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Briefing note

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English law choice prevails over foreign mandatory laws

The ability to use foreign mandatory law to escape from the consequences of an English law contract is very limited. In particular, the use of an international standard form of contract may on its own be enough to prevent the application of a foreign law.

If the parties choose English law to govern their contract, there are very few rules that allow a foreign law trump card to be played. The rule relied on in *Dexia Crediop SpA v Comune di Prato* [2017] EWCA Civ 428 was article 3(3) of the Brussels Convention (article 3(3) of the Rome I Regulation, which is relevant to contracts concluded after 17 December 2009, is worded slightly differently but is to the same effect). Article 3(3) applies where "all the elements relevant to the situation at the time of the choice are connected with one country only"; if so, the parties' choice of law is without prejudice to the laws of that one country that cannot be derogated from by contract.

But what will be enough to take a transaction outside the application of article 3(3)? *Comune di Prato* concerned a swap transaction between an Italian local authority and an Italian bank, with payments in Italy. The Court of Appeal concluded that this scenario was not sufficient to render the transaction one where all the elements relevant to the situation were connected with Italy only.

In particular, the Court of Appeal decided that the fact that the transaction was documented under the ISDA Master Agreement was, pretty nearly on its own, enough to make the situation not connected solely with Italy. Following *Banco Santander Totta SA v Companhia Carris* [2016] EWCA Civ 1267, the Court of Appeal decided that it is not necessary to identify connections between the transaction and another country. Aspects that are not connected with the single country in question are sufficient, and these can include elements signalling its international nature. Using a standard contract produced by ISDA, *a fortiori* the Multi-currency Cross Border form in English, itself introduced an international element beyond the borders of Italy.

The Court of Appeal added that non-Italian banks had tendered for the mandate that C won and that C had hedged the swap in question on the international derivatives markets. Hedging was the principal underlying reason offered by the Court of Appeal for giving article 3(3) a limited scope. If a party entered into one transaction, hedging that transaction with another, any differences between the two contracts potentially undermined the hedging effect. Article 3(3) could not be used to introduce Italian law into one side of the hedging and thus to bring about unintended differences.

Comune di Prato is another case in which a local authority sought to escape a swap that had become disadvantageous. The local authority argued that the swap was ultra vires - which is inescapably a matter of Italian law - but the Court of Appeal in London (deciding the question of Italian law) did not agree that the swap was ultra vires.

Key issues

- Foreign mandatory laws can overrule the chosen law if all elements are connected with that foreign country
- An international element may be enough to mean that a transaction is not linked to one country
- Use of the ISDA Master Agreement may on its own bring an international element

Having lost on vires, the local authority relied on mandatory Italian laws, principally the failure to include a cooling off period in the documentation. The Court of Appeal decided that Italian laws were irrelevant to this transaction because article 3(3) did not apply but that, even if article 3(3) had brought Italian law into play, the laws in question did not apply to this transaction. The local authority was therefore bound by the contract.

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