



## The Italian Supreme Court's Interpretation of the Jurisdiction Clause Favoring English Courts Contained in ISDA Master Agreements

The Italian Supreme Court (“Supreme Court” or “Court”) recently had the opportunity to have its say, for the second time, concerning the scope of the jurisdiction clause favoring English courts and contained in International Swaps and Derivatives Association (“ISDA”) Master Agreements. The action was prompted by a pair of separate transactions involving two Italian municipalities and certain international banks and financial institutions.

ISDA Master Agreements are standard agreements, published by the ISDA and used in over-the-counter derivatives transactions. The agreements establish terms applied to agreed derivatives transactions between two parties. By this mechanism agreement is reached to abide by the standard stipulations and renegotiation of general terms is avoided each time a new derivatives transaction commences.

The agreement typically contains a jurisdiction clause in its Art. 13, which provides as follows: “[w]ith respect to any suit, action or proceedings *relating to this Agreement* ... each party irrevocably ... submits to the jurisdiction of the English courts, if this Agreement is expressed to be governed by English law” (emphasis

in italics added). In the cases in question, the master agreements appeared to have been subjected to English law as substantive law.

The Supreme Court assessed the relevance and scope of such jurisdiction clause in two similar cases where Italian municipalities—which had entered into ISDA Master Agreements with several banks and financial institutions—sued before Italian courts in order to seek redress for the negative consequences they suffered as a result of their counterparties’ behavior in the context of the relevant transactions. In both cases, the municipalities’ first claim was for damages in tort allegedly caused by the defendants’ unlawful conduct before the conclusion of the contract (i.e., the so-called precontractual liability). In addition, both municipalities allegedly brought concurrent claims for contractual liability due to their breach of the collateral consultancy agreements.

The first case, which involved the Municipality of Milan, was heard by the joint divisions of the Supreme Court on February 24, 2012.<sup>1</sup> The second case, which mirrored the first one, involved the Municipality of Venice and was decided on September 18, 2014.<sup>2</sup> The first

decision established that Italian courts were competent to hear the dispute, despite the mentioned jurisdiction clause, which according to the Supreme Court did not extend to tort claims, as the defendants sought to argue. The second decision reconfirmed the first ruling in full.

## Factual Background

In the first case, the Municipality of Milan, in the context of a complex debt restructuring transaction—which included collateral consultancy provided by the banks—issued a 30-year debenture loan in 2005 for more than 1.6 billion euro and concluded four identical contracts, each including an amortizing swap agreement and an interest rate swap collar. The amortizing swap agreement with each bank was governed by an ISDA Master Agreement and by the provisions detailed in attached schedules and confirmations. The ISDA Master Agreement contained the above-mentioned jurisdiction clause (i.e., submitting to English courts) in its Art. 13.

In 2008, a pool of experts appointed by the municipality found that the entire transaction was fraudulently imbalanced in favor of the banks and the financial institutions due to the existence of implicit costs incorporated in the swaps. Therefore, in 2009, as criminal proceedings were already pending, the Municipality of Milan also brought civil proceedings before the Court of Milan.<sup>3</sup>

In the second case, the Municipality of Venice in 2010 brought proceedings before the Court of Venice against a bank and a financial institution in a very similar scenario. In fact, the Municipality of Venice had accepted the defendants' proposals to issue two debenture loans for several million euro and concluded a number of derivatives transactions governed by the ISDA Master Agreement that, according to the plaintiff, entailed seriously unfavorable conditions and forced it to assume undeclared and unpredictable risks, which then resulted in serious damages.

## The Plaintiffs' Claims and the Defendants' Arguments

Both the Municipality of Milan and the Municipality of Venice sued the banks and the financial institutions before their respective local courts, claiming damages deriving from tort

liability in connection with their illicit conduct in the precontractual phase, before the conclusion of the relevant transactions. Moreover, as a concurrent claim, the municipalities claimed compensation for damages relating to the defendants' contractual liabilities, due to the breach of their consulting and advising obligations.

In both cases, certain defendants, among other things, preliminarily held that the respective local courts lacked jurisdiction to hear the case, claiming that the jurisdiction clause contained in Art. 13 of the ISDA Master Agreement, which envisaged the jurisdiction of the English courts for disputes "relating to this Agreement," extended to all types of claims, whether in contract or in tort. Therefore, in both cases, the joint divisions of the Supreme Court were requested to determine whether Italian courts had jurisdiction, per the interim proceedings on jurisdiction (the "*regolamento di giurisdizione*").

The Supreme Court, in each case, concluded that Italian courts did have jurisdiction over the dispute, based on the following reasoning.

## The Applicable Criteria for Determining Jurisdiction

First of all, the Supreme Court held that jurisdiction will be assessed with regard to the remedy requested by the plaintiff and the relevant cause of action. Furthermore, in both cases, the Court noted that the first relief requested by the municipalities asked for damages in tort due to the defendants' conduct before the conclusion of the derivatives transactions. In disputes pertaining to tort liability, the presiding court where the harmful event occurred, or may occur, has jurisdiction under Art. 5, par. 3, of the EU Regulation 44/2001.<sup>4</sup> In this respect, such place may either be the venue where the illicit conduct took place, or the venue—which could be different—where the plaintiff suffered damages. In both cases, the relevant venues were within Italy. On this basis, the Supreme Court held that Italian courts had jurisdiction to hear the dispute with respect to the first claim.

In addition, according to the Supreme Court, in a complex dispute where the plaintiff brings more than a single request for relief, the tort action may be deemed autonomous.

In this respect, the Court applied the case law trend of its joint divisions, which holds that it is necessary to determine jurisdiction with respect only to the main claim brought by the plaintiff, if subordinate claims were also brought. In the present case, this principle was otherwise applied, provided that the two requests for relief were concurrent and not subordinated. Hence, commentators held that the Court introduced a new principle, where in cases involving a plaintiff bringing both a precontractual tort claim and a contractual claim, jurisdiction must be assessed autonomously in relation to each claim.<sup>5</sup>

Having determined that Italian courts had jurisdiction to hear the tort claim, the Court went on to establish whether the additional request for contractual liability should have been heard together with the tort claim.

In the 2012 case, the Court found that four of the defendants executed a consultancy agreement with the Municipality of Milan that contained a jurisdiction clause in favor of the Court of Milan. Therefore, in respect to such defendants, the Italian courts undoubtedly had jurisdiction.

Moreover, in both the 2012 and 2014 decisions, the Court found that one of the defendants had its registered offices in Italy; therefore, Italian courts would have jurisdiction over such defendant(s) according to the rule contained in Art. 2 *juncto* Art. 60 of the EU Regulation 44/2001. This rule holds that a company with registered offices in a Member State, whatever its nationality, will be sued in the courts of that Member State. Having thus recognized that Italian courts had jurisdiction over some of the defendants, the Court held that the plaintiffs were allowed to summon the other defendants before the same courts pursuant to Art. 6, par. 1, of EU Regulation 44/2001,<sup>6</sup> as the relevant claims appeared to be closely connected. In fact, the Court declared that the defendants offered their consultancy services together, in the same manner and jointly. As a result, the close connection requirement was satisfied, and it was advisable to hear all claims in the same proceedings in order to avoid the risk of conflicting judgments.

Moreover, the Court found another factor connecting the contractual claim to Italy in Art. 5, par. 1, let. b) of EU Regulation 44/2001,<sup>7</sup> which provides that the Member State—where,

under the contract for the provision of services, the services were provided or should have been provided—has jurisdiction over defendants are not domiciled in such Member State. In these cases, the consultancy services associated with the transactions had been (and should have been) provided by the defendants to the two Italian municipalities—and within Italian territory. Therefore, Italian courts would have jurisdiction under the mentioned rule.

## The Supreme Court's Interpretation of the Jurisdiction Clause

Finally, the Supreme Court rejected the argument of some of the defendants involved in both cases, stating that the jurisdiction clause contained in Art. 13 of the ISDA Master Agreement, envisaging the jurisdiction of English courts, was so broad that it would have extended to all disputes “relating to this Agreement,” whether arising out of the agreement or concerning tort liabilities.

Preliminarily, the Supreme Court held that according to the case law of its joint divisions and of the European Court of Justice,<sup>8</sup> jurisdiction clauses must be assessed separately from the agreement in which they are contained, must be interpreted by the national judge before which their interpretation is sought, and, most importantly, must be interpreted in a strict manner.

Hence, the Court declared that pursuant to the Italian law principles on contract interpretation, the wording “relating to this Agreement” in the jurisdiction clause under Art. 13 of the ISDA Master Agreement does not mean that the jurisdiction of English courts, envisaged by such clause, would unequivocally extend to all disputes, whether in contract or in tort, in any case connected to the contractual implementation of derivatives governed by the ISDA general conditions.

In stating the above, the Court referred to the Italian Civil Code principles on contract interpretation, including Art. 1362 of the Italian Civil Code, which provides that a contract must be interpreted with regard to the common intention and the behavior of the parties, and not merely to the literal meaning of its wording, and with regard to Art. 1364, which provides that, even if the wording contained in a contract is general, a contract exclusively covers the objects on which the parties

intended to contract. Also, the Supreme Court referred to Art. 1370 of the Italian Civil Code, pursuant to which the clauses inserted in general conditions, in case of doubt, are interpreted in favor of the nondrafting party.

In the 2014 Municipality of Venice case, the Supreme Court applied this reasoning for the second time. It explicitly added that the scope of application of the jurisdiction clause contained in Art. 13 of the ISDA Master Agreement extends only to the disputes pertaining to the agreement itself, excluding tort and precontractual claims. In the cases at hand, Italian courts were found to have jurisdiction under Art. 5, no. 3 of the EU Regulation 44/2001, because Italy was the place where the harmful event caused by the defendants' wrongful behavior occurred or may have occurred.

In both cases, the Supreme Court decided that each party had to bear its own costs. In the first case, it was on the basis of the "undeniable objective and subjective complexity of the matter." In the second case, it was on the basis that, when the proceedings were initiated, the Supreme Court had not yet ruled according to the principles established in the first case.

After the decisions on jurisdiction were issued by the joint division of the Supreme Court, both cases were referred back to the local courts where they were initiated—to the courts of Milan and Venice, respectively. The Milan case appears to have been settled by the parties after the decision on jurisdiction was issued in 2012. The second case seems still to be pending before the Court of Venice after the decision on jurisdiction was issued on September 18, 2014.

## Conclusion

According to the Supreme Court, the jurisdiction clause in favor of English courts contained in ISDA Master Agreements and concerning disputes "relating to this Agreement" does not extend to tort claims but only to contractual claims. In this respect, according to Italian case law, a financial institution's deceptive conduct, including its breach of the duties to appropriately inform the counterparty about potential risks and other aspects of the transaction, amounts to a type of tort liability known under Italian law as "precontractual liability," if the conduct occurred before (or at time of) the conclusion of a master agreement. Such conduct would amount to

contractual liability if the wrongful behavior concerned subsequent transactions carried out pursuant to the terms and conditions of the master agreement.<sup>9</sup>

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## Endnotes

- 1 Municipality of Milan v. JP Morgan Chase Bank, UBS Italia SIM S.p.a., Dafka Bank PLC, Deutsche Bank A.G. and J.P. Morgan Securities Ltd., Italian Supreme Court, joint divisions, February 27, 2012, no. 2926.
- 2 Municipality of Venice v. Merrill Lynch International Bank Ltd. and Fincon S.r.l. in liquidazione, Italian Supreme Court, joint divisions, September 18, 2014, no. 19675
- 3 See comment by Paola Piroddi, "In presenza di istanze concorrenti e pari ordinate l'accertamento della giurisdizione è autonomo" ("Where the plaintiff brings concurrent claims the jurisdiction shall be ascertained autonomously for each claim"), in Guida al diritto, 21/2012, p. 55 and ff.
- 4 Art. 5, par. 3 of EU Regulation 44/2001, superseded as of January 10, 2015, by Art. 7, par. 2, of EU Regulation 1215 /2012, which contains the same wording, provides that: "A person domiciled in a Member State may, in another Member State, be sued ... 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur..."
- 5 See comment by Paola Piroddi, "In presenza di istanze concorrenti e pari ordinate l'accertamento della giurisdizione è autonomo" ("Where the plaintiff brings concurrent claims the jurisdiction shall be ascertained autonomously for each claim"), in Guida al diritto, 21/2012, p. 56.
- 6 Article 6, par. 1, EU Regulation 44/2001, superseded as of January 10, 2015, by Art. 8, par. 1, of EU Regulation 1215 /2012, which contains the same wording, provides that: "A person domiciled in a Member State may also be sued: 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings..."
- 7 Art. 5, par. 1, let. b) of EU Regulation 44/2001, as of January 10, 2015, has been superseded by the identical Art. 7, par. 1, let. b) of EU Regulation 1215/2012.
- 8 See ECJ C-269-95 dated July 3, 1997, and C-387-98 dated November 9, 2009; and see Italian Supreme Court, joint divisions, decisions no. 4634 dated February 28, 2007, and no. 2224 dated February 1, 2010.
- 9 See, for instance, the following decisions: Italian Supreme Court, first division, decisions no. 14056, dated June 11, 2010, and no. 20260, dated September 19, 2006, and Italian Supreme Court, joint divisions, decisions no. 2674 and no. 2675, both dated February 5, 2010, and decision no. 8034, dated April 8, 2011.

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