NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 22 SUMMER 2026 NUMBER 3

# THE ENFORCEABILITY OF CROSS-BORDER DERIVATIVES: OF *LEX MERCATORIA*, COURTS, AND DIALOGUE

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*Cross-border Over-the-Counter (OTC) derivatives underpin global financial markets' stability. They are governed by the International Swaps and Derivatives Association Master Agreement (ISDA MA), an example of successful lex mercatoria. However, a string of lawsuits spanning the last decade and a half has cast doubt over the enforceability of cross-border derivatives. This Article delves into these disputes, finding three main causes. First, the ISDA MA primarily relies for its enforcement on the laws, and courts, of England and New York. This creates a vulnerability when other jurisdictions, and their laws, not chosen in the contract, come nonetheless into play, as mandatory laws, public policy, or sources of non-contractual liability. Second, English and Continental European courts disagree on how to approach cases where (i) a bank's client alleges that the bank failed to properly disclose a transaction's risks, or to give proper advice, resulting in liability, or contract invalidity, while (ii) the bank alleges that the contract includes representations that negate the existence of disclosure or advisory duties. Moreover, courts historically focused more on affirming their own (partial) jurisdiction over the contract claim (English courts) or the advisory/disclosure duties' claim (Continental European courts), instead of finding common ground. Third, numerous cross-border disputes have focused on the alternative issue of whether the banks' clients had "capacity" to celebrate "speculative" transactions. However, determining whether a transaction is speculative is an uncertain, often futile exercise, while "capacity" is a concept that makes*

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*compromise impossible. The outcome, negative for all parties, and risky for derivatives markets, nonetheless provides an opportunity for reflection. The Article outlines possible solutions to the impasse, emphasizing the importance of deeper inter-court dialogue, to pursue a more plural lex mercatoria for derivatives.*

## INTRODUCTION

Cross-border derivatives litigation has been prominent in the past fifteen years. Norwegian and Italian municipalities, German and Portuguese public corporations, and Dutch housing associations, to name a few, have all sought to annul the derivatives contracts they once entered into. In response, English courts have asserted their jurisdiction, and the application of English law; they have acknowledged foreign laws on capacity, but they have sought to protect the validity of the contract, or to mitigate the effects of voidness. This failed to ease the tension. Norwegian local corporations refused to pay the moneys owed; a Dutch housing association sued other banks, while being on the brink of collapse; and Italian municipalities engaged in unilateral action, contumacious behavior, and parallel proceedings. The picture is not pretty.

Look past each individual dispute, and there are common elements that explain the tensions. This Article presents the anatomy of those tensions, and courts' failure to resolve them. First, this Article describes how the governing contractual framework, the International Swaps and Derivatives Association (ISDA) Master Agreement (MA), an example of successful *lex mercatoria,*[1] is designed to be self-contained, and protected from external threats to its validity, by relying primarily on the jurisdiction of English and New York courts, and on English and New York law for its enforcement; yet, conversely, it is not good at facilitating dialogue between those laws, and courts,

1. This Article accepts the conception of *lex mercatoria* as an emerging set of legal norms, procedures, and institutions outside the state and its institutions as a basis. *See infra* Section I.A. However, instead of a "pure" version of this conception, where there is no state interference, the Article wishes to emphasize the opposite idea. Even the ISDA MA, a phenomenally successful privately originated set of rules, relies on courts, and national laws, for its enforcement, and raises issues of legitimacy, which, if not properly addressed, can ultimately undermine its effectiveness.

and other laws and courts, when such validity may legitimately be challenged.

This would not be a problem if there were essential agreement between English/New York courts and other courts. Unfortunately, at least courts in numerous Continental European countries consider that financial intermediaries, including banks, are subject to duties to adequately disclose the risk of a transaction, or give advice;[2] in contrast, courts in England see derivatives as a commercial contract, banks as normal commercial counterparties, and rely on contract representations that negate disclosure, advisory, or fiduciary duties. Even in the best-case scenario, this disagreement is tense and complex. The next two sections describe how the scenario has been far from the best.

Next, Section II discusses how litigating parties have pled their cases by appealing to courts' experience in each jurisdiction with banks framing the problem as one of contract representations before English courts, and clients as one of disclosure and advisory duties before courts in Continental Europe (with Italy offering the greatest number of cases). While this approach was strategically sensible for the parties, it meant that courts were presented with a half-truth at best, and, by accepting the parties' characterization, courts avoided the

2. The terms "disclosure duties," "advisory duties," etc. used here encompass the doctrinal developments in jurisdictions such as Germany, Italy, France, Spain or the Netherlands, which emphasize financial intermediaries' duty to properly disclose the risks of a financial transaction, and, in case there is a relationship of financial advice, ensure that the product is suitable for the client's needs. Regulatory provisions, such as Articles 24 and 25 of Directive 2014/65/EU on Markets in Financial Instruments (MiFID) contemplate those duties. However, the scope of such duties goes beyond financial regulation, and shapes private law obligations, resulting in contract voidness, in the most serious cases, or giving remedies such as termination and/or damages. Some courts, e.g., in Germany, have developed such duties independently from regulation, while others have used regulatory provisions to shape pre-existing duties. These duties can apply with varying intensity to retail and other clients but are not automatically excluded if a client is non-retail. For a comparative analysis, see MARCO LAMANDINI & DAVID RAMOS MUÑOZ, FINANCE, LAW AND THE COURTS: FINANCIAL DISPUTES AND ADJUDICATION 310–319 (2023); DANNY BUSCH & CEES VAN DAM, A BANK'S DUTY OF CARE (2019); David Ramos Muñoz, *The Validity of Derivatives Contracts. Legal Doctrine as a Vehicle of Dialogues on 'Speculation'*, 26 EUR. BUS. ORG. L. REV. 141 (2025). I posit that these duties and doctrines are the form in which courts in Continental Europe have managed to transform fruitless criticism of "speculation" into a fruitful discussion about how risks should be properly managed.

real cross-border issue: the interplay between English contract representations and Continental European mandatory advisory duties. As such, the matters were settled by default, without discussing the full scope of the issue.

Section III considers how in the same vein, bank clients choose to plead before English courts that they lack capacity to subscribe speculative transactions. Again, this is strategically rational because arguments of "capacity" and "speculation" resonate with English precedent and make English courts potentially more inclined to acknowledge the role of clients' local personal laws. However, framing the conflict in terms of "capacity" and "speculation" is deeply problematic. Capacity is a rigid, uncompromising term: an entity has it, or not. "Speculation" is vague, and sometimes impossible to establish. Combined, they substantiate allegations that invariably make the client appear opportunistic and disingenuous, and force the court into an all-or-nothing position with the potential for contract voidness. English courts predictably sought to limit findings of voidness, or mitigate its consequences, but this, also predictably, has only deepened the schism.

Each actor has behaved as expected to avoid or mitigate a risk. However, the compounded effect has been miscommunication, misunderstanding, and mistrust. The conflict may blow over—or blow up, with a real risk that financial disputes may result in inconsistent judgments or migrate away from courts. This would be sad and unnecessary if dialogue is given a chance. Inter-court dialogue is a well-known idea, which encompasses both "formal" dialogue where national courts in one jurisdiction ask courts with a different jurisdiction to clarify a specific issue, and "informal" dialogue, where courts acknowledge other courts' views as a persuasive, if not authoritative source.[3] Section IV provides an onward perspective with potential avenues to move forward, and expresses a preference for a more dialogical, but still court-based system of dispute resolution and governance.

3. Marco Lamandini, David Ramos Muñoz & Violeta Ruiz Almendral, *The EMU and Its Multi-Level Constitutional Structure: The Need for More Imaginative 'Dialogue' Among and Across EU and National Institutions*, 47 LEGAL ISSUES ECON. INTEGRATION 311 (2020).

## I.
## Design: The Self-Contained Framework of the ISDA and the Challenges for Cross-Border Dialogue

Cross-border derivatives disputes have typically involved contract documentation subject to the ISDA MA, which is seen as an example of *lex mercatoria*. Thus, it is useful to analyze: (A) how *lex mercatoria* protects its legitimacy and integrity; (B) how the ISDA MA's structural features promote legal certainty while limiting legal pluralism; (C) how core ISDA provisions on interpretation and validity interact with diverse legal traditions; and (D) the broader societal questions embedded in derivatives disputes that courts are often called upon to resolve.

### A. *Lex Mercatoria and Transnational Law: Legitimacy and Integrity*

The *lex mercatoria* can find as many definitions as there are scholars. This Article accepts as a basis the conception of *lex mercatoria* as an emerging set of legal norms, procedures, and institutions outside the state and its institutions,[4] although under a broad view, which encompasses rules that may originate outside states and their institutions, but still rely on state institutions, like courts, for their application and enforcement.

It is difficult to adopt a conception of *lex mercatoria* without acknowledging the academic debates on its true nature, and role. Some scholars view it as a complement to national legal systems,[5] others see it as an autonomous system,[6] and still others focus on the conditions under which it could emerge as such an autonomous system.[7] Most views agree that, empirically speaking, a body of transnational commercial law exists. However, this body is not autonomous from the state; rather, it coexists

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4. Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 Ind. J. Global Legal Stud. 447, 448 (2007).

5. Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, 4 Arb. Int'l 86, 88 (1988).

6. Klaus Peter Berger, The Creeping Codification of the Lex Mercatoria 61 (2010).

7. Gralf-Peter Calliess, *Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law*, 23 Zeitschrift für Rechtssoziologie 185 (2002); Gunther Teubner, "Global Bukowina: Legal Pluralism in the World Society" in Global Law Without a State 3–28 (Gunther Teubner ed., 1997); Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 Eur. L.J. 400, 418 (2002).

with and relies upon state structures, including legislatures and courts.[8]

Indeed, a search for a pure *lex mercatoria*, completely autonomous from the state, misses the bigger picture, where private transactions and disputes are regulated by a diverse ensemble of rules and procedures, which present varying degrees of state involvement in their production and application. These comprise, at the state-based end of the spectrum, treaties like the UN Convention on Contracts for the International Sale of Goods (CISG), which was produced by the United Nations Commission on International Trade Law (UNCITRAL), and relies on states' ratification to take effect,[9] or other UNCITRAL texts, such as the Model Law on International Commercial Arbitration. At the private end of the spectrum there are standard contract terms generated by trade organizations, such as the Baltic and International Maritime Council (BIMCO) rules governing maritime carriage[10] or the Uniform Customs and Practice for Documentary Credits (UCP).[11] Codified soft law norms, like the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts,[12] would be in between, as they rely on incorporation by private parties into their contracts, but also on arbitrators' and courts' recourse to them as a persuasive source of legal principles.[13]

The commonality across these transnational sets of rules is that they apply without fully or partly going through a formal legislative process, and thus a central concern is ensuring their

8. *See* Joanne P. Braithwaite, *Standard Form Contracts as Transnational Law: Evidence from the Derivatives Markets*, 75 MOD. L. REV. 779 (2012) [hereinafter "*Standard Form Contracts*"]; *see also* Michaels, *supra* note 4; Royston Goode, *Usage and its Reception in Transnational Commercial Law*, 46 INT'L & COMPAR. L.Q. 1, 24–26, 34 (1997). *See generally* JOANNE P. BRAITHWAITE, THE FINANCIAL COURTS: ADJUDICATING DISPUTES IN DERIVATIVES MARKETS (2020).

9. United Nations Convention on Contracts for the International Sale of Goods, 1980.

10. BIMCO, *Contracts and Clauses*, https://www.bimco.org/contracts-and-clauses (last visited March 10, 2026).

11. ICC, Uniform Customs and Practice for Documentary Credits (UCP) 600 (2007).

12. UNIDROIT Principles of International Commercial Contracts (2016).

13. For databases on the influence of these instruments, see United Nations Comm'n on Int'l Trade L , Case Law on UNCITRAL Texts (CLOUT), UNCITRAL, https://uncitral.un.org/en/case_law (last visited June 29, 2025) [hereinafter "UNCITRAL"]; UNILEX, International Case Law & Bibliography on the UNIDROIT Principles and CISG, UNILEX.info, https://unilex.info/ (last visited March 10, 2026) [hereinafter, "UNILEX"].

legitimacy.[14] This is granted in the case of treaties and Model Laws, where there are legislative procedures to ratify or adopt, even if they do not produce the norm from scratch. Even so, state-based international bodies, like UNCITRAL or UNIDROIT try to bolster their "input" legitimacy by ensuring a plurality of views in the working groups that formulate the rules.[15] Other bodies try to involve "stakeholders."[16] Privately originated, contract-based rules, closer to the idea of *lex mercatoria,* often spread because a well-organized group, typically of specialized service-providers, requires their acceptance by users as a precondition for contracting.[17] However, these organizations also try to ensure some "participation" of different groups and interests in the committees that draft and update the rules.[18]

Perhaps the most important source of legitimacy is their application of international commercial rules, including *lex mercatoria,* by a plurality of courts, which strengthens the widespread acceptance. Many transnational law texts foster this "output" legitimacy by relying on a decentralized system of application and enforcement by courts, e.g., the success of the CISG or the UNIDROIT principles is due, in large part, to their application by thousands of court decisions in many jurisdictions, on top of their application by arbitral tribunals. Privately

14. Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMPAR. L. 843, 879–80 (2006).

15. The 70 Member States of UNCITRAL represent African, Asian, Eastern European, Latin American and Caribbean, Western European and other States. *See* United Nations Comm'n on Int'l Trade L., *Origin, Mandate and Composition of UNCITRAL*, UNITED NATIONS, https://uncitral.un.org/en/about/faq/mandate_composition/history (last visited March 10, 2026). There is participation by delegates from countries with different socio-economic background and legal traditions. UNIDROIT's 63 members include less African countries (4), and more from Asia, South and North America and Europe. *See* Int'l Inst. for the Unification of Priv. L., *Membership*, UNIDROIT, https://www.unidroit.org/about-unidroit/members-states-2/ (last visited June 29, 2025). Working Groups are formed based on expertise, but observers from organizations representing different legal traditions also participate.

16. Caroline Bradley, *Private International Law-Making for the Financial Markets*, 29 FORDHAM INT'L L.J. 127, 133 (2006). The Basel Committee on Banking Supervision (BCBS) is responsible for the development of common standards of prudential regulation, or the Organization for Economic Cooperation and Development (OECD) customarily gather the views of stakeholders from industry and civil society.

17. *E.g.*, BIMCO or UCPs.

18. Andreas Maurer, *The Concept of Participation in the Making of Transnational Law: Legitimization and Normativity in the Transnational Sphere, in* REGULATORY HYBRIDIZATION IN THE TRANSNATIONAL SPHERE 203 (Paulius Jurčys, Poul F. Kjaer & Ren Yatsunami eds., Brill 2013).

produced contract texts, like the UCP, have also given rise to hundreds of decisions.

Application by a plurality of courts bolsters output legitimacy but presents a risk for the uniform application, and integrity of the instrument. If different courts and bodies interpret and apply the same terms and provisions differently, this compromises the aim to harmonize and enhance legal certainty. Legal concepts or rules that are uniform in theory, but diverging in practice may increase unpredictability, and undermine the effectiveness of the text. There is no silver bullet to prevent this from happening. Many law texts such as those by UNCITRAL and UNIDROIT include a "uniformity clause," with a mandate to interpret the text in a uniform manner in light of its international character. An example is CISG Article 7:

> *(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*
>
> *(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.*[19]

This mandate is accompanied by official and unofficial efforts to assist courts and arbitral tribunals applying and interpreting uniform texts, by compiling past court rulings and arbitral awards,[20] which offers a persuasive body of precedent, by systematically studying them (e.g., through digests),[21] which helps spot common trends and better interpretations, and by trying to offer authoritative opinions to foster converging interpretations.[22] Studies suggest that progress, though uneven, is undeniable.[23]

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19. Although the CISG is part of the state-based end of the spectrum of transnational law, the UNIDROIT Principles of International Commercial Contracts (2016), which are soft law, and rely on parties and arbitrators for their application, include an analogous clause in their Article 1.6.

20. UNCITRAL, *supra* note 13; UNILEX, *supra* note 13.

21. UNCITRAL, *supra* note 13; UNILEX, *supra* note 13.

22. *E.g.*, CISG Advisory Council, CISG Advisory Council Advisory Opinions, CISG https://www.cisgac.com/ (last visited March 10, 2026).

23. For a thorough account, which extols the examples of good practice, but does not spare the reader the instances of bizarre, ethnocentric applications of the CISG, see ANSELMO MARTÍNEZ CAÑELLAS, LA INTERPRETACIÓN Y

Contract-based commercial law is, typically, subject to fewer initiatives to foster convergence, but some norm-producing bodies monitor how courts apply their instruments, especially when this happens across numerous jurisdictions.[24] Some experiences are encouraging. Consider documentary credits under UCPs, wherein civil law courts struggle to characterize a documentary credit within their legal concepts, and yet the rules work well in civil law countries.[25] In those countries courts adjust legal principles like good faith or fraud to preserve the UCPs' effectiveness.[26] Common law courts apply the "fraud" exception narrowly, but with varying approaches.[27] Thus, a plurality of legal frames presents a manageable source of legal risk, and a system of decentralized application by courts from different jurisdictions, representing a diversity of legal systems, can still result in an instrument that is uniformly applied in practice.

### B. *The ISDA Framework as Lex Mercatoria: Mitigating Legal Risk at the Expense of Plurality*

The ISDA framework's widespread acceptance, and its contribution to legal certainty in the global derivatives market,[28] make it a successful, if unique, example of *lex mercatoria*.[29]

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la integración de la Convención de Viena sobre la compraventa internacional de mercaderías, de 11 de abril de 1980 (Comares 2004).

24. *E.g.*, ICC Comm. on Banking Tech. and Prac., *Position Papers No. 1, 2, 3, 4 on UCP 500* (Sept. 1, 1994).

25. Malgorzata Karolina Chmielewska, *Documentary Letter of Credit: A Pivotal Case for the Inefficiency of the Law of Contract*, 35 Revue Générale de Droit 487, 530 (2005). In Spain, a Supreme Court decision suggested that the UCPs could be a sort of "usage," but they are more commonly applied as standard terms, which complete the contract. J.T.S., Judgment of Oct. 27, 1984 (R.J., No. 1984/5076) (Spain).

26. Gralf-Peter Calliess & Insa Stephanie Jarass, *Private Uniform Law and Global Legal Pluralism, in* The Oxford Handbook of Legal Pluralism 746 (Paul Schiff Berman ed., Oxford University Press 2020); Sang Man Kim, *The Fraud Exception in a Documentary Credit (or Letter of Credit) under Korean Law,* 136 Banking L.J. 587 (2019).

27. Gao Xiang & Ross P. Buckley, *A Comparative Analysis of the Standard of Fraud Required Under the Fraud Rule in Letter of Credit Law,* 13 Duke J. Compar. & Int'l L. 293 (2003).

28. Gabriel V. Rauterberg & Andrew Verstein, *Assessing Transnational Private Regulation of the OTC Derivatives Market: ISDA, the BBA, and the Future of Financial Reform,* 9 Va. J. Int'l L. 54 (2013); Maciej Konrad Borowicz, *Private Power and International Law: The International Swaps and Derivatives Association,* 8 Eur. J. Legal Stud. 46 (2015).

29. *Standard Form Contracts*, *supra* note 8.

The ISDA framework relies on parties' incorporation by reference,[30] and thus on decentralized party autonomy, but its text is updated following a centralized process by a non-state actor in the ISDA. Its application relies on (i) national decision making by specialized bodies;[31] (ii) national courts applying national law;[32] and (iii) national courts or international arbitrators for the application of the uniform contract framework.[33] Thus, the fact that the key ISDA provisions are primarily interpreted and applied by courts belies simplified conceptions of *lex mercatoria* as mostly merchant-based and court-shy.[34] In reality, courts are essential actors in the process.

In terms of legitimacy and plurality, the ISDA has over one thousand members globally, including representatives from both sell-side and buy-side.[35] It has commissioned legal opinions in over eighty jurisdictions about the enforceability of close-out netting,[36] and actively engages with legislators[37] and courts,[38] to ensure the enforceability of such netting provisions.

However, some point to the ISDA's rulemaking as influenced by the producer side, specifically large dealer banks.[39]

30. John Biggins, *'Targeted Touchdown' and 'Partial Liftoff': Post-Crisis Dispute Resolution in the OTC Derivatives Markets and the Challenge for ISDA*, 13 Ger. L.J. 1323 (2012).

31. *E.g.*, Determinations Committees (DCs) for "Events of Default." *See* John Biggins & Colin Scott, *Licensing the Gatekeeper? Public Pathways, Social Significance and the ISDA Credit Derivatives Determinations Committees*, 6 Transnat'l Legal Theory 370 (2015).

32. *E.g.*, collateral enforcement, or close-out netting. *See* Biggins, *supra* note 30.

33. This includes cases where the issue is the enforceability of the derivative transactions, or the ISDA MA, such as those examined in the present Article, as well as cases where the issue is the interpretation of specific ISDA MA provisions, e.g., on the calculation of moneys owed post-default in Lomas v. JFB Firth Rixson Inc., [2012] EWCA (Civ) 419.

34. *Standard Form Contracts*, *supra* note 8.

35. *About ISDA*, https://www.isda.org/about-isda/ (last visited June 29, 2025).

36. *Id.*

37. *Status of Netting Legislation*, ISDA: Safe, Efficient Mkt., https://www.isda.org/2020/07/03/status-of-netting-legislation/ (last visited June 29, 2025).

38. For example, through amicus briefs. Amicus Briefs, ISDA: Safe, Efficient Mkt., https://www.isda.org/category/legal/amicus-briefs/ (last visited June 29, 2025).

39. ISDA's original name was the International Swap Dealers' Association, and changed to its current name in 1993, to signal its greater openness, although dealers remain the only ones with full voting privileges. *See* Anna Gelpern, *Boilerplate against Bailouts: A Regulatory Ride Fallacy* in Hidden Fallacies in Corporate Law and Financial Regulation: Reframing the

Such "tilt" towards the producer side is present in other contract-based examples of *lex mercatoria*.[40] Other scholars also point out that the ISDA contract provisions are more inspired by the common law tradition,[41] and thus, the limited onboarding of other legal traditions, such as civil law, makes the rules not too pluralistic.

This strategy of centralization helps to protect the integrity of the instrument: if the meaning of its clauses is shaped by a relatively close-knit group of lawyers from the same legal tradition, coherent interpretation and application is strengthened.

This centralization strategy further extends to the application of the ISDA framework. The ISDA Master Schedule shows a preference for English or New York law,[42] and courts.[43] Although

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MAINSTREAM NARRATIVES 253–89 (Alexandra Andhov, Claire A. Hill & Saule T. Omarova eds., Bloomsbury Publishing 2025). There has traditionally been a narrower group of large banks that are particularly active in the derivatives market, including JP Morgan, Goldman Sachs, Bank of America Merrill Lynch, Morgan Stanley, Barclays, Deutsche Bank, BNP Paribas, Société Générale, Credit Suisse, or Nomura. *See* DAVID MENGLE, CONCENTRATION OF OTC DERIVATIVES AMONG MAJOR DEALERS 2–4 (2010), https://www.isda.org/a/8PDDE/concentrationrn-4-10.pdf. Scholars agree that the producer side and especially large dealers hold much influence in the process of generating ISDA's new rules. John Biggins & Colin Scott, *Public-Private Relations in a Transnational Private Regulatory Regime: ISDA, the State and OTC Derivatives Market Reform*, 13 EUR. BUS. ORG. L. REV. 317, 324 (2012); Anna Gelpern & Mitu Gulati, *CDS Zombies*, 13 EUR. BUS. ORG. L. REV. 347, 350 (2012).

40. *E.g.*, BIMCO's bill of lading, or UCPs (noting that these are contract-based rules). *See supra* Section I.A. For a general description of the balance of private interests in transnational private regulation, see Daniel Mügge, *Private-Public Puzzles: Inter-firm Competition and Transnational Private Regulation*, 11 NEW POL. ECON. 177, 180–181 (2006); Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J. L. & SOC'Y 20 (2011).

41. Biggins & Scott, *supra* note 39, at 325.

42. Clause 13 of the ISDA MA 2002 refers to the law indicated in the Master Schedule, and the Master Schedule, Part 4, letter (h) refers to either English law or the law of the State of New York not including their conflict-of-laws. The choice of law extends to non-contractual obligations such as concurrent duties of care or tortious acts leading to the formation of the contract. ISDA Choice of Court and Governing Law Guide, Annex D (2018). This is permitted by, for example, Article 14(1) of the Rome II Regulation, and by New York state and federal courts.

43. The ISDA model clause includes a default choice for English courts, if English law applies, or New York courts and the U.S. District Court (Borough of Manhattan, New York City) if New York law applies. *See* ISDA Master Agreement, cl. 13 (2002). English courts or New York courts are chosen as the non-exclusive jurisdiction, or as the exclusive jurisdiction, if only exclusive jurisdiction clauses are admissible. ISDA Choice of Court and Governing Law Guide, 1.12 and Annexes A–B (2018). Regarding exclusive choice of

the parties could hypothetically change this preference, default rules are sticky.[44] The ISDA elaborated an amendment document to migrate to French or Irish law and courts after Brexit,[45] as well as a series of model arbitration clauses.[46] However, any choice beyond these limited exceptions is difficult to implement in practice; if a party tried to draft the clause differently, this would be seen by the party relying on the uniform template (typically, the bank) as a source of risk, and thus strongly resisted. This framework reflects a perception that English and New York courts are a source of certainty, while other jurisdictions are a source of legal risk.[47]

This is not a unique option. BIMCO, for example, includes a Model Dispute Resolution clause that favors English law, albeit with a lean towards arbitration,[48] as do standard commodities contracts by the Grain and Feed Trade Association (GAFTA) for both arbitration and matters falling outside arbitral proceedings.[49]

Sacrificing plurality in favor of predictability is a feature of so-called "commercial boilerplate," of which the ISDA documentation is the quintessential example.[50] If certain terms

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court agreements, Article 1 (1) of the Hague Convention on Choice of Court Agreements states that: "This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters." Article 3 of the Convention defines exclusive choice of court agreements.

44. *See* Cass R. Sunstein, *Deciding by Default*, 162 U. Pa. L. Rev. 1, 5 (2013); Julian Nyarko, *Stickiness and Incomplete Contracts*, 88 U. Chi. L. Rev. 1 (2021); Stephen Choi, Mitu Gulati & Robert Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 Duke L.J. 1 (2017).

45. This model document included a new attachment providing for the amendment of the governing law clause, to subject the agreement to Irish or French law, and a jurisdiction clause, giving the parties the option to subject themselves to the exclusive, or non-exclusive, jurisdiction of Irish courts, or the Commercial Court of Paris and the Paris Court of Appeal. ISDA Amendment of the ISDA 2002 Master Agreement, attachs. 1 & 2 (2020).

46. ISDA Arbitration Guide (2018).

47. Biggins & Scott, *supra* note 39, at 326.

48. *See* BIMCO, Dispute Resolution Clause (2017), https://www.bimco.org/contractual-affairs/bimco-clauses/earlier-clauses-list/dispute_resolution_clause_2017/ (last visited June 29, 2025).

49. Stephen J. Choi & Mitu Gulati, *Contract as Statute*, 104 Mich. L. Rev. 1139 (2006). For the point that boilerplate clauses can create discontinuities between the parties' intent and the legal term, see Gregory Klass, *Boilerplate and Intent*, 82 L. & Contemp. Problems 105, 106 (2019).

50. Klass, *supra* note 49; Mitu Gulati & Robert E. Scott, The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design (The University of Chicago Press 2012).

apply on a market-wide basis, any interpretation will have market-wide implications, hence the greater need for certainty.[51] Such enhanced need for certainty is, in this case, also linked to national policy goals like financial stability.[52]

Thus, some authors posit that when boilerplate clauses apply, rather than ascertaining the parties' intent in individual cases, courts should interpret "contract as statute" and prioritize consistent interpretation across cases while deferring to the original intent of the drafters and the opinion of standard-setting bodies.[53] Without going that far, the ISDA drafters chose New York and English courts because they thought that those courts would differ little in their interpretation of the ISDA terms,[54] and some courts acknowledge the system-wide implications as further supporting enhanced certainty.[55]

The question remains as to whether sacrificing plurality in favor of stability is equally justified when the issue concerns not the contract's interpretation, but its validity and enforceability.

### C. *From Interpretation to Validity Protections: The ISDA's Agreement and Representations and Warranties*

The ISDA model follows the common law tradition when protecting the integrity of the instrument not only from spurious interpretations, but also from threats to its validity through the use of representations and warranties.

The ISDA MA's core representations clauses provide that each party has the requisite "Status," meaning that it validly exists and is duly organized under applicable law.[56] Each party further represents that it has the necessary "Powers" to enter into and

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51. LAMANDINI & RAMOS MUÑOZ, *supra* note 2, at 233.
52. *Id.*
53. Choi & Gulati, *Contract as Statute*, *supra* note 49, at 1139; Maciej Konrad Borowicz, *Contracts as Regulation: The ISDA Master Agreement*, 16 CAP. MKTS. L.J. 72 (2021).
54. Jeffrey Golden, *Interpreting ISDA Terms: When Market Practice is Relevant, as of When Is It Relevant?* 9 CAP. MKTS. L.J. 299, 304–05 (2014) ("At the time that the ISDA Master was first published, the drafters felt that there was likely to be little variation in the way that an English or a New York court would construe the terms of the agreement.").
55. LAMANDINI & RAMOS MUÑOZ, *supra* note 2, at 328–336. *See also* Lomas v. JFB Firth Rixson Inc., [2012] EWCA (Civ) 419, ¶¶ 42–44 (2012); *In re* Lehman Bros. Holdings Inc., No. 08–13555 SCC, 2015 WL 7194609, at *1 (Bankr. S.D.N.Y. Sept. 16, 2015).
56. ISDA Master Agreement, cl. 3 (2002).

execute the agreement; that its execution and performance will involve "No Violation or Conflict" with any applicable law, constitutional documents, or contractual restrictions; that all required "Consents" have been obtained; and that all conditions necessary for its "Obligations" to be legally binding are met.[57] The MA also contains an "Entire Agreement" clause and resolves questions of interpretation through the self-referenced interpretation of the Single Agreement, formed by the ISDA MA, its Master Schedule (with preference over the MA) and the transaction Confirmations (with preference over the Master Schedule).[58] The ISDA Master Schedule's "Additional Representations" provide that (i) each party enters every future transaction under its own independent decision, not relying on the other party's advice or recommendation; (ii) each party understands and accepts the transaction's terms, conditions and risks; and (iii) no party is acting as a fiduciary for or adviser to another party.[59]

Such clauses, typical of common law countries, are well-known in international commercial contracts. However, their meaning and weight vary depending on the jurisdiction. Common law courts tend to consider "entire agreement" clauses conclusive,[60] or at least attach significant weight to them,[61] and reinforce them with the parol evidence rule excluding extrinsic evidence. Transnational law texts such as CISG or UNIDROIT Principles differ from this approach. First, they admit negotiations, practices, or subsequent conduct as valid elements to interpret both the contract and the parties' intent,[62] which is an implied rejection of the parol evidence rule.[63] Then, the CISG and UNIDROIT Principles admit entire agreement or merger

57. *Id.* cl. 3(a)(i)–(v).

58. *Id.* cl. 9 (Miscellaneous) (a) (entire agreement), cl. 1 (Interpretation).

59. Schedule to the 2002 ISDA Master Agreement, pt. 4 (Miscellaneous) Additional Representation, [(i)] Relationship between the Parties (1)–(3) (2002). The Master Schedule can be incorporated into the agreement.

60. David McLauchlan, *The Entire Agreement Clause: Conclusive or a Question of Weight?,* 128 L.Q. Rev. 521 (2012); Benvenuti Oil Co. v. Foss Consultants, Inc., 781 A.2d 435 (Conn. App. Ct. 2001).

61. Bonfire, LLC v. Zacharia, 251 F. Supp. 3d 47 (D.D.C. 2017).

62. CISG, *supra* note 9, art. 8(3); UNIDROIT Principles, *supra* note 12, arts. 1.2, 4.3.

63. As courts in common law jurisdictions have acknowledged. *See* MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.P.A., 144 F.3d 1384 (11th Cir. 1998); Mitchell Aircraft Spares, Inc. v. Eur. Aircraft Service AB, 23 F. Supp. 2d 915, 919–21 (N.D. Ill. 1998).

clauses, but do not view them as conclusive.[64] Article 2.1.17 of the UNIDROIT Principles (*Merger clauses*) states that:

> A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed *cannot be contradicted or supplemented by evidence of prior statements or agreements*. However, *such statements or agreements may be used to interpret the writing*.[65]

Thus, while merger clauses are admissible, courts may still use extrinsic evidence to ascertain whether the merger clause expresses the parties' actual intent.[66] The Principles of European Contract Law distinguish between individually negotiated merger clauses, which exclude prior statements, and boilerplate ones, which only establish a rebuttable presumption.[67]

Representations and warranties (R&Ws) for their part have a distinct legal meaning in common law.[68] Conversely, civil law countries and uniform law lack a distinct legal framework for R&Ws. Courts and scholars can classify them as part of the provisions of contract remedies for breach of contract obligations,[69]

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64. CISG-AC Opinion No. 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG* (Rapporteur: Richard Hyland) (2004); UNIDROIT Principles, *supra* note 12, art. 2.1.17.

65. UNIDROIT Principles, *supra* note 12, art. 2.1.17 (emphasis added); *see also* CISG-AC, CISG-AC Opinion No. 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG* (Rapporteur: Richard Hyland) (2004).

66. TeeVee Toons, Inc. v. Gerhard Schubert GmbH, No. 00 Civ. 5189(RCC), 2006 WL 2463537, at *8 (S.D.N.Y. Aug. 23, 2006) (applying the CISG to refuse summary judgment as there was a genuine issue of fact regarding whether the parties shared the intent to be bound by merger clause).

67. Ole Lando & Hugh Beale, Principles of European Contract Law, art. 2:105 (Kluwer Law International 2000) [hereinafter PECL].

68. "A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true. In order to determine whether any representation was made by a statement . . . ." Cassa di Risparmio Della Repubblica di San Marino Spa v. Barclays Bank Ltd [2011] EWHC (Comm) 484 [215] (Eng.). Which, if false, can give rise to a claim for misrepresentation, while a warranty is a promise or a contractual undertaking. *See, e.g.*, Credit Suisse International v. Stichting Vestia Groep, [2014] EWHC 3103 [296]–[300] (Eng.). This normally gives rise to a damages claim and potentially a right of termination.

69. In France, *see* Cour de cassation [Cass.] [supreme court for judicial matters] com., Jan. 25, 2017, No. 15-17137, 15-18246 (Fr.) (dismissing a damages claim for breach of warranty, though the facts suggest that it was an indemnity).

non-conformity,[70] or other obligations or ancillary commitments depending on the clause's function in the circumstances.[71]

Here, the ISDA MA's reliance on the common law tradition, coupled with its strategy of centralization, at the expense of plurality, becomes controversial. Derivatives' enforceability is subject to doctrinal developments that are the result of a delicate evolution process that differs between jurisdictions.

### D. *Derivatives, Speculation, and Law: Societal Dialogue and Courts' Maieutic Role*

The ISDA's centralized approach, while a sensible way to promote certainty in a global market, downplays derivatives' rich, diverse, and eventful relationship with law and society. Derivatives have been on the radar since the 2008 financial crisis due to the aggregate effects of OTC derivatives as a source of systemic risk. Global standards enhanced (i) transparency, via trade repositories or platform trading, (ii) risk mitigation, via central clearing, and (iii) higher capital requirements for non-centrally cleared derivatives.[72]

Derivatives have a troubled history with law and society beyond systemic risk, though. Embracing derivatives has required overcoming prejudices over speculation.[73] Courts have played an instrumental, maieutic role, using legal concepts and

70. *See, e.g.*, Djakhongir Saidov, *Article 35 of the CISG: Reflecting on the Present and Thinking about the Future*, 58 VILL. L. REV. 529, 530–33 (2013); Villy De Luca, *The Conformity of the Goods to the Contract in International Sales*, 27 PACE INT'L L. REV. 163, 176 (2015).

71. In Italy, see Cass. Civ. [Court of Cassation], 25 July 2014, n. 16963 (It.) (treating R&Ws as ancillary commitments to ensure the correspondence between price and business value); Cass. Civ. [Court of Cassation], 13 August 2020, n. 17011 (It.) (classifying them as 'guarantee' clauses). In Spain, see T.S., Dec. 21, 2009 (JUR No. 24346) (Spain) (considering the possible contribution by R&Ws to the concrete *causa* of the contract, giving rise to termination for its breach).

72. Central clearing is the process through which the derivatives contract initially concluded is novated, and a central counterparty (CCP) interposes itself between the two original parties, acting, respectively, as "buyer" to one, and "seller" to the other, replacing bilateral exposures with a safer centralized system. These elements were agreed upon at the G-20 summit in Pittsburgh in September 2009. Through the Financial Stability Board (FSB) initiative, in April 2010, a working group was formed to make recommendations on the implementation of the G-20 objectives. *See, e.g.*, FINANCIAL STABILITY BOARD, IMPLEMENTING OTC DERIVATIVES MARKET REFORMS (Oct. 25, 2010), https://www.fsb.org/uploads/r_101025.pdf.

73. David Ramos Muñoz, *supra* note 2.

doctrines to shape societal dialogue and balancing derivatives enforcement with acknowledging societal concerns. Choosing the right legal doctrine has been trial-and-error, with setbacks and variations across jurisdictions.[74] English courts' experience with the *ultra vires* doctrine and the concept of "capacity" has largely been destabilizing, leading them to adopt an approach that prioritizes certainty and limits challenges based on capacity.[75] By contrast, courts in parts of Continental Europe have developed a different synthesis. Rather than framing disputes in terms of impressible speculation, they tend to focus on the level of risk embedded in the transaction, the banks' role as a gatekeeper, and the scope of its corresponding disclosure and advisory duties.[76]

### 1. *The Ultra Vires Doctrine, Its Risks, and the Futility of Discussing Speculative Transactions: The English Experience*

*Ultra vires* is a term often used in practice to describe situations where an act goes beyond the legal capacity of an entity, or beyond the legal authority of its agents.[77] Limiting an entity's capacity or authority can be done in its articles of association through an "objects" clause that defines the scope of its activities in order to guard against agency conflicts.[78] An objects clause can help ensure that the entity's resources are dedicated to the purposes for which the entity was created, protecting shareholders and creditors from the dissipation of assets into unrelated ventures.[79] In practice, however, the doctrine often prevented companies from undertaking useful activities and was unscrupulously used to invalidate otherwise legally binding

74. *Id.*
75. *See infra* Section I.D.1.
76. *See infra* Section I.D.2.
77. Stephen J. Leacock, *The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic*, 5 DEPAUL BUS. & COM. L.J. 72–73 (2006). Another situation would be that of a company acting in a way prohibited by statute. *See* Harry Rajak, *Judicial Control: Corporations and the Decline of Ultra Vires*, 26 CAMBRIAN L. REV. 9 (1995).
78. Leacock, *supra* note 77, at 70.
79. Ashbury Railway Carriage & Iron Co. Ltd. v. Riche (1875) LR 7 HL 653 (Eng.).

contracts.[80] Thus, the *ultra vires* doctrine has a residual role under modern corporate laws.[81]

The doctrine, however, survives for other entities. For non-profits, objects clauses can ensure that an association truly remains a non-profit, and that profit-making activities are secondary or auxiliary.[82] For public authorities, *ultra vires* doctrines ensure that the exercise of governmental powers stems from the laws conferring those powers, and there is no abuse or deviation of power.[83]

However, there are powerful objections to using *ultra vires* to nullify contracts with third parties: guarding against an agent's abuse of power does not generally justify penalizing a third party, nor does it justify subjecting it to unbearable uncertainty or opportunistic claims of invalidity.[84] Financial contracts entered into by a nonprofit or public authority as an investment, financing, or hedging are typically ancillary to the entity's main mandate. If such secondary or ancillary acts are valid *to the extent that* they are conducive to the entity's mandate, the third party may not know enough to ascertain *ex ante* whether the contract is valid.

80. Leacock, *supra* note 77, at 78.

81. Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, art. 9(1), ¶ 1 [hereinafter EU Company Law Directive]. Member States may consider a contract non-binding if it falls outside the corporate "objects," and this was known to the third party concluding the contract. *Id.* ¶ 2. The Directive balances German doctrines about the scope of the power of representation of company organs, and French theories of *spécialité statutaire* and *ultra vires* theories. MADS ANDENAS & FRANK WOOLRIDGE, EUROPEAN COMPARATIVE COMPANY LAW, 42–43 (Cambridge University Press, 2009).

82. RAS INSTITUTE, COMPARATIVE LEGAL ANALYSIS OF ASSOCIATIONS LAWS AND REGIMES IN THE EU: FINAL REPORT 28–30 (Sept. 2022), https://op.europa.eu/en/publication-detail/-/publication/21adb612-42cb-11ed-92ed-01aa75ed71a1.

83. This idea is found in most jurisdictions that uphold the rule of law. In the United States, federal courts have long asserted equitable power to enjoin executive officers from acting *ultra vires*. *See* Nat'l Ass'n of Postal Supervisors v. U.S. Postal Serv., 26 F.4th 960, 970 (D.C. Cir. 2022). In Europe's local governments, the EC Charter of Local Self-Government states in its art. 4 (1) that: "[t]he basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute. However, this provision shall not prevent the attribution to local authorities of powers and responsibilities for specific purposes in accordance with the law." (ETS No. 122), https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=122.

84. Leacock, *supra* note 77, at 78.

Furthermore, in some laws, whether a contract is incidental or conducive to an entity's object depends on whether the contract is a hedge or mere speculation.[85] Cases regarding capacity and authority form part of a broader, ongoing discourse or dialogue which tries to accommodate speculation's useful role while acknowledging its risks.[86] Legislators and judges historically struggled to balance these views and used different doctrines to shape societal dialogue.[87]

Attempts to use legal doctrines to shape societal dialogues over speculation, however, have had their fair share of failures and dead ends. Generally, a doctrine that requires courts to analyze whether an individual transaction is speculative tends to yield outcomes too rigid and unpredictable to be useful and should be abandoned.[88] Speculation and hedging are not opposites, but parts of a continuum, and often can only be assessed in the aggregate.[89] Thus, a bank acting as a third party may be unaware of how a single transaction is speculation or hedging for its client.

Even among bad doctrines that aim to distinguish speculative from legitimate transactions, *ultra vires* occupies a singularly problematic position.[90] The concept of capacity is binary: an entity either can enter into a transaction, or

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85. *See also* Omotola Ariyo, *The 'Hedging or Speculation' Question in Determining the Capacity of Public Bodies to Trade Derivative Transactions*, 20 Cap. Mkts. L.J. 1 (2025).

86. *See* David Ramos Muñoz, *supra* note 2 (providing a historical account of the traditional objections against speculation as a form of gambling in the United States and in Europe, and how these objections have been gradually overcome. Economic analysis (e.g., Frank Knight's *Risk, Uncertainty and Profit*) showed that speculators, by specializing in certain one-way bets, can provide a counterpart to parties trying to hedge, and also, by aggregating multiple claims, can transform "uncertainty" into "risk," which can be studied probabilistically. Court cases showed that many, if not most conventional executory contracts (where performance lies in the future) can involve some form of speculation or "bet").

87. *Id.* (showing how speculation, although tolerated, is not fully accepted, and courts and legislatures recurrently bring back anti-speculation arguments. Courts have the challenge of sidestepping those arguments in favor of a more constructive debate (e.g., on whether a transaction was "risky," and its elements were properly disclosed to a client)).

88. *Id.*; *see also* Jo Braithwaite, *Thirty Years' Law: Local Authorities, National Courts and the Global Derivatives Markets*, 71 Current Legal Probs. 369 (2018).

89. Isabel Vansteenkiste, *What is Driving Oil Futures Prices? Fundamentals versus Speculation,* 20 (ECB WP Series No. 1371) (2011) (available at https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1371.pdf).

90. Lamandini & Ramos Muñoz, *supra* note 2, at 542–45.

it cannot.[91] That determination is independent of the parties' conduct. As a result, a reckless client could always invoke lack of capacity to escape a transaction characterized as speculative. Thus, a client making this allegation will tend to look opportunistic and disingenuous. The concept of authority is slightly more flexible, particularly where it protects good-faith parties by enforcing transactions that would otherwise be *ultra vires.* Yet it is similarly problematic: it resolves internal agency conflict by shifting the risk outward, placing the burden of those conflicts on third parties.

The problem may be made worse if a public entity is subject to fiscal policy constraints, which ban transactions that endanger public services[92] or fund non-capital expenditures.[93] This raises a further question: are such constraints "internal" governance rules, inapplicable to third parties, or do they have "external" effect, rendering non-compliant transactions *ultra vires* and unenforceable against third parties?

This uncertainty can be substantial. To address it, courts in some jurisdictions have attempted to draw clearer lines. For example, German courts have clarified that the autonomy of local self-government limits the ability of national or regional authorities to curtail municipalities' capacity to contract. As a result, fiscal constraints are generally treated as internal limitations rather than restrictions on third parties, and *ultra vires* does not raise major issues in Germany.[94]

As a contrary example, the United Kingdom gained first-hand experience of how bad *ultra vires* can be. During the 1980s, fiscal constraints led local authorities to use innovative financing, including derivatives as a funding mechanism.[95] Local authorities became active players in the swaps market,

91. *Id.* at 540–45.

92. *See, e.g.,* Council of Europe, *Local Government in Critical Times: Policies for Crisis, Recovery and a Sustainable Future* (Kenneth Davey ed., 2011) (available at https://rm.coe.int/16807472af).

93. Heather McVey, *Council of Europe, Coping with the Debt Burden: Local Authorities in Financial Difficulty* ¶ 64 (Report CG35(2018)21 final of Nov. 8, 2018) (available at https://rm.coe.int/coping-with-the-debt-burden-local-authorities-in-financial-difficulty/16808d3dc6).

94. Bundesgerichtshof [BGH] [Federal Court of Justice], Judgment of Apr. 28, 2015, XI ZR 378/13 (Ger.).

95. Martin Loughlin, *Innovative Financing in Local Government: The Limits of Legal Instrumentalism - Part I,* 4 PUB. L. 372 (1990); Martin Loughlin, *Innovative Financing in Local Government: The Limits of Legal Instrumentalism - Part II,* 5 PUB. L. 568 (1991).

and many filed lawsuits, claiming their swaps were invalid. One of them, Hammersmith & Fulham LBC, was chosen as the test case because it had subscribed every conceivable form of swap.[96]

The result was *Hazell v. Hammersmith & Fulham LBC,* where the House of Lords held the swaps to be void for lack of capacity (i.e., *ultra vires*) under Section 111 and Schedule 13 of the Local Government Act 1972.[97] Importantly, the House of Lords found the swaps fell outside the council's incidental powers because they involved *speculation* and were outside the council's borrowing function.[98]

*Hazell* was strongly criticized, but from a bad decision came mixed outcomes.[99] The case exposed governance flaws in municipalities.[100] The British government was urged to intervene by enacting retroactive legislation but refused to do so, instead letting the courts deal with the problem.[101] Commercial courts coordinated to deal with the ensuing wave of litigation, selecting both "pilot" and "second tier" cases.[102] This helped develop the law of restitution,[103] and to clarify that derivatives were not gaming contracts (and thus not legally suspect).[104] The Legal Risk Committee pondered, and ultimately discarded,

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96. The council had entered into 592 swap transactions and 297 of these were still outstanding, with a notional principal of £6052 million. Compared to this, its actual borrowing was £390 million, its estimated expenditure, £85.7 million, and its budget £44.6 million. *See* DUNCAN CAMPBELL-SMITH, FOLLOW THE MONEY (Allen & Lane, 2008).

97. Hazell v. Hammersmith & Fulham LBC [1992] 2 A.C. 1 (Eng.).

98. *Id.* ("a local authority is not a trading or currency or commercial operator with no limit on the method or extent of its borrowing or with powers to speculate").

99. Ewan McKendrick, *Local Authorities and Swaps: Undermining the Market?,* in MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE 201, 215–16 (Royston Miles Goode & Ross Cranston eds., Clarendon Press 1997).

100. The swaps in *Hammersmith & Fulham* were subscribed by local officers without the scrutiny of their elected superiors. *See* DUNCAN CAMPBELL-SMITH, *supra* note 96, ch. 6.

101. McKendrick, *supra* note 99, at 202.

102. *Id.* at 221.

103. *See, e.g.,* Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] A.C. 669 (HL) (Eng.); Kleinwort Benson v. South Tyneside Metro. Borough Council [1994] 4 All E.R. 972 (Eng.); Kleinwort Benson v. Birmingham City Council [1996] 4 All E.R. 733 (Eng.); Morgan Grenfell & Co. Ltd. v. Welwyn Hatfield DC [1995] 1 All E.R. 1 (Eng.); Kleinwort Benson Ltd. v. Lincoln City Council [1999] 2 A.C. 349 (Eng.).

104. Morgan Grenfell & Co. Ltd. v. Welwyn Hatfield DC [1995] 1 All E.R. 1 (Eng.).

changes to the *ultra vires* doctrine.[105] A 2011 reform expanded city councils' powers.[106] Thanks to courts' unquestioned legitimacy, the law-making partnership between courts, legislators, and administrative authorities managed, through constructive engagement, to mitigate the worst consequences, and draw some useful lessons about how to balance predictability for financial markets with the need for accountability, and the respective roles of courts and legislature in that process.

### 2. *From Fruitless Speculation to Useful Risk Management and Advice: Banks' Gatekeeping Role in Continental Europe and the Contrast with English Courts*

*Hazell* and its aftermath exemplify the perils of capacity, and the advantages of the interaction between courts, legislatures and civil society. Courts in other jurisdictions went in a different direction. Instead of discussing whether a transaction is speculative or within the bounds of *ultra vires*, they focused on the transaction's risk, whether the risk was properly disclosed, and, if not, whether this could give rise to voidness, rescission, avoidance, or damages.[107]

In the European Union, the Markets in Financial Instruments Directive (MiFID) tries to capture these pre-existing concerns about the relationship between financial intermediaries marketing financial services and their clients, and requires investment firms to disclose the transaction's main elements: the relative risks, whether the client understands the transaction (appropriateness), and whether the firm provides financial advice suitable for the client.[108] MiFID's aim goes beyond pure financial regulation.[109] Although Member States can determine

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105. McKendrick, *supra* note 99, at 202.

106. Localism Act 2011, c. 20, § 1 (Eng.).

107. *See* LAMANDINI & RAMOS MUÑOZ, *supra* note 2; *see, e.g.*, *Bundesgerichtshof* [BGH] [Federal Court of Justice] Judgment of Mar. 22, 2011, XI ZR 33/10 (Ger.); S.T.S., Jan. 20, 2014 (No. 840/2013) (Spain); Cass., sez. un., *25 giugno 2008*, n. 17340, Foro it. 2009, II (It.); Cass. civ., 19 December 2007, no. 26724, 26725, Foro it. 2008, I, 748 (It.).

108. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, arts. 24–25, 27, 2014 O.J. (L 173) 349 [hereinafter MiFID II].

109. *Id.* art. 69 ("Member States shall ensure that mechanisms are in place to ensure that *compensation may be paid* or *other remedial action be taken* in accordance with national law *for any financial loss or damage* suffered *as a result of an*

the private law consequences for breach of MiFID rules subject to the principles of equivalence and effectiveness,[110] it is often assumed that there must be *some* consequences.[111]

In fact, concerns about financial intermediaries' gatekeeping role go far beyond MiFID and resonate deeply with civil law courts, which see the enforcement of these duties as their own responsibility and not just that of financial supervisors.[112] Some courts use regulatory provisions to inform the application of private law doctrines, such as mistake, precontractual or contractual liability, or principles like good faith.[113] Others have independently developed doctrines and principles in ways that make them equally demanding on banks, if not more.[114]

Being principles-based solutions, these doctrines can account for factors like the transaction's complexity, the client's sophistication, or the firm's reasonable behavior. All of these can shape the outcome in a flexible way.[115] "Basis clauses," representing that the client understood and chose freely, are less

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*infringement* of this Directive or of Regulation (EU) No 600/2014") (emphasis added).

110. CJEU, Judgment of May 30, 2013, Case C-604/11, *Genil*, ECLI:EU:C:2013:344, ¶ 57 (2013) ("it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness"); *see also* Danny Busch, *The Private Law Effect of MiFID II: The Genil case and Beyond*, 4 EUR. REV. CONT. L. 70 (2017). The principle of equivalence ensures that procedural rules for enforcing provisions of EU Law are no less favorable than domestic actions, while the principle of effectiveness ensures that the exercise of rights protected by EU Law is not rendered impossible or excessively difficult.

111. Busch, *supra* note 110, at 70. The result cannot be that the civil action is rendered impossible or excessively difficult.

112. *See* BUSCH & VAN DAM, *supra* note 2.

113. Italy and Spain are prominent examples. *See, e.g.*, S.T.S., Jan. 20, 2014 (No. 840/2013) (Spain); S.T.S., Oct. 15, 2015 (R.J., No. 2015/5030) (Spain); Cass. Civ., 25 giugno 2008, n. 17340 (It.); Cass. civ., 19 dicembre 2007, n. 26724, 26725 (It.); *see also* Federico Della Negra, *The Private Enforcement of the MiFID Conduct of Business Rules: An Overview of the Italian and Spanish Experiences*, 10 EUR. REV. CONT. L. 571 (2014).

114. Germany follows this approach. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 22, 2011, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 189, 13, XI ZR 33/10 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 27, 2011, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 191, 119, XI ZR 182/10 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] June 3, 2014, Neue Juristische Wochenschrift [NJW] 2947 (2014) XI ZR 147/12 (Ger.); all discussed in BUSCH & VAN DAM, *supra* note 2.

115. LAMANDINI & RAMOS MUÑOZ, *supra* note 2.

tested, but courts tend to be more circumspect if the situation represented by a boilerplate clause does not match reality.[116] This is similar to the way civil law courts act when assessing whether the parties actually treated the entire agreement as precluding extrinsic evidence.[117]

Most important, this approach helps focus the debate on relevant factors (risk and transparency), instead of elusive arguments about "speculation." It also offers a practical solution to both the asymmetry of information between banks and clients, *and* the agency conflicts of some (public, social or private) entities discussed in the previous section in a more fair and balanced way than under the *ultra vires* doctrine. Once it properly discloses the risk elements, a financial entity need not be acquainted with the entity's objects or internal governance.

The only objection to the approach in civil law countries is that it relies on a case-by-case analysis of the adequacy of disclosures, which can lead to less predictable outcomes. Instead of focusing on the text of the contract, courts may examine the surrounding circumstances and the quality of the information given to the counterpart. By contrast, a more formal approach would focus strictly on the contract's wording. Such strict focus is the approach of English courts, which prioritize certainty, and treat banks and financial intermediaries like any other commercial counterparty. In claims of misrepresentation, implied representations, or advice, English courts adhere strictly to the letter of the contract and extensively rely on broad disclaimers in the documents.[118] They use contractual estoppel to prevent customers from relying on extrinsic facts to the written contract terms,[119] and to enforce representations or warranties that exclude advice or disclosure obligations.[120] These "basis

116. For a comparison between the Scottish decision of Grant Estates Ltd v. Royal Bank of Scotland, Court of Session 21 August 2012 [2012] CSOH 133, and Dutch or German law, *see* Danny Busch, *Agency and Principal Dealing under the Market in Financial Instruments Directive*, in AGENCY LAW IN COMMERCIAL PRACTICE 168–69 (Danny Busch, Laura McGregor & Peter Watts eds., Oxford Univ. Press 2015).

117. *Supra* Section I.C.

118. Raiffeisen Zentralbank Osterreich AG v. The Royal Bank of Scotland Plc [2010] EWHC (Comm) 1392 [80]-[87] (Eng.); IFE Fund SA v. Goldman Sachs International [2006] EWHC (Comm) 2887 (Eng.).

119. Peekay Intermark Ltd v. Australia and New Zealand Banking Group Ltd [2006] EWCA (Civ) 386 [56]-[58] (Eng.).

120. Springwell Navigation Corp v. JP Morgan Chase Bank [2010] EWCA (Civ) 1221 [170] (Eng.).

clauses" preclude customers from relying on the actual events, are strictly enforced, and not subjected to a test of unfairness, in contrast to exclusionary clauses.[121]

Further, English courts tend to find that there were no implied disclosure or advisory duties.[122] Regulatory Conduct-of-Business (COB) duties have been construed narrowly, as applicable to consumers only,[123] and the presence of COB duties was found to not give rise to a co-extensive duty of care in common law.[124] According to English courts, banks are not legally obliged, as part of their private law duties, to disclose to clients internal mark-to-market (MTM) valuations of the products, break cost scenarios, or contingent liability calculations,[125] all of which are important elements in transactional risk assessment.

Such certainty in law, however, can lead to results that are seen as unfair by bank clients and the public. In fact, from 2012 onwards, the regulator, the Financial Services Authority (FSA), began an inquiry, after identifying problems in the marketing of Interest Rate Hedging Products (IRHP) to Small and Medium Enterprises (SMEs).[126] Its successor, the Financial Conduct Authority (FCA), made a large-scale intervention to reach transactional solutions (so-called "redress") that left their customers in a similar position as if the contracts had never been signed.[127]

Despite its intervention the FCA was criticized for being slow to react, and for agreeing with the banks to exclude from

121. Crestsign Ltd v. NatWest Plc & RBS Plc [2014] EWHC (Ch) 3043 [111–114] (Eng.).
122. Property Alliance Group Limited v. Royal Bank of Scotland Plc [2018] EWCA (Civ) 355 [78], [127]–[132] (Eng.).
123. Titan Steel Wheels v. RBS [2010] EWHC (Comm) 211 [44]–[76] (Eng.); Bailey et al. v. Barclays Bank Plc [2014] EWHC (QB) 2882 [37]–[51] (Eng.).
124. Green and Rowley v. Royal Bank of Scotland plc [2012] EWHC (QB) 361 [114]–[117] (Eng.); Green and Rowley v. Royal Bank of Scotland plc [2013] EWCA (Civ) 1197 [30] (Eng.).
125. Green and Rowley v. Royal Bank of Scotland plc [2012] EWHC (QB) 361 [88]-[107] (Eng.); Crestsign Ltd v. NatWest Plc & RBS Plc [2014] EWHC (Ch) 3043 [117]-[122] (Eng.).
126. *See* Financial Conduct Authority, *Interest-Rate Hedging Products (IRHP)*, www.fca.org.uk/consumers/interest-rate-hedging-products [https://perma.cc/D8GZ-VK37] (last visited June 29, 2025).
127. *Id.*; LAMANDINI & RAMOS MUÑOZ, *supra* note 2.

the scheme what it classified as "Sophisticated Customers"[128] which still left out of the scheme many business clients that did not see themselves as "sophisticated," prompting the FCA Board to commission an independent review,[129] resulting in a detailed report with recommendations.[130] The FCA accepted many of those recommendations,[131] but refused to seek further redress for sophisticated customers.[132] This prompted the All Party Parliamentary Group (APPG) on Fair Business Banking to seek judicial review of that decision,[133] and the High Court confirmed the FCA's exercise of discretion.[134] In all fairness, the FCA was the only institution able and willing to intervene in a situation where courts granted no redress to customers, sophisticated or not.[135] In fact, it was a challenge for the FCA to seek redress over swap contracts that would, in all likelihood, have been strictly enforced by the courts.[136] Thus, while crystal clear for English courts, the strict enforceability of swap contracts was controversial enough for English society to prompt the FCA to act, and an independent inquiry was organized due to the perception that even that was not enough.

In sum, courts in England and Continental Europe differ both on their approach to banks' disclosure and advisory duties

128. Sophisticated Customers include firms meeting at least two out of three requirements: a turnover of more than £6.5 million; a balance sheet total of more than £3.26 million; or more than 50 employees. John Swift QC, *Lessons Learned Review commissioned by the non-executive directors of the Financial Conduct Authority (FCA) into the supervisory intervention on Interest Rate Hedging Products (IRHPs)*, FCA (7 February 2022) [hereinafter, "Swift Review"] at 116–18, 200, 288–89.

129. *Id.* at 24.

130. *Id.* at 21–38.

131. Financial Conduct Authority, *Independent Review of Interest-Rate Hedging Products*, www.fca.org.uk/transparency/independent-review-interest-rate-hedging-products#section-fca-response [perma.cc/3ZFQ-D3VF] (last visited June 29, 2025).

132. Financial Conduct Authority, *Report of the Independent Review into the FSA and FCA's supervisory intervention on Interest Rate Hedging Products (IRHP): The FCA response* ¶¶ 3.21–3.28, 4.3 (December 2021).

133. All-Party Parliamentary Group on Fair Business Banking v. The Financial Conduct Authority [2025] EWHC (Admin) 525 [1]-[4].

134. *Id.* at [168].

135. Swift Review, *supra* note 128, at 74–80.

136. *Id.* at 175–76 (describing how the High Court handed down the abovecited *Green and Rowley* ruling while the FSA was trying to seek solutions for clients, and the FSA sought to present it as "decided on its facts," while RBS and other banks considered it as a "landmark legal judgment" which supported their approach).

as well as on the interplay between such duties and contract representations that negate them. In cross-border transactions, the ISDA expresses a preference for English and New York law, as well as contract representations negating advisory or fiduciary duties. The question remains whether courts manage to have a constructive exchange over this issue.

## II.
## Avoidance: How English Courts and Continental Courts Never Talked About Their Differences

Diverging approaches to banks' advisory and disclosure duties in the presence of representations and warranties that negate such duties would require courts' diplomacy and ingenuity in even a best-case scenario. Unfortunately, the reality has been far from best. Banks strategically sued their clients in England and presented the dispute as a pure contract matter, familiar to English courts. English courts, among others, in a series of decisions over jurisdiction and applicable law, proceeded to: (A) dodge the real substantive conflict, (B) settle that conflict by default, (C) retrench into their own doctrinal position, and (D) protect that position. The substantive disagreement was never squarely discussed.

### A. *Dodging Conflict, Shunning Dialogue: The Equivocation Cases*

The failure of English courts and the courts in Continental Europe to understand each other began with a line of "equivocation" cases, wherein both the parties and the courts made what, at best, was a partial description of the conflict. More importantly, they failed to state the problem in full: a situation where the riskiness of a transaction, together with an allegedly flawed disclosure of, and advice over, such risk, could affect both the validity of the contract, and the validity of the decision of a corporate or public entity to sign the contract. The *BVG* cases, and the *Pisa* saga form this first block of "equivocation" cases.

BVG, a German corporation responsible for Berlin's public transportation, engaged in a swap known as an "Independent Collateral Enhancement Transaction" ("ICE Transaction") with

JP Morgan Chase.[137] JP Morgan sued in England, and BVG not only opposed the claim in England, but brought parallel proceedings before the Berlin Regional Court. BVG claimed that JP Morgan offered incorrect advice and misrepresented the risks, and also that BVG Management Board and Supervisory Board had acted *ultra vires*.[138] The Berlin court made a preliminary reference to the Court of Justice of the European Union (CJEU).[139] The preliminary reference procedure is the main form of structured dialogue between the Court of Justice and domestic courts, where the latter can ask the former to answer questions of European Union (EU) Law.[140]

Regarding the parties' argument, JP Morgan relied on the contract's clause choosing English courts.[141] BVG, on the other hand, relied on Article 22(2) of the Brussels I Regulation, which granted exclusive jurisdiction to the courts of the corporate seat for proceedings that "have as their object" the validity of companies, or decisions of their company boards. But was this a contract dispute or a corporate dispute?

In *BVG v. JP Morgan (BVG I)*, the English Court of Appeal upheld the jurisdiction of English courts. It held that the proceedings did not "have as their object" the validity of companies or the decisions of their bodies, as per Article 22(2) Brussels I, because the *ultra vires* issue was important, and might even be decisive, but the proceedings were not "principally concerned" with this issue, but rather with the enforceability of the swap contract, against which other objections, including wrong advice and misrepresentation, had been raised.[142] The court

137. Berliner Verkehrsbetriebe (BVG) Anstalt Des Offentlichen Rechts v. JP Morgan Chase Bank N.A. [2010] EWCA (Civ) 390 [4].

138. *Id.* at [4], [98]; Case C-144/10, Berliner Verkehrsbetriebe (BVG) v. JP Morgan, ECLI:EU:C:2011:300, ¶¶ 16–17, 19 (May 12, 2011).

139. Case C-144/10, Berliner Verkehrsbetriebe (BVG) v. JP Morgan, ECLI:EU:C:2011:300, ¶ 21 (May 12, 2011).

140. Article 267 of the Treaty on the Functioning of the European Union (TFEU) regulates this procedure. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, Oct. 26, 2012, 2012 O.J. (C 326) 47.

141. Choice-of-court clauses were protected by article 23 of the Brussels I Regulation. Case C-144/10, Berliner Verkehrsbetriebe (BVG) v. JP Morgan, ECLI:EU:C:2011:300, ¶ 16 (May 12, 2011).

142. Berliner Verkehrsbetriebe (BVG) Anstalt Des Offentlichen Rechts v. JP Morgan Chase Bank N.A. [2010] EWCA (Civ) 390, [25], [99]-[106] (upholding the view of the lower court).

relied primarily on English precedents.[143] Further, the court refused to make a preliminary reference to the CJEU, holding that it was bound by those precedents.[144]

The CJEU decided the Berlin court's preliminary reference in *BVG II*,[145] with a conclusion similar to the English court's, holding that Article 22(2) did not apply to "proceedings in which a company pleads that a contract cannot be relied upon against it because a decision of its organs which led to the conclusion of the contract is supposedly invalid on account of infringement of its statutes."[146] The court held that, for disputes principally related to a *company's* validity, courts of a company's seat are better placed, but they are not when the dispute is principally related to a *contract's* "validity, interpretation, and enforceability" as in the case at issue.[147]

The two decisions in the parallel proceedings were measured and respectful yet planted the seed of future discord. BVG did not succeed in characterizing the dispute as a problem of acts concluded *ultra vires* because it had made other invalidity claims for wrongful advice and misrepresentation; future litigants would successfully make the *ultra vires* claim by omitting the wrongful advice and misrepresentation claims, which might have been a more useful basis for dialogue.[148] The CJEU declined to answer the question whether the validity of public bodies' decisions was a civil or commercial matter under Brussels I despite it being a critical issue in subsequent cases. The English court was wrong to refuse dialogue with the CJEU: if the legal issues in the German and English proceedings were different, as the Court of Appeal held,[149] it should have made a

143. The court cited the Judgment of the Court of Justice, Case C-372/07, Hassett v. South Eastern Health Board, ECLI:EU:C:2008:534, ¶¶ 20–21, 23–26 (Oct. 2, 2008) (also citing the Jenard Report on the Brussels Convention); and Case C-4/03, Gesellschaft für Antriebstechnik mbH & Co KG (GAT) v. Lamellen und Kupplungsbau Beteiligungs KG, ECLI:EU:C:2006:457, (July 13, 2006), but not on the decisive interpretative issues. Berliner Verkehrsbetriebe (BVG) Anstalt Des Offentlichen Rechts v. JP Morgan Chase Bank N.A. [2010] EWCA (Civ) 390, [34]-[106].

144. *Berliner*, EWCA (Civ) 390 at [114] (referring to Grupo Torras SA v. Sheikh Fahad Mohammed Al-Sabah, [1995] 1 Lloyd's Rep 374).

145. Judgment of the Court of Justice, Case C-144/10, Berliner Verkehrsbetriebe (BVG) v. JP Morgan, ECLI:EU:C:2011:300, (May 12, 2011).

146. *Id.* ¶ 49.

147. *Id.* ¶¶ 37–38.

148. *Infra* Section IV.

149. Berliner Verkehrsbetriebe (BVG) Anstalt Des Offentlichen Rechts v. JP Morgan Chase Bank N.A. (Rev 2) [2010] EWCA (Civ) 390, [111].

preliminary reference to the Court of Justice. If they were the same, it should have stayed the proceedings. The U.K. Supreme Court on appeal made its own preliminary reference,[150] but after the CJEU forwarded a copy of *BVG II*, it withdrew the reference.[151] This is not the best display of judicial dialogue.

Next came the *Pisa* saga, with two decisions in England and two in Italy. The basic question was whether the dispute was about the validity of the swap contract, or about the validity of the decision of the client (a local entity) and its governing bodies to sign the contract. The Italian province of Pisa alleged that its swap's initial undisclosed negative value made the transaction speculative, contrary to the economic convenience principle (a principle under Italian fiscal and budgetary law), and thus null and void,[152] which could be treated as a matter of capacity or a matter of contract validity. Sadly, *Pisa* also acted unilaterally, using its self-redress powers (*autotutela*) under Italian administrative law to revoke the contract.[153] The banks challenged the decision before Italian administrative courts and sued Pisa before English courts, leading to *Pisa I* and *III* (England), and *Pisa II*, *IV* and *V* (Italy).[154]

In *Pisa I*,[155] the High Court relied on *BVG I* to dismiss Pisa's jurisdictional objection under Article 22 of the Brussels I Regulation, because the case was not "principally concerned" with the validity of Pisa's organs' acts, since it *also* involved arguments of misrepresentation or mis-selling.[156] In the parallel proceedings in Italy, the Council of State held in a preliminary

150. Case C-54/11: Reference for a preliminary ruling from Supreme Court of the United Kingdom made on 7 February 2011 - JPMorgan Chase Bank N.A., Frankfurt Branch, J.P. Morgan Securities Limited v. Berliner Verkehrsbetriebe (BVG) Anstalt des öffentlichen Rechts, 2011 O.J. (C 120) 7.

151. Case C-54/11, Order of the President of the Court on 5 July 2011 (reference for a preliminary ruling from the Supreme Court of the United Kingdom, JPMorgan Chase Bank N.A., J.P. Morgan Securities Limited v. Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts 2011 O.J. (C 311) 49 (removing the case from the register).

152. Pisa alleged that the imbalance between the swap's cap and floor generated an implied cost, divorcing it from its purported hedging purpose. The economic convenience principle, in Ministerial Decree 389/2003, and Ministerial Circular of 27 May 2004, required transactions to produce savings, not increase risks. *Infra* Section IV.C.

153. Depfa Bank plc & Dexia Crediop S.p.A. v. Provincia di Pisa [2010] EWHC (Comm) 1148 [35] (Eng.) [hereinafter *Pisa I*].

154. *Id.*

155. *Id.*

156. *Id.* at [61]–[64].

jurisdictional decision, *Pisa II*, that Italian authorities were competent to annul the contracts through *autotutela*, and Italian courts competent to review these acts and the contract's validity.[157] The English High Court declared its exclusive competence over the case in *Pisa III*.[158] Finally, the Italian Council of State, in its subsequent decision on the merits in *Pisa IV*, held that the derivatives contract was valid: the alleged "implied cost" was not a cost, but the negative market valuation of a hypothetical contract and did not breach the economic convenience principle.[159] Disclosure and advisory duties were inapplicable because the contract was signed following an unofficial tender procedure, and MiFID was not yet in force.[160] In *Pisa V* the Italian Supreme Court dismissed Pisa's appeal.[161]

The *Pisa* saga was another missed opportunity for dialogue. Pisa (the local entity) was not straightforward in its position, arguing before English courts that its plea was only one of lack of capacity, while it was pleading misrepresentation and breach of advisory duties before Italian courts. Both English and Italian courts seemed more focused on affirming their jurisdiction than on settling the substantive dispute, about the enforceability of a private contract in the face of alleged misrepresentation and mis-selling, and a breach of local administrative laws.

Furthermore, neither court made a preliminary reference to the CJEU, a decision as disappointing as it was careless. The parallel proceedings in Italy and England created the risk of conflicting judgments. A central point for the underlying conflict was whether the Brussels I Regulation applied to the dispute, which involved both a private contract, and the decisions of a public body, and how Brussels I would allocate jurisdiction between English and Italian courts. This point was

157. Cons. Stato [Council of State], Sez. V, 7 September 2011, n. 5032 (It.) [hereinafter *Pisa II*]. Previously, the Regional Administrative Court of Tuscany had found that Pisa could not unilaterally annul contracts under the jurisdiction of English courts. Tribunale Amministrativo Regionale [Regional Administrative Court] Toscana, 27 January 2011, n. 6579 (It.).

158. Depfa Bank Plc v. Provincia di Pisa [2012] EWHC (Comm) 687 [19] (Eng.) [hereinafter *Pisa III*].

159. Cons. Stato [Council of State], Sez. V, 27 November 2012, n. 5962 (It.) (hereinafter Pisa IV).

160. *Id.*

161. Cass. Civ., Sez. Un. [Court of Cassation], 16 January 2014, n. 773 (It.) (hereinafter *Pisa V*). Pisa had alleged the Council of State's lack of jurisdiction but had directed its appeal against the second (substantive) decision, not the first (jurisdictional) decision.

not settled. In fact, it was a central question not answered by the CJEU in the *BVG II* case discussed above. The CJEU was the *only* court that could settle this issue of EU Law authoritatively, and the preliminary reference is *the* procedure specifically conceived for settling these issues. Furthermore, for the English High Court, not referring the matter to the CJEU was not an oversight, but a conscious choice. In *Pisa III* the *banks*, who clearly wanted to have the case decided by English courts, nonetheless argued that the High Court should make a preliminary reference to the CJEU, even when this risked taking the case away from England, while Pisa, which preferred to have the case decided by Italian courts, argued that the English Court should decide alone, without referring the matter to the CJEU. The banks had the more convincing position: if a matter of EU Law was critical for the dispute, the ordinary course was to refer the issue to the CJEU, unless the English court could decide the issue "with complete confidence,"[162] and the English court could not have "complete confidence" because there was a conflicting decision by the Italian Council of State (in *Pisa II*).[163] The English High Court dismissed this argument, holding that the matter was "civil or commercial," and thus it could adjudicate with "complete confidence."[164] Further, it held that only the Italian courts should refer the matter to the CJEU.[165] As much as one can admire the court's confidence, the outcome, in terms of legal certainty, was far from admirable.

### B. *Settling by Default: The "No Show Up" Cases*

If parties and courts in the first group of cases failed to define the problem in full, in the second group of cases, defendants simply failed to show up, and English courts thus unsatisfactorily settled by default the critical issue of how disclosure and advisory duties interact with contract representations.

The outcomes before English courts were not always negative for bank clients. In *UBS v. Calabria*, a case decided on

162. *Pisa III*, *supra* note 158, at [20].
163. *Pisa III*, *supra* note 158, at [21]–[22].
164. *Id.*
165. *Id.* at [28]–[31]. The court also held that the case would involve "no inquiry in this case into the internal decision making procedures of the Defendant," *see Pisa I*, *supra* note 153, at [65], a statement that seemed premature then, and unfortunate now. *See infra* Section III.C.

the same date as *Pisa III*,[166] the High Court stayed the English proceedings in favor of earlier litigation in Italy.[167] Calabria, an Italian region, sued UBS for breach of an "Advisory Contract" governed by Italian law between Calabria and UBS *Ltd* in Italy. Separately, Calabria had entered into swap agreements with UBS *AG* governed by English law and subject to English jurisdiction. When proceedings were brought in England, the High Court granted the stay, holding that the English case with UBS Ltd had the same cause of action (Article 27 of the Brussels I Regulations), and the case with UBS AG was a related action.

*UBS v. Calabria* does not belong in the following group of cases, but it helps to explain them. This rare jurisdictional victory for a client (Calabria) taught banks an important lesson: it was important to take the initiative, and to shape the narrative. If they sued first, asking English courts for a declaratory judgment protecting the enforceability of derivatives contracts and finding advisory duties inapplicable, they could pre-empt lawsuits before other courts and protect themselves.

In the following group of cases, banks showed that they had learned their lesson well. However, the main reason banks succeeded, and the defining feature of these cases was the failure of the bank clients to appear before English courts, hence the "no show up" moniker. The unsatisfactory result was that the main underlying issues were settled by default.

In *Verona,*[168] the local authority of Verona failed to attend the English trial and the English High Court granted *all* the declarations of swaps' enforceability sought by the bank. Critically, the High Court held that the defendant was *contractually estopped* from denying the representations made in the ISDA MA.[169] Thus, the court settled the central issue of the breach of precontractual advisory duties versus contract representations without any discussion.

Then, the *Piemonte* case showed features of both the *Pisa* saga,[170] and the *Verona* case just discussed. In *Piemonte,* the Piedmont region hired several banks (including Merrill Lynch, Intesa Sanpaolo, and Dexia) to arrange a bond issuance and

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166. *See supra* Section II.A.

167. UBS Ltd. v. Regione Calabria [2012] EWHC (Comm) 699 [4] (Eng.).

168. Merrill Lynch v. Commune di Verona [2012] EWHC (Comm) 1407 [2], [32]–[34] (Eng.).

169. *Id.* at [29].

170. *Supra* Section II.A.

signed a hedging interest rate swap (IRS) that lost the client's money.[171] The banks sued in England, seeking declarations that the derivatives contracts were valid and enforceable. Piedmont used its self-redress powers (*autotutela*) under Italian law to revoke the swaps, a decision that was challenged before Italian administrative courts, which ultimately held that English courts had jurisdiction.[172] Piedmont managed to reach a settlement with Merrill Lynch and Intesa in England,[173] but not with Dexia, and it failed to appear in the proceedings brought by Dexia. By default,[174] the High Court granted all declarations sought by the banks.[175]

The Court of Appeal affirmed,[176] understandably displeased at Piedmont's behavior.[177] Unfortunately, instead of simply stating that reopening the issues would result in unjustified delay, the court went on to say that Piedmont's arguments would have failed even at their best since the breach of Italian fiscal and budgetary rules did not result in a lack of capacity under Italian law.[178] As such, the transaction could not be considered contrary to English public policy and thus could not be illegal.[179] Further, the court held that the arguments on lack of authority, fiduciary duties, secret profits, mis-selling, and unsuitability were precluded by contractual estoppel, due to the presence of contract representations.[180] This statement, unnecessary to settle the case at hand, nonetheless shaped the official position of English courts. In subsequent cases, English

171. The more complete narrative of the facts can be found in the decision by the Court of Appeal in *Piemonte v. Dexia* [2014] EWCA (Civ) 1298 (Eng.). It is largely taken from there.

172. Tribunale Amministrativo Regionale [Regional Administrative Court] Toscana, 21 December 2012, n. 1390 (It.), holding that the contracts' validity should be decided by the (English) civil judge. The Italian Council of State rejected Piemonte's appeal in Italy in Cons. Stato [Council of State], Sez. V, 5 May 2014, n. 13 (It.).

173. Piedmont agreed on a declaration that the swaps were valid, binding/effective and enforceable. *See* Piemonte v. Dexia [2014] EWCA (Civ) 1298 [49]–[53] (Eng.).

174. Piemonte v. Dexia [2013] EWHC (Comm) 1994 [66]–[67] (Eng.), Piemonte v. Dexia [2014] EWCA (Civ) 1298 [126]–[127] (Eng.).

175. Piemonte v. Dexia [2013] EWHC (Comm) 1994 [66]–[67] (Eng.).

176. Piemonte v. Dexia [2014] EWCA (Civ) 1298 [126]–[127] (Eng.).

177. *Id.* at [44]–[45].

178. *Id.* at [84]–[98].

179. *Id.* at [100].

180. *Id.* at [102], [109], [116], [120], [122] (relying on Springwell Navigation Corp. v. JP Morgan Chase Bank [2010] EWCA (Civ) 482).

courts would repeat the estoppel argument without ever reconsidering it.

Taken together, *Calabria, Verona* and *Piemonte* effectively smothered any chance of discussing the interplay between advisory and disclosure duties, on one hand, and contract representations, on the other hand. Arguably the central controversy of these cases, the application of this interplay was settled by default, without meaningful debate or dialogue. Ironically, in *Piemonte*, the High Court discussed in detail the municipality's capacity and authority to conclude the contracts, but since these were issues of Italian law, the English court's view would be subsequently disavowed by the Italian Supreme Court.[181] Conversely, the High Court's passing remark on contract representations that estopped clients from relying on advisory or disclosure duties would define English courts' position, as discussed below.

### C. *Compartmentalizing and Retrenching: The "Advisory Contracts" Cases*

In a third group of cases, courts would "retrench" by defining the conflict as separate components. This is the group of the "advisory duties" cases, because in all of them the claims by the banks against their clients under derivatives contracts, subject to the ISDA MA, coexisted with claims by the clients against their banks, based on advisory duties, arising both from Italian securities laws, and from "advisory contracts" subscribed between the banks and their clients, where the derivatives contracts were inserted as a form of hedging. In spite of these two angles, English courts, and the courts in the clients' country (Italy), framed the conflict as *either* a matter of contract representations (in England) *or* as a matter of advisory and disclosure duties (in Italy), not both. This allowed courts in each country to affirm their jurisdiction over one part of the dispute (contractual in England, non-contractual in Italy) while making it impossible to analyze the whole conflict or seek common ground.

Despite Italian courts affirming English courts' jurisdiction over derivatives *contracts* and the ISDA MA,[182] the Italian

181. *See infra* Section IV.C.
182. *E.g.*, in *Pisa IV; see supra* Section II.A.

Supreme Court in three key cases affirmed the jurisdiction of Italian courts over non-contractual claims for breach of disclosure and advisory duties based on Italian securities laws under the place-of-harm forum in Article 5(3) of the Brussels I Regulation.[183] In each *Milan v. Deutsche Bank,*[184] *Venice v. Merrill Lynch*[185] and *Lazio v. Dexia,*[186] the Italian Supreme Court held that Italian courts were competent for the non-contractual claims, and for the secondary claims based on a breach of duties under an advisory contract concluded between the banks and each local authority, because, according to the court, even these were autonomous claims, arising under a separate, broader contract, and thus did not fall under the exclusive jurisdiction clause in the ISDA MA.[187]

English courts' response came through the cases of *Dexia v. Brescia,*[188] *Deutsche Bank v. Commune di Savona* (*Savona*),[189] and *BNP Paribas v. Trattamento Rifiuti Metropolitani* (*TRM*).[190] In all three cases, there were derivatives contracts subject to the ISDA MA and English law and courts, *but* in each case the derivatives agreements were inserted within a broader relationship, where the banks were supposedly acting as advisers of their clients, under a contract of mandate/agency subject to Italian law and courts. English courts, however, would construe the derivatives relationship as autonomous and independent, and affirm the jurisdiction of English courts.

In *Brescia*, the Italian province of Brescia sued in Italy for breach of the advisory (mandate) contract.[191] Dexia, the bank, sued in England, seeking declarations that the swaps were valid

183. The Supreme Court was consistent with its previous case law. *See* Cass. Civ., Sez. Un. [Court of Cassation], 19 December 2007, n. 26724 & n. 26725 (It.); Cass. Civ., Sez. Un. [Court of Cassation], 8 April 2011, n. 8034 (It.).

184. Cass. Civ., Sez. Un. [Court of Cassation], 27 February 2012, n. 2926 (It.).

185. Cass. Civ., Sez. Un. [Court of Cassation], 18 September 2014, n. 19675 (It.).

186. Cass. Civ., Sez. Un. [Court of Cassation], 19 January 2017, n. 1311 (It.).

187. *Id.* (holding that the ISDA Exclusive jurisdiction clause should be interpreted restrictively).

188. Dexia Crediop SPA v. Provincia di Brescia [2016] EWHC (Comm) 3261 [24]–[27] (Eng.).

189. Deutsche Bank v. Commune di Savona [2018] EWCA (Civ) 1740 [2] (Eng.).

190. BNP Paribas v. Trattamento Rifiuti Metropolitani [2019] EWCA (Civ) 768 [1]–[2] (Eng.).

191. Dexia Crediop SPA v. Provincia di Brescia [2016] EWHC (Comm) 3261. For the full description of facts, see *id.* at 13–29.

and enforceable, that their execution and performance were in conformity with provisions on Brescia's capacity and powers as well as Italian fiscal and budgetary law, and with financial intermediaries' duties ("conformity" declarations). Without much explanation, Brescia accepted that the validity declarations fell within the scope of the ISDA Master Agreement, and thus English courts were competent, but it contended that the "conformity" declarations fell outside, as they concerned breaches of the mandate contract and Italian law.[192]

The High Court held itself competent because the conformity declarations largely matched the representations made in the ISDA MA.[193] Ultimately, however, this meant accepting the bank's framing of the dispute as a controversy about contract representations and warranties, instead of Brescia's framing as a controversy about flawed disclosures and advice *leading* to an unsuitable contract contrary to mandatory public policy. The High Court reasoned that upholding Brescia's view would mean "a degree of fragmentation that the parties could not have intended,"[194] and that despite the overlap between issues,[195] a conflict could be avoided by granting the declarations "without making any findings about Italian law . . . on the basis of a contractual estoppel."[196] The court did not see that the real fragmentation was deciding on contract representations *separately* from advisory duties because this provided partial, compartmentalized, and irreconcilable views of the conflict. In making this decision the High Court relied on *Piemonte.*[197] However, *Piemonte,* as seen in the previous section, was a case settled by default, because the bank client (Piedmont) failed to appear in the proceedings brought by the bank.[198] By using *Piemonte* as an authority, the court in *Brescia* was signaling its unwillingness to open a discussion or seek a synthesis between English and Italian positions.

In *Savona,* the Italian municipality of Savona sued in Italy for breach of a convention (a contract) to provide advisory services, subject to Italian law, and under the jurisdiction of Italian

192. *Id.* at 75.
193. *Id.* at 106–07.
194. *Id.* at 108.
195. *Id.* at 110–11.
196. *Id.* at 112.
197. *Id.*
198. Piemonte v. Dexia [2014] EWCA (Civ) 1298, [Section 11.B] (Eng.).

courts.[199] In parallel, Deutsche Bank sued in England seeking declaratory relief based on the ISDA MA, subject to English law, and the jurisdiction of English courts.[200] The High Court held that some of the declarations sought by the bank regarding the absence of investment advice, fiduciary duties, and speculation fell outside of its jurisdiction.[201] After a detailed analysis of the jurisdiction clause in the convention, the High Court held that although the bank's claim relied solely on the ISDA MA clauses, this did not automatically make English courts competent: the analysis of the clause, which carefully considered expert opinion over Italian law, and Waksman, J. concluded that the underlying issue was whether the declarations made and the advice given were correct, and these were matters to be decided by Italian courts.[202]

However, the *Savona* court's deferential, even curious, view towards foreign law principles of contract interpretation and advisory duties meant that English courts would not decide on matters of relevance for the ISDA MA. Thus, subsequent cases would disavow this view.

In *Trattamento Rifiuti Metropolitani (TRM)* (a corporation involved in the treatment of waste, and its conversion into energy, for the province of Turin, Italy) *v. BNP* (a bank), the High Court took the opposite view. The contract structure followed the same structure as *Savona*. First, there was a broader relationship based on a financing agreement governed by Italian law. That framework agreement contemplated (i) a loan, (ii) advisory obligations owed by the bank, and (iii) a proposed hedging strategy. Second, the parties provided standard derivatives documentation in the form of an ISDA Master and a Swap Confirmation, both governed by English law and courts. The High Court held that the declarations about the ISDA MA's validity and enforceability sought by BNP fell within the ISDA's exclusive jurisdiction clause.[203] The High Court further emphasized the importance of a uniform interpretation of the

199. Deutsche Bank v. Comune di Savona [2017] EWHC (Comm) 1013 [2], [44]–[47] (Eng.).
200. *Id.* at [2].
201. *Id.* at [10], [105].
202. *Id.* at [84].
203. BNP Paribas v. Trattamento Rifiuti Metropolitani [2018] EWHC (Comm) 1670 [23]–[35] (Eng.). Admittedly, TRM did not help its case by arguing that the only dispute was over the Finance Agreement and that "there was no dispute" about the ISDA's declarations of validity and enforceability.

ISDA MA,[204] siding with *Brescia* and against *Savona*. The *TRM* court dismissed the expert testimony regarding the scope of the finance agreement's jurisdiction clause,[205] and dismissed a clause in the finance agreement that stated this agreement *prevailed* over the ISDA MA, holding that, since there was no conflict between the two agreements, the prevalence clause was not engaged.[206]

Then, it was the turn of the Court of Appeal, which overturned *Savona* first, and later confirmed *TRM*. First, in setting aside the lower court's ruling in *Savona*, the Court of Appeal succinctly dismissed the expert evidence on the application of Italian legal principles of contract interpretation to the jurisdiction clause.[207] In the court's view, the parties had subscribed a "generic" relationship set out in the Convention, and a "specific" relationship set out in the ISDA MA, and the jurisdiction clause in the latter emphasized that it was a separate self-contained contract.[208]

The Court of Appeal then confirmed the High Court's view in *TRM,* discussing in detail the jurisdiction clauses in light of Article 25 of the Brussels I Regulation, concluding that the parties had two "particular legal relationship[s]."[209] Accepting TRM's view would either subsume the ISDA-based claims into the finance agreement claims, not treating them separately, or require the court to make an impossible distinction between derivatives that implemented the hedging strategy in the finance agreement and those that did not.[210]

These considerations were reasonable. Other aspects of the decision were less so. The Court of Appeal based its decision solely on English precedents;[211] it did not make a preliminary

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However, we surmise that the conclusion would have been the same in any event.

204. *Id.* at [43]–[45].

205. *Id.* at [47]–[51].

206. *Id.* at [40].

207. Deutsche Bank v. Comune di Savona [2018] EWCA (Civ) 1740 [15]–[16], [21]–[24] (Eng.).

208. *Id.* at [21]–[22].

209. BNP Paribas v. Trattamento Rifiuti Metropolitani [2019] EWCA (Civ) 768 [79], [82] (Eng.).

210. *Id.* at [90]–[92].

211. The court cited case C-214/89, Powell Duffryn PLC v. Wolfgang Petereit, 1992 E.C.R. I-1745, but only as part of a verbatim quote of the English case Deutsche Bank AG London Branch v. Petromena ASA [2015] EWCA (Civ) 226. The *Powell Duffryn* case concerned a jurisdiction clause in a company's

reference to the CJEU, despite the issue being a novel one. Furthermore, when construing the two agreements (the ISDA MA and the financing agreement), the Court of Appeal held that the ISDA's entire agreement clause and the separate jurisdiction clauses indicated that (i) the swaps were self-contained contracts (echoing *Savona*),[212] (ii) the jurisdiction clauses did not materially overlap,[213] and (iii) the conflicts clause, stating that the finance agreement prevailed in case of conflict, was not engaged because there was no conflict.[214] This downplayed the fact that the parties had settled on a framework via the finance agreement, which expressly contemplated a hedging strategy under the ISDA MA. It also downplayed the agreed upon ISDA MA Master Schedule, which stated that the parties' rights under the Master Agreement:

> [A]re subject to the terms and conditions of the [FA] and the [ICA]; (ii) that BNPP is the 'Banca Hedging' (ie. the bank that will provide the 'Contratti di Hedging' pursuant to the 'Strategia di Hedging' as these terms are defined in paragraph 1 (Interpretazione) and annex 17.19 (Strategia di Hedging) of the [FA] and (iii) no derivative transactions shall be entered into hereunder other than those foreseen in annex 17.19 (Strategia di Hedging) of the [FA] . . . In the case of conflict between the provisions of this Agreement and the [FA] and the [ICA], the provisions of the [FA] and the [ICA] as appropriate shall prevail.[215]

While the entire agreement and jurisdiction clauses are part of the ISDA MA's standard language, the ISDA schedule's function is to complement boilerplate clauses with more specific choices.[216] The choice in this case was to link the two contracts by placing the ISDA MA within the broader framework of the finance agreement. Thus, the Court of Appeal's insistence of the separateness of the contracts and the self-contained nature of the derivative looks more like a policy choice to preserve

bylaws, i.e., unrelated issue. Even in *Petromena* the issue was whether a tort-based claim of non-liability for breach of advisory duties fell within the exclusive jurisdiction clause in favor of Norwegian courts in a financing contract (holding that there were not two interrelated contracts, as in this case).

212. *TRM* [2019] EWCA (Civ) 768 [83].
213. *Id.* at [82].
214. *Id.* at [86]–[87].
215. *Id.* at [20].
216. Gelpern & Gulati, *supra* note 39, at 357.

the integrity and self-contained nature of the ISDA MA, and English courts' jurisdiction than an attempt to ascertain the parties' intent. By compartmentalizing the derivatives' dispute, *Savona* and *TRM* also prevented any attempt at a synthesis between contract representations and advisory duties.

### D. *Fortifying (or Burning Bridges): The Foreign Mandatory Laws Cases*

The remaining group of foreign mandatory laws cases represents a final step in the process of affirmation by English courts of their jurisdiction and laws. After English courts had defined the archetypal derivatives case as being solely about contract representations, and Continental European (typically Italian) courts had defined the same dispute as one about disclosure and advisory duties, English courts took the final step of ruling out any role for foreign laws, even of mandatory provisions.

The relevant provision was Article 3(3) of the Rome Regulation I,[217] which states that:

> Where *all other elements relevant to the situation at the time of the choice* are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of *the law of that other country which cannot be derogated from by agreement.*[218]

The key issue was defining: (i) "all other elements," (ii) "relevant," and (iii) "the situation." From an initial position of relative openness to the role of foreign mandatory laws, English courts evolved towards a more closed, and protective approach, until they eventually ruled out any role for foreign mandatory laws in the presence of an ISDA MA.[219]

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217. The predecessor of Article 3 (3) of the Rome I Regulation was Article 3(3) of the Rome Convention 1980. This was replaced by the Rome I Regulation. However, the Rome I Regulation did not intend to introduce substantial differences, or change the meaning of the provision, as expressly acknowledged in Recital (15) of the Rome I Regulation.

218. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 3(3), 2008 O.J. (L 177) 6 (emphasis added). Although the wording is different, Recital (15) of the Rome I Regulation suggests that there has been no intent to change the basic regime.

219. One can note the parallel between the group of "advisory" cases of *Brescia, Savona* and *TRM* (*supra* Section II.C) and the "foreign mandatory laws" cases in this ection. In both groups one of the High Court decisions

Step one was *Dexia v. Comune di Prato,* a case where the bank and client were domiciled in Italy, and the swaps in question were also entered into and performed in Italy.[220] The bank argued that there were two other key elements that would take it outside of the Italian courts: (1) the ISDA MA drafted by international working groups for international derivative transactions; and (2) a back-to-back hedging swap entered into for each swap by the bank with another bank in the international market under the same standard documentation.[221] The High Court dismissed the bank's arguments in finding a breach of Italian securities law, holding that an international agreement was not an "element of the situation" connected with a different country and that the back-to-back transaction was relevant to the bank but not the client.[222] However, this deferential position towards foreign mandatory laws would soon be reversed.

Step two was *Santander Totta,*[223] where the clients were Portuguese public sector transport corporations which argued that, despite the choice of English law, "Portugal was where both parties were incorporated, where the parties communicated with each other, where the swaps were entered into, and where the obligations under the swaps had to be performed."[224] However, the High Court held that Article 3(3) of the Rome Regulation had to be interpreted *restrictively* in commercial transactions: the parties had chosen the applicable law, which created a rebuttable presumption that this should be the law applicable.[225] The connecting factors should be appraised not in relation to the *contract*, but to the present "*situation*."[226] The High Court excluded the application of Article 3(3), finding that not all the elements of the situation were connected with Portugal, considering elements like (i) the right to assign to a foreign bank, (ii) the use of standard international documentation, (iii) the

(*Savona* in the advisory cases, *Prato* in the "mandatory laws" cases) showed an open mind towards the application of foreign laws, or the competence of foreign courts, only to be contradicted by another High Court decision (*TRM* in the "advisory" cases, *Santander* in the "mandatory laws" cases), and be disavowed by the Court of Appeal.

220. Dexia Crediop S.P.A. v. Comune di Prato [2015] EWHC (Comm) 1746 [209] (Eng.).

221. *Id.* at [210].

222. *Id.* at [211], [218]–[252].

223. Banco Santander Totta v. Companhia de Carris de Ferro de Lisboa [2016] EWHC (Comm) 465 (Eng.).

224. *Id.* at [388], [408].

225. *Id.* at [394].

226. *Id.* at [395]–[400].

necessity of a relationship with a bank outside Portugal, or (iv) the fact that Santander (the bank) had hedged its exposure to the transaction with a back-to-back swap with another bank outside Portugal, as something typical of the international nature of the swaps market, finding that a different conclusion would undermine legal certainty.[227]

Despite its finding that only English law applied, and its restrictive approach towards foreign mandatory laws, the High Court in *Santander* tried to create dialogue on foreign law, which is unusual. The court held that the contract would have also been valid under a hypothetical application of the Portuguese law that prohibited games of chance (which was not applicable to derivatives),[228] and under a hypothetical application of the Portuguese change of circumstances doctrine (which would not render the swaps invalid).[229] Unfortunately, unlike "advisory" cases, like *Brescia, Savona,* or *TRM*,[230] the non-bank counterparties had not alleged a breach of advisory or disclosure duties.

Step three involved the Court of Appeal's review of both *Prato* and *Santander.* The court confirmed *Santander*'s approach towards foreign mandatory laws, maintaining that Article 3(3) of the Rome Regulation should be interpreted restrictively.[231] Then, the court relied on *Santander* to set aside *Prato*, holding that the mere fact that the parties used an ISDA MA in English and that there were back-to-back hedging contracts sufficed to exclude Article 3(3) of the Rome Convention.[232]

The last step, *Dexia v. Provincia di Pesaro e Urbino*, eliminated any role for local mandatory laws.[233] In this case, most of the relevant elements were connected to Italy.[234] Although the bank could not prove that it had hedged its exposure in the international market, a relevant element to establish that not all elements of the situation were linked to the same country, the English court considered the mere choice of ISDA

227. *Id.* at [411].
228. *Id.* at [413]–[453].
229. *Id.* at [465], [439]–[442], [503]–[523].
230. *Supra* Section II.C.
231. Dexia Crediop SpA v. Provincia di Pesaro e Urbino [2022] EWHC (Comm) 2410 (Eng.).
232. Dexia Crediop SpA v. Comune di Prato [2017] EWCA (Civ) 428 (Eng.).
233. Dexia Crediop SpA v. Provincia di Pesaro e Urbino [2022] EWHC 2410 (Comm) (Eng.).
234. *Id.* at [79].

documentation enough to create an "international situation" ruling out Article 3(3).[235]

The foreign mandatory laws cases excluded any chance for synthesis between the approach based on contract representations under the ISDA MA, enforced under English contract law, and the approach based on advisory and disclosure duties under other jurisdictions. No court found it appropriate to make a preliminary reference to the CJEU to interpret the Rome Regulation despite it being a novel issue. Thus, a controversial interpretation of Article 3(3) of the Rome Regulations became the official position of English courts before Brexit without a single authoritative decision by the CJEU.

## III.
## Wrong Framing: The Futility of Capacity and Speculation

Courts in England and Continental European countries disagree about the interaction of disclosure and advisory duties with any contract representations that negate them. The previous Section illuminates how these courts failed to establish constructive dialogue on this difference and seek synthesis. This Section analyzes how English courts, prompted by litigants, have channeled the dialogue on the role of foreign laws through the *ultra vires* doctrine due to allegations by non-bank counterparties that they lacked capacity to conclude speculative contracts.

This is a terrible framing. It is one thing for a bank client to say, "when signing I was not fully aware of the risk involved," and quite another to say, "I signed this willingly, but, as it now turns out, I lacked the capacity to do so." The *ultra vires* doctrine is rigid, unpredictable, and unfair to third parties. The party who alleges that it acted *ultra vires* looks invariably opportunistic. English courts know this well thanks to *Hazell* and its progeny.[236] And yet, like a bad zombie movie, decades after *Hazell*, capacity came back to haunt cross-border derivatives, with predictably disappointing results. The cases where courts and arbitral tribunals grappled with the questions of capacity and speculation fall into three groups: (A) Diplomacy, wherein English courts purportedly deferred to foreign laws on capacity, while mitigating

235. *Id.* at [75]–[78].
236. *Supra* Section I.D.1.

their effects in practice; (B) Dismissal, wherein English courts excluded *ultra vires* applicability to government-owned commercial corporations; and (C) Stalemate, wherein the local courts' push to expand *ultra vires* was met with pushback from English courts.

### A. *Diplomacy: Norwegian Municipalities and Dutch Social Housing Associations*

The first group includes two key cases concerning a Norwegian local authority and a Dutch Social Housing Association. They have in common the attempt of English courts to, on the one hand, defer to foreign laws regulating the capacity of bank clients to conclude derivatives transactions, and, on the other hand, limit the effects of the resulting voidness over such derivatives. English courts' diplomacy was only outdone by their legal gymnastics in trying to protect derivatives contracts.

*Haugesund Kommune v. Depfa ACS Bank* is the first case in the international capacity and *ultra vires* saga.[237] At least one justice was aware of the parallel with *Hazell,*[238] remarking that "*history repeats itself, at least with variations.*"[239] He may have also been aware of Marx's quip that, when history repeats itself, the first time is as tragedy; the second as farce,[240] but failed to see the irony.

The swap contracts were entered into by Norwegian local authorities (Kommunes) with an Irish bank that was a subsidiary of a German parent and governed by English law. However, the Kommunes were legally classified as corporations, meaning their capacity was subject to Norwegian law.

237. *Haugesund* was decided only one month after *BVG I*, the first "equivocation" case (*supra* Section II.A), although neither the High Court nor the Court of Appeal in *Haugesund* seems to have been aware of the *BVG* dispute, and its similarities, or at least they make no mention of it. As fate would have it, *BVG*'s equivocation would be the first step in the (failed) process to find a synthesis between advisory duties and contract representations, while *Haugesund* would be the first step in the process where *ultra vires* doctrines would successfully assert themselves as the conceptual basis of dialogue on the role of foreign laws, if success is a term that one can associate with this process.

238. *Supra* Section I.D.1.

239. Haugesund Kommune v. Depfa ACS Bank [2010] EWCA (Civ) 579 [1] (Eng.).

240. KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 5 (Saul K. Padover trans., Marx/Engels Internet Archive 1995) (1852), https://www.marxists.org/archive/marx/works/download/pdf/18th-Brumaire.pdf [https://perma.cc/4794-XNYQ].

At first instance, the High Court held that the contracts were invalid because the Kommunes lacked capacity.[241] On appeal, the bank argued that the High Court improperly conflated corporate capacity, substantive power to enter into this particular type of contract, and unlawfulness.[242]

The Court of Appeal held that the concept of capacity had to be given a "broad, internationalist interpretation" such that matters that could fall within the scope of "substantive power" to enter into an agreement were treated as matters of capacity.[243] When assessing Haugesund's constitution, the court followed a similarly flexible approach and considered not only the constitutional documents, as it would do under English law, but also statutes like the Norwegian Municipalities Act.[244] The court concluded that, under Section 50 of that Act, local corporations lacked capacity to conclude loan contracts. Broadly interpreted, this included the swaps, which were declared void.[245]

However, once the court accepted that the contract was void under Norwegian law, the remedy had to be governed by English law.[246] On this point, the court found that the bank had a claim for the return of sums advanced under the now-void contract plus interest, and any restitution-related exceptions were inapplicable. Thus, the Norwegian local authorities' victory on the issue of voidness was of little consequence in financial terms; it was in essence a "pyrrhic victory," as put by the High Court judge.[247]

241. Haugesund Kommune v. Depfa ACS Bank [2009] EWHC (Comm) 2227 [123] (Eng.).

242. Haugesund Kommune v. Depfa ACS Bank [2010] EWCA (Civ) 579, [30] (Eng.).

243. The court was aware of the difference between the Anglo-American tradition that "capacity" is conceived with a purpose in mind, and the more continental approach, where the legal entity's "power of law" is deemed to be universal, and constraints do not result from a doctrine of *ultra vires*, but from the exercise of powers. *See* Haugesund Kommune v. Depfa ACS Bank [2010] EWCA (Civ) 579 (Eng.).

244. *Id.* at [48]–[49].

245. *Id.* at [49] (where it declared the swaps to be "loans," confirming the findings of first instance in Haugesund Kommune v. Depfa ACS Bank, [2009] EWHC (Comm) 2227 at [12]–[15] (Eng.)). The concept should be given a broad meaning in light of Section 50's goal to ensure the municipalities' economic control. *See id.* at [55]–[60] (for the declaration of voidness).

246. *Id.* (citing Westdeutsche Landesbank Girozentrale v. Islington London BC [1996] A.C. 669 (Eng.)).

247. Haugesund Kommune v. Depfa ACS Bank [2009] EWHC (Comm) 2227, [182] (Eng.) (Tomlinson, J.).

The case, however, involved many issues beyond capacity. For one, it was part of the Terra Securities affair, a national scandal where Terra Securities, an investment firm, convinced Norwegian municipalities to raise money, thus circumventing restrictions on indebtedness, and invest in complex products that performed disastrously.[248] The "zero coupon" swaps were the form of circumventing those restrictions, as they were similar to loans,[249] but the municipalities could pretend they were not. The bank (Depfa) was complicit in this strategy. It admitted that it was trying to "lend money" to the municipalities,[250] while still maintaining that the swaps were not "loans" under Section 50, primarily based on a questionable law firm opinion.[251]

None of this affected the outcome. English courts found that Section 50 gave no reason of public policy to limit the restitution to the sums invested in the risky investments,[252] that the banks had behaved in good faith, and that the municipalities had assumed the duty to pay the money back, regardless of how the investments turned out.[253] The problem was not the finding itself, but the absence of any consideration as to whether something more might have been expected from the bank.

248. *Id.* at [6]. The "Terra Securities scandal" has its own Wikipedia page. *Terra Securities Scandal*, WIKIPEDIA, https://en.wikipedia.org/wiki/Terra_Securities_scandal [https://perma.cc/W6EE-YNQU] (last visited April 6, 2026). It got ample press coverage, comedic quips, and two documentaries.

249. The rate payable by the banks was zero; the bank made initial payments, which were subsequently repaid in quarterly payments, with a final "bullet" payment (similar to a loan with a large final payment). Haugesund Kommune v. Depfa ACS Bank [2009] EWHC (Comm) 2227, [34], [77] (Eng.).

250. *Id.* at [151] (citing the statement by the bank's head of legal).

251. *Id.* at [12], [14], [50], [78]–[96]. The legal basis was a Ministry of Local Government letter (the "Vik Letter") which referred to a different transaction, where the future payment obligations were tied to the revenue from energy license fees, thus lowering the potential impact on public services. In any event, the Ministry expressed concern about the treatment of similar transactions as loans in the future, and its views were challenged by opposition politicians. In contrast, in this case the repayment obligation was independent from the performance of the (risky) investments for which the money would be used.

252. Haugesund Kommune v. Depfa ACS Bank [2010] EWCA (Civ) 579, [101]–[102] (Eng.) (Aikens, L.J.)

253. Haugesund Kommune v. Depfa ACS Bank [2009] EWHC (Comm) 2227, [141], [148], [163], [169] (Eng.) (finding that the municipalities assumed the risk). The courts also examined the "change of position" exception to restitution, finding that it did not apply in a case like this, where the municipalities understood that the money had to be restituted. *See* Haugesund Kommune v. Depfa ACS Bank [2009] EWHC (Comm) 2227, [162]–[169] (Eng.); [2010] EWCA (Civ) 579, [109]–[126], [141], [148] (Eng.).

In the end, the bank could not get its money. The Norwegian Kommunes refused to pay back the sums, arguing that the English ruling was not binding on them as a matter of Norwegian public policy, and Depfa sued the law firm that had issued the opinion (Wikford Rein) unsuccessfully.[254] Thus, the English courts' elaborate, diplomatic, and at times acrobatic balancing of deference towards foreign law and public policy with strict contract enforcement not only failed to address the relevant underlying issues, but also produced an unenforceable decision that was useful to no one.

The matter of capacity to enter into swap agreements arose again in *Credit Suisse International v. Stichting Vestia Groep*.[255] The defendant was a Dutch social housing association (SHA), a type of foundation subject to the Dutch Civil Code that plays a critical role in Dutch social housing for owning a large percentage of the residential rental market. Given their importance, SHAs are subject to considerable constraints: their financial regulations allow them to enter into derivatives contracts to manage borrowing costs, but not for speculation.

The High Court concluded that Vestia's primary objective of operating in the field of social housing did not include the capacity to conclude derivative contracts.[256] Acts falling outside of their objective had to be analyzed under the doctrine of secondary acts, which allows such acts only if they served the interest of the corporate entity and not an unrelated third party.[257] Whether the transactions served the entity's interest was to be judged objectively, without regard to their purpose, and in light of the act's substance.[258] Since the SHA was a nonprofit entity operating in a highly regulated field,[259] the court concluded that some transactions, the so-called *ultra vires* transactions, were void.[260]

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254. Haugesund Kommune v. Depfa ACS Bank [2011] EWCA (Civ) 33 (Eng.) settled the complaint against the law firm. *See id.* at [24], [31], [42], [89]–[90] for the subsequent facts on the municipalities' refusal to pay back the moneys, and [73]–[94], for the arguments on the law firm's (lack of) liability.

255. Credit Suisse Int'l v. Stichting Vestia Groep [2014] EWHC (Comm) 3103 (Eng.).

256. *Id.* at [39] (Article 3 of the articles of association) and [188]–[190].

257. *Id.* at [76], [196].

258. *Id.* at [196]–[203], [206].

259. *Id.* at [208]–[209].

260. *Id.* at [228]–[253].

The court's analysis was complicated. On the one hand, the court found that the distinction between transactions that genuinely constituted hedges as opposed to speculation was "false" or "elusive," and only distracted from the key issue: whether the transactions were within Vestia's objects.[261] On the other hand, the court's assessment of whether the transaction was within Vestia's objects was based on whether the act served Vestia's interest, which depended on whether the transactions had an objectively identifiable "hedging effect,"[262] thus implicitly relying upon the hedging-speculation distinction. The court also held that such a hedging strategy had to be assessed in the aggregate or on a portfolio basis,[263] although the House of Lords in *Hazell* had rejected this same approach.[264, 265]

And yet, despite declaring the swaps void, the High Court managed to exclude the disruptive effects of voidness. Once it found Vestia lacked capacity to enter into the derivative agreements, the court held that Vestia had *also* concluded (i) an ISDA MA that represented that Vestia had the power and capacity to enter into a swap transaction, and (ii) a Schedule to the Master Agreement entitled "Additional Representations." This Master Schedule stated that:

> [Vestia] hereby represents and warrants to [Credit Suisse] (which representations will be deemed to be repeated by [Vestia] on each date on which a Transactions [sic] is entered into that:
>
> (i) [Vestia's] entry into and performance of its obligations under this Agreement and each Transaction hereunder is and will be in compliance with its articles of association (statuten), its financial rules (financieel statuut) and any other laws or regulations applicable to [Vestia] from time to time . . .

261. *Id.* at [214].
262. *Id.* at [235]–[244].
263. *Id.* at [222].
264. *Supra* Section I.D.1; *infra* Section III.C (discussing judgments post-*Cattolica* (e.g., *Venice*)).
265. *Hazell* concerned English local authorities, and *Vestia* concerned Dutch Social Housing Associations. However, the court in *Vestia* did not explain why this should result in a different assessment of the hedging effects.

(ii) [Vestia] is entering into each Transaction purely for the purpose of hedging its exposures and not for the purpose of speculation.[266]

The court held that the power and capacity representations were "statements of fact" that were true at the date of signing but not binding for future transactions.[267] In contrast, the Master Schedule's Additional Representations were found to be warranties that invoked contractual estoppel for future transactions.[268] The consequence of this was that although Vestia had acted beyond its capacity, Credit Suisse could enforce the MA *as if* the derivatives contracts were valid, and Vestia could not object.[269]

This was a creative strategy, and the court's aim was to strengthen the contract. The court's construction of a warranty of future capacity, under contractual estoppel, was based on cases where courts had *assumed* the client's warranty that it would seek independent advice in the future or rely on its own judgment,[270] which is different from a client saying that it will have capacity to contract in the future. In fact, in *Westdeutsche Landesbank Girozentrale* the court had held that if a contract was entered into beyond an entity's capacity and is *ultra vires,* a clause in that contract warranting that the entity has capacity is also *ultra vires*,[271] such that an entity cannot expand its capacity by contract or estoppel.[272]

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266. Credit Suisse Int'l v. Stichting Vestia Groep [2014] EWHC 3103 (Comm), [291] (Eng.); *see also supra* Section I.A-I.C, for a discussion of the role of representations and warranties in the ISDA MA.

267. Credit Suisse Int'l v. Stichting Vestia Groep [2014] EWHC (Comm) 3103, [295]–[296] (Eng.).

268. *Id.* at [300], [307], [309], [315].

269. *Id.* at [301]–[321]. Alternatively, Vestia would be subject to liability for breach of warranty, on similar grounds. *Id.* at [322].

270. Credit Suisse International v. Stichting Vestia Groep [2014] EWHC (Comm) 3103, [308] (Eng.), with reference to Titan Steel Wheels v. RBS [2010] EWHC 211 (Comm) (Steel, J.) (Eng.) or Bank Leumi (UK) Plc v. Wachner [2011] EWHC 656 (Comm) (Flaux, J.) (Eng.).

271. Westdeutsche Landesbank Girozentrale v. Islington LBC [1994] 4 All E.R. 890, 905b (Eng.).

272. *Id.*; *see also* Hazell v. Hammersmith and Fulham LBC [1992] 2 A.C. 1, 36F/G (Eng.). The court considered in *Vestia* this precedent inapplicable by treating the ISDA MA as separate from the derivatives contract, thus concluding that an entity cannot expand its capacity through a clause in the same (void) contract, but that it can do it (or achieve an equivalent effect) through a clause in a separate contract.

As in *Haugesund,* the situation went deeper than the capacity issue. Vestia's case was a national scandal.[273] Its cash manager, Mr. Marcel de Vries, caused a sensation for his blatantly speculative strategies, enabled by Vestia's weak governance, which placed Vestia on the brink of collapse.[274] Banks were involved in the scheme; some received kickbacks for the transactions contracted, and split the money with Mr. De Vries, a conduct that resulted in criminal sentences,[275] and lawsuits against the banks that ended in settlements.[276]

Credit Suisse itself was not suspected of wrongdoing, and the transactions were concluded before the scandal erupted in January of 2012. However, Credit Suisse's liaison with Vestia supported Mr. De Vries' strategy despite being aware of its problems, and the concerns about Mr. De Vries,[277] and the bank subjected the derivatives to limited scrutiny, and made no attempt to flag potential risks to Vestia's governing bodies.[278] None of these issues were convincingly addressed in the case, arguably because doctrines of capacity and concepts like speculation do not provide a basis for it. Although a bank cannot be responsible for an entity's governance failures, it is at least worth discussing whether it may be asked to properly disclose the risks.

### B. *Dismissal of Capacity: Public Sector Corporations Cases*

The next group comprises the "public sector corporations" cases, where arbitral tribunals struggled with classifying

273. Apart from the press coverage, the books on the affair include JAN SMIT, HET DERIVATENDRAMA [The Derivatives Drama] (2014); HANS VERBRAEKEN, DE VRIJE VAL VAN VESTIA [The Free Fall of Vestia] (2014).

274. Credit Suisse Int'l v. Stichting Vestia Groep [2014] EWHC (Comm) 3103, [49]–[53], [62], [91] (Eng.).

275. *See* Bart Brugman, *Main Suspects in Vestia Derivatives Case Jailed for Fraud and Bribery*, DUTCH NEWS (July 24, 2018), https://www.dutchnews.nl/2018/07/main-suspects-in-vestia-derivatives-case-jailed-for-fraud-and-bribery/.

276. *See, e.g.,* Olaf Storbeck, *Deutsche pays €175m to settle Dutch bribery lawsuit*, FIN. TIMES (July 19, 2019), https://www.ft.com/content/a8da07a0-a4b8-11e9-a282-2df48f366f7d. There were also settlements with ABN Amro, BNP Paribas, Citibank, Société Générale, Nomura, or Barclays.

277. Mr. Sebastian Dupont, the bank's liason with Vestia, enabled Mr. De Vries' actions. *See* Credit Suisse Int'l v. Stichting Vestia Groep [2014] EWHC (Comm) 3103, [66], [84], [88], [91], [95], [116], [117], (Eng.).

278. Credit Suisse approved the transactions as "non-standard transactions," with "potential Reputational Risk issues and/or particular market or franchise risk" and was supposed to check whether the transactions involved an unacceptable degree of risk for the client. *Id.* at [99], [102]. In such a scenario, it would have been sensible to raise the issue with Vestia's CEO, or governing bodies.

individual transactions as speculation or hedging, while English courts opted for excluding the *ultra vires* doctrine for this type of entity.

A line of cases involving Ceylon Petroleum Corporation (CPC) illustrates the challenges of these entities. CPC was a public corporation created by statute for supplying petroleum products to Ceylon, later Sri Lanka. CPC entered into a derivative arrangement with Citibank, Standard Chartered, and Deutsche Bank, and later refused to pay on the grounds that it lacked capacity to conclude speculative transactions. Three cases were brought, with three different outcomes.

The first, *Citibank v. CPC*, was a commercial arbitration dispute.[279] Both parties *agreed* in the dispute that CPC's capacity extended *only* to hedging transactions, not to speculation on the price of oil, and that the hedging/speculation distinction should be based on objective elements over the parties' subjective intent.[280] The arbitral tribunal found for CPC, attaching much weight to the hedging/speculation distinction.[281]

The second, *Deutsche Bank v. Sri Lanka*, was an investment arbitration dispute under the International Centre for the Settlement of Investment Disputes (ICSID) where the bank sued the Sri Lankan government, not a specific, government-owned entity, and the tribunal's analysis of the validity of the derivative transaction was a step in determining whether an "investment" existed for purposes of the arbitral tribunal's jurisdiction.[282] The tribunal concluded that the derivative was not speculation and thus valid. Relying on the parties' *shared* understanding of speculation and applying an objective assessment, the tribunal examined market expectations at the time the transaction was entered into. It found that prices were expected to remain high and the derivative was designed to mitigate the associated risk, and this sufficed to characterize the transaction as a hedge.[283]

279. Citibank N.A. v. Ceylon Petroleum Corp., LCIA Arb. No. 81215, First Partial Award (July 31, 2011). The text of the arbitral award was not made public, but the outcome was described in the parallel dispute of Standard Chartered v. CPC [2012] EWCA (Civ) 1049 (Eng.).

280. Standard Chartered v. CPC [2012] EWCA (Civ) 1049 [10] (Eng.).

281. *Id.* The parties had agreed that the distinction between hedging and speculation was key to determine the capacity of the entity.

282. Deutsche Bank AG v. Sri Lanka, ICSID Case No. ARB/09/02 (Oct. 31, 2012). The transaction was referred to as a "zero cost collar," "seagull" or "swap."

283. *Id.* ¶ 336.

The tribunal rejected Sri Lanka's expert's argument that risk reduction had to be meaningful or effective to characterize the instrument as a hedge.[284] It noted that no such requirement existed in the relevant accounting standards,[285] and reasoned that the difference between hedging and speculation should not be based on a subjective or shifting evaluation of how successful the risk reduction ultimately proved to be.[286]

Some authors see *Deutsche Bank v. Sri Lanka* as a success in distinguishing between hedging and speculation.[287] A closer look, however, shows its weaknesses. The tribunal's arguments to dismiss the idea that a hedge must be effective to justify the hedge accounting treatment were wrong.[288] However, had the tribunal accepted the idea, it would have been in a similarly weak position. The problem is not whether the "effectiveness" of a hedge is a sound concept under accounting rules (it is) but whether using accounting concepts to decide whether an act is *ultra vires* is sound (it is not).[289] This brings the problem back to the same point: classifying a derivative as *either* a hedge, *or* a speculative transaction, except in clear cases, involves some degree of arbitrariness.

Thus, it is not surprising that in the third case, *Standard Chartered v. CPC,*[290] English courts chose a different approach. The High Court ruled that distinguishing between hedging and speculation was difficult,[291] that CPC had the burden of

284. *Id.* ¶ 333.

285. *Id.* This was International Accounting Standard (IAS) 39.

286. *Id.* ¶ 334.

287. Ariyo, *supra* note 85.

288. The tribunal said that it could find no reference in the relevant accounting standards to the idea of "effectiveness" to treat a transaction as a hedge. This is surprising and factually incorrect since IAS 39 contained about 60 references to it. *See, e.g.*, IAS 39 ¶¶ 9, 76, 81, 84, 88(b), 88(d), AG105-AG113A. The standard that replaced IAS 39, i.e., International Financial Reporting Standard (IFRS) 9, also contains many references to this idea. *See* IFRS 9 ¶¶ 6.4.1(b)(c)(iii), 6.5.5. The tribunal also said that the idea of a hedge "effectiveness" was "subjective," when it is not considered subjective at all in the accounting standards.

289. "Hedge accounting" allows companies to treat the underlying exposure (e.g., bonds or other financial instruments) *and* the hedge (e.g., a derivative) as a single position, instead of recognizing them separately, as would be the general rule. Thus, this is authorized only when the derivative "effectively hedges" the exposure, because then, and only then, showing the joint position is more transparent than showing them separately. This is far from the concerns that justify the limitations arising from *ultra vires* doctrines.

290. Standard Chartered v. CPC [2011] EWHC (Comm) 1785; [2012] EWCA (Civ) 1049; [2012] WLR(D) 232 (Eng.).

291. Standard Chartered v. CPC [2011] EWHC (Comm) 1785, [344] (Eng.).

proving that the contracts were speculative, and that CPC had not discharged such burden.[292] The Court of Appeal went further, holding that the question of hedging versus speculation was a false question that should not determine the issue of capacity.[293] Instead, for the Court of Appeal, CPC was a *commercial* company, which, in itself, distinguished the case from those involving local authorities.[294] As a commercial company, its founding act should be interpreted as authorizing CPC to "enter into any transaction that could fairly be said to be incidental or conducive to its statutory objects."[295]

*Santander Totta v. Companhia de Carris de Ferro de Lisboa*[296] completed this saga and gave doctrinal shape to the approach in *Standard Chartered*. The debtor companies were public-sector Portuguese transport companies which ran the metro, bus, and tram services in the cities of Lisbon and Porto, which argued that the swaps were speculative, and that their capacity extended only to swaps that operated as hedges.[297]

The High Court rejected the hedging versus speculative distinction as a valid basis, due in large part to "the difficulty of drawing distinctions between the various activities of speculation, hedging, financial management and similar in the absence of an applicable definition."[298] Determining whether the companies had capacity required examining whether the swaps were necessary or convenient for their purpose of seeking profit, not the speculative or hedging nature of swaps.[299]

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292. *Id.* at [369].

293. "In our judgment, the question of hedging or speculation is, at any rate, in the context of an issue of capacity, a false question." Standard Chartered v. CPC [2012] EWCA (Civ) 1049, [22] (Eng.).

294. The Court of Appeal found that the courts' restrictive approach in *Hazell, see supra* Section I.D.1, was justified because the bank clients were local authorities, with capacity restricted by the Local Government Act 1972. Standard Chartered v. CPC [2012] EWCA (Civ) 1049, [28] (Eng.).

295. Standard Chartered v. CPC [2012] EWCA (Civ) 1049, [31] (Eng.).

296. Banco Santander Totta v. Companhia de Carris de Ferro de Lisboa [2016] EWHC (Comm) 465 (Eng.).

297. *Id.* at [6] ("What makes the swaps unusual was the incorporation of a 'memory' feature. Speaking generally, once the reference interest rates (EURIBOR and sometimes LIBOR) moved outside upper or lower 'barriers,' the fixed rate payable by the Transport Companies had a 'spread' added to it. The spread was cumulative at each payment date and was subject to leverage (in all but one swap), hence the swaps being described as 'snowball' swaps").

298. *Id.* at [229].

299. *Id.* at [265], [270], [274] (considering the parties' arguments); [294], [310]–[314] (analysis); [324]–[328] (conclusion).

This functional, profit-making test was a different doctrinal approach from *Haugesund* and *Vestia*.[300] The courts in *Santander* rightly held that making the validity of the swaps depend on whether they helped the company in "contributing to the economic and financial balance of the public sector as a whole and in achieving adequate levels of satisfaction in meeting the community's needs" was unworkable,[301] and making it depend on whether the swaps were "convenient" to the entities' power to borrow in aid of their aim to run a public transportation system,[302] was too uncertain.[303] The High Court case was confirmed on appeal.[304]

### C. *Stalemate: Italian Local Authorities*

The third group of capacity cases involved Italian local authorities. To provide background on the disputes, Article 119(6) of the Italian Constitution restricts local authorities' indebtedness "only for the purpose of financing investment expenditures." The Italian Finance Law—and subsequent decrees and circulars, including Article 62 of Decree Law No. 112 of 2008—initially permitted certain interest rate swaps (IRS), if they provided a financial advantage to the local authority.[305] However, even these transactions were later prohibited.[306] Article 62 was challenged before the Constitutional Court of Italy, which upheld the provision as constitutional. The court reasoned that derivatives may serve either a hedging or a speculative function and can generate significant debt exposures. Under Article 119(6) of the Italian Constitution, public entities must maintain debt equilibrium, and it is the legislature who must define what qualifies as

300. *Supra* Section III.A.
301. Banco Santander Totta v. Companhia de Carris de Ferro de Lisboa [2016] EWHC (Comm) 465, [312] (Eng.).
302. *Id.* at [334].
303. *Id.* at [312]–[314]. Furthermore, the companies were not able to furnish a clear test for when a company could be considered a "public company" since this depended on the degree of state ownership, which would introduce further uncertainty.
304. Santander Totta v. Companhia de Carris de Ferro de Lisboa [2016] EWCA (Civ) 1267 (Eng.).
305. *See* Art. 41, Fin. Law, n. 448, 28 December 2001 (It.); Art. 3.2, Decreto Ministeriale [Ministerial Decree], n. 389, 1 December 2003 (It.); Art. 62, Decreto Legislativo [Legislative Decree], n. 112, 25 June 2008 (It.).
306. Para. 572, Stability Law, n. 147, 27 December 2013 (It.), amending Art. 62, Decreto Legislativo [Legislative Decree], n. 112, 25 June 2008 (It.).

"indebtedness" and "investment," including by excluding certain derivatives contracts and prohibiting transactions that are deemed "objectively dangerous."[307] However, the practical implications of this ruling for Italian municipalities remained unclear.

In *Dexia v. Comune di Prato,* the High Court held that the relevant constitutional provision was framed in vague terms and that its concept of "indebtedness" did not extend to derivatives.[308] As a result, it did not limit the municipalities' legal capacity to enter into the swap. The court further held that the statutory requirement of financial advantage had to be evaluated in light of the transaction as a whole.[309]

Then, in 2020, the Italian Supreme Court decided *BNL v. Cattolica* (*Cattolica*), laying down several important principles.[310] The court held that swaps (and derivatives more generally) are presumed valid because they were not "futile bets," but "rational bets."[311] This presumption depends on the parties' agreement and understanding of the mark-to-market value and relevant probabilistic scenarios.[312] Under local administration law, Italian local authorities may validly enter into swap contracts for hedging purposes, but not speculative ones.[313] Even where a swap is framed as a hedge, the absence of agreement on mark-to-market and probabilistic scenarios renders the contract void for indeterminacy of its object.[314] In addition, swaps with debt-like features like upfront payments were only valid if approved by the municipal council.[315]

The *Cattolica* decision raised the stakes even more by stating unequivocally that certain transactions were invalid. The response by English courts did not take long. The first English case post-*Cattolica* was *Deutsche Bank v. Busto Arsizio.*[316]

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307. Corte Cost. [Constitutional Court], 10 February 2010, n. 52 (It.).
308. Dexia Crediop S.p.A. v. Comune di Prato [2015] EWHC (Comm) 1746 (Eng.).
309. The High Court ultimately found the swap invalid because Dexia had breached several mandatory provisions of Italian law, particularly on disclosure and advice. The Court of Appeal upheld the High Court arguments on capacity, overturning it on the issue of mandatory law. *See* Dexia Crediop S.p.A. v. Comune di Prato [2017] EWCA (Civ) 428 (Eng.); *see also supra* Section II.D.
310. Cass. Civ., Sez. Un. [Court of Cassation], 12 May 2020, n. 8770 (It.).
311. *Id.* ¶ 6.2.
312. *Id.*
313. *Id.* ¶¶ 8.1, 9.8.
314. *Id.* ¶ 9.1.
315. *Id.* ¶¶ 10.2–10.5.
316. Deutsche Bank AG London v. Commune di Busto Arsizio [2021] EWHC (Comm) 2706 (Eng.).

Busto Arsizio, an Italian local authority, claimed that, under *Cattolica,* it lacked the capacity to enter into a swap subscribed with Deutsche Bank, and, alternatively, that in the absence of sufficient information regarding mark-to-market value and the relevant probabilistic scenarios, the contract would be rendered void. The English Court dismissed this argument. First, it found that before *Cattolica*, the Italian Constitution did not impose any limits on the capacity of Italian local authorities to enter into speculative derivative contracts. Article 119(6) of the Italian Constitution did not limit capacity,[317] and swaps fell outside the concept of indebtedness.[318] Second, the court found that the *Cattolica* ruling focused on the invalidity claim based on the lack of a determinable object for the contract, not on the local authority's lack of capacity.[319] Third, although the *Cattolica* ruling established that local authorities could only enter into derivatives for *hedging* and not for speculative purposes,[320] the High Court found that Busto Arsizio had not clearly asserted that the swap was speculative,[321] and concluded, on the evidence, that the swaps were hedging instruments.[322]

The plot thickened even more with *Intesa v. Comune di Venezia* (*Venezia*).[323] The origin of the transaction was the restructuring of a bond offering (the Rialto bond) where Venice had entered into an IRS with Bear Stearns to hedge its interest rate exposure.[324] The banks entered into a mandate (agency) contract to restructure the bond and extend its maturity, and, since the IRS was no longer aligned with the bond, Venice entered into the contested derivative transactions to replace the IRS.[325]

317. *Id.* at [173]–[195].
318. *Id.* at [196]–[203].
319. *Id.* at [211]–[251] (referring to Section 9 of the *Cattolica* decision).
320. *Id.* at [280]. The court accepted the criticism of the *Cattolica* ruling's equivocation and consistency with the Constitutional Court ruling 52/2010, and its statement that the Supreme Court was not "creating" new law but merely stating the law as it was. Yet, these were arguments for Italian courts. *Id.* at [256], [278]–[279].
321. *Id.* at [281]–[302].
322. *Id.* at [302]–[306].
323. Banca Intesa Sanpaolo SPA v. Comune di Venezia [2022] EWHC (Comm) 2586 (Eng.); [2023] EWCA (Civ) 1482 (Eng.).
324. Banca Intesa Sanpaolo SPA v. Comune di Venezia [2022] EWHC (Comm) 2586 [22]–[30] (Eng.).
325. *Id.* at [37]–[42] (bond restructuring); [43]–[57] (replacing the derivative); [58]–[66] (detailing the transactions).

The High Court,[326] and the Court of Appeal that overturned it,[327] chose different ways to mitigate the effects of the *Cattolica* judgment.

The High Court first tried a diplomatic approach, similar to *Haugesund* or *Vestia*,[328] acknowledging that Italian law rendered the contract void, while simultaneously excluding the effects of such voidness. The court accepted that the *Cattolica* judgment by the Italian Supreme Court meant that under Italian law, local authorities lacked the capacity to enter into speculative derivative transactions,[329] and it was not the job of the High Court to second-guess that interpretation.[330] Then, instead of formulating a definitive test for what makes a transaction speculative, the court focused on the specific features of the transaction,[331] finding that the structure of the new derivative entailed an element of speculation with interest rate movements.[332] The court also found that the derivatives qualified as indebtedness under the *Cattolica* standard and therefore breached Article 119(6) of the Italian Constitution.[333] Simultaneously, the court found that, although the contract was void, the bank did not have to restitute the sums paid, using a novel interpretation of

326. Banca Intesa Sanpaolo SPA v. Comune di Venezia [2022] EWHC (Comm) 2586 (Eng.).

327. Banca Intesa Sanpaolo SPA v. Comune di Venezia [2023] EWCA (Civ) 1482 (Eng.).

328. *Supra* Section III.A.

329. Banca Intesa Sanpaolo SPA v. Comune di Venezia [2022] EWHC (Comm) 2586 [196] (Eng.).

330. *Id.* at [194]–[195], [200]. In particular, the Court of Cassation drew from the principle of "financial equilibrium constraint," as expressed in a previous ruling by the Constitutional Court, n. 52/2010, that local authorities could not conclude speculative derivatives.

331. Banca Intesa Sanpaolo SPA v. Comune di Venezia [2022] EWHC (Comm) 2586 [202]–[223] (Eng.). The High Court cited the U.S. case of *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), where Justice Potter Stewart said that he would not attempt to define "obscenity," but that "I know it when I see it."

332. *Id.* at [226]–[232]. Instead of paying the winding-up cost of the Bear Stearns swap, the winding-up costs were incorporated into the structure of the new swap, which meant that Venice was assuming the risk of paying a great deal more, and was subject to terms that were no longer based on the terms of the Rialto Bond, and were disconnected from the prevailing forward rate curve, all suggestive of speculation.

333. *Id.* at [233]–[254], [260], [267]–[269].

restitutionary defenses,[334] which sought to temper the consequences of the *Cattolica* judgment.[335]

However, the Court of Appeal was not convinced, and the decision was overturned.[336] First, the Court of Appeal held that the fact that the derivatives transactions acted as a replacement for the Bear Stearns IRS, which was a hedge, meant that they could not be speculative. The large, negative mark-to-market value was the result of the cumulative effect of low interest rates in the previous years, which was dragged into the new transaction.[337] Second, the Court of Appeal challenged the Italian precedents used by the High Court to make its finding of speculation, which were mostly from lower courts, and some English precedents.[338] The High Court should instead have been based on Supreme Court decision number 19013 of 2017,[339] which relied on a Determination by the Italian securities regulator (CONSOB).[340] That determination provided a structured test for identifying a hedging transaction: (i) the transaction is explicitly carried out to reduce risks associated with the underlying financial instrument; (ii) there is a high degree of correlation between the characteristics of the underlying debt and those of the derivative.[341] Applied properly, the Court of Appeal concluded, this test would have been satisfied, and the transaction should therefore have been characterized as non-speculative.[342]

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334. *Id.* at [393]–[425]. One should note that in *Haugesund Kommune v. Depfa ACS Bank* [2010] EWCA (Civ) 579 [123] (Eng.), where restitution favored the bank, the court applied a restrictive approach to restitutionary defenses.

335. Banca Intesa Sanpaolo SPA v. Comune di Venezia [2022] EWHC (Comm) 2586 [425] (Eng.).

336. Banca Intesa Sanpaolo and Dexia v. Commune di Venezia [2023] EWCA (Civ) 1482 (Eng.).

337. *Id.* at [156]–[158], [161]–[163].

338. *Id.* at [164]–[167].

339. Cass. Civ., Sez. Un. [Court of Cassation], 31 July 2017, n. 19013 (It.).

340. Commissione Nazionale per le Società e la Borsa (CONSOB), *Comunicazione n. DI/99013791: Strumenti finanziari derivati: criteri di qualificazione e applicazione di norme regolamentari* (Feb. 26, 1999), https://www.consob.it/documents/1912911/1926871/99013791.pdf/b3a6f8ea-040e-d81f-66b6-8c5def90b6ab (last visited March 9, 2026). This CONSOB determination was an answer to a question by a corporation.

341. *Id.*

342. Banca Intesa Sanpaolo and Dexia v. Commune di Venezia [2023] EWCA (Civ) 1482 [159], [168] (Eng.).

The Court of Appeal's focus on context was sensible: the contested derivative was skewed and risky, but it novated an IRS that was originally intended for hedging and should not transform into speculation when it is novated. However, its choice of precedents was also selective. The English Court of Appeal in *Venice* relied on the Italian Supreme Court's decision number 19013 of 2017. This decision analyzed the existence of hedging versus speculation. However, it did not do so in order to determine whether an entity had capacity to conclude the contract, or whether the contract had a determinable "object," the topics analyzed in *Venice* or in *Cattolica,* but in order to determine whether the bank had breached its duties to disclose the transaction risks, and give advice.

*Venice* is an apt corollary of the trend described here. The key difference between English courts and courts in Italy and other countries in Continental Europe is in the role of banks' duties to disclose risks, and/or offer advice. Courts in England enforce contract representations that negate those duties. Courts in Continental European countries tend to enforce those duties. In multiple iterations, courts on both sides have failed to find common ground. Parties gradually shifted towards presenting the issue not as one of risk disclosure and advice, but as one of capacity to conclude speculative transactions, until the Italian Supreme Court listened in its *Cattolica* judgment. English courts' reaction was to protect the contract, and the banks, against this development. What did they use? The more robust definitions for a "hedging" transaction drawn from a case about risk disclosures and advisory duties. No court gave dialogue a chance.

## IV.
## ONWARD: WHAT *LEX MERCATORIA* FOR DERIVATIVES?

This Section sets out the principal conclusions. Years of litigation have weakened the enforceability of cross-border derivatives, rather than strengthening it. Part of it is due to some initial shortcomings, such as relying, for derivatives enforcement, on a dispute resolution system centered in the law and jurisdiction of the United Kingdom and United States. Part is due to the inability of English courts, and courts in Continental Europe, to openly discuss, let alone find common ground, on how to approach a conflict where the bank's client alleges that it was sold a product with inadequate advice or risk disclosure, while the bank relies on contract representations that preclude such allegations. Part is due to bank clients' decision to plead that they lacked the capacity to conclude speculative transactions, and English courts' decision to *prima facie* accept such arguments. The result has been frustration and stalemate. This Section analyzes the possible ways forward, which consist of (i) preserving the current system in full, i.e., ignoring the conflict (A); (ii) moving towards hybrid arrangements that incorporate more explicit regulatory involvement (B); or (iii) seeking to recalibrate the current private system through greater decentralization and enhanced dialogue among courts (C).

### A. *Status Quo: Private and Centralized Lex Mercatoria*

Despite the strains caused by derivatives litigation, the current system has clear strengths: the ISDA MA is a well-tested and technically precise framework, and courts in England and New York are experienced, sophisticated, and predictable. Thus, one option is to simply wait until the conflict fades out in the distance (procrastination). A return to normalcy in interest rates will reduce the incentives of non-bank counterparties to litigate, and courts in other jurisdictions may learn to normalize derivatives contracts and accept the centrality of English and New York courts. Relying on parties' negotiation would be equivalent to this. Post-conflict negotiation has always been available; presumably, the parties litigated only when both thought that doing so could yield a better outcome. Pre-conflict negotiation looks unrealistic: default preferences are sticky, and any individual counterparty would face an uphill battle in attempting to introduce an untested option. Some non-bank counterparties managed to insert the derivatives into a broader advisory relationship, only to realize that English courts interpret the derivatives contracts and the ISDA MA in a self-referenced, self-contained way.[343]

Thus, if the choice is to double down on the current system of private and centralized *lex mercatoria*, a natural evolution would be to go one step further in the privatization of *lex mercatoria* and encourage the use of *arbitration*. Arbitration is a natural companion of *lex mercatoria*.[344] Centralized models that favor one

343. *See supra* Section II.C (discussing cases of Brescia, Savona, and TRM).
344. BERGER, *supra* note 6, 109–110.

specific law (English law) to settle disputes over standard terms, such as BIMCO, for maritime carriage, or GAFTA, for commodities trade increasingly rely on arbitration.[345] Arbitration's importance is rising in financial disputes,[346] and it is already enabled by the ISDA's arbitration framework.[347] Arbitral awards benefit from the widely accepted New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This includes, for example, the enforcement of English courts' decisions in European countries post-Brexit that fall outside the Brussels Regulations and the Lugano Convention,[348] and are covered by the Hague Convention of 2019.[349] Arbitrators seem as likely as English judges to focus on the letter of the contract and to leave matters of disclosure or advice out.

However, as the *Ceylon Petroleum* saga illustrated,[350] arbitrators are unlikely to sidestep matters like capacity and speculation. Furthermore, the *Ceylon* saga is not a paragon of predictable, cohesive solutions, given it consisted of three decisions (two of which were arbitral awards), with three different doctrinal outcomes. Arbitration's private nature, though positive for parties wary of public exposure, would prevent a more coherent body of case law from developing and anchor *ultra vires* challenges more firmly into the private law of derivatives.

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345. *Supra* Section I.B.

346. Lamandini & Ramos Muñoz, *supra* note 2, at 460. The American Arbitration Association (AAA) has a specific section for financial disputes (https://www.adr.org/industries/commercial-industries/financial-services/) and it is a growing area (https://feature.adr.org/2025-aaa-infographics). Self-regulatory organizations, such as the Financial Industry Regulatory Authority (FINRA) also provide alternative dispute resolution mechanisms (https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/2025).

347. *Supra* Section I.B.

348. The European Commission objected to the United Kingdom rejoining it. Communication from the Commission to the European Parliament and the Council: Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention, at 4, COM (2021) 222 final (May 4, 2021), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021DC0222.

349. Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, 3827 U.N.T.S. 1. The EU's accession was on 29 August 2022, and the Convention entered into force on 1 September 2023. The United Kingdom ratified the Convention on 27 June 2024, and it will enter into force there on 1 July 2025. *See* HCCH, Status Table, available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=137 (last visited June 29, 2025).

350. *Supra* Section III.B.

This connects to a broader structural concern. Preserving the *status quo* is defensible only if disputes over the validity of derivatives are viewed as either opportunistic—raised by non-bank counterparties seeking to escape unfavorable bargains—or exceptional deviations from an otherwise correct model in which strict enforcement and a self-contained construction of the ISDA framework is plainly right, and any deviation from it is plainly wrong. However, the cases analyzed here suggest a more complicated picture. Different jurisdictions are not merely misapplying a shared framework; they diverge in how to conceptualize transactional risk, what conduct they legally expect from banks, and how they assess financial transactions that may undermine public services or social goals. Glossing over these differences may preserve short-term stability, but likely only at the expense of bigger issues in the long run. A particularly salient case, or a string of cases, involving risky products actively promoted by banks and leading to the failure of a prominent public or civil society institution could trigger a legitimacy crisis for the system as a whole. Thus, it is worth considering how to keep the strengths of the current system, while addressing the vulnerabilities these disputes have exposed.

### B. *Regulation and Regulators (Hybrid Lex Mercatoria)*

If one accepts that some issues that have emerged in cross-border derivatives litigation reflect genuine concerns and disagreements over matters of policy not fully addressed by the ISDA framework, one option would be to evolve towards a hybrid system with greater involvement from administrative authorities.

Stronger regulation became standard practice for the derivative market after the 2008 financial crisis exposed the link between those elements and financial stability.[351] The relationship between banks and their clients, including in the sale of complex financial products, is also a matter of regulatory concern for both consumer and retail clients.[352] Supervisory authorities have developed alternative dispute resolution systems to deal with the large volumes of cases, as exhibited by the Italian "twin" systems sponsored by Bank of Italy and

351. Ramos Muñoz, *supra* note 2, at 539.
352. *Supra* Section I.D.2.

CONSOB.[353] In the United Kingdom, where courts tend to strictly rely on the letter of the contract, regulatory authorities like the FCA intervened to address the perceived protection gap in Interest Rate Hedging Products marketed by banks to retail clients and managed to foster transactional solutions between parties without charging banks with any breach of standards.[354]

Authorities have not yet developed similar schemes for cross-border cases but could do so if they wished. Securities regulators could, for example, sign memoranda of understanding with each other to reach common positions on the riskier elements in certain transactions, what behavior is expected from banks, and what steps are recommended to enter into transactions. They could also liaise with public auditors or authorities enforcing fiscal or budgetary rules to flag particularly risky transactions. Banks could implement the newly promulgated guidelines into their internal risk processes to minimize interference with the ISDA framework.

This, however, would be tantamount to an admission of defeat for courts, as they were unable to reconcile public concerns about risk, disclosure, or *ultra vires* with private *lex mercatoria* for cross-border derivatives. Despite their unquestionable advantages, administrative authorities do not bolster the legitimacy of the system like courts can.[355] Italian alternative dispute resolution bodies, and the arbitrators that sit in them, deferentially follow case law, and the FCA's IRHP review, despite efficiently bringing redress to thousands of clients, was subject to a subsequent inquiry and an independent report, to address criticism.[356]

353. *Supra* Section I.D.2.

354. *Supra* Section I.D.2; Ramos Muñoz, *supra* note 2, at 556.

355. Ramos Muñoz, *supra* note 2, at 560, offering different examples where dispute resolution schemes sponsored by financial supervisors operate as complements, not substitutes of courts, to handle a large volume of disputes, while courts are still needed to settle relevant points of doctrine and principle.

356. *Id.* at 558–60. In the case of Italy, it refers to the Annual Reports of the two main Alternative Dispute Resolution (ADR) mechanisms in Italy, the *Arbitro Bancario Finanziario* (ABF), sponsored by the Bank of Italy, the bank supervisor, and the *Arbitro per le Controversie Finanziarie* (ACF) sponsored by the CONSOB, the securities supervisor. The Annual Reports typically refer to the more relevant doctrinal developments in the courts, which the arbitrators follow closely, to ensure alignment. In the case of the United Kingdom,

### C. *Conversation (Plural Lex Mercatoria)*

Courts have not fully allayed the tensions underlying cross-border derivatives disputes, but they have undeniable, if unsung, advantages over administrative authorities. Thus, one plausible avenue is to make derivatives' *lex mercatoria* more *plural* through better *conversation,* or dialogue, between courts.

Inter-court dialogue is a well-known idea, encompassing both "formal" dialogue where national courts in one jurisdiction ask courts in a different jurisdiction to clarify a specific issue, and "informal" dialogue, where courts acknowledge other courts' views as a persuasive, if not authoritative source.[357]

This dialogue is often associated with higher courts on matters like fundamental rights and principles.[358] However, informal inter-court dialogue also underpins the success of some transnational commercial law texts. The CISG's principle of "uniform interpretation" (Article 7) has enabled courts to consider foreign courts' opinions.[359] Some court decisions have become truly international precedents on matters like extrinsic evidence (parol evidence rule),[360] damages,[361] or exemption ("*force majeure*").[362] In the CISG's arguably most famous case (*New Zealand Mussels*), the German Supreme Court set the

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it describes the IRHP intervention, its subsequent scrutiny, and the parallel developments in the English courts. *See supra* Section I.D.2.

357. Lamandini, Ramos Muñoz & Ruiz Almendral, *supra* note 3; Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 100, 102, 104, 106 (1994) (offering multiple examples of 'horizontal' communication, in the absence of any Treaty or formal framework, in contrast with 'vertical' communication between national and supranational courts). Within Slaughter's typology, within horizontal cases I would still differentiate between cases where there is a "formal" request, as in cross-border recognition and enforcement, and cases where there is, simply, a cross-citation.

358. JUDICIAL DIALOGUE 55 (Martin Belov ed., 2019); Anthony Arnull, *Judicial Dialogue in the European Union*, in 109 PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 117–19 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

359. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, art. 7; Anselmo Martínez Cañellas, *Interpretación de la Convención de Viena sobre Compraventa Internacional de mercaderías*, 102 CEF Legal 13, 17 n. 11, 41 n. 173 (2010).

360. MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino S.P.A., 144 F.3d 1384 (11th Cir. 1998).

361. Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024, 1026 (2d Cir. 1995) (supporting the claim although its reasoning on the susceptibility to interpret the CISG in line with the UCC is mistaken).

362. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 9, 2002, Neue Juristische Wochenschrift [NJW] 1651 (2002) (Ger.).

standard for determining when a foreign country's mandatory health and safety regulations could amount to a lack of conformity under the Convention's uniform rules.[363] The court had to balance the relevance of domestic rules (typically in the buyer's country) with the behavior to be expected from the seller. Thus, a product in breach of such standards would be non-conforming only if the seller ought to have known the existence of such standards.[364] Thus, there are clear similarities with the problems analyzed here: banks actively engaging with their clients in a jurisdiction, used to the process of selecting a suitable product, and with knowledge of that jurisdiction's expectations on the disclosure of risks or advisory duties may not easily claim that such duties are irrelevant.

Admittedly, selling mussels is not the same as selling derivatives. However, the ISDA's centralized model of *lex mercatoria* is comparable only to those of BIMCO, for maritime carriage, or GAFTA, for commodities trade,[365] which have their own differences. Furthermore, there are other examples where courts' acknowledgment of each other's opinions can foster convergence, even in matters that impinge on public policy. This is the case of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI).[366] In the MLCBI context, courts sometimes have very different approaches to key legal concepts, such as the "center of main interest" (COMI) in Europe and in the United States.[367] However, that has not prevented courts in the United States or the United Kingdom from referring to, and analyzing, the decisions of the CJEU as persuasive, where possible, to emphasize the commonalities, rather than the differences.[368]

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363. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 8, 1995, 129 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 75 (1995) (Ger.).

364. *Id.*

365. *Supra* Section I.A.

366. *See* U.N. Comm'n on Int'l Trade L., Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency 20 (Vienna, 2021) (Commentary on Article 6, public policy exception).

367. Courts in the EU, which interpret the concept of COMI under the European Insolvency Regulation 2015/848 (EIR) (recast) differ from U.S. courts interpreting the concept under U.S. Bankruptcy Code Chapter 15, based on the UNCITRAL MLCBI, e.g., on the strength of the presumption that the COMI is the registered office (stronger in the EU, weaker in the US).

368. U.S. cases, such as In re SPhinX, Ltd., 351 B.R. 103 (Bankr. S.D.N.Y. 2006), aff'd, 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768 have cited European cases, such as Case C-341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813 (Grand

Thus, differences aside, there are lessons to be learned. Some English courts showed interest in foreign laws, such as in *Haugesund, Santander* (first instance), or *Venice* (first instance). The competent courts under the contract could find a way to develop their doctrines to acknowledge that cross-border cases may not be equivalent to domestic cases, that the parties' expectations may differ, and that foreign doctrines on disclosure and advice, which are a matter of principle in some jurisdictions, can have a role in shaping those expectations. Courts in other jurisdictions, typically deciding non-contractual claims, could look more deeply into the due diligence expected from supposedly sophisticated non-bank counterparties, and reach sterner verdicts when such parties acted opportunistically or carelessly. This would help align the findings in contractual and non-contractual cases, and to reach more calibrated decisions, like shifting the focus towards damages and away from voidness as a remedy. A positive side effect of focusing on disclosure and advice over risk would be to gradually eradicate capacity and speculation as the basis for cross-border dialogue, as they are uncompromising, rigid, and ultimately futile.

As the central organization in derivatives' *lex mercatoria* and governance, the ISDA would be a key actor in this process. The ISDA can foster uniform interpretations, and help tackle key legal issues by making existing case law available, like UNCITRAL does through the CLOUT system.[369] It can aid courts to pursue interpretations that acknowledge important matters of principle without endangering the stability of global markets, and use its wide stakeholder base to balance the demands for certainty of some members (like banks) with the advantages that a more plural *lex mercatoria* has for the legitimacy of the system, and, ultimately, the stability of global derivatives markets.

Formal inter-court dialogue is more difficult, but some examples could provide inspiration. Court-to-court cooperation is an established feature of insolvency law, including memoranda of

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Chamber May 2, 2006) as a persuasive basis. The English Court of Appeal in re Stanford International Bank Ltd. [2010] EWCA (Civ) 137 (Eng.), analyzed the concepts of COMI under the EIR and the MLCBI, concluding that it was correct to use the Eurofood approach to interpret the English concept of COMI under its Cross-Border Insolvency Regulations SI 2006/1030, which gave force to the UNCITRAL MLCBI (in a non-EU case).

369. *Supra* note 13.

understanding or protocols.[370] At a regional level, inter-court dialogue is formally established in the European Union through the preliminary reference procedure to the CJEU.[371] Contract (and non-contractual) disputes may not need such a level of formality or institutionalization. The increasing presence of specialist courts for international commercial disputes creates an opportunity to experiment with more structured forms of judicial dialogue. In cases involving parallel or interconnected jurisdictional "legs," courts could formally request clarification from one another on specific issues of local law, rather than resolving those questions unilaterally. Such mechanisms would allow courts to address conflicts more cooperatively and with greater sensitivity to the legal frameworks involved in each forum.

It is easy to dismiss such views as unrealistic. This would look at the problem backwards. The cases discussed above demonstrate that risk and inconsistencies already exist: counterparties sometimes refuse payment on public policy grounds, and courts can reach opposing verdicts in both contractual and non-contractual proceedings. Those cases also suggest that the enforceability of derivatives contracts and of the ISDA MA cannot be secured through a purely self-referential interpretation of the agreement itself. Broader questions of public law, regulatory policy, and judicial authority are inevitable. The resulting tension may be addressed through some form of synthesis, such as structured inter-court dialogue, or some form of informal dialogue, where courts in one jurisdiction not only apply the laws of another jurisdiction when they have to, but also acknowledge the interests protected by a different legislation, and accept that they may call for a different approach in cross-border cases from the one that would be given to domestic cases. Alternatively, the center of gravity may shift away from courts altogether—towards arbitration or even regulatory authorities. The latter trajectory appears increasingly plausible. It would be a sad outcome. Courts are perfectly capable of using imaginative strategies to enhance dialogue, acknowledge the diversity of views, and try to find a synthesis. With that, courts should

370. *See, e.g.*, Int'l Insolvency Inst., *III: Insolvency Protocols*, https://www.iii-global.org/initiatives/iii-insolvency-protocols/ (last visited June 29, 2025).

371. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, Oct. 26, 2012, 2012 O.J. (C 326) 47.

and will keep their role as the leading forum for cross-border derivatives disputes.