Neutral Citation Number: [2024] EWHC 2717 (Comm)

Case No: FL-2023-000025

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

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

Date: 25/10/2024

Before :

The Hon. Mr Justice Bryan

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Between :

Dexia Crédit Local S.A.	**Claimant/ Respondent**
- and -	
Patrimonio del Trentino S.p.A.	**Defendant/ Applicant**

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- -

Craig Ulyatt (instructed by **Dentons UK & Middle East LLP**) for the **Applicant**
Andrew Lodder (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Respondent**

Hearing date: 16 October 2024

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Approved Judgment

This judgment was handed down remotely at 2:00pm on Friday 25 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BRYAN:

A. INTRODUCTION

1. The subject of the application before me is the challenge to this Court's jurisdiction ("the Jurisdiction Application") by Patrimonio del Trentino S.p.A. ("Trentino"/the "Defendant"), the defendant to the claim in this action which was issued on 27 November 2023 by Dexia Crédit Local S.A. ("Dexia"/the "Claimant"), (the "English Proceedings").

2. Trentino and Dexia are also parties to a claim that had already been brought by Trentino against Dexia before the Civil Court of Rome (the "Italian Proceedings"). In the Italian Proceedings, Trentino argues that the Transaction entered into between Dexia and Trentino, as defined below, was inappropriate, and that it has caused losses to Trentino of over EUR 10 million in net payments to Dexia. Trentino asserts that the Transaction is void, thus seeking the recovery of its losses.

3. For its part, Dexia submits that the Italian Proceedings were brought in breach of the English jurisdiction clause in the ISDA Master Agreement between Dexia and Trentino (itself governed by English law), and which Dexia also submits is, on its true construction, an exclusive English jurisdiction clause. There is an extant challenge by Dexia to the jurisdiction of the Italian court in the Italian Proceedings which is due to be heard in January 2025.

4. By its claim in the English Proceedings, Dexia is seeking declaratory relief in respect of an interest rate swap transaction (the "Transaction") pursuant to an ISDA Master Agreement dated 7 October 2010 between Dexia and Trentino (the "Master Agreement"/the "Agreement"), and a confirmation dated 7 March 2011 (the "Confirmation", and with the Master Agreement, the "Transaction Documents"). It will be noted that the Master Agreement was entered into some 5 months before the Confirmation i.e., before the subject matter of the specific swaps was agreed, and the Confirmation expressly states that: "This Confirmation supplements, forms part of, and is subject to the Agreement. All provisions contained in the Agreement govern the Confirmation".

5. The Master Agreement/Agreement is governed by English law (by the "Governing Law Clause") and contains a bespoke jurisdiction clause (the "Jurisdiction Clause") (at Schedule Part 4 replacing the standard ISDA Master Agreement clause at section 13(a) and (b) thereof) in the following terms, which Dexia submits (and Trentino denies) is, on its true construction, an exclusive English jurisdiction clause:

> "(h) ***Governing Law and Jurisdiction***
>
> Section 13(a) and (b) of the Agreement [the ISDA Master Agreement] shall be deleted and replaced with the following:
>
> (a) **Governing Law**. This Agreement and any non-contractual obligations arising out of or in connection to it will be governed by and construed in accordance with the laws of England and Wales.

> (b) **Jurisdiction**. With respect to any suit, action or proceedings relating to any dispute, whether contractual or non-contractual, arising out of or in connection with this Agreement ("Proceedings"), each party irrevocably:
>
> (1) submits to the exclusive jurisdiction of the English courts;
>
> (2) 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 [the "Waiver Clause"]; and
>
> (3) agrees, notwithstanding the above and to the extent permitted by applicable law, that the bringing of Proceedings before the English courts will not preclude the bringing of Proceedings before the Italian courts."

6. Dexia served Trentino out of the jurisdiction, as of right, in reliance on CPR 6.33(2B) which provides:

> "(2B) The claimant may serve the claim form on the defendant outside of the United Kingdom where, for each claim made against the defendant to be served and in the claim form-
>
> ...
>
> (b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim; or
>
> (c) the claim is in respect of a contract falling within sub-paragraph (b)."

7. By its Application Notice dated 1 March 2024 (the "Application") Trentino seeks two Orders:-

   (1) That there is no valid jurisdiction clause in favour of the English Court, and accordingly Dexia was not entitled to serve Trentino out of the jurisdiction in Italy as of right pursuant to CPR 6.33(2B) (the "Jurisdiction Challenge"), alternatively

   (2) That the English Proceedings should be stayed on the basis that Italy is the appropriate forum and/or the Italian proceedings constitute a lis alibi pendens (the "Stay Application").

8. It will be seen, at the outset, that the issue as to whether the English jurisdiction clause is an exclusive jurisdiction clause is not of relevance to (1) (i.e., the challenge to jurisdiction) given that all that is required is a contract containing a term to the effect that the English court shall have jurisdiction to determine the claim, and it matters not whether that is an exclusive jurisdiction clause for the purpose of CPR 6.33(2B).

9. The issue is, however, of relevance to (2). Trentino accepts that if the Jurisdiction Clause is an exclusive jurisdiction clause its Stay Application must fail. Even if the Jurisdiction Clause is only a non-exclusive jurisdiction clause then, in combination with the Waiver Clause, Trentino irrevocably waived any right to object to the proceedings being brought in this Court, or to argue that this Court is an inconvenient forum, or that this Court does not have jurisdiction over it, and Dexia submits that there are no "overwhelming or very strong reasons" or "exceptional circumstances" that would warrant a stay, on the applicable principles.

10. It will also be seen at the outset (in relation to (1)), that in circumstances in which it is common ground that the Master Agreement was entered into, any challenge by Trentino to English jurisdiction under CPR 6.33(2B) would have to go to the root of the contract contained in the Master Agreement (and not merely the subsequent Confirmation). Dexia submits that that is an insurmountable hurdle in relation to the jurisdictional challenge.

11. There is the following witness evidence before the Court in relation to the Application:-

    (1) A first witness statement of Craig Neilson on behalf of Trentino ("Neilson 1").

    (2) A first witness statement of Jonathan Kelly on behalf of Dexia ("Kelly 1").

    (3) A first witness statement of Adrian Giles on behalf of Trentino ("Giles 1")

    (4) A second witness statement of Jonathan Kelly on behalf of Dexia ("Kelly 2").

12. On an Application in which much turns on the proper construction of English law contracts (the Master Agreement and the Confirmation), this extensive evidence frequently strays beyond any relevant and admissible factual matrix evidence into legal submission on issues of construction as a matter of English law, and also seeks to opine at length on issues of Italian law (for which no permission has been granted). Neither has any place in a witness statement on a jurisdictional challenge such as the present (certainly without permission in the latter case).

13. However, neither party has permission to serve any evidence as to Italian law. Dexia's primary position is that Italian law is irrelevant, that such evidence is neither necessary nor proportionate, and that Trentino has wasted both the Court's time, and very substantial party costs, in seeking to pursue points of Italian law at this jurisdiction stage (and without the Court's permission at that).

14. In this regard on 24 May 2024 (i.e., long after the Application with its 4 hour estimate had been issued on 1 March 2024) Trentino served a first expert report of Associate Professor Ugo Malvagna ("Malvagna 1") on Italian law (running to some 32 pages and raising multiple issues on Italian law) accompanied by an application notice for an order that Trentino has permission to rely on that Italian law expert evidence (marked with a wholly unrealistic estimate of 30 minutes). Notwithstanding Dexia's primary position that Italian law evidence was irrelevant in relation to the Application, this inevitably provoked a responsive report served on behalf of Dexia on 8 August 2024 from Professor Emanuele Rimini ("Rimini") (itself running to some 53 pages) accompanied by an application notice the following day, seeking permission to rely upon the same (lest the Court be persuaded to grant Trentino permission to rely upon Malvagna 1).

Yet further, and again without permission (but predictably), on 13 September 2024 Trentino served a supplemental report of Professor Malvagna ("Malvagna 2") itself running to 27 pages.

15. It is deeply regrettable that the parties did not fix a hearing to determine the applications to adduce expert evidence (the "Expert Applications") either well in advance of this hearing or at all not least in circumstances in which Dexia denied its relevance to the jurisdictional challenge. That evidence runs to a total of no less than 112 pages of expert opinion on multiple issues of Italian law (somewhat ironically, by the time of this hearing some 33 pages thereof had even fallen away as the relevant issue of Italian law was no longer pursued by Trentino).

16. No attempt was made to give the Expert Applications any (realistic) time estimate in the context of what was already fixed as a 4 hour jurisdiction challenge (the maximum permitted in the Commercial Court without express permission). Even this estimate was challenging (to be as charitable as possible to those who gave, and saw fit to maintain, that estimate).

17. It was clear, in circumstances in which Dexia's primary position was that such evidence of Italian law was irrelevant on the jurisdictional challenge, and in circumstances in which the parties would have to convince the Court as to the relevance of such evidence and that it was appropriate to admit the same, that the Expert Applications could have taken up a very significant part of the hearing and, if argued out, in reality would have necessitated the adjournment of the Jurisdiction Application to a further hearing (in all probability many months hence).

18. In such circumstances, I took the pragmatic decision to hear submissions based on the Italian law evidence *de bene esse*, and will rule on the Expert Applications as part of this judgment. I also indicated that I was prepared to sit extended hours to hear the Jurisdiction Application and associated Italian law evidence (in the event it occupied over 6 hours across an extended Court day).

19. The attention of users of the Commercial Court is drawn once again to paragraph F.5.3 of the Commercial Court Guide as to the importance of the parties being realistic about the length of time required to determine applications. As is there stated, the Court's experience is that parties under-estimate the time required for the hearing far more often than they overstate time. As is also stated at F.5.6(b) the Listing Office must be informed immediately if at any time either party considers that there is a material risk that the hearing will exceed the time currently allowed.

20. So far as the expert evidence is concerned, I would simply note at this point that I consider that there are a number of shortcomings in both Malvagna 1 and Malvagna 2. In particular, Malvagna 1 contains a number of mistakes and omissions (many of which are, I am satisfied, corrected in paragraphs 38 to 45 of Rimini). The mistakes include referring to the wrong versions of Italian legislation and legal materials, factual errors, and even a paragraph in Malvagna 1 that appears to be left over from an expert report in unrelated proceedings (see paragraph 111 of Malvagna 1).

21. There are also errors and omissions in Malvagna 2, most notably paragraphs 5 to 37 (the majority of Malvagna 2) which deal primarily with Professor Rimini's supposed view that Trentino does not qualify as an "instrumental entity", notwithstanding the fact

that this was clearly stated to be common ground (in contrast, Trentino's Skeleton does not refer to such paragraphs at all). Professor Malvagna also repeatedly proceeds on the (mistaken) basis that Professor Rimini's view is that the Province Accounting Regulation (i.e., Decree 18-48/2005 issued pursuant to Article 31(10) of Provincial Law No. 7/1979, which authorised entry into derivative transactions set out in Article 3(2) of Ministerial Decree 389/2003 as well as "further transactions…on the basis of evaluations of convenience in relation to particular opportunities offered by the financial markets") does not apply to the Transaction, when Professor Rimini says the opposite (as Trentino in fact relies upon at paragraph 42 of Trentino's Skeleton). Due to the shortcomings in Professor Malvagna's evidence, to the extent that the Italian law evidence is of any assistance, I prefer the evidence of Professor Rimini in relation to Italian law where there is a difference between them in that regard.

B. FACTUAL BACKGROUND

22. Trentino is an Italian private company (a "joint stock company", the equivalent to a public limited company under English law). It was established in Italy in accordance with Article 14 of Provincial Law No. 1 of 10 February 2005. It is wholly owned and controlled by the Autonomous Province of Trento ("the Province"). Its sole business is managing the Province's assets. Dexia is a French company, resulting out of a cross-border merger between Dexia Crediop S.p.A. and Dexia Crédit Local S.A. which occurred on 1 October 2023. At the time of the Transaction, the company was an Italian bank known as Dexia Crediop S.p.A. Dexia changed its corporate name to Dexia S.A. with effect from 1 January 2024, without any change to the legal entity bringing the claims in the English Proceedings.

23. In late 2008, the Province wished to purchase land for the purposes of a new science museum. So far as is material, on 26 September 2008, the Province passed a resolution authorising Trentino to: (a) purchase the land earmarked for the science museum for a total anticipated cost of EUR 75,592,336, to be funded by grants to be provided by the Province to Trentino over thirty years; and (b) issue bonds to provide the requisite up-front funding in advance of the aforesaid grants. On 19 November 2009, Trentino's board passed a resolution to issue bonds, in one or more tranches, up to a maximum total of EUR 75 million. On 27 November 2009, the Province passed a resolution authorising Trentino to issue short term bonds as well as "swap contracts to … manage the interest rate risk".

24. Subsequently, in September 2010, Trentino's board invited Dexia and five other financial institutions to sign ISDA documentation with a view to concluding possible derivative transactions. It is clear from that correspondence that no particular derivative transactions were specified and Trentino did not commit itself to conclude any derivative transactions:

    (1) On 3 September, the Vice President of Trentino wrote to Dexia, stating the following:

        "We hereby inform you that Patrimonio del Trentino S.p.A. ("Patrimonio") intends to select one or more banks/banks from among leading domestic and foreign banks in order to proceed with the signing with the selected bank/banks of **the ISDA**

> **contract which will enable it to conclude any derivative transactions**.
>
> In relation to the needs of the Company's assets, the Board of Directors deemed it appropriate to provide the Company with a standard Schedule ("Schedule of Specific Clauses"), as a contractual text which, together with the ISDA Master Agreement - 2002 version approved by the International Swaps and Derivatives Association ("**ISDA Master Agreement"), will be used by the Company to document any derivative transactions with selected counterparty banks**.
>
> Furthermore, the Board of Directors of Patrimonio resolved to approve the selection criteria that led to the identification of the potential counterparties, among which Dexia is included, with which the ISDA Framework Agreement and the related Schedule of Specific Clauses, both attached hereto (the "ISDA Contracts"), may be signed.
>
> Should you be interested in initiating the process of sharing and possible subsequent signing of the ISDA Contractual Agreement, please contact […].
>
> It is understood, however, that it will be the exclusive right of Patrimonio to proceed, according to its own needs and once it has received your acceptance of the ISDA Framework Agreement, to conclude derivative transactions. In fact, **the approval and subsequent signing of the ISDA Master Agreement and the related Schedule of Specific Clauses do not bind Patrimonio in any way to the conclusion of derivative transactions."** (emphasis added)

(2) On 17 September, the Vice President of Trentino wrote to Dexia anew, extending the deadline:

> "Dear Dexia
>
> We hereby inform you that the deadline by which your acceptance of the ISDA Contracts must be sent to Patrimonio - by e-mail to […] – has been extended to 27 September 2010 (acceptance must be received by 4 p.m. on 27 September 2010).
>
> In the coming days, […] will send you the Schedule that Patrimonio is willing to sign.
>
> This is without prejudice to what else was defined in our letter of 3 September 2010."

25. This led to the execution by Trentino and Dexia on 7 October 2010 of a 2002 ISDA Master Agreement (i.e., the Master Agreement) which included an associated Schedule thereto (i.e., the Schedule), by which the standard form governing law and jurisdiction

clause contained in clause 13 of the ISDA Master Agreement was replaced with the bespoke provisions in Part 4(h) of the Schedule that I have already quoted above (i.e., the Governing Law Clause and the Jurisdiction Clause). As already noted, at this stage particular derivative transactions had not been agreed.

26. On 26 November 2010, the Province passed a resolution authorising the payment of annual grants to Trentino over a reduced period of 20 years in the total amount of EUR 63,475,932.59 in respect of capital, along with EUR 45,064,067.40 in respect of interest (calculated on the basis of a fixed rate of 6.17%). The resolution provided that Trentino's bond issues should be structured in such a way that the sums to be paid by Trentino "do not exceed the total amount of the sums payable by the Province to [Trentino]" and once again authorised Trentino to enter into swap transactions "to manage the interest rate risk".

27. On 1 December 2010, Trentino provided Dexia with a term sheet for a potential interest rate swap that set out the parameters required by Trentino and its professional advisers.

28. On 3 December 2010, Trentino issued two bonds ("the Bonds"): a 2-year variable rate bond with a principal amount of EUR47 million, maturing on 31 March 2012, with interest payable at Euribor 3M plus a spread of 0.9%; and a 10-year variable rate bond with a principal amount of EUR15 million, maturing on 31 March 2020, with interest payable at Euribor 3M plus a spread of 1.34%.

29. The principal amount of the Bonds was thus EUR62 million, lower than the EUR63.5 million in principal payments due to Trentino from the Province over the relevant period, as stipulated by the Provincial Council. The principal amount of the Bonds issued by Trentino was thus fully covered by the Provincial grants, which was true also of the various refinancings between 2012 and 2017.

30. The result of the variable interest rates under the Bonds meant that Trentino was exposed to a risk that the interest cost of its borrowing might exceed the interest component of the grants it was due to receive from the Province (which was fixed at an annual rate of 6.17%).

31. Therefore, by resolutions on 27 November 2009, 26 November 2010, 14 January 2011 and 24 January 2011 the Province and Trentino's Board authorised Trentino to enter into derivatives to hedge the interest rate risk to which it was exposed because of the mismatch between the fixed rate grants and the variable rate borrowing.

32. I am satisfied that Dexia is right to submit that it was the mismatch between the grants and the Bonds that was the object of the hedge, not the variable rate borrowing under the Bonds simpliciter. In this regard-

    (1) The 26 November 2010 resolution approved Trentino's proposal "to enter into a swap contract to eliminate the risk of interest rate variability arising from the existence of fixed-rate assets (the annual grants awarded by the Province) and variable-rate debt".

    (2) The 14 January 2011 resolution set out "the intention of combining these [Bond] issues with an operation to eliminate the risk of interest rate variability with a duration equal to that envisaged for the disbursement of the provincial grants" and

authorised Trentino "to carry out one or more transactions, maturing in 2029, to hedge the interest rate risk associated with the Company's floating-rate debt arising from the Bonds that may be subject to future refinancing".

(3) The 24 January 2011 resolution stated Trentino's intention to "hedge itself against the risk that the interest paid on its variable-rate debt represented by the Bonds… will exceed the portion of the provincial grants" (emphasis added).

33. On 18 February 2011, Trentino entered into the Transaction with Dexia, which was subsequently documented in a Trade Confirmation dated 7 March 2011 (i.e., the Confirmation). The duration of the Transaction was 18 years with a termination date of 31 December 2029. The practical effect of the Transaction was that Trentino exchanged a fixed income stream from the Province for a variable income stream from Dexia in an attempt to protect against the risk of the interest grants from the Province being insufficient to cover Trentino's variable liabilities under the Bonds (and any subsequent refinancings thereof).

34. The Master Agreement was amended on 25 January 2012 (the "Amendment Agreement") to add an additional termination event in the case of a credit downgrade. The Amendment Agreement was also governed by English law and contained, in clause 8, an exclusive English jurisdiction clause, without the permission in sub-paragraph (3) of the Jurisdiction Clause.

35. The Bonds were subsequently refinanced; on five occasions for the Bond of 2 years' duration, and on one occasion for the Bond of 10 years' duration.

36. As is addressed in Kelly 1 at paragraphs 28 to 36 in relation to the terms of the Transaction Documents, the effect was that Trentino exchanged fixed-rate inflows from the Province for variable-rate inflows from Dexia, in order to cover its variable-rate exposure under the Bonds and subsequent re-financings. The spread on Euribor 3M payable by Dexia to Trentino (2.775%) was significantly higher than the spread on Euribor 3M payable by Trentino under the Bonds (0.9–1.34%) and subsequent re-financings (0.9–1.89%), with the effect that, for the duration of the Transaction, Trentino has received significantly higher interest payments from Dexia than it has paid to Bondholders.

37. The parties performed their obligations under the Transaction for a decade. Who, in the event, received/will receive the better end of the deal under the Transaction can only be viewed with the benefit of hindsight as to subsequent events. In the event, Trentino has received more in grants from the Province than it paid to Bondholders, and so benefitted overall from its financing arrangements. As things turned out (at least to date), Trentino would have been even better off not hedging its variable rate exposure under the Bonds, because it would have received fixed interest at 6.17% from the Province and still paid historically low interest rates to Bondholders. However, as Dexia rightly points out, Trentino has paid no more than what it expected and agreed to pay when it entered the Transactions, in return for largely eliminating the risk of its borrowing costs exceeding the amount of the grants, which was, I am satisfied, the purpose of the hedge.

38. On 17 February 2021, Trentino made a complaint about the Transaction. Its complaint was followed by correspondence between the parties from March 2021 to August 2021 in which Dexia pointed out, and the Province conceded, that Trentino had instigated

and determined the structure of the Transaction itself and put it out to an open and transparent tender, selecting Dexia because it offered the best price.

C. THE PROCEEDINGS

39. On 27 September 2023 (and without prior warning), Trentino commenced the Italian Proceedings, asking the Italian Courts to apply Italian law to invalidate the Transaction, notwithstanding the fact that it is governed by English law. As already noted, Dexia has challenged the jurisdiction of the Italian Courts, who have not yet accepted jurisdiction over Trentino's claims in Italy. There will be a hearing to determine jurisdiction on 21 January 2025 (which is a further reason why it was unattractive, on the facts, to adjourn the hearing to a future date).

40. On 27 November 2023, Dexia commenced the English Proceedings. Trentino acknowledged service and indicated their intention to challenge jurisdiction on 2 February 2024. The Jurisdiction Application was filed on 1 March 2024, and the current hearing subsequently fixed.

D. JURISDICTION

D.1 APPLICABLE PRINCIPLES : PERMISSION UNDER CPR 6.33

41. The general rule is that a claim form can be served on a defendant present within the territorial jurisdiction of England and Wales, but not outside that territory (CPR rule 2.3(1)), see *Pantheon International Advisors Ltd v Co-Diagnostics, Inc* [2023] EWHC 1984 (KB) at [16].

42. However, under CPR 6.33, permission of the Court is not required for a claimant to serve a defendant, who is not in the jurisdiction (i.e., "out of the jurisdiction"), provided there is a gateway for the claim (such as under CPR 6.33(2B), "The claimant may serve the claim form on the defendant outside of the United Kingdom where, for each claim made against the defendant to be served and included in the claim form- … a contract contains a term to the effect that the court shall have jurisdiction to determine that claim").

43. The burden of proof is upon the claimant to satisfy the Court that it has a "good arguable case" that the claim falls within the rule as explained in *Brownlie v Four Seasons Holdings* [2017] UKSC 80 ("*Brownlie*") at [7], and *Kaefer Aislamientos v AMS Drilling Mexico* [2019] EWCA Civ 10 ("*Kaefer*") at [73].

44. The test to be met, of "a good arguable case", is a higher hurdle than "a serious issue to be tried" but not as high as the "balance of probabilities" test, see *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWCA Civ 437 per Beatson LJ at [16]. The test must be satisfied on the evidence as at the date when the proceedings were commenced, per Lord Sumption in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, at [9].

45. There are three limbs to the test, as identified by Lord Sumption in *Brownlie,* supra at [7]:

> "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway;
>
> (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but
>
> (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

46. The test in CPR 6.33(2B)(b) applies for each claim made against the defendant in the proceedings where "a contract contains a term to the effect that the court shall have jurisdiction to determine that claim". This is not limited to exclusive jurisdiction clauses but also "includes English jurisdiction clauses which are non-exclusive" and also clauses which are "asymmetric (that is, which do not apply identically to both parties)" (see *Dicey, Morris and Collins on the Conflict of Laws*, 16th Ed., at paragraph 11-241).

47. Where an English exclusive or non-exclusive jurisdiction clause is challenged under CPR Part 11, any questions as to the validity, existence or incorporation of the jurisdiction clause are to be determined by reference to the putative governing law of the contract, which in the present case is English law.

48. On the Jurisdiction Application, therefore, Dexia as the claimant in the English Proceedings (and respondent in this application) must show a good arguable case that the Jurisdiction Clause in the Master Agreement is binding on Trentino as a matter of English law. The approach is set out in Dicey at paragraph 12-083:

> "…the party relying on the existence of the agreement must supply an evidential basis showing that it has the better argument (and *not* much the better argument); second, if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but, third, the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the existence of the agreement if there is a plausible (albeit contested) evidential basis for it."

49. In relation to the construction of an English law jurisdiction clause, "it is axiomatic as a matter of English law, that jurisdiction clauses and arbitration clauses should be widely and generously construed" (*Deutsche Bank AG v Petromena ASA* [2015] EWCA Civ 226, [2015] 1 WLR 4225 at [84] ("*Petromena*")) and the approach to be adopted to construction is a "broad, purposive and commercially minded approach" (*Etihad Airways PJSC v Flöther* ("*Etihad"*) [2020] QB 793 at [58]).

D.2 JURISDICTION IN THE PRESENT CASE

50. It is common ground that the parties entered into the Master Agreement and the Schedule thereto. The Master Agreement is a contract between Dexia and Trentino, and is a contract that was entered into 5 months before the Confirmation. As already quoted above (and as is indisputable) the Master Agreement "contains a term to the effect that the court shall have jurisdiction to determine" the claims in the claim form (CPR 6.33(2B)(b)), namely, the Jurisdiction Clause which provides, "with respect to any suit, action or proceedings relating to any dispute, whether contractual or non-contractual arising out of or in connection with this Agreement ("Proceedings") each party irrevocably (1) submits to the exclusive jurisdiction of the English courts", and that is so whether such jurisdiction clause is an exclusive or a non-exclusive jurisdiction clause (as addressed in due course below).

51. It will be apparent that the Jurisdiction Clause could not be wider and as such is apt to cover all the claims advanced in the Claim Form, and I am satisfied that there is, prima facie, very much more than a good arguable case (and, indeed, more than the better of the argument) that the Jurisdiction Clause in the Master Agreement is binding on Trentino as a matter of English law, and that gateway CPR 6.33(2B)(b) is satisfied.

52. Equally, the Confirmation expressly "supplements, forms part of, and is subject to the [Master Agreement]. All provisions contained in the [Master Agreement] govern this Confirmation" with the result that there is, prima facie, very much more than a good arguable case (and, indeed, more than the better of the argument) that the Jurisdiction Clause in the Master Agreement is binding on Trentino as a matter of English law in relation to the Confirmation and the Transaction itself.

53. Trentino therefore sought to attack the Jurisdiction Clause and argue that it is not valid. It originally sought to do so on two grounds (each relying on Italian law arguments):-

    (1) It argued that the Jurisdiction Clause is void due to an alleged lack of capacity on the part of Trentino to enter into speculative derivatives (the "Speculation Ground"); and

    (2) It argued that Article 4 of Law No. 218/1995 (Law 218), which applies following the Brexit transition period, prohibits agreements involving so-called "non-disposable rights" from ousting the jurisdiction of the Italian courts (the "Non-Disposable Rights Ground").

54. The Non-Disposal Rights Ground was (rightly) abandoned at the time of Trentino's Skeleton Argument. The same did not bear examination and was unmeritorious for the reasons addressed at paragraph 43 of Dexia's Skeleton Argument.

55. That leaves the Speculation Ground. As a matter of English law, the capacity of a foreign corporation to enter into any legal transaction is governed by the law of the country of incorporation of the entity in question (in this case, Italian law) – see *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] QB 549 at [27]-[30] ("*Haugesund*").

56. In *Haugesund,* Aikens LJ explained (at [47]) that when trying to characterise whether a particular foreign law rule relates to capacity:

> "… the concept of "capacity" has to be given a broader, "internationalist", meaning and must not be confined to the narrow definition accorded by domestic English law. In my view it should be interpreted as the legal ability of a corporation to exercise specific rights, in particular, the legal ability to enter a valid contract with a third party. So I agree with the approach of Tomlinson J; for the purposes of English conflicts of laws, a lack of substantive power to conclude a contract of a particular type is equivalent to a lack of "capacity", to use English terminology."

57. However, even before turning to consider the Speculation Ground and the question of capacity, Trentino faces a difficulty and one which I am satisfied Dexia is correct to characterise as fatal to Trentino's argument.

58. The Speculation Ground does not go to, and cannot be suggested as going to, whether Trentino had the capacity to enter into the Master Agreement, which is the contract containing the Jurisdiction Clause. As already addressed in Sections A and B above, Trentino requested that Dexia enter into the Master Agreement on 7 October 2010 which was long before the structure and terms of the Transaction had even been proposed (and no question as to Trentino's capacity to enter into the Master Agreement can arise, or is suggested by Trentino). It is equally common ground that the Master Agreement was entered into in "the expectation that its terms would govern the future derivative transactions anticipated to be entered into between the parties".

59. As Mr Neilson (on behalf of Trentino) says in Neilson 1 at paragraph 15.4:-

> "On 7 October 2020, Trentino and Dexia … executed an ISDA 2002 Master Agreement ("the ISDA Master") and Schedule ("the Schedule") … **in the expectation that its terms would govern the future derivative transactions anticipated to be entered into between the parties**." (emphasis added)

This was confirmed by Mr Kelly (on behalf of Dexia) at paragraph 51.1 of Kelly 1.

60. The Speculation Ground relates to the validity of the Transaction subsequently entered into under the Master Agreement on 7 March 2011, not the Master Agreement that was entered into five months earlier on 7 October 2010. Before the hearing Trentino advanced no argument that would invalidate the Master Agreement. The Master Agreement was a valid and binding contract even before the Confirmation and the Transaction. Indeed, if one envisaged a situation where no confirmation followed (i.e., if the Confirmation and Transaction had never been concluded), Trentino has identified no basis on which the Master Agreement could be invalidated.

61. The same is true in circumstances where the Confirmation and Transaction followed. Any lack of capacity to enter into a particular derivative transaction cannot, and does not, equate to a lack of capacity to enter into an ISDA Master Agreement. This is clear from *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (see especially at [293] and [319] – [320]) ("*Vestia*").

62. In *Vestia*, some of the derivatives were outside Vestia's capacity and others were not, but the Master Agreement remained valid. As Andrew Smith J concluded at [320]:

> "320. I therefore conclude that, because those acting for Vestia purported to enter into the ultra vires contracts under the Master Agreement and those contracts were not in compliance with their articles of association, Vestia were in breach of the compliance provision of the Additional Representations. Moreover the ultra vires contracts were outside Vestia's capacity as a natural (but not inherent) result of them being made for the purpose of speculation and not for the purpose of hedging: this led to them in fact not being hedging contracts. Accordingly the ultra vires contracts were invalid because Vestia were in breach of the hedging provision of the Additional Representations. **I conclude that therefore it is not open to Vestia to dispute their liability to Credit Suisse under the Master Agreement on the grounds that the ultra vires contracts were outside their capacity and so invalid**." (emphasis added)

63. However, at the hearing itself, Mr Ulyatt, on behalf of Trentino, somewhat ambitiously, suggested that the alleged total ban on entering into derivatives did also apply to the Master Agreement itself (and the Jurisdiction Clause therein). This was, with respect, a hopeless argument for a whole raft of reasons. Trentino, as an Italian private company (a joint stock company) had capacity to enter into commercial contracts such as the Master Agreement and there is no evidence before me that it did not. The Master Agreement is not itself a derivative contract and any alleged prohibition in relation to derivatives would not apply to the Master Agreement. The alleged ban on trading in derivatives does not purport to apply to a master agreement such as the ISDA Master Agreement. Yet further, even the alleged ban allows re-financing and the like (which would contemplate an associated ISDA Master Agreement) so an entity such as Trentino would have capacity to enter into an ISDA Master Agreement. Nor can it be said that the Master Agreement is itself a contract to trade in speculative derivatives (and as addressed in due course below for completeness, the Transaction does not amount to the same in any event).

64. In an attempt to circumvent the difficulty that Trentino did have capacity to enter into the Master Agreement and that the Master Agreement (containing the Jurisdiction Clause) is valid, Trentino then submits that the "single agreement" provision in Clause 1(c) of the Master Agreement means the Master Agreement is not a separate and distinct agreement. In this regard Clause 1(c) of the Master Agreement provides:-

> "[a]ll Transactions are entered into in reliance on the fact that this Master Agreement and all Confirmations form a single agreement between the parties (collectively referred to as this "Agreement"), and the parties would not otherwise enter into any Transactions".

65. However, this is clearly a bad point, not least in circumstances where the Master Agreement came into place separate from, and long before, any particular transactions. In this regard I agree with the sentiments expressed by Foxton J in *Banca Intesa*

Sanpaolo SpA v Comune di Venezia [2022] EWHC 2586 (Comm), [2023] Bus LR 384 *("Venezia First Instance")* at [361]:-

> "I was not persuaded that the "Single Agreement" clause in the ISDA Master Agreement compels a different construction in such a scenario … That cannot have the effect, in a case in which the parties seek to enter into a number of swap transactions within the framework of the ISDA Master Agreement, they will always all stand or fall together. *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm); [2012] Bus LR D5 is one of a number of cases which are inconsistent with any such suggestion. Nor can I accept that (for example) the setting aside of a particular swap because it was induced by misrepresentation necessarily impugns the Master Agreement and the other transactions entered into within the framework it established. I accept, however, that in a case such as the present where the ISDA Master Agreement and a single Confirmation are entered into at the same time for the sole purpose of executing the latter transaction, they constitute in a very real sense a single contract."

66. The same point is made in *Firth on Derivatives Law and Practice* at 12.046 (by reference to *Venezia First Instance*): "It is, however, possible for the Agreement to be valid even though a particular Transaction governed by it is not. For example, the Agreement could be entered into in anticipation of a course of trading". The editors of *Firth* also make the point that if the Agreement is entered into at the same time as the Confirmation of a Transaction, and for the purpose of concluding that Confirmation, there will be a single contractual arrangement. However, as the editors say, "This is not the result of s.1(c) of the Agreement but because the entire suite of documentation is effectively a single transaction and so stands or falls together". That is to be contrasted with the present case where the Master Agreement was not "entered into at the same time" as the Confirmation "for the sole purpose of executing" the Transaction, but was a freestanding contract entered into many months earlier.

67. Perhaps recognising that it is not in a position to challenge the Master Agreement (and the Jurisdiction Clause therein) as a freestanding contract, Trentino then seeks to fall back on the suggestion that Dexia's claim is concerned primarily with the Transaction, not the Master Agreement, and as such (it is submitted) the CPR 6.33(2B) gateway requires Dexia to establish a good arguable case that the Transaction is a valid contract, not just the Master Agreement. Trentino also submits that the Jurisdiction Clause only allowed service as of right under CPR 6.33(2B)(b) in relation to claims about the Master Agreement itself (rather than in relation to the Transaction which, of course, incorporated the Jurisdiction Clause via the Confirmation), with the result (it is submitted) that only the claim the subject of Declaration (6) in the Claim Form could be served as of right under CPR 6.33(2B), and that the claims the subject of Declarations (1)-(5) and (7)-(15) could not.

68. I am satisfied that this is an equally bad point as is clear from the express language of CPR 6.33(2B)(b) itself. CPR 6.33(2B)(b) applies where "a contract contains a term to the effect that the court shall have jurisdiction to determine that claim". Accordingly, Dexia needs to establish a good arguable case that a contract exists that contains a

jurisdiction clause that gives this Court jurisdiction to determine Dexia's claim. The relevant contract relied upon by Dexia is the Master Agreement and, if valid (as it clearly is) it "contains a term to the effect that the court shall have jurisdiction to determine" the claims advanced in the Claim Form (the Jurisdiction Clause being in the widest possible terms as to claims caught by that jurisdiction clause).

69. Trentino's submission fails to give effect to the express language of CPR 6.33(2B)(b). It is also premised on a misunderstanding that CPR 6.33(2B)(b) was, or was intended to be, a like for like replacement of paragraph 3.1 (6)(d) of PD 6B (which previously allowed service out of the court's jurisdiction with the court's permission under r 6.36 if a claim was made in respect of a contract containing a jurisdiction clause in favour of the English court). It was not, as is clear from the language of CPR 6.33(2B)(b) (and in this regard see the notes at paragraphs 6.33.4 and 6.33.4.1 of the *White Book 2024*). The difference in wording is also why CPR 6.33(2B)(c) was subsequently added (as explained at paragraph 6.33.4.1 of the *White Book 2024*).

70. In the above circumstances I am satisfied, and find, that Dexia has very much more than a good arguable case that the Master Agreement is valid and binding on Trentino, that CPR 6.33(2B) is applicable, and Dexia was entitled to serve Trentino out of the jurisdiction without permission in relation to the claims that it advances. Accordingly, the Jurisdiction Challenge fails and is dismissed.

71. It will be noted that (save for the unmeritorious argument as to the alleged invalidity of the Master Agreement, which hardly required reports from Italian law experts to identify such lack of merit), the Italian law expert evidence was not necessary to reach such a conclusion and was irrelevant to the same (and accordingly it would not be appropriate to grant leave to call expert evidence on such matters).

72. Whilst irrelevant in the light of my findings, I will briefly address the Speculation Ground (and the alleged absolute ban of derivative trading) in circumstances where I have heard argument on it. I am satisfied that none of the arguments on Italian law are of merit, and Dexia has, in any event, at least a good arguable case within CPR 6.33(2B) in relation to the Confirmation and Transaction (which itself incorporates the Jurisdiction Clause) and so the Claim Form was validly served even if (contrary to my findings above) that depended on Trentino having capacity to enter into the Transaction.

73. First, I am satisfied that Dexia has at least a good arguable case that the derivative was not speculative under Italian law. That is, after all, precisely what Trentino argued successfully in front of the Tax Court of First Instance of Trentino, in challenging the Italian Revenue Service's tax assessment in February 2023. The tax treatment turned on whether the Transaction was a hedge, which was said to be the "core of [Trentino's] defence", and Trentino argued that "the conclusion of the interest rate swap contracts … had no speculative purpose whatsoever, but was exclusively aimed at guaranteeing [Trentino] from the risk of fluctuations in market rates". That decision is the subject of an appeal by the Internal Revenue Service, and Trentino is maintaining on appeal the position it successfully argued below, namely that the derivative had no speculative purpose. It is deeply unattractive (and hardly credible) for Trentino to act Janus like and argue the exact opposite before this Court. In any event, as further addressed below, I am satisfied that there is no merit in the point as a matter of Italian law.

74. Secondly, I am satisfied that the rules on speculative derivatives do not apply to Trentino, both because it is a joint-stock company and because the Province is a Region, which has a greater level of autonomy in such matters than local authorities. Trentino's power to enter into derivatives is found in Regional laws, namely Article 31 of the Province Accounting Regulation. Article 31 of the Province Accounting Regulation authorised entry into the derivative transactions set out in Article 3(2) of Ministerial Decree 389/2003 (Decree 389) as well as "further transactions…on the basis of evaluations of convenience in relation to particular opportunities offered by the financial markets".

75. Trentino's powers under these Regional Laws are the powers referred to in Article 1(c) of the foundational Convention between Trentino and the Province dated 27 July 2006, which identified one of Trentino's authorised purposes as entering into "financial transactions provided for in Provincial Law No. 7 of September 14, 1979" and "other innovative finance transactions". It is clear, therefore, that Trentino's power to enter into derivative transactions does not derive from the various national laws referred to by Trentino and Professor Malvagna.

76. Further, Trentino's powers are also not limited by those national laws, which have no application to it. Article 41 of Law no. 448/2001 and Decree 389 (relied on by Professor Malvagna in Malvagna 1 at paragraphs 40 to 42), do not apply to Regions and their instrumental entities. I consider that this is clear from the language of the provision and recent Italian case law. The submission on Trentino's behalf that references to the Province must necessarily be taken to include instrumental entities is premised on a non sequitur: that because the Province is constitutionally required to supervise instrumental entities, the national parliament intended to include instrumental entities within the scope of Article 41. However, as Dexia points out, Trentino's debts do not even constitute indebtedness of the Province.

77. I am satisfied that Article 31 of Decree 14-94 (relied on by Professor Malvagna in Malvagna 1 at paragraphs 47 and 49) applies only to Italian municipalities and communities and specifically excludes joint-stock companies like Trentino from its scope. I am also satisfied that the other laws listed by Professor Rimini at paragraph 86 of his report, which had been relied on by Professor Malvagna in Malvagna 1 at paragraphs 4, 76 and 77 also do not apply to Trentino, for the reasons given by Professor Rimini.

78. The suggestion in Trentino's Skeleton Argument (at 40.2) that Article 31 of the Province Accounting Regulation is "functionally similar" in effect to the above national laws does not bear examination, and also omits the power, identified above, to enter into other convenient derivatives under Article 31(2). Furthermore, the only relevant restriction on the power in Article 31 is that the derivative must seek to balance the twin aims of "reducing exposure to market risks" and "cost-effectiveness". Unlike Decree 389, which permits derivatives only in "correspondence with actual liabilities due", Article 31(3) expressly permits derivatives in respect of "payment commitment" or "guarantee" transactions, including, amongst other transactions, hedging transactions in respect of provincial grants.

79. Third, even if the rules on speculative derivatives were to apply to Trentino (contrary to Professor Rimini's evidence), then I am satisfied that the Transaction is not speculative. As already noted above, the purpose of the Transaction was to hedge the

interest rate risk that Trentino was exposed to by financing the variable rate payments under the Bonds through fixed interest rate grants from the Province. Applying the Consob test, which it is common ground determines whether a derivative is speculative under Italian law, the Transaction was both (i) expressly carried out in order to reduce and (ii) highly correlated with the technical-financial characteristics of that particular interest rate risk exposure. The Province instigated and designed the Transaction itself, and its accounting advisor, PwC, considered and approved the hedging purpose of the Transaction prior to execution.

80. Trentino's submission that it was speculative to swap a fixed-rate inflow for a variable Euribor 3M inflow in order to hedge a Euribor 3M outflow, and do so at a much higher spread than the prevailing market also does not bear examination, and I do not consider that there is any merit in the points advanced in this regard at paragraph 45 of Trentino's Skeleton argument.

81. First, paragraphs 45.1 and 45.2 mischaracterise the object of the hedge. As already addressed above in terms of the purpose of the hedge, Trentino was required to hedge the exposure created by the mismatch of fixed-rate inflows under the Provincial grants and variable-rate outflows under the Bonds, to comply with the Province's requirement that Trentino's borrowing costs did not exceed the grants. To de-risk Trentino's exposure to variable interest rates, the fixed-rate inflows under the grants needed to be transformed into variable Euribor 3M inflows to meet the Euribor 3M outflows to Bondholders. The hedge achieved its goal if Trentino received a Euribor 3M indexed rate from Dexia at least equal to that it paid to the Bondholders (which is what happened). There is nothing speculative in this.

82. At paragraph 45.3 of Trentino's Skeleton, Trentino effectively suggests that the Transaction is speculative because it did not guarantee Trentino would not suffer an interest rate loss. The fact that risk would not be eliminated does not mean that the hedge is speculative (and that is no part of the Consob test). Even in a scenario where spreads over Euribor 3M doubled or tripled from the rates under the Bonds in future re-financings, the hedge would still limit Trentino's interest rate losses to the marginal spread.

83. Fourth, I am also satisfied that there is nothing in Trentino's recent argument that there was an "absolute ban" on public entities entering into financial derivatives after 25 June 2008 pursuant to Law Decree No. 112/2008 (Law 112). I am satisfied that the short answer is that the prohibition (if it ever came into force), did not apply to Trentino. In this regard, none of the laws involved purports to apply to instrumental entities like Trentino or to affect the regional laws that empower it to enter into derivatives. The prohibition in Article 62(6) states that it applies only to the entities "referred to in [Article 62(2)]", which are "Regions, autonomous provinces of Trento and Bolzano, and local entities set out in Article 2 of the Consolidated Law in Legislative Decree 18 August 2000, n. 267" (TUEL). Article 2 of TUEL in turn applies to "municipalities, provinces, metropolitan cities, mountain communities, island communities and unions of municipalities." The prohibition thus applies to the listed territorial entities and does not purport to apply to their instrumental entities. This is confirmed by the Court of Auditors, which concluded that Article 62 "textually, refers only to territorial entities".

84. Secondly, the alleged prohibition does not affect Trentino's capacity to enter into derivatives. At most, it would affect the Province's power to authorise Trentino to enter

into derivatives, which is how it is put both by the Court of Auditors and by Professor Malvagna in Malvagna 1 at paragraph 70, "[Trentino] has entered into the Transaction without being validly authorized to do so" thereby making clear that the prohibition applied to the Province and not Trentino. To use the language in *Haugesund,* this does not mean that Trentino lacked capacity to enter into transactions of the relevant kind, where properly authorised to do so. As Professor Rimini explains, Trentino had the same general civil law capacity as any joint stock company, including the capacity to enter into derivatives.

85. I also consider it relevant to note that Trentino clearly did not consider that the alleged ban applied to it, or that any national laws prevented it from entering into the Transaction. On the contrary, Trentino considered the Italian legal position at the time and represented that the Transaction complied with all applicable laws. Whilst Trentino now seeks to deploy the recent *Cattolica* decision (a decision of the Joint Sections of the Italian Supreme Court in May 2020 in a case between an Italian bank and the Municipality of Cattolica, which has given rise to renewed efforts by Italian public authorities to seek to challenge derivatives transactions in Italy) to its advantage, I am satisfied that that decision has no relevance to Trentino.

86. Accordingly, and as addressed above, I am satisfied that, had the same been relevant (contrary to my findings above), there is no merit in the Speculation Ground, and the position would remain that Dexia has at least a good arguable case within CPR 6.33(2B) with the result that Dexia was entitled to serve Trentino out of the jurisdiction without permission.

87. Having so found, it remains open to Trentino to make its Stay Application and submit that the English Proceedings should be stayed on the basis that Italy is the appropriate forum and/or that the Italian proceedings constitute a lis alibi pendens if, but only if, Trentino is right that the Jurisdiction Clause is not an exclusive English jurisdiction clause. It is to this issue that I will now turn in Section E below.

E. EXCLUSIVE OR NON-EXCLUSIVE JURISDICTION CLAUSE

E.1 APPLICABLE PRINCIPLES

88. There is disagreement between the parties regarding the proper construction of the Jurisdiction Clause, in particular whether the Jurisdiction Clause is exclusive in favour of the English court or is non-exclusive/hybrid (in relation to Italy).

89. "The question of whether parties have agreed to confer exclusive or non-exclusive jurisdiction is fundamentally a question of construction of the parties' bargain", see *Joseph, Jurisdiction and Arbitration Agreements and their Enforcement* 3rd Ed., at paragraph 4.10 (citing *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep. 588 at 591, col.2 (Staughton LJ)), which is "governed by the law applicable to the contract, or more accurately, the law governing the jurisdiction agreement, whether a jurisdiction clause is exclusive or non-exclusive"- *Dicey,* at paragraph 12–073. As already noted, the starting point when construing an English law jurisdiction clause is that "it is axiomatic as a matter of English law, that jurisdiction clauses and arbitration clauses should be widely and generously construed" (see *Petromena,* supra, at [84]), adopting a "broad, purposive and commercially minded approach" (*Etihad*, supra, at [58]). Further, "the true question is whether on its proper construction the clause **obliges** the

parties to resort to the relevant jurisdiction, irrespective of whether the word 'exclusive' is used" (*Dicey*, at paragraph 12–073 (emphasis added); see also *Deutsche Trustee Co Ltd v Bangkok Land (Cayman Islands) Ltd* [2018] EWHC 2052 (Comm) at [19]).

90. The assumption is also that rational business people are likely to have intended for any dispute arising out of the same relationship to be settled in a single forum, see *Dicey*, at paragraph 12-077.

91. The consequence of an exclusive jurisdiction clause is that the bringing of proceedings by a party to the contract in a court other than the court designated in the "exclusive jurisdiction agreement" is a breach of contract (see *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep. 571 at [30] Waller LJ) and at common law, English courts will ordinarily enforce such a bargain absent strong reasons to the contrary – *Joseph*, at paragraph 4.02.

92. It is common ground between the parties, therefore, that if the Jurisdiction Clause confers exclusive jurisdiction on the English courts, then Trentino's Stay Application should be dismissed.

93. Where the parties are contracting on the basis of a standard form contract, such as the ISDA 2002 Master Agreement, but make bespoke changes, the Court may have regard to the deleted words if it assists in resolving an ambiguity, but this must be done with care (*Narandas-Girdhar v Bradstock* [2016] EWCA Civ 88, at [20]). Where there is an apparent or possible conflict between two provisions, the contract may itself indicate how such a conflict is to be resolved. For example, in *The World Symphony* [1992] 2 Lloyd's Rep 115, there was an inconsistency between two clauses in a time charter contract, and the latter clause included an express "notwithstanding the above" qualification. Butler-Sloss LJ stated (at p. 119):

> "In my view, the words in cl. 18 "notwithstanding the provisions of clause 3 hereof" are crucial. In construing two clauses in the time charter which, read together, display not only a tension but also an inconsistency, it is clear to me that cl. 18 must override cl. 3…"

94. Of course that was an example where there was an inconsistency between two clauses which were ultimately considered to be irreconcilable. In this regard, there is a fundamental difference between a clause which qualifies (or carves something out from) another clause and one which is inconsistent with and overrides that other clause. On ordinary principles of contractual construction the Court will strive to give meaning and effect to all clauses in a contract, and reconcile clauses so far as possible.

95. In terms of the applicable principles in relation to construction of a contract clause (of which a jurisdiction clause is an example) it is common ground that the Jurisdiction Clause is to be construed as a whole in the light of its factual matrix, and ultimately the question is what the words used in their context would convey to a reasonable person.

96. Whilst every jurisdiction clause has to be construed having regard to its specific terms, it is relevant to note that previous authorities have considered the ISDA 2002 Master Agreement and variations thereof.

97. The standard, unamended, ISDA Jurisdiction Provision ("the Standard ISDA Jurisdiction Provision") contains, with one exception (as addressed in due course below) a non-exclusive jurisdiction agreement – see *Joseph,* at paragraph 4.15. Variations thereof have been considered in previous authorities.

98. For example, in *Royal Bank of Canada v Centrale Raiffeisen-Boerenleenbank* [2004] EWCA Civ 07 at [3] ("*RBC*"), the jurisdiction clause was as follows:-

> "13 Governing law and jurisdiction
>
> …
>
> (b) Jurisdiction
>
> With respect to any suit action or proceedings relating to this Agreement ("proceedings") each party irrevocably:—
>
> (1) Submits to the jurisdiction of the English Courts. If this Agreement is expressed to be governed by English law …
>
> (2) 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 […] nor will the bringing of Proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction."

99. The defendant in that case brought proceedings in New York, and the claimant in England. The claimant then sought to restrict the New York action with an anti-suit injunction from the English court. The Court of Appeal (Thorpe and Mance LJJ and Evans-Lombe J) concluded that, based on the terms of the jurisdiction clause, there was no breach involved in the bringing of the New York proceedings and there was nothing to suggest that the conduct of those proceedings had been or become oppressive or vexatious. At [4], the jurisdiction clause in that case was found to be "non-exclusive". The first paragraph of that clause did not include the word "exclusive", and particular emphasis was placed on the third paragraph of that clause. In *RBC* Evans−Lombe L stated [at 21]:

> "it seems to me that by entering into an agreement containing a jurisdiction clause with provisions similar to the final paragraph of the jurisdiction clause in issue in this case, the parties must have had in contemplation the possibility of virtually simultaneous trials with all the additional burdens which the judge describes since such is an obvious possible consequence

> of permitting parallel proceedings in the absence of provision in the jurisdiction clause, or elsewhere in the agreement, for the means of avoiding those consequences."

100. He also referred (at [22]) to what had been said by Andrew Smith J, at first instance, that the Court was, "unable to accept that the jurisdiction clause was to be construed so as to confer on the English court the title of "primary forum" in the sense that, in any conflict between the English forum and any other forum, as to the place of trial, the English court should take precedence". Andrew Smith J had also stated at [70]:

> "the submission does not reflect what the jurisdiction clause says […] It is a gloss on the agreement to interpret it as requiring a party who conducts proceedings elsewhere than England so to excuse or explain his decision, and, it seems to me, an unwarranted gloss, especially given that the jurisdiction clause expressly contemplates litigation elsewhere than England and indeed, ex consessu, parallel proceedings in England and elsewhere."

101. By way of contrast, in *Morgan Stanley & Co International v China Haishang Juice Holdings Co Limited* [2009] EWHC 2409 (Comm) ("*Morgan Stanley*") the ISDA clause was amended in terms which expressly did provide for exclusive jurisdiction. The terms of that jurisdiction clause were as follows, at [13]:-

> "(b) Jurisdiction and Third Party Rights.
>
> (i) Jurisdiction. With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement ("Proceedings"), each party:
>
> (1) irrevocably submits to the **exclusive** jurisdiction of the English courts; and
>
> (2) 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".

102. Paragraph (1) in that case was effectively in identical terms to the latter part of paragraph 1 of the Jurisdiction Clause, as was paragraph 2. In *Morgan Stanley*, however, there was no third paragraph either equivalent to that in the Standard ISDA Jurisdiction Provision, or the bespoke third paragraph in the Jurisdiction Clause.

103. In the present case I have been provided with a side-by-side comparison of the Standard ISDA Jurisdiction Provision and the Jurisdiction Clause (showing additions and deletions in track changes).

104. The Standard ISDA Jurisdiction Provision is as follows:-

> "(b) Jurisdiction. With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement ("Proceedings"), **each party irrevocably:—**
>
> **(i) submits**:—
>
> (1) **if this Agreement is expressed to be governed by English law, to** (A) the non-exclusive jurisdiction of the English courts if the Proceedings do not involve a Convention Court and (B) **the exclusive jurisdiction of the English courts if the Proceedings do involve a Convention Court**; or
>
> (2) if this Agreement is expressed to be governed by the laws of the State of New York, 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;
>
> (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; and
>
> (iii) agrees, to the extent permitted by applicable law, that the bringing of Proceedings in any one or more jurisdictions will not preclude the bringing of Proceedings in any other jurisdiction." (emphasis added)

105. It will be seen therefore, that whilst other permutations confer non-exclusive jurisdiction, if the Proceedings involve a Convention Court then the parties submit to the exclusive jurisdiction of the English court. The reason for this is obvious as any party with legal advisers would know (and the parties in the present case did have legal advisers and Trentino positively asserts that that is to be borne in mind when construing the Jurisdiction Clause). In this regard Trentino expressly relies on the parties being taken to know of any applicable laws (such as any applicable Council Regulation) when they made the Master Agreement (relying, if authority be needed, upon *SwissMarine Corp v OW Supply & Trading* [2015]1 CLC 1040 at [26] per Andrew Smith J).

106. The reason for making English jurisdiction exclusive in relation to proceedings involving a Convention Court is that at all material times from 2002 when the ISDA Master Agreement 2002 was introduced until the date of the Transaction, a variant of the Brussels and/or Lugano jurisdiction regimes was in effect in Europe. As of 2002, the applicable regime was to be found in EC Regulation No. 44/2001 ("the Brussels I Regulation").

107. As any lawyer would know, under the Brussels I Regulation unless there was an exclusive jurisdiction clause (for the purpose of Article 23), the lis pendens provision (Article 27) would mean that the court second seised would stay its proceedings in favour of the court first seised where proceedings are between the same parties with the same cause of action (Article 27). Given that in the present case both parties were

domiciled in Italy (Article 2 containing the general provision that "Subject to this Regulation, persons domiciled in a Member State shall…be sued in the courts of that Member State"), and given that the place of performance of any contract was Italy for the purpose of Article 5 it would be obvious to the parties and their legal advisers (as it was to the drafters of the Standard ISDA Jurisdiction Provision) that one party could bring proceedings in Italy before the other party brought proceedings in England with the result that a non-exclusive jurisdiction clause in favour of England would not result in English court jurisdiction notwithstanding English jurisdiction being specified, with the result that the choice of jurisdiction (in favour of England) would not, or might not, be effective in a particular case (depending on who commenced proceedings first).

108. Far from being controversial, this is candidly acknowledged in Trentino's Skeleton Argument at paragraph 52.2:-

> "Against that background, in order to ensure its effectiveness within Europe, the Standard ISDA Jurisdiction Provision provided for the English Court to have exclusive jurisdiction within the Convention territories (i.e. the parties to the Brussels and Lugano regimes), but to remain non-exclusive as against the rest of the world. [Footnote 33 - *Royal Bank of Canada v Cooperatieve Centrale* [2004] EWCA Civ 07; [2004] 1 Lloyd's Rep 471 at [4]; *Fondazione Enasarco v Lehman Brothers Finance SA* [2014] EWHC 34 (Ch); [2014] 2 BCLC 662 at [4]]."

109. In this regard Articles 23 and 27 of the Brussels I Regulation provide as follows:-

> "
>
> **Prorogation of jurisdiction**
>
> Article 23
>
> 1. If the parties, one or more of whom is domiciled in Member State, 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. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.
>
> …
>
> **Lis pendens – related actions**
>
> Article 27
>
> 1. 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.

> 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

110. As Mr Ulyatt rightly pointed out to me during the course of his oral submissions, parallel proceedings are not permitted under the Brussels I Regulation (not least by reason of Article 27) with one (important) exception, namely provisional, including protective, measures. Thus Article 31 provides:-

> "
>
> **Provisional, including protective, measures**
>
> Article 31
>
> Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter."

111. Before addressing the parties' respective submissions on the Jurisdiction Clause, it is convenient to repeat the Jurisdiction Clause at this point for ease of reference:-

> "**Jurisdiction**. With respect to any suit, action or proceedings relating to any dispute, whether contractual or non-contractual, arising out of or in connection with this Agreement ("Proceedings"), each party irrevocably:
>
> (1) submits to the exclusive jurisdiction of the English courts;
>
> (2) 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 [the "Waiver Clause"]; and
>
> (3) agrees, notwithstanding the above and to the extent permitted by applicable law, that the bringing of Proceedings before the English courts will not preclude the bringing of Proceedings before the Italian courts."

112. It will also be recalled that the Master Agreement was amended on 25 January 2012 (the "Amendment Agreement") to add an additional termination event in the case of a credit downgrade. The Amendment Agreement was also governed by English law and contained, in clause 8, an exclusive English jurisdiction clause, without the permission in sub paragraph (3) of the Jurisdiction Clause.

113. For its part, Trentino submits that the true construction of the Jurisdiction Clause is a hybrid clause, with the effect that (a) as between England and the rest of the world apart

from Italy, English jurisdiction is exclusive; but (b) England and Italy have concurrent jurisdiction.

114. In this regard Trentino submits that:-

(1) The default position under the Standard ISDA Jurisdiction Provision is that, with one exception (as addressed above), non-exclusive jurisdiction is conferred on the Courts of the chosen governing law (either New York or England) – see as per *RBC*.

(2) Non-exclusivity is reinforced by sub-clause (iii) in the standard form which makes clear that the parties are free to bring proceedings anywhere else ("Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction").

(3) The drafters of the Jurisdiction Clause made it clear that they were deliberately creating an exception or derogation from the exclusive jurisdiction being conferred in sub paragraph (1) by adding the words "notwithstanding the above" to the concurrency-of-jurisdiction provision in sub paragraph (3), those words not having been necessary in the original clause, because sub-clause (i) of the Standard ISDA did not confer exclusive jurisdiction on England outside of the Convention states.

(4) Reading the express reference in sub paragraph (3) as referring to interim measures and enforcement in Italy only is inconsistent with the use in sub paragraph (3) of the capitalised term "Proceedings", which was defined to mean "any suit, action or proceedings relating to any dispute, whether contractual or non-contractual, arising out of or in connection with this Agreement", and thus (it is said) permits the bringing of a substantive claim in Italy.

(5) To suggest that pre-existing English proceedings are a necessary pre-condition for the commencement of "Proceedings" in Italy, is said to be non-sensical given that under the Brussels regime that was in effect when the Jurisdiction Clause was drafted and agreed, any court second seised would be required immediately to stay their proceedings in favour of the court first seised, and requiring English proceedings to be pre-existing would preclude the bringing of proceedings in Italy.

115. Trentino also submits that the Waiver Clause contained in sub paragraph (2) of the Jurisdiction Clause needs to be construed in light of the lis pendens rules in the Brussels regime that was prevailing at the time that the Transaction was concluded and in light of sub paragraph (3) of the Jurisdiction Clause. In this respect, sub paragraph (3) expressly stated that it was to prevail over "the above", which included the Waiver Clause in sub paragraph (2).

116. In contrast, Dexia submits that the Jurisdiction Clause straightforwardly (and expressly) confers exclusive jurisdiction upon English Courts, that the parties waived any claim that England is an inconvenient forum as well as the right to object to the English Courts exercising jurisdiction over it (by way of the Waiver Clause), and that the Jurisdiction clause permits parallel proceeding to be brought in Italy only where English proceedings have already been commenced (and applicable law so permits), such as in

relation to provisional and protective measures (under Article 31 in a Convention State) at the time the Jurisdiction Clause was entered into.

117. In particular, Dexia submits that:

(1) In sub paragraph 1, the parties expressly chose to provide that each party "irrevocably submits to the exclusive jurisdiction of the English courts*"* in respect of "any suit action or proceedings relating to this Agreement". Meaning and effect should (and must) be given to the word "exclusive". In this regard:-

a) On ordinary principles of contractual construction, meaning and effect should be given to every word in a contract and Trentino's construction (read with its construction of sub paragraph 3) fails to give any meaning to the word "exclusive" (and indeed gives it a meaning of "exclusive save in respect of Italy", which both adds words to the clause and does violence to its meaning in circumstances where that cannot have been the objective common intention of the parties).

b) On ordinary principles of contractual construction, the word "exclusive" should be given its ordinary and natural meaning – exclusive means exclusive (to the exclusion of any other) (subject, of course, to what is provided in sub paragraph 3).

c) The use of the word "exclusive" together with "jurisdiction" has an established meaning in English law of conveying exclusive jurisdiction on the court specified (see, by way of example, *Morgan Stanley* supra and indeed the very wording of the Standard ISDA Jurisdiction Provision if Proceedings involve a Convention State).

d) If the intention was to confer jurisdiction on the English and the Italian courts that could, and would, have been stated in sub paragraph (1), and there would have been no need for sub paragraph (3).

(2) The words "notwithstanding the above" in sub-paragraph (3) do not undo everything that comes before them, rather, the qualification provides that the proviso has no effect unless and until proceedings have been brought in the English Courts.

(3) Sub-paragraph (3) of the Master Agreement is further qualified by the words "to the extent permitted by applicable law", i.e., English law, so that the bringing of Italian proceedings is thus conditioned on English law, as the governing law of the Master Agreement.

(4) What sub-paragraph (3) is permitting is ancillary proceedings supportive of the main English proceedings that have already been commenced, such as applications in Italy for interim measures (as per Article 31).

(5) The words in sub-paragraph (3) "the bringing of Proceedings before the English courts will not preclude" should be given meaning and effect, they contemplate that proceedings have already been brought in England but this "will not preclude" (i.e., prevent) subsequent proceedings in Italy (of the type envisaged).

These words are meaningless if the Jurisdiction Clause permitted Trentino to litigate in Italy at its election (as there would be no need to refer to "the bringing of Proceedings before the English court" English proceedings or their commencement).

(6) Equally if Trentino could litigate in England or Italy at its election, it would make no sense in sub-paragraph (3) for this right to be available only "*to the extent permitted by*" the law governing the Transaction, i.e., English law.

(7) As already noted, the ISDA Master Agreement was amended on 25 January 2012 (the Amendment Agreement) to add an additional termination event in the case of a credit downgrade, the Amendment Agreement also being governed by English law and containing, in clause 8, an exclusive English jurisdiction clause without the permission in sub-paragraph (3) of the Jurisdiction Clause. Thus, the parties intended that any disputes arising out of the amended ISDA Master Agreement after 25 January 2012 would be subject to the exclusive jurisdiction of the English Court and would be decided by the English Court, whereas (on Trentino's case) disputes concerning the original clauses of the ISDA Master Agreement could be heard in Italy, resulting in parallel substantive proceedings. If nothing else, it is difficult to see on what basis the parties would have agreed the wording in the amended Master Agreement if the Master Agreement allowed disputes concerning the original clauses of the ISDA Master Agreement in Italy (rational businessmen are likely to have intended for any dispute arising out of the same relationship to be settled in a single forum, see *Dicey*, at paragraph 12-077). This is a point about the amended Master Agreement (as opposed to the Master Agreement which must, of course, be construed as at the time of contracting).

E.2 DISCUSSION

118. On ordinary contractual principles, meaning and effect should be given to all words within a clause so far as it is possible to do so, and words should be given their natural and ordinary meaning (see *Wood v Capita* [2017] AC 1173 at [9] -[14] and *Arnold v Britton* [2015] AC 1619 at [15]-[21]).

119. There is, and can be, no doubt, that paragraph (b) (1), by reference to its express terms, amounts to a submission of the parties to the exclusive jurisdiction of the English courts. That is exactly what it says having regard to the ordinary and natural meaning of the words used, and giving meaning to all such words.

120. Thus it provides:-

> "**Jurisdiction**. With respect to any suit, action or proceedings relating to any dispute, whether contractual or non-contractual, arising out of or in connection with this Agreement ("Proceedings"), each party irrevocably:
>
> (1) submits to the **exclusive** jurisdiction of the English courts;" (emphasis added)

121. Parties use the word "exclusive" when they mean just that – the specified words are used to make clear that the court specified has exclusive jurisdiction (i.e. that no other court has jurisdiction) – reinforced by the language of the clause itself whereby each party irrevocably submits to [that] exclusive jurisdiction.

122. Whilst it is conceptually possible that the parties might not intend a jurisdiction clause to be exclusive, despite expressly stating that it is, such cases are likely to be rare. As an example turning on the particular wording of the clause in question, see *Hex Technologies Lt v DCBX* Ltd [2023] EWHC 537 (Ch) where the court found that the word "exclusive" had been included "in error" (at [59])).

123. Of course, the Jurisdiction Clause, like any jurisdiction clause, and indeed any contractual clause, must be read as a whole, and I address sub-paragraph (3) in that context below.

124. However, when having regard to the Jurisdiction Clause as a whole, the applicable factual matrix to the Jurisdiction Agreement must be had regard to. A very important part of that factual matrix is that at the time the Master Agreement was entered into both England and Italy were EU countries and as at the date of the Master Agreement and the Transaction the applicable jurisdictional regime was the Brussels I Regulation as already addressed above. Trentino itself not only accepts, but positively submits, that the parties were the recipients of legal advice, and to be taken as having known the application of the Brussels I Regulation and its provisions.

125. In order to ensure that the English court did have exclusive jurisdiction under the Brussels I Regulations (as per the express language of the Jurisdiction Clause) the English jurisdiction clause had to be exclusive, for the purpose of the application of Article 23, for otherwise the effect of the jurisdictional provisions of the Brussels I Regulation (as to jurisdiction at Articles 2 and 5 and, most relevantly at Article 27) would be that if the court first seised was Italy, and there was a non-exclusive English jurisdiction clause, the English court would have to decline jurisdiction in favour of the Italian court. As already noted that is precisely why the Standard ISDA Jurisdiction Provision provides for the exclusive jurisdiction of the English courts if the proceedings involve a Convention Court (as Trentino acknowledges this was to ensure the Standard ISDA Jurisdiction Provision's "effectiveness" within Europe so as to ensure that the English court did have exclusive jurisdiction within the Convention territories).

126. So applying a purposive approach to contractual construction, the obvious purpose, and rationale, for making English jurisdiction exclusive in the Jurisdiction Clause was to ensure that the only jurisdiction to which the parties had irrevocably submitted (England) would be the forum in which any dispute would be resolved (applying the very same rationale, as acknowledged by Trentino, as the parties to the Standard ISDA Jurisdiction Provision). The Jurisdiction Clause had to be exclusive in favour of English jurisdiction.

127. Conversely, it is inherently improbable that it was the objective common intention of the parties (who were both Italian), at a time when the Brussels I Regulation governed jurisdiction, that they intended the Jurisdiction Clause to be hybrid allowing proceedings to be commenced in England or Italy, given (1) they expressly submitted (only) to the exclusive jurisdiction of the English courts, and (2) it is only by agreeing to exclusive English jurisdiction that the Jurisdiction Clause makes any sense. There

cannot be parallel substantive proceedings in two EU countries, the second seised must decline jurisdiction in favour of the former, unless there is an exclusive jurisdiction in favour of that second seised court.

128. In contrast what is perfectly permissible under the Brussels I Regulation is for the court of one member state to have exclusive jurisdiction, whilst (expressly or otherwise) provision is made for provisional and protective measures to be brought in another member state (see Article 31).

129. If one then approaches sub-paragraph (3) against the express language of sub-paragraph (1) ("each party irrevocably…submits to the exclusive jurisdiction of the English courts") and the backdrop of the factual matrix (including the Brussels I Regulation regime, as addressed above), taken together with the express words in sub-paragraph (3) (all of which can be given meaning and effect), the meaning of sub-paragraph (3) becomes quite clear and it is entirely consistent with the parties having submitted to the exclusive jurisdiction of the English Court.

130. It will be recalled that sub-paragraph (3) provides as follows:-

> "(3) agrees, notwithstanding the above and to the extent permitted by applicable law, that the bringing of Proceedings before the English courts will not preclude the bringing of Proceedings before the Italian courts".

131. There are a number of points that can be made about sub-paragraph (3):-

(1) It begins "notwithstanding the above". Far from what follows being "inconsistent" with what goes before (per Trentino's submission), it is clear that the language is a "carve out" permitting something, the question being what? On any view it is not a reason to fail to give meaning and effect to the word "exclusive" in sub-paragraph (1) or as basis to strike a red-line through it.

(2) "and to the extent permitted by applicable law". I consider the better view (as advocated by Dexia) is that the "applicable law" being referred to is English law in the context of an English law contract and an expressed exclusive English jurisdiction clause (as the most natural meaning) and English law would, of course, permit, proceedings in another jurisdiction to obtain security, as is often recognised in an anti-suit context (and as it would under the Brussels I Regulation at the time). However, if the "applicable law" was Italy (as Trentino advocates) then in the context of Italy (as a party to the Brussels I Regulation and associated Italian law at the time of contracting), the Italian courts then (and presumably now) would allow Article 31 proceedings before the Italian courts, but not substantive proceedings given the express language of sub-paragraph (1) and the purpose of an exclusive jurisdiction clause set against the factual matrix identified above.

(3) "that the bringing of Proceedings before the English courts will not preclude the bringing of Proceedings before the Italian courts". In the context of Brussels I Regulation (that the parties are taken to be aware of, as were their legal advisers), parallel substantive proceedings in England and Italy are simply not possible, so the parties cannot have been intending that (as Trentino contends in

submitting the clause is hybrid), as that would make no sense. Equally, for the Jurisdiction Clause to be effective (which on any view has an English jurisdiction clause to which both parties irrevocably submit), what is here contemplated/permitted must be something consistent with sub-paragraph (1) which must be an exclusive jurisdiction clause if the parties are to be held to having submitted irrevocably to the English court. Yet, further, the clause contemplates "the bringing of proceeding before the English courts" i.e., that they have already occurred – in such circumstances it is only then possible to bring Article 31 proceedings in the Italian courts, which is what must be contemplated (and agreed) for all these reasons.

(4) Whilst one would not need a contractual permission to bring Article 31 proceedings, the parties can "agree" (as they have done) that such proceedings in the Italian Courts should only take place after, the bringing of proceedings before the English courts, and expressly confirm that the same will not be precluded thereby. There is also additional logic to that. It is a further protective measure to prevent a party attempting to make the Italian courts "first seised" and then arguing (contrary to the language of sub-paragraph (1)) that the English jurisdiction clause was not exclusive.

(5) Such construction gives meaning and effect to the words "the bringing of Proceedings before the English courts". In contrast Trentino's construction gives no meaning to them, and they are red-lined on Trentino's construction.

(6) Whilst the defined word "Proceedings" is used, what can be brought in the Italian courts is limited (under sub-paragraph (3)) by the applicable law (be it English law or indeed Italian law) each of which would only permit Article 31 proceedings, assuming sub-paragraph (1) is an exclusive jurisdiction clause – as it is expressly stated to be. This is not a "boot-straps" argument, as the Jurisdiction Clause as a whole would make no sense in the context of the Brussels I Regulation, and England as a contractually agreed neutral jurisdiction would not be secured (and submitted to), unless the Jurisdiction Clause is an Exclusive Jurisdiction Clause.

(7) That the parties intended England to be the neutral forum (which can only be secured by the English jurisdiction clause being exclusive), is also supported by the wording of the Waiver Clause in sub-paragraph (2), showing the parties' objective common intention in that regard.

(8) Yet further whatever rights are conferred in sub-paragraph (3) (which are as identified above) those are only rights. The only submission to jurisdiction (and an irrevocable one at that) is to English jurisdiction.

132. In the above circumstances, and for the above reasons, I am satisfied, and find, that the Jurisdiction Clause is an exclusive English jurisdiction clause which also permits provisional and protective measures in the Italian Courts (within Article 31) once Proceedings have been brought before the English courts.

133. In such circumstances the Stay Application must fail (as Trentino accepts on the basis of any such finding), and is dismissed. However, having heard argument on it, I address it for completeness in Section F below.

134. I would only add that the Italian law evidence sought to be adduced had nothing to do with whether the Jurisdiction was an exclusive or non-exclusive jurisdiction, and that issue provides no basis for its admission.

F. THE STAY APPLICATION

135. For the reasons set out in Section E above, the Jurisdiction Clause is an exclusive jurisdiction clause, and accordingly (as Trentino acknowledges) its application for a stay must fail in those circumstances.

136. I address in the remainder of Section F what the position would have been if the Jurisdiction Clause had not been an exclusive English jurisdiction clause. In fact, as will appear, there would be no merit in the Stay Application in that scenario either, and it would stand to be dismissed if the Jurisdiction Clause was only a non-exclusive jurisdiction clause.

137. If the Jurisdiction Clause is non-exclusive, to commence proceedings in another jurisdiction is not, without more, a breach of contract (*Joseph*, at paragraph 4.04). The implication of a non-exclusive jurisdiction agreement is that the parties are precluded "from later arguing that the forum identified is not an appropriate forum on grounds foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement", per Lord Justice Toulson, *Highland Crusader Offshore Partners LLP v Deutsche Bank AG* [2009] EWCA Civ 725 ("*Highland Crusader*"), at [50(7)].

138. It has been said that, "overwhelming" reasons are required for a Court to grant a stay of proceedings in England where there is a jurisdiction clause (even a non-exclusive one) conferring jurisdiction on the English court, see *Dicey*, at paragraph 12-106, citing, among others, *UCP Plc v Nectrus Ltd* [2018] EWHC 380 (Comm) (a case of a non-exclusive jurisdiction clause).

139. Where the English court is the "neutral forum" (as in the present case) it has been said that it is "most unlikely that the English court will override the choice", see *Dicey*, at paragraph 12-106, citing *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep. 90, 105 (only for "exceptional reasons" per Thomas J.); *BAS Capital Funding Corp v Medfinco Ltd* [2003] EWHC 1798 (Ch), at [192] (requiring "very strong grounds to override a choice of English jurisdiction"). It was also said by Staughton LJ in *Attock Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 W.L.R. 1147 (CA), at p. 1161 that "we ought to look with favour on the choice of our own jurisdiction".

140. It has been said that, in practice, "there is generally little fundamental difference, as regards the question of whether or not a stay of proceedings should be granted, between the approach of the English courts in cases involving an exclusive and a non-exclusive jurisdiction agreement" – *Joseph*, at paragraph 10.35.

141. Since the implication of a non-exclusive jurisdiction agreement is that the parties are precluded from later making forum non conveniens arguments, "an application to stay on forum non conveniens grounds an action brought in England pursuant to an English non-exclusive jurisdiction clause will ordinarily fail unless the factors relied upon were unforeseeable at the time of the agreement", per Toulson LJ in *Highland Crusader*, at [50(7)].

142. See also in this regard what was said in *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm) at [7] ("*Antec International*"):

> "(i) The fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law, creates a strong prima facie case that the English jurisdiction is the correct one. In such circumstances it is appropriate to approach the matter as though the claimant has founded jurisdiction here as of right, even though the clause is non-exclusive …
>
> (ii) Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule; …
>
> (iii) Such overwhelming or very strong reasons **do not include factors of convenience that were foreseeable at the time that the contract was entered into** (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard *Spiliada* balancing exercise. The **defendant has to point to some factor which it could not have foreseen at the time the contract was concluded**. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain … In particular, the fact that the defendant has, or is about, to institute proceedings in another jurisdiction, not contemplated by the non-exclusive jurisdiction clause, is not a strong or compelling reason to relieve a party from his bargain …" (emphasis added)

143. As identified in *Dicey* at paragraph 12-109, "it is not open in principle (although this is not a fixed and invariable rule) to either party to object to the exercise of its jurisdiction at least on grounds which should have been foreseeable when the agreement was made" (citing *British Aerospace Plc v Dee Howard Co* [1993] 1 Lloyd's Rep. 368, where the point was made in relation to English non-exclusive jurisdiction agreements).

144. Circumstances specifically excluded as grounds under the forum non conveniens exception are (per *Dicey*, at paragraph 12-109): inconvenience as a result of witnesses and documents being in another country (*BAS Capital Funding Corp v Medfinco Ltd* [2003] EWHC 1798 (Ch); *Antec International, supra*) and inconsistent findings as a result of parallel proceedings (*CH Offshore Ltd v PDV Marina SA* [2015] EWHC 595 (Comm)).

145. Where an English jurisdiction clause is paired with a forum non conveniens waiver (as in the present case in relation to sub-paragraph (2) of the Jurisdiction Clause) it has been said that "very strong or exceptional grounds will have to be shown", and "The test applied must be stricter than simply the "strong grounds" test which is applied to a

choice of court agreement without such a waiver clause" - *Joseph* paragraph 10.14. See also *Dicey* at paragraph 12-114.

146. Turning to the parties' respective submissions. Trentino submits that the Court should decline to exercise jurisdiction due to factors pointing towards Italy as the *forum conveniens*, and also asserts that there were circumstances that were unforeseeable at the time that the Transaction was concluded.

147. As to the former, Trentino submits that the nature of the dispute is concerned with a transaction entered into between a corporate creature of an Italian local authority and what was at the time an Italian bank, and that the ISDA Master Agreement and Transaction were negotiated and concluded in Italy; that all trial witnesses can be expected to be based in Italy (not England) and to be native Italian speakers who are likely to want to give their evidence in Italian; and that the substance of the dispute is overwhelmingly likely to be dominated by issues of Italian law and, in particular, whether Trentino had capacity to enter into the Transaction.

148. The reality is that all these factors were, or would have been known to the parties to be if they had put their mind to matters, known at the time they entered into the Master Agreement, including the Jurisdiction Clause. In short, they were all foreseeable (as Trentino accepts), and none of them can be prayed in aid in support of a stay (see in particular, as addressed above, *Highland Crusader*, at [50(7)], and *Antec International*, at [7]).

149. The position is *a fortiori* in the context of the Waiver Clause, which it will be recalled provides:-

> "each Party irrevocably … 2) 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".

150. Trentino is forced to submit that there are what it seeks to characterise as two exceptional reasons which were not foreseeable at the time of concluding the Transaction, with a view to depriving the Waiver Clause of its force. As will be seen they are thin gruel indeed, that do not bear examination.

151. In terms of the associated principles, reference is made to what was said by Flaux J in *Standard Chartered Bank v Independent Power Tanzania* [2015] EWHC 1640 (affirmed at [2016] EWCA Civ 411), at [109]:

> "… even where there is an FNC waiver with a non-exclusive jurisdiction clause, if very strong or exceptional grounds for granting a stay are demonstrated, the court may in an appropriate case grant a stay, provided that the grounds in question can properly be described as unforeseen and unforeseeable at the time the agreement was made. In other words, the bargain which the defendant makes in entering a contract with an FNC waiver

> is that he will not seek to argue that England is not an appropriate forum in relation to forum non conveniens grounds which were foreseeable at the time that the relevant agreement was made."

152. Trentino submits that there are two factors which were unforeseeable at the time of concluding the Transaction, firstly the likelihood of parallel proceedings (given that that was impossible under the Brussels I Regulation save in respect of Article 31 protective proceedings), and secondly the risk that an English judgment that would be readily enforceable under the Brussels I Regulation might now be unenforceable in Italy. I will take each of these points in turn. I am satisfied that there is nothing in either of them, and they do not begin to provide a basis for the stay that Trentino seeks, even if the clause was a non-exclusive jurisdiction clause.

Parallel Proceedings

153. Quite apart from the fact that it was not unforeseeable that one party might, notwithstanding the Waiver Clause, attempt to bring pre-emptive proceedings in a particular Convention country other than England in the context of a non-exclusive English jurisdiction (with parallel proceedings at least for a time), the fact of the possibility of parallel proceedings cannot constitute "overwhelming or very strong reasons*"* or "exceptional circumstances" justifying a stay in favour of another forum. The fact that the Brussels I Regulation lis pendens rules no longer apply to prevent the possibility of parallel proceedings does not make Italy a more appropriate forum than England or vice-versa. It is a consequence of Brexit that does not bear on the question of which court is the forum conveniens (and the agreed Waiver Clause is to be given effect to even in a non-excusive jurisdiction context).

154. If Dexia had commenced proceedings in England first, the same problem would exist on Trentino's construction of the Jurisdiction Clause, because Dexia would not be able to use the Brussels Regulations lis pendens provisions to prevent the parallel Italian Proceedings from continuing. The fact that Trentino has started proceedings in Italy first is thus irrelevant to which of the two jurisdictions is to be preferred, particularly where the Italian Courts have not accepted jurisdiction.

155. Nor can it be said that parallel proceedings are, in of themselves, regarded as unacceptable. A party complaining of such parallel proceedings (for example for the purpose of an anti-suit injunction application) will need to point to factors over and above the mere existence or pursuit of parallel proceedings - see *Highland Crusader* per Toulson LJ at [107]:-

> "In the case of a non-exclusive clause, either party is prima facie entitled to bring proceedings in a court of competent jurisdiction. Duplication of litigation through parallel proceedings is undesirable, but it is an inherent risk where the parties use a non-exclusive jurisdiction clause".

156. See also, in this regard, *Dicey*, at paragraph 12-113, and *Konkola Copper Mines Plc v Coromin Ltd (No.2)* [2006] EWHC 1093 (Comm), at [31]: "In such circumstances procedural inconvenience clearly has to yield to the public policy of holding him to his contract".

157. There could, of course, always also have been the risk of one party commencing proceedings in a third country (out-with the Regulation I regime) – for example if there were substantial assets in that country, and the regime was amenable to such proceedings being commenced and maintained there. Yet further, parallel proceedings (for protective measures) were contemplated in the Brussels I Regulation, and such parallel proceedings were not regarded as inappropriate.

158. In any event, it has become commonplace in prior Italian swaps cases for there to be parallel proceedings in Italy and England, for example in *Pesaro*, *Catanzaro* and the pending Financial List decision in *Provincia di Brescia* (FL-2020-000032 and FL-2021-000010). In each of these cases, the banks have legitimately, sought declaratory relief from the English Court with a view to relying on those declarations in the corresponding Italian proceedings, to give effect to their contractual right to have these matters decided by the English Court (instead of seeking an anti-suit injunction), which, Dexia submits, is equally the case here, where the English Proceedings will be resolved far quicker than the Italian Proceedings (the average length of proceedings in Italy being more than seven years). There is no reason to believe that the Italian courts will not have regard to such declarations, and every reason to believe that they will, not least as evidence as to the position under English law.

Enforceability of an English Judgment in Italy

159. Trentino argues that in contrast to the position at the time the Transaction was concluded, when any English judgment would have been readily/automatically enforced (free movement of judgments being at the heart of the Brussels regime), as a result of the United Kingdom leaving the EU and the Brussels regime, there is now uncertainty as to the enforceability of English judgments in Italy (where both of the original contracting parties were located), and whilst future changes to the Brussels regime were foreseeable at the time of contracting, Brexit, with the Brussels regime ceasing to apply, was not.

160. In this regard, there is a difference of view between the Italian law experts as to whether an English judgment would now be enforced in Italy. It is the view of Trentino's expert, Professor Malvagna, that recognition of English judgments in Italy would now be governed by the third-country recognition rules in Article 64 of Law No. 218/1995 ("Law 218/1995"), which would prevent any judgment being recognised while there is a "pending lawsuit before an Italian judge for the same subject and between the same parties, which began before the foreign lawsuit" (Article 64(1)(e)) or if it is "contrary to another judgment pronounced by an Italian judge that has become final".

161. In contrast, the view of Professor Rimini (at paragraphs 129 to 147 of his report), as also advanced in Kelly 1 (at paragraph 78) is that a judgment of the English Court will be enforceable in Italy (and elsewhere) on the basis that Law no. 280/1973 applies following Brexit, which permits reciprocal enforcement of English judgments in Italy pursuant to the 1964 Bilateral Convention between Italy and the UK. The Bilateral Convention was given effect in English law as the Reciprocal Enforcement of Foreign Judgments (Italy) Order 1973, extending the Foreign Judgments (Reciprocal Enforcement) Act 1933 to Italy. On any view there is a good arguable case that Law no. 280/1973 applies given the views expressed by Professor Rimini and the matters he relies upon in that regard.

162. Dexia also points out that even if Article 64 were to be the applicable provision, the Italian and English proceedings are not identical and do not involve the same remedies. In such circumstances I am satisfied that there is a good argument that the "same subject" test in Article 64(1)(f) is not satisfied.

163. It is also common ground that the issue will fall away if the Italian Courts decline jurisdiction over Trentino's claims. Even if the Italian court accepts jurisdiction, I consider it likely that an English judgment on the merits rendered prior to any decision of the Italian courts will either be recognised in Italy or will be taken into account in the Italian Proceedings as evidence of the English law position, which will avoid or mitigate the risk of inconsistent decisions.

164. Once again, the fact of parallel proceedings is not in and of itself a reason to stay the English proceedings, and Trentino is also in a position to withdraw the Italian Proceedings in circumstances where (on this hypothesis) it has agreed a non-exclusive English jurisdiction clause and the Waiver Clause. Thus, Trentino is in a position to avoid parallel proceedings (and at the same time honour the Jurisdiction Clause).

165. In the above circumstances I am satisfied that Dexia has at least a good arguable case that a judgment of the English Court will be enforceable in Italy, and accordingly there is nothing here that would amount to very strong or exceptional grounds for a stay (as required in the context of a Waiver Clause) (see *Joseph* at 10.14 and *Dicey* at 12-114).

166. The (on this hypothesis) non-exclusive English jurisdiction clause is also to be considered together with the Waiver Clause. Whilst "such a clause does not operate as an absolute bar to prevent a party from applying for a stay on the grounds of forum non conveniens … very strong or exceptional grounds will have to be shown" – see *Joseph*, at paragraph 10.14. As referred to above, "[t]he test applied must be stricter than simply the 'strong grounds' test which is applied to a choice of court agreement without such a waiver clause" – see also Dicey at paragraph 12-114. I am not satisfied that any of the submissions advanced by Trentino reach the threshold of "very strong or exceptional grounds".

167. In the above circumstances, even if the English jurisdiction clause was non-exclusive (rather than exclusive as I have found in Section E), the present case would not have been an appropriate one for a stay, and the Stay Application would have been dismissed.

G. THE EXPERT APPLICATIONS

168. It will be readily apparent that the Jurisdiction Application and the Exclusive/Non-Exclusive Jurisdiction did not require expert evidence on Italian law and it would not have been necessary or proportionate to grant leave to adduce such evidence. Equally the provisions of Italian law that needed to be considered on the Stay Application did not require the far-ranging Italian law evidence that is sought to be adduced. Any evidence on Italian law in relation to enforcement could sensibly have been dealt with in the witness statements, if necessary with supporting short letters from the experts. In such circumstances the Expert Applications are dismissed.