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Article

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ISDA derivatives and English jurisdiction after Brexit

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Abstract

This article examines the validity, scope, and effects of the jurisdiction clauses commonly contained in International Swaps and Derivatives Association ('ISDA') Master Agreements, particularly in light of the guidance provided in *Dexia SA v Comune di Torino* ('*Torino*') in relation to the 1992 Master Agreement. The article contextualizes *Torino* within the broader line of English and Italian case law on OTC derivatives, draws inferences for other iterations of the ISDA jurisdiction clause, and considers the practical implications of *Torino* affirming the exclusive jurisdiction of English courts over English-law-governed ISDA derivatives. It further engages with the key issue left open by *Torino*—that is, whether the 1992 ISDA jurisdiction clause is capable of benefiting from the 2005 Hague Convention. It argues that it is.

Introduction

According to an influential theory of law, there are close analogies between law and literature,[1] and a judge deciding a case is akin to a writer contributing to a chain novel, with each judgment constituting a new chapter of a single story.[2]

This theory is controversial, but the metaphor is certainly apt for *Dexia SA v Comune di Torino*,[3] a judgment which forms part of a long-standing legal narrative, driven by allegations of disloyalty and neglect, with surprising twists as the applicable legal regime has changed over time.

The plot revolves around certain over-the-counter ('OTC') interest rate swap ('IRS') transactions entered into by Italian local authorities in the early 2000s, ostensibly with the aim of hedging the interest rate risk arising from the local authorities' variable-rate indebtedness. The 2007–08 financial crisis was followed by a fall in interest rates and, at least in part for this reason, numerous local authorities found themselves out of the money under the swaps. Since then, some authorities have sought to challenge those transactions with an eye to recovering the negative differentials previously paid and avoiding any future payment obligations.

The contested derivatives are governed by the virtually ubiquitous ISDA Master Agreement,[4] in either its 1992 or 2002 version, typically with some bespoke provisions inserted in its Schedule. In

1 R Dworkin, 'How Law is Like Literature' in *A Matter of Principle* (HUP 1985) 146.
2 R Dworkin, *Law's Empire* (HUP 1986) 228–232.
3 [2025] EWHC 1903 (Comm).
4 By way of background, ISDA has estimated its Master Agreement to govern 'more than 90% of over-the-counter derivatives transactions globally': see *Lomas v JFB Firth Rixson Inc* [2010] EWHC 3372 (Ch), [2011] 2 BCLC 120 [5], which records the evidence given by ISDA as intervener in the proceedings. For reference, the worldwide OTC derivatives market has recently been said to have an aggregate outstanding notional of USD 699.5 trillion: see ISDA, *Key Trends*

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many cases, the Master Agreement includes a choice of English law (section 13(a)) and English courts (section 13(b)), applicable both to the Master Agreement itself and to the transactions executed under it. But, even in those cases, local authorities have consistently challenged the validity of the IRS transactions in front of the Italian courts, largely on the basis of Italian law arguments, with some degree of success.[5]

So, starting from *Depfa Bank plc v Provincia di Pisa* [2010] EWHC 1148 (Comm), [2010] 2 CLC 478, it has become common for the local authorities' counterparties—international financial institutions—to bring a claim in England to have the derivatives declared binding under English law.[6] Because of the parallel proceedings in Italy and England, the parties' choice of court in section 13(b) of the Master Agreement has attracted considerable judicial attention at the pre-trial stage.

On a factual level, *Torino* is more of the same. The Comune di Torino—at one point the Italian municipality with the highest level of indebtedness per capita[7]—launched an action in the Court of Turin in respect of IRS transactions executed with Dexia Crediop SpA in 2001 and restructured in 2003 and 2006, which during their life had developed a negative mark-to-market for Torino. In line with similar cases, Torino's primary claim was that Dexia breached an advisory agreement allegedly entered into before the negotiation of the IRSs and, as a result of the bank's disloyal conduct in structuring and negotiating the derivatives, also incurred pre- and extra-contractual liability; in the alternative, Torino asserted the nullity of the swap contracts.[8] In response, Dexia sought declaratory relief in England and applied for summary judgment on the jurisdictional points.

The reason why *Torino* is noteworthy is Brexit. It is now old news that the Brussels I Recast Regulation—which sets out a harmonized regime for determining jurisdiction and recognizing foreign judgments—no longer applies in relation to the UK.[9] Without the European Union (EU) regime, the focus has turned to international conventions to govern the enforcement of jurisdiction clauses. From the UK's perspective, the leading sources of law in this respect are the Hague Convention of 30 June 2005 on Choice of Court Agreements ('the 2005 Hague Convention') and the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ('the 2019 Hague Convention').[10]

Despite this significant shift in the international legal framework, there has so far been little authoritative guidance on its implications for the operation of ISDA Master Agreements, and particularly of their standardized jurisdiction clauses. Although there have been various post-Brexit rulings by English judges on the extent of their jurisdiction over ISDA derivatives, each decision turned on a

in the Size and Composition of OTC Derivatives Markets in the Second Half of 2024 (July 2025) <https://www.isda.org/a/1rjgE/Key-Trends-in-the-Size-and-Composition-of-OTC-Derivatives-Markets-in-the-Second-Half-of-2024.pdf> accessed 1 February 2026.

5 See Trib. Pesaro, 23.12.2024 <https://www.dirittobancario.it/wp-content/uploads/2025/01/Tribunale-di-Pesaro-23-dicembre-2024.pdf> accessed 1 February 2026. cf Cass., Ss.Uu., 15.7.2024, n. 19456, in *DeJure*; Cass., 3.7.2025, n. 18113, in *DeJure*; App. Brescia, 21.8.2025, in *One Legale*.

6 For an overview of the earlier case law on Italian swaps, see *Banca Intesa Sanpaolo SpA v Comune di Venezia* [2022] EWHC 2586 (Comm), [2023] Bus LR 384 [153]–[166]. See also GM Danusso, 'The Litigation on Derivative Transactions Involving Italian Counterparties: An Extreme Stress Test for the Derivative Contractual Documentation' (2018) 13 CMLJ 26, esp 41–43.

7 CGIA Mestre, *È Torino il comune capoluogo più indebitato d'Italia* (26 July 2012) <https://www.cgiamestre.com/wp-content/uploads/2012/07/comuni-indebitati.pdf> accessed 1 February 2026.

8 This unusual structure—which places the central issue of validity at the very end of Torino's pleaded case—is presumably meant to take advantage of the peculiar approach seemingly adopted by Italian courts whereby, once an Italian court is found to have jurisdiction over the primary claim, its jurisdiction is deemed to also extend to any alternative claims, 'irrespective of their content': see, most recently, Cass., Ss.Uu., 29.5.2023, n. 14939 in *DeJure*, at §2.1, which has been applied in Trib. Pesaro (n 5), where the local authority deployed precisely the same claims as Torino. Such an approach, however, has not been fully elaborated, and is rather difficult to justify, being also difficult to reconcile with the *acquis communautaire* on jurisdiction.

9 The full reference is to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

10 See R Brittain, 'Exclusive Jurisdiction Agreements Post-Transition' (2020) 10 JIBFL 709; S Garvey, 'Brexit and Dispute Resolution Clauses: The Options for Finance Parties' (2021) 2 JIBFL 109; S Garvey, 'Hague 2019: Extending the Lifespan of Asymmetric Jurisdiction Clauses?' (2024) 2 JIBFL 104. See also L Merrett, 'The Future Enforcement of Asymmetric Jurisdiction Agreements' (2018) 67 ICLQ 37.

narrow *ratio decidendi*, specific to the peculiar facts of that case.[11] In light of Brexit, ISDA has also published its own views and materials, but, as will be argued below, none seem entirely satisfactory.

Against this backdrop, the *Torino* summary judgment stands out as the first post-Brexit case in which an English judge—here, Butcher J—engaged directly with the standard jurisdiction clause of the 1992 ISDA Master Agreement. Accordingly, this article begins by examining *Torino*'s contribution to the existing case law, identifying and commenting on the three points of law articulated by Butcher J. While not all points are equally novel or general in their application, each represents a continuation of the assertive, market-oriented approach that English courts have consistently applied in cases involving English-law-governed ISDA derivatives. At the same time, however, Butcher J's summary judgment also raises fresh questions relevant to both the Italian swaps litigation and the OTC markets more broadly. Indeed, the article then turns to what the summary judgment *does not* say, addressing what is arguably the most important issue left open by *Torino*: whether the 2005 Hague Convention is capable of applying in connection with the standard ISDA jurisdiction clauses. This article suggests that it is.

Butcher J's three points of law

To contextualize the Judge's analysis, it may be convenient firstly to set out in full the parties' choice of court, that is section 13(b) of the 1992 ISDA Master Agreement (unamended):

> **Jurisdiction**. With respect to any suit, action or proceedings relating to this Agreement ("Proceedings"), each party irrevocably:
> i. submits to the jurisdiction of the English courts, if this Agreement is expressed to be governed by English law, or 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, if this Agreement is expressed to be governed by the laws of the State of New York; and
> 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.
>
> Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction (outside, if this Agreement is expressed to be governed by English law, the Contracting States, as defined in Section 1(3) of the Civil Jurisdiction and Judgments Act 1982 or any modification, extension or re-enactment thereof for the time being in force) nor will be bringing of Proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction.

As in the previous episodes of the Italian swaps saga, neither party disputed, in Italy or in England, that the Schedule to the Master Agreement selected English law as the governing law of the contract and, consequently, that section 13(b) designated English courts as the competent forum. Here, too, the Judge proceeded on that basis.

[11] In *Banca Nazionale del Lavoro SpA v Provincia di Catanzaro* [2023] EWHC 3309 (Comm), for instance, the defendant admitted the jurisdiction of the English courts: see [67]–[69]. In *Deutsche Bank AG London v Provincia di Brescia* [2022] EWHC 2859 (Comm) and *Dexia Crediop SpA v Provincia di Brescia* [2023] EWHC 959 (Comm), the parties expressly clarified the intended meaning of the ISDA jurisdiction clause, respectively, in the Schedule (*DB v Brescia* [14]) and in a subsequent settlement agreement (*Dexia v Brescia* [16]). In *Dexia Crédit Local SA v Patrimonio del Trentino SpA* [2024] EWHC 2717 (Comm), the parties departed from the standard ISDA wording altogether by agreeing to a bespoke jurisdiction clause: see [5]. The only outlier is *Dexia SA v Regione Emilia Romagna* [2024] EWHC 3236 (Comm), in which at [179] Bryan J appeared to lay down a point of general application on the effect of the 1992 version of the ISDA jurisdiction clause, but without a detailed discussion of that point, and in any case alongside the more straightforward finding that the defendant had voluntarily submitted to the jurisdiction of the English courts: see [66].

Second, it may be convenient to note at the outset that Butcher J ruled in Dexia's favour. His conclusion, in short, was that section 13(b) conferred exclusive jurisdiction on the English courts not only over contractual disputes arising under the Master Agreement itself, but also over the rest of Torino's Italian claims, based on pre-contractual liability, extra-contractual liability, and liability arising under a separate advisory agreement.

In terms of reasoning, as done in other post-Brexit Italian swaps cases, the Judge framed the dispute by looking at the arguments deployed by the local authority in Italy.[12] In Torino's case, such arguments relate, quite neatly, to the validity, scope, and effects of section 13(b).

Validity: Italian local authorities are not precluded from conferring jurisdiction on foreign courts in connection with financial derivatives

In Italy, Torino appealed to Article 4, paragraph 2 of Italian Law n. 218 of 1995, which permits parties to submit a dispute to the jurisdiction of a foreign court or arbitral tribunal only to the extent the dispute concerns 'disposable rights' capable of being alienated or waived (*diritti disponibili*). According to Torino, the rights at issue related to 'public finances' and, as such, could not be validly subjected to the jurisdiction of the English courts.[13]

Butcher J dismissed this argument: Article 4, paragraph 2 of Law n. 218/1995 bears upon the material validity of the contract, not the capacity of the parties, so is irrelevant to an English court tasked with applying English law; in any event, even if Article 4, paragraph 2 were relevant, it would be inapplicable to Torino's Italian claims.

This is not, in itself, particularly remarkable. Under Italian law, non-disposable rights are the exception rather than the rule. They typically comprise the most personal of rights, such as one's status as a parent[14] or one's statutory rights as an employee.[15] These classic examples of non-disposable rights could not be more different from the rights asserted by Torino, which instead are purely economic in nature and arise simply from the rough and tumble of commercial bargaining. Indeed, the Italian *Corte di Cassazione* has very recently recognized a judgment issued by the High Court in one of the latest instalments of the Italian swaps saga.[16] Had the parties truly been prevented by Law n. 218/1995 from designating an English judge, the resulting judgment could not have been recognized. It follows that Torino's argument—even taken on its own terms, as a matter of Italian law—is very weak indeed.

What is more remarkable is that Butcher J openly addressed these substantive issues of Italian law, reaching a rather strong conclusion, to the effect that Torino's Italian law argument 'stands no realistic prospect of success'.[17] This is by no means new: before *Torino*, the non-disposable rights point had been raised—but then abandoned—in front of Bryan J, who, even without the benefit of a full discussion of that issue at trial, eagerly dismissed it as 'unmeritorious' and 'rightly' discarded.[18] Earlier still, the most famous judgments on Italian swaps—Cockerill J's in *Deutsche Bank AG London v Comune di Busto Arsizio*[19] and Foxton J's in *Banca Intesa Sanpaolo SpA v Comune di Venezia*[20]—reveal

12 Eg *Dexia Crediop SpA v Provincia di Pesaro e Urbino* [2022] EWHC 2410 (Comm), as well as *Catanzaro*, *Brescia*, and *Emilia Romagna* (n 11). cf *Patrimonio del Trentino* (n 11).
13 See *Torino* (n 3) [20] and [49].
14 Cass., 17.8.1998, n. 8087, in *One Legale*.
15 Cass., 15.1.2024, n. 1485, in *One Legale*.
16 Cass., 18113/2025 (n 5), relating to *Dexia v Brescia* (n 11). See also App. Brescia (n 5), relating to *Deutsche Bank AG London, Dexia SA v Provincia di Brescia* [2024] EWHC 2967 (Ch) and Trib. Milano, 7.1.2026, unpublished (*ined.*), relating to *DB v Brescia* (n 11).
17 *Torino* (n 3) [56].
18 *Patrimonio del Trentino* (n 11) [54]. See also Bryan J's discerning analysis of Italian administrative law at [74]–[78] and [83].
19 [2021] EWHC 2706 (Comm).
20 [2022] EWHC 2586 (Comm), [2023] Bus LR 384.

a clear willingness to engage critically with foreign law arguments, including those formulated by the *Corte di Cassazione* itself.[21] Butcher J very much continues in this tradition.

Also remarkable is Butcher J's reliance, in terms of conflict of laws, on the distinction between material validity (assessed with reference to English law) and capacity (assessed with reference to foreign law).[22] As pointed out in the literature, this distinction is not free from theoretical difficulties and, in practice, is applied with a healthy dose of pragmatism.[23] In this respect too, Butcher J continues in the tradition established in previous Italian swap cases of classifying most mandatory provisions of Italian law as going to material validity, thereby limiting their significance from an English conflict-of-laws perspective.[24]

In this sense, Butcher J's ruling provides reassurance to derivatives dealers beyond the specific context of the 1992 ISDA Master Agreement. The pragmatic approach identified in the literature and affirmed in *Torino* appears to apply generally to all financial dealings with foreign public authorities, who will face significant difficulties in attempting to renege on their choice of court by relying on rules of foreign law.

Scope: the standard ISDA jurisdiction clauses are sufficiently wide to cover pre- and extra-contractual disputes connected to ISDA transactions, as well as claims under separate but related contracts

Torino's second argument concerned the phrase 'any suit, action or proceedings relating to this Agreement' within section 13(b) of the Master Agreement. In the local authority's view, this expression should be read restrictively, so as to exclude the primary claims formulated in Italy from the scope of the jurisdiction clause.

Once again, it is not altogether surprising that Butcher J rejected this argument. The UK Supreme Court has repeatedly affirmed that choice-of-forum clauses are to be interpreted in accordance with their proper law, which, unless otherwise specified, generally corresponds to the governing law of the matrix contract.[25] In *Torino*, the Master Agreement was governed by English law, without any indication that section 13(b) should be governed by a different law. And, as a matter of English law, the House of Lords has famously established that choice-of-forum clauses are interpreted expansively.[26] This approach has been faithfully upheld in other OTC derivatives cases, with courts emphasizing that jurisdiction clauses are construed with an eye to producing commercial results, consistent with the expectations of rational businesspeople.[27]

Indeed, Butcher J was effectively compelled to follow the Court of Appeal's judgment in *Deutsche Bank AG v Comune di Savona*.[28] In *Savona* too, the local authority alleged that the bank had mis-sold IRSs, breaching *inter alia* an advisory agreement entered into by the parties before executing a 1992 ISDA Master Agreement. In response, the bank sought declarations in England as to its supposed

[21] cf eg *Busto* (n 19) and the (in)famous Cattolica decision—Cass., Ss.Uu., 12.5.2020, n. 8770, in *DeJure*, esp §§ 6.6.1 and 8.1-8.3—particularly as applied in App. Milano, 22.3.2021, in *One Legale* and in Cass., 29.7.2021, n. 21830, in *DeJure*. For detailed comparisons of the different approaches adopted by English and Italian judges in relation to financial contracts, see M Barcellona, *La Cassazione e i derivati: tra pessime argomentazioni e condivisibili conclusioni*, in *La Nuova Giurisprudenza Civile Commentata*, 2022, 451 ff and A Gentili, *Regolare i contratti finanziari: una questione di approccio*, in *Rivista di diritto bancario*, 2025, 207 ff.

[22] Established in *Haugesund Kommune v Depfa ACS Bank*, [2010] EWCA Civ 579, [2012] QB 549.

[23] See J Braithwaite, 'Thirty Years of Ultra Vires: Local Authorities, National Courts and the Global Derivatives Markets' (2018) 71 CLP 369, esp 396–401 and A Fulton, 'Swaps Litigation: The Continuing Search for Certainty' (2023) 3 JIBFL 164, 165-166.

[24] Though some provisions, such as art 119, para 6 of the Italian Constitution, have been recognized to go to capacity: most authoritatively, *Banca Intesa Sanpaolo v Comune di Venezia* [2023] EWCA Civ 1482, [2024] Bus LR 228 [178]–[179].

[25] In *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117, cited in *Torino* (n 3) at [31] and *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, [2021] Bus LR 1717 [28] and [35]–[36].

[26] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951.

[27] Eg *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585, [2009] 1 CLC 934 [82]–[97] and *Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd* [2009] EWHC 2409 (Comm), [2012] 2 CLC 263 [25].

[28] [2018] EWCA Civ 1740, [2018] 4 WLR 151, cited in *Torino* (n 3) at [34].

liability under the IRSs, under the advisory relationship, and for breach of extra-contractual and pre-contractual duties. The Court of Appeal found that all declarations fell within the scope of the English courts' jurisdiction by virtue of section 13(b), even though the alleged advisory agreement included its own jurisdiction clause in favour of Italian courts. To account for this choice of Italian courts, the Court of Appeal simply qualified its declarations so as to clarify that the focus was 'the entry into, validity, enforceability, interpretation or performance of the Transactions'.[29] The advisory agreement in *Torino*, by contrast, did not include a choice of court, so there was no need for a similar qualification.[30]

Torino, though, goes further than *Savona* in two respects. First, rather than focusing on the declarations sought by the bank in England, Butcher J considered the claims brought by the local authority in Italy, concluding that Torino's Italian legal initiatives engaged section 13(b); this, in turn, opened the door to a possible finding that Torino breached that clause. Second, Butcher J was faced with the more demanding threshold for summary judgment, yet was satisfied that Torino's argument had no realistic prospect of success.[31]

It is notable that the phrase in question—'any suit, action or proceedings relating to this Agreement'—is a recurring one throughout the ISDA documentation. Accordingly, Butcher J's finding in this respect extends naturally to the 2002 version of the ISDA Master Agreement, as well as many bespoke spin-offs of the standardized ISDA document.

But, if this is correct, *Torino* sits in stark conflict with a 2023 ruling of the *Corte di Cassazione*. In its most authoritative composition—the *Sezioni Unite*—the Italian Court considered the scope of the standard 2002 version of section 13(b). While acknowledging the bank's argument that the jurisdiction clause should be read in light of English canons of interpretation,[32] the *Sezioni Unite* effectively ignored it: the ISDA jurisdiction clause, in their view, does not cover pre- and extra-contractual claims,[33] nor claims under an advisory agreement analogous to Torino's.[34]

London's High Court is an exceptionally popular forum for the resolution of commercial disputes,[35] and its popularity goes some way towards explaining the different approaches of English and Italian judges: on the one hand, English judges are eager to enhance the effects of jurisdiction clauses which, more often than not, are in favour of those same judges; on the other hand, Italian judges seek to curb the operation of forum selection clauses, which are usually meant to redirect disputes elsewhere. Simultaneously, however, the commercial merits of the English approach—better aligned with the expectations of rational businesspeople—do credit to English judges in the market for forum shopping, reinforcing the general preference for English litigation.

Effects: after Brexit, section 13(b) of the 1992 ISDA Master Agreement remains an exclusive jurisdiction agreement vis-à-vis the courts of all other states bound to apply the 2005 Hague Convention, irrespective of whether such Convention applies to any particular proceedings

If an ISDA Master Agreement is expressed to be governed by English law, section 13(b) confers jurisdiction on the English courts. Depending on the circumstances, such jurisdiction can be exclusive or

29 *Savona* (n 28) [28]. See also *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2019] EWCA Civ 768, [2020] 1 All E.R. 762, esp [102] and [108].
30 *Torino* (n 3) [33].
31 ibid [59], read jointly with [23(2)].
32 Cass., Ss.Uu., 14939/2023 (n 8), §4.
33 ibid §2.4(a).
34 ibid §4.1.
35 See Courts and Tribunals Judiciary, *Business and Property Courts: The Commercial Court Report 2023–2024 (Including the Admiralty Court Report)* (February 2025) <https://www.judiciary.uk/wp-content/uploads/2025/03/24.295_JO_Commercial_Court_Report_23-24_WEB.pdf> accessed 1 February 2026, 17; The Law Society of England and Wales, *International Data Insights Report* (2nd edition 2024) <https://www.lawsociety.org.uk/topics/research/international-data-insights-2024#download> accessed 1 February 2026, § 3.

non-exclusive, and the mechanism for determining the exclusivity of section 13(b) differs from one edition of the Master Agreement to another.

As regards the 1992 version of section 13(b), the last paragraph expressly entitles the parties to commence proceedings in other jurisdictions, subject to one carve-out: English courts' jurisdiction is exclusive vis-à-vis the courts of 'the Contracting States, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982 or any modification, extension or re-enactment thereof for the time being in force'.

At the time the Italian litigation started, section 1(3) of the Civil Jurisdiction and Judgments Act 1982 (CJJA) provided that 'Contracting State' denoted 'in the application of the provision in relation to the 2005 Hague Convention, a 2005 Hague Convention State', in the sense of 'a State bound by that Convention'. According to Torino, the 2005 Hague Convention did not apply to the claims brought in Italy and, therefore, Italy did not qualify as a State bound by the 2005 Hague Convention. On this view, the High Court's jurisdiction did not exclude that of the Court of Turin.

Torino's most significant contribution to the existing case law lies in Butcher J rejecting this argument. The Judge followed Torino's reasoning to the extent that the reference to 'Contracting States' is a dynamic one, with the consequence that whether a State qualifies as such is to be assessed 'at the time of the litigation'.[36] But, says Butcher J, the expression 'Contracting States' should be read in a 'simpler' way:

> Whether a state is a 'Contracting State' for the purposes of Clause 13(b), and thus falls within the ambit of exclusivity for English jurisdiction, does not depend on whether the identified Convention is applicable to the dispute under the relevant transactions, but only on whether that state is a party to, or is bound by, that Convention.[37]

'Contracting States', in essence, describes a '*class*'. Italy, being generally bound to apply the 2005 Hague Convention, belongs to such class, such that section 13(b) has the effect of excluding the jurisdiction of all Italian courts over Torino's claims, whether or not those particular claims fall within the scope of the 2005 Hague Convention.[38]

The class of Contracting States formulated by Butcher J is a relatively wide one, which includes states which are *bound by* the 2005 Hague Convention as well as those that are merely *a party to* it. The United States, for example, signed the 2005 Hague Convention, and in that sense is a party to it, but never ratified, accepted, approved, or acceded to it, so it is not bound by its provisions. There used to be Court of Appeal authority that, where a 1992 ISDA Master Agreement is governed by English law, section 13(b) applies non-exclusively towards US courts, but such precedent predates the 2005 Hague Convention and speaks to a time when the notion of 'Contracting States' turned on the Brussels Convention of 1968 and the Lugano Convention of 1988, which did not concern the USA at all.[39] Following *Torino*, in contrast, it would seem that section 13(b) also excludes the jurisdiction of US courts over disputes concerning English-law-governed derivatives.

Butcher J's reading of section 13(b) is best justified by the commercial realities at play. In broader terms, the conventional wisdom is that 'there is only limited benefit' in designating a court as non-exclusive forum, and the result is a general tendency towards construing choice of court agreements as exclusive.[40] More specifically, the latest generation of Italian swaps claims has seen the resurgence of the 'Italian torpedo', a defensive litigation strategy whereby one party pre-emptively sues the

36 *Torino* (n 3) [42]. For a historical account of the original rationale behind the drafting of Section 13(b), see PR Wood, *Set-off and Netting, Derivatives, Clearing Systems* in *The Law and Practice of International Finance Series*, vol 4 (2nd edn, Sweet & Maxwell 1995) para 12-058; ISDA, *User's Guide to the ISDA 2002 Master Agreement* (23 July 2003) 38; S James, *The Law of Derivatives* (Routledge 2014) 210–212.

37 *Torino* (n 3) [43].

38 ibid and [47].

39 *Royal Bank of Canada v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2004] EWCA Civ 7, [2004] 1 CLC 170 [3]–[4].

40 *Hin-Pro International v Compania Sud Americana* [2015] EWCA Civ 401, [2016] 1 All ER (Comm) 417 [64], but cf [51]. L Pearce, 'Jurisdiction Clauses in the English Courts: Is There a Presumption of Exclusivity?' (2016) 1 JIBFL 38A).

other in Italy, creating a situation of prolonged *lis pendens*.[41] Freed from the shackles of the Brussels I Recast Regulation, Italian judges are now afforded much greater freedom to refuse to decline jurisdiction in favour of UK courts and, then, to refuse to recognize and enforce UK judgments.[42] The effect, ultimately, is that jurisdiction clauses in favour of English courts risk being sterile in practice. In this light, interpreting section 13(b) as exclusive allowed Butcher J to conclude that Torino's Italian claims constituted a breach of contract and, by necessary implication, that the deployment of the Italian torpedo was, in the circumstances, wrongful. Further, and in more practical terms, a financial intermediary armed with a similar declaration could claim damages for its counterparty's breach or, especially after Brexit, apply for an anti-suit injunction. Thus, section 13(b) is given teeth.

Similar declarations have recently been granted in other Italian swaps claims,[43] and unsurprisingly so. As put by Briggs J, the ISDA Master Agreement is 'probably the most important standard market agreement used in the financial world', so 'it should, as 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'.[44] English courts find themselves in a virtuous cycle in which their flexible, market-minded attitude has made them extremely popular fora for the resolution of ISDA-governed disputes,[45] but, because the ISDA Master Agreement is effectively 'a source of privately created law for these transnational markets',[46] English courts bear a significant responsibility to ensure the proper operation of the ISDA documentation. As a result, English courts have developed a 'concern to act as the "court of record" in decisions interpreting English law governed standard form terms', 'even when the outcome is to fragment litigation between several forums'.[47] This concern is readily apparent in the Italian swaps claims, where English judges appear to be especially keen to provide derivatives dealers with the tools to defend against the Italian torpedo and to dissuade opportunistic claims abroad.

Read within the context of this market-minded approach, *Torino* also calls into question the limited, and by now somewhat dated, case law on the 2002 version of section 13(b). For the purposes of the 2002 ISDA Master Agreement, the key issue is whether the proceedings 'involve a Convention Court' in the sense of 'any court bound to apply to the Proceedings either … the 1968 Brussels Convention … or … the 1988 Lugano Convention'. Both instruments have been superseded and, for this reason, Andrew Smith J held in *SwissMarine Corporation Limited v OW Supply & Trading A/S* that neither the English nor the Danish courts qualified as Convention Courts, with section 13(b) operating as a non-exclusive choice of court.[48] In light of the most recent case law, however, one might wonder if *SwissMarine* is still good law. On the one hand, a more expansive interpretation of 'Convention Court' might be pushing against the textual boundaries of the 2002 ISDA documentation, but on the other hand, the same commercial considerations which justify the latest generation of Italian swaps judgments also weigh equally strongly against *SwissMarine*. Indeed, on Andrew Smith J's reading, section 13(b) is always non-exclusive—which it was clearly not meant to be—and, especially after Brexit, exposes parties to torpedo-like strategies and satellite litigation. These problems are compounded by a lack of uniformity, in that the two versions of the same Master Agreement would lead, in terms of dispute resolution, to profoundly different results. It is difficult to believe that this inconsistency could have been intended by rational businesspeople.

41 See M Franzosi, 'Worldwide Patent Litigation and the Italian Torpedo' (1997) 19 EIPR 382.

42 Among the principal culprits is, once again, Law n. 218/1995, art 64, para 1(f). See S Ring, 'Broken Justice: The Return of the "Italian Torpedo"' *Financial Times* (London, 5 May 2025) <https://www.ft.com/content/35e639df-dd4c-4b09-9478-24b0e9384546> accessed 21 August 2025.

43 *DB, Dexia v Brescia* (2024) (n 16) [231]–[234] and *Emilia Romagna* (n 11) [179].

44 *Lomas* (n 4) [53]. See also *Re Lehman Brothers International (Europe)* [2016] EWHC 2417 (Ch), [2017] Bus LR 1475 [48]; *Grant v FR Acquisitions Corporation (Europe) Ltd* [2022] EWHC 2532 (Ch), [2022] Bus LR 1283 [51]–[58].

45 See A Hudson, *The Law on Financial Derivatives* (Sweet & Maxwell 2017) para 6–113 and J Braithwaite, *The Financial Courts: Adjudicating Disputes in Derivatives Markets* (CUP 2020) 104–111 and 281.

46 Braithwaite (n 45) 2 and 30-32. See also Hudson (n 45) para 6-94.

47 Braithwaite (n 45) 106–107.

48 [2015] EWHC 1571 (Comm) [35].

The scope of the 2005 Hague Convention

Like any good chapter of an interesting chain novel, *Torino* ends with a cliffhanger. For the sake of Dexia's summary judgment application, Butcher J assumed that the 2005 Hague Convention did not apply to section 13(b), but specifically acknowledged that the issue was contested.[49] And contested with good reason. *Torino* confirms that, in the eyes of English judges, the 1992 ISDA jurisdiction clause is, as a matter of contractual interpretation, exclusive in specific circumstances. Yet foreign judges might disagree on the effect, the scope, or even the validity of section 13(b), in which case the risk of satellite litigation could persist. A possible solution to mitigate such risk is the 2005 Hague Convention, which is a powerful tool for enforcing exclusive jurisdiction agreements and the judgments given by the courts designated by such agreements. If available to derivatives dealers, the 2005 Hague regime would bind foreign judges, first, to decline jurisdiction and, then, to recognize and enforce English judgments like *Torino*, stopping strategies like the Italian torpedo in their tracks. The open question, though, is whether the 2005 Hague Convention can actually apply to disputes caught by the standard ISDA jurisdiction clauses.

The main obstacle, in this respect, is that the Convention only applies in connection with exclusive choice of court agreements,[50] which are defined in Article 3(a) as follows:

> an agreement concluded by two or more parties that meets [certain formal requirements] and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.

The prevailing view is that this definition is to be read restrictively so as to exclude, in particular, asymmetric jurisdiction agreements which are exclusive for one party but not the other, as well as jurisdiction agreements which designate (albeit exclusively) the courts of two or more Contracting States.[51]

But the 1992 ISDA clause is symmetric and, as found by Butcher J, designates the courts of only one Contracting State (the UK) to the exclusion of all other Contracting State courts. Indeed, *Torino* is an unambiguous authority that the 1992 version of section 13(b) is an exclusive choice of court among the Contracting States to the Hague 2005 Convention and, at least as a starting point, one would expect section 13(b) to be treated as exclusive in the application of the 2005 Hague Convention itself. Unsurprisingly, such starting point aligns quite nicely with market expectations, promoting the integrity of the ISDA documentation in two respects. First, it allows the 2005 Hague Convention to act as a harmonized regime that applies consistently across Contracting States, so as to surrogate the old EU framework. Second, it subjects section 13(b) to a highly favourable body of rules, which leaves very little room to refuse the enforcement of the jurisdiction clause or the recognition of judgments handed down by the designated courts. Thus, it flattens the idiosyncrasies of national laws, curbs the discretion of national judges, and ultimately ensures that section 13(b) is consistently given proper effect.

Consider the alternative. *Firth on Derivatives Law and Practice*—arguably the most authoritative work on the ISDA documentation[52]—has argued that section 13(b) falls outside the scope of the 2005 Hague Convention. The argument is not fully fleshed out, but appears to be that section 13(b)

[49] *Torino* (n 3) [38].

[50] Art 1(1). Naturally, there are other requirements that must be satisfied for a forum selection agreement to be caught by the 2005 Hague Convention—see eg arts 3(c) and 16—but this article will focus on art 3(a).

[51] See TC Hartley and M Dogauchi's *Explanatory Report* (off-print of the Proceedings of the Twentieth Session, Tome III) paras 105–106 and 247–249 and L Collins et al, *Dicey, Morris & Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell 2022, with 2nd supp 2025) paras 12-089–12-091. For critical perspectives on this restrictive approach, see *Commerzbank AG v Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm.), [2017] 1 WLR 3497 [39] and [74] and Merrett (n 10) 57–58. The argument put forth by Merrett is, at the risk of oversimplification, that 'the effect of a clause can only be judged by considering the effect of a particular obligation on a particular party' but—despite its considerable persuasive force—such argument has found little traction.

[52] See Braithwaite (n 45) 114 and *Lomas v JFB Firth Rixson Inc* [2012] EWCA Civ 419, [2012] 2 All ER (Comm) 1076 [2].

expressly preserves the jurisdiction of certain non-English courts—that is, the courts of non-contracting States—so cannot be construed as designating English courts '*to the exclusion of the jurisdiction of any other courts*', as required by Article 3(a).[53] To a somewhat similar effect, but in decidedly more tentative terms, ISDA itself suggested in its *Brexit FAQs* that the 2005 Convention only applies 'where the jurisdiction clause is of a very straightforward exclusive form' and, for this reason, that the 1992 version of section 13(b) 'is unlikely to fall within the scope of the 2005 Hague Convention'.[54] Nevertheless, ISDA's *Brexit FAQs* date back to 2020, at the height of the Brexit uncertainties, and in fact specify that 'there may be further debate' on this issue.[55]

If *Firth* were correct, the consequences would be severe. At best, ISDA users would receive the protection afforded by the 2019 Hague Convention, which is much more limited compared to its 2005 counterpart.[56] The existing English case law on OTC derivatives is largely the result of section 13(b) 'pulling into this jurisdiction dozens of disputes involving global derivatives transactions'[57] and, without the robust protection of the 2005 Hague Convention, strategies like the Italian torpedo risk seriously undermining decades' worth of market expectations.

Firth concludes that the ISDA documentation is 'somewhat out of date' in this respect, pointing to the alternative template provisions published by ISDA in the meantime.[58] One might wonder, however, how useful those alternative clauses can be for parties who are already locked into a standard ISDA Master Agreement. In theory, establishing and maintaining efficacious exclusive jurisdiction clauses can benefit both parties because 'it provides certainty and the selection of a court which will be neutral and which will be applying its own law'.[59] Yet, in practice, the Italian swaps cases demonstrate that one party can have an enormous advantage in maintaining the contractual documentation out of line with the international legal framework.[60] In effect, *Firth*'s reading risks leaving a significant section of the market stranded in a jurisdictional limbo.

The use of standardized contractual documents naturally fosters a certain degree of inertia, discouraging parties from revisiting or updating their own contractual documentation, and thereby creating a risk of occasional misalignments with the underlying legal framework.[61] But in this case, the misalignment between the 1992 ISDA Master Agreement and the 2005 Hague Convention seems more apparent than real. Specifically, the remainder of this article puts forth two alternative arguments why the 2005 Hague Convention can, in fact, apply in relation to the 1992 ISDA Master Agreement. These arguments are informed, respectively, by the background and purpose of the 2005 Hague Convention and by the peculiar structure of section 13(b).

A slightly expansive reading of Article 3(a)

One way of looking at this issue is by starting with the 2005 Hague Convention.

Implicit in the argument advanced in *Firth* is that a choice of court is only exclusive, for the purposes of the 2005 Hague Convention, if it is to the exclusion of any other court *in the world*. However, Article 3(a) does not include the italicized wording, and may lend itself to a different reading: that is, that an exclusive choice of court 'designates … the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts' … *of the Contracting States*. The issue, in essence, is what the expression 'any other courts' refers to.

53 S Firth, *Firth on Derivatives Law and Practice* (Sweet & Maxwell 2025) para 12.125.
54 ISDA, *Brexit FAQs—Version 8* (21 July 2020) <https://www.isda.org/2020/07/21/brexit-faq/> accessed 1 February 2026, answer to question 10.4.
55 ibid, answer to question 14.
56 Chiefly because the 2019 Hague Convention is only concerned with the recognition of foreign judgments, and not the earlier issue of enforcing jurisdiction agreements, and because the later Convention affords national judges greater freedom to refuse recognition of a foreign judgment, particularly in cases of *lis pendens*. See, generally, *Dicey* (n 51) para 14-021.
57 Braithwaite (n 23) 393.
58 Firth (n 53) para 12.125. See also ISDA (n 54) answer to question 14.
59 *Hin-Pro* (n 40) [76]. See also TC Hartley, *Civil Jurisdiction and Judgments in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* (2nd edn, OUP 2023) para 13.09
60 See R Goode and E McKendrick, *Goode and McKendrick on Commercial Law* (6th edn, Penguin 2020) para 38.132.
61 SeeA Hudson, *The Law of Finance* (Sweet & Maxwell 2013), para 19-05 and Hudson (n 45) paras 6-112 to 6-116.

Within the text of Article 3(a), there is not much pointing one way or the other. On the one hand, of course, the phrase 'any other' is a wide one, which tends to support *Firth*'s interpretation. On the other hand, these are only two words in a rather long and elaborate definition, and one may question whether they are sufficient on their own to restrict the scope of the 2005 Hague Convention so drastically.[62] Indeed, a more holistic reading of Article 3(a) might lend itself to an *ejusdem generis* analysis: earlier on, Article 3(a) introduces an important qualification, referring specifically to 'the courts *of one Contracting State* or one or more specific courts *of one Contracting State*', and this qualification might extend, *mutatis mutandis*, to the later expression 'any other courts'. Nevertheless, this reading is undoubtedly far from straightforward.

Like Article 3(a) itself, the leading commentaries on the 2005 Hague Convention are not particularly precise in their use of language on this point. The official Explanatory Report, for example, asserts that pursuant to Article 3(a), 'the agreement must designate the courts of one State, or one or more specific courts in one State, to the exclusion of all other courts'.[63] Strictly speaking, the references should be to *Contracting* States, though a reader would readily understand this to be implied. But how far does this implied qualification extend? Could it also be implied that the agreement must exclude the jurisdiction of 'all other courts' … *of the Contracting States*? Similarly, a weighty monograph notes that Article 3(a) 'means that it is not possible under Hague to designate the courts of two *Contracting* States … or specific courts in two *contracting* States'.[64] But what about agreements which admit proceedings in *non-contracting* States?

A possible explanation for this linguistic glitch is found in another commentary, which points out that Article 3(a) was an especially difficult provision for the Diplomatic Conference to negotiate and draft. As a result, '[t]he final language of Article 3(a) is a consensus position, with inevitable ambiguity'.[65] As a more general point, one of the main challenges faced by the Diplomatic Conference was balancing the interest in legal certainty against the need for flexibility to accommodate different legal traditions, with the consequence that 'there is and will remain considerable play in the joints of this Convention'.[66] This account also explains why the earlier preparatory works—drafted before the Diplomatic Conference's input—consistently use more rigorous language, specifically referring to excluding 'the jurisdiction of any other court *under the Convention*'.[67] However, precisely because of the significant work done by the Diplomatic Conference, '[w]e cannot simply transfer an interpretive statement made about the earlier text to the 2005 text'.[68]

Nevertheless, the *travaux préparatoires* proper do shed some light on the true meaning of Article 3(a).

In the first place, the Explanatory Report opens by summarizing the aim of the 2005 Hague Convention, that is, 'making choice of court agreements as effective as possible'. To this end, the Convention 'has to ensure' that 'the chosen court must hear the case when proceedings are brought before it' and, inversely, that '*any other court* before which proceedings are brought must refuse to hear them'.[69] At least in this context, 'any other court' must necessarily refer to the courts of the Contracting States, because only those courts can be bound by the 2005 Hague Convention to

[62] On the general approach to the interpretation of international agreements, see the Vienna Convention on the Law of Treaties of 1969, arts 31–32 and, from an English perspective, D Bailey and L Norbury, *Bennion, Bailey & Norbury On Statutory Interpretation* (8th edn, LexisNexis 2022) chapter 11, esp § 11.6 on the expectation that legislative sources will be interpreted with an eye to the likely consequences of adopting each of the interpretations proposed.

[63] Hartley and Dogauchi (n 51) para 93. See also para 12.

[64] TC Hartley, *Choice-of-Court Agreements under the European and International Instruments: The revised Brussels I Regulation, the Lugano Convention, and the Hague Convention* (OUP 2023) para 7.41. Emphases added.

[65] RA Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements Commentary and Documents* (CUP 2009) 42.

[66] ibid 24.

[67] Art 12(5) of the *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil And Commercial Matters adopted by the Special Commission on 30 October 1999*, Preliminary Document No 11 of August 2000 <https://assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf> accessed 21 August 2025.

[68] Brand and Herrup (n 65) 31.

[69] Hartley and Dogauchi (n 51) paras 1 and 4. Emphasis added. See also A Schulz, *Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Preliminary Document No 19 of August 2002 (off-print of the Proceedings of the Twentieth Session, Tome III) para 58.

decline jurisdiction. The Convention cannot bind courts of non-contracting States,[70] and it would be absurd for it to purport to do so.

More broadly, the assumption throughout the *travaux* is that the 2005 Hague Convention is only meant to govern the relationship between the courts of different Contracting States. Non-contracting States are hardly ever mentioned[71] and, in the rare instances in which it was hypothesized that they might fall within the scope of the Convention, those proposals were not carried over into the final text.[72] As Butcher J pointed out in *Torino*, at the heart of the 2005 Hague Convention lies the idea of a class of (Contracting) States, and the provisions of the Convention are almost exclusively concerned with members of that class. In fact, when the Explanatory Report offers some more practical examples—of different jurisdiction agreements, for instance—it takes care to expressly clarify that all States mentioned are assumed to be parties to the 2005 Hague Convention.[73] These materials simply do not contemplate jurisdiction agreements which designate the courts of non-contracting States.

If, then, the operation of the 2005 Hague Convention is generally indifferent to non-contracting States, the same can be said of Article 3(a) in particular: for the purposes of determining whether a choice of court agreement qualifies as exclusive, the position of non-contracting State courts is immaterial; what matters is that the agreement designate the courts of one Contracting State to the exclusion of all other Contracting State courts, because it is only those latter courts that can be bound by the 2005 Hague Convention.

In this sense, section 13(b) of the 1992 ISDA Master Agreement is perfectly aligned with the 2005 Hague Convention, as it establishes exclusive jurisdiction vis-à-vis precisely those courts that are required, under the Convention, to give effect to exclusive choice of court agreements by declining jurisdiction. Section 13(b) thus generates exclusivity precisely where it can benefit from the full legal protection contemplated by the Convention. Within this geographical area, the 2005 Hague Convention can function perfectly well to uphold the effectiveness of the ISDA choice of court.

Indeed, the preparatory works reveal that the main reason why the Diplomatic Conference ultimately decided to limit the 2005 Hague Convention to exclusive choice of court agreements was ‘to

[70] In case there was any doubt, this is made clear by art 16(2).

[71] In summary, non-contracting States are mentioned in three cases. First, to ensure that the wording of the Convention would not afford them ‘an unjustifiable advantage’: see TC Hartley and M Dogauchi’s *Preliminary draft Convention on Exclusive Choice of Court Agreements Explanatory Report*, Preliminary Document No 26 of December 2004 (off-print of the Proceedings of the Twentieth Session, Tome III) para 151. Second, to reconcile the 2005 Hague Convention with other international agreements: see A Schulz, *The Relationship between the Judgments Project and other International Instruments*, Preliminary Document No 27 of April 2005 (off-print of the Proceedings of the Twentieth Session, Tome III) 149 and following; Hartley and Dogauchi (n 71) paras 227–231; the *Minutes No 10 of the meeting of Tuesday 27 April 2004 (morning)* (off-print of the Proceedings of the Twentieth Session, Tome III) 477; the *Minutes No 21 of the meeting of Tuesday 28 June 2005 (afternoon)* (off-print of the Proceedings of the Twentieth Session, Tome III) 713; Hartley and Dogauchi (n 51) para 279. Third, in a miscellany of one-off queries raised by individual members of the Diplomatic Conference: see the *Minutes No 3 of the meeting of Wednesday 15 June 2005 (morning)* (off-print of the Proceedings of the Twentieth Session, Tome III) 582; and the *Minutes No 11 of the meeting of Tuesday 21 June 2005 (morning)* (off-print of the Proceedings of the Twentieth Session, Tome III) 640.

[72] Some of the earlier documents suggested that the Convention might apply to exclusive jurisdiction agreements in favour of courts in non-contracting States, in which case the courts of Contracting States would be bound to decline jurisdiction: see Schulz (n 69) paras 69–72 and fn 42; and A Schulz, *Report on the Work of the Informal Working Group on the Judgments Project, in particular on the Preliminary Text Achieved at its Third Meeting*, Preliminary Document No 22 of June 2003 (off-print of the Proceedings of the Twentieth Session, Tome III) para 75. This suggestion was ultimately rejected: Hartley and Dogauchi (n 51) para 100. Other documents suggested that that the courts of the Contracting States could be bound to refuse recognition and enforcement of judgments issued by courts of non-contracting States which are incompatible with an exclusive jurisdiction agreement: see Hartley and Dogauchi (n 71) paras 172–175; A Schulz, *Report on the Meeting of the Drafting Committee of 18 to 20 April 2005 in Preparation of the Twentieth Session of June 2005*, Preliminary Document No 28 of April 2005 (off-print of the Proceedings of the Twentieth Session, Tome III) paras 25–38; the *Comments on the Preliminary Draft Convention on Exclusive Choice of Court Agreements*, Preliminary Document No 29 of May 2005 (off-print of the Proceedings of the Twentieth Session, Tome III) 301; A Schulz, *The Future Convention on Exclusive Choice of Court Agreements and Arbitration Parallel proceedings and possible treaty conflicts, in particular with ICSID and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Preliminary Document No 32 of June 2005 (off-print of the Proceedings of the Twentieth Session, Tome III) paras 54 and 60; and the *Minutes No 10 of the meeting of Monday 20 June 2005 (afternoon)* (off-print of the Proceedings of the Twentieth Session, Tome III) 633 and 636–637. This suggestion was not carried over into the final text of the Convention either.

[73] Hartley and Dogauchi (n 51) p 789 and various fns thereafter.

avoid the problems that would otherwise arise with regard to *lis pendens*'.[74] But the 2005 Hague Convention does not set out to prevent all instances of *lis pendens*—nor could it!—and it is quite clear that not all cases of *lis pendens* were 'problematic' from the perspective of the Diplomatic Conference. The *travaux* expressly clarify, for example, that it is not the function of the 2005 Hague Convention to regulate parallel proceedings between different courts of the same Contracting State.[75] The rationale, it seems, is that this form of *lis pendens* is a purely domestic issue, which lies beyond the Convention's legitimate (international) ambit. In fact, what the Diplomatic Conference had in mind as 'problematic' was the possibility of parallel proceedings in different Contracting States, which is an issue that the Convention could have, and would have, had to deal with.[76] By contrast, the 2005 Hague Convention could not realistically regulate parallel proceedings which involve a non-contracting State court, because such proceedings lie outside of the Convention's territorial scope. The fundamental point, picked up by Butcher J, is that the 2005 Hague Convention is concerned with governing the relationship between different members of the class of Contracting States, and issues which involve non-contracting States are simply not the Convention's concern.

Jurisdiction clauses like section 13(b) do not admit parallel proceedings being lawfully commenced in multiple Contracting States at once, so they do not give rise to the sort of mischief which justified limiting the 2005 Hague Convention to exclusive choice of court agreements in the first place. In light of the *travaux*, it is therefore difficult to justify denying such clauses the protection of the Hague 2005 regime, which would seem to be at odds with the central purpose of the Convention—that is, enhancing the effectiveness of choice of court agreements.

A reconstructive interpretation of section 13(b)

Alternatively, another way of looking at the same issue—the applicability of the Hague 2005 Convention—is by focusing on the text of the 1992 ISDA Master Agreement. Indeed, there may be scope for a reconstructive interpretation of section 13(b), capable of engaging the 2005 Hague Convention on any reading of Article 3(a), including *Firth*'s more restrictive one.

As a matter of method, the idea of a reconstructive interpretation might raise a few red flags, given that English judges could not make it clearer that they 'will not, indeed cannot, use the canons of construction to rescue one party from the consequences of what that party has clearly agreed'.[77] At least in theory, 'the court has no power to *improve* upon the instrument which is called upon to construe … It is concerned only to *discover* what the instrument means'.[78] In practice, however, the line between legitimate and illegitimate exercises of contractual interpretation is very fine,[79] and English judges also recognize the creative role which they inevitably perform: '[w]e mitigate the uncovenanted effects of literalism not by nakedly writing a new contract for the parties but by construing the words according to principles which enable the contract, in effect, to be reconstructed'.[80] In practice, such a reconstructive approach can be seen at work in relation to jurisdiction clauses, which are consistently interpreted as exclusive rather than non-exclusive, if the latter reading would render the

[74] Hartley and Dogauchi (n 51) paras 47–48. See also the *Minutes No 9 of the meeting of Monday 26 April 2004 (afternoon)* (off-print of the Proceedings of the Twentieth Session, Tome III) 473; and the *Minutes No 17 of the meeting of Friday 24 June 2005 (morning)* (off-print of the Proceedings of the Twentieth Session, Tome III) 687, which also refer to 'a need to reintroduce … *forum non conveniens* rules'.

[75] Schulz, *Report on the Third Meeting* (n 72) fn 21.

[76] See A Schulz, *Report on the Second Meeting of the Informal Working Group on the Judgments Project 6 to 9 January 2003*, Preliminary Document No 21 of January 2003 (off-print of the Proceedings of the Twentieth Session, Tome III) para 12, which refers to 'further risks for the acceptance of this Convention', as if the *lis pendens* problems in question could only affect Contracting States; Schulz, *Report on the Third Meeting* (n 72) para 63, which refers to the existence 'more than one basis of jurisdiction lawfully available *under the Convention*' (emphasis added), implying that the *lis pendens* at issue must be between multiple courts within the scope of the Convention, ie Contracting State courts.

[77] *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd* [2016] EWCA Civ 1990, [2017] 1 WRL 1893 [39].

[78] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1998 [16] *per* Lord Hoffmann. Emphases added. See also *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 (HL) 388C and

Wood v Sureterm [2017] UKSC 24, [2017] AC 1173 [41].

[79] See *Sugarman v CJS Investments LLP* [2014] EWCA Civ 1239, [2015] 1 BCLC 1 [44]; *Wood v Sureterm* [2015] EWCA Civ 839 [31].

[80] *Casson v PJ Ostley Ltd* [2001] EWCA Civ 1013 [32] *per* Sedley LJ.

clause 'idle'.[81] So too, the interpretation of the ISDA Master Agreements is informed, as seen, by their systemic role within the OTC markets, with judges consistently favouring more market-friendly readings.[82]

In relation to the 2005 Hague Convention, a reconstructive interpretation of the 1992 ISDA Master Agreement might look like this. The Hague Convention relates to choice of court *agreements*, not to jurisdiction clauses *per se*. In principle, the same clause could comprise multiple jurisdiction agreements, only some of which are covered by the Convention. In this sense, section 13(b) might be severed in two parts: vis-à-vis Contracting States, English courts are conferred exclusive jurisdiction; vis-à-vis other courts, English courts are designated non-exclusively. In proceedings like *Torino*, only the former limb applies, and applies as an unquestionably exclusive choice of court. On any interpretation of Article 3(a), this contractual mechanism is amenable to the 2005 Hague regime.

This construction also explains, and is supported by, the peculiar structure of the 1992 version of section 13(b), which is unquestionably a work of complex drafting. A distinctive feature of the ISDA clause, when compared to many other jurisdiction clauses, is that it can be neatly severed in two sentences, each its own independent speech-act. The first sentence (the First Sentence) is composed of the introductory formula ('With respect to any suit … ') and then sub-clauses (i) and (ii). Read in isolation, the First Sentence provides that, where the Master Agreement is subject to English law, the parties submit to the jurisdiction of the English courts, without specifying whether that jurisdiction is exclusive or non-exclusive. This engages Article 3(b), pursuant to which choice of court agreements are 'deemed to be exclusive unless the parties have expressly provided otherwise'. Since the First Sentence contains no such express qualification, it is deemed to be an exclusive jurisdiction agreement in favour of the English courts, within the scope of Article 3(a) of the 2005 Hague Convention.

The second sentence of section 13(b) (the Second Sentence) consists of the concluding proviso ('Nothing in this Agreement … ') which, by way of derogation from the rest of the Master Agreement, entitles the parties to commence 'Proceedings' outside the Contracting States. This is a non-exclusive jurisdiction agreement which preserves the jurisdiction of non-contracting State courts and, when it applies, has the effect of disapplying the First Sentence. However, this occurs only in circumstances where the Second Sentence actually applies, that is, where Proceedings are commenced in a non-contracting State. Beyond such pocket of cases, the Second Sentence does not deprive the First Sentence of its exclusionary effect.

So, in cases like *Torino*, the commencement of Proceedings in Italy—which is always a Contracting State, says Butcher J—triggers the First Sentence only. The Second Sentence simply does not bite, meaning that the First Sentence can apply as a self-standing, exclusive choice of court agreement for the purposes of the 2005 Hague Convention.

Conclusion

Butcher J's contribution to the Italian swaps chain novel sits very comfortably alongside his co-authors' earlier work. *Torino* engages with some novel arguments advanced by aggrieved local authorities but, in rejecting all, embraces the pragmatic and market-friendly approach which characterizes English judgments on English-law-governed ISDA derivatives. This approach is most noticeable where Butcher J establishes continuity, pre- and post-Brexit, as regards the exclusivity of the 1992 ISDA jurisdiction clause vis-à-vis the courts of other Contracting States. The Judge, like those before him, was also willing to confront substantive issues of Italian law—such as Law n. 218/1995—while firmly insisting on English law as the proper law of section 13(b).

81 *Dicey* (n 51) para 12-074, citing among other cases *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588 (CA) 591-592; *A/S D/S Svendborg v Wansa* [1997] 2 Lloyd's Rep 183 (CA) 186; and *British Aerospace Plc v Dee Howard Corp* [1993] 1 Lloyd's Rep 368 (Comm) 373.

82 See nn 45–48 and, more generally on the interpretation of standardised documentation such as the ISDA Master Agreement, J Golden, 'Interpreting ISDA terms: when market practice is relevant, as of when is it relevant?' (2014) CMLJ 299. Beyond the realm of contractual interpretation see also O Ariyo, 'The "Hedging or Speculation" Question in Determining the Capacity of Public Bodies to Trade Derivative Transactions' (2025) CMLJ 1, 6–7.

All this is certain to please OTC derivatives dealers, who are now well-placed—possibly better placed than ever—to defend against torpedo-like strategies, at least in relation to the 1992 ISDA Master Agreement. The position in relation to the 2002 Master Agreement, however, is far less certain, and it remains to be seen whether *SwissMarine* is still good law after *Torino*.

Most importantly, *Torino* hints at the apparent misalignment between two sources of law which are vital to the proper functioning of the international OTC markets: that is, a private source of transnational law, in the form of the ISDA Master Agreement, and a public source of international law, in the form of the 2005 Hague Convention. Despite an eminent writer suggesting that the two are irreconcilable, the more coherent interpretation—coherent with market expectations, with the preparatory works for the 2005 Hague Convention, with the peculiar drafting of the 1992 version of the section 13(b), and more generally with the limits of legitimate interpretation—is that the 2005 Hague regime can apply to the 1992 ISDA Master Agreement.

And the Italian swaps saga demonstrates that English courts may find themselves under considerable pressure to reconcile the ISDA documentation with the current international framework. The renegotiation of legacy Master Agreements is not always a realistic option, in which case the legal solution can only be found in court by a judge. The Italian swaps cases also show that different national courts respond to very different concerns, and the next chapter of the chain novel—on the applicability of the 2005 Hague regime, a very important chapter indeed—may vary depending on whether it is written in the Rolls Buildings or, for example, an Italian courtroom. In this respect, of course, much depends on the vagaries of litigation, but much also depends on the willingness of English judges to use their interpretative tools to their full extent, if given the chance, to promote the proper functioning of the OTC markets.

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