What is an international contract within the meaning of Article 3(3) Rome I? – Dexia Crediop SpA v Provincia di Pesaro e Urbino [2022] EWHC 2410 (Comm)

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On 27 September 2022, the English High Court granted summary judgment and declaratory relief in favour of the Italian bank Dexia Crediop SpA ("Dexia") in its lawsuit against the Province of Pesaro and Urbino ("Pesaro"), a municipal authority in the Marche region of Italy. This judgement marks the latest development in a long-running dispute involving derivative transactions used by Italian municipalities to hedge their interest rate risk. Reportedly, hundreds of Italian communities entered into interest rate swaps between 2001 and 2008 having billions of Euros in aggregate notional amount. It is also a continuation of the English courts' case law on contractual choice of law clauses. Although the judgments discussed in this article were, for intertemporal reasons, founded still on Art. 3(3) of the Rome Convention, their central statements remain noteworthy. The Rome Convention was replaced in almost all EU member states, which at the time included the United Kingdom, by Regulation (EC) No 593/2008 ("Rome I"), which came into effect on 17 December 2009. Article 3 Rome I Regulation contains only editorial changes compared to Article 3 of the Rome Convention. As a matter of fact, Recital 15 of the Rome 1 Regulation explicitly states that despite the difference in wording, no substantive change was intended compared to Article 3(3) of the Rome Convention.

In the case at hand, Pesaro and Dexia entered into two interest rate swap transactions in 2003 and 2005. Each of the transactions was subject to the 1992 International Swap Dealers Association ("ISDA") Master Agreement, Multicurrency – Cross Border and a Schedule therto. During the 2008 financial

crisis, the swaps led to significant financial burdens for Pesaro. In June 2021, Pesaro commenced legal proceedings in Italy seeking to unwind or set aside these transactions. Dexia then brought an action in England to establish the transactions were valid, lawful and binding on the parties.

A central question of the dispute was the law applicable to the contract. Pesaro claimed breaches of Italian civil law in its proceedings, while Dexia argued that only English law applies. As correctly stated by the court, the applicable law is determined by the Rome Convention, as the transactions between the parties took place in 2003 and 2005. According to Article 3(1) Rome Convention, a contract is governed by the law chosen by the parties. The ISDA Master Agreement in conjunction with the Schedule contained an express choice of law clause stating that the contract is to be governed by and construed in accordance with English law. Of particular importance therefore was whether mandatory provisions of Italian law could nevertheless be applied via Article 3(3) Rome Convention. This is the case if "*all the [other] elements relevant to the situation at the time of the choice are connected with one country only […]*". In order to establish weather Article 3(3) applied, the court referred to two decisions of the English Court of Appeal. Both cases also concerned similar interest rate swap transactions made pursuant to an ISDA Master Agreement with an expressed choice of English law.

In *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267, the Court of Appeal extensively discussed the scope of this provision in connection with the principle of free choice of law, more precisely, which factors are to be considered as "*elements relevant to the situation*". This was a legal dispute between the Portuguese Santander Bank and various public transport companies in Portugal. First, the Court of Appeal emphasised that Article 3(3) Rome Convention is an exception to the fundamental principle of party autonomy and therefore is to be construed narrowly. Therefore, "*elements relevant to the situation*" should not be confined to factors of a kind which connect the contract to a particular country in a conflict of laws sense. Instead, the Court stated that it is sufficient if a matter is not purely domestic but rather contains international elements. Subsequently the court assessed the individual factors of the specific case. In so far, the Court of Appeal confirmed all factors the previous instance had taken into account. Relevant in the case was the use of the "Multi-Cross Border" form of the 1992 ISDA Master Agreement instead of the "Local Currency-Single Jurisdiction" form, that the contract included the

right to assign to a foreign bank and the practical necessity for a foreign credit institution to be involved, as well as the foreseeability of the conclusion of hedging arrangements with foreign counterparties and the international nature of the swap market. These factors were found sufficient to establish an international situation.

In *Dexia Crediop S.P.A. v. Comune di Prato* [2017] EWCA Civ 428, the Court of Appeal addressed the issue again and concluded that already the fact that the parties had used the "Multi-Cross Border" form of the 1992 ISDA Master Agreement in English, although this was not the native language of either party, and the conclusion of back-to-back hedging contracts in connection with the international nature of the derivatives market was sufficient.

In the present case, Dexia again relied on the use of the ISDA Master Agreement, Multicurrency – Cross Border and on the fact that Dexia hedged its risk from the transactions through back-to-back swaps with market participants outside Italy. But as the relevant documents were not available, the second circumstance could not be taken into account by the court. Nevertheless, the court considered that the international element was sufficient and Article 3(3) of the Rome Convention was not engaged.

Thus, this new decision not only continues the very broad interpretation of the Court of Appeal as to which elements are relevant to the situation, but also lowers the requirements even further. This British approach appears to be unique. By contrast, according to the hitherto prevailing opinion in other Member States, using a foreign model contract form and English as the contract language alone was not sufficient to establish an international element (see, e.g., *Ostendorf* IPRax 2018, p. 630; *Thorn/Thon* in Festschrift Kronke, 2020, p. 569; *von Hein* in Festschrift Hopt, 2020, p. 1405). Relying solely on the Master Agreement in order to affirm an international element seems unconvincing, especially when taking Recital 15 of the Rome I Regulation into account. Recital 15 Rome I states that, even if a choice of law clause is accompanied by a choice of court or tribunal, Article 3(3) of the Rome I Regulation is still engaged. This shows that it is the purpose of this provision to remove the applicability of mandatory law in domestic matters from the party's disposition. The international element must rather be determined according to objective criteria. With this interpretation, Article 3(3) of the Rome I Regulation also loses its *effet utile* to a large extent.

Unfortunately, the Court of Appeal considered its interpretation to be an *acte clair* and therefore refrained from referring the case to the CJEU. Since Brexit became effective, the Rome I Regulation continues to apply in the United Kingdom in an "anglicised" form as part of national law, but the English courts are no longer bound by CJEU rulings. As a result, a divergence between the English and the Continental European assessment of a choice of law in domestic situations is exacerbated.

This also becomes relevant in the context of jurisdiction agreements. In the United Kingdom, these are now governed by the HCCH 2005 Choice of Court Convention which is also not applicable according to article 1(2) if, "*the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State*". As there is a great interest in maintaining the attractiveness of London as a the "jurisdiction of choice", it is very likely that the Court of Appeal will also apply the standards that it has developed for Article 3(3) Rome I to the interpretation of the Choice of Court Convention as well.

One can only hope that in order to achieve legal certainty, at least within the European Union, the opportunity for a request for referral to the CJEU will present itself to a Member State court as soon as possible. This would allow the Court of Justice to establish more differentiated standards for determining under which circumstances a relevant foreign connection applies.