Jurisdictional clauses: Exclusive or not? The example of the English Courts' jurisdiction under the 1992 ISDA Master Agreement

Dr Christian Oetiker and Dr Jana Essebier*

Introduction

In the aftermath of the Lehman bankruptcy, courts in various jurisdictions have seen quite a few proceedings involving derivatives transactions governed by a Master Agreement of the International Swaps and Derivatives Association (ISDA). Some of these disputes involved issues of jurisdiction, which on the one hand concerned the interpretation of the jurisdictional clauses contained in the ISDA Master Agreement and on the other hand implicated the impact of insolvency proceedings. One of the cases involving the first issue has been recently decided by the Swiss Federal Court. This gives reason to deal with both issues on the basis of case law rendered over the last few years in Switzerland and, to some extent, in England.

While the following considerations are mainly based on the situation under the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Lugano on 16 September 1988 ('Lugano Convention 1988'), and the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Lugano on 30 October 2007 ('Lugano Convention 2007'), which are the instruments applied by the Swiss courts, they are of general relevance for the application of jurisdictional clauses in Europe.

* Dr Christian Oetiker is a partner at VISCHER's Dispute Resolution Team. Dr Jana Essebier is a partner at VISCHER's Banking and Finance Team.

Background

ISDA was formed in 1985. The purpose was to promote efficiency, decrease costs and limit risks by standardising market practice and documentation. For this purpose, ISDA developed a documentation architecture, at the heart of which is the ISDA Master Agreement – an umbrella agreement for over-the counter derivative transactions (also referred to as 'OTC derivatives'). The main types of OTC derivatives are options, swaps, and forwards, but there are a variety of combinations.

The ISDA Master Agreement consists of the framework agreement and the schedule. The framework agreement must be adopted by the contracting parties unaltered. In the schedule they can make choices where the framework agreement provides for alternatives, stipulate particularities, and make amendments to the framework agreement.

The individual derivative transactions under an ISDA Master Agreement are typically documented in the form of separate confirmations. They govern the terms and conditions specifically related to the transactions which are not provided for in the ISDA Master Agreement or the schedule and contain provisions which deviate from the framework set by the ISDA Master Agreement and the schedule.

ISDA has issued different versions of the ISDA Master Agreement. Currently one of two versions are generally used in practice: the 1992 ISDA Master Agreement or the 2002 ISDA Master Agreement. Both agreements are governed either by English law or the laws of the state of New York.

The ISDA Master Agreement has become one of the most important standard form business contracts used in the financial world. In view of its widespread use, there is a thriving interest by market participants that it is construed by the courts in a uniform way.

The jurisdictional clause of the 1992 ISDA Master Agreement

The 1992 ISDA Master Agreement provides in section 13(b)(i) as follows:

> 'Jurisdiction. With respect to any suit, action or proceedings relating to this Agreement ("Proceedings"), each party irrevocably: -
>
> (i) submits to the jurisdiction of the English courts, if this Agreement is expressed to be governed by English law, or to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City, if this Agreement is expressed to be governed by the laws of the State of New York; and
>
> (ii) [...].

> Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction (outside, if this Agreement is expressed to be governed by English law, the Contracting States, as defined in Section 1(3) of the Civil Jurisdiction and Judgments Act 1982 or any modification, extension or re-enactment thereof for the time being in force) nor will the bringing of Proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction.'

A choice of forum clause confers jurisdiction on a court, whether or not it would otherwise have jurisdiction. In addition, to the extent such a clause is of an exclusive nature, it precludes the parties from having recourse to a court that would otherwise have jurisdiction. This is the so-called derogatory effect.

Section 13(b)(i) of the 1992 ISDA Master Agreement explicitly states that a jurisdiction agreement in favour of the courts of the state of New York is not exclusive. However, the clause is silent as to whether the choice of the English courts is exclusive or not. Section 13(b), second paragraph, of the 1992 ISDA Master Agreement makes it clear that, as a general rule, the jurisdiction of the English courts is non-exclusive: the parties are not precluded from bringing proceedings elsewhere. There is an exception to this: the provision applies only to courts outside of the contracting states as defined in the English Civil Jurisdiction and Judgments Act 1982 (the 'CJJA 1982'). Hence, the question whether the English courts' jurisdictions is exclusive depends on what other jurisdiction is concerned.

The CJJA 1982 was enacted to give effect in the United Kingdom to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968 ('Brussels Convention 1968'). It was subsequently amended to give effect to the Lugano Convention 1988 and to take account of the replacement of the Brussels Convention 1968 by the European Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels Regulation 2001'). The latter has now been replaced by the European Council Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels Regulation 2012').

In its current version, section 1(3) CJJA 1992 defines a contracting state as follows:

> '(3) In this Act—
>
> 'Contracting State' without more, in any provision means—
>
> (a) in the application of the provision in relation to the Brussels Conventions, a Brussels Contracting State; and
>
> (b) in the application of the provision in relation to the Lugano

Convention, a State bound by the Lugano Convention;

'Brussels Contracting State' means a state which is one of the original parties to the 1968 Convention or one of the parties acceding to that Convention under the Accession Convention, or under the 1982 Accession Convention, or under the 1989 Accession Convention, but only with respect to any territory–

(a) to which the Brussels Conventions apply; and

(b) which is excluded from the scope of the Regulation pursuant to Article 299 of the Treaty establishing the European Union;

[…]

'State bound by the Lugano Convention' in any provision, in the application of that provision in relation to the Lugano Convention has the same meaning as in Article 1(3) of that Convention.

'Regulation State' in any provision, in the application of that provision in relation to the Regulation, means a Member State.'

Article 1(3) of the Lugano Convention 2007 reads as follows:

'3. In this Convention, the term 'State bound by this Convention' shall mean any State that is a Contracting Party to this Convention or a Member State of the European Community. It may also mean the European Community.'

The issue

On the face of section 13(b) of the ISDA Master Agreement and section 1(3) of the CJJA 1982, the situation seems to be quite clear: if two states bound by the Lugano Convention 2007, such as the United Kingdom and Switzerland, are concerned, the jurisdiction of the English courts is exclusive. However, the background of section 13(b), second paragraph, of the ISDA Master Agreement may cast some doubt on this interpretation.

This provision dealt with the fact that at the time of the drafting of the 1992 ISDA Master Agreement, Article 17 of the Brussels Convention 1968 and Article 17 of the Lugano Convention 1988 did not explicitly acknowledge the validity of non-exclusive jurisdiction agreements and there was a view that they were in fact not allowed.[1]

This situation has changed. Article 23(1) of the Brussels Regulation 2001, Article 23(1) of the Lugano Convention 2007 and Article 25(1) of the Brussels Regulation 2012 all provide that jurisdiction agreements are exclusive unless the parties agree otherwise. Hence, it is now without any doubt that non-exclusive jurisdiction agreements are allowed.

1 ISDA, *User's Guide to the 2002 ISDA Master Agreement (ISDA 2003)*, 38.

The question arises whether this change of the legal position in these instruments had an impact on the interpretation of the jurisdiction clause.

English decisions

There is limited English case law on this issue.

In *Bankers Trust International Plc v RCS Editiori SpA*,[2] the court held that section 13(b) of the 1992 ISDA Master Agreement created exclusive jurisdiction in favour of the English courts. The judge stated:

> 'It seems to me that there is no inherent reason why the existence of mandatory rules should negate the primacy which the court must accord an exclusive jurisdiction clause; it must not be forgotten that the parties did agree that the English Court should have jurisdiction and that other member states of the European Community should not… Once one concludes, as I do, that the clause does exclude Italian jurisdiction, there cannot in my view, be room for submission that it is wrong or inappropriate that art.17 should prevail to the exclusion of the court first seized.'[3]

This finding was made prior to the enactment of the Brussels Regulation 2001 and the Lugano Convention 2007.

In *Nomura v Banca Monte dei Paschi di Siena SpA*,[4] Mr Justice Eder stated:

> 'It is common ground that this [Section 13 1992 ISDA Master Agreement] constitutes an exclusive jurisdiction clause in favour of the English courts within the Convention territories (which include Italy) for the purposes of the Judgments Regulation.'

This judgment of 2013 was rendered after the enactment of the Brussels Regulation 2001. The relevant 1992 ISDA Master Agreement had been entered into in 1994.[5] The judge did not further discuss the question of whether the clause was exclusive or not, and it seems that there was no dispute between the parties in this regard. It is therefore unclear whether the judge was of the opinion 1. that the date of conclusion of the 1992 ISDA Master Agreement was decisive or 2. whether the enactment of the Brussels Regulation 2001 had generally no impact on the interpretation of the jurisdictional clause in the 1992 ISDA Master Agreement.

In *Fondazione Enasarco v (1) Lehman Brothers Finance AG and (2) Anthracite Rated Investments (Cayman) Limited*,[6] Mr Justice Richards held that section 13(b) of the

2 *Bankers Trust International Plc v RCS Editiori SpA* [1996] CLC 899.

3 *Ibid*, 899, 905.

4 *Nomura v Banca Monte dei Paschi di Siena SpA* [2013] EWHC 3187 (Comm), para 17.

5 *Ibid*, para 4.

6 *Fondazione Enasarco v (1) Lehman Brothers Finance AG and (2) Anthracite Rated Investments (Cayman) Limited* [2014] EWHC 34 (Ch).

ISDA Master Agreement established, 'exclusive jurisdiction to the English Courts as between the courts of states bound by the Lugano Convention, but proceedings may be brought in other countries.'[7] The judge did not, however, address the question of whether the amendments to the Lugano Convention had any impact on the interpretation of section 13(b) of the ISDA Master Agreement.

Swiss decisions

Background of the dispute

In a recent litigation between an insolvent Swiss company in liquidation proceedings and two German parties, the question arose whether the jurisdictional clause contained in the 1992 ISDA Master Agreement provides for the exclusive jurisdiction of the English courts in relation to the Swiss courts if the parties have opted for English law to apply to the merits.

The dispute concerned alleged claims of the insolvent Swiss party against the German parties. The latter had brought an action for negative declaration before the Zurich courts, arguing that the jurisdictional clause in the 1992 ISDA Master Agreement was not exclusive. The insolvent Swiss party denied the jurisdiction of the Swiss courts for this claim.

Decision of the Zurich Superior Court

In the proceedings before the Zurich Superior Court, the German parties argued that the wording contained in section 13(b), second paragraph, of the ISDA Master Agreement ('[n]othing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction') did not exclude the jurisdiction of the Swiss courts. The Zurich Superior Court agreed that this wording, in principle, establishes that the jurisdiction of the elected English courts is not exclusive.[8] However, it added that the wording in the bracket of that clause ('outside, if this Agreement is expressed to be governed by English law, the Contracting States, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1992 or any modification, extension or re-enactment thereof for the time being in force') contained a qualification of this principle.[9]

The Zurich Superior Court considered that the meaning of 'contracting states' was decisive. It stated that contracting states, for the purposes of the CJJA 1982, were originally meant to be the contracting states to the Brussels Convention 1968 and the Lugano Convention 1988 and that according to

7 *Ibid*, para 4.

8 Decision of the Zurich Superior Court, 4 July 2014, NE130012, c 5.a.

9 *Ibid*.

the current version of the CJJA 1982, this term refers to the states bound by the Lugano Convention 2007 in accordance with Article 1(3) of the Lugano Convention 2007, which includes Switzerland.[10] The Court concluded that the submission to the jurisdiction of English courts: 1. is exclusive if courts of a contracting state of the Lugano Convention 2007 are affected; and 2. is non-exclusive where other courts are affected.[11]

The Court considered that the background of this solution was the fact that Article 17(1) of the Brussels Convention 1968/Lugano Convention 1988 did not allow for any non-exclusive jurisdiction agreements.[12] It went on to say that the scope of the jurisdictional clause had not changed, although the Lugano Convention 2007 and the then Brussels Regulation 2001, which both allowed for non-exclusive jurisdictional clauses, had been enacted and the CJJA 1982 had been adapted accordingly: the definition of the term 'contracting states' in the CJJA 1982 still referred to Article 1(3) of the Lugano Convention 2007. Hence, the Court concluded that jurisdiction clauses in accordance with the 1992 ISDA Master Agreement remain exclusive if the courts of a Lugano contracting state are affected.[13]

The Zurich Superior Court also denied an argument by the two German parties that the wording of section 13(b) of the 1992 ISDA Master Agreement was not sufficiently clear and had to be interpreted in a broad way. The Court found that the language of the jurisdiction clause was unambiguous and left no room for interpretation.[14]

For those reasons, the Court decided that section 13(b), second paragraph, of the 1992 ISDA Master Agreement did not apply to Switzerland, being a contracting state as defined in the CJJA 1982, and that the jurisdiction of the English courts was therefore exclusive.[15]

With regard to the jurisdictional clause in section 13(b)(i)(1) of the 2002 ISDA Master Agreement, the Court came to a different finding in an *obiter* statement. It said that, while the clause makes a distinction between cases of exclusive and non-exclusive jurisdiction, it no longer refers to the CJJA 1982, but speaks of the 'Convention Court' and provides an unalterable definition of that term in section 14 of the 2002 ISDA Master Agreement:[16]

> 'Convention Court means any court which is bound to apply to the Proceedings either Article 17 of the 1968 Brussels Convention on

10 *Ibid.*

11 *Ibid.* The second part of this finding is likely to consider only circumstances in which the Lugano Convention 2007 applies, although the Court has not explicitly said so.

12 Decision of the Zurich Superior Court, 4 July 2014, NE130012, c 5.b.

13 Decision of the Zurich Superior Court, 4 July 2014, NE130012, c 6.a.

14 Decision of the Zurich Superior Court, 4 July 2014, NE130012, c 8.b.

15 Decision of the Zurich Superior Court, 4 July 2014, NE130012, c 5.

16 Decision of the Zurich Superior Court, 4 July 2014, NE130012, c 5.b.

> Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters or Article 17 of the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.'

The Zurich Superior Court considered that after the entry into force of the Lugano Convention 2007, the courts bound by that Convention did no longer fall within the definition of Convention Court which explicitly refers to the Lugano Convention 1988. Hence, a jurisdiction agreement in favour of English courts in the 2002 ISDA Master Agreement is to be regarded as non-exclusive with respect to courts which have to apply the Lugano Convention 2007 (which is the case for Switzerland since 1 January 2011).[17] This finding that the definition of Convention Court should not be interpreted dynamically is in line with the view of the drafters of the 2002 ISDA Master Agreement. They intentionally distinguished between states which applied the Brussels Convention 1968 and the ones which applied the Brussels Regulation 2001.[18]

Decision of the Swiss Federal Court

The German parties challenged the Zurich Superior Court's finding that the jurisdictional clause was of an exclusive nature and that Swiss courts did not have jurisdiction. As a consequence of Swiss procedural law, the Swiss Federal Court could not examine the application of English law freely, but rather only with reference to a breach of the prohibition on arbitrary action.[19]

Applying the yardstick of arbitrariness, the Swiss Federal Court found that the lower court's interpretation, pursuant to which 'contracting states' were intended to cover the current states that are parties to the Lugano Convention 2007, was justified. It held that there was no lack of clarity in the choice of term, but that the clause could be construed in simple terms and simply means that, if an action is to be brought in Europe, this may only occur in England.[20] The Swiss Federal Court therefore confirmed the Zurich Superior Court's decision.

Conclusion

These two landmark decisions of the Zurich Superior Court and the Swiss Federal Court confirm that the jurisdictional clause in the 1992 ISDA Master Agreement is, if English law governs the agreement, of an exclusive nature in the relation between states bound by the Lugano Convention 2007. Parties to

17 *Ibid.*

18 See n1 above.

19 Decision of the Swiss Federal Court, 28 April 2015, 4A_451/2014, c 3.1.3.

20 *Ibid.* This finding is likely to consider only circumstances in which the Lugano Convention 2007 applies, although the Court has not explicitly said so.

disputes under the 1992 ISDA Master Agreement will be able to rely on those decisions in order to avoid disputes about jurisdiction.

If the same reasoning is followed with regard to circumstances in which the Brussels Regulation applies (2001 or 2012), the result is different. The term 'Brussels contracting states', as defined in section 1(3) of the CJJA 1982, means states which were one of the original parties to the Brussels Convention 1968 (including the 1982 and 1989 accessions), but only with respect to any territory which is excluded from the scope of the Brussels Regulation 2001 (and now 2012) pursuant to Article 299 of the Treaty establishing the European Community. Currently, there is no such territory, so that there are no states falling within the meaning of Brussels contracting states. The consequence of this reasoning is that the jurisdictional clause is not exclusive whenever the Brussels Regulations 2001 or 2012 apply.

As set out above, in *Nomura v Banca Monte dei Paschi di Siena SpA*,[21] the judge had stated that the jurisdictional clause in the 1992 ISDA Master Agreement, which had been entered into before the enactment of the Brussel Regulation 2001, was exclusive without further considering the matter. Hence, with regard to clauses in old contracts, there may still be an argument that the jurisdictional clause is exclusive.

The Zurich Superior Court has also made clear – although only in *obiter* – that the reasoning which applies to the 1992 ISDA Master Agreement does not apply to the 2002 ISDA Master Agreement. Rather, its jurisdictional clause is of a non-exclusive nature since there are no longer any states which are bound by the Brussels Convention 1968 or the Lugano Convention 1988, to which the definition of Convention Court in the 2002 ISDA Master Agreement refers.

Impact of insolvency proceedings (example of Switzerland)

The question of which court has jurisdiction becomes more complex if one of the parties involved is subject to insolvency proceedings. This can be illustrated by the example of Switzerland. Obviously, the legal situation will be different in other countries. However, we submit that the Swiss example will give a taste of the possible issues. The assumption in the following is that a company having its registered seat in Switzerland has become insolvent and bankruptcy proceedings in Switzerland have been commenced.

Switzerland claims exclusive jurisdiction

The starting point is that Swiss insolvency law claims the exclusive jurisdiction of the Swiss courts for matters which are related to Swiss

21 See n2 above, 899, 905.

insolvency proceedings. The Swiss Federal Court has labelled this as the *vis attractiva concursus*.[22] The following thoughts will be developed on the basis of the example of the action of the admission to the schedule of claims (so-called 'collocation action'): if the liquidator of an insolvent company rejects a claim filed by a creditor, such creditor has the possibility to bring a collocation action. Pursuant to Article 250(1) of the Debt Enforcement and Bankruptcy Law Act (DEBLA),[23] the court at the place of the insolvency proceedings has exclusive jurisdiction.[24]

The exception of Article 1(2)(b) of the Lugano Convention 2007

Article 1(2) (b) of the Lugano Convention 2007 provides that the Convention does not apply to bankruptcy proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. The Brussels Regulation contains the same exception. As per the European Court of Justice's (ECJ) case law on the interpretation of this clause,[25] the relevant test is the following:

> '[…] Article 1(2)(b) of Regulation No 44/2001 excludes from the scope of that regulation, which […] is intended to apply to all civil and commercial matters apart from certain well-defined matters, only actions which derive directly from insolvency proceedings and are closely connected with them.'

It is clear that a collocation action, which requires 1. insolvency proceedings in Switzerland and 2. the rejection of a claim by the liquidator, meets that test. Hence, a Swiss collocation action does not fall within the scope of the Lugano Convention 2007.[26]

The effects of insolvency proceedings are territorial in principle unless one of the rare bilateral conventions or the EU Insolvency Regulation (Council Regulation (EC) 1346/2000) apply. This means that, in principle, the courts of other Lugano states are not bound by the fact that the Swiss party is insolvent. As a consequence, an action brought against the Swiss

22 Decision of the Swiss Federal Court, 29 May 2015, 5A_491/2013, c 5.4.

23 Art 250(1) DEBLA: 'Any creditor wishing to contest the schedule of claims because his claim has been entirely or partially rejected or not allocated to the requested class must bring an action against the bankrupt estate before the court at venue of the bankruptcy proceedings within 20 days of the schedule of claims having being made available for public inspection.'

24 DSFC 135 III 127, c. 3.3.2.

25 Case C-133/78 Gourdain v Nadler [1979] ECR 733; Case C-292/08 German Graphics Graphische Maschinen GmbH v Schee [2009] ECR I-8421; Case C-213/10 F-Tex SIA v Lietuvos-Anglijos UAB [2012].

26 Decision of the Swiss Federal Court, 29 May 2015, 5A_491/2013, c 3.5.2; 140 III 320, c 7.3; 133 III 368, c 4.3.2 and 4.3.3.

insolvent party may proceed outside of Switzerland.[27] The foreign courts will regard their proceedings as ordinary civil proceedings, not as proceedings related to a bankruptcy. Hence, they will apply the Lugano Convention to determine their jurisdiction. In the case of a dispute related to a 1992 ISDA Master Agreement, the English courts have exclusive jurisdiction.

In view of this legal situation, it is possible, and in fact not unlikely, that parallel proceedings will take place: a collocation action in Switzerland, ordinary civil proceedings abroad. What is the impact of the judgments rendered in these proceedings?

No recognition or enforcement of a Swiss collocation judgment abroad

As stated above, the Swiss collocation action falls outside of the scope of the Lugano Convention. Hence, a recognition or even enforcement of a Swiss collocation judgement in another Lugano state is not possible.[28] The judgment has no impact outside of Switzerland.

No recognition or enforcement of a foreign judgment in Switzerland

A judgment rendered in ordinary civil proceedings in a state bound by the Lugano Convention 2007 other than Switzerland may not be recognised and enforced in Switzerland pursuant to the case law of the Swiss Federal Court. In 2008, the Swiss Federal Court ruled that, when a court action in connection with a given claim is pending in a foreign country, the inclusion or non-inclusion of that claim in the schedule of claim depended wholly and solely on the outcome of the collocation proceedings in Switzerland, and not on the outcome of the foreign proceedings.[29] This approach was recently confirmed in a 2014 decision. The Swiss Federal Tribunal found that civil proceedings brought in a foreign country after the commencement of Swiss bankruptcy proceedings fall outside the scope of the Lugano Convention by virtue of Article 1(2)(b) of the Lugano Convention 2007 if it has to be assumed that they were brought exclusively with a view to a possible admission of the claim to the schedule of claims in Switzerland.[30] This is the case if the claimant, when commencing the foreign action, could not have any reasonable doubt that a positive judgment could be enforced

27 For example, Brussels Court of Appeal, 9th Chamber, 19 May 2005, 2004/AR/1114 and 2004/AR/1190, No.IV(1)(4) (unpublished). In Switzerland, Art 63 of the Verordnung des Bundesgerichts über die Geschäftsführung der Konkursämter (KOV) vom 13 Juli 1911 (Ordinance of the Swiss Federal Court on Administrative Procedures of Bankruptcy Offices dated 13 July 1911) excludes such actions in Switzerland.

28 Exceptionally, a recognition or enforcement may be possible on the basis of the national law of such foreign state or on the basis of a bilateral agreement between Switzerland and such foreign state.

29 Decision of the Swiss Federal Court 135 III 127, c 3.3.2 and 3.3.4.

30 Decision of the Swiss Federal Court 140 III 320, c 9.4.

only in the frame of the Swiss bankruptcy proceedings of the respondent. This is even more so if the claimant has filed the same claim in the Swiss bankruptcy proceedings as well and relies on the foreign judgment in the action for admission to the schedule of claims.[31] In a very recent decision of April 2015, the Swiss Federal Court went even a step further, finding that a foreign judgment in the same matter was irrelevant for the Swiss collocation proceedings although the action abroad had been initiated before the Swiss insolvency and although it could not be assumed that claimant could not have any reasonable doubt that a positive judgment could be enforced only in the frame of the Swiss bankruptcy proceedings.[32]

The consequence of this case law is that, under normal circumstances, any foreign judgment rendered after the commencement of Swiss insolvency proceedings will not be recognised or enforced in Switzerland. The existence of an exclusive jurisdictional clause as in the 1992 ISDA Master Agreement does not change anything about this finding.

It is submitted that this case law of the Swiss Federal Court is quite far-reaching, and therefore open to criticism, in that it requalifies ordinary civil proceedings in another state bound by the Lugano Convention 2007 as proceedings closely related to Swiss insolvency proceedings. On the other hand, it may not be denied that there is a genuine interest in avoiding parallel proceedings. Hence, the result achieved by the Swiss Federal Court seems correct if the action abroad was filed after the Swiss insolvency proceedings were commenced and if the circumstances of the case lead to the assumption that the claimant had the intention to prejudice the Swiss collocation action with a foreign judgment. The most recent decision, which denies those criteria,[33] is too far-reaching in our view.

No application to active claims of insolvency estate

The case law of the Swiss courts set out above does not apply to claims of the insolvency estate against third parties (other than clawback claims). Hence, for claims of a Swiss insolvency estate against its debtors based on the 1992 ISDA Master Agreement, the English courts have exclusive jurisdiction if English law applies to the merits. It is not possible to draw such claims to the Swiss court of the collocation action by way of counterclaim, amongst others because jurisdictional clauses prevail over the jurisdiction for counterclaims based on Article 6(3) of the Lugano Convention 2007.[34]

31 Decision of the Swiss Federal Court 140 III 320, c 9.3.

32 Decision of the Swiss Federal Court, 29 May 2015, 5A_491/2013, c 5.

33 *Ibid.*

34 Rohner and Lerch, in Oetiker and Weibel (eds), Lugano-Übereinkommen (Helbing Lichtenhahn, Basel 2011), Art 6 N 82.

Conclusion

In summary, the following conclusions may be drawn:

- The jurisdictional clause in the 1992 ISDA Master Agreement is of an exclusive nature if English law applies and to the extent that the courts of states which are bound by the Lugano Convention are concerned. Otherwise, the jurisdictional clause is of a nonexclusive nature. For 1992 ISDA Master Agreements predating 2001, there may be an argument that the English courts have exclusive jurisdiction based on the *Nomura* decision.
- The jurisdictional clause in the 2002 ISDA Master Agreement is generally of a nonexclusive nature.
- In the context of the Lugano Convention and the Brussels Regulation, an exclusive jurisdictional clause may be ineffective in proceedings which are closely related to insolvency proceedings and therefore fall under the exception in Article 1(2)(b) of the 2007 Lugano Convention/Brussels Regulation.
- Under the regimes of the Brussels Regulations (2001 and 2015) and the Lugano Convention 2007,
  - judgments in proceedings which are closely related to insolvency proceedings and are rendered by the courts of the insolvency state are likely not recognisable and enforceable abroad; and
  - judgments rendered by the courts out of the insolvency state may not be recognisable and enforceable abroad in the insolvency state. This is, for example, the case in Switzerland.