P.R.I.M.E. Finance

Panel of Recognized International Market Experts in Finance

Topic I (Cont'd): Permissibility of Complex Transactions a.k.a. "The Mother of All Italian Derivatives Disputes"

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P.R.I.M.E. Finance Annual Conference 2019

4 & 5 February, Peace Palace, The Hague

The mother of all Italian derivatives dispute

- *Republic of Italy vs. Morgan Stanley*
- First case ever where management of public debt through derivatives by a sovereign has been challenged in Court
- Complex case involving jurisdictional issues as well as contractual and pre-crontractual claims

The mother of all Italian derivatives dispute

- Public prosecutor argued that:

  1 – Swaptions are not suitable for sovereign

  2 – Speculative derivatives are not appropriate for management of public debt

  3 –Early termination clauses may frustrate long term debt management

- Judgments in first instance favourable to the defendants. Currently on appeal

The mother of all Italian derivatives dispute

- Certain related issues:
  1 – Representations
  2 – Indemnities

- They were both present in the agreement more or less in line with standards

The mother of all Italian derivatives dispute

- Question: do civil law courts treat reps and indemnities in the same way as UK courts do?

- This question may be extremely relevant if ISDA chooses to go ahead with local country model (such as France or Ireland)

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Topic II: A MATTER OF AGREEMENT
FORUM SELECTION AND DUELLING PROCEEDINGS

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The issue – competing jurisdiction agreements

- Parties in banking litigation often search for a home court advantage
- Rightly or wrongly, parties perceive an advantage in litigating at home
- Banks have often sought to litigate in London or New York; clients elsewhere
- Jurisdiction disputes have therefore long been common in banking disputes and that remains as true now as ever
- Want to look at one particular aspect – competing jurisdiction agreements in bank transaction documentation
- Recently considered by the English Court of Appeal
- Reflects the approach of English commercial law more generally

Deutsche Bank AG v. Comune di Savona [2018] EWCA Civ 740

- DB's London branch entered two agreements, with competing jurisdiction clauses:
  - an agreement to provide services to Savona, governed by Italian law and a Milan jurisdiction clause; and
  - an ISDA Master Agreement, governed by English law and with a English court jurisdiction clause
- The parties entered a number of swap confirmations subject to the Master Agreement
- The bank issued proceedings in London seeking declarations that the transactions were valid and tracking several of the provisions of the Master Agreement dealing with the relationship between the parties (e.g. the standard form non-reliance clauses)
- Savona challenged the English Court's jurisdiction, on the basis of an Italian law claim, and relying on Article 25 of the Recast Regulation
- Savona succeeded in the Commercial Court; the Judge held that the Italian law claim fell more naturally within the Milan jurisdiction clause and outside the English
- The Bank appealed, successfully, to the Court of Appeal: the English Court had jurisdiction in relation to all the declarations

The English Court's reasoning

- A matter of interpretation of the two agreements; the demarcation was between disputes relating to the generic relationship (which was subject to the Milan jurisdiction) and disputers relating to the interest rate swap relationship (which was subject to the English courts)
- The declarations all raised disputes relating to the swaps and so fell within the jurisdiction of the English Court. A consistent line of cases emphasising upholding the agreements of the parties
- An emphasis on certainty. As Knowles J put it in another case on the same point (BNP Paribas SA v. Trattamento Rifiuti Metropolitani [2018] EWHC 1670 (Comm) (citations omitted):
    - *The most powerful point of context in my view is the use of ISDA documentation and the ISDA jurisdiction clause within it. Even generally, "[d]ispute resolution provisions require certainty. The parties need to know from the outset what to do and where to go if a dispute arises." The worldwide use of ISDA documentation further signals the interest of parties to achieve consistency and certainty in this area of financial transacting. In the case of an ISDA master agreement "[i]t is axiomatic that [it] should, so far as possible, be interpreted in a way that serves the objectives of clarity, certainty and predictability so that the very large number of parties using it should know where they stand"*.
- Discussion of expert evidence of foreign law; Court of Appeal deprecated its excessive use

A U.S. Perspective

- A slightly different debate is pending in the U.S.
- « Manufactured Credit Events » or « Narrowly Tailored Credit Events »
- Wide range of creative financial engineering with distressed corporate borrowers and in complex derivatives markets.
  - *Hovnanian*
  - *Sears Bankruptcy*
  - *See also CFTC v. David Wilson (DRW Trading)*
- CFTC issued a press release cautioning against manipulative conduct.

A U.S. Perspective

- *Blackrock Trustee Litigation* (S.D.N.Y. 2018)
  - Denial of class certification in a case involving over 800 RMBS trusts and potentially tens of billions of dollars in claimed losses.
  - RMBS Trusts were all governed by New York law and provided for non-exclusive New York choice of forum.
  - One reason for denial of certification was the likelihood that multiple foreign laws would apply to the claims of the investors.
  - Foreign law would determine assignability of claims and, hence, standing to sue.
  - Foreign law would determine statute of limitations and, hence, availability of remedy.
  - Foreign law inquiries would be highly individualized and would therefore defeat any benefit of class certification.
  - Second Circuit Court of Appeals declined to review.