CL-2020-000092

Neutral Citation Number: [2023] EWHC 774 (Comm)

Case No: CL-2020-000092

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

7 Rolls Building
Fetter Lane
London,
EC4A 1NL

4 April 2023

Before :

MRS JUSTICE COCKERILL

- -

Between:

CRF I LIMITED	**Claimant**
- and –	
(1) BANCO NACIONAL DE CUBA	
(2) THE REPUBLIC OF CUBA	**Defendants**

- -
- -

Jawdat Khurshid KC and Andrew Pearson (instructed by **Rosenblatt** for the **Claimant**
Alison MacDonald KC, Anton Dudnikov and Mark Belshaw (instructed by **PCB Byrne LLP**) for the **Defendants**

Hearing dates: 23,24,25,26, 30, 31 January 2023, 1, 2 February 2023

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down remotely by the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 4 April 2023 at 08:45am.

Mrs Justice Cockerill:

INTRODUCTION

1. This dispute involves a sovereign debt claim of something over €70 million by the Claimant ("CRF") against the principal obligor of those debts, Banco Nacional de Cuba ("BNC") and the guarantor of one of those debts, the Republic of Cuba ("Cuba"). The debts arise out of loan agreements dating to the mid 1980s.

2. CRF was not the original lender. It is a company which was established to invest in defaulted Cuban debt. It took what it says are valid assignments of the debts from the lenders and their successors, and it has sued the Defendants for those debts.

3. By a CPR Part 11 challenge issued on 26 May 2020, the Defendants have disputed the jurisdiction of the English Courts to hear this claim under three separate grounds.

   i) First, the Defendants say that the Court has no jurisdiction to try the claims because the relevant debt agreements and guarantee were not validly assigned, the consequence of this being that CRF does not have the benefit of the submissions to the jurisdiction of the English courts that were present in those agreements ("Ground 1").

   ii) Second, the Defendants say that they are immune from the jurisdiction of the English courts pursuant to the State Immunity Act 1978 ("SIA"), as, similarly to Ground 1, the relevant debt agreements and guarantee were not validly assigned to CRF, such that CRF cannot take the benefit of the waivers of sovereign immunity present in those agreements ("Ground 2").

   iii) Thirdly, the Defendants contend that the conditions for service of the claim form out of the jurisdiction have not been satisfied because the relevant debt agreements were not validly assigned to CRF, so that CRF cannot take the benefit of the contractual provisions contained in those agreements ("Ground 3").

4. As will be readily apparent, in order to determine each ground, the court has to decide the central question as to whether or not the relevant agreements and guarantee were validly assigned to CRF. The issue turns on a provision in the loan agreements and guarantee whereby the parties agreed that the agreements should not be assigned without "prior consent" – and also agreed that such consent was not to be unreasonably withheld.

5. The issues concern whether such prior consent was validly given, and in particular whether BNC had (under Cuban Law) capacity and/or authority to give such consent either on its own behalf (as regards the debts) or on behalf of Cuba (as regards the Guarantee); as well as a portfolio of contingent issues which arise depending on the answers to those central questions.

FACTUAL BACKGROUND

6. The legal background to the case goes back as far as 1948. The relevant legal provisions which will be considered are set out and dealt with in detail in the relevant sections of the judgment. However, by way of backdrop it may be useful for the reader to bear in mind the following skeletal timeline:

   i) In 1944 and 1948 elections took place in Cuba. In 1948 Carlos Manuel Prío Socarrás was elected President. Under his presidency BNC was established. At this point BNC had authority to grant guarantees on behalf of Cuba and to consent to assignment of such guarantees on behalf of Cuba.

   ii) The Cuban Revolution took place shortly thereafter, between 1952 and 1959. It was succeeded by significant legal reforms and changes. The position of BNC did not however materially alter.

   iii) In 1976 a national referendum ratified a new constitution. At the same time under Law 1323/1976 ("*Law on Organisation of the Central State Administration*"), BNC ceased to be the "Financial Organ of the State" but remained the central bank. Some of the functions it had previously performed moved to the State Finance Committee.

   iv) In the 1970s and 1980s Cuba was in economic conflict with the USA and accumulated billions in unpaid loans and debts. Funds were borrowed from *inter alia* Mexico, Canada, Australia, France, Italy, Japan and the former Soviet Union. Much of this debt remains unpaid. The debts which form part of this claim are amongst these debts. The "Paris Club" (a forum for sovereign debt crisis resolution formed in the 1950s) subsequently entered into formal and informal discussions with Cuba with a view to potential restructuring.

   v) In the 1980s BNC was still seen as the central bank of Cuba and was given functions including "*to oversee and record international credit operations of any nature*".

   vi) The 1990s was a period of particular economic difficulty for Cuba, reflecting the changes in Russia, formerly Cuba's major trading partner. A "Special Period in Peacetime" was declared. A number of changes, including austerity measures and the legalization of the use of the US Dollar were introduced in 1994.

   vii) In 1997 a new central Bank was formed – the Central Bank of Cuba ("BCC"). It took on a number of the functions of the BNC.

   viii) The current legislation which is in issue dates from the period 1997-1999. In particular the following laws come into focus: Decree Law ("DL") 172/1997 ("*On the Central Bank of Cuba*"), DL 181/1998 ("*Of Banco Nacional de Cuba*"), and DL 192/1999 ("*On the State Financial Administration*").

The relevant agreements

7. There are two agreements which CRF are seeking to rely on in order to reclaim the debt owed.

8. The first, on 24 January 1984, an agreement which was executed between Credit Lyonnais and BNC in which Credit Lyonnais agreed to maintain and extend the maturity of pre-existing deposits made with BNC (the "CL Agreement"). The second, on 30 January 1984, was an agreement executed between Istituto Banco Italiano and BNC on materially the same terms as the CL Agreement (the "IBI Agreement").

9. On 30 January 1984, Cuba executed a guarantee dated 30 January 1984 (the "IBI Guarantee"). By the IBI Guarantee, in consideration of the IBI Agreement, Cuba agreed to guarantee that, if BNC failed to make payment of any sum payable under the IBI Agreement, Cuba would pay the same as if it were the sole principal.

10. In both relevant agreements, the creditor was entitled to assign its rights and obligations under the agreements, provided that prior consent was given by BNC, such consent not to be unreasonably withheld. The relevant clause is Clause 17 in both of the Agreements:

> "17. ASSIGNMENT
>
> (A) Benefit and Burden of this letter: This letter shall benefit and be binding on the parties, their respective successors and any permitted assignee or transferee of some or all of a party's rights and obligations under this letter. Any reference in this letter to any party shall be construed accordingly.…
>
> (C) Bank:
>
> (1) The Bank may assign all or part of its rights under this letter to any holding company or subsidiary of the Bank or any other subsidiary of any such holding company without the consent of the Borrower or to any other person with the prior consent of the Borrower, such consent not to be unreasonably withheld. If, as part of the same transaction, the Bank wishes to transfer all or part of its obligations under this letter, that assignment shall only be effective when that transfer becomes effective in accordance with paragraph (2).
>
> (2) The bank may transfer all or part of its obligations under this letter to any holding company or subsidiary of the Bank or any other subsidiary of any such holding company or to any permitted assignee of all or (as the case may be) the corresponding part of its rights under this letter without the consent of the Borrower or to any other person with the prior consent of the Borrower, such consent not to be unreasonably withheld. The transfer shall become effective when the Bank has received from the transferee an undertaking (addressed to

> the Bank and the Borrower) to be bound by this letter and to perform the obligations transferred to it.
>
> (3) Any such transferee shall be and be treated as the bank for all purposes of this letter and shall be entitled to the full benefit of this letter to the same extent as if it were an original party in respect of the rights or obligations assigned or transferred to it."

11. Additionally, both the Agreements and the IBI Guarantee were expressed to be governed by and to be construed in accordance with English law. The Agreements and the IBI Guarantee contained provisions by which both BNC and Cuba submitted to the jurisdiction of the English Court, accepted service in England and agreed to waive any sovereign immunity.

The BNC Statutes

12. The BNC Statutes were brought into effect following Resolution No 1 of the BNC and pursuant to the provision in Article 2 of DL No. 181 of Banco Nacional de Cuba dated February 23, 1998.

13. They provide:

> "CHAPTER III
>
> ORGANISATION AND GOVERNMENT…
>
> MANAGEMENT LEVELS AND THEIR HEADS …
>
> Article 18: The President, when exercising his/her authority can grant the powers he deem necessary and delegate his/her authority to other managers and officials of the bank.
>
> SECOND AND THIRD MANAGEMENT LEVELS
>
> Article 40: Second and third level managers shall be in charge of the divisions and functions that are assigned to them and they shall be responsible for the direct management control and supervision of these.
>
> Article 41: The following common duties, powers and functions shall also be their responsibility.
>
> a) To be personally responsible for the completion of the tasks, and for exercising of the powers and functions of its division;
>
> b) Represent his/her division;…
>
> h) To issue binding instructions and other provisions within his/her sphere of competence; …
>
> CHAPTER IV
> DELEGATION OF AUTHORITY

> ARTICLE 45: Authority to exercise specific powers or perform specific functions shall be delegated according to the following precepts; …
>
> CHAPTER VII…
>
> EXTERNAL RELATIONS
>
> ARTICLE 54: In its external relations the Bank shall always be represented by its President, or by the manager or officer to whom he has delegated that responsibility."

Assignments Pre-CRF

14. After the original inception of the agreements but prior to CRF obtaining an interest in the agreements, they were assigned several times. The way in which this was done was relied upon by the Defendants as relevant to the issues on the validity of the consent given in this case.

15. On 22 August 2005, BNC consented to the assignment of the CL Agreement and Debt from Credit Lyonnais to City & Continental Securities Ltd. Both the Notice of Assignment and Agreement to be Bound and the cover letter with which it was sent were signed by two BNC employees: Mr Lozano as a "Manager" and Ms Lidia Gomez Beltran as a "Director". The cover letter was on BNC's official "blue security paper". The Notice contained a stamp confirming that the two BNC signatories were authorised.

16. On 10 January 2006, BNC consented to the assignment of the CL Agreement and Debt from City & Continental Securities Ltd to GML International Limited. Again both the cover letter and the Notice of Assignment and Agreement to be Bound were signed by two BNC employees: Mr Lozano as a "Manager" and Ms Lidia Gomez Beltran as a "Director". The Notice contained a stamp confirming that the two BNC signatories were authorised.

17. On 14 March 2006, BNC consented to the assignment of the CL Agreement and Debt from GML International Limited to Standard Bank Plc (which became ICBC). Both the cover letter and the Notice of Assignment and Agreement to be Bound were signed by two BNC employees: Mr Lozano as a "Manager" and Ms Lidia Gomez Beltran as a "Director". The Notice contained a stamp confirming that the two BNC signatories were authorised.

18. On 6 August 2007, Corporation Financière Européenne SA sent to BNC documents relevant to an assignment of the IBI Agreement and Debt to that entity from Intesa SanPaolo SpA. The letter refers to a request by BNC for these documents. The description of the assigned asset did not include the IBI Guarantee. On 23 August 2007 BNC sent a cover letter and the Notice of Assignment and Agreement to be Bound signed by two BNC employees: Mr Lozano as a "Manager" and Ms Lidia Gomez Beltran as a "Director". The Notice contained a stamp confirming that the two BNC signatories were authorised. No documents have been identified which purport to assign the IBI Guarantee.

19. On 14 December 2007, ICAP Securities Ltd sent to BNC documents relevant to an assignment of the IBI Agreement and Debt to that entity from Corporation Financière Européenne SA. The description of the assigned asset did not include the IBI Guarantee. On 10 March 2018 BNC sent the Notice of Assignment and Agreement to be Bound and a cover letter, both signed by two BNC employees: Mr Lozano as a "Manager" and Ms Lidia Gomez Beltran as a "Director".

20. On 11 May 2009, BNC confirmed agreement to the assignment of the IBI Agreement and Debt from ICAP Securities Ltd to ING (L) Renta Fund Emerging Market Debt ("ING"). Both the cover letter and the Notice of Assignment and Agreement to be Bound were signed by two BNC employees: Mr Lozano as "Manager" and Ms Lidia Gomez Beltran as "Director". The Notice contained a stamp confirming that the two BNC signatories were authorised.

21. By a document dated 9 October 2009 and entitled "Request for Consent", ING requested BNC's and Cuba's prior consent to assign the IBI Agreement and Debt and the IBI Guarantee to ICBC (also known as Standard Bank). This document was faxed to BNC and sent to both Mr Lozano and Ms Londa Martí under cover of an email from Claudia Da Silva Azavedo of ING dated 12 October 2009. On 14 May 2010 BNC sent the Notice of Assignment and Agreement to be Bound and a cover letter signed by two BNC employees: Ms Almina Barba Lorenzo as a "Bank Business Manager "A"' and Ms Lidia Gomez Beltran as a "Director". The cover letter was on BNC's official "blue security paper". The Notice contained a stamp confirming that the two BNC signatories were authorised.

The development of CRF's business: 2009-2014

22. CRF's business profile is relevant to one of the issues – whether if consent was withheld by the Defendants, that refusal was reasonable. The Defendants also look to the details of some of the other earlier debt acquisitions of CRF as relevant to the questions as to capacity and authority.

23. CRF was specifically set up in 2009 to buy Cuban debt and specifically defaulted loans. The fund has been continually active in the market since then.

24. In July 2009, CRF delivered an "Investor Presentation", which outlined that it intended to purchase primarily Cuban sovereign loans, which it believed were at severely distressed levels with the natural holders of these securities having been forced to liquidate due to the financial crisis of 2008-2009, with a potential return of 100%-1000%. In a later email by Mr Gordhandas on 25 March 2013, it was highlighted that CRF only buys debt that is guaranteed by the Republic of Cuba. Buying debt in relation to Cuba was their sole purpose and was highlighted to their investors in the prospectus.

25. On the 24 September 2009, Standard Bank entered into a custody agreement with CRF I Limited, as well as a Master Participation Agreement, as well as a Debt Acquisition Agreement.

26. At the same time CRF began to build its interest in Cuban debts. On 29 September 2009, Exotix offered CRF a Cuban sovereign debt (with face value JPY 321,550,000) for sale. CRF executed the relevant confirmation document on 30

September 2009. On 7 October 2009, CRF instructed ICBC to accept the sale pursuant to the terms of the Debt Acquisition Agreement. By a Joint Seller Notice of Assignment and Buyer Agreement to be Bound dated on its face 12 October 2009, this debt was assigned by Exotix to ICBC. There was no indication that ICBC was acting on behalf of CRF (or indeed in any capacity other than as principal). This Notice, and the cover letter purportedly providing BNC's consent, were signed by two BNC employees: Mr Lozano as a "Manager" and Ms Lidia Gomez Beltran as a "Director". The cover letter was on BNC's official "blue security paper". The Notice contained a stamp confirming that the two BNC signatories were authorised. The relevant "Sale Letter Agreement" between Exotix, ICBC and CRF is dated on its face 26 October 2009, but executed at a later date.

27. On 1 November 2012, an advisory agreement was entered into between CRF Management Limited, CRF I Limited & Mr Gordhandas. Mr Gordhandas' role was to provide investment research and recommendations, accounting and administration services.

28. On 13 December 2012, CRF I Limited released its prospectus, which highlighted that it was a company incorporated with an investment period commencing on the Business Day immediately following the close of the Initial Offer Period and ending on 30 June 2019, followed by a period of up to 12 months during which it will be wound down and its assets realised and distributed to investors. CRF was therefore telling investors that it was looking to wind up its portfolio by around 2020.

29. On 26 March 2013, Mr Gordhandas informed Mr Stevenson (ICBC) that CRF had purchased various Cuban sovereign debt positions from Westlake.

30. On 28 March 2013 (confirmed on 23 April 2013), CRF purchased a number of DEM-denominated debts from the liquidator of Socimer. The executed Letter Agreement was dated 22 April 2013 between Socimer as "Assignor" and CRF as "Assignee". BNC gave agreement "*in principle*" to the assignment of various debts from Socimer to ICBC on 9 July 2013, with this document being signed by two BNC employees: Ms Martí as "Assignment of Debt" and Mr Lozano as a "Manager".

31. By various Joint Seller Notices of Assignment and Buyer Agreements to be Bound dated on their face 8 November 2013, certain debts were assigned by Socimer to ICBC, with no indication that ICBC was acting on behalf of CRF (or indeed in any capacity other than as principal). These Notices, and the cover letters providing BNC's consent, were each signed by two BNC employees: Mr Lozano as a "Manager" and Ms Magali Mon Hernandez as a "Director". The cover letters were each on BNC's official "blue security paper". The Notices each contained a stamp confirming that the two BNC signatories were authorised. On 19 November 2013, Socimer's liquidator provided BNC's 8 November 2013 letter to CRF.

32. In July 2013, CRF Management Limited gave an Investor Update. It was stated that CRF Ltd completed loan purchases of EUR 60.8mm in the first half of 2013, in which the portfolio had a notional exposure of EUR 126m in Cuban Loans with

the Republic of Cuba as the Guarantor and Banco Nacional de Cuba as the Obligor.

33. On 6 August 2013, against a background of reports that the Paris Club restructuring negotiations were to resume, CRF Management Limited wrote to President Raul Castro as follows:

> "[CRF] holds approximately € 130mm (Face Value) of medium-term and short-term (MT/ST) restructured debt from the early 1980s which is guaranteed by the Republic of Cuba …
>
> Furthermore, CRF Management Limited (CRFM) is in direct contact with other professional creditors that own approximately another € 300mm of this debt. Together, we represent over 40% of the total outstanding MT/ST debt and strongly believe that as a group we can lead the process to restructure this benchmark debt. Such process would set a precedent for all other creditors and could lead the full restructuring process for Cuba giving the country renewed access to the international capital markets.
>
> CRFM is willing to lead discussions for the formation of a "London Club" steering committee with the other identified professional creditors mentioned above, CRFM feel that a Cuba that has access to international capital markets would be able to efficiently execute its current economic strategy and grow more rapidly reducing its dependence on trade finance and bi-lateral credits.…
>
> CRFM seeks to be a long-term partner for the Cuban government and seeks a fair, rational restructuring that is equitable to all sides based upon established international norms.".

34. The delivery of this letter is contentious. CRF says that it was delivered by hand to the Cuban embassy in London. The Defendants say that (i) CRF has adduced no documentary evidence of sending the letter or of delivery (ii) Mr Gordhandas' evidence that he handed the evidence to someone at the Cuban Embassy in London is not sufficient and (iii) in any event, hand delivery to the Cuban embassy does not amount to delivery of the letter to Cuba or to its identified addressee, the Cuban President.

35. On 2 December 2013, CRFM wrote to the Secretary General of the Paris Club, in which it was outlined that there is broad scope to co-operate with the Paris Club on the matter of restructuring Cuba's sovereign debt. It was outlined that working together would provide a tailored, comprehensive debt treatment that reflects their current financial situation as well as ensuring long-term debt sustainability.

36. In December 2013, CRFM, CRF and Mr Gordhandas entered into a further Consultancy Agreement where Mr Gordhandas agreed to provide information and factual analysis relating to securities, bonds, debt instruments and derivative

instruments, amongst other services in relation to the valuations in respect of securities, bonds, debt instruments and derivative instruments.

37. By a letter to Mr Stevenson dated 18 February 2014, Mr Lozano and Ms Martí confirmed that the debts represented by the Agreements and the Guarantee were held by BNC in favour of ICBC.

The 2014 ICBC abortive assignment

38. In 2014 there was an abortive attempt to assign one of the ICBC debts. This was relied upon by the Defendants in support of their case on prior consent.

39. On 21 May 2014, Mr Gordhandas wrote to Mr Stevenson of Standard Bank on the process of assigning positions to CRF I Limited. Mr Stevenson responded by stating that other than BNC having to first approve CRF as a counterparty, it would not be different to any other transfer. Mr Gordhandas then further asked Mr Stevenson to begin preparing a "Request of Consent" to BNC to assign the securities from Standard Bank to CRF I Limited.

40. On 28 May 2014, Mr Stevenson wrote to Mr Lozano and Ms Martí of BNC introducing Mr Gordhandas of CRFM and outlining that Standard Bank were looking to assign a number of its Cuban assets to CRF I Limited, asking what is required by BNC so that those transfers could be effected. On the same day, Mr Gordhandas again wrote to Mr Stevenson asking whether he should contact both Mr Lozano and Ms Martí, but Mr Stevenson said to wait as BNC were not the quickest to respond.

41. On 28 May 2014, CRF held a board of directors meeting where it was outlined that there was no progress on any restructuring talks with Cuba, the Paris Club or the London Club, nor had Cuba responded to the letters previously written to them by CRF.

42. On 12 June 2014, Mr Stevenson again wrote to Mr Lozano asking if he had a chance to look at the attached letter previously sent on 28 May 2014 and asking to advise accordingly.

43. On 13 June 2014, Mr Stevenson wrote to both BNC and Cuba with a request for consent on a 1984 Refinancing Agreement between BNC and other financial institutions and a further Refinancing Agreement entered into in 1985 in relation to another client, not CRF.

44. On 16 June 2014, Mr Lozano responded outlining the acceptance of the proposed assignment from Standard Bank plc with necessary documents that needed to be filled out as that client did not appear in BNC's records. The various documents were needed so that BNC could figure out who is the current real creditor.

45. On 20 June 2014, Mr Gordhandas chased Mr Stevenson for a draft of the "Request to Consent" to be sent to BNC. Mr Stevenson then wrote to Mr Gordhandas on 20 June 2014 with draft requests. On the same date, Mr Stevenson then sent these drafts to Mr Lozano.

46. On 20 June 2014, Mr Lozano and Ms Martí wrote to Mr Stevenson and Mr Gordhandas stating that they accepted in principle the assignment from Standard Bank Plc in favour of CRF I Limited with the necessary documents needing to be filled out so that BNC could know who the real creditor is. The documents included: (1) a certificate of registration of CRF; (2) Incumbency Certificate; (3) Joint Seller Notice of Assignment and Buyer Agreement to be bound signed by both Standard Bank and CFR I Limited; (4) CRF I Limited's Annual Report; (5) Book of authorized signatures of CRF I Limited; (6) Undertaking to indemnify BNC for damages for non-fulfillment of any conditions.

47. On 26 June 2014, Mr Stevenson sent to Mr Gordhandas a draft Joint Notice of Assignment and Agreement to be bound with a proposed date of 31 July 2014 for this to be executed.

48. On 24 July 2014, Mr Gordhandas wrote to Mr Lozano attaching the requested documentation for review before they were signed and legalized.

49. On 28 July 2014, Mr Lozano confirmed to Mr Gordhandas that the documentation was correct, attaching a guarantee to be signed by CRF.

50. On 31 July 2014, the Joint Notice of Assignment and Agreement to be Bound was signed by ICBC and CRF.

51. On 7 August 2014, Mr Lozano wrote to Mr Stevenson asking him to inform BNC about any new notices about this matter.

52. On 3 September 2014, Mr Stevenson wrote to Mr Lozano to make him aware that he had received the scanned copies of the relevant documents from CRF, but that he needed clarification as to whether or not Mr Lozano needed all of the documents to be legalized at the Cuban consulate in London.

53. On 5 September 2014, Mr Lozano confirmed that the Joint Notice of Assignment should be legalized too and that the documents have to be legalized by a Cuban notary.

54. On 22 September 2014, Mr Nutton (filling in for Mr Stevenson on leave) wrote to Mr Lozano with the further requested documentation, further enquiring about whether or the Notice of Assignment is the only document that needs translating, notarizing and apostilled; to which Mr Lozano replied on the 23 September accepting the documentation and agreeing to the form in which the Notice of Assignment must take.

55. On 9 October 2014, Mr Stevenson informed Mr Gordhandas that they had received the translated, notarized and apostilled Notice of Assignment and Agreement to be Bound from their notary.

56. On the same date, Mr Stevenson wrote to Mr Lozano stating that they now have all the documents in hand relating to the transfer to CRF ready to send to a Cuban notary for legalization. He further enquired as to why the legalization by a Cuban notary is necessary, when the Joint Notice of Assignment and Agreed to be bound was already legalized by the Cuban Embassy in London. Mr Lozano replied on

the same day stating that he would be contacting his legal advisers in relation to the matter.

57. On 21 October 2014, Mr Stevenson again wrote to Mr Lozano asking about whether it needed to be legalized by a Cuban notary.

58. On 31 October 2014, Mr Lozano wrote to Mr Stevenson that for the validity of any document issued out of Cuba then. Law No. 7 "*Law of Civil, Administrative, Work and Economic Proceeding*" dated August 19 1977 article 290:

> "The documents granted in other nations will have the same value in the process that those granted in Cuba, if they comply with the following requirements:
>
> 1. that the matter of the act or contract is licit and permitted under the laws of Cuba;
>
> 2. that the grantors have aptitude and legal capacity to obligate according to the laws of its country;
>
> 3. that were observed the forms and solemnities established in the country where the acts or contracts have been agreed;
>
> 4. that the document contains the legalization and other necessary requirements for its authenticity in Cuba.
>
> Those (documents granted) issued in foreign language have to be accompanied with its translation to Spanish; and if this is not accepted, said documents have to be translated officially by the Ministry of Foreign Affairs or by experts in the language chosen".

59. Mr Stevenson responded on the same date to confirm that it was necessary to have the Notice of Assignment legalized by a notary in Cuba.

60. On the same date, Mr Stevenson informed Mr Gordhandas that the relevant correspondence had been received by Mr Lozano and asked whether they should go ahead and send the document to the Cuban notary for legalization.

61. On 3 November 2014, Mr Gordhandas wrote to Mr Stevenson outlining the Fund's legal counsel's indicative professional costs in conducting a review of the relevant documents.

62. On 25 November 2014, Credit Suisse wrote to Mr Gordhandas that they were negotiating with some of their customers regarding the settlement of the BNC loan participation.

63. On 8 January 2015, Credit Suisse wrote to Mr Gordhandas' that there were issues with the re-registration of the former holdings registered under the names of Credit Suisse group member banks, which were later fully integrated into Credit Suisse. It was further outlined that Credit Suisse could check the possibility of a direct BNC registration of CRF as the future new beneficial owner, instead of registering first the (old) holdings under Credit Suisse. On 21 January 2015, Mr

Gordhandas stated that he was happy for Credit Suisse to seek BNC consent to assign loans directly to them.

64. Ultimately the assignment did not proceed: Mr Gordhandas evidence was that the final item sought – an indemnity – was something that CRF was not prepared to give in this instance. There is a confirmation from Mr Stevenson to Mr Lozano and Ms Martí on 27 May 2015 that the proposed assignment to CRF did not take place. The hard copy documents sought in the 20 June 2014 letter were not provided to BNC.

2015: Finter Bank

65. A second abortive assignment dates to 2015. On 8 January 2015, Mr Gordhandas wrote to Finter Bank Zurich with a bid of EUR 38,346.89 for the 30 December 1983 Refinancing Agreement, Banco Nacional de Cuba as Borrower, CL as Agent as guaranteed by the Cuban State. This was accepted by Mr Antonio on 15 January 2015.

66. The relevant documents including a "Request for Consent", were provided to Mr Gordhandas on 26 January 2015. On 18 February 2015, Mr Stevenson wrote to Mr Gordhandas outlining that the request for consent was fine and that "*Finter Bank need to send it…to Banco Nacional de Cuba, for the attention of Mr Raul Olivera Lozano and Londa Caridad Marty Grinan…*". Mr Stevenson informed Mr Gordhandas that, once signed, the Joint Notice of Assignment and Agreement to be Bound would need to be delivered to both BNC and Cuba.

67. On 19 February 2015, Finter Bank wrote to Mr Lozano and Ms Martí indicating that they proposed to assign DEM 1 M of the 1983 Refinancing Agreement to CRF Ltd and requested consent.

68. On 12 March 2015, Mr Lozano replied that consent would be given if the relevant documents were provided.

69. On 7 May 2015, Mr Lozano raised questions as to the identity of the registered holder of the credit. Following this, owing to problems with Finter's title to the debts, discussions continued for many months thereafter. In February 2016 Mr Gordhandas was still looking for the answer to the Request: "*Before I provide them with the requested KYC, can you please reach out to them to follow up on your outstanding questions and get us the BNC consent?*"

70. As with the proposed assignment from ICBC to CRF, this proposed assignment from Finter was eventually abandoned.

2015-2018: The London Club

71. On 1 April 2015, Mr Gordhandas resigned as consultant to CRFM. On the same date, CRFM entered into a consultancy agreement with Redux Research Limited with Mr Gordhandas working for them.

72. In April 2015 the London Club of creditors of Cuba was formed at CRF's instigation. Its initial press release, issued by Mr Gordhandas recorded that it:

> "Seeks a fair and equitable outcome for both Cuba and its commercial creditors and will endeavour to work constructively with the Republic of Cuba towards that end … [The London Club] believes that a timely restructuring of Cuba's commercial debts would allow Cuba to access sizeable capital flows from the international markets thus increasing its rate of GDP growth."

73. The Paris Club concluded a successful part forgiveness, part rescheduling deal with Cuba late in 2015.

74. On 21 January 2016, the London Club wrote to Mr Ruiz ("Vice President of Council of Ministers and Executive Committee") that:

> "Cuba Adhoc London Club Committee (L4C) was formed by the institutions listed below, who hold more than 40% of the outstanding financial debts (denominated in foreign currency) of Cuban public sector borrowers owed to private sector lenders under the Credit Lyonnais Refinancing and other Agreements. As you know, these debts were restructured in the 1980s but fell into arrears shortly thereafter.
>
> We have noted the considerable progress that the Cuban Government achieved at the end of last year in negotiating a settlement of the claims of its bilateral (government) creditors. We assume that the Government will now wish to proceed expeditiously to arrange a settlement of its long-outstanding commercial debt as well. The purpose of this letter is merely to say that the L4C and the institutions identified below are prepared to meet with you (or your colleagues) at a time and place convenient to you to commence these discussions".

75. The listed members were: (1) CRF Limited; (2) Adelante Exotic Debt Fund Limited; and (3) Stancroft Trust Limited. The delivery of this letter (said by CRF to be by hand) is contentious. The Defendants note that CRF has adduced no documentary evidence of sending the letter or of delivery.

76. On 23 March 2016, a redacted correspondent wrote to Mr Gordhandas stating that if CRF came up with a litigation plan, then they would be open to the transfer of the Fiat paper to CRF in exchange for some of the share of the fund.

77. On 20 April 2016, The London Club wrote to Mr Lozano:

> "The Cuba Adhoc London Club Creditor Committee (L4C) was formed by the institutions listed below, who hold more than 40% of the outstanding financial debts (denominated in foreign currency) of Cuban public sector borrowers owed to private sector lenders under the Credit Lyonnais Refinancing and other Agreements.
>
> We have noted the considerable progress that the Cuban Government achieved at the end of last year in negotiating a

> settlement of the claims of its bilateral (government) creditors. We hope that similar progress would follow towards an expeditious settlement of its long-outstanding commercial debt with the private sector creditors, aiming at normalizing Cuba's relations with the financial markets and resuming access to foreign credit and investments.
>
> The purpose of this letter is to notify you of the establishment of the L4C and that the institutions identified below are ready to engage in meaningful dialogue towards a solution of these pending matters. The members of the L4C Committee, who have considerable experience of sovereign debt restructurings, look forward to being long-term investors in Cuba and seek a restructuring that is equitable to all sides based upon established international principles".

78. On 23 May 2016, Mr Gordhandas wrote to Mr Ruiz ("Vice President of Council of Ministers and Executive Committee") that:

> "As you are aware, since its inception, CRF I Limited has sought to find an amicable resolution to its outstanding claims vis-a-vis the Republic of Cuba.
>
> In the interest of reaching a final resolution to the outstanding claims, CRF I Limited has agreed to sell its bi-lateral and unstructured claims against Banco Nacional de Cuba from its portfolio, held at ICBC Standard Bank, to Trafin SRL. The estimated total value of these claims using the Paris Club methodology is approximately Eur 207 million.
>
> Per the agreement between CRF I Limited and Trafin SRL, the sole intended use for these assets is to utilize them in a debt for equity exchange with the Government of the Republic of Cuba. CRF I Limited understands that Ignacio Foncillas and his colleagues will be leading the effort for Trafin SRL".

79. As to this letter, the Defendants note that it contains no address and no purported delivery method and that CRF has adduced no documentary evidence of sending the letter or of delivery. Its delivery therefore is not accepted by the Defendants.

80. On 26 November 2017, Mr Gordhandas wrote to the Lic. Robero Verrier Castro of Pro Cuba that:

> "We are a private investment firm based in Grand Cayman that is dedicated to Latin American investments. Our firm serves as investment manager to CRF I Limited (the "Fund"), a Cuba focused investment vehicle. The Fund together with other international group of investors control approximately Euros 4 billion of the commercial debts of the Republic of Cuba.
>
> CRF has authorised Redux Research Limited (Redux) to serve as an authorised intermediary to negotiate with the Republic of

> Cuba and is willing to consider Redux's proposal of a friendly conciliation for the total collection and cancellation of this debt through a mechanism of exchanging the balance of commercial debt for licenses, concessions and/or permits for large investment projects, in accordance with the priorities established in the portfolio of opportunities published by the Cuban government.
>
> The amount of the first tranche to be negotiated would be roughly Euros 1,200 million. The mechanism proposed by Redux is to arrive, in the first instance, to an agreement of payment of the total amount of each tranche of debt that is placed on the table. Once this amount has been reconciled, the parties will conclude their total cancellation from a percentage payment in cash and a percentage payment in acceptable concessions, permits and/or licenses for productive investment projects that generate growth and development for the people of Cuba, as per the priorities defined by the Cuban government.
>
> The productive projects will be defined jointly and will imply that the holding group will be responsible for obtaining the necessary and sufficient capital to fund the projects and to carry them out, either by licensing, concession and/or through long-term operation permits within a reasonable amount of time previously agreed between the parties. In case this proposal deserves your interest, we have mandated Redux and its close Mexican partners: Jesús Villalobos, Humberto López and Rafael de Regil, who have operating relationships established in Cuba, to facilitate engagement with a view to reaching first-level agreement that defines the friendliest and most effective route you would consider".

81. On 26 January 2018, the London Club wrote to BNC outlining proposed terms which it said were approximately 25% better on a Net Present Value basis than what Cuba had ultimately agreed with the Paris Club in late 2015:

> "I am writing on behalf of the Ad Hoc Committee of Cuba's London Club Creditors (the "Committee"). Members of the Committee hold in excess of 50% of the outstanding medium term debt of Cuba.
>
> Following the December 2015 settlement of Cuba's bilateral debt owed to the Group of Creditors of Cuba, we have attempted to engage the Cuban authorities in a discussion of a similar settlement of the London Club debt. As you know, this debt has been in arrears for nearly 30 years. The Committee met recently in London and it was agreed to discuss a final settlement attempt with the Cuban authorities in order to seek an arrangement favourable to both parties and structured in a manner similar to that agreed between Cuba and its bilateral creditors. This will produce a significant reduction in the

> overall size of the London Club debt. Details of the suggested settlement are included in the non-binding proposal (subject to contract) attached to this letter as Annex I. In addition, the Committee is prepared to consider giving Cuba a two-year grace period on principal and a five-year grace period on interest payments under the new arrangement, which will immediately translate into a material positive impact on Cuba's finances. We have some specific ideas for how the restructured debt could be arranged (to minimize its financial impact on Cuba's current account) and we can discuss these when we meet, including face value for equity participations in approved foreign investment projects in Cuba.
>
> Of crucial importance, however, is timing. These debts have been in arrears for decades and Cuba will obviously need to settle the claims before the country can expect to reenter the international capital markets and access new financing. The momentum created by the December 2015 settlement of bilateral debts is quickly dissipating. Representatives of the Committee are therefore prepared to meet with the Cuban authorities at the earliest practicable date. We urge the authorities to respond to this letter within the next 30 days in order to schedule such a meeting, otherwise the terms of this letter will expire".

82. On the same date, Professor Rodrigo Olivares writes to Mr Lozano outlining:

> "I am writing to you on behalf of and on behalf of the Committee of Private Creditors of Cuba (London Club), regarding the outstanding debt obligations of the Banco Nacional de Cuba/Banco Central de Cuba and the Cuban government.
>
> The purpose of this letter is to request you to please forward the attached letter to the President of the National Bank of Cuba, Mr. Rene Lazo Fernandez, by the means you deem appropriate. The attached letter contains a very favourable proposal that has been motivated by the current situation and the latest events that have affected Cuba. It is a non-binding proposal that grants great benefits, including partial debt forgiveness and suspension of interest for 5 years. Further details are outlined in the annex to the joint letter".

83. On 29 January 2018, Mr Lozano wrote to several other employees of BNC copying a Spanish translated version of the London Club Committee's letter.

84. On 10 April 2019, CRF wrote to its shareholders as regards extension of the investment period and subscription period. Significantly, it was mentioned that:

> "The Investment Manager, on behalf of the Company, has spent a significant amount of its time and resources, utilising its relationships with relevant parties, in attempting to engage

> the Cuban Government and Banco Nacional de Cuba ("BNC") in negotiations regarding its debt. Despite such efforts, the Cuban Government and BNC have so far shown no willingness to discuss the debt or enter into negotiations. The Investment Manager intends to continue to seek such negotiations but, should such further efforts fail, the Company may seek to bring legal action against the Cuban Government, BNC and any other issuers, custodians, trustees, counterparties or guarantors of relevant debt. Any such action would require the engagement of legal advisers and other professional advisers in relevant jurisdictions and the Company would therefore incur costs and expenses in connection with any such action. The Investment Manager believes that such an approach is now the best and most effective way to obtain maximum value for Shareholders in connection with the assets of the Company".

85. The investment period was extended until 31 December 2021.

The BNC Rules

86. BNC Rules were enacted by Resolution 10 of 2016 of the BNC President pursuant to Articles 15 and 17(a) of Decree Law 181 of 1998.

87. The requirements of BNC Rules extend to all banking operations within their scope, including such banking operations as are conducted by BNC pursuant to its powers or functions in Article 7(II) of Decree Law 181.

88. They are relied on heavily by the Defendants because one part of what they do is to set down rules for signatures. In particular they provide as follows:

> "Rules on Authorisations and Uses of Signatures
>
> WHEREAS: It is necessary to update the regime governing authorised signatures of officials and agents of the National Bank of Cuba and, accordingly, to approve a new "*Order governing Authorisations and Use of Signatures*" for the National Bank of Cuba, so as to accommodate such regime to the current structure of the Bank.
>
> WHEREAS: Under Section 17 a) of Decree Law no. 181/98, the President of the National Bank of Cuba may issue any orders, instructions and other resolutions binding on the National Bank of Cuba and its subdivisions…
>
> CHAPTER I
>
> GENERAL PROVISIONS
>
> SECTION 1: Bank powers of attorney may be conferred on certain officials and employees of the National Bank of Cuba, based on their functions and responsibilities, through the granting of use of banking signatures, so that they may act in

> the name and on behalf of such Bank under the rules herein and thus enter into any relevant banking transaction….
>
> SECTION 5: Where a document is required to be signed by two signatories to bind the National Bank of Cuba to any transaction, the signature by the first signatory shall be deemed to mean a confirmation that the relevant transaction has been fully reviewed, while the signature by the second signatory shall be deemed to confirm the legality, amount and date of execution of the transaction…
>
> CHAPTER II
>
> AUTHORISATIONS AND USE OF SIGNATURES
>
> SECTION 12: Two "A" and "B" joint signatures shall be required for all banking transactions that create an obligation for the National Bank of Cuba, on the basis of the type of transactions and amount involved as described in Section 17 below.
>
> SECTION 15: Both an "A" and a "B" joint signature, or two "A" or two "B" joint signatures shall in accordance with Section 17 below be required for the purposes of authorising and executing the following banking operations. …
>
> d) to issue any comfort letters and guarantees;
>
> e) to assign, endorse or order a protest of any bills;…
>
> j) to open and close accounts with other banks and of natural or legal persons located in Cuba or abroad;
>
> k) to approve any accounting vouchers and notices related to any of the above transactions;
>
> l) To carry out any other banking operation in accordance with international standards…
>
> SECTION 17: A banking transaction where a signature by the National Bank of Cuba is required (Section 15 above) shall be signed as followed: …
>
> USD 5,000,001.00 and above Two "A" signatures"

The BNC Handbook

89. The BNC Handbook is a document whose status was to some extent contentious between the parties. However it is common ground that:

    i) It is a document issued pursuant to the relevant provisions of Cuban Law;

    ii) It is intended to set out the relevant processes to be followed within the BNC.

90. Chapter 6 of the BNC Handbook ("*Foreign Debt Department: Operations Carried out by the Department*") describes the operations carried out by the Foreign Debt Department. It provides in part as follows:

> "The Foreign Debt Department of [BNC] and in accordance with Chapter II, sub-paragraph 7(ll) of Decree Law No. 181. Its main objective is to register, control, service and deal with the foreign debt which the Cuban State and [BNC] have contracted with foreign creditors until the validity date of Decree-Law No. 172 of 1997, Of Banco Central de Cuba, issued by the Council of State.
>
> In this sense, the Foreign Debt Department exercises control of and review Cuban debt, classified as: Official, Supplier and Banking.
>
> …
>
> **1. DEBT ASSIGNMENTS**
>
> The Foreign Debt Department will maintain control and administration of Cuban debt that is ceded in the secondary market.
>
> Cuban debt that can be transferred from one creditor to another is divided into two fundamental types: private or commercial debt and bank debt.
>
> Any assignment of debt will be with the consent of the debtor, if so stipulated in the contract, however, the debtor may object if there is a reasonable reason.
>
> …
>
> This debt, when left in the hands of companies and banks, is ceded in many cases to others, either as a means of obtaining a capital recovery considered as uncollectible using the price of Cuban debt in the secondary market, either as part of getting out of a debt that is collectible at very long-term or difficult to recover, or either for speculative or other purposes. Many of these debts then began to be sold, partially (in the majority) or totally (in a few cases) to new creditors. These in turn, have followed a chain of sale so these portions of debt began to circulate and are circulating in a large part of the banks and entities of the world which is known as the secondary market for Cuban debt.
>
> Under this process, the work of the debt assignments consists of having a control of the totality of all Cuban debt that is subject to assignment in the secondary market in terms of how it is distributed. That is, what part of our debt has each bank, or financial institution, to which loan, deposit, or letter of original credit it corresponds, what is its new nature (example

of commercial to be transferred by a company to a bank, becomes a bank and vice versa), to what deposit or what original maturity it corresponds to, as well as when and to whom it was bought and sold.

2. PROCESS FOR THE MATERIALIZATION OF ASSIGNMENTS

Generally, a communication is received first (via telex, SWIFT, fax, email, or document) from a certain bank, company or financial institution, explaining the intention to assign an amount of our debt to another entity.

This communication generally specifies:

• Name of the agreement, loan, deposit, numbers of letters of credit that are objects of the assignment.

• The original amount and currencies as well as the value in EURO if they correspond to the EURO zone.

• The name of the current creditor, his address and means of communication (telephone number, fax, email, SWIFT, telex).

• The name of the buyer, his address and means of communication (telephone number, fax, email, SWIFT, telex).

• The account number in which we must pay the funds to the new creditor.

• Form of calculation of interest for the period (in some cases).

• Other information.

…

This request is recorded in all its details to have a control and give you follow up until the end of the process, through the Register of Debt Assignments.

The debt that is the object of assignment is verified in the following aspects.

…

If it is a bank debt:

• Check that the amounts and maturities correspond to the amounts that make up each agreement, loan, deposit, etc.

• Check in the Register of Debt Assignments that the beneficiary reflected corresponds to the current creditor (i.e. the seller). In case of any change in the name of the creditor, legal documents will be requested to evidence such a change.

• Verify that the agreement, loan, deposit, etc. object of assignment has the official documentation that protects its raison d'être. In case of doubt or lack of documents, request the foreign party for a copy of it for your verification.

• Reconcile the debt with the records of the [BNC].

If the potential buyer is an entity not known in Cuba, they are requested to provide documents, which must be certified or legalized by a competent institution of the country where they were issued:

• Annual Report

Balance Sheet.

Profit and Loss.

Financial statement notes.

Audit report.

Shareholders or owners of the Institution.

Book of authorized signatures

• Certificate of registration of the institution.

• Affidavit using the model Declaration for Banks and Known Entities, showing that the institution is not under the jurisdiction of the United States of America, or to undertake not to assign the rights and obligations acquired to any entity that is subject to the jurisdiction of the United States of America, or to have entities of the United States of America participate in its share capital (by proforma letter in English and Spanish).

• Commitment to compensate [BNC] for damages and economic damages that may be caused by breaching any of the above conditions (by proforma letter in English and Spanish).

…

• The aforementioned documents must be certified or legalized by a competent institution of the country where they were issued (notary public) and then they must be certified by the Consulate of the Embassy of Cuba in the same country, they will be sent to the Ministry of Foreign Affairs in Cuba and before a Cuban Notary, they will later be sent to [BNC].

• These documents are reviewed by the legal department of the institution.

> If there is a positive result in all the aforementioned checks (including verification by the Register of Debt Assignments reflecting the balances of each bank classified by number of loans and year of renegotiation in the case of bank debt) a tele, email, SWIFT or fax is sent to the foreign party, informing him that it is accepted "in principle" your request and that you must send us a set of original and two copies of the official documents of the assignment duly signed by the buyer and the seller. …
>
> When that document is received, it is checked:…
>
> The document is also sent to:
>
> • The legal department: they review the documents and inform the Foreign Debt Department, by means of a letter, if they are duly formalized in legal terms and if it is appropriate to proceed with the assignment according to the agreements, clauses and other details reflected in the documents.
>
> If the legal letter, telex or message, the acceptance in principle and signature control with all other documentation requested with the necessary requirements are already contained in the file, then the assignment is ready to be materialized. Its materialization consists in sending both the "assignor" and the "assignee" (assignor and assignee) a copy of the initial document duly signed by the Cuban side (containing two authorized signatures of [BNC]) and a letter giving our consent for the "purchase - sale", leaving within the file that will work in our archives, a copy of this, together with the original documentation. This file is given an assignment number.
>
> …
>
> Once the assignment is materialized, it is then registered in the Register of Debt Assignments to maintain control of the balances of each bank, company and financial institution and, if necessary, to reconcile with the records of the [BNC].
>
> …"

The lead up to the disputed assignments

91. On 8 May 2019, Mr Dagba wrote to Mr Lozano in relation to the 17 January 1984 Short Term Non-Trade Related Indebtness that ICBC Bank were contemplating transfer of certain amounts to CRF, specifically:

> "1. Short Term Non-Trade Related Indebtedness dated 17th January 1984, signed on 25th January 1984 between Banco Nacional de Cuba, as Borrower and Credit Lyonnais Bank Nederland N.V. as the Bank, as amended from time to time - (amount to be transferred: DEM 2:2,500,000.00).

> 2. Short Term Bank Non-Trade related indebtedness dated January 30th, 1984 with Banco Nacional de Cuba as Borrower and Istituto Bancario Italiano (IBI) as Bank, as amended from time to time, and pursuant to a Guarantee issued by the Republic of Cuba dated January 30th, 1984 -(amount to be transferred: Dem 5,750,000.00)".

92. On 13 May 2019, Mr Dagba informed Mr Gordhandas that he had still not heard back from BNC but that he would chase to ascertain their decision on his previous email. Mr Gordhandas further replied asking if ICBC could get the draft documentation ready for the relevant assignment.

93. On 20 May 2019, Mr Dagba wrote again to Mr Lozano, after having spoken on the phone saying that ICBC Bank were contemplating transfer of certain amounts to CRF, specifically:

> "1. Short Term Non-Trade Related Indebtedness dated 17th January 1984, signed on 25th January 1984 between Banco Nacional de Cuba, as Borrower and Credit Lyonnais Bank Nederland N.V. as the Bank, as amended from time to time - (amount to be transferred: DEM 2:2,500,000.00).
>
> 2. Short Term Bank Non-Trade related indebtedness dated January 30th, 1984 with Banco Nacional de Cuba as Borrower and Istituto Bancario ltaliano (IBI) as Bank, as amended from time to time, and pursuant to a Guarantee issued by the Republic of Cuba dated January 30th, 1984 -(amount to be transferred: Dem 5,750,000.00)."

94. Mr Lozano confirmed receipt on the same day.

95. On 3 June 2019, Mr Gordhandas wrote to Mr Dagba asking for an update on BNC's position. Mr Dagba followed this up with an email to Mr Lozano asking for BNC's position the next day.

96. On 4 June 2019, Miss Martí wrote to Ms Baik of ICBC that BNC needed more time to verify the debt assignment from the origin of the transaction.

97. On 5 June 2019, Mr Dagba wrote to Mr Gordhandas stating that they had managed to speak to Mr Lozano and that they were apologetic about the delay and that they were still in the process of digging up the original trade and verifying the details.

98. On 6 June 2019, Mr Dagba sent the Incumbency Certificate to Mr Gordhandas with further documents to follow.

99. On 10 June 2019, Mr Dagba wrote to Mr Lozano the following:

> "1- BNC to confirm ICBC Standard Banks is the holder of these positions:

> Short Term Non-Trade Related Indebtedness dated 17th January 1984, signed on 25th January 1984 between Banco Nacional de Cuba, as Borrower and Credit Lyonnais Bank Nederland N.V. as the Bank, as threatened from time to time – (amount to be transferred: **DEM 22,500,000.00**). Short Term Bank Non-trade related debt dated January 30th, 1984 with Banco Nacional de Cuba as Borrower and Istituto Bancario Italiano (IBI) as Bank, as threatened from time to time, and pursuant to a Guarantee issued by the Republic of Cuba dated January 30th, 1984 – (amount to be transferred: **DEM 5,750,000.00**)
>
> 2- BNC to give its consent to this transfer between ICBCS and CRF 1.
>
> 3- BNC to let us know what documents you will request from us and CRF 1 Limited in order to consent and execute this transfer".

100. On 12 June 2019, Mr Dagba wrote again to Mr Lozano outlining that they needed an answer on this transfer immediately.

101. On 12 June 2019, Ms Martí wrote to Mr Dagba outlining that she was verifying the documents of the assignment between ICBC to Standard Bank and CRF I Limited.

102. On 13 June 2019, Ms Baik wrote to BNC outlining the following:

> "Dear Raul,
>
> I contact him with respect to the transfer of outstanding debts that my colleague Olivier has communicated to him.
>
> We require the following documents:
>
> 1. The National Bank of Cuba will have to confirm that ICBC Standard Bank these positions
>
> Short Term Non-Trade Related Indebtedness dated 17th January 1984, signed on 25th January 1984 between Banco
>
> Nacional de Cuba, as Borrower and Credit Lyonnais Bank Nederland N.V. as the Bank, as threatened from time to time – (amount to be transferred: **DEM 22,500,000.00**). Short Term Bank Non-trade related debt dated January 30th, 1984 with Banco Nacional de Cuba as Borrower and Istituto Bancario Italiano (IBI) as Bank, as threatened from time to time, and pursuant to a Guarantee issued by the Republic of Cuba dated January 30th, 1984 – (amount to be transferred: **DEM 5,750,000.00**)
>
> 2. The approval of the National Bank of Cuba to transfer these positions from ICBC Standard Bank to CRF 1.

> 3. The documents you will require from ICBC Standard and CRF 1 Limited to conclude the transfers.
>
> At this point, we urgently need to give documents or at the very least acknowledge that they have received this mail
>
> and provide some sustained progress. I am your orders if there are any questions.
>
> I would appreciate your immediate attention".

103. On 13 June 2019, Mr Dagba wrote to Ms Martí outlining that there was no previous assignment between ICBC and CRF with the request submitted on 8 May 2019 being a new request.

104. On 13 June 2019, Ms Martí wrote to Mr Dagba outlining the following:

> "We accept in principle the assignment from ICBC Standard Bank to CRF I LIMITED. We need the necessary documents about CRF I Limited. We refer to the following original documents:
>
> -Certificate of Registration of CRF I Limited.
>
> -Incumbency Certificate (attached proform in English and Spanish) signed by two offiicers from the CRF I Limited.
>
> -Joint Seller Notice of Assignment and Buyer Agreement to be Bound signed by Standard Bank Plc and CRF I Limited.
>
> - CRF I Limited's Annual Report.
>
> -Book of Authorized Signatures of CRF I Limited.
>
> - Undertaking to indemnify of Banco Nacional de Cuba for the economic damages and prejudices that it might suffer due to the Non-Fulfilment of any of the abovementioned conditions (attached proform in English and Spanish).
>
> The information provided by those documents is needed by BNC to know who is the current real creditor. Please, these documents should be certificated with a public notary and with our Cuban consulate.
>
> According to Cuban law, the certification and legalization of the documents is necessary to be accepted as public docun1ent in Cuba In this sense these documents must be legalized at Ministry of Foreign Relation of Cuba and afterward this legalization of MINREX, the documents have to be legalized by a Cuban public notary.
>
> For the legalization procedure at Cuba you can contact:
>
> …..".

105. On the same date, Ms Martí wrote to Ms Baik stating that she had given an acceptance between ICBC and CRF with the required documents. Mr Dagba replied attaching ICBC Standard Bank's list of authorised signatures.

106. On 19 June 2019, Mr Dagba wrote to Mr Gordhandas with the attached Joint Notice of Assignment asking for confirmation of CRF's details.

107. On 8 July 2019, Mr Gordhandas attached the edited files noting that once they had been finalised, they will all be signed, notarized and sent back to ICBC.

108. On 18 July 2019, Mr Dagba sent the Incumbency Certificates to Mr Gordhandas.

109. On 19 July 2019, Mr Dagba wrote to Mr Gordhandas with the edited Joint Notice of Assignment with the suggested amendment that: "*the Assignor is hereby released from all obligations under the Agreements*".

110. On 29 July 2019, Mr Dagba wrote to Ms Martí outlining the following:

> "We are preparing the documents mentioned in the list you provided earlier.
>
> Before finalizing all, we would like to confirm with you which documents need to be notarized and/or legalized.
>
> Our understanding is the following:
>
> 1- Certificate of Registration of CRF I Limited.
>
> Will be notarized only.
>
> 2- Incumbency Certificate (in English and Spanish) signed by two officers from the CRF I Limited
>
> Will be notarized and legalized in the Cuban Embassy in London.
>
> 3- Joint Seller Notice of Assignment and Buyer Agreement to be Bound signed by Standard Bank Plc and CRFI Limited.
>
> Will be notarized and legalized in the Cuban Embassy in London.
>
> 4 - CRF I Limited's Annual Report.
>
> Will be notarized only.
>
> 5- Book of Authorized Signatures of CRF I Limited.
>
> Will be notarized only.
>
> 6- Undertaking to indemnify of Banco Nacional de Cuba for the economic damages and prejudices that it might suffer due to the Non-Fulfilment of any of the abovementioned conditions (in English and Spanish)

> Will be notarized and legalized in the Cuban Embassy in London.
>
> Can you please confirm our understanding as soon as possible, as we plan to execute these documents the next couple of days".

111. On the same date, Ms Martí wrote to Mr Dagba stating that:

> "Besides the documents of the mail below should send us the Book of Authorized Signatures of ICBC Standard Bank.
>
> All the documents should be legalized at Ministry of Foreign Relation of Cuba (MINREX) and afterward this legalization by MINREX, the documents have to be legalized by a Cuban public notary".

112. Mr Gordhandas replied stating that they were planning to legalise the signatures at the Cuban Embassy in London and asked if they did that, did they still need to legalize with MINREX and notarize in Cuba.

113. On 30 July 2019, Mr Lozano wrote to Mr Gordhandas that the foreign documents shall be notarized in Cuba under Public Notary in Cuba and cannot be done at the Embassy.

114. On 31 July 2019, the Notice of Assignment was signed by ICBC and CRF and notarised by Cheesewrights. It was backdated to 13 June 2019.

115. On 5 September 2019, Mr Gordhandas wrote to Ms Torres that CRF were in the process of transferring two loans from ICBC to CRF Limited and needed to submit documents to BNC and informed her that he needed her assistance for the notarization process in Cuba.

116. On 10 September 2019, due to a lack of response from Ms Torres, Mr Gordhandas wrote to Ms Carmen Maria that CRF needed a proposal and a quote from them to assist with the required legalisation process in Cuba. Mr Gordhandas went on to send this message to further law firms in Cuba.

117. On 10 September 2019, Ms Torres replied stating that it would be best to contact Mrs Lena Alvarez. On 11 September 2019, Mr Gordhandas accordingly did so and wrote to Ms Alvarez outlining the proposal.

118. On 10 September 2019, Mr Gordhandas received an email from Mr Caballero of Bufete Internacional ("Bufete") stating that:

> "As you well point out '*All the documents should be legalized at Ministry of Foreign Relation of Cuba (MINREX) and afterward this legalization by MINREX, the documents have to be legalized by a Cuban public notary*.'; and in that sense Bufete Internacional can provide you with the service of legalization and notarize of the documents sent. ln order to carry out this service, you must come to our offices with the 1ega1 documentation that you are interested in legalizing, as

> well as proving that you are the legal representative of the company in order to be able to notarize the legal documents. Otherwise, you can send the legal documents by DHL, together with a Power of Attorney granted by the company in favor of our lawyers so that we can take care of this procedure. This power of attorney must also be legalized by the Cuban consulate in the country where it was authorized. Mr Gordhandas replied attaching the various documents that were needed to complete the process".

119. CRF instructed Bufete to legalise the documents in Cuba. CRF emailed the full set of documents to Bufete by email on 23 September 2019.

120. On 23 September 2019, Mr Gordhandas wrote to Mr Lozano and said that he had received the full set of documents and that he needed his confirmation that these are the correct documents so that they can confirm and send them off for legalisation and notarisation in Cuba:

> "1 - Certificate of Registration of CRF I limited.- notarized
>
> 2- Incumbency Certificate (in English and Spanish) signed by two officers from the CRF I limited- notarized and legalized
>
> 3- Joint Seller Notice of Assignment and Buyer Agreement to be Bound signed by Standard Bank Plc and CRF I Limited. - notarized and legalized
>
> 4 - CRF I Limited's Annual Report.- notarized
>
> 5- Book of Authorized Signatures of CRF I Limited. - notarized
>
> 6- Undertaking to indemnify of Banco Nacional de Cuba for the economic damages and prejudices that it might suffer due to the Non-Fulfilment of any of the above mentioned conditions (in English and Spanish)- notarized and legalized
>
> 7- Power of Attorney for Bufete lnternacional to assist with legalization and notarization in Cuba.
>
> We have also been in touch with Ernesto Caballero Alvarez (copied) of Bufete lnternacional who will be assisting us with the legalization and notarization in Cuba".

121. On the same date, Mr Lozano wrote to both Ms Zubeldia and Ms Martí that:

> "on this matter what I need you to do is to check that nothing is missing. They have made it clear that the legalisation has to be done in Cuba".

122. On 25 September 2019, Ms Zubeldia wrote to Ms Martí stating that only the "*constituent document is missing*".

123. On 3 October 2019, Mr Gordhandas wrote again to Mr Lozano stating that he had received the full set of documents translated into Spanish and legalised by the

Cuban consulate in the UK, and asking for confirmation that it is the full set of information that was required.

124. On 4 October 2019, Mr Lozano forwarded the email to Ms Zubeldia and Ms Martí to see whether all the relevant documentation was present from CRF.

125. On 4 October 2019, Mr Lozano wrote to Mr Caballero that:

> "It gives me great pleasure to greet you. Allow me to introduce myself, my name is Raul Olivera and I am in charge of the Operations Directorate of the Banco Nacional de Cuba.
>
> I have asked my colleague Londa Marty, Manager of the External Debt area of the CNB, to also check the documentation sent to her in case any of them are missing and to anticipate in time. Londa will contact you. Her email address is in the addressees. I look forward to working with you on these issues".

126. On 7 October 2019, Mr Gordhandas re-sent the email to Mr Lozano asking if he could respond to the relevant question of whether the relevant documentation was present.

127. On 7 October 2019, Mr Caballero wrote to Mr Lozano that:

> "In relation to this matter, one of our specialists is already responding to Mr. Gordhandas because we could not specify in the attachments that all the documentation is translated and legalised by the Cuban consulate, which is an essential step to proceed with the legalisation and protocolisation in Cuba".

128. On 7 October 2019, Ms Martí wrote to Mr Caballero outlining that the constituent document of CRF was missing.

129. On 15 October 2019, the relevant documentation that was to be sent to Cuba was returned by DHL due to failing to pass the security screening to a sanctioned country. Mr Gordhandas sought the assistance of the British Embassy in Havana to resolve the matter to ensure it was sent over to Cuba to complete the legal process.

130. On 15 October 2019, Mr Gordhandas contacted Yanelis Rodríguez of the Department for International Trade asking:

> "I am trying to send some documents that have been notarized and legalized by the FCO in UK and the Cuban Embassy in London to Bufete Internacional, a Cuban law firm recommended by the FCO, on the following address:…
>
> However, I am struggling to find a service provider for this. DHL initially accepted the document package asking me to sign an indemnity (which I completed) but then rejected the package …

> I was wondering if you could advice on alternative service providers who can assist with delivering the package to Bufete Internacional. Alternatively, would it be possible to send the documents via the Embassy?"

131. On the same date, Yanelis Rodríguez replied stating that:

> "Regarding your enquiry, we would need to make a little research of alternative courier service providers. We were not aware that DHL had completely closed its services to Cuba.
>
> We will find out and let you know.
>
> On the other hand, the head of DIT Team in Cuba, Alina Niebla, mentioned that she remembers you and Mr. Sudeep Singh from some years ago. She would like to know the state of the project you were working in back at the time, or if this is a new project. It would be useful if we could hold a meeting during your next visit to Cuba to have an update on your current business in our market, so we could assist you better.
>
> Looking forward to your comments".

132. On 17 October 2019, Yanelis Rodríguez wrote to Mr Gordhandas again outlining that:

> "We have been looking for alternative courier service providers for Cuba with no success, unfortunately. The only way we can assist you on this is to initiate the process with the diplomatic bag service. It is important to clarify that this is not a service we usually provide as it is only for diplomatic use. However, if there is no other way to make this happen, we are keen to assist you on this.
>
> For that purpose, it is essential to know what are the documents content and purpose, what would be the size and weight of the envelope, who they will be addressed to, etc. It is also important to mention that the recipient should come to the embassy to collect them, since we are not allow to deliver this correspondence outside of the embassy".

133. On 22 October 2019, Mr Gordhandas responded to Yanelis Rodríguez that:

> "Sorry for a delayed response. I was actually travelling and am currently in Mexico. I am planning to take a quick break in Havana the coming weekend and would be very keen to meet for an update. Would you be available to meet on Monday, 28th October 2019?"

134. On the same date, Mr Gordhandas wrote to Mr Caballero to say that he was currently in Mexico and planning to take a quick break in Havana the coming weekend, and could he drop off the documents to them in person and asked

whether they would be available to meet 28 on October 2019. Mr Caballero confirmed that this could take place.

135. On 29 October 2019, Mr Lozano wrote to Mr Caballero asking for an update on the relevant documentation.

136. On 30 October 2019, Mr Caballero made Mr Lozano aware that they had received the documents and that they have signed the corresponding contracts for the legalisation and protocolization of those documents. Once ready, they would send to Mr Lozano. Mr Lozano responded stating that:

> "You need to continue this work with BNC in this and other new cases we will help you too".

137. On 31 October 2019, Mr Gordhandas wrote to Mr Caballero that:

> "I wanted to follow up on the progress with protocolization and legalization. Can you please send me an update? Are we still on track to submit to BNC on Monday? Please make sure we receive scanned copies of all documents that are being submitted and also an acknowledgement from BNC that they have received these documents"

138. On 1 November 2019, Mr Caballero wrote to Mr Gordhandas stating that:

> "It has also been a pleasure to receive you in our office. We appreciate your trust in us and look forward to working together on many more matters of interest to your company. You can always count on our cooperation and legal advice.
>
> In this sense, I update you that the documents are already legalized by MINREX and in the hands of our notaries. On Monday we will be sending you a scanned copy of those documents and we will try to have it protocolized".

139. On 11 November 2019, Mr Caballero wrote to Mr Lozano confirming that the CRF documentation was ready for delivery. Mr Lozano asked if Mr Caballero could attend the "Maaina" on Thursday. Mr Caballero confirmed. The documents were submitted on 14 November.

140. On 15 November 2019, Mr Gordhandas wrote to both Mr Lozano and Ms Martí that:

> "We have been informed by our Cuban Legal Counsel, Ernesto Caballero of Bufete lnternacional, that the documents listed below have now been submitted to you. For your reference, I attach copy of the constancy of the delivery as well as all the documents that have been submitted.
>
> 1. Certificate of Registration of CRF I Limited
>
> 2. Incumbency Certificate

> 3. Joint Seller Notice of Assignment and Buyer Agreement to be Bound signed by Standard Bank Plc and CRF I Limited.
>
> 4. CRF I limited's Annual Report
>
> 5. Authorized Signatures of CRF I Limited.
>
> 6. Indemnity
>
> Can you please let us know when we will get the final formal consent of transfer as well as a confirmation that CRF I Limited is now the new registered owner of the two positions being transferred?"

141. On an unknown date but inferentially at this point, Ms Martí wrote to Ms Torres as regards the debt assignment between ICBC Standard Bank and CRF attaching all the documentation and requested her "*legal considerations in order to begin with the processing of the assignment*".

142. On 18 November 2019, Ms Zubeldia and Ms Torres wrote to Ms Martí outlining that having reviewed the documents provided to them for the transfer they had no comments to make on them.

143. On 22 November 2019, Mr Gordhandas wrote to Mr Lozano following up on the email of 15 November 2019 asking for an update as to when the formal consent of transfer would be provided as well as confirmation that CRF I Limited was now the new registered owner of the two positions being transferred.

144. On the same date Mr Lozano wrote to Ms Perez Fleita stating:

> "CALL LONDA AND SET THIS UP AT 72629138".

145. Later on, Mr Lozano wrote to Mr Gordhandas stating:

> "Our sincerely apologize for our late reply.
>
> YES, we confirm you that the CRF I Limieted is now the new registered of the following possition
>
> DEM 22,500,000 equivalent to EUR 11,504,067.33
>
> DEM 5,750,000 equivalent to EUR 2,939,928.32
>
> Plaese, send us by message the addres to the Assignor and Assigned in order to send the legal documents signed by Banco Nacional de Cuba
>
> Thank you in advance for your always kind cooperation".

146. On 25 November 2019, Mr Gordhandas responded:

> "That is fantastic news.
>
> I would be grateful if you would please send a scanned copy of the signed document to all the recipients of this e-m ail.

> For the Originals, I have requested Leyanis Mendez Romero of Bufete lnternacional to pick up the original for CRF I limited from your office in Havana.
>
> She is reachable on +53(7) 204 5126-27 ext. 229 and leyanis@bufeteinternacional.cu
>
> Can you please confirm the best time to pick it up?
>
> For ICBC Standard Bank, please send to:
>
> Pierre-Oiivier Dagba
>
> ICBC Standard Bank Plc
>
> 20 Gresham Street London EC2V 7JE, United Kingdom
>
> Telephone: +44 (0)20 3145 8872
>
> Email: Pierre-Oiivier.Dagba@icbcstandard.com
>
> Many thanks in advance".

147. On 25 November 2019, Mr Lozano wrote to Mr Gordhandas stating:

> "Thank you very much for your kind telephone call, today. We contacted Ms Leyanis and we agreed to send the original confnmation of your possition through the Bufete International. Please, let me take some time in order to prepare the original confinnation that includes the accounting register in our records. We shall inform you as soon as we conclude doing this in the following days. Our apologize for this petition".

148. On 25 November 2019, Mr Lozano wrote to CRF on BNC's ordinary headed notepaper that:

> "R**e the Short Term Non-Trade Related Indebtedness dated 17th January 1984 signed on the 25th January 1984 between BNC, as Borrower, and CL Bank Nederland NV as the Bank …**
>
> **Short Term Bank Non-Trade related indebtedness dated 30th January 1984 with BNC as Borrower and IBI as Bank, … and pursuant to a Guarantee issued by the Republic of Cuba dated 30th January 1984 …**
>
> Assigned Principal Amounts …
>
> Dear Sirs
>
> We confirm our agreement .. to above mentioned Notice *of* Assignment, we are pleased to enclose copies of your Notice of Assignment , duly signed.

> Our agreement is subject, without any liability from our part, to the assumption by us of the validity, value, genuineness, enforceability and legality of the documentation presented, empowered and entitled to do so in the name of the Seller.
>
> Notwithstanding the above statement, in case present Assignee fails to comply with our requirement of sending proper documentation for the legitimisation of the signatures of its official employees or agents, Banco Nacional de Cuba reserves the right of withholding consent for future assignments of this debt".

149. That letter was signed by Mr Lozano alone and stamped with BNC's "wet" stamp.

150. The status of this letter and its compliance with relevant BNC rules and the provisions of Cuban Law has been a central matter of contention when it comes to questions of authority. It was the Defendants' case that this document required two signatures and that it was, at best a serious mistake on the part of Mr Lozano – so serious indeed that an 18 year old trainee (Ms Perez Fleitas) called him out on it and it gave rise to suspicions of his probity on the part of BNC. It was also the Defendants' case that CRF knew or should have known that such a document required two signatures.

151. On 26 November 2019, Mr Lozano wrote to Mr Gordhandas attaching the documents of the original confirmation.

152. On 27 November 2019, Mr Lozano wrote to fellow colleagues at BNC that:

> "FOR ASSIGNMENT OF CUBAN DEBT WE NEED A **BANK CODE** WITH THE FOLLOWING DATA NAME **CDR** I LIMITED COUNTRY . CAYMAN ISLANDS
>
> COUNTRY CODE **249**
>
> ADDRESS C/O MaplesFs Limited
>
> Queensgate House
>
> South Church Street
>
> P Or Box 1093
>
> Grand Cayman, KY1-1102
>
> Cayman Islands
>
> CONTACTS Jeetkumar Gordhandas
>
> OR: +44 203 289 3601
>
> M: +44 798 4439 208
>
> E:Jgordhandas@reduxcap.com/
> jgordhandas@crfmanagement.com

> FOR YOUR INFORMATION, ALL DOCUMENTS WERE LEGALIZED ACCORDING TO EXISTINGREGULATIONS AND CONFIRMED BY OUR LEGAL ADVISORS COMPLYING WITH THE ESTABLISHED RULES OF TRANSFERS OF CUBAN DEBT, WHICH IS RECORDED IN THE CASE FILE".

153. On 27 November 2019, Mr Gordhandas wrote to Mr Lozano stating he really appreciated the turnaround time and further asked Mr Caballero to coordinate with Raul to pick up the originals.

154. On 27 November 2019, Mr Lozano wrote to Mr Dagba stating that:

> "We refer to the assignments of the participation in documents enclosed between ICBS Standard Bank, as Assignor and CDF 1 Limited, as Assignee. Note in above indicated documents that we are informing you about our final acceptation of this assignments Would you need any original of this documents in order to send it to you by DHL? Please confirm us in order to inform you about our commissions".

155. On the same date, Mr Lozano wrote to Mr Gordhandas asking for the swift code of the bank where CRF has an account for the records of BNC.

156. On 2 December 2019, Mr Gordhandas replied with the relevant Swift code.

157. The assignments were registered and given an assignment number on the excel spreadsheet maintained by Ms Martí which comprised BNC's Debt Assignment Registry.

The steps to litigation

158. On 11 December 2019, Gibson Dunn wrote a Letter Before Claim on behalf of CRF I Limited and were instructed to secure payment of two debts that CRF held from the obligors under the debts: namely, BNC and/or Cuba, a guarantor under at least one of the debt instruments.

159. On 30 December 2019, Rene Lazo Fernandez wrote to Gibson Dunn. That letter, the text of which is provided later in the judgment, is a key part of CRF's case on ratification. Mr Fernandez as the President of BNC stated:

> "We refer to your letter … regarding the assignment of receivables executed by ICBC Standard Bank Plc in favour of CRF I Limited concluded on 25 November 2019.
>
> In relation to this matter as you must be aware these assignments correspond to debts that [BNC] has had on its records since the 1980s with no (partial or total) payments of principal or interest related to them having been made."

160. Mr Fernandez goes on to outline the difficult economic situation that Cuba currently finds itself. He further outlines that the obligations under the Agreements were subject to the terms of the Refinancing Agreement which included a pari-passu clause. Thus, it was outlined that it would not be appropriate for Cuba to establish bilateral negotiations since if any payment is made pari-passu, they would be forced to give the same treatment to the rest of the creditors if they request it, something that they did not have the necessary resources for.

161. On 14 January 2020, Gibson Dunn responded. That letter said as follows:

> "1. Your letter refers to the fact that the Debts described in the [first letter] have been maintained in BNC's records since the 1980s, with no payments (whether as to principal or interest amounts) ever having been made by either BNC, or Cuba as guarantor. Notwithstanding those circumstances, as you know, CRF has since 2013 been seeking to resolve its outstanding debt claims against BNC and Cuba (including but not limited to the Debts). CRF has approached BNC and Cuba on multiple occasions in relation to these matters but has received no response.
>
> 2. Furthermore, CRF has led the efforts to form the Cuba Ad-Hoc London Club Committee (the "London Club"). The London Club has also reached out to BNC and Cuba on various occasions, most recently in January 2018, making detailed proposals to restructure and resolve BNC and Cuba's outstanding debts (including but not limited to the Debts). Again, no response has been received.
>
> 3. It is against the above background of unresponsiveness by BNC and Cuba that CRF now pursues its rights under the Debts.…
>
> 6. As regards the remainder of your letter, Cuba's financial and economic circumstances are well known. As has been indicated in our client's and the London Club's prior communications to BNC and Cuba, CRF remains interested in resolving its outstanding debt claims against BNC and Cuba (including but not limited to the Debts) amicably. To that end, CRF is willing to meet with representatives of BNC and/or Cuba at a neutral location, to discuss the possibility of a resolution."

162. On 27 January 2020, Mr Fernandez wrote back to Gibson Dunn:

> "...we reiterate that the assigned receivables, although signed bilaterally are under the umbrella of the 1984 refinancing agreement between the BNC, other banks and financial institutions and the Agent Bank of the London Club, currently called Credit Agricole Corporate & Investment Bank.
>
> In relation to the referred Short-Term Bank Non-Trade Related Indebtedness, signed according to the format established in Part

> II of the Refinancing Agreement, a series of conditions were fulfilled, established in clause 2 "Prior Conditions" of the Refinancing Agreements, required so that these Short-Term receivables are subject to the Syndicated Agreement of the London Club.
>
> Among the aspects established in the aforementioned legal instrument is the pari passu right, set forth in Clause 12(A), sub-clause 7; its effects are also described in Clause 6(B)and as we already mentioned in the previous letter, it restricts our ability to establish bilateral negotiations, since we would have to offer the same treatment to the rest of the creditors.
>
> We reiterate that all obligations with creditors of the London Club, which were included in the Refinancing Agreements concluded in 1983, 1984 and 1985 are treated multilaterally through the Agent Bank. However, they are not being executed since Cuba has been unable to make the corresponding payments under the terms of the Pari Passu clause".

163. On 4 February 2020, Ms Martí wrote to Ms Ng of ICBC to update ICBC's reconciliation records of BNC. Ms Ng accordingly sent back on 5 February 2020 their position statement for their perusal.

164. Thereafter, on 18 February 2020, the Claim Form was issued. CRF claimed in excess of €72 million from BNC and/or Cuba.

Discussions: 2020-2021

165. On 9 March 2020, Ms Martí wrote to Ms Ng outlining the following:

> "We agree with the balance for the Short-Term Debt in CHF.
>
> We have descrepancies according to the balance for the Short-Term Debt in EUR, because ICBC Standard Bank PLC assigned to CRF I Limited the following debts:
>
> Short-Term Non-Trade Related Indebtedness dated 17 January 1984, signed on 25 January 1984 between
>
> BNC as Borrower and Credit Lyonnais Bank Nederland N. V. as the Bank, as amended from time to time, and stated to be guaranteed by Cuba (the ··credit Lyonnais Debt ··) for the amount (DEM 22,500,000.00) equivalent to EUR 11 ,504,067.33.
>
> Short-Term Non-Trade Related Indebtedness dated 30 January 1984 with BNC as Borrower and Istituto Banco Italiano as Bank, as amended from time to time, and guaranteed by Cuba in a Guarantee dated 30 January 1984 (the ·IBI Debt) for the amount (DEM5,750,000.00) equivalent to EUR 2,939,928.32.

> According to the abovementioned Short-Term. We need that you provide us with the information about your calculation of interest in order to verify our records.
>
> We shall inform you on the other category of debt".

166. On 24 April 2020, Ms Ng asked for the spreadsheet from Ms Martí so that, once received regarding the two debts, they could then complete the calculations.

167. On 6 July 2020, Ms Ng wrote to Mr Lozano stating that ICBC was looking to transfer certain amounts to CRF I Limited in relation to the indebtedness and asked for the documents that were needed from ICBC and CRF in order to go through with this transfer. Ms Ng wrote several more times over the month without a response from Mr Lozano.

168. On 28 August 2020, in an extract from the Cuban criminal case file, the President Joscelin Rio Alvarez stated:

> "I hereby certify that citizens Londa Caridad Marty Grinan and Raul Eugenio Olivera Lozano did not inform the management of the Banco Nacional de Cuba, nor any other official or entity, about the visit to the headquarters of this institution, in the year 2019, of the foreign citizen Jeetkumar Gordhandas of CRF I Limited.
>
> Given the above, it is found that the citizens infringed the following rules:
>
> a) Resolution No. 35 "Regulations for the relations of cadres, managers and officials with foreign personnel" of 15 May 2000, issued by the Minister President of the Central Bank of Cuba; regarding the establishment of relations with foreign nationals with whom he maintained working relations for unauthorised purposes, in inappropriate places and in an inappropriate manner.
>
> b) Resolution No. 33 "Internal Disciplinary Regulations of the National Bank of Cuba", of 27 September 2017, of the President of this institution; regarding violations of the rules in force, inappropriate relations with foreign nationals and other conduct associated with their conduct that constitute violations of labour discipline.
>
> c) Instruction No.1/2015 "Regimen de acceso a las instalaciones del Banco Nacional de Cuba", dated 20 August 2015, of the President of the institution, (in force at the time of the facts and replaced in 2020 by Instruction No. 1/2020 of the Director General); regarding the related violations on access to the institution by foreign visitors".

169. On 20 November 2020, The First Vice Minister of the Ministry of Finance and Prices, Vladimir Regueiro Ale stated:

> "It is hereby certified that the Ministry of Finance and Prices did not receive a Request from ICB STANDARD BANK to Assign Credit in favour of the CRF I LIMITED Investment Fund for amounts of 11,504,067.33 and 2,939,928.32 EUROS. Neither was information given in good time of its receipt by the Cuban National Bank nor the processing and subsequent granting of authorisation, for which this Ministry's consent was not sought".

170. On 18 September 2020 CRF's solicitors wrote to BNC's and Cuba's solicitors and requested consent from each of the Defendants to the assignments. On 23 November 2020, the Defendants' solicitors responded to the same request on behalf of the Defendants, refusing to consent to the assignments.

171. On 18 March 2021, Mr Charters, Chairman of CRF, wrote to the President Miguel Diaz-Canel to establish whether it was possible to reach a settlement agreement that would eliminate the costs, negative publicity and stigma for Cuba. Specifically, Mr Charters outlined a potential solution to the conflict between Cuba and CRF:

> "Our proposed solution is that you offer to exchange the London Club debt for a single instrument, with no interest or principal repayments for 5 years. We understand the Republic of Cuba does not have immediate cash flow to pay our debts. Under this proposal, CRF would convert all of its claims against Cuba into a new English law loan that would be a zero coupon, i.e. no interest or principal payments for the Republic until at least 2026.
>
> This will result in a net present value reduction (NPV) of nearly 60% based upon BICSA's borrowing rate. There will be no cash flow impact on Cuba until 2026. A deal like this will allow Cuba to begin the process of restoring its image in the global financial markets thus drastically lowering its borrowing costs in the years and decades to come.
>
> As the largest holder in the London Club, CRF believes it can work with other holders to effect a similar arrangement. Thus, in one move, Cuba can move from being in arrears with the commercial creditors to regaining access to willing lenders in the global financial markets. At the very least Cuba would have delayed its London Club debt by a number of years and would allow for the possibility of exploring additional financing options. This possibility would be available at near zero initial cost for the Republic. CRF investors have approved this final attempt to solve this matter.
>
> Currently, your lawyers are engaging in the expected tactics of delay and avoiding the unavoidable in the English courts, which in the end will not work. The fact is the Republic borrowed the sums owed and did not repay them, something that English judges usually disfavour. Moreover, if Cuba were

> to use a Statute of Limitations defence it can cause potential serious long-term economic problems. Only one country has ever used it, namely Argentina, and in doing so destroyed its good faith standing in the international capital markets. We do not believe that it can possibly be in Cuba's interest to announce to the world that Cuba is not in fact a 'good faith' borrower. This would have the effect of permanently locking in Argentina's borrowing rates of 18%. Thus a victory, if even possible, would be catastrophic in its long term consequences.
>
> We urge you to consider our proposal seriously as a final good faith attempt to solve this ongoing problem of defaulted London Club debt. CRF has made multiple prior attempts to engage with the Republic in the past. The silence from your part has brought us to this point, now the matter is serious as it is in the public domain and the whole world is watching.
>
> Unusually there still remains a 'win-win' possibility for all parties. The Obama opening to Cuba was a golden opportunity but did not prove fruitful. Luckily a Biden administration is also likely to be amenable to better relations with Cuba. We urge you not to let this historic moment slip by again and hope for a positive response and engagement from your side. In the meantime, our legal process continues unabated".

172. On 29 April 2021, Ms Ng wrote to BNC with an attached communication from ICBC regarding the assignment by ICBC to CRF of some or all of ICBC's rights as regards the CL Agreement and IBI Agreement.

173. On 19 May 2021, Mr Herrero of BNC replied:

> "We note that through the Omnibus Order ICBC Standard Bank Plc. ("*ICBC*") would be seeking the consent of Banco Nacional de Cuba ("*BNC*") to the assignment by ICBC to CRF 1 Limited of some or all of ICBC's rights, title, benefits and obligations over certain assets set out in an annex to the Omnibus Order.
>
> Please be advised that it is impossible for the CNB to consider the relevance of the Omnibus Order, either formally and/or substantively, without having before it the full set of documents duly evidencing the rights to each of the assets that ICBC would intend to assign, including the full legal terms to which such rights are subject, evidence that ICBC has acquired the rights pursuant to such terms, and any document by which ICBC has already transferred to any third party any right, interest, title or benefit in or to the assets that it now intends to assign.
>
> As you are aware, BNC has already requested similar documentation in its email of 20 August 2020, when we have been informed that ICBC was proposing to make a transfer to

> CRF which was not pursued. BNC does not know whether this is the same assignment that is now intended. BNC also requested similar documentation again on 9 April 2021 in connection with a reconciliation exercise that ICBC claimed it wanted to undertake. In any event, ICBC has never sent the requested documentation despite repeated requests from BNC.
>
> Finally, BNC makes the broadest and most effective reservation of its rights and remedies under all applicable laws".

174. Ms Ng responded on 12 May 2021 stating:

> "We refer to your email of 19 May 2021 and our request for consent dated 29 April 2021 (the "Consent Request"). As you are aware, ICBCS and BNC have in the past periodically conducted reconciliation exercises in respect of the debt positions set out in the schedule to the Consent Solicitation, recognising ICBCS as the lender of record in respect of those positions. It is unclear why the documents you have requested are necessary for you to consider the Consent Solicitation.
>
> Furthermore, we would have expected BNC to already have copies of these documents in its possession.
>
> We therefore invite you to reconsider your position and confirm by 16:00 on 27 May 2021 whether you will provide the requested consent".

175. There was no further engagement between the parties directly after this email.

Criminal proceedings in Cuba

176. Separate, concurrent criminal proceedings were taking place in Cuba whilst this dispute arose.

177. On 27 May 2020, the Superintendency of the Central Bank of Cuba announced the following:

> "Hereby and in accordance with the provisions of Article 41 of the Law of Procedure Act, we hereby inform you that as result of the investigations in progress in the Preparatory Phase File 21/2020, filed for an alleged offence of Acts detrimental to the Economic Activity or Contracting, where **Raul Eugenio Olivera Lozano** appears as accused**,** following information on the filing of a lawsuit against the Banco Nacional de Cuba **(BNC)** and the Republic of Cuba before the High Court of Justice of Landes, in the United Kingdom of Great Britain and Northern Ireland, it has been possible to clarify the following: That as Director of Operations of the BNC, **Olivera Lozano** approved the Cesion of Cuban Debt, between the ICBC Standard Bank Plc and the financial company Cuba Recovering

Fund I Limited **(CRFI),** for two Short Term Credits, signed between the BNC and the Credyt Lyonnais Bank Nederland NV, for 11 million 504 thousand 067.33 euros and by the BNC with the Italian Banking Institute for **2 million 939 thousand 928.32 euros,** respectively; backed by Sovereign Guarantees of the Republic of Cuba represented by the Ministry of Finance and Prices **(MFP).**

So far, it has been identified that the approval has violated the provisions of the BNC, by not denying acceptance of its execution on the existence of reasonable grounds, by not taking into account CRFI's negative history that would invalidate it to be authorised as a creditor, such as having published threats of a lawsuit against Cuba in May 2018; as well as not informing of the Cessation and not obtaining the consent of the MFP as Guarantor on behalf of the Cuban State

He also failed to comply with the rules and procedures laid down in the BNc,...:._ as he signed the documents formalising the initial acceptance and final approval of the termination in a unipersonal manner and not with the two required signatures granting the final approval on ordinary paper and not on the Legal or Security Paper as regulated by the BNC.

It has also been established that these violations were committed by Olivera Lozano, motivated by the receipt of benefits in cash from the English citizen Jeetkumar Gordhandas, representative of CRFI, as well as the promise of the delivery of a large sum of money, before the accused was able to pay a large sum of money.

The Commission will initial the approval of the Assignment of the debt, specifying that the defendant will

The foreigner was received at the BNC and was assured of the revision of the documentation to presented by CRFI, unofficially. Accordingly, I hereby request that the following be resolved:

1. Review the debt assignment process in question, clarify and certify whether it was carried out correctly and in compliance with the rules and procedures of the CNB or others relevant to the event.

2. If there are violations, certify what they are, what is the responsibility of Olivera Lozano and others; what internal or external legislation they failed to comply with and, if applicable, the sanction imposed, for which the corresponding documentation must be attached.

3. Please certify that there are rules governing the relations of NCB staff with foreigners belonging to organisations with

> whom they maintain official relations, their attendance at NCB headquarters and whether they may receive gifts of cash, promises of such gifts, offers of work and any other personal material advantages.
>
> 4. Please send us a certified copy of all documentation related to the process of assignment of debts in favour of the foreign company CRFI, materialised in 2019, but also, all previous negotiating history for other cessions.
>
> 5. Certified information on the background of this foreign entity in its relations with Cuban banking institutions.
>
> 6. Send us a certified copy of the banking and other legislation relevant to the facts under investigation, in particular the Manual of Instructions and Procedures for the process of transfer of divestitures".

178. Following this, Mr Lozano was convicted of receiving a bribe from Mr Gordhandas in exchange for facilitating the assignment of the relevant debt agreements and guarantee to CRF, and of acts detrimental to the economic activity of Cuba. He was sentenced to 13 years imprisonment and is currently in prison serving out that sentence.

179. Ms Martí, who was at the time the Head of the Foreign Debt Department at BNC, Ms Zubeldia, and Mr Fernández, were each convicted of acts detrimental to the economic activity of Cuba and sentenced to between one year and 5 years imprisonment, all apparently suspended.

180. On 28 August 2020, the President of BNC wrote to Francesco Estrada Portales, Head of OEDSCE Dept:

> "Dear colleague,
>
> I hereby certify that, in the records and files of Banco Nacional de Cuba, there is no evidence that CRF I Limited has acquired Cuban foreign debt, in addition to the two items that are the subject of the lawsuit before the Court of Justice in London.
>
> If any other item(s) are known to be held by CRF I Limited, they have not been assigned with the consent of Banco Nacional de Cuba".

181. On the same date the President wrote to her colleagues:

> "I hereby certify that citizens Londa Caridad Marty Grinan *and* Raul Eugenio Olivera Lozano did not inform the management of the Banco Nacional de Cuba, nor any other official or entity, about the visit to the headquarters of this institution, in the year 2019, of the foreign citizen Jeetkumar Gordhandas of CRF I Limited.

> Given the above, it is found that the citizens infringed the following rules:
>
> a) Resolution No. 35 "Regulations for the relations of cadres, managers *and* officials with foreign personnel" of 15 May 2000, issued by the Minister President of the Central Bank of Cuba; regarding the establishment of relations with foreign nationals with whom he maintained working relations for unauthorised purposes, in inappropriate places *and in* an inappropriate manner.
>
> b) Resolution No. 33 "Internal Disciplinary Regulations of the National Bank of Cuba", of 27 September 2017, of the President of this institution; regarding violations of the rules in force, inappropriate relations with foreign nationals *and* other conduct associated with their conduct that constitute violations of labour discipline.
>
> c) Instruction No.1/2015 "Regimen de acceso a las instalaciones del Banco Nacional de Cuba", dated 20 August 2015, of the President of the institution, (in force at the time of the facts *and* replaced in 2020 by Instruction No. 1/2020 of the Director General); regarding the related violations on access to the institution by foreign visitors".

182. Thereafter, various pre-action correspondence had been sent between both parties, which has culminated in this two-week hearing, with both parties still firmly holding their position on the correct interpretation as to whether the Agreements and Guarantee were validly assigned.

Progress of the litigation and 2020 request for consent

183. On 16 March 2020, CRF issued an application for default judgment on the entirety of the claim against the Defendants (as well as its costs). The Defendants have relied upon this step as evidence of CRF's "vulturine" nature – a point which goes to unreasonable withholding of consent. They also rely on the fact that this application included a claim worth approximately €50 million against Cuba on the CL Guarantee, in circumstances where that claim was outside the scope of the assignment being relied upon. This claim was formally discontinued in September 2020.

184. An acknowledgement of service on behalf of the Defendants was filed indicating an intention to challenge jurisdiction.

185. On 26 May 2020, the Defendants issued their application under CPR Part 11, challenging the Court's jurisdiction.

186. On 18 September 2020, CRF's solicitors wrote to the Defendants' solicitors and requested consent from each of the Defendants to a further proposed assignment. This was refused on 23 November 2020 by the Defendants' solicitors, who responded to that request on behalf of the Defendants, refusing to consent to the proposed assignment. On 18 May 2021, ICBC purported to assign to CRF legal

title to the CL Agreement, the IBI Agreement and the IBI Guarantee, without prejudice to the Notice of Assignment and Agreement to be bound.

187. At the CMC on 4 March 2021, Cuba applied for its costs of the CL Guarantee claim to be assessed on the indemnity basis. Although the application was not granted (and the Court did not conclude that CRF's evidence in support of the default judgment application had been misleading), Mr Salter KC found that: (i) The Defendants had the better of the argument that there was no relevant "*change in the forensic landscape*" sufficient to justify CRF's change of heart in respect of the CL Guarantee claim; (ii) until 18 September 2020, CRF was continuing to pursue a claim which it had then abandoned; (iii) it was a criticism of CRF's conduct that it had not withdrawn the application for default judgment and, instead of acknowledging at least a potential problem with their title to sue, had stuck their head in the sand. In the event, CRF was ordered to pay Cuba's costs on the standard basis and to make a payment on account of those costs.

188. On 26 May 2021 Mr Lozano, Mr Fernandez Ms Martí and Ms Zubeldia were tried before the Second Criminal Chamber of the Popular Provincial Court of Havana. Mr Lozano was convicted of bribery and sentenced to 13 years imprisonment, a sentence which he was still serving at the time of the trial. Ms Martí was sentenced to 5 years detention and remedial work, Ms Compte Zubeldia to 5 years remedial work; both for the crime of acts detrimental to economic activity. Mr Fernandez received a sentence of 1 year restriction on liberty for the crime of failing to preserve the assets of an economic entity.

Allegations of Bribery

189. At one point in these proceedings, the Defendants had alleged that Mr Lozano had been bribed by Mr Gordhandas and thus lacked authority to consent to the assignments in 2019. By a letter dated 23 November 2020, Byrne and Partners LLP asserted (on instructions) that "*strong evidence ha[d] emerged*" to show that the assignments were "*attended by the bribery of Raúl Olivera Lozano*". Specifically, it was asserted that Mr Stevenson of ICBC had agreed the essential elements of a scheme to bribe Mr Lozano in early 2019; that Mr Gordhandas had met with Mr Lozano in late October 2019; and that Mr Gordhandas gave Mr Lozano a cash sum (in convertible Cuban Pesos), and promised him a larger sum (in pounds sterling) at a later date, as a bribe for Mr Lozano's help in securing the assignments.

190. The Defendants also referred to the judgment of the Second Criminal Chamber of 26 May 2021. Following a contested application at the pre-trial review (PTR), the Defendants were given permission to withdraw the allegation that bribery had in fact taken place. Accordingly, the Defendants have not asked the Court to find as a matter of fact that any bribe was paid. The Defendants maintain that Mr Lozano lacked authority for other reasons.

191. The result of this *volte face* is that CRF has specifically asked for a finding that Mr Lozano was not bribed, and the allegations of wrongdoing made against Mr Stevenson of ICBC and Mr Gordhandas on behalf of CRF lack substance and are false. It is noted that as a result of the allegations Mr Gordhandas and Mr Stevenson have been damaged. In particular Mr Gordhandas was placed by Cuba

on Interpol's Red List: something that led to his detention in, and deportation from, Mexico in July 2021.

192. I do not consider that it would be appropriate for me to make such a finding when that point was not in issue and full evidence on the point was not before me. However in these unusual circumstances it seems appropriate to record the following points:

i) It is an incontrovertible fact that the Defendants actively sought to withdraw the case on bribery at the PTR. In that context they said this:

> "Ds seek permission to amend their PoD ... The amendments principally relate to an allegation that Mr Lozano (a former employee of the BNC) had been bribed by Mr Gordhandas (representing CRF) and thus lacked authority to consent to the purported assignments in 2019. Ds no longer wish to pursue that allegation at the Jurisdiction Trial, although their position and their rights remain fully reserved for all other purposes."

ii) During this trial the Defendants' legal team have been absolutely clear that no case of bribery was being advanced. No questions were asked of the witnesses which were consistent with a case of bribery;

iii) The Defendants did not oppose the Claimants' request for the finding set out at paragraph 191 above;

iv) There was no dispute that Mr Stevenson had retired from ICBC in 2015. There was no evidence that Mr Gordhandas ever met Mr Lozano; his one visit to Cuba was in late October 2019 when he hand delivered the documents sought by the Defendants to the nominated Cuban lawyer.

193. Further, as I will explain in more detail below in numerous respects the evidence before me on the points which were in issue was inconsistent with a case of bribery. I refer in particular to:

i) The way in which the assignments were registered on the register of debt assignments even though on the Defendants' case the documents materializing the assignments were markedly and obviously wrong and lacking authority;

ii) Mr Lozano's open correspondence with his colleagues after the 25 November, which would be an extraordinary thing to do if he did not think that he was able to and authorized to give the confirmation which he gave;

iii) The fact that if, as Ms Alvarez suggested, Mr Lozano's actions were so grossly wrong and suspicious, and compatible only with bribery, that case has not been pursued.

THE TRIAL

194. The trial has been conducted live (with some remote evidence) over the course of two Commercial Court weeks. There are three features of the trial which I would wish to note.

195. First that the trial was hugely supported and benefitted by simultaneous translation from excellent translators. They not only conveyed the words of the witnesses, but also managed to adopt something of the style in which each witness gave evidence. There were points during the video-linked evidence at which it appeared that the evidence was coming in English from the witness so perfectly did the tone and intonation match the witness's body language.

196. Secondly the trial was, despite the usual vicissitudes, exacerbated by a very crowded courtroom, conducted with courtesy and professionalism on both sides.

197. Thirdly it was extremely good to see that thought had been given on both sides to the division of advocacy, so as to afford opportunities to the more senior junior counsel. Mr Pearson for CRF handled a number of the factual witnesses, including cross-examining Mr Fernandez, and Mr Dudnikov for BNC dealt with the expert evidence of Cuban Law. The balance of witnesses meant that Mr Belshaw did not appear on the transcript; but his hand was evident in the extremely skillful written submissions provided by BNC.

The Factual Witnesses

198. The following individuals gave evidence (in order of appearance):

i) For the Defendants:

a) Ms Maria Teresa Compte Zubeldia, who was at all material times BNC's legal director. She was dismissed in 2020 and had not been involved in BNC's business since that date. She was a polite and somewhat nervous seeming witness;

b) Ms Odalys del Nodal Molina, who is and was at all material times a secretary in BNC's Foreign Debt Office. She was firm and careful - and somewhat defensive;

c) Ms Melissa Peres Fleitas, who is a "Type C" Manager in BNC's Foreign Debt Office, having joined BNC as a trainee in August 2019 and having been a trainee at all material times for the purposes of the purported assignments. She was involved in the drafting of the 25 November 2019 letter. She was a forthcoming and confident witness, albeit that her grasp of the details seemed limited to a particular aspect of the case and her grasp of the details outside of that was hazy;

d) Mr Vladimir Regueiro Ale, who is the First Deputy Minister of the Ministry of Finance and Prices, having been appointed to that position in November 2019, prior to which he had been a Vice Minister since Q1 2019. As a witness he was confident and appeared keen to convey

the points he had in mind, but was on occasion evasive when answering questions put to him;

e) Mr Raul Eugenio Olivera Lozano, who was at all material times a Director of Operations at BNC (which is not the same as a "director" as understood in English law, and Mr Lozano was not a member of BNC's board of directors). He was dismissed in 2020 and is currently serving a custodial sentence in Cuba. As the central factual witness I deal with his evidence separately below;

f) Ms Joscelin Rio Alvarez, who is BNC's current President, having been appointed to that position in February 2021, prior to which she had been appointed as BNC's Vice President in November 2019. Her evidence was brief. She was careful and clear in her evidence;

g) Mr Rene Lazo Fernandez, who was the President of BNC at all material times for the purposes of the purported assignments until his retirement in early 2020. He was a careful and somewhat reluctant witness.

ii) For CRF:

a) Mr Jeetkumar Gordhandas. As will be apparent from the factual summary, Mr Gordhandas was involved in obtaining the contentious assignments for CRF and has been central to CRF's conduct of this litigation from the outset. Although it was suggested that he was a "well-prepared" witness I found Mr Gordhandas to be a candid and noticeably frank witness, not shying away from giving evidence which might have been thought to be unattractive.

b) Mr David Charters, the Chairman of CRF. He was a clear confident witness and his evidence was not heavily challenged.

199. Not called to give evidence were:

i) Mr Donald Stevenson, who was an employee of ICBC (although apparently not at the material times for the purposes of the purported assignments). Mr Stevenson was previously summonsed by CRF but this summons was discharged since his evidence went to the allegation of bribery which was not pursued by the Defendants at trial;

ii) Ms Martí. As will be apparent from the account given, Ms Martí was closely involved in the process. She was the Manager of the Foreign Debt Office, working closely with Mr Lozano and training Ms Perez Fleitas. She maintained the register of assignments. It is apparent from the evidence given that she was regarded as a capable and reliable person to whom others turned;

iii) Mr Ovidio Perez Fong, the BNC General Director of Operations. He was part of the Working Party established in relation to the Letters before Action.

200. CRF to some extent sought to persuade me to draw inferences from the absence of Ms Martí and Mr Perez Fong. As to the latter I am not persuaded that this would be appropriate. Mr Perez Fong, although copied into a number of emails was absent from the office for a considerable portion of the relevant period through ill health. There was a question about whether he was told that consent had not validly been given, but it was not front and centre of the dispute prior to trial. Given his health issues, which meant that he was not involved in the criminal proceedings the decision not to approach him as a witness cannot be said to be one from which it would be reasonable to draw an adverse inference.

201. The position as to Ms Martí is somewhat different. The position as to Ms Martí is that she would plainly have been a highly relevant witness. It is manifest from the factual summary that she was a key player – her name is all over the correspondence. She is repeatedly mentioned in the witness statements. She emerges from those witness statements as a person of character and principles who would have been likely to have given evidence which would have been of assistance in reaching conclusions on the matters in issue. However I am told on this, via a solicitors' letter "*Ms Martí was approached on more than one occasion but did not agree to give evidence in these proceedings*."

202. The witnesses of the Defendants all gave evidence via simultaneous translation. This is a case where it is a matter of simple justice to commend the exceptional job done by the interpreters. They not only translated faultlessly, but also managed to tailor intonation and tone to align with the evidence of each witness as they came. At points in the video-linked evidence it was genuinely hard to tell that the evidence was not being given live in English, so naturally did the tone match even the gestures of the witness.

203. So far as the factual witnesses were concerned, while the constraint of giving evidence in a different language (even with the best translation) may be in part to blame it appeared to me that the Defendants' witnesses were generally somewhat cautious and defensive.

204. I should say a word in particular about Mr Lozano. Mr Lozano was very forthcoming and gave full answers to the questions he was asked. He was plainly very keen that his evidence should be persuasive to me. He also plainly found the experience of giving evidence difficult, exhibiting noticeable high stress body language, but did his very best to give complete answers. As will appear below, I accept his evidence in some respects and not in others. Where I do not accept his evidence I wish to make it quite clear that this was not due to any defect or deficiency in the evidence he gave. He did his utmost to imprint his points on my mind. Where I have rejected his evidence I have done so because his evidence does not match up with other evidence and owing to the ephemeral nature of memory I prefer to place reliance on documents where there is a conflict between documents and memories.

The Expert Witnesses

205. The expert witnesses were Professor Mendoza and Ms Rodriguez. I was tactfully reminded by Mr Dudnikov (mindful of the temptations which present themselves to any lawyer when considering foreign law) that in terms of approach it is not

for the English judge to construe foreign law themselves – the judge must take the evidence from the witnesses and use the text only as a help to decide between conflicting expert testimony. Here one may bear in mind the following passage from the judgment of Lord Wright in *Lazard Bros. v Midland Bank* [1933] AC 289 at 298:

> "On what evidence of the foreign law a Court can act has been often discussed. The evidence it is clear must be that of qualified experts in the foreign law. If the law is contained in a code or written form, the question is not as to the language of the written law, but what the law is as shown by its exposition, interpretation and adjudication: … if there be a conflict of evidence of the experts, " you (the judge) must decide as well as you can on the conflicting testimony, but you must take the evidence from the witnesses"…. The text of the foreign law if put in evidence by the experts may be considered, if at all, only as part of the evidence and as a help to decide between conflicting expert testimony".

206. I was also reminded by reference to the judgment of Clarke LJ in *Morgan Grenfell v SACE* [2001] EWCA Civ 1932 at [49]-[52] that assessing the material is slightly more permissible when considering concepts familiar to English Law which arise within a common law system.

207. These points are well made, and indeed reflect the line which the Commercial Court has drawn in recent years in calibrating the approach to expert evidence: see Commercial Court Guide at H3.4.

208. The reason for these reminders was that this is a case where we have expert witnesses and where the subject matter of the expert evidence is not familiar common law concepts.

209. The assessment of the expert evidence therefore takes on considerable significance. Both experts had a sufficient basis of expertise to be proffered as experts; that was not really in dispute. While points were made about the degree of expertise in closing there was no formal challenge put to Ms Rodriguez in cross-examination on this basis.

210. As to depth of expertise, on the face of it Professor Mendoza had significantly greater expertise: he is *inter alia* Professor of Procedural Law at the University of Havana, where he served as Vice-Dean of the Faculty of Law for 26 years until 2021; whereas Ms Rodriguez is much younger, her expertise appears to rest with IP Law, and it appears that while she is qualified she may not currently be practicing as a lawyer. The Defendants obviously invited me to regard that as a significant factor in evaluating the experts' evidence.

211. In addition (perhaps unsurprisingly given his role as a teacher of law) Professor Mendoza was (even making allowances for being present rather than remote) the better live witness in terms of pace and assurance. However against that, Ms Rodriguez' evidence read better in the transcript than it sounded live. Further the written reports of Ms Rodriguez were overall clearer and more consistent and

comprehensible (although there were faults: she strayed outside the ordered ambit of expert evidence at least in regard to one point, and had apparently missed a development on a case upon which she relied).

212. So far as oral evidence went, making all allowances for the vicissitudes of giving evidence via a translator (and in Ms Rodriguez's case via videolink), neither was an entirely satisfactory witness. Neither was particularly clear in their evidence, and both were somewhat defensive.

213. This is not therefore a case where I have found myself able simply to prefer the evidence of one witness over another across the board. The evidence of both experts needs to be weighed on each point. In doing that I am entitled and indeed required to bring my own training and experience to bear (cf *Morgan Grenfell* at [52]). In the event, bearing in mind all these points and using the sources to evaluate the conflicts, I have agreed with each expert on some points but not on others.

THE ISSUES

214. The List of Issues for this jurisdiction dispute ran to three pages and nearly 30 issues (including sub-issues).

215. So far as concerns the issues of proper law, the position is agreed as follows:

    i) Capacity: Whether BNC had capacity to consent to the alleged assignments: Cuban Law;

    ii) Attribution/Actual Authority: Whether the acts of relevant BNC officials allegedly consenting to the alleged assignments were authorised/can be attributed to BNC and/or Cuba: Cuban Law;

    iii) Consent: Whether BNC and Cuba validly consented to the alleged assignment? Cuban Law;

    iv) Apparent authority:

        a) Whether BNC acted with the ostensible / apparent authority of Cuba: English Law;

        b) Whether BNC's employees acted with the ostensible / apparent authority of BNC: English Law;

    v) Ratification: If the acts of BNC's employees were not authorised, whether such acts were subsequently ratified: English Law.

216. Despite the range of issues the dispute can however be resolved into more or less straightforward chunks. In part this is because in practice each party focused on a sub-set of the issues, with full issue being joined only on a limited number of fronts.

217. The heart of the dispute is whether the English Law anti-assignment provisions bite. On its face this raises an issue of whether the requirements of "prior consent" have been met. In some cases this would be the only issue; here it is simply a threshold issue. If that hurdle is surmounted, there is a logically preliminary issue as to whether BNC had capacity to consent on its own behalf and on behalf of Cuba. If that is resolved in Cuba's favour then questions of authority and ratification are sidestepped.

218. Assuming capacity there then follow issues (which to some extent overlap) about actual authority and attribution. There are then secondary English Law disputes about whether:

    i) If actual authority was lacking BNC had apparent / ostensible authority of Cuba with respect to the alleged assignment of the Credit Lyonnais Agreement and Debt, the IBI Agreement and Debt and the IBI Guarantee;

    ii) If actual or apparent authority was lacking whether consent was ratified by Mr Fernandez.

219. There is a tertiary dispute about whether if there was no consent in 2019, consent was unreasonably withheld in either 2019 or 2020; and if so whether the result is that the prior consent requirement is deemed to have been fulfilled.

220. There are also additional issues as to (i) the Cuban Law concepts of Good Faith and Proper Acts (ii) the validity of previous assignments and (iii) sovereign immunity.

221. In relation to these issues my conclusions, as outlined below are as follows.

Prior consent

222. Although logically capacity comes first, because of (i) the overlap of Cuban law arguments between capacity and authority and (ii) the need to address capacity and authority arguments to the critical point in time and communications, it is useful to consider the main factual issue first. That is the question of whether (assuming capacity/authority) the acts relied upon by CRF constitute prior consent, it being common ground that under the Agreements and Guarantee, ICBC only had an English law right to assign with "prior consent", such consent not to be unreasonably withheld.

223. Overall I have no difficulty in concluding that as a matter of fact prior consent was given in relation to all of the Agreements and the Guarantee. Here the run of documents has to be considered. I have given these at paragraphs 91-156 above.

224. This breaks down into the following stages. First there was a request for consent. That forms the backdrop to the issue. As to this:

    i) By the email from Mr Dagba dated 8 May 2019 sent to Mr Lozano and Ms Martí, ICBC informed BNC that it was contemplating transfer and asked what documents would be needed from ICBC and CRF in order for BNC

to consent to the assignment. The CL and IBI agreements and the IBI Guarantee were all identified;

ii) Mr Dagba then called Mr Lozano and sent a follow up email to him on 20 May 2019;

iii) Mr Dagba spoke again with Mr Lozano and Ms Martí. It seems they were looking into the documents and some confusion had arisen about an earlier suggestion of an assignment. But it was Mr Lozano's evidence that as part of this exercise Ms Martí "*checked that both debts were held by ICBC Standard Bank in the records of ICBC*";

iv) In the email to Mr Lozano and Ms Martí on 10 June 2019 Mr Dagba referred back to the original request (which was part of the email chain) and stated that what was needed was for BNC:

a) To confirm that ICBC was the holder of the relevant positions;

b) Give its consent to the transfer between ICBC and CRF;

c) Let ICBC and CRF know what documents BNC needed in order to give its consent to, and to execute, the transfer.

225. Clearly therefore consent had been sought by 10 June. Then comes the email of 13 June. It bears repetition:

> "We accept in principle the assignment from ICBC Standard Bank to CRF I LIMITED. We need the necessary documents about CRF I Limited. We refer to the following original documents:
>
> a) Certificate of Registration of CRF I Limited
>
> b) Incumbency Certificate (attached proform in English and Spanish) signed by two officers from the CRF I Limited.
>
> c) Joint Seller Notice of Assignment and Buyer Agreement to be Bound signed by Standard Bank PLC and CRF I Limited.
>
> d) Book of Authorized Signatures of CRF I Limited.
>
> e) Undertaking to indemnify of Banco Nacional de Cuba for the economic damages and prejudices that it migh suffer due to the Non-Fulfilment of any of the above mentioned conditions (attached proform in English and Spanish).
>
> The information provided by those documents is needed by BNC to know who is the current real creditor. Please, the documents should be certified with a public notary and with our Cuban consulate.

> According to Cuban law, the certification and legalization of the documents is necessary to be accepted as public document in Cuba. In this sense these documents must be legalized at Ministry of Foreign Relation of Cuba and afterwards this legalization of MINREX, the documents have to be legalized by a Cuban public notary."

226. The question was asked therefore in relation to all of the Agreements and the Guarantee. It was answered without qualification. On its face to the extent that this document constitutes prior consent it is a consent which applies to all of these.

227. There was nothing unusual about such emails; the process outlined by Ms Martí was echoed in the BNC Handbook in particular in the provision:

> "If there is a positive result in all the aforementioned checks (including verification by the Register of Debt Assignments reflecting the balances of each bank classified by number of loans and year of renegotiation in the case of bank debt) a tele, email, SWIFT or fax is sent to the foreign party, informing him that it is accepted "in principle" your request and that you must send us a set of original and two copies of the official documents of the assignment duly signed by the buyer and the seller …"

228. Mr Lozano confirmed (consistently with this) that sending such emails was standard practice or "pro forma".

229. There is a disagreement between the parties as to whether this email of consent "in principle" can constitute "prior consent" for the purposes of the relevant agreements. In particular there is disagreement about whether this email is prior consent, or whether the later documents of 22 and/or 25 November would have to be relied upon. BNC invites me to find that Ms Martí's email of 13 June 2019 did not provide BNC's or Cuba's "prior consent" as required under the terms of the CL Agreement and the IBI Agreement or (so far as it matters) the IBI Guarantee, praying in aid (i) Mr Lozano's evidence that providing acceptance "in principle" was only the start of the due diligence process and (ii) the fact that CRF had never prior to pleading its case regarded the June email as anything more than "preliminary consent".

230. Attractively as this argument was put, I cannot accept this submission. This was not a meaningless or facile response. What one sees to this point is a request for consent to assign both the Agreements and the IBI Guarantee. That was taken seriously and acted upon: BNC checked that the debts were held by the proposed assignor. Then the 13 June email was sent. It contained serious detailed requirements as prescribed by BNC's procedures.

231. Then, looking at the language of the clause, what is being asked for is simply consent, which requires no formalities. Secondly it is "prior consent" – As Mr Khurshid KC pointed out, logically therefore it is something which should pre-date the assignment. It would, as the Claimants pointed out, be illogical and unworkable for the final formal stage to be the prior consent. If the point at which the countersignature by BNC were taken as the "prior consent" that would be a

"prior" consent happening after the assignment. That is a "Through the Looking Glass" approach. Consent – logically - has to come before the notice of assignment is signed between assignor and assignee.

232. At the end of the day: the 13 June 2019 communication looks like a prior consent, it fulfils the logical requirements of being an answer to a request which predates the assignment and it conforms to the terms of the procedures set down by BNC. It is therefore prior consent.

233. I should deal briefly with an ingenious argument deployed in closing by the Defendants, namely that the 13 June email could not be prior consent because the actual assignment was backdated to 13 June, and therefore consent would have to have been obtained before 13 June. This is plainly wrong (and to be fair Ms MacDonald KC did not stand on the point). The assignment in fact and reality took place after 13 June; the backdating was cosmetic. Consent was obtained before the assignment in fact took place. The consent of 13 June was prior consent.

234. Then there is the issue of whether the conditionality affects the position. On its face the 13 June email reads as a consent with a subjectivity. On this, the main difference between the parties really resolved into the question of whether this was a condition precedent or a condition subsequent. As to this I have no difficulty in concluding that it was the latter. The basis for the condition precedent argument was never explained. As a simple matter of construction of the email that is not how the communication presents itself. I accept the submission of CRF that the email is properly analysed as a consent subsequent – that is a condition which "*comes into operation only upon the occurrence of a future event that may or may not occur*" (per Lord Diplock *The Hollandia* [1983] 1 A.C. 565).

235. But in truth, it makes no difference whether the condition is seen as a condition precedent (such that there is no obligation until the condition is fulfilled) or a condition subsequent (such that there is an obligation which is discharged only if the condition is not fulfilled). That is because the conditions were not ones which turned on matters which are time critical. To recap, the subjectivities were:

    i) The provision of certain, listed, documents;

    ii) Their proper notarization.

    These were either fulfilled or they were not.

236. The question then becomes whether the conditions put on the consent were fulfilled. Again I have no difficulty in concluding that they were.

237. Again the full details are set out above, but in summary:

    i) On 31 July 2019, the Notice of Assignment was signed by ICBC and CRF and notarised by Cheesewrights;

    ii) It was subsequently legalised by the Cuban Embassy in London in September 2019;

iii) CRF instructed Bufete to legalise the documents in Cuba. CRF emailed the full set of documents to Bufete by email on 23 September 2019;

iv) Hard copies of the documents were hand delivered to Bufete in Cuba by Mr Gordhandas on behalf of CRF on 28 October 2019;

v) On 14 November 2019, Bufete delivered the fully notarised and legalised documentation to BNC;

vi) On 18 November 2019, Ms Zubeldia reviewed the documents and raised no issues on them, indicating that she accepted that the "*documents were legalised and protocolised, that they were the documents that had been required.*" She did not consent to the assignment from ICBC to CRF, but she did in practical terms give BNC's legal department's confirmation that the documentary requirements had been fulfilled.

In effect, the boxes had been ticked.

238. Finally without any form of roundaboutation, Mr Lozano said to CRF (copied to Ms Martí and Ms Zubeldia):

> "Our sincerely apologize for our late reply.
>
> Yes, we confirm you that the CRF I Limieted is now the new registered of the following possition
>
> DEM 22,500,000 equivalent to EUR 11,504,067.33
>
> DEM 5,750,000 equivalent to EUR 2,939,928.32
>
> Plaese, send us by message the addres to the Assignor and Assigned in order to send the legal documents signed by Banco Nacional de Cuba
>
> Thank you in advance for your always kind cooperation."

239. A further, more formal confirmation followed in the letter of 25 November.

240. Accordingly the documents were provided, confirmed as compliant/adequate and accepted. The conditions were fulfilled. To the extent that BNC had capacity and authority to do so, the Agreements and the Guarantee became unconditional.

241. Although the subjective views of those at BNC are not relevant or admissible in considering this question, this conclusion aligns with Ms Martí's own understanding of what had been done. She emailed ICBC, copying in two colleagues at BNC on 13 June: "*Today I sent an email giving acceptance of the assignment between ICBC Standard Bank and CRF 1 LIMITED with the required documents*".

242. The Defendants invited me to reject the case on prior consent *inter alia* because Mr Gordhandas on 22 November 2019 asked both Mr Lozano and Ms Martí when he would receive the "final formal consent" as well as confirmation that CRF is "*now the new registered owner of the two positions being transferred*".

That was said to be significant and to show that: (i) Mr Gordhandas was aware of the need to obtain BNC's prior consent (and he did not believe that Ms Martí's email of 13 June 2019 fulfilled that function, as indeed it did not); (ii) Mr Gordhandas was also aware that neither Mr Lozano nor Ms Martí were authorised to act in their sole name; and (iii) the two positions which Mr Gordhandas was referring to were the CL Agreement and the IBI Agreement; not the IBI Guarantee (which would have been a third position). Further it is said that the absence of a response in the 22 November response to the request for final formal consent shows that it too was not the "prior consent" which had been sought. Reliance was also placed on the abortive ICBC assignment of 2014 referred to at paragraphs 3863 above.

243. However Mr Gordhandas' concerns or subjective beliefs are not relevant. The question must be what, as a matter of English Law, is the meaning of the "prior consent" provision, and was it fulfilled? The same point as to subjective beliefs or understandings can be made about the CRF board minutes of 29 July referring to "preliminary consent" and the fact that the letter before action (and indeed the claim form) focused on the 25 November letter rather than on the 13 June conditional consent. In any event as regards the board minutes, they are not incompatible with the case as finally run and accepted above – the wording (*"CRF is now in the process to transfer 2 securities it plans to litigate on into its own name. This process has been live since start of the year and we have received preliminary consent by BNC. The original signed, notarized and legalised documents with requested KYC now need to be submitted to BNC."*) actually reflects the conditionality.

244. As for the aborted ICBC assignment of 2014, the key point here is that the conditions sought in that case were not met. As outlined at paragraphs 38-63 above, this was a *"thus far and no farther"* transaction. CRF got consent in principle – subject (again) to provision of documents. But those documents were never provided because CRF on that occasion jibbed at giving an indemnity. The condition was not satisfied and the agreement either (condition subsequent) ceased to have effect or (condition precedent) never came into being.

245. It was also suggested that the case as to condition subsequent was unworkable because consent is only given when it is communicated – a point which was submitted to be axiomatic. But, as outlined above, that is not how a condition subsequent works as a matter of English Law. In any event the email of 22 November was enough to the extent that any communication was needed to convey the fact that the conditions were accepted as having been met.

246. An argument was also deployed by reference to the supposed need for two signatures. However this is an argument which conflates two different issues. If consent comes at 13 June, the evidence as to two signatures, the requirements for it and (to the extent relevant) CRF's knowledge of it pertains to a later stage. That is reflected in the process prescribed by the BNC Handbook. There is no document or evidence which suggests that two signatures were ever required for this preliminary consent. The witness evidence relied upon by the Defendants as to the number of signatures ("Mr Lozano's mistake") pertains to the 25 November document.

247. Finally I should deal with the suggestion that the point as to consent being given on 13 June was unpleaded and should be rejected on that basis. It is certainly the case that CRF's original case in its Claim Form relied on the 25 November letter. However the 13 June email was specifically pleaded in the Particulars of Claim, as consent. Paragraph 30 pleads the email and states:

> "BNC thereby consented on its own behalf and on behalf of Cuba to the assignment of the Credit Lyonnais debt, the IBI debt and the IBI guarantee from ICBC to CRF."

248. That document, and the subsequent approval, was also pleaded at paragraph 20.1D of the Reply. The Defendants pleaded that the document was a consent in principle only and denied Ms Martí 's authority to give consent. That paragraph was then subject to an implied joinder of issue in the Reply.

249. Thus, while it is fair to say that the condition subsequent formulation was not explicitly pleaded in the sense of reliance on the 13 June email as providing consent subject to a condition subsequent, CRF did plead that document as providing consent. There was also a plea as to provision of documents requested. That is ample to plead the facts upon which the plea is based. Further, even if that were not the case: (i) condition subsequent is a legal argument and did not need to be pleaded (ii) there is no suggestion that the Defendants were prejudiced by this, in circumstances where it was pleaded that the email embodied consent.

250. This issue of prior consent is purely factual; it is the question which would be asked if everything took place according to English Law. At the next stages it is necessary to consider whether BNC had the capacity to give this consent (for itself and for Cuba), and if so whether Ms Martí/Mr Lozano's acts were authorized, which includes a consideration of whether consent as a matter of Cuban law required more than was given.

Backdrop to the Cuban Law issues

251. It was common ground that the Court's approach to issues of foreign law is as set out in *Deutsche Bank AG v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm) at [105] per Cockerill J and (more completely) in *Banca Intesa Sanpaolo SPA v Comune di Venezia* [2022] EWHC 2586 (Comm) at [120]-[127] per Foxton J. Both cases refer to *Haugesund Kommune v Depfa ACS Bank* [2012] QB 549 at [38-9] and [47-8].

252. It was common ground also that the Cuban legal system is in the French continental or Roman law tradition, based on its Spanish heritage. The hierarchy of sources of law is as follows (starting with the most authoritative):

    i) The Constitution;

    ii) International treaties ratified by Cuba;

    iii) Legislation and regulatory provisions:

        a) "Laws": legislation passed by the National Assembly of People's Power (i.e., the Cuban parliament);

b) "Decree-Laws" ("DLs"): legal norms approved by the Council of State, which performs legislative functions between biannual sessions of the National Assembly. DLs are ratified by the National Assembly;

c) Decrees, issued by the Council of Ministers (which is the Cuban government, comprising the Prime Minister, Deputy Prime Ministers and Ministers);

d) Administrative regulations (e.g., Resolutions, Instructions etc) adopted by various public institutions;

iv) Interpretations of the laws made by the National Assembly and Council of State;

v) Provisions issued by the Governing Council of the Supreme People's Court;

vi) General principles of law;

vii) Case law.

253. The last two categories (general principles and case law) are used as auxiliary sources and do not have the binding character of legislation.

254. However in this case there is very little to be gained from this background, since there are no relevant interpretations or case law. The exercise of considering the Cuban law therefore proceeds from the original statutory provisions and the light which can be shed on them by the experts' evidence, duly evaluated.

Capacity

255. There is one agreed capacity issue: whether BNC had capacity to consent to an assignment on behalf of Cuba. There is also an issue as to BNC's ability (put neutrally) to consent to the assignment of the debts at issue in these proceedings and within that issue whether the requirements of one of the statutory provisions (DL 192/99) is properly seen as imposing limits on BNC's capacity.

256. The starting point is that the experts agree that:

i) The capacity of a Cuban legal entity is governed by Articles 12.3 and 41 of the Cuban Civil Code;

ii) Article 41 of the Cuban Civil Code provides: "*Legal persons, in order to carry out their activities, have the capacity determined by law and its statutes or regulations*";

iii) An act outside a legal entity's capacity is null and void, by reason of Article 67(g) of the Cuban Civil Code, and is incapable of being ratified. BNC's capacity is governed by (at least) DL 181/1998 and BNC Resolution 1/1998 ("BNC Statutes").

iv) In the event of a contradiction or conflict, DL 181/1998 prevails.

257. There is however, rather a lot more to the questions than this.

Capacity/authority to bind Cuba

258. This is a discrete issue. The Defendants' submission was that from 1976, BNC had no power (in the *Haugesund* sense[1]) to act on behalf of the Cuban State in matters relating to financing arrangements to which Cuba was a party, including any guarantees issued by Cuba in connection with borrowing by other national entities (such as BNC itself). That was now within the exclusive purview of the State Finance Committee ("SFC").

259. It was common ground that the effect of the relevant statutory provisions was that BNC was no longer authorised after 1976 to enter into or create indebtedness on behalf of the State, for example by granting or issuing a guarantee on behalf of the Cuban State. The fault line between the parties was whether by implication Article 56 of DL 192/99 extended to the handling of existing indebtedness, including the giving of consent to an assignment of a guarantee of such pre-existing indebtedness. This provision states:

> "No entity from the public sector may take any kind of step towards performing a public credit operation without the express authorization of the Ministry of Finance and Prices.
>
> Once all the steps are taken, the resulting public credit operation must be approved by the Council of Ministers."

260. Essentially this was an argument about whether Article 56 should be read expansively or whether that gap was filled by DL 172/1997 (and subsequently by Article 7(ll) of DL 181/1998). The former provided:

> "The National Bank of Cuba continues to [register, control, service and deal with] the foreign debt which the Cuban State and the National Bank of Cuba have contracted with foreign creditors to date."

261. The latter, to which there will be considerable reference below provides:

> "Article 7.- The Banco Nacional de Cuba has the following functions and powers: …
>
> (ll) to maintain the registration, control, and care of the external debt that the Cuban State and the Banco Nacional de Cuba have contracted with foreign creditors up to the date of entry into

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1 *"the legal ability of a corporation to exercise specific rights, in particular, the legal ability to enter a valid contract with a third party… a lack of substantive power to conclude a contract of a particular type is equivalent to a lack of 'capacity'. For similar reasons, it seems to me that the concept of a corporation's 'constitution' must be given a broad, 'internationalist' interpretation... it is necessary to examine all the sources of the powers of the corporation under consideration. This will include any constitutional documents but also relevant statutes and other rules of law of the country where the corporation was created."*

force of Decree-Law No. 172 of 1997, "On the Banco Central de Cuba."

262. The reality appears to be that both of these provisions are somewhat late in the day and that there was a certain amount of redrawing of authority in the period from 1948. Taking the matter through the timeline via the experts' evidence we see the following:

i) 1948: Under Law 13/1948 BNC was established as "an autonomous credit institution". Its purpose was said to be "*to centralize monetary reserves; to oversee and regulate credit, create and withdraw means of payment; to act as Financial Agent of the Currency Stabilization Fund and cooperate with it for the purposes of the Cuban exchange policy; to serve as Financial Agent and Economic Advisor to the State*". As such "*the BNC had power and authority to grant guarantees on behalf of Cuba and to consent to assignment of such guarantees on behalf of Cuba*";

ii) 1961: Following the enactment of Law 930/1961, whose purpose was "*To consolidate and further develop the economic and social achievements of the Revolution, the State must establish a unique, centralised banking system, consisting of the National Bank of Cuba which fosters the development and advancement of the country's productive activities, by combining and using its financial resources as economically and reasonably as possible*" the BNC's power and authority to act on behalf of the state remained materially the same after 1961 as it was before;

iii) 1966: Under Law 1187/1966 which was to amend the structure of BNC and determine *"its functions as a bank and as the entity responsible for implementing financial policy and monitoring compliance with the National Economic Plan"* there is no change;

iv) 1975: Under Law 1298/1975 there is no change. Article 2 specifically records "*The National Bank of Cuba shall have the status of Central Bank of the State and Financial Organization of the Nation*";

v) 1976: Cuban Constitution was promulgated.

a) Under Law 1323/1976 ("*Law on Organisation of the Central State Administration*"), the arrangement of powers was altered and a variety of "Institutions of the Central State Administration" were defined. BNC ceased to be the "Financial Organ of the State".

b) Under Article 60 the SFC became the institution responsible for "*managing, implementing and monitoring, within the scope of its purview, the application of State and Government financial policy, advising State and Government on said policy and managing and controlling the organisation of State finances*".

c) This included *"representing the Cuban State in the arrangement and signing of ... agreements and negotiations of credits to which the*

Cuban State is a party" As such "*the State Finance Committee became responsible for issuing guarantees on behalf of Cuba in respect of debts incurred by national entities*";

vi) 1983: Under Law DL 67/1983 "On the Central Administration of the State" this arrangement was further developed. As regards BNC (i) it remained a Central Bank of the State (ii) it is recorded not to be liable for the obligations of the Republic (iii) its statutes were approved and DL 1298/1975 was ratified. Accordingly, BNC lost its status as an organ of Central State Administration;

vii) 1984: Under DL 84/1984 *"On the National Banking System and the National Bank of Cuba"* BNC's status and functions as "the central bank of Cuba" were maintained.

a) Article 21 records that BNC "*shall be in charge of the management, implementation and oversight of State and Government monetary and credit policy. Within the scope of its functions, it shall act as financial agent and advisor to the State and the Government";*

b) Under Article 36 BNC is given functions including "*to oversee and record international credit operations of any nature and … any other international banking operations*;"

viii) 1994: Under DL 147/1994 State Central Administration was re-organised because DL 67/1983 was *"in certain respects not adapted to the current conditions that demand the greatest possible saving of resources in all senses".*

a) As regards BNC functions which had previously fallen to SFC these moved to Ministry of Finance & Prices ("MFP") (a merger of the previous committees of Finance and Prices);

b) Previous laws were otherwise ratified;

c) The "Sole Final Provision" states: "*[MFP] shall have the following specific functions: […] To guarantee on behalf of the State any indirect public external debt when appropriate; to participate and collaborate with the competent agencies in the renegotiation of the external debt*.";

ix) 1997: Under DL 172/1997 BCC is created. The purpose of the law was recorded as being to separate the functions of central and commercial banking;

a) Under it BCC is to act "*in all matters relating to the contracting of foreign and domestic credit as well as concerning the servicing of the State's foreign debt repayments*";

b) Under the Special Provisions BNC "*retains all of the powers and functions … except for its powers and functions as the State Central*

Bank, which are transferred to [BCC]. [BNC] continues to maintain the recording, oversight, service and monitoring of the foreign debt that the Cuban State and the National Bank of Cuba have contracted with foreign creditors to date";

x) 1998: DL 181/1998 is the most recent (and still current) piece of legislation, delineating the powers of BNC and aligning previous legislation with the changes of the 1997 statute. It revoked DL 84/1984. It contains Article 7(ll) which provides that BNC has the function and jurisdiction "*to register, control, service and deal with the foreign debt which the Cuban State and Banco Nacional de Cuba have contracted with foreign creditors until*" 28 May 1997, that being "*the validity date of Decree-Law No. 172 of 1997, Of Banco Central de Cuba*";

xi) 1999: DL 192/1999: The Law of Financial Administration promulgated because current procedures "*do not conform to the country's prevailing economic and financial transformations*". It is the statute from whence Article 56 derives. Its purpose is expressed as being to: "*establish the principles for planning, organising, administering, executing and controlling the procurement and effective and efficient use of public financial resources to achieve the State's policies and programmes and allow the provision State services, i.e. public sector entities. [and] ... Develop such systems as are necessary to provide timely and reliable information on the financial performance of the public sector.*"

263. The position is not explicit in the wording of the relevant legislation; on that point the experts were agreed. Essentially the issue seemed to be what was intended in 1976 – hence the Claimant's characterization of the point as "the 1976 point". Although focus was on DL 181/1998, that was not intended to enlarge BNC's powers – that was common ground and is evident from this timeline. Any dividing line has to be sought in the 1976 legislation.

264. Like the legislation itself the evidence was not entirely clear. Professor Mendoza was clear that he considered that guarantees as a whole were taken away from BNC and moved under the aegis of the SFC (and hence later the MFP); but his reason for reaching this conclusion was not well explained.

265. Ms Rodriguez's report was clear. She stated:

> "Law 1323/1976 by Article 64 designated BNC as a 'State Committee', which by Article 22 meant it was '*generally in charge of the functional and governing direction of matters affecting all activities and all state agencies and institutions'*. This included matters such as the assignment of guarantees. It is important to note that this meant that BNC was of the same status as the State Finance Committee. The former was not subordinated to the latter."

266. Again her reason for coming down on this side was not explained. This precise passage of the report was not challenged. However Ms Rodriguez was asked the question about assignment of guarantees by reference to 1984 as a point on the

timeline. Her response was that it was probably the State Finance Committee and agreed that "*in principle, yes, that's correct*". That answer was not consistent with her report. In closing an attempt was made to say that both entities could have capacity to deal with assignments. That seems unlikely, when judged against this fairly prescriptive series of legislative provisions. It would be an arrangement which would run risks of confusion and inconsistency.

267. On the (fairly slight) evidence I would therefore conclude that post-1976 BNC lacked capacity to consent to the assignment of guarantees given directly by Cuba. That balance of evidence is enough of itself. But it is also essentially consistent with:

    i) The "direction of travel" which one can discern within these succeeding pieces of legislation, which takes BNC away from complete alignment with Cuba;

    ii) The fact that the drafting of the legislation suggests that where the Cuban legislature confers powers on a separate legal entity to act for, or bind, the Cuban State, it does so in terms that are express and unambiguous: examples are: (i) Articles 3, 48(1) and 50 of Law 13/1948; (ii) Articles 36(29) and (30) of DL 84/1984 (BNC); (iii) Articles 19, 21 and 25(a)-(b) of DL 172/1997 (BCC).

268. That conclusion is also supported by the evidence of the position on the ground. As outlined by the Defendants, when the IBI Guarantee (itself executed by the SFC on behalf of Cuba) was subsequently confirmed/amended, the relevant correspondence was sent and signed by the Minister-President of the SFC (and not the BNC). Further, clause 4 of the IBI Guarantee provided for the Vice-President of the SFC (and not the BNC) to be the person designated for the purposes of all communications and documents to be made or delivered under the Guarantee. Thus, any request for consent to an assignment of the IBI Guarantee had to be sent to the SFC (not BNC). Also consistent is the (later) MFP Manual, which provides for the MFP (not BNC) to decide whether to consent to an assignment of a State guarantee.

269. In addition the standard form message sent by BNC (reproduced below) seems to draw a distinction between guarantees (where MFP is specifically referenced) and the debts themselves.

270. Accordingly I conclude that BNC did not have capacity to consent to an assignment of guarantees issued by the Cuban State in respect of debt contracted by BNC prior to 1997 (in particular the IBI Guarantee).

271. Had I concluded otherwise I would have concluded that the claim in respect of the IBI Guarantee failed for lack of authority.

<u>Capacity/authority to consent to assignment of debts</u>

272. As to whether BNC has the capacity to consent to an assignment of the debts at issue in these proceedings, both experts agreed on the relevance of Article 7(ll) of DL 181/1998 which provides (subject to translation disputes as to which see

further below) that BNC has the function and jurisdiction "*to register, control, service and deal with the foreign debt which the Cuban State and Banco Nacional de Cuba have contracted with foreign creditors until*" 28 May 1997, that being "*the validity date of Decree-Law No. 172 of 1997, "Of Banco Central de Cuba*"".

273. Professor Mendoza's opinion was that while the debts at issue fall within the scope of Article 7(ll):

    i) Article 7 itself properly construed indicates a restriction;

    ii) That is supported or reinforced by both BNC's Statutes and Article 56 of DL 192/99;

    iii) The net result was that BNC was required to obtain prior approval of the MFP and the Council of Ministers.

274. Ms Rodriguez's position was that BNC has the capacity to consent to an assignment of BNC debt of the type at issue in these proceedings on its own behalf and on behalf of Cuba and that this capacity is confirmed by and derived from Article 7(ll) of DL 181/1998. Essentially she sees this as a straightforward point of construction: the natural meaning of the Spanish words "*mantener el registro, control, servicio y atención de la deuda externa*" is broad enough to encompass all aspects of the handling of the assignment of Cuban Debt. She also disputed the relevance to this issue of the BNC Statutes and DL 192/99.

275. The argument thus divides into three portions: construction, BNC Statutes and DL 192/99.

276. As to the first part of this argument, Professor Mendoza's contention, insofar as it was based on translation, was not persuasive. It had all the appearances of an afterthought, and one which smelled of the lamp. It turned on a criticism of the (agreed, if machine based and possibly less than perfect) translation which plainly was not Professor Mendoza's own. His original report contained the translation which Ms Rodriguez used and in evidence he credited the new argument's genesis to discussions "*with bilingual members of the Defendants' legal team*". To be fair, he did not embrace it with much enthusiasm. In his oral evidence he effectively resiled from this part of it, which formed no real part of the Defendants' closing submissions. In my judgment nothing turns on whether one translates the passage as given in the agreed form or (as the Defendants contended was preferable) "*to maintain the registration, control, servicing and care of [or attention to]*". As the Defendants submitted: what ultimately matters is the meaning of the words used overall.

277. There was then the more straightforward issue of interpretation of Article 7(ll). Professor Mendoza attempted to contend that Article 7(ll) did not extend to the materialization of the assignment in the books of BNC, without first referring the matter to the MFP, which must in turn seek the consent of the Council of Ministers.

278. So far as construction goes (with due caution about wording which plainly could be translated in a number of ways) on its face the wording (which is broad,

covering a number of what one might term "looking after" functions) is apt to cover consent to assignment of a debt. Looking at that provision alone Professor Mendoza's approach could not be justified. There appears to be no textual basis for such a reading in. This is not a question of taking on a debt, or imposing a new commitment. It is a question of long term management of the existing debt. It is plainly apt to come within the wording of Article 7(ll). One might well call this a "handling" function, and Professor Mendoza agreed that BNC has the power, to "handle" Cuba's legacy debt: "*In the generic concept of 'handle' Cuban debt*".

279. That is wording alone. But the same picture emerges if one "iterates" by reference to the legislative background. As the previous section demonstrates the position of BNC has been gradually moving away from complete alignment with Cuba, but it has retained a particular position. In particular as it moved away from being the principal State bank, its field of operations seems to have moved more towards management and administration (see paragraph 261 above). This is then reflected in the line in the sand produced by the 1997 legislation and the creation of BCC.

280. Professor Mendoza's evidence was consistent with this, accepting that part of the function covered by this Article included the critical parts of the BNC procedure for present purposes:

> "Q. So you say that BNC's responsibility with respect to the assignment of these debts is to respond to a request to assign by verifying that the request is genuine; correct?
>
> A. Yes.
>
> Q. And it is BNC's responsibility with respect to the assignment of the debts to respond by verifying that the creditor is registered as the holder of the corresponding debt that is in BNC's register of debt assignments; correct?
>
> A. Yes.
>
> Q. And it is BNC's responsibility with respect to the assignment of the debts to respond by taking the necessary steps with respect to the assignee of the debt, and by that you mean requesting documents and getting them approved by the BNC's legal department; correct?
>
> A. Yes. The checking of that documentation."

281. Thus Article 7(ll) covers the 13 June consent. In the light of that primary conclusion the debate which ensued about which side of the line materialization (and approval of the final documents) fell is academic. However to the extent that it does matter I would accept the submission that Professor Mendoza was wrong to see this second stage of the process as falling the other side of the "handling" line. There is no interior logic to this argument, and there is no justification for it within the wording of Article 7(ll).

282. The simple construction exercise therefore supports Ms Rodriguez's approach. A further consistent layer of (albeit subjective and slightly *ex post facto*) understanding is demonstrated in BNC's documents, for example:

i) The release on the BNC website: "*Banco Nacional de Cuba is committed to the effective handling of financial operations related to foreign trade, managing foreign financing and export credit insurance coverage, keeping the strict record and control of Cuba's foreign debt and its own, as well as debt servicing and attending through cessions and transactions, any renegotiations derived or required from it;*"

ii) The standard form message used by BNC's Foreign Debt Department, which was clear to the point of assertiveness:

> "Dear ,
>
> Banco Nacional de Cuba, by Decree-Law 181 of the Government of the Republic of Cuba signed the 23rd day of February of 1998, is liable to maintain the register, control, service and attention of the foreign debt of the Cuban State and that of Banco Nacional de Cuba, contracted with foreign creditors. In this case said undertaking refers to the liabilities contracted before 1997, liabilities that include our obligations with you.
>
> … for legal purposes, this sole confirmation by Banco Nacional de Cuba is sufficient to carry out the operation.
>
> The Ministry of Finance and Prices of the Republic of Cuba-MFP, acts as garantor [sic] of these operations. Notwithstanding, we repeat, that to control said operations, we, Banco Nacional de Cuba, as stated in above mentioned Decree-Law 181, is the entity authorized to assign referred debts.
>
> Attached hereto, please find a photocopy of the Gaceta Oficial of the Republic of Cuba ,…d. Regarding Banco Nacional de Cuba functions please read article 7 subsection ll) referred precisely to Banco Nacional de Cuba undertaking to register, control, service and attend the foreign debt of the Cuban State and of Banco Nacional de Cuba."

iii) BNC's operational documents including:

a) The "Work Objectives" of the Operations Department of BNC and Chapter 6 of the BNC Handbook which essentially reiterate the terms of Article 7(ll);

b) The detailed terms of the BNC Handbook which sets out detailed guidance on how to deal with matters such as debt assignments. For example (quoted more fully above):

> "1. DEBT ASSIGNMENTS

> The Foreign Debt Department will maintain control and administration of Cuban debt that is ceded in the secondary market. … Any assignment of debt will be with the consent of the debtor, if so stipulated in the contract, however, the debtor may object if there is a reasonable reason….
>
> 2. PROCESS FOR THE MATERIALIZATION OF ASSIGNMENTS
>
> Generally, a communication is received first (via telex, SWIFT, fax, email, or document) from a certain bank, company or financial institution, explaining the intention to assign an amount of our debt to another entity. …
>
> This communication generally specifies: …
>
> This request is recorded in all its details to have a control and give you follow up until the end of the process, through the Register of Debt Assignments.
>
> The debt that is the object of assignment is verified in the following aspects. [list of documents to be sought]…
>
> • The aforementioned documents must be certified or legalized by a competent institution of the country where they were issued (notary public) and then they must be certified by the Consulate of the Embassy of Cuba in the same country, they will be sent to the Ministry of Foreign Affairs in Cuba and before a Cuban Notary, they will later be sent to [BNC].
>
> • These documents are reviewed by the legal department of the institution.
>
> If there is a positive result in all the aforementioned checks… a tele, email, SWIFT or fax is sent to the foreign party, informing him that it is accepted "in principle" your request and that you must send us a set of original and two copies of the official documents of the assignment duly signed by the buyer and the seller…
>
> Once the assignment is materialized, it is then registered in the Register of Debt Assignments to maintain control of the balances of each bank, company and financial institution and, if necessary, to reconcile with the records of the [BNC].…"

283. The justification for the difference in view in reality lay in Professor Mendoza's approach to Article 56 of DL 192/99. The point therefore turned on what Article 56 of DL 192/99 does, in the light of the wording of Article 7. In particular there is the question of whether this article goes to capacity, applying the principles set out in *Haugesund* at [48], and *Banca Intesa* at [112].

284. As already noted, Article 56 of DL 192/1999 provides:

> "No entity from the public sector may take any kind of step towards performing a public credit operation without the express authorization of the Ministry of Finance and Prices. Once all the steps are taken, the resulting public credit operation must be approved by the Council of Ministers."

285. Professor Mendoza's contention was that Article 7(ll) of DL 181/1988 has to be analysed in conformity with DL 192/1999, because that establishes the procedure that obliges BNC and other entities to ask for the relevant authorisation from the MFP when there is a public credit operation.

286. There is however a logically prior point, which is whether this law applies to public debt contracted by the Cuban State and BNC prior to 1997 at all. The Claimant submitted that whereas DL 1972/1997 and DL 181/1998 (for example) expressly record in their recitals that they are directed to BNC and the legislation governing it, the recitals to DL 192/1999 make no mention of BNC or the legislation governing it. CRF contended that DL 192/1999 in fact contains a transitional provision which expressly provides that "*The public debt contracted by the Cuban State prior to the entry into force of this Decree Law is governed by the provisions by virtue of which it was contracted*". Purely as a matter of impression reading this provision, this appears to be a sound point and nothing in the evidence or submissions changes that impression. The issue was not squarely dealt with by the Defendants in their written submissions. Further (to some extent in line with the position on guarantees) the natural expectation would be for a transitional provisions section to outline any reaching back; which it does not.

287. So far as the evidence on this point was concerned, Ms Rodriguez was quite clear:

> "Q: …do you agree that this article, Article 56, imposes conditions on the exercise of the power to perform public credit operations? Do you agree with that?
>
> A. Yes, yes, not for debts from before 1997 when it came into force, but later, yes."

288. Professor Mendoza's evidence was equally clear that he disagreed; but the reasoning for reading the transitory provision the way he did was lacking. His account was that its purpose was to reassure – "give certainty" to – existing creditors that their substantive rights were not modified by this legislation, but the explanation of why that was the case indicated that he was focusing on concerns ("*the provisions incorporated into this decree law with regard to modification of debts in Article 59 that establish conversion mechanisms for debt, modification of debt, et cetera…*") to which the expression of the transitory provision is not apt, and which, if they were the focus, would be expected to be referenced more specifically.

289. The point therefore falls at the first hurdle.

290. As to the question of capacity versus authority, had that arisen, I am not persuaded that this enactment does go to capacity. While Ms Rodriguez accepted that Article 56 imposes conditions on the exercise of the power to perform public credit operations, it does so by placing limits on BNC officials' authority in

respect of public credit operations. Accordingly it does not mean that it defines the substantive powers of BNC and thus forms part of BNC's "constitution" in the *Haugesund* sense, as the Defendants submitted.

291. But in a real sense that is neither here nor there. The question is whether (even assuming the need to read DL 192/1999 with Article 7(ll) – ie that it does apply to pre-1997 debts) consenting to an assignment is "*taking a step towards performing a public credit operation*". Contextually (and as the language might suggest, absent any expert evidence) Article 54 of the same piece of legislation provides that "*The indebtedness resulting from public credit operations is called public debt*.". That in turn indicates that a public credit operation is one which results in indebtedness. That proposition was accepted by Professor Mendoza and the suggestion that the term be limited to operations "relating to" as opposed to creating new public debt is not consistent with his evidence on this.

292. Although both he and Ms Rodriguez agreed that it encompasses "debt conversion", "debt consolidation" and "debt renegotiation" as provided for in Article 59 of DL 192/1999 (and hence as going wider than the creation of new public debt), all of those things change the terms of the indebtedness and hence the performing of a public credit operation. However it is hard to see - and Professor Mendoza did not really explain - why giving consent to the assignment of an unchanged debt from one creditor to another would be caught. On this Ms Rodriguez's evidence was well expressed and persuasive: "*It doesn't indebt the Cuban state more than it was previously committed to with the original debt. There's not a variety there or a variation. The debt is an amount that is an invariable amount, despite the figure of the creditor changing.*"

293. Professor Mendoza's argument seemed to rest on the proposition that the identity of the creditor is critical. That was a point on which stress was laid in closing, with Mr Dudnikov submitting that:

> "the identity of the creditor is obviously important, and it could well have a significant impact on whether Cuban public funds are ultimately called upon, whether through successful enforcement action or even because of the costs of litigation alone."

294. That may be true in terms of the chances of enforcement. But it can make no difference to the obligations. And indeed the same creditor could (for example with a change of management) take very different approaches at different times. Further as CRF rightly pointed out, that potential has been dealt with under the terms of the contract by (i) excluding assignment without consent and (ii) requiring consent not to be unreasonably withheld. BNC has a chance to refuse on this basis – but only if to do so would not be unreasonable.

295. Nor did I find attractive the submission that the English law analysis of the processes of assignment, which may be said to involve the creation of a new contract, could properly impact on the construction of the Cuban statute. If the same approach were taken as a matter of Cuban law, that might have an impact, but that was not suggested to be the case.

296. I therefore conclude that BNC had capacity to consent to the assignment of the debts in issue in this case.

297. Again there is support for this conclusion in the later events, though I do not rely upon this for my conclusion. In particular:

    i) BNC did not in practice seek the approval of the MFP and the consent of the Council of Ministers, and such approval and consent was not provided. The Defendants have accepted in correspondence that there is no evidence that any prior authorisation of the MFP or approval of the Council of Ministers has ever been sought or provided in connection with any of the assignments of Cuban sovereign debt that have been concluded in the past;

    ii) As already noted BNC's very clear explanation to creditors was that consent from BNC's Foreign Debt Office was the only consent that was required;

    iii) In the Cuban criminal proceedings Ms Zubeldia and Ms Fernandez Ponce gave evidence that they had never encountered a situation where there had been communication with MFP in relation to consent to an assignment.

298. This conclusion also aligns with the fact that Professor Mendoza had not identified the capacity issue in his first report, where he dealt only with issues of authority. While I entirely take on board the point that this was before the ordering of the expert issues, and that the issues which he records being asked did not touch on capacity, it is also the case that the report was given in support of the jurisdiction challenge, and the capacity argument both logically precedes authority and is more useful to the Defendants, as taking apparent authority and ratification out of the equation. It is therefore somewhat surprising - if the point were a good one - that Professor Mendoza did not spot and raise the issue at that point.

299. Accordingly I conclude that Article 7(ll) gives BNC power to consent to an assignment of debts contracted by BNC prior to 1997, without obtaining approval of the MFP and the Council of Ministers.

300. It was essentially common ground that as a matter of Cuban Law the question of authority of BNC turned on the same points. Although it was submitted that it was not open to CRF to maintain this argument based solely on a challenge to the experts, with the point not having been formally put to the factual witnesses, it has never been the practice in the Commercial Court to require cases to be formally to put to all or inessential witnesses. The question of authority was a matter of Cuban Law and was properly put to the experts. The factual witnesses' understanding as to the content of Cuban law at any material time was not itself significant. I therefore conclude BNC had actual authority of Cuba with respect to the alleged assignment of the Credit Lyonnais Agreement and Debt, the IBI Agreement and Debt.

Did BNC's employees and agents have actual authority?

301. The crux of this issue relates to whether, in order to have authority to give the "prior consent" the consent had to be given in a particular form, with two signatures.

302. The Defendants' case is that:

    i) The BNC Rules regulate (i) the conditions for the exercise of BNC's power to conduct banking operations that fall within the scope of the Rules; and/or (ii) the authority of BNC officials to act in the name of and on behalf of BNC;

    ii) Approval of an assignment of BNC's debt (and, insofar as it is relevant, of a Cuban State guarantee) is a banking operation within the meaning of Article 15(l) and/or 12 and/or 17 of the BNC Rules, and thus requires two (in the case of Article 17, Category A) signatures;

    iii) The signature requirements imposed by the BNC Rules cannot be fulfilled by the application of a stamp or seal.

303. CRF, for its part, contended that:

    i) The President of BNC may delegate his power by appointing officials to positions within BNC and delegating his authority to those officials to perform acts inherent in their functions;

    ii) Mr Lozano and Ms Martí were so appointed to positions within BNC and the President of BNC delegated his authority to consent to the assignment of historic Cuban sovereign debt to them.

304. As can be seen from this summary of the parties' cases here the parties are a long way from each other conceptually as well as on the details.

305. The starting point, at the top of the tree of legal sources, is the Cuban Civil Code. It is common ground that, pursuant to Article 59 of the Cuban Civil Code, a person will be appointed a voluntary representative of another when he is empowered to carry out acts on behalf of the other pursuant to a power of attorney, and a legal representative of the other when the authority of the other is delegated to him in a legal manner.

306. The parties then look to different means of delegation.

307. CRF looks to delegation via the President of the BNC to officials. This delegation takes place pursuant to Article 15 and 17 of DL 181/1998 which provides as follows:

> "15. The President of Banco Nacional de Cuba, whilst exercising his functions, may grant the powers he deems necessary and delegate his faculties to other directors and functionaries of Banco Nacional de Cuba …

> 17. In addition to the jurisdiction consigned to the aforementioned articles, the following apply, without prejudice to the remaining functions assigned to him by this Decree-Law and the Statutes:
>
> a) to issue resolutions, instructions and other requirements of an obligatory nature for [BNC] and its branches …
>
> c) to appoint the directors of [BNC], whose designation is not reserved to other senior management levels …
>
> f) to delegate his functions to other directors and functionaries of [BNC]."

308. The Defendants look to delegation by way of an administrative regulation made by a public institution; in this case, a Resolution of the President of BNC under Articles 15 and 17 - in the form of Resolution 10/2016 ("the BNC Rules"). This is entitled "*Rules on Authorisations and Uses of Signatures*".

309. Both parties also referred to an earlier resolution, Resolution No 1/1988 (the BNC Statutes). That, as already noted at paragraph 12 sets out:

    i) Management Levels and their Heads (Article 13);

    ii) The role of the President (including at Article 18 delegation);

    iii) The roles of Second and Third Management Levels (including issuing binding instructions within their sphere of competence);

    iv) Delegation of Authority (Article 45);

    v) External Relations (Article 54) including provision for it to be conducted by a delegate.

310. I will first evaluate the route advocated by CRF (and the Defendants' challenges to that), before passing on to consider the impact which the BNC Rules have on that approach.

<u>Delegation under DL 181/1998</u>

311. Professor Mendoza's written report seemed to dispute the possibility of a delegation other than via the BNC Rules. However orally he (realistically) accepted that delegation could be done other than via the rules, saying that "*the President of BNC may delegate his power by appointing officials to positions within BNC and delegating his authority to those officials to perform acts inherent in their functions*".

312. That was plainly a sensible concession in the face of (i) the wording of Article 15 and 17(f) and (ii) the fact that the title of the BNC Rules does not seem to indicate that it is prescribing the scope of the power, merely setting out rules to operate on authorisations.

313. It follows, and Professor Mendoza accepted, that:

i) The President of BNC may appoint managers and officials to specific positions within the bank;

ii) The President of the BNC may delegate his powers to those managers and officials to perform acts inherent in their functions;

iii) Where the President of BNC has delegated his powers to a manager or official in this way, the manager or official is authorised to present the bank in its external relations within the limits of the authority and power that has been delegated to them.

314. Each of Mr Lozano and Ms Martí was in the face of it apparently a delegate of the President of BNC. Mr Lozano was appointed by the President of BNC to the position of Director of Operations, by Resolution 26 of 1 August 2018. By Resolution 27 of 1 August 2018 Ms Martí was appointed by the President of BNC to the position of Manager of the Foreign Debt Office. Both were positions specific to BNC. The question was then what that entitled them to do.

315. The experts were agreed that "*the Statutes, the resolution of appointment of the department or official and the employment contracts of these persons detail or deploy the scope of their mandate.*" There was also agreement that internal resolutions might define the scope of that authority.

316. There were however no employment contracts or "scope of mandate" documents for these two individuals in the material before me. CRF submitted that this was a failure on the part of the Defendants and that I should draw an adverse inference on that basis.

317. The position as to the existence of employment contracts and documents relating to the scope of certain roles was less than clear. No employment contracts had been disclosed for either Mr Lozano or Ms Martí. While plainly Ms Zubeldia had such a contract (because it was disclosed) it was suggested for the Defendants that such contracts might not have existed. The Claimants relied on Professor Mendoza's evidence that he would expect the documents defining the scope of the position of the Director of Operations and of the Manager of the Foreign Debt Office to exist. The Defendants pointed to some correspondence by which employment files were disclosed in which it was said that "*the Bank does not issue 'employment contracts' in the form which the parties' legal representatives might be accustomed to ... other than the documents contained in the enclosed employment files*". They also placed reliance on Professor Mendoza's evidence that employment contracts are not to be expected in every case for every employee, and that employment relations in some cases are conducted through an appointment resolution.

318. Despite the evidence on which the Defendants relied, I did not find the position on the employment contracts or "scope of mandate" documents satisfactory. Overall what was produced had the appearance of being lacking both in terms of that specific absence and the vestigial nature of the "complete employment files" (20 pages for Mr Lozano's 40 year career). There was nothing in the evidence which went further than giving a possible reason for the absence of a contract. When evaluated that reason was lacking. Professor Mendoza did not say in what

kinds of cases a resolution rather than a contract would be expected. Ms Rodriguez was clear that a contract was to be expected. Mr Lozano appeared to think that he had had a contract. The roles which Mr Lozano and Ms Martí inhabited did not seem to be so unusual that they would be outside the normal situation where an employment contract would be expected. Had it mattered I would therefore have been prepared in this case to draw an adverse inference from the absence of the employment contracts/documents defining scope of work. However ultimately the point is immaterial.

319. This is because, even considering the matter without reference to this possibility, the position is still tolerably clear.

i) Articles 40 and 41(a) of the BNC Statutes mean that Mr Lozano and Ms Martí were authorised to exercise the powers and functions of the Foreign Debt Office. Each of them was responsible for the direct management, control and supervision of the Foreign Debt Office and of the functions assigned to that office. Moreover, as the Defendants' witnesses accepted, one of the common duties, powers and functions was to be personally responsible for the completion of the tasks, and exercising of the powers and functions of the Foreign Debt Office;

ii) Articles 41(b) and 41(h) mean that Mr Lozano and Ms Martí were responsible for representing their division and issuing binding instructions and other provisions within his/her sphere of competence.

320. Subject therefore to any requirements of how they were to go about performing actions pursuant to their delegated authority Mr Lozano and Ms Martí had authority to act for BNC in relation to consenting to the assignments.

BNC's Signature Rules

321. The next question which arises is whether there are any requirements of Cuban Law alleged which go to their actions on 13 June (and 22/25 November).

322. As to this, the Defendants contend, and invite me to find, that:

i) Approval of an assignment of BNC's debt is a banking operation within the meaning of Article 15(l) of the BNC Rules, and thus requires two signatures;

ii) By extension/analogy approval of an assignment is a banking operation within the meaning of Article 12 of the BNC Rules, and thus requires two signatures;

iii) Approval of an assignment of the CL/IBI Agreements/Debts (which were valued above US$5,000,001) required two category A signatures, in accordance with Article 17 of the BNC Rules.

323. All of this depends upon equating consent to an assignment with "a banking operation" within the meaning of Resolution 10/2016. It was Ms Rodriguez's evidence that it was not. She said this:

> "Section 12 of Resolution 10/2016 states that two 'A' and 'B' signatures shall be required for all banking transactions that create an obligation for BNC, on the basis of the type of transaction and amount involved as described in Section 17 of Resolution 10/2016. Assignments do not, in my view, create an obligation within the meaning of Article 12. Therefore, the signature rules set out in Resolution 10/2016 do not apply to assignments….
>
> … The act of giving of consent to an assignment is the performance of an existing contractual obligation under an existing loan agreement. The act of consent, without more, does not create an obligation on BNC. It merely permits the existing creditor to assign its existing rights to a new creditor."

324. A certain amount of cross-examination was directed to the question of whether an assignment of a debt was, contrary to this evidence, caught by the Rules. The effect of Ms Rodriguez's evidence appeared to be that she accepted these propositions at least insofar as they concerned assignments of debts by BNC. However she was not asked, and did not accept, the proposition that consent to an assignment between a creditor and a third party was a banking operation which attracted a need for compliance with these rules. Her evidence was that signatures were required for transactions which equated to an obligation for BNC, and that with consent to an assignment "*there's no amount involved*" appeared to make sense. There is a very real distinction between executing an assignment of a debt (i.e. BNC either assigning the debt to a third party or becoming the assignee of the debt) and consenting to the assignment of a debt owed by the bank between its creditor and another person.

325. Professor Mendoza's reasoning appeared to come back in part to his approach to capacity and in part to an approach to the Rules which saw them as necessarily applying to all actions of the Bank's authorized employees. The reasoning behind this was not clear. It did not appear to be justified by the wording of the Rules, where Article 12 is clear that the two A/B signatures requirement is not a blanket obligation but rather one which is triggered by banking transactions which "create an obligation".

326. This approach also seemed both impractical, as requiring a degree of formality and delay which would be odd in cases where a transaction effectively made no difference to the bank's bottom line and contrary to the understanding of those operating in the BNC at the time. As CRF pointed out, there is no record of any previous in principle consent to an assignment or even the confirmation of the finalized assignment being attended with such formalities. Mr Ale did seek to suggest orally that there had been previous request to MFP, but that did not reflect the documentary evidence which was considered in some detail in the solicitors' correspondence. That indicated that the Defendants' solicitors had resisted disclosure of other assignments precisely because a search and sampling exercise from 1999 onwards had indicated that "*none of the documents … evidenced the Defendants seeking the approval of the Council of Ministers and/or the Ministry of Finance and Prices for assignment of Cuban sovereign debt.*"

327. It was suggested that the fact that, if BNC has an empty account with another bank and wished to close it, that still requires two signatures, even though the value of the transaction is zero (as Ms Rodriguez accepted) affected this analysis. But this is to ignore the terms of Article 15 which specifically defined operations which require signatures – regardless of whether they are categorized for the purposes of Article 12 as "*banking transactions that create an obligation*". Article 15(j) stipulates that signatures are necessary "*to open and close accounts with other banks and of natural or legal persons located in Cuba or abroad*."

328. I conclude that consent to an assignment:

    i) Is not a banking operation within the meaning of Article 12 of the BNC Rules;

    ii) Is not a banking operation within the meaning of Article 15(l) of the BNC Rules.

    Thus there is no need for two signatures.

Effect on 13 June consent

329. It follows that there is nothing in the arguments on the Rules which impact on the actions of Ms Martí and Mr Lozano in giving prior consent. I conclude that:

    i) By her email of 13 June 2019, Ms Martí gave "prior consent" on behalf of BNC to the assignment of the Agreements and the Guarantee by ICBC to CRF, subject only to the documentation requested of ICBC and CRF being provided to BNC's satisfaction;

    ii) The documentary requirements identified were fulfilled when those documents were provided to BNC. At that point, BNC's "prior consent" to the assignment of the Agreements and the Guarantee became unconditional;

    iii) The *terminus ad quem* for the conditionality inherent in the prior consent becoming fulfilled was on 18 November 2019, when Ms Torres and Ms Zubeldia of BNC's Legal Department confirmed that the documents provided by ICBC and CRF had been duly formalised. However their confirmation had no impact on whether the condition was fulfilled or not. It had been fulfilled before they opined.

330. It follows that the authority of Ms Zubeldia is not relevant. To the extent that it were to become relevant, it was common ground that it was her function to provide legal advice to other officials at BNC, and she had authority to do so. She did not exercise the commercial decision to consent to an assignment, which was not part of her function. She therefore acted within the scope of her authority.

Effect on 22 and 25 November documents

331. In the premises Mr Lozano's email of 22 November 2019, in which Mr Lozano confirmed that "*CRF I Limited is now the new registered [owner]*" of the Agreements and the Guarantee, is also not in analytical terms relevant. Nor is his

formal letter dated 25 November 2019, by which Mr Lozano again confirmed "*our agreement to the above mentioned Notice of Assignment*". However by either of these points three senior officials of the BNC, at the appropriate level of seniority, had all consented to the assignments in the ordinary course of performing their functions for BNC.

332. That raises the question of what relevance those documents have and what impact any arguments of Cuban Law as to the formalities have. Putting the BNC Rules to one side for the moment, the reference to signatures within the BNC Handbook (which, it will be recalled, outlines the process for consenting to assignment of debts) comes after the point where "*a tele, email, SWIFT or fax is sent to the foreign party, informing him that it is accepted "in principle" your request*". At that point the BNC representative is told to instruct the counterparty that "*you must send us a set of original and two copies of the official documents of the assignment duly signed by the buyer and the seller*".

333. In other words, from this communication the assignor and assignee move on to executing the assignment, and send it to BNC. At this point "*the assignment is ready to be materialized*":

> "Its materialization consists in sending both the 'assignor' and the 'assignee' (assignor and assignee) a copy of the initial document duly signed by the Cuban side (containing two authorized signatures of [BNC]) and a letter giving our consent for the 'purchase – sale', leaving within the file that will work in our archives, a copy of this, together with the original documentation. This file is given an assignment number.…
>
> Once the assignment is materialized, it is then registered in the Register of Debt Assignments to maintain control of the balances of each bank, company and financial institution and, if necessary, to reconcile with the records of the [BNC]…"

334. Thus the only reference to signatures by the Cuban party appears after the assignment documentation has been signed. It forms part of a process internal to BNC: the "materialization" of the assignment stage. There is a requirement for the "copy of the initial document" (the Notice of Assignment) to be "*duly signed by the Cuban party (containing two authorized signatures of the Banco Nacional de Cuba),*" and both sent to the assignor and assignee and filed. It is not clear, even after the evidence, what the precise basis for that is, or why as a matter of law there is a requirement for two signatures. That requirement is not communicated to the assignor/assignee as a requirement for consent. It comes (without ever having been notified to the assignor/assignee) at a stage after they have been given consent in principle. Logically it appears to be a combination of a tidy system for the BNC records and some form of comfort to the assignor/assignee.

335. That being the case, even if there was a requirement for such signatures at this stage, it could not affect the validity of the 13 June consent whose conditions affected only CRF.

336. As to the question of whether materialization requires signatures via the Rules (which could go to validity) rather than the Handbook (which lacks legal status), it is hard to see why if consent does not (as I have concluded) constitute a banking operation caught by the Rules, this materialization stage would. Looking at the way in which such a document would fit within the scheme of the Rules, there is no easy fit. Such a letter is not covered by Article 12 (banking transactions creating an obligation). As a formal approval of an assignment it does not happily fit any of Article 15(d): "*to issue any comfort letters and guarantees*", Article 15(k): "*to approve any accounting vouchers and notices related to any of the above transactions*" or Article 15(l) authorising and executing "*any other banking operation in accordance with international standards*".

337. If contrary to the above, (i) the 25 November letter is relevant and (ii) consent to an assignment is a banking operation I would then prefer the Defendants' arguments on whether what was done was compliant (or sufficiently compliant). CRF contended that there was no requirement under the Rules for two signatures and that even as regards a banking operation which fell within the ambit of Article 15, the requirement for two signatures was not a mandatory one. However if that were the case, it is hard to see what the point of Article 15 is; either it sets out a requirement or it is a waste of ink.

338. CRF also contended that any default in this regard could be made good via the application of the "wet seal". The position as to the seals (of which there were two, a "wet" (ink) seal and a "dry" (embossed) seal) was not entirely clear. Both carried with them a degree of authentication to reassure those who would not know whose was the signature on a document, but it appeared to be a certifying function (for external readers) rather than a validating function (under Cuban Law). While there was a vibrant debate about the respective roles of the dry seal and the wet seal, with the balance of the evidence suggesting that the "dry pressure" seal might be used for more solemn acts and the wet ink stamp for authenticating more everyday documents emanating from BNC, there was no clear delineation between them. I end with the view that neither had any function as a matter of Cuban Law. To the extent that there are signature requirements imposed by the BNC Rules, they cannot be fulfilled by the application of a stamp or seal.

339. As to s. 44 Companies Act 2006, I would if necessary conclude that BNC's "stamp" is not a "common seal" for the purposes of that Act (as varied), and that whether or not it was affixed to any relevant documents by Ms Zubeldia (or on her instructions) it does not satisfy the two-signature requirement. I would also have concluded that it was not applied by Ms Zubeldia, but by Mr Lozano. That was her evidence, which I accept. It was also the evidence of Mr Lozano. In addition, Ms Zubeldia had custody of the dry stamp. If she had wished to apply a stamp there is no reason why she would not have used that.

340. On that basis, if the 25 November document did (contrary to the above) have any relevance to the process of consent, it would appear clear that the Defendants are correct that the formal requirements of Cuban Law were not met:

i) Mr Lozano was an "A" signatory who reviewed the Notice of Assignment and approved it by signing it as "director" on behalf of BNC;

ii) While Ms Zubeldia – also an "A" signatory – had confirmed its legality by permitting the Notice of Assignment to be stamped with BNC's seal, after she had countersigned a report stating that BNC's Legal Department had no objection to the assignments, she did not sign the Notice of Assignment;

iii) Copies of the Notice of Assignment were sent to both ICBC (as the assignee) and CRF (as the assignor) under cover of a letter which had been prepared on BNC's headed paper, but again while signed by Mr Lozano as "director" on behalf of BNC and stamped with BNC's seal, they had only one signature;

iv) The fact that the email by which Mr Lozano sent copies of the Notice of Assignment, together with his covering letter, to ICBC and CRF on 25 November 2019 was copied to Ms Zubeldia and also Ms Martí – a third 'A' signatory cannot count as a second signature.

341. It cannot however make any difference to the validity of the "outward facing" consent, that these "inwards facing" procedures were defective. Further even internally it would seem that any irregularities were in practical terms irrelevant, in that the assignments were registered and were given an assignment number, as evidenced by the table of original assignments extracted from BNC's Debt Assignment Registry maintained on Ms Martí's computer.

342. It also seems that this was not the only case in which a single signature had been used for this stage in the process, with no issue being taken. While it is certainly true that in the vast majority of cases identified in the disclosure the equivalent documents involved two signatures and CRF understood that the document for which they sometimes had to wait would be a two signature document, there were occasional exceptions. Examples referred to in closing included a 1999 example (redacted counterparty) and another 1999 Acknowledgement of Debt in favour of Fiat. Both of these of course predate the signature rules in force at this time. However it appears from this that the process had previously at least sometimes only involved one signature, that occasionally that process was defaulted to, and that it was not regarded as a matter of significance internally.

Contingent Issues

Ratification

343. In the circumstances this issue is academic. It arises potentially in two circumstances:

i) If BNC did have capacity to act on behalf of Cuba;

ii) If the analysis as to prior consent and authority above is wrong, such that the acts of BNCs officers were not authorised.

344. I will consider the latter point first and then consider the possibility that if BNC had capacity to act for Cuba but the actions of its officers were not authorised, Mr Fernandez had capacity or authority to ratify the relevant acts on behalf of Cuba.

Ratification: BNC

345. On the law there was almost nothing between the parties. It was common ground that if ratification can arise it is a matter of English law and that, as Waller J put it in *Suncorp Insurance and Finance v. Milano Assicurazioni SPA* [1993] 2 Lloyd's Rep. 225 at 234:

> "Ratification may be express or implied, and will be implied whenever the conduct of the person in whose name a transaction has been entered into is such as to show that he adopts the transaction in whole or in part; mere acquiescence or inactivity may be sufficient."

346. The only cigarette paper between the parties concerned the question of the degree of knowledge needed. It was common ground that the ratifying purported principal need not know that the purported agent lacked authority. The Defendants emphasized that they must still know what the purported agent has done and have "*full knowledge of the material circumstances in which the act was done*" (see paragraph 2-071 Bowstead). The distinction which the Claimant sought to draw was that the purported principal need not know that the purported agent lacked authority according to the rules which vest authority in the purported agent.

347. CRF says that if BNC's employees exceeded their authority by manifesting approval to the proposed assignments without using two signatures, their acts were ratified by Mr Fernandez, who was at the relevant time the President of BNC. The issue is all about the second letter before action, quoted above, and the knowledge of Cuba/BNC when it was sent.

348. On this question the facts as they have emerged justify the following conclusions:

i) After BNC received CRF's first letter before action in these proceedings, the President on the instructions of the Central Bank of Cuba convened a working group with a view to drafting a response;

ii) The Central Bank of Cuba was involved because it (per Mr Fernandez) "*is the entity that establishes and controls policies relating to the problem of Cuban debt, and any matter that is related to Cuban debt has to be mentioned to the BCC*";

iii) That working group either included or was attended by three senior representatives of the Central Bank of Cuba (Isaac Hernández Pérez, the Director of External Debt at the BCC; Arnaldo Alayón Bazo, Vice-President of (and later an advisor to) the BCC; and Marta Luzon, the Secretary of the BCC) as well as Mr Fernandez, Ms Alvarez (incoming vice president), Mr Lozano, Ms Martí and Ms Zubeldia. Mr Ovidio Perez Fong, the BNC General Director of Operations was also involved. This line up is, in my judgment, significant. This is an extensive list of serious senior people. It speaks of a determination to deal with the letter carefully. Mr Fernandez's attempts to detract from the list by suggesting that the response

was really put together by Messrs Lozano, Martí and Zubeldia were not impressive;

iv) Unsurprisingly, therefore, I conclude that the working group reviewed the assignment documents. This was, as Mr Fernandez accepted, an obvious first step to take. The hotly contested issue was whether this review extended beyond the underlying loan documentation and the letter of 25 November and into the wider assignment documents including the letter of 13 June. Here I conclude that Ms Martí's evidence in the Cuban criminal proceedings is to be preferred to the denials of the witnesses called in these proceedings. Ms Martí said that "*Raul sent me to ask for the originals of the deposit agreements from the Italian Banking Institute and Credit Lyonnais in Holland, he asked me for the documentation*" and that "*we checked, everybody checked the documents*". That is clear credible evidence. Mr Fernandez' contention that, charged with drafting a formal response to a letter before action, he "*didn't read any documents relating to the assignments and didn't conduct any analysis*" is, I regret to say, not credible. Likewise his oral evidence that he *"assumed that [the people who were subordinate to me] would have checked the documents"*. This was not credible as live evidence and it does not improve in re-reading of the transcript. The same can be said for the studied attempts by Ms Zubeldia, Mr Lozano and Ms Alvarez. Their evidence on this point was awkwardly given and did not speak of frankness;

v) Whether or not the 13 June email was itself checked, Mr Fernandez was aware that a preliminary consent had been given as a foundation for the later documents and that Mr Lozano had purported to consent to an assignment by signing the letter and Notice of Assignment. Others of the Working Group would also have been aware of this point, and many of them (familiar with the BNC Handbook) would know the nature of the response which would have been given as a precursor to this letter;

vi) Even as to the 25 November letter, no-one seems to have raised the question of defects in the documents rendering the consent to the assignment invalid. While Ms Zubeldia said that it was unknown, if (as is accepted) the Working Group looked at least at the 25 November letter and if (as BNC contend) everyone knew about the two signature requirement there is an interesting lack of explanation as to why this was not raised. This lack is of course consistent with my primary conclusion on prior consent and actual authority; but on the hypothesis that there was no actual authority it would seem to follow that none of them considered the point worth raising;

vii) The group also knew a certain amount about CRF – that it was the largest debt holder in the London Club in 2018 and that it had hired lawyers with a view to litigation on other debts;

viii) Following meetings and discussions, the working group produced a draft response to the letter before action, to be sent in the name of the President. That draft response was analysed and discussed. It was said to be "*regarding the assignment of receivables executed by ICBC Standard Bank Plc. in favour of CRF I Limited, concluded on 25 November 2019*" and went

on to state that "*these assignments correspond to debts that the Banco Nacional de Cuba has had on its records since the 1980s ...*";

ix) Following a further letter from CRF to BNC, the working group was reconvened to review, assess, and prepare a response;

x) The resulting letter referred to "*the assignment of receivables executed by ICBC Standard Bank Plc. in favour of CRF 1 Limited.*" The President also confirmed that the "assigned receivables" were "*signed bilaterally (under Short-Term Bank Non-Trade Related Indebtedness)*" A such, it confirmed and adopted the assignments on behalf of the BNC and Cuba;

xi) Each of the two letters were sent by the then President of BNC, Mr Fernandez.

349. It follows that with knowledge of the material circumstances and the consent of the Central Bank of Cuba, the duly authorised representative of BNC participated in the discussions in which the letters before action were considered, and reviewed and signed the letters in response.

350. By the responses to the letters before action, in particular the second letter, BNC so conducted itself as to show that if it were the case that the assignments had not been authorised it adopted the transactions and thus ratified the assignment of the Agreements on its own behalf.

Ratification: Cuba

351. The position as regards Cuba is different. Careful regard has to be had here to the mechanics of how Mr Fernandez (President of the BNC) could have ratified anything on behalf of Cuba. It does not follow (bearing in mind the legislative history above) that because Mr Fernandez could enter a transaction on behalf of BNC that he could ratify consent to an assignment on behalf of Cuba. Nor is the fact that BNC also had the power to "manage" historic debt on behalf of Cuba or that the two letters were reviewed by the BCC, which is an organ of the Cuban State, sufficient to bridge the gap. The reality, reflected in CRF's reflexive use of language is that the actions of Mr Fernandez were "*made by Mr Fernandez on behalf of BNC*".

352. During the course of the hearing a second possible approach to this issue emerged. CRF suggested that Cuba (via the MFP) was informed by the Banco Central de Cuba about the steps being taken to respond to Gibson Dunn's letters, with the implication being that the MFP agreed with that. That point was never put to Mr Ale and the case via MFP was not pleaded. Here, because of the centrality of "all material circumstances" such pleading might have been critical – for example in enabling Cuba to call representatives from MFP.

353. Accordingly I reject the case on ratification insofar as it relates to Cuba.

Apparent Authority

354. This again proceeds on the basis that the Defendants are correct that the letter confirming materialization of the assignment was a part of the consent, and that Mr Lozano lacked authority to give that letter by himself. It also assumes that (contrary to the above) ratification is not made out.

355. As a doubly contingent point it can be dealt with very briefly. There was no real issue on the law. The requirements can be summarized as follows. There must be: (i) a representation by the principal to a third party which is intended by the principal to be relied upon; and (ii) the third party does in fact (reasonably) rely upon the representation. The burden lies on the third party alleging the purported agent's authority to prove apparent/ostensible authority.

356. If one arrives at this point the argument on apparent authority must fail; and indeed it was not pressed with any degree of enthusiasm by CRF.

357. In summary:

i) There was no representation from Cuba (or indeed from anyone) to CRF (or indeed to anyone) which could form the basis of ostensible authority;

a) At the level of BNC's authority for Cuba, there would need to be a representation to the effect that BNC was authorised to act as Cuba's agent to consent to the proposed assignments at issue in these proceedings or to accept notice of assignment on its behalf. The simple reason is that there were no such representations. Mr Gordhandas freely accepted in cross examination that he simply assumed that BNC was authorised to act on behalf of Cuba, based on his review of emails between Mr Stevenson of ICBC and Mr Lozano and Ms Martí;

b) At the level of the officials, there would need to be a representation as to their authority. No such representation can be discerned. The case here as to Cuba effectively depended on viewing Mr Lozano as a State Official, with his authority being represented via that status CRF's case amounts to saying that BNC is a public sector entity and (by dint of that) any official of BNC is an official of the Cuban State, it involves a misuse of the concept of 'State official' (and is in any event inconsistent with Ms Rodriguez's oral evidence). As to BNC, the representations all come from Mr Lozano/Ms Martí and would thus fall foul of the ban on an agent representing their own authority;

ii) CRF was not aware of any such representation and did not purport to rely on one. CRF did not allege that it relied on any such representation, and it patently did not: none of the matters relied on in argument by CRF were identified by CRF's witnesses. There is no contemporaneous documentary evidence to suggest that CRF was aware of them and relied on them: Mr Gordhandas' evidence went no higher than saying that he assumed that Mr Lozano and Ms Martí were acting for Cuba and BNC;

iii) In the circumstances it is not necessary to consider whether any reliance by CRF would have been unreasonable or (if relevant) irrational (there being a debate – irrelevant for present purposes as to the correct test: see Bowstead paragraphs 8-048-8-050).

Withholding of consent

358. Again this point proceeds on a considerable degree of contingency.

359. So far as 2019 is concerned, had the matter arisen I would have found that:

i) As regards Cuba: (i) Cuba's prior consent was not sought; (ii) if prior consent was sought and not given, it was not "withheld";

ii) As regards BNC there was a seeking of consent, but no withholding of consent.

360. In circumstances where there was no request (of Cuba) and no withholding (by Cuba or BNC), I do not consider it appropriate to go on to consider the hypothetical question of whether, if there had been a request and a withholding, such hypothetical withholding would have been unreasonable. I note here the dicta in *Hendry v Chartsearch Ltd* [1998] CLC 1382 at 1390:

i) Per Henry LJ "*I prefer the simple certainty that prior consent never applied for is never withheld or refused (whether reasonably or otherwise)*";

ii) Per Millett LJ "*The hypothetical question whether if their consent had been sought it could reasonably have been refused is in my opinion irrelevant and is not a proper subject of inquiry*".

361. So far as concerns 2020, it is clear both that there was a request and a withholding of consent. The only question is whether it was unreasonably withheld. As for the test of unreasonableness the Defendants relied upon *Falkonera Shipping v Arcadia Energy* [2013] 1 CLC 280 at [85]:

> "… the question is not whether the owners' conclusions that led them to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances, even though that conclusion might in fact be incorrect or some other persons might take a different view: see Ashworth Frazer... Thus, I accept the owners' submission that they were only in breach if no reasonable shipowner could have regarded their concerns as sufficient reason to decline approval."

362. Interesting questions arise as to what feeds into the question of unreasonableness – whether it must be viewed at the time of the withholding and whether it must be judged only on material reasonably available to the party whose consent is sought.

363. The Claimants relied upon Slade LJ in *Bromley Park Gardens Ltd v Moss* [1982] 1 WLR 1019 at 1034 as encapsulating a rule that a withholding of consent can

only be justified on grounds that actually influenced the mind of the party who refused it; while the Defendants pointed to *Falkonera* at [108]):

> "108. […] the question of reasonableness must, in my judgment, be viewed at the time such withholding took place on the basis of the evidence reasonably available to Capt Papapostolou (and the owners) at such time […]"

364. Reference was also made to *Ashworth Frazer Ltd v Gloucester City Council* [2001] 1 WLR 2180 at [5] per Lord Bingham:

> "the [requested party's] obligation is to show that his conduct was reasonable, not that it was right or justifiable. As Danckwerts LJ held in *Pimms Ltd v Tallow Chandlers Company* , above, at p 564:"it is not necessary for the landlords to prove that the conclusions which led them to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances." ….

365. The Defendants relied upon two factors as justifying withholding of consent. The first was that the information reasonably available as at the date of any alleged refusal of prior consent in mid to late 2019 would have led a reasonable person to conclude that CRF was not a responsible creditor of a sovereign state, but was instead a "vulture fund" intent on enforcing the debts of an impoverished country, contrary to the actions of other creditors holding Cuban sovereign debt – the "vulture fund" justification.

366. As to this the argument is not persuasive. To the extent the argument is one which goes simply to the nature of CRF, that the information would suggest that CRF "*invests in distressed Cuban Sovereign Debt for enforcement purposes*" this was not strongly pressed, for good reason. It elides into an argument that a refusal would be permissible in relation to any fund which invests in distressed debt. That cannot be right.

367. The argument would then have to add something extra to suggest that CRF was not a responsible creditor. Here one would expect an argument to be run by reference to recognisable benchmarks or specific conduct which marked the assignee out as not responsible. What is put forward however is a much more impressionistic approach based on (inter alia) press reports.

368. To the extent there was a core argument here it was focussed on CRF's approach to litigation – the commencement of proceedings shortly after the assignment, and the application for default judgment. This would plainly be inadmissible for any 2019 decision – because the decision has to be looked at at the time. It is admissible as at 2020. However the entirety of the picture has to be looked at along with those factors.

369. As to this, the commencement of proceedings comes not at all in those binary terms, but against a backdrop where there had been considerable attempts at engagement since as early as 2013. As outlined above, CRF had written to Cuba on 6 August 2013, then the London Club wrote to Cuba on 21 January 2016 and again CRF wrote to Cuba on 23 May 2016. As noted above, Cuba disputes receipt

of this correspondence, but I would accept the evidence that the documents were sent/handed in as described and that being the case, the actual receipt by the Defendants is not significant. These documents evidence genuine attempts to engage. Further, Mr Gordhandas wrote on behalf of CRF to ProCuba on 26 November 2017 that CRF's strategy was not to seek to enforce Cuban debts through the courts and wanted to discuss proposals. That was echoed even in the approach to litigation with proceedings only being commenced in relation to a small segment of the total portfolio, completely undermining the submission made by the Defendants that this debt was simply bought as part of "enforcement purposes".

370. This is consistent with the approach outlined in CRF's prospectuses which indicated a desire to act via discussion and restructuring; but also with the indications which they had given investors of a desire to wind up investments prior to 2020.

371. Accordingly the withholding of consent on the basis of CRF's "vulture fund" nature or supposed irresponsibility as a creditor is one which is unreasonable in the sense that no reasonable person would have regarded either of these, on the facts reasonably available as a reasonable basis to withhold consent.

372. The second reason given was the criminal investigation. As already noted, Byrne and Partners LLP letter of 23 November 2020 alleged that there was "strong evidence" that Mr Lozano had been bribed.

373. Of course the position now is that the Defendants advance no case in bribery or fraud. However the question is whether at the time, based on the information then reasonably available, consent could have been reasonably withheld.

374. On this I conclude that it could. Here the nature of the concern means that the evidence uncovered need not have been compelling or correct to provide a basis for refusing consent. The essence of the point was highlighted by Ms Macdonald KC in argument: "*if the Serious Fraud Office had uncovered evidence of suspected bribery relating to the assignment of UK sovereign debt, would the UK Government or any entity, we ask, have consented to the proposed assignment?*"

375. The only question therefore is whether the evidence available had some apparent basis. As at September 2020 the evidence was that:

    i) There was an investigation through the General Prosecutor which covered breaches of procedure and a criminal investigation in relation to an allegation that Mr Lozano had been bribed;

    ii) The claim being made appeared to rely on 25 November 2020 document;

    iii) There was at least a view within BNC/MFP/the working group that that document should have borne two signatures, which would tend to reinforce concerns that the investigation was looking at a real problem.

376. This does, I consider, form a proper basis for withholding consent.

377. Accordingly I conclude:

    i) As to 2019 there was no unreasonable withholding of consent, because there was no withholding of consent. Had there been a withholding on the basis of CRF's nature or approach it would not have been reasonable;

    ii) As to 2020 there was no unreasonable withholding of consent because the evidence available regarding the criminal investigation provided a proper basis for refusal.

378. As to consequences had I found otherwise, this is a double contingency, and I do not consider it appropriate to provide an answer.

Good Faith and Proper Acts

379. This remaining part of the Cuban law case goes only to curing a lack of authority. CRF does not contend that either of these principles can cure a lack of capacity/power. It follows that they do not arise and can therefore be dealt with briefly.

380. The contention is that even if the two signature requirement for a valid assignment works, pursuant to Cuban law doctrines of good faith and proper acts, the Defendants would be precluded from relying on the absence of a second signature on the notice of assignment to resile from their consent to the assignments. Their argument stems from the assertion, as put forward by Ms Rodriguez in her expert report, that the doctrine of good faith will prevent a party from relying on a defect in a document to defeat the good faith intention of the document.

381. This aspect of the case did not attract much attention in argument (though the experts' reports on the subject were lengthy and complex). The parties each addressed a rather different case.

382. CRF contended (without much dispute) that the requirements for the application for the doctrine, are set out by the Cuban Supreme Court in *Case 124/2012* (Cuba) and are as follows:

> "the following requirements must be met: 1) existence of legally relevant conduct; 2) that such conduct has an unequivocal significance and is likely to generate reasonable expectations in third parties; 3) that the subsequent conduct is incompatible with the previous one and defrauds the legitimate expectations created".

383. CRF put forward the argument that since the acts of Ms Zubeldia, Ms Martí and the Legal Department are attributable to BNC and thus constitute legally relevant conduct, those acts are unequivocal and generated the expectation in ICBC and CRF that the rights and obligations under the Agreements and the rights under the Guarantee had been assigned by ICBC to CRF and the acts of BNC now in seeking to deny the validity of the assignment is inconsistent with those acts.

384. The overall shape of this argument was not really disputed. However the Defendants contended that the principles of good faith and proper acts do not assist CRF because:

    i) To the extent that the principles are part of Cuban procedural law, they are inapplicable since matters of procedure are governed by the *lex fori*. DL 304/2012 (relied upon by Ms Rodriguez) is inapplicable, because the present case involves international contracts;

    ii) There is no example in Cuban case law of these principles being used in relationships with public entities;

    iii) The case law cited by Ms Rodriguez is irrelevant and/or not binding.

385. Reliance was also placed on the contention that CRF either knew or should have known that two signatures were required and hence could not fulfil the due diligence requirement. For the reasons already given however, I would not find that contention persuasive, had it arisen.

386. The first three arguments were not really grappled with by CRF. So far as they do arise:

    i) Procedural law: Professor Mendoza gave no positive evidence that the principles are part of Cuban procedural law. Ms Rodriguez's evidence on this was not clear: "*we can have a whole debate about this*". But she did not give positive evidence that it was part of the substantive law. Therefore the balance of the evidence is unclear. This appears to have been a late thought and not fully explored;

    ii) International contracts: Both experts gave evidence to the effect that DL 304/2012 which was relied on by Ms Rodriguez was inapplicable as it does not apply to international contracts;

    iii) Public bodies: The evidence was to the effect that there is no example in Cuban case law of these principles being used in relationships with public entities. The case law cited relates to contractual disputes and as a matter of Cuban Law case law is non-binding;

    iv) Nullity: The experts both agreed that where formalities are required such that the effect of non-compliance is a nullity the doctrine cannot rescue the nullity. There was disagreement as to whether the resolution was such a requirement, but on the hypothesis that actual authority is precluded by this resolution it would make sense for the consequence to be seen as a nullity.

387. Ultimately, while the evidence did not cohere entirely the thrust of what the experts said appeared to strike a line where if the rule is substantive and creates formalities which must be complied with such that there is no authority, it is a nullity and cannot be rescued. If it is procedural (as the lack of clarity about the proper acts doctrine might suggest) it is inapplicable. Nothing in Ms Rodriguez's evidence made a sufficiently clear line to demonstrate how the argument for applicability held good.

388. Thus one way or another, either authority is saved by English law concepts such as ratification or apparent authority, or is it not. There is no Cuban Law backstop behind them.

Validity of previous Assignments/Notice of Assignments

389. The Defendants invited me to find that CRF's alleged predecessor in title ICBC did not have good title to the Agreements or to the IBI Guarantee and that CRF had failed to prove otherwise.

390. The Defendants also invited me to find neither BNC nor Cuba were given notice of the 2019 assignments, whether in accordance with English law requirements and/or the contractual requirements set out in the Agreements and in the IBI Guarantee, and that accordingly regardless of whether or not prior consent was given or withheld in 2019, the purported 2019 assignments are not binding on either BNC or on Cuba.

391. Neither of these are points which commended themselves to me.

392. As to the first, this argument hinged on the argument that ICBC did not acquire good title because as a matter of Cuban law, it was necessary to obtain prior consent from the MFP and the Council of Ministers. This is wrong for the reasons I have already given. It was also said that to the extent that BNC ever expressed its consent to any of the purported assignments, that was after the date of the purported assignments. This is wrong as set out at paragraph 329 above.

393. As to the second it was said that the notices of assignment were not delivered in accordance with the contractual notice provisions in Clause 20 of the CL Agreement, Clause 20 of the IBI Agreement and Clause 4 of the IBI Guarantee, which provide in relevant part:

> "(A) Addresses: Each communication under this letter shall be made by telex or otherwise in writing. Each communication or document to be delivered to any party under this letter shall be sent to that party at the telex number or address, and marked for the attention of the person (if any), from time to time designated by that party for the purpose of this letter…"

394. There is a short answer to this (unattractive) point. The relevant clauses in the agreements did not on their true construction apply to the giving of notice of assignment under section 136 of the Law of Property Act 1925. In any event, the clauses were complied with. Notice of the assignments were delivered to BNC and Cuba at BNC's offices in Havana, which were the place for delivery of letters to BNC and Cuba under the clauses in the agreements referred to because BNC (on its behalf and as agent for Cuba) had indicated to market participants that that was where such letters should be delivered to.

Sovereign Immunity

395. The Defendants have sought a finding that that each of BNC and Cuba are immune from the Court's jurisdiction.

396. They contend that:

    i) There has been no submission for the purposes of section 2 of the State Immunity Act 1978, since CRF is a stranger to the relevant contracts and is not entitled to rely on the sovereign immunity waivers contained therein. The contractual rights only inure to the benefit of the parties and their permitted assignee;

    ii) For the purposes of the Declarations claim, which is predicated on an unreasonable withholding of consent, there is no relevant "*commercial transaction entered into by the State*" and for neither claim are there proceedings which "relate to" that transaction for the purposes of section 3 of the Act.

397. This area of argument was not dealt with orally at all, a fact which reflected the reality – namely that the submission argument stands or falls with my primary conclusion as to the validity of the assignment.

398. The Defendants submitted to the jurisdiction of the courts of the United Kingdom under s 2 of the State Immunity Act 1978. CRF has the benefit of that submission as a permitted assignee under the relevant agreements.

399. That being the case, the section 3 arguments do not arise. For completeness I should note that likewise the argument that BNC is a separate entity immune from the jurisdiction of the courts of the United Kingdom pursuant to s 14(2) of the State Immunity Act 1978, which related only to the unreasonable withholding of consent, did not arise.

CONCLUSIONS AND SERVICE OUT

400. In conclusion:

    i) BNC consented on its own behalf to the assignment by ICBC to CRF of its rights and obligations under the Agreements;

    ii) It lacked capacity to consent on behalf of Cuba to the assignment by ICBC to CRF of its rights under the Guarantee;

    iii) Accordingly, the rights and obligations of ICBC under the Agreements were validly assigned to CRF, with the result that CRF is entitled to rely on the contractual provisions contained therein as to the jurisdiction of the English court, waiver of immunity and service of process.

401. I therefore find and declare that:

    i) BNC, on its own behalf, consented to the assignment of the debts represented by the Agreements by ICBC to CRF;

    ii) Accordingly, the debts represented by the Agreements have been validly assigned by ICBC to CRF;

iii) The Court has jurisdiction to try the debt claims herein;

iv) BNC is not immune from the jurisdiction of the Court pursuant to the SIA; and

v) The conditions for the service of the Claim Form out of the jurisdiction upon BNC have been satisfied.