

## Commercial Court upholds ISDA English jurisdiction clause over Italian jurisdiction clause in finance agreement

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### Background

A recent interim hearing in the Commercial Court in *BNP Paribas SA v Trattamento Rifiuti Metropolitan SPA* [2018] EWHC 1670 (Comm) concerned the determination of jurisdiction where one party asserts that a dispute falls under the jurisdiction of the English Court under a standard form International Swaps and Derivatives Association (“**ISDA**”) documentation, and the other party asserts that it is in fact a foreign Court which should deal with the dispute pursuant to a different agreement entered into by the parties.

### Facts

In October 2008, the claimant, BNP Paribas SA (“**BNP**”), along with a syndicate of banks, entered into a finance agreement with the defendant (“**Finance Agreement**”), Trattamento Rifiuti Metropolitan SPA, (“**Trattamento**”) to finance an energy plant in Turin.

The Finance Agreement contained an exclusive jurisdiction clause in favour of the Turin Court and was governed by Italian law. It required Trattamento to implement a “Hedging Strategy” to cover the risk of fluctuation of interest on the loan. The Finance Agreement further specified that any hedging contracts must be concluded exclusively with BNP and must use standard documentation published by ISDA.

The Hedging Strategy was implemented in March 2010 via a 1992 ISDA Master Agreement in Multi-Currency – Cross Border form, 1992 edition (“**Master Agreement**”) which contained a jurisdiction clause in favour of the English Court and was expressed to be governed by English law. The parties agreed an interest-rate swap transaction with BNP under the Master Agreement.

Following a dispute over the interest-rate swap, BNP issued proceedings in the Commercial Court in September 2016 and sought certain declarations regarding Trattamento’s obligations under the Master Agreement.

In April 2017, Trattamento brought proceedings in Italy regarding the question of whether the Hedging Strategy had been properly implemented. Trattamento stated that the Italian proceedings were “...not concerned with the... (Swap) *per se*...”, but related to alleged breaches by BNP of the Finance Agreement and breaches of other obligations Trattamento stated BNP owed to it under Italian law.

Trattamento applied to the Commercial Court to dismiss the claim against it due to a lack of jurisdiction and as it alleged that there was no serious issue to be tried.

Trattamento argued that the language used in BNP’s claim was “apt to include” the Finance Agreement and therefore the jurisdiction of the Italian Court was engaged. Trattamento also argued that the jurisdiction of the English Court was displaced by the express agreement to Italian Court jurisdiction in the Finance Agreement, and challenged the jurisdiction of the English Court for the following reasons:



Article By [Mariyam Harunah](#)  
[Garon Anthony](#)  
[Squire Patton Boggs \(US\) LLP](#)  
[UK Finance Disputes and Regulatory](#)  
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1. BNP's promise to act as a 'single reference point' for Trattamento gave rise to significant duties on BNP under Italian law;
2. the Finance Agreement specified that it was governed by Italian law;
3. the Finance Agreement contained an obligation on BNP to enter into the Master Agreement, which made Trattamento's compliance with its obligations under the Master Agreement a term of the Finance Agreement;
4. the Master Agreement specified that the parties rights under that agreement were subject to the terms and conditions of the Finance Agreement; and
5. the Master Agreement provided that the terms of the Finance Agreement would prevail over the terms of the Master agreement where there was a conflict between the two agreements.

Trattamento therefore concluded that "[a]ny dispute...as to whether [Trattamento] has complied with its obligations under the interest-rate swap plainly comes with [in] the scope of the Italian Jurisdiction Clause".

Trattamento sought to adduce expert evidence on Italian law in support of its argument that breaches of obligations under the Finance Agreement, including those relating to the Hedging Strategy, would fall under the Italian court's jurisdiction and to show that the Italian courts would interpret the jurisdiction clause in the Master Agreement narrowly.

## Commercial Court decision

The Court provided a useful summary of the position where there is more than one contract and those contracts contain competing jurisdiction clauses.

The Court pointed to cases such as *Sebastian Holdings Inc v Deutsche Bank* [2011] 1 Lloyd's Rep 106, which decided that the construction of a jurisdiction clause should be broad and purposive, and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 which noted that the Court will look at the language and investigate the commercial consequences when interpreting any provision of a commercial contract.

In relation to Trattamento's assertions that the wording of BNP's claim included the Finance Agreement, the Court stated that it was "...clear that the language refers only to the Master Agreement and the swap transaction entered into under that." The Court noted that the brief details of claim stated that the Transaction Documents contained the terms governing the transaction. The Master Agreement was included in the definition of Transaction Documents whereas the Finance Agreement was separately defined.

The Court held that BNP had "...much the better of the argument..." on jurisdiction and stated that there was not in fact a conflict between the Finance Agreement and the Master Agreement. This was because the parties had agreed that (a) the Italian Court would have jurisdiction over disputes regarding the Finance Agreement and (b) the English Court would have jurisdiction over disputes regarding the Master Agreement. Trattamento's commitment under the Finance Agreement to comply with its obligations under the Master Agreement did not mean that the Master Agreement and interest rate swap were not subject to the English law jurisdiction agreed under the Master Agreement.

The Court decided that the declarations sought by BNP derived from the swap and the Master Agreement and therefore the English Court had jurisdiction, as set out under the Master Agreement. The judge noted that it would not be a commercial interpretation if "...general words in the [Finance Agreement] [could] prevail over the fact that the parties specifically agreed jurisdiction in favour of the English Court for their obligations under the Master Agreement..."

The Court also rejected Trattamento's argument that the Italian proceedings should form part of the English Court's analysis of whether the declarations sought fell within the Master Agreement's jurisdiction clause. The judge noted that the allegations were not part of the context in which the jurisdiction clauses were agreed and so they could not contribute to the interpretation of the Master Agreement.

The Court chose not to follow the decision in *Deutsche Bank AG v Commune di Savona* [2017] EWHC 1013 (Comm), where the court thought it appropriate to consider how declarations in English proceedings might act as a defence to a claim in another jurisdiction. Instead, the Court followed the approach in *Dexia Crediop SPA v Provincia di Brescia* [2016] EWHC 3261 (Comm) to ensure the focus was not taken away from the relevant dispute in relation to the question of whether or not the English court had jurisdiction.

The judge stated that "*The most powerful point of context...is the use of ISDA documentation*". This was because the worldwide use of ISDA documentation requires consistency and certainty in its construction so that the numerous parties using it know where they stand. The judge referred to *Re Lehman Brothers International (Europe) (in administration) (No 8)* [2016] EWHC 2417 (Ch) in which the Court decided that as ISDA master agreements are standard form and not context specific, any factual background which implies that they do not

mean what they say has “...a much more limited, if any, part to play.”

On the matter of whether there was a serious issue to be tried, the judge said that “... there is no question there is an issue between the parties, and no question that [BNP’s] case is serious.” In this regard, the judge pointed to the fact that Trattamento was unable to say it would not challenge the accuracy of the declarations sought by BNP.

The Court held that it was not necessary for it to rely on the expert evidence provided by the parties to decide Trattamento’s application. In relation to Trattamento’s expert evidence, the Court decided that the matters covered by the expert were not matters for decision on this application. The judge noted that he was able to interpret the English law jurisdiction clause in the Master Agreement itself and did not require an expert on Italian law to do so.

For these reasons, the Court refused Trattamento’s application to dismiss the claim against it for lack of jurisdiction.

## **Comment**

The Court was clearly mindful of the wide ramifications, which could occur if Trattamento’s arguments on jurisdiction were correct, as it would mean that an express agreement on jurisdiction in ISDA documentation could be displaced or restricted. In this regard, the judge emphasised the point that parties using ISDA documentation are unlikely to intend that it should have different meanings in different contexts.

It is notable that the Court rejected the expert evidence on Italian law submitted by Trattamento as it was not necessary to decide the application.

The Court was also hesitant to consider how the declarations in the English proceedings could act as a defence in the Italian proceedings as the Court considered this would distract from the dispute in hand regarding the English court’s jurisdiction.

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