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Piedmontese Struggle to Consume Full English

Court of Appeal in England holds that ISDA jurisdiction clause trumps competing provisions in related agreement

The recent decision in *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2020] EWHC 2436 (Comm), examining a bank counterparty's rights under an interest rate hedging arrangement governed by the 1992 ISDA Master Agreement determined, as matter of English law, the effect of a range of 'boilerplate' provisions. However, of greatest interest to those of us practising outside of England and Wales, was the way in which the court resolved tensions arising from the choice of English law to govern hedging arrangements forming an integral part of complex local law governed financing. The judgment holds quite categorically that the English law governed ISDA is its own animal.

Buffet or à la carte?

In 2008, a syndicate of banks led by BNP Paribas SA (**BNPP**), entered into a loan agreement (the **Facility Agreement**) with Trattamento Rifiuti Metropolitani SPA (**TRM**), which is headquartered in Turin. TRM, an Italian public-private partnership, had sought funding to construct an energy plant. The Facility Agreement was governed by Italian law and contained a clause submitting to the jurisdiction of the Italian courts.

The Facility Agreement included an obligation for TRM to enter into interest rate swaps with BNPP to hedge interest rate risks associated with TRM's ongoing payment obligations to the syndicate of lenders under and on the terms of the Facility Agreement. In 2010, pursuant to that obligation, BNPP and TRM executed confirmations of swap transactions pursuant to a 1992 ISDA Master Agreement (the **ISDA Master Agreement**). As is common in relation to European bank

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financings, the ISDA Master Agreement contained an exclusive jurisdiction clause in favour of the English courts.

In correspondence some six years later, TRM alleged that BNPP had negligently advised TRM to enter into the hedging transactions, which (among other things) TRM said were mismatched with its real hedging requirements, generated a significant negative cash flow, and had a negative mark-to-market value. In September 2016, BNPP issued proceedings in the English Commercial Court against TRM seeking declarations of non-liability in relation to the hedging transaction, in most cases tracking the wording of the ISDA Master Agreement. In April 2017, TRM sued the Bank before the Italian court and then issued an application in the English Commercial Court to challenge its jurisdiction.

The menu

As customary for swap documentation between market counterparties and corporate 'end users', the Schedule to the Master ISDA Agreement contained a number of provisions intended to exculpate BNPP from liability for adverse financial consequences of TRM's entry into the transactions. Essentially BNPP was seeking to establish that TRM was entering into the hedging transactions entirely at its own risk. Specifically, TRM represented and warranted to BNPP in the ISDA Master Agreement that:

- TRM had "made its own independent decision" to enter into the hedging transactions and was not relying on communications from BNPP as investment advice or as a recommendation to enter those deals (the *Non-Reliance* provisions at Part 5(d)(i) of the Schedule);
- TRM was capable of evaluating and understanding the terms, risks etc. of the hedging transactions (*Evaluations and Understanding* at Part 5(d)(ii) of the Schedule);
- TRM was acting as principal and not as agent or in any other capacity, fiduciary or otherwise (*Acting as Principal* at Part 5(d)(iv) of the Schedule);
- TRM had specific competence and expertise to enter into the hedging transaction and in connection with financial instruments (*Competence and Expertise* at Part 5(e)(i) of the Schedule);
- TRM entered into the hedging transaction for hedging purposes and not for speculative purposes (*Hedging Purposes* at Part 5(e)(ii) of the Schedule); and
- TRM had full capacity to undertake the obligations under the hedging transaction, the execution of which fell within its institutional functions (*Capacity* at Part 5(e)(iii) of the Schedule).

BNPP petitioned the English Commercial Court for a number of declarations, among them that in accordance with the *Non-Reliance* provisions at Part 5(d)(i) of the Schedule to the ISDA Master Agreement, TRM had "made its own independent decision" to enter into the hedging transaction and was not relying on communications from BNPP as investment advice or as a recommendation to enter into the hedging transaction.

In addition to challenging the Commercial Court's jurisdiction to determine that the Non-Reliance provisions governed the relationship between the parties, TRM argued in the alternative that the standard ISDA *Entire Agreement* clause was not effective. Accordingly, that TRM was able to rely on separately negotiated terms of the Financing Agreement as prevailing over the ISDA terms.

Breakfast is served

The Commercial Court found that the proceedings for declaratory relief brought before the English court were governed by the jurisdiction clause in the ISDA Master Agreement, finding that this clause was not displaced or restricted by the apparently competing Italian jurisdiction clause in the Financing Agreement. This was despite a provision in the Schedule to the ISDA Master Agreement that, in the case of conflict between the terms of that document and those of the Financing Agreement, the latter should "prevail as appropriate".

The English Court of Appeal agreed, finding that there was no conflict between the jurisdiction clauses, which were found to govern different legal relationships and were therefore complementary, rather than conflicting (such that the conflicts provision was not in fact engaged). The Court of Appeal emphasised that factual overlap between potential claims under the ISDA Master Agreement and the related Financing Agreement did not alter the legal reality that claims under the two agreements related to separate legal relationships.

The Court of Appeal rejected TRM's argument that the *Entire Agreement* clause was not effective and that it was able to rely on separately negotiated terms of the Financing Agreement prevailing over ISDA Master Agreement, making the following observations:

- On its face, the meaning of the ISDA entire agreement clause is "clear and unambiguous". This was reflected by the decision in *Deutsche Bank v Commune di Savona* [2018] EWCA Civ 1740, which said that the ISDA Master Agreement is a "self-contained" agreement, exclusive of prior dealings.

- The court was not persuaded that TRM's approach successfully undermined this simple reading of the clause, in particular because it did not identify the specific provisions in the ISDA Master Agreement which were allegedly offensive and which provisions of the Financing Agreement overrode them.

- While TRM was a party to both the ISDA Master Agreement and to the Financing Agreement, BNPP was a party to the latter as Mandated Lead Arranger (and other roles), not in its capacity as the "Hedging Bank" (even though BNPP was separately defined in the Financing Agreement as fulfilling this role). The court said it would be something of an oddity if the terms of a separate agreement in which BNPP participated with a different hat on, could impact the ISDA Master Agreement.

- The hedging transaction was entered into "in connection with" the Financing Agreement, highlighting the fact that there were two distinct, albeit connected, agreements.

- TRM's approach would sit uneasily with, while BNPP's argument was harmonious with, the *dicta* in various authorities as to the importance of certainty and clarity in interpreting the ISDA Master Agreement (most famously in Lomas v Firth Rixson).

Accordingly, the Court of Appeal readily declared, tracking TRM's representations and warranties in Part 5.(d) of the Schedule to the ISDA Master Agreement, that TRM could not rely on BNPP in relation to its decision to enter into transactions on the agreed terms. BNNP was not therefore legally responsible for the adverse consequences that TRM had apparently suffered as a result. Moreover, it noted that a judgment in England as to the meaning and legal effect as a matter of English law of specific clauses within the ISDA Master Agreement would be enforceable against TRM in Italy under the Brussels Regulation. Given that the ISDA Master Agreement was governed by English law, to the extent the Italian court had to grapple with what the agreement meant, the English court was best placed to decide and the Italian court was likely to be assisted by that determination.

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