the FA, TRM was to pay a floating interest rate against which interest rate hedging contracts were to be made. In the FA, the Hedging Bank is defined as "[BNPP] in its capacity as counterparty of [TRM] within the meaning of the Tender Documents and Hedging Contracts" (Article 1.2). Article 17.19 provides that "[TRM] is committed to sign the Hedging Contracts in accordance with the Strategy of Hedging". The Strategy of Hedging is defined as "the hedging strategy intended to cover the risk of fluctuation of interest on the Loan, as more fully described in Appendix 17.19". Appendix 17.19 to the FA provides as follows:

> "1. [TRM] must conclude and maintain derivatives contracts covering the risk arising from interest rate fluctuations on 100% of the total amount disbursed from time to time and not reimbursed under the Base Lines ("Hedging Contracts") from the first Date of Use indicated in the Financing Contract until the Final Expiry date of the Base Lines.
>
> 2.[TRM] must conclude Hedging Contracts exclusively with [BNPP] in its capacity as a Hedging Bank.

> 3.Hedging Contracts shall be concluded by [signing] the relative standard documentation as published from time to time by the International Swaps and Derivatives Association, Inc. ("ISDA") and shall refer to the 1992 ISDA definitions.
>
> 4. Except in the case of Hedging Contracts, [TRM] may not enter into any sort of agreement which constitutes a derivative contract."

16. On 30 January 2013, Article 17.19 was subsequently amended to include the following, further obligation on TRM:

> "…to comply with its undertakings under the Hedging Contracts and to abstain from perfecting transactions of any kind whatsoever on financial instruments different from the Hedging Contracts".

17. On 29 October 2008, BNPP and other lenders entered into an Intercreditor Agreement ('the ICA'). As with the FA, BNPP was party to the ICA through its Italian branch as "Mandated Lead Arranger, Lending Bank and Agent Bank". BNPP was, however, also party to the ICA through its Paris office as "Hedging Bank". The ICA is governed by Italian law, with an exclusive jurisdiction clause in favour of the Courts of Milan, later amended to Turin TRM submits.

18. In fulfilment of its interest rate hedging obligations to the lenders under the FA, TRM entered into the Swap on 23 March 2010. The Swap documents comprise a 1992 ISDA Master Agreement dated 1 March 2010 ('the ISDA Master') and the Schedule thereto ('the Schedule'), and a final Confirmation dated 23 March 2010 (together, 'the Transaction Documents'). The Transaction Documents include the representations relied on by BNPP in the Claim. They were amended, and the representations repeated, on 9 October 2015. BNPP was counterparty to the Swap in its capacity as "Hedging Bank" and through its central office in Paris.

19. The ISDA Master provides that:

> "Section 1(b) - In the event of any inconsistency between the provisions of the Schedule and the other provisions of this Master Agreement, the Schedule will prevail.
>
> Section 13 - Governing Law and Jurisdiction … (b) – With respect to any suit, action or proceedings relating to this Agreement …, each party irrevocably: - submits to the jurisdiction of the English courts, if this Agreement is expressed to be governed by English law …" (as it was).

20. The Schedule contains the following provisions:

> "Notwithstanding anything to the contrary contained herein, this Agreement is entered into in connection with the loan agreement dated October 29th, 2008, as subsequently amended by the Atto Modificativo del Contratto di Finaziamento (sic) dated January

> 21st, 2010 [ie. the FA]… and the relevant intercreditor agreement dated as of January 21st, 2010 [ie. the ICA]....
>
> For the purpose of this Agreement, the parties acknowledge the existence of the [FA] and the [ICA] and further acknowledge that (i) their respective rights under this Agreement are subject to the terms and conditions of the [FA] and the [ICA]; (ii) that BNPP is the 'Banca Hedging' (ie. the bank that will provide the 'Contratti di Hedging' pursuant to the 'Strategia di Hedging' as these terms are defined in paragraph 1 (Interpretazione) and annex 17.19 (Strategia di Hedging) of the [FA] and (iii) no derivative transactions shall be entered into hereunder other than those foreseen in annex 17.19 (Strategia di Hedging) of the [FA]…
>
> …In the case of conflict between the provisions of this Agreement and the [FA] and the [ICA], the provisions of the [FA] and the [ICA] as appropriate shall prevail."

21. TRM places particular reliance upon the conflict resolution provision in the last paragraph ('the Conflicts Provision').

22. The Transaction Documents also contain the following provisions:

    (1) by Section 13(a) of the ISDA Master and part 4(h) of the Schedule, the Transaction was governed by English law;

    (2) by Section 13(c) of the ISDA Master and part 4(b) of the Schedule, the parties agreed that BNPP would appoint its London branch as its process agent and that TRM would on BNPP's request appoint a process agent in the City of London;

    (3) by Sections 3(a)(ii), 3(a)(v) and 9(a) of the ISDA Master and part 5(d) of the Schedule (repeated in the final Confirmation), the parties made various representations relied upon by BNPP in the Claim;

    (4) by Section 9(a) of the ISDA Master it was agreed that the Transaction Documents constitute "the entire agreement and understanding" between BNPP and TRM "and supersedes all oral communications and writings with respect thereto"; and

    (5) by part 1(h)(i) of the Schedule, in the event of TRM repaying, prepaying or cancelling any loan under the FA, BNPP had the right under Section 6(b)(iv) to designate an Early Termination Date ('ETD') in respect of the Swap and to the payment from TRM of any early termination amount.

23. In the course of correspondence and meetings in 2016, TRM made allegations which BNPP believed constituted a serious threat of litigation. This led to BNPP issuing the Claim on 23 September 2016.

24. On 14 November 2016, TRM asked BNPP to waive its right under part 1(h)(i) of the Schedule and Section 6(b)(iv) to designate an ETD under the Swap in the event that TRM repaid the loan under the FA ('the Waiver'). BNPP refused to grant the Waiver under the terms of the Swap. The Claim Form was amended on 7 December 2016 to

seek a further declaration in respect of the Waiver and served on TRM in Italy on 10 March 2017.

25. The Italian Claim was issued on 14 April 2017. In advance of the first hearing on 8 November 2017, BNPP was required to submit a substantive defence brief, which it did.

## The judge's decision

26. The judge recognised that the dispute as to jurisdiction turns on the application of Article 25 of the Regulation which provides:

> "1. 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 …".

27. In relation to the proper approach to the argument on jurisdiction, the judge directed himself as follows:

(1) Where there is more than one contract, and the contracts contain jurisdiction clauses in favour of different countries, the court is faced with a question of construction: *Trust Risk Group SPA v Amtrust Europe Ltd* [2015] EWCA Civ 437; [2015] 2 Lloyd's Rep 154 at [44]-[49] per Beatson LJ, *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767 at 777 per Rix J (as he then was) and *Sebastian Holdings Inc v Deutsche Bank* [2011] 1 Lloyd's Rep 106 per Thomas LJ (as he then was) at [42] (judgment at [27]).
(2) The approach to the construction of a jurisdiction clause should be broad and purposive: *Sebastian Holdings*, at [39] per Thomas LJ (judgment at [28]).
(3) When interpreting any provision of a commercial contract the court will look at the language and investigate the commercial consequences: *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 at [8]-[15], per Lord Hodge (judgment at [28]).

28. Since this was an interlocutory hearing to challenge jurisdiction, it was sufficient for the judge to see whether BNPP had "much the better of the argument" [29].

29. The judge considered that the two jurisdiction clauses governed different legal relationships, stating that:

> "38. The two jurisdiction clauses as a matter of language readily bear the interpretation that one is concerned with the Master Agreement and the other is concerned with the Financing Agreement. This fits perfectly well in the context of the parties' dealings. It recognises that the parties had more than one relationship.
>
> 39. The wider language of the written contracts ("performance ... of this contract" "or otherwise relating to it" in the Financing Agreement; "relating to this Agreement" in the Master

> Agreement) does not prevent an interpretation that allows those contracts to fit together. That is certainly more commercial than an interpretation that would have general words in the Financing Agreement prevail over the fact that the parties specifically agreed jurisdiction in favour of the English Court for their obligations under the Master Agreement when they agreed that and the swap transaction. There is no basis for rewriting the contracts: Sebastian Holdings (above) at [65] per Thomas LJ and Dexia Crediop SPA v Provincia di Brescia [2016] EWHC 3261 (Comm) at [100]-[111] per Ali Malek QC sitting as a Deputy High Court Judge."

30. The judge said that since there is no conflict between the two jurisdiction clauses, TRM's argument of primacy of the IJC because of the Conflicts Provision "is not engaged" [40].

31. In relation to context, the judge said that TRM sought impermissibly to rely upon the nature of the disputes raised by the Italian Claim, but that this was not part of the context at the time when the jurisdiction clauses were agreed and therefore cannot contribute to the task of interpretation [42].

32. The judge considered the most powerful point of context to be the use of ISDA documentation and the ISDA jurisdiction clause within it. The judge cited with approval the statement of Coulson J (as he then was) in *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC); [2017] 1 Lloyd's Rep 331 at [42] that: "Dispute resolution provisions require certainty. The parties need to know from the outset what to do and where to go if a dispute arises." He observed that use of ISDA documentation signalled the parties' interest in achieving consistency and certainty in this area of financial transacting, and that it "is axiomatic that [the ISDA Master] should, so far as possible, be interpreted in a way that serves the objectives of clarity, certainty and predictability so that the very large number of parties using it should know where they stand": *Lomas and others v JFB Firth Rixson Inc and others (ISDA intervening*) [2010] EWHC 3372 (Ch); [2011] 2 BCLC 120 at [53] per Briggs J (as he then was) referring to *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] QB 529 at 540 per Robert Goff LJ (as he then was) (judgment at [44]).

33. The judge said that where commercial parties use ISDA documentation, they are even less likely to intend that provisions have one meaning in one context and another meaning in another context, citing the following statement of Hildyard J in *Re Lehman Brothers International (Europe) (in administration) (No 8)* [2016] EWHC 2417 (Ch); [2017] 2 All ER 275 at [48(2)], referring to *AIB Group (UK) Ltd v Martin* [2001] UKHL 63; [2002] 1 WLR 94:

> "Although the relevant background, so far as common to transactions of such a varied nature and reasonably expected to be common knowledge among those using the ISDA Master Agreements, is to be taken into account, a standard form is not context-specific and evidence of the particular factual background or matrix has a much more limited, if any, part to play"

34. The judge did not consider it was necessary to start by interpreting the IJC in the FA as it was first in time. He said that the essential point is that there are two jurisdiction clauses, not one [47].

35. In relation to the expert evidence of Italian law, the judge said that he had not found it necessary to use that evidence to decide the application, although he had considered it and found "enough to confirm to [him] that the language used by the parties is central to interpretation in Italian law as it is in English law" [49].

36. The judge then rejected various of the arguments raised by TRM in reliance on the Italian law expert evidence. He said that the court is able to interpret the IJC for itself and that the argument as to whether TRM has complied or will comply or threatens not to comply with its commitments under the Swap plainly comes within the Scope of the IJC had no merit, observing that:

> "…The parties agreed jurisdiction in favour of the English Court under the Master Agreement. The fact that TRM further committed itself in the Financing Agreement to comply with its commitments under the Master Agreement does not mean that commitments under the Master Agreement and swap transaction are any the less subject to the jurisdiction agreed under the Master Agreement, or any the less able to be adjudicated upon and enforced by proceedings in England." [54]

37. The judge found that with minor amendments, all the declarations sought in the Claim fell within the EJC. He accepted that all the declarations sought either derive directly from the contractually agreed language of the Transaction Documents or are consequent on those declarations [31]. The declarations sought are set out in the Appendix to this judgment.

38. The judge accordingly concluded that BNPP had much the better of the argument and dismissed TRM's application.

## The grounds of appeal

39. TRM's grounds of appeal are:

(1) The judge did not undertake, correctly or at all, the contractual analysis necessary to dispose of TRM's application. In particular, he failed to construe, correctly or at all, the IJC.
(2) The judge did not undertake, correctly or at all, the analysis required by Article 25 of the Regulation, before concluding that the Court had jurisdiction by virtue of Article 25.
(3) The judge was wrong to find that "with the exception of the declaration sought under paragraph 7(1)(f) [of the Claim Form], all of the declarations sought either derive directly from the contractually agreed language of the Swap, and in particular the ISDA Master Agreement (7(1)(a) to 7(1)(c) and 7(1)(e)) or are consequent on those declarations (7(1)(d), (g), (h) and (i))" (at [31]).
(4) The judge was wrong to find that the Conflicts Provision was not engaged "because there is no conflict".

40. TRM contends that had the judge correctly construed the IJC and undertaken the analysis required by Article 25 (with the exception of the declaration at 7(1)(a) in the Claim Form) he would have concluded that:

    (1) The declarations in substance raised disputes concerning the legal relationship of the parties constituted by the FA; and
    (2) The declarations in 7(1)(b), (f), (g), (h) and (i) in the Claim Form did not come within the EJC; and
    (3) The declarations came within the ambit of the IJC; and
    (4) Even if any of the declarations came also within the ambit of the EJC, the effect of the Conflicts Provision in the Schedule to the Master Agreement was that the IJC prevailed, with the result that the Court of Turin, not the English Court had jurisdiction under Article 25 to determine the declarations.

41. By a Respondent's Notice, BNPP, if necessary, seeks to support the judge's decision on the following further grounds:

    (1) There was no relevant obligation on BNPP under the FA. Accordingly, there is no possibility of a potential conflict between the EJC and the IJC.
    (2) Even if BNPP did have some relevant obligation under the FA, it is not one under which BNPP could incur any liability to TRM, and so there is still no possibility of competing jurisdiction clauses.
    (3) Even if there were potentially competing jurisdiction clauses, the proper approach is to ask where the "centre of gravity" of the Claim lies. BNPP submits that the Claim is more closely related to the Swap and so the EJC still applies. There is therefore no need to resort to the Conflicts Provision which is clearly intended to apply to other potential conflicts of terms between the Swap and the FA.

**Grounds 1, 2 and 4 – The proper interpretation of the EJC and IJC and the application of Article 25 of the Regulation**

42. Grounds 1, 2 and 4 concern the proper interpretation of the EJC and the IJC, the application of Article 25, and whether in general terms disputes relating to the Swap fall exclusively within the EJC. Ground 3 concerns the further and different question of whether the particular declarations sought raise disputes which relate to the Swap. It is accordingly appropriate to consider Grounds 1, 2 and 4 first and together.

43. TRM's case on Grounds 1, 2 and 4 may be summarised as follows:

    (1) Where the Court is faced with multiple jurisdiction clauses, the Court must construe them all and do so in a careful and commercially-minded way: see *Trust Risk Group* at [48] and the recent Court of Appeal decision in *Deutsche Bank AG v Savona* [2018] EWCA Civ 1740 at [3].

    (2) The clauses need to be construed in the light of the transaction as a whole, taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme: see *UBS AG v HSH Nordbank* [2009] EWCA Civ 585, 2 Lloyd's Rep 272 at [83] per Lord Collins and *Trust Risk Group* at [47] per Beatson LJ (citing from Thomas LJ in *Sebastian Holdings* at [39] – [42]).

(3) The judge focused unduly, if not completely, on the proper interpretation of the EJC and failed to construe the EJC and the IJC together and to analyse how they worked within the scheme of the parties' overall bargain, which included the provisions in Article 17.19 and the corresponding Annex 17.19 in the FA and the parties' express agreement in the Schedule, namely that the ISDA was entered into in connection with the FA and that their respective rights under the ISDA were subject to the terms and conditions of the FA.

(4) The judge erred in failing to construe the IJC by applying the relevant provisions of Italian law and drawing assistance from the Italian law expert reports when doing so. If the judge had construed the IJC by applying Italian law, then he would and should have concluded that the "dispute" fell within the ambit of the IJC - the dispute raised by the declarations sought concerned the "performance" of the FA "or otherwise related to it" such that an Italian Court (applying Italian law) would conclude that they fell within the IJC.

(5) The judge further erred in not carrying out the enquiry which Article 25 requires the Court to perform, which is to characterise the dispute or disputes between the parties and determine who has the better of the argument as to whether the claim (in this case, the declarations) relates to a dispute arising in connection with the particular legal relationship regulated by the jurisdiction agreement relied on before the Court. On the facts of this case, that meant determining whether the dispute between the parties related to a relationship regulated only by the ISDA, or only by the FA, or by both the ISDA and the FA.

(6) Had the judge conducted the correct enquiry under Article 25, he would and should have concluded that the declarations in substance raised disputes which arose in connection with the parties' legal relationship set out in the FA and therefore within the IJC.

(7) By virtue of the Conflicts Provision, the conclusion which the judge should have drawn under (4) and/or (6) would have entailed that, whether or not any declaration claims also fell within the ambit of the EJC, the Italian Court had exclusive jurisdiction to determine them.

44. Before addressing the detail of TRM's case it is appropriate to address two preliminary matters raised by it, namely (i) the relevance of Italian law and (ii) the relevant "dispute" or "disputes".

*The relevance of Italian law*

45. The role of foreign law experts in relation to issues of contractual interpretation is a limited one. It is confined to identifying what the rules of interpretation are.

46. It is not the role of such experts to express opinions as to what the contract means. That is the task of the English court, having regard to the foreign law rules of interpretation.

47. This is well established law and is clearly set out and summarised by Lord Collins in *Vizcaya Partners Ltd v Picord* [2016] UKPC 5, [2016] 1 All E.R. (Comm) 891 at [60]:

> "60. …Where the applicable law of the contract is foreign law, questions of interpretation are governed by the applicable law. In such a case the role of the expert is not to give evidence as to what the contract means. The role is "to prove the rules of construction of the foreign law, and it is then for the court to interpret the contract in accordance with those rules": *King v Brandywine* [2005] EWCA Civ 235, [2005] 1 Lloyd's Rep 655 2 All E.R. (Comm) 1 para 68 , para 68; Dicey, paras 9-019 and 32-144 ("the expert proves the foreign rules of construction, and the court, in the light of these rules, determines the meaning of the contract")."

48. To similar effect is the judgment of Longmore LJ in *Savona* at [15]:

> "15. …In a case in which the main, let alone the only, issue is as to the construction of a foreign jurisdiction clause as opposed to an English jurisdiction clause, the only relevance of evidence of foreign law is to inform the court of any difference of law in relation to the principles of construction, see *King v Brandywine* [2005] 2 All E.R. (Comm) 1 para 68 per Waller LJ and *Vizcaya Partners Ltd v Picord* [2016] 1 All E.R. (Comm) 891 para 60 per Lord Collins. It is not to have competing arguments as to how the highest court in the foreign jurisdiction would decide the question whether a claim brought in England would (or would not or would also) fall within the foreign jurisdiction clause. The task of the English court is merely to inform itself of any relevant different principles of construction there might be in the foreign law and, armed with such information, look at both jurisdiction clauses and decide whether the English claim falls within the English clause. That should be a comparatively straightforward exercise."

49. TRM's Italian law expert did express views as to how an Italian court would interpret the IJC and what she considered the IJC to mean. That is inadmissible and irrelevant evidence.

50. In its written submissions, TRM supported the relevance of inquiring into what an Italian court would decide by reliance on passages from this Court's decision in *Morgan Grenfell & Co Limited v SACE – Istituto per I Servizi Assicurativi del Commercio* [2001] EWCA Civ 1943 and contended that submissions as to how an Italian Court would resolve an issue are simply a different way of submitting what the effect of Italian law is.

51. The *Morgan Grenfell* case was primarily concerned with an issue of substantive law relating to the principles of non-disclosure under the Italian Civil Code rather than issues of contractual interpretation. That is the context in which the Court made the comments upon which particular reliance was placed by TRM at [50]:

> "50. In that case the court was concerned with the construction of the Uniform Commercial Code which was part of the law of New York. It was therefore a question upon which an English

> judge might perhaps be expected to make a valuable contribution. In this case, on the other hand, the judge was faced with differing views of Italian law, which is not based in any relevant respect upon the common law. Indeed, whatever their true extent, the principles of Italian law which the judge had to consider, especially Article 1892 of the Italian Civil Code, are significantly different from the principles of non-disclosure in English law. In these circumstances, there was less room for the judge to apply his own legal training and experience to help determine the relevant question, namely how, in the case of each disputed question of law, the Italian courts (and in particular the Corte di Cassazione ) would have resolved it."

52. It is correct that issues of construction also arose in that case and that in relation to a new issue raised in respect of which there was no Italian law expert evidence the Court referred *obiter* at [300] to the question of "how an Italian court would interpret the new clause". There appears, however, to have been no argument as to the appropriateness of this hypothetical question. In my judgment, the correct approach is as clearly and authoritatively set out in the passages from the *Viczaya* and *Savona* cases set out above.

53. In oral argument, TRM did not press this argument and ultimately its only point was that it was inaccurate for Longmore LJ to state in *Savona* that the "task of the English court is merely to inform itself of any relevant different principles of construction" because, strictly speaking, the court is still applying the foreign law relating to contractual interpretation even where there is no material difference. In theory that may be so, but in practical terms it is a distinction without a difference.

54. As to the Italian law in relation to contractual interpretation, there was no issue as to the relevant rules. The primary rule is Article 1362 of the Italian Civil Code, under which the literal meaning of the words must be considered. It is only if that meaning is not clear that one goes on to consider later Articles, although they may be used as a cross check. In these circumstances, the judge was entitled to find at [50] that "the language used by the parties is central to interpretation in Italian law as it is in English law" and to consider that it did not assist the court in its task of determining the meaning of the IJC. That was a similar conclusion to that reached by this Court in *Savona,* in which it was found that there was no material difference on the principles of contractual interpretation between Italian and English law (at [16]).

55. In these circumstances, although the IJC was governed by Italian law, the judge was entitled to approach the task of interpreting the EJC and the IJC by reference to English law relating to the interpretation of such provisions, concentrating on the meaning of the words used in their relevant context.

*The relevant "dispute" or "disputes"*

56. The interpretation of the scope of a jurisdiction clause falls to be considered at the time that jurisdiction agreement is made, at which time there will be no "dispute" unless, which is not this case, it is an *ad hoc* agreement relating to existing disputes.

57. Save in relation to such *ad hoc* agreements, the interpretation of the scope of a jurisdiction clause is therefore necessarily forward looking and looks towards the general nature of dispute or disputes that would fall within the clause.

58. As Rix LJ stated in *Ryanair Ltd v Esso Italiana Srl* [2013] EWCA Civ 1450, [2015] 1 All ER (Comm) 152 at [34], the scope of a jurisdiction clause "has to be capable of being answered at the date of the contract" and the clause is not to be interpreted "on the basis of post-contract events".

59. Where proceedings are commenced in this country in reliance on an English jurisdiction clause and a jurisdictional challenge is raised, the issue of whether the clause may be so relied upon is to be answered by reference to the claim in relation to which those proceedings have been issued.

60. As Thomas LJ stated in *Sebastian Holdings* at [62]:

> "…the question as to whether a claim falls within the jurisdiction clause is an issue that has to be determined at the time the proceedings are issued"

61. The answer to this question cannot change by reason of subsequent events, such as a defence raised or a subsequent set of proceedings, like the Italian Claim. As Rix LJ observed in *Ryanair*, the issue of interpretation must not be confused with "the adventitious circumstances of a defendant's reaction to a particular claim" (at [34]). The same applies to the application of Article 25, as made clear by the CJEU's explanation of its purpose in *Powell Duffryn Plc v M Petereit (case C-214/89)* [1992] ECR 1-1745, as set out below.

62. The judge was accordingly correct to reject TRM's argument that, with regard to the correct characterisation of the dispute, the Claim was in substance directed to providing a defence to the Italian Claim (at [43]). Longmore LJ endorsed the judge's approach in *Savona* at [33]. At times, TRM's submissions on the appeal appeared to resurrect this argument. To the extent that it did so, I would similarly reject it.

*The approach to the interpretation of the EJC and IJC*

63. Under Article 25 of the Regulation the interpretation of the scope of the jurisdiction clause is a matter for the national court applying the relevant applicable law – see *Powell Duffryn.*

64. For reasons already given, the judge was correct to consider this question as a matter of English law.

65. The judge directed himself by reference to the judgment of Beatson LJ in *Trust Risk Group*, which itself references the other judgments cited by the judge, *Credit Suisse v MLC* (Rix J) and *Sebastian Holdings* (Thomas LJ). In *Trust Risk Group* Beatson LJ stated as follows at [45]-[48]:

> 45.…This case concerns an overall agreement package which contains two express choice of law and jurisdiction clauses, one of English law and jurisdiction, the other of Italian law and arbitration… As Lord Collins stated in *UBS AG v HSH*

*Nordbank AG* [2009] EWCA Civ 585, reported at [2009] 2 Lloyd's Rep 272 at [84], where the agreements are all connected and part of one package, "sensible businesspeople would not have intended that a dispute of this kind would have been within the scope of two inconsistent jurisdiction agreements".

46. Where the overall contractual arrangements contain two or more differently expressed choices of jurisdiction and/or law in respect of different agreements, however, the position differs in that one does not approach the construction of those arrangements with a presumption. So, the 14th edition of Dicey, Morris and Collins on the Conflict of Laws stated:

> "the decision in Fiona Trust has limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries. There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes in contract B; the question is entirely one of construction… (§12–094)

That reflects *inter alia* the statement of Rix J in *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767 at 777 per Rix J (as he then was) and *Sebastian Holdings Inc v Deutsche Bank* [2011] 1 Lloyd's Rep 106 at 777 that:

> "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".

47. In *Sebastian Holdings Inc v Deutsche Bank* [2010] EWCA Civ 998, reported at [2011] 1 Lloyd's Rep 106, a case involving a complex series of eight agreements, Thomas LJ referred with approval (at [42] and [49]) to the passages from Dicey, Morris and Collins and the judgment of Rix J I have set out. He summed up the position as follows:

(1) "… [I]n construing a jurisdiction clause, a broad and purposive construction must be followed": see [39];

(2) "… [A]n agreement which [is] part of a series of agreements [should be construed] by taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme": see [40];

(3) "It is generally to be assumed … that just as parties to a single agreement do not intend as rational businessmen that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them

> set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals": see [41]; but
>
> (4) "… [W]here there are multiple related agreements, the task of the court in determining whether the dispute falls within the jurisdiction clauses of one or more related agreements depends upon the intention of the parties as revealed by the agreements as against these general principles: see [42].

48. The current (16th) edition of Dicey, Morris and Collins states (at §12–110) that:

> "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 expressed in ample terms, was intended to capture disputes more naturally seen as arising under a related contract. …Even if the effect is that there will be a 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."

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

…

59. …If the conclusion is that the parties made two contracts at different times which contain jurisdiction agreements for different countries, there is no presumption that the provisions in the more recent contract are intended to capture disputes in the earlier contract even if the effect is a risk of fragmentation of the overall process for the resolution of disputes…"

66. As stated in the passage from *Dicey, Morris and Collins* at §12–110 cited above, where there are interlinked contracts between the same parties, each containing its own jurisdiction clause, "the point of departure will be that it is improbable that a jurisdiction clause in one contract, even expressed in ample terms, was intended to capture disputes more naturally seen as arising under a related contract." As Lord Collins said in *UBS v HSH Nordbank* at [84], "sensible business people" are unlikely to intend that disputes between them should fall within the scope of two inconsistent jurisdiction clauses. As Longmore LJ observed in *Savona* at [1], where there are theoretically competing

jurisdiction clauses, "one's natural reaction is that it should be possible to assign any particular dispute to one or other such clause and that there should be no overlap between them".

67. In *Savona* the Court cited with approval the following passage from the judgment of Popplewell J in *Monde Petroleum S.A. v Westernzagros Ltd* [2015] 1 Lloyd's Rep 330 at [35]-[36]:

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

68. In the light of the guidance provided by these authorities, so far as relevant to the present case I would summarise the approach to be as follows:

(1) Where the parties' overall contractual arrangements contain two competing jurisdiction clauses, the starting point is that a jurisdiction clause in one contract was probably not intended to capture disputes more naturally seen as arising under a related contract: *Trust Risk Group* at [48]; *Dicey, Morris & Collins* at § 12-110.

(2) A broad, purposive and commercially-minded approach is to be followed - *Trust Risk Group* at [48]; *Sebastian Holdings* at [39] and [50].

(3) Where the jurisdiction clauses are part of a series of agreements they should be interpreted in the light of the transaction as a whole, taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme: see *UBS v Nordbank* [2009] at [83]; *Trust Risk Group* at [47]; *Sebastian Holdings* at [40].

(4) It is recognised that sensible business people are unlikely to intend that similar claims should be the subject of inconsistent jurisdiction clauses: *UBS v Nordbank* at [84], [95]; *Sebastian Holdings* at [40]; *Savona* at [1].

(5) The starting presumption will therefore be that competing jurisdiction clauses are to be interpreted on the basis that each deals exclusively with its own subject matter and they are not overlapping, provided the language and surrounding circumstances so allow: *Monde Petroleum* at [35]-[36]; *Savona* at [1].

(6) The language and surrounding circumstances may, however, make it clear that a dispute falls within the ambit of both clauses. In that event the result may be that either clause can apply rather than one clause to the exclusion of the other –*Savona* at [4] and [31].

*The proper interpretation of the EJC and the IJC*

69. In the present case the starting point is that the EJC was probably intended to capture claims naturally arising under the Swap and the IJC was probably intended to capture claims naturally arising under the FA. The clearest example of such claims would be contractual claims brought under the Swap and the FA respectively.

70. The most obvious subject matter of a generally worded jurisdiction clause contained in a contract is that it is to capture claims made under that contract, not some other contract, more especially another contract containing its own jurisdiction clause or other dispute resolution provision.

71. Wide words such as "relating to" the contract may capture broader claims, such as related tortious claims, but would not naturally extend to claims under a different contract.

72. This natural reading of the wording in the EJC and IJC is supported by their contractual context and the overall scheme of the parties' agreements. The FA was an overarching financing agreement made between TRM as borrower and a syndicate of lending banks, including BNPP. BNPP entered into that contract in its capacity of Mandated Lead Arranger, Lending Bank and Agent Bank. Although the FA referred to the fact that Hedging Contracts were to be entered into, that BNPP was to be the Hedging Bank, and that BNPP was to enter into those contracts "in its capacity as Hedging Bank", BNPP did not contract under the FA in that capacity, in contrast to the position under the ICA. The FA therefore drew a clear distinction between the capacity in which BNPP was entering into the FA and that in which it would be entering into the Swap.

73. Under the FA various further contracts were to be entered into, such as "Project Contracts" and the Hedging Contracts. Under Appendix 17.19 the Hedging Contracts were to be on standard ISDA terms. Those standard terms include a jurisdiction clause in favour of either New York or England and an entire agreement clause. When the parties agreed (together with the other banks) the IJC, it was therefore in circumstances where it was contemplated that Hedging Contracts would be made with BNPP acting in a different capacity, which contracts would contain their own jurisdiction (and choice of law) clause and would be entire and separate.

74. The Swap was one of the contracts entered into pursuant to the FA. Its specific subject matter was hedging through the mechanism of swaps. As contemplated by the FA, it contained its own EJC and (as another standard ISDA term) an entire agreement clause. It was governed by English law.

75. The natural interpretation of the IJC and the EJC in this context is that the IJC was to govern claims relating to the overarching or background FA, whilst the EJC was to govern claims relating to the specific interest rate Swap entered into pursuant to the FA. Each was to apply to claims relating to the separate contracts in which they were contained and was to be mutually exclusive.

76. This conclusion is further borne out by the implausibility of sensible business people agreeing inconsistent jurisdiction clauses and the presumption of mutual exclusivity. As discussed further below, there is no clear language displacing that presumption.

*The application of Article 25*

77. As Longmore LJ stated in *Deutsche Bank AG v Petromena ASA* [2015] EWCA Civ 226 at [85]-[86]:

> "85. English law cannot, however, be decisive of the matter in the European context. It is important to note that Article 23 is itself confined to agreements to settle disputes "which have arisen or which may arise in connection with a particular legal relationship." The emphasis on the "particular legal relationship" shows that a dispute arising from a second relationship is not likely to be included in an agreement for resolving disputes in an earlier, and different, relationship. The European Court of Justice made exactly this point in *Powell Duffryn Plc v M Petereit (case C-214/89) [1992] ECR 1-1745* . Powell Duffryn was an English company which subscribed for shares in a German company which increased its capital but subsequently went into liquidation; the liquidator (Mr Petereit) sued Powell Duffryn in Germany for sums due in respect of the increase in capital and for dividends paid by mistake, relying on a clause inserted into the company statutes on a show of hands in a general meeting by which it was said that any shareholder submitted to the jurisdiction of the courts ordinarily competent to entertain suits against the company. Powell Duffryn asserted that it should be sued in the courts of its domicile. The Court of Justice was asked to rule on a number of questions including: "Does the jurisdiction clause satisfy the requirement that the dispute must arise in connection with a particular legal relationship within the meaning of Article 17 of the Brussels Convention?" [which later became Article 23 and is now Article 25 ].
>
> 86. The court held at para 34 that the requirements of Article 17 would be satisfied if the clause "may be interpreted as referring to the disputes between the company and its shareholders", leaving it to the domestic court to determine whether the clause was to be so construed or not. In reaching that conclusion it said at para 31 that the requirement that the dispute arise in connection with a particular legal relationship:
>
> > "is intended to limit the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. Its purpose is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a

> relationship other than that in connection with which the agreement conferring jurisdiction was made.""

78. In the light of the proper interpretation of the EJC and the IJC as outlined above, in terms of Article 25, the IJC was to apply to claims arising in connection with the background lending relationship set out in the FA, made between TRM as borrower and various lending banks, including BNPP in its capacity of Mandated Lead Arranger, Lending Bank and Agent Bank. That was the relevant "particular legal relationship" for the purposes of the IJC. The EJC was to apply to claims arising in connection with the specific interest rate swap relationship set out in the Swap, made between TRM as customer and BNPP in its capacity as Hedging Bank. That was the relevant "particular legal relationship" for the purposes of the EJC.

79. This conclusion is strongly supported by this Court's decision in *Savona*.

80. In that case the parties ('the Bank' and 'Savona') had agreed an advisory services agreement ('the Convention'), which contained an exclusive jurisdiction clause expressed in broad terms which referred "disputes relating to" the Convention to the Italian courts. A few months later the parties entered into an ISDA Master Agreement, with an English exclusive jurisdiction clause. The parties then executed swap transactions subject to the terms of the ISDA Master Agreement. As in the present case, the Bank issued a Claim Form seeking declarations tracking clauses of the ISDA Master Agreement, and Savona made an application challenging jurisdiction.

81. The Court concluded that the two jurisdiction clauses governed different relationships and did not materially overlap. Longmore LJ concluded that the parties had two "particular legal relationship[s]" in relation to one another: a generic relationship set out in the Convention, and a specific interest rate swap relationship set out in the swap contracts incorporating the ISDA Master Agreement [21]. Gross LJ agreed, stating as follows at [36]:

> "…the Convention governed the background or generic relationship between the parties but, as clause 2(b) thereof made plain, not the individual swap contracts subsequently proposed and entered into by the parties. These were to be governed by separate agreements with separate terms, here the ISDA Master Agreement…"

82. Equally, in the present case it may be said that the parties had two "particular legal relationship[s]" in relation to one another: a background or generic relationship set out in the FA, and a specific interest rate swap relationship set out in the Transaction incorporating the ISDA Master. The IJC and the EJC governed those different relationships and do not materially overlap.

83. The Court also held in the *Savona* case at [22] that the entire agreement clause is "a strong confirmation that the swap contracts are indeed separate contracts and that any dispute relating to them is to come within the jurisdiction clause of those contracts." It stressed that such a clause exists "for the purpose of expressing the parties' understanding that the swap contracts are self-contained contracts to be interpreted in accordance with their terms regardless of other prior relationships between the parties." The ISDA Master for the Swap contained the same clause.

*TRM's arguments*

84. TRM seeks to distinguish *Savona* and to suggest that a different conclusion should be reached in this case on four main grounds:

(1) The terms of the Schedule and the Conflicts Provision.
(2) BNPP's alleged obligation under the FA to implement the "Hedging Strategy".
(3) The 2013 amendment to Article 17.19 of the FA by which TRM was to "comply with its undertakings under the Hedging Contracts".
(4) The governing nature of the parties' legal relationship set out in the FA.

85. As to (1), TRM stresses the reference in the Schedule to the fact that it stated that the Swap was being entered into "in connection with" the FA and the ICA. There is, however, no issue that the FA and the Swap are connected. Indeed, the terms of the FA required TRM to enter into the Hedging Contracts. Such a connection does not in any way prevent the relationships being entered into thereby being separate and different "particular legal relationship(s)", as they were in *Savona*.

86. TRM also relies on the reference in the second paragraph to the Swap being "subject to the terms and conditions" of the FA and the ICA. Aside from the complication that this refers to the ICA as well as the FA, this should be read together with the Conflicts Provision in the following paragraph. In other words, in so far as the FA or the ICA contain applicable terms and conditions which conflict with the terms of the Swap then they are to prevail and the Swap is to be subject to them. Indeed, it is difficult to see in what other circumstances the terms and conditions of the FA and ICA would be relevant. This therefore adds nothing to TRM's case based on the Conflicts Provision.

87. With respect to the Conflicts Provision, this can only assist TRM if there is a conflict. Where, as here, the Swap and the FA deal with different relationships so that the EJC and the IJC are complementary rather than conflicting, I agree with the judge that there is no conflict. TRM's argument also assumes that: (i) the fact that some disputes may be resolved under either the EJC or the IJC involves a conflict as opposed to an agreement to parallel jurisdictions, as contemplated by Longmore LJ in the *Savona* case at [4]; and (ii) the Conflicts Provision applies to collateral agreements such as a jurisdiction agreement and not just to the substantive provisions of the contracts.

88. As to (2), even if it was established that BNPP was under an implied obligation under the FA to implement the Hedging Strategy, an alleged failure so to do might give rise to a claim under the FA but that does not mean that a claim under the Swap could not be made. A factual overlap between claims under the FA and the Swap does not alter the legal reality that a claim under the FA is a different claim made under a different contract in relation to a different legal relationship to a claim under the Swap. The possibility that such a claim under the FA could be made provides no good reason why the IJC and the EJC should not continue to apply to claims under the separate contracts in which they are contained.

89. The argument also involves placing impermissible reliance on TRM's response to the Claim rather than the terms of the Claim itself. On the making of a claim there is no means of knowing whether such a claim will be alleged to involve the implementation of the Hedging Strategy.

90. The resulting line of demarcation between the EJC and the IJC is, moreover, wholly unclear, if not unworkable. How are parties to know whether a claim which they wish to make does or does not involve implementation of the Hedging Strategy? What exactly is the Hedging Strategy and what did it require? This is not spelt out in Art 17.19 or any other documents to which we were referred. Nor was this defined or explained by TRM in argument, other than by reference to the terms in which the Italian Claim is couched, an impermissible aid.

91. Fragmentation of jurisdiction is undesirable and unlikely to be intended by sensible commercial business people, all the more so if it is on an unclear and impractical basis. The logic of TRM's argument is that claims relating to different terms of the Swap may require to be resolved in different jurisdictions and, moreover, under different governing laws. Indeed, it means that claims relating to the same term may be so bifurcated. A claim against TRM for failure to pay under the Swap is a very clear example of a claim under the Swap, not just relating to it. On TRM's case, if such a claim resulted from an alleged failure to implement the Hedging Strategy it would fall under the IJC, either from the outset or on a subsequent migratory basis.

92. As to (3), TRM's argument is that this meant that any claim for failure to comply with the terms of the Swap also involves a failure to comply with the FA and that the Swap was thereby somehow subsumed into the FA. However, they remain separate contracts. The amendment does not mean that BNPP is no longer entitled to bring claims under the Swap. It may also be able to bring a claim on the same grounds under the FA, if it so chooses, but that remains a different claim made under a different contract, however great the factual overlap. Moreover, the logical consequence of TRM's argument, as was accepted, is that all claims have to be brought under the IJC so that the EJC is deprived of any effect. This is a legally incoherent and commercially unreal conclusion. As Gross LJ observed in the *Savona* case at [38]:

> "…it would be startling if the bank's claims falling squarely under the swap contracts could not be brought in the forum selected by the parties through the jurisdiction clause under those agreements, namely that contained in the ISDA Master Agreement. A fortiori, if and to the extent that such an outcome might be said to turn on subsequent proceedings which Savona chose to initiate: cf, *Deutsche Bank AG v Sebastian Holdings Inc* at para 63. A conclusion to this effect would be highly damaging to market certainty and I would not agree to it unless driven to do so."

93. As to (4), this is essentially the conclusion which TRM submits follows from points (1), (2) and (3). For the reasons already outlined, there is no proper basis for treating the parties as effectively having only one "particular legal relationship". They clearly had two such relationships, as illustrated by the choice of different governing laws and jurisdictions in relation to each such relationship.

94. In summary, none of TRM's arguments provides a satisfactory reason for distinguishing *Savona* or for arriving at a different conclusion in this case.

*Conclusion on Grounds 1, 2, and 4*

95. For the reasons outlined above I would uphold the judge's decision in relation to these Grounds. In my judgment he was correct to conclude that in general terms disputes relating to the Swap fall exclusively within the EJC.

**Ground 3 – Whether the declarations sought either derive directly from the contractually agreed language of the Swap or are consequent on those declarations.**

96. The declarations sought and the terms of the ISDA Master to which each of them relate are set out in the Appendix.

97. There is no dispute as to declaration (a).

98. As is apparent from the Appendix, each of the declarations in (c) precisely tracks the language of terms of the ISDA Master. As Longmore LJ stated in relation to similar declarations sought in *Savona*, it is "self-evident that they raise a dispute which relates to the swap contracts" (at [24]). The same conclusion follows if, as in that case, one considers the positive mirror image of those declarations (at [25]).

99. The declaration sought in (d), which relates to contractual estoppel, is the alleged consequence of the declarations sought in (c) and must equally relate to the Swap.

100. The declaration sought in (b) is:

> "The Transaction Documents, as well as all other written agreements and/or written notifications and/or documents entered into and/or executed pursuant to the Transaction Documents, constitute the entire agreement and understanding of the parties thereto with respect to their subject matter and supersede all oral communication and prior writings with respect thereto." (emphasis added)

101. This tracks the language of the entire agreement clause (clause 9(a)) of the ISDA Master, save in relation to the underlined words, which are concerned with notices and similar documents. TRM submits that it cannot be correct that the Transaction Documents constitute the parties' entire agreement with respect to their subject matter because this must be read subject to the wording contained in the first two paragraphs of the Schedule and in particular the Conflicts Provision, and that this engages the IJC. This ignores or seeks to sidestep the judge's unappealed conclusion (at [18]) that the Transaction Documents and thus the "entire agreement" in respect of the Swap do not include the FA. The mere reference in the Conflicts Provision to the existence of the provisions of the FA (as well as of the ICA) does not mean that the IJC is engaged in addressing any question relating to the incorporation of those provisions.

102. The declaration sought in (e) mirrors paragraph d(ii) of Part 5 of the Schedule to the ISDA Master and asserts the consequence of contractual estoppel. Like the declarations in (c) and (d), it too relates to the Swap.

103. The declaration sought in (f) is:

> "In respect of the Transaction, that [BNPP] neither owed nor owes no duty or obligation in deciding whether to grant the Waiver or otherwise to grant the Waiver" and/or "a refusal by [BNPP] to grant the Waiver does not constitute a breach of the terms of the Transaction Documents".

104. This declaration does not track any provisions in the ISDA Master. Nor, TRM submits, is it consequent in any logically necessary sense on any such provisions. TRM's early reimbursement request was made pursuant to the FA. Its argument is that BNPP failed in breach of the FA to grant its early reimbursement request on the basis proposed by TRM. It is submitted that the fact that part of that basis was that BNPP should waive the ETD right it had under the ISDA Master did not entail that there was any dispute relating to the parties' relationship under the Swap. The dispute related to the parties' rights and obligations under the FA and on any view it could not be said that no dispute was raised under the FA.

105. The right which BNPP was being asked by TRM to waive was a right to designate an ETD under the Swap. While the right to pre-pay the loan arises under the FA that right is not in dispute and has not been challenged. There was no need for TRM to request agreement to the exercise of its own right or to attach conditions to any such request. I agree with the judge's conclusion that this declaration addresses the question of whether a refusal to grant the Waiver constitutes a breach of the terms of the ISDA Master, and so also relates to the Swap.

106. The declaration sought in (g) is:

> "By reason of 7(1)(a) to 7(1)(f) above, the Claimant is not liable in respect of any claim relating to the Transaction, or for losses in respect of any claim, under any system of law or regulation, whether by reference to the Transaction or the Financing Agreement or otherwise, in contract, tort/delict, statute or otherwise, and including but not limited to claims for breach of duty of care (including without limitation, a duty to advise), breach of contract, breach of fiduciary or other duty including any duty of good faith, non-disclosure, omission, misrepresentation (whether innocent, negligent or fraudulent) or breach of statutory or regulatory obligations arising out of or in connection with the Transaction (including but not limited to its suitability, its pricing, its notional amount, its terms, its execution and the circumstances of the Defendant's entry into it) (a "Claim")."

107. This declaration does not track any terms of the ISDA Master and it seeks to capture a wide variety of non-contractual claims and, moreover, includes express reference to the FA. BNPP made it clear that the intention was to ensure that it was limited to claims related to the Swap and that it was prepared to amend the wording to achieve that (by, for example, removing the reference to the FA). In my judgment this is best achieved by replacing the "or" before "losses in respect of any claim" with "including" and removing the phrase "whether by reference to the Transaction or the Financing Agreement or otherwise", so that it reads as follows:

> "By reason of 7(1)(a) to 7(1)(f) above, the Claimant is not liable in respect of any claim relating to the Transaction, including for losses in respect of any claim, under any system of law or regulation, in contract, tort/delict, statute or otherwise, and including but not limited to claims for breach of duty of care (including without limitation, a duty to advise), breach of contract, breach of fiduciary or other duty including any duty of good faith, non-disclosure, omission, misrepresentation (whether innocent, negligent or fraudulent) or breach of statutory or regulatory obligations arising out of or in connection with the Transaction (including but not limited to its suitability, its pricing, its notional amount, its terms, its execution and the circumstances of the Defendant's entry into it) (a "Claim")."

108. If those amendments are made I consider that the claims referred to are sufficiently anchored in the Swap to ensure that it only covers claims relating to the Swap.

109. TRM's objections to declarations (h) and (i) were founded on its objections to (g) and the width of the definition of "Claim" therein. If (g) is appropriately amended, these consequential objections fall away.

110. Subject to the amendments to declaration (g) above, in my judgment all the declarations sought fall within the EJC and not the IJC and I would uphold the judge's decision on this Ground.

## Conclusion

111. For the reasons outlined above, I would dismiss the appeal on all Grounds. In those circumstances it is not necessary to consider the further issues raised by the Respondent's Notice.

112. The conclusion that BNPP's claims fall within the EJC contained in the ISDA Master accords with the objects of the Regulation of: (i) allowing the claimant easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued; and (ii) enabling the court seised to be able readily to decide whether it has jurisdiction, without having to consider the substance of the case - see *Knorr-Bremse Systems v Haldex Brake Products* [2008] EWHC 156 (Pat) at [30(i)].

113. It also accords with the commercial imperative that jurisdiction clauses provide certainty and that the parties know where their disputes will be resolved, both from the outset and when a claim arises.

114. It also accords with the acknowledged importance of interpreting the standard terms of the ISDA Master Agreement so as to provide clarity, certainty and predictability.

## Lord Justice Flaux:

115. I agree.

## Lady Justice Asplin:

116. I also agree.

| **APPENDIX** | | | |
|---|---|---|---|
| **Declarations sought** | | | **Relevant term of Master Agreement** |
| (a) | The obligations of the Defendant under the Transaction Documents, as well as under all other written agreements and/or written notifications and/or documents entered into and/or executed pursuant to the Transaction Documents, constitute its legal valid and binding obligations, enforceable in accordance with their terms. | | 3(a)(v) ***Obligations Binding***. Its obligations under this Agreement and any Credit Support Document to which it is a party constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms (subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law)). |
| (b) | The Transaction Documents, as well as all other written agreements and/or written notifications and/or documents entered into and/or executed pursuant to the Transaction Documents, constitute the entire agreement and understanding of the parties thereto with respect to their subject matter and supersede all oral communication and prior writings with respect thereto. | | 9(a) ***Entire Agreement***. This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto. |
| (c) | In entering into the Transaction, the Defendant: | (i) Was acting for its own account and had made its own independent decisions to enter into the Transaction and as to whether the Transaction was appropriate or proper for it based on its own judgment and upon advice from such advisers as it had deemed necessary. | **Schedule, PART 5 OTHER PROVISIONS**<br><br>(d)(i) **Non-Reliance**. It is acting for its own account and it has made its own independent decisions to enter into that Transaction and as to whether that Transaction is appropriate or proper for it based upon its own judgement and upon advice from such advisers as it has deemed necessary. |
| | | (ii) Was not relying on any communications (written or oral) of the Claimant as investment advice or as a recommendation to enter into the Transaction; it being understood that information and explanations related to the terms and conditions of the Transaction should not be considered investment advice or a recommendation to enter into the Transaction. | (d)(i) **Non-Reliance**… It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into that Transaction; it being understood that information and explanations related to the terms and conditions of a Transaction shall not be considered investment advice or a recommendation to enter into that Transaction. |
| | | (iii) Had not received from the Claimant any assurance or guarantees as to the expected results of the Transaction. | (d)(i) **Non-Reliance**… It has not received from the other party any assurance or guarantee as to the expected results of the Transaction. |
| | | (iv) Was capable of evaluating and understanding (on its own | (d)(ii) **Evaluations and Understanding** It is capable of evaluating and understanding (on its |

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| | | behalf or through independent professional advice) and understood and accepted, the terms, conditions and risks of the Transaction. | own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of that Transaction. |
| | | (v) Was also capable of assuming, and assumed, the financial and other risks of the Transaction. | (d)(ii) **Evaluations and Understanding**… It is also capable of assuming, and assumes, the financial and other risks of that Transaction. |
| | | (vi) Was acting as principal and not as agent or in any other capacity, fiduciary or otherwise. | (d)(iv) **Acting as Principal**. It is acting as principal and not as agent or in any other capacity, fiduciary or otherwise. |
| | | (vii) Had specific competence and expertise to enter into the Transaction and in connection with financial instruments. | (e)(i) **Competence and Expertise**. For the purpose of this Agreement, Party B will be deemed to represent to Party A on the date on which it enters into a Transaction that it has a specific competence and expertise to enter into the Transaction and in connection with financial instruments. |
| | | (viii) Entered into the Transaction for hedging purposes and not for speculative purposes. | (e)(ii) **Hedging Purposes**. Party B has entered into the Transaction for hedging purposes and not for speculative purposes. |
| | | (ix) Had full capacity to undertake the obligations under the Transaction, the execution of which fell within its institutional functions. | (e)(iii) **Capacity**. The execution of the Transaction falls within the institutional functions of the Party B which has full capacity to undertake the relevant obligations. |
| (d) | Further or in the alternative, in respect of each of the matters in 7(1)(c) above, the Defendant is estopped by contract from contending otherwise. | | Consequent upon the above |
| (e) | In respect of the Transaction, the Claimant did not act as fiduciary or an adviser for the Defendant. Further or in the alternative, the Defendant is estopped by contract from contending otherwise. | | **Schedule, PART 5 OTHER PROVISIONS**<br><br>(d)(iii) **Status of Parties**. The other party is not acting as a fiduciary or an adviser for it in respect of that Transaction. |
| (f) | In respect of the Transaction, the Claimant neither owed nor owes any duty or obligation in deciding whether to grant the Waiver or otherwise to grant the Waiver. Further, or in the alternative, a refusal by the Claimant to grant the Waiver does not constitute a breach of the terms of the Transaction Documents. | | (6)(b)(iv) ***Right to Terminate***.<br>(2) either party in the case of …an Additional Termination Event if there is only one Affected Party may, by not more than 20 days notice to the other party and provided that the relevant Termination Event is then continuing, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all Affected Transactions.<br><br>**SCHEDULE**<br>**PART 1 TERMINATION PROVISIONS** |

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| | | (h) "***Additional Termination Event***" will apply. The following shall constitute Additional Termination Events:<br><br>(i) if a Loan provided to Party B by any lender is repaid, prepaid or cancelled in accordance with the provisions of the Contratto di Finanziamento Modificato; |
| (g) | By reason of 7(1)(a) to 7(1)(f) above and in any event, the Claimant is not liable in respect of any claim relating to the Transaction, or for losses in respect of any claim, under any system of law or regulation, whether by reference to the Transaction or the Financing Agreement or otherwise, in contract, tort/delict, statute or otherwise, and including but not limited to claims for breach of duty of care (including without limitation, a duty to advise), breach of contract, breach of fiduciary or other duty including any duty of good faith, non-disclosure, omission, misrepresentation (whether innocent, negligent or fraudulent) or breach of statutory or regulatory obligations arising out of or in connection with the Transaction (including but not limited to its suitability, its pricing, its notional amount, its terms, its execution and the circumstances of the Defendant's entry into it) (a "Claim"). | Consequent upon 7(1)(a) to 7(1)(f) above |
| (h) | The Claimant is entitled to an indemnity from the Defendant and/or damages in respect of all loss or damage incurred by it arising out of, in respect of any Claim brought in breach of 7(1)(a) to 7(1)(f) above and in respect of all reasonable out of pocket expenses incurred in the enforcement and protection of its rights under the Transaction. | Consequent upon the above |
| (i) | Each and every Claim, save for a claim arising in connection with or by reason of the matters referred to in 7(1)(f) above, is in any event statute barred pursuant to the provisions of the Limitation Act 1980. | Consequent upon the above |