

EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHCM2021/0145

BETWEEN:

CREDORAX INC.

Claimant

and

[1] ISRAELI VC PARTNERS, LP

**[2] IZIT MANAGEMENT LIMITED (IN ITS CAPACITY AS
GENERAL PARTNER OF ISRAELI VC PARTNERS, LP)**

Defendants

Appearances:

Mr. David Chivers, QC, with him Mr. Ben Griffiths and Ms. Tameka Davis for the Claimant

Mr. Alain Choo-Choy, QC, with him Mr. Tim Wright and Ms. Catherine O'Connell for the
Defendants

2022: February 21, 22, 23;

March 3, 9;

September 8.

[1] **WALLBANK, J.(Ag.):** These are the written reasons for the judgment after trial of this matter, which took place over parts of five days in February and March this year, the result of which was delivered orally on 8th September 2022. The net result was that the relief sought by the Claimant was refused and that sought by the Defendants granted, with certain matters stood over for further hearing. The reasons for the Court's decision are set out below.

Background

[2] In this matter, the Claimant seeks the following relief:

(1) a declaration that the obligations under a Senior Secured Convertible Promissory Note dated 15th November 2016 (as amended) ('the Note') and the Note Purchase

Agreement dated 15th November 2016 (as amended) (the 'Note Purchase Agreement'), have been:

- (i) frustrated; and/or
 - (ii) rendered unenforceable as a result of supervening illegality;
in each case in consequence of sanctions imposed on the First Defendant by the United States Office of Foreign Assets Control ('OFAC'), including without limitation the First Defendant becoming being designated a 'blocked person' and the Note becoming being designated as 'blocked property' (events which were not in the contemplation of the contracting parties when the Note and Note Purchase Agreement were agreed);
- (2) a declaration that performance of the obligations under the Note and Note Purchase Agreement, including the payment of monies due thereunder into the account identified by the Defendants in their letter dated 18th May 2021, be excused and/or modified as a result of the aforementioned event of frustration and/or supervening illegality;
- (3) a declaration that the Claimant's payment obligations under the Note and the Note Purchase Agreement be deferred (without further interest accruing) and shall only be capable of being discharged:
- (i) in a manner that does not violate the laws of the United States ('U.S.');
 - (ii) as OFAC may direct pursuant to written guidance or a licence granted to the Applicant, including without limitation by payment of amounts due to a blocked account in the U.S. under the supervision of OFAC; and
- (4) a declaration that the First Defendant's right to receive interest under the Note was suspended for the period when it would have been unlawful for the Claimant to attempt to repay the Note under U.S. law other than as directed by OFAC.

and the following orders namely that:

- (5) the Defendants be restrained from:

- (i) declaring an Event of Default for failure to pay amounts due pursuant to the Note and the Note Purchase Agreement (the 'Debt') or otherwise as a result of this claim;
- (ii) enforcing the Debt and floating charge dated 15th November 2016 (the 'Floating Charge') that secures the Debt;

until appropriate guidance or a licence is received from OFAC and, from that date, in any manner that is inconsistent with such guidance or licence.

[3] The Defendants opposed this relief sought and counterclaimed for the following relief, which is in large part the converse of the claim, on the basis that Credorax's contractual obligations subsist:

- (1) An order that Credorax pay to IVC the following sums:
 - (i) The amount of principal sum due under the Note in the amount of US\$25 million;
 - (ii) The interest which has accrued under the Note from the date on which payment of the principal fell due, being 18th May 2021, until the date of the Court's order;
 - (iii) The amount of US\$311,140 in respect of an outstanding balance due under Section 4(b) of the Note; and
 - (iv) Interest at the rate of 20%, or alternatively 5%, following judgment, with payment being made to a certain bank account of the Second Defendant, for and on behalf of the First Defendant,
- (2) The following declarations that:
 - (i) neither IVC nor its property are subject to or restricted by U.S. blocking sanctions, in particular by reason of Executive Order 13662 of 20th March 2014 (the 'Sanctions');
 - (ii) the Note, the Note Purchase Agreement and the Floating Charge remain in existence, in full force and effect and capable of performance by Credorax;

- (iii) IVC was entitled under clause 1(d)(i) of the Note to issue to Credorax the formal written demand for payment of the outstanding principal and interest dated 18th May 2021 and that, upon Credorax's failure to pay the sum thereby demanded within 5 business days of delivery of the demand (which delivery occurred on 23th May 2021) and upon Credorax failing to remedy that default within a further 20 business days of receipt of the written notice of the failure to pay issued by IVC and dated 2nd August 2021, an Event of Default occurred under clause 2(a) of the Note on 2nd September 2021; and
- (iii) Credorax is not excused by reason of the Sanctions from complying with its outstanding obligations under the Note and remains bound to comply with and perform those obligations. In particular, Credorax is and remains liable to pay IVC (a) outstanding principal in the amount of US\$25 million;
(b) accrued interest in an amount of US\$24,008,649; and
(c) an outstanding balance under Section 4(6) of the Note in the amount of US\$311,140, with such payment to be made into the Account or such account as IVC shall notify to Credorax.

Both sides seek their respective costs of this action.

Background

- [4] Credorax Inc. ('Credorax') is a company which was incorporated in the Territory of the Virgin Islands ('BVI') on 5th February 2007. Its constitutive provisions, such as they are material for present purposes, are comprised of an Amended and Restated Memorandum of Association and Articles of Association dated 12th July 2018.
- [5] They record that Credorax was founded by one Mr. Benjamin Nachman ('Mr. Nachman'). A significant part of these constitutive provisions has to do with the shares of Credorax. These provisions are not entirely standard and appear to have been put in place with an eventual public offering in view. For present purposes, parts of these provisions warrant some preliminary observations.
- [6] By clause 70 of the Amended and Restated Articles of Association, the minimum number of directors shall be one (1) and the maximum number shall be seven (7). Four 'Original Directors' were named: Mr. Igal Rotem, Mr. Haim Neerman, Mr. David Blumberg and Mr.

Nachman. By the time Mr. Nachman swore his first Affidavit in this matter, Mr. Neerman appears to have been replaced by a Mr. Winchip. The evidence is that Mr. Igal Rotem is an Israeli citizen and resident, whereas Messrs. Winchip, Blumberg and Nachman are citizens and residents of the U.S. There is no requirement that a majority of the directors be citizens and/or residents of the U.S.

- [7] By clauses 52 and 85, meetings of members and directors of Credorax may take place anywhere within or outside of the BVI. There is no requirement that any such meetings take place in the U.S.
- [8] Credorax's evidence, given largely by Mr. Nachman who made five Affidavits, is that Credorax is a company incorporated in the BVI and is the parent company of the Credorax group. The latter is an 'acquiring bank' and provides payment related services to global merchants and payment service providers. It has a number of operating subsidiaries, including in the U.S., United Kingdom, Malta, Israel, Hong Kong, Japan and Germany. Some of these hold banking and regulated financial service licenses. Credorax's evidence is that the Credorax Group has about 300 employees and in 2020 processed over US\$8.1 billion in payments with gross and net revenues respectively of US\$138.7 million and US\$16.8 million, with further growth anticipated.
- [9] In 2016, Credorax borrowed US\$25 million from an entity called Israeli VC Partners, LP ('IVC') to raise capital. IVC is the First Defendant to these legal proceedings.
- [10] The way this borrowing was done was that IVC provided the money to Credorax, and in return, Credorax issued a promissory note – the Note - to IVC. The Note was dated 15th November 2016. Thus, the Note became an asset of IVC. IVC is a Cayman Islands exempted limited partnership ('CIELP'), that operates as a venture capital fund. As is standard with such partnerships, IVC had been organised with a 'General Partner' and a 'Limited Partner'. As learned Queen's Counsel for the Defendants explained (and this appears to be uncontroversial between the parties) CIELPs have no legal personality separate from that of their partners, and so cannot legally own property directly. A CIELP's property is held upon trust in the name of the General Partner for the benefit of the CIELP.
- [11] Thus, the Note was and is held by IVC's General Partner.
- [12] At the time of the borrowing, IVC's General Partner was a Cayman Islands exempt company, called Israeli VC Partners, Ltd. ('IVC Ltd.').

- [13] IVC's Limited Partner was a company called Renova Innovation Technologies Ltd.('RITL'), a company incorporated and registered in the Bahamas.
- [14] The evidence of fact given on behalf of IVC (and the Defendants generally) was given by a Mr. Mark Manuylov, an 'investment consultant' who made two Affidavits in these proceedings.
- [15] He explained that IVC had been constituted pursuant to a Limited Partnership Agreement ('LPA') dated 15th November 2013, and that whilst the General Partner (IVC Ltd.) managed IVC on a day-to-day basis, the Limited Partner (RITL) 'had complete control', with rights of replacement of the General Partner and veto and approval rights, such that, according to Mr. Manuylov, the General Partner IVC Ltd. did not have control or possession of IVC or its assets. This contention does not sit comfortably with the (entirely conventional) proposition, adopted by the Defendants' (and the Claimant's) learned Queen's Counsel, that the Note was/is held by the General Partner. To the extent that this Court has to decide which version to take as correct, for the purposes of the matters before this Court, I shall accept the position as contended for by the Defendants' (and the Claimant's) learned Queen's Counsel.
- [16] The Note was issued pursuant to the Note Purchase Agreement and the obligations under the Note were secured by a Floating Charge (the 'Floating Charge').
- [17] By clause 1(d) of the Note Purchase Agreement it was agreed that:
- "The Company [Credorax] will make all cash payments due under the Note **in immediately available funds** on the date such payment is due to such bank account of the Holders [IVC] as is notified by the holder to the Company at least five Business Days before the due date for such payment." (Emphasis added.)
- [18] It is pertinent here to note that the Note Purchase Agreement does not require payment of principal and/or interest to be made in the U.S. Importantly, the place of performance of Credorax's repayment obligations was not stipulated.
- [19] The Floating Charge made provision for IVC as the holder of the Note to convert the Floating Charge into a fixed charge should a defined 'Event of Default' occur.
- [20] An 'Event of Default' included any failure to pay the principal amount by the due date, if payment is not made within a certain period (here 20 business days) of receipt by Credorax of written notice of its failure to pay.

- [21] Furthermore, an 'Event of Default' would also render the Floating Charge immediately enforceable at IVC's discretion and would trigger the availability of statutory powers of sale.
- [22] The Note makes provision for escalating interest. For the first 6 months of the loan, the rate was 8% per annum, then 12% per annum for the next six months, and then 15% per annum for the remainder of the loan. The interest was agreed to compound with quarterly rests.
- [23] The Note, the Note Purchase Agreement and the Floating Charge can together be referred to as the 'Transaction Documents'. The Transaction Documents are all governed by the laws of the BVI and the parties are agreed that the Courts of the BVI have jurisdiction to resolve disputes arising from the terms of the Transaction Documents.
- [24] There is no *force majeure*, hardship or other similar clauses in the Transaction Documents.
- [25] Credorax accepts that repayment of the borrowing became due and payable on demand after 15th November 2019. On 18th May 2021, by a letter (the 18th May 2021 Demand Letter) IVC made a formal demand for payment. That demand was stated to be pursuant to clause 1(d) of the Note and required the
- "...immediate payment of the Outstanding Balance. As at the date of this letter the Outstanding Balance amounts to USD45,677,722, calculated as follows:
a) Principal Amount of the Note of USD25 million;
b) Interest accrued on the Principal Amount pursuant to clause 1(a) of USD20,366,582;
and
c) Outstanding Balance in the amount of USD311,140."
- [26] The formal demand further identified that payment should be made in cash to a U.S. Dollar denoted bank account with a certain bank, VTB Bank, in Germany. The formal demand required that payment was to be made immediately and 'in any event no later than five days from delivery by courier of hard copy Demand' and threatened thereafter to declare an Event of Default if payment was not made.
- [27] Credorax does not dispute that it has obligations to repay the amounts due under the Note, including the 'Outstanding Balance' of US\$311,140 and accrued interest, but it did not comply with this demand. Credorax contends that its reason for not doing so was on account of a supervening event.
- [28] The supervening event in question was that on 6th April 2018, thus about a year and a half after Credorax had entered into the transaction with IVC, the U.S. Department of the Treasury announced that certain Russian individuals and entities had been designated as subject to

blocking sanctions and had their assets frozen or blocked ('the Press Release'). This announcement was set out in a Press Release of 6th April 2018, which stated:

"All assets subject to U.S. jurisdiction of the designated individuals and entities, and of any other entities blocked by operation of law as a result of their ownership by a sanctioned party, are frozen, and U.S. persons are generally prohibited from dealings with them. Additionally, non-U.S. persons could face sanctions for knowingly facilitating significant transactions for or on behalf of the individuals or entities blocked today."¹

[29] This Press Release reflected a more formal underlying official U.S. government document. This designation, freezing and blocking did not affect Credorax directly. But it did directly affect IVC. This is because the designated individuals and entities included a Mr. Viktor Vekselberg and a group of companies which the Press Release referred to as 'Renova Group'. According to the Press Release, Mr. Vekselberg 'is the founder and Chairman of the Board of Directors of the Renova Group' and he was being designated 'for operating in the energy sector of the Russian Federation economy'. To cut a longer story short, the U.S. Government was imposing economic sanctions upon Russia on account of Russian actions in relation to the Crimea/Ukraine and Syria that had been perceived by the U.S. Government to have been 'malign', by making it difficult for certain Russian businessmen active in strategic sectors of the Russian economy to operate. Mr. Vekselberg and 'Renova Group' were thenceforward 'blocked' and their assets that were subject to U.S. jurisdiction were 'frozen' by the United States Department of Treasury.

[30] This is important for the present case, because as at the date of the Press Release, 6th April 2018, IVC was, according to Credorax, directly and/or indirectly owned, as to more than 50%, by Mr. Vekselberg and/or a company in the 'Renova Group'. Mr. Nachman explained in his First Affidavit that the reasons the sanctions extended to IVC and its property were that

- (1) Mr. Vekselberg and 'Renova' directly or indirectly owned more than 50% of IVC (the 'OFAC 50% Rule'); and
- (2) IVC was at the time managed by U.S. persons, in particular an entity identifying as Columbus Nova Technology Partners, and a Mr. Intrater.

Mr. Nachman said that Credorax had been professionally advised that, as a result, the sanctions were automatically extended to IVC by operation of U.S. law and consequently IVC was deemed to be a 'blocked person' and the Note was deemed to be 'blocked property'.

¹ <https://home.treasury.gov/news/press-releases/sm0338>.

- [31] Moreover, according to Credorax, Mr. Intrater, is said to be related to Mr. Vekselberg.
- [32] Credorax's evidence was that a 'blocking report' was also submitted to OFAC on behalf of a company named Renova U.S. Management, LLC, an affiliate of IVC (again according to Credorax), which reported IVC to be 'blocked' as a result.
- [33] Credorax considered that this placed Credorax in an impossible position, because it believed that any repayment of the Note directly to IVC would violate U.S. law.
- [34] That would be so, because even non-U.S. entities (such as Credorax) and persons may have sanctions imposed upon them if they materially violate or attempt to violate the blocking of IVC.
- [35] Moreover, three out of Credorax's four directors are U.S. citizens and residents, such that if Credorax were to act (necessarily) by a majority of its directors, their action would necessarily be done by U.S. citizens and residents, and thus within OFAC's territorial penal jurisdiction.
- [36] Remaining in good odour with United States authorities and regulators is understandably something of particular importance to Credorax. Credorax's evidence is that any violation by it of OFAC rules could result in instant catastrophic commercial consequences, including being shut out of the U.S. financial system which is vital to its business. Thus, it can be seen that the stakes are extremely high for Credorax in its response to the situation it found itself in.
- [37] The stakes are extremely high for IVC as well, of course. IVC faces being shut out from accessing the US\$45 million and rising, which would appear to be 'blocked'. Credorax proposed a solution, namely that an application for a payment license be made to OFAC, which would allow Credorax to pay the money due into a 'blocked account'. Whilst that would absolve Credorax from its obligations under the Note, if accepted by IVC, it would clearly and literally be of no avail to IVC. Indeed, IVC points out that clause 1d of the Note Purchase Agreement requires Credorax to pay IVC in immediately available funds, which payment into a blocked account would not achieve.
- [38] Credorax, though, does not consider such an outcome to be particularly unmeritorious. Credorax points to the fact that, following IVC's designation as a 'blocked entity', Credorax had entered in certain merger and acquisition negotiations with IVC. As part of those dealings, Credorax had applied for and obtained two licenses from OFAC, which allowed Credorax to pay monies due to IVC, provided such monies were paid into a blocked account in the United States.

- [39] Moreover, Credorax observes that the current General and Limited Partners of IVC had accepted these positions knowing that the Note was, or might be, treated by OFAC as 'blocked'.
- [40] Credorax also applied for, and on 21st October 2021 obtained, a license from OFAC to repay the Note into a 'blocked' bank account in the name of IVC located in the U.S. That license expired on 31st December 2021. Credorax draws from the fact that OFAC granted this license that OFAC must necessarily have considered the Note to be 'blocked' property, otherwise it would have held that no license was needed. Credorax applied to renew it, with the outcome still awaited as at the trial date.
- [41] For its part, IVC applied to OFAC on 12th October 2021 requesting that OFAC recognise that the Note is not 'blocked' property subject to U.S. jurisdiction, on the ground that no basis exists for the Note to be treated as 'blocked'. As at the trial date, OFAC had not yet determined that application by IVC. Following the trial, the Defendants communicated to the Court that OFAC has since rendered a decision to the effect that, so far as OFAC is concerned, IVC does not appear to be owned as to more than 50% by 'blocked' persons/entities, and thus, according to the Defendants, there is now no longer any obstacle to Credorax making a payment. For present purposes, this Court will ignore this development. This is because, especially as a result of the development referred to in the next paragraph below, the import and effect of this latest OFAC decision is not an issue currently before this Court, and it does not affect this Court's analysis of the claims and counterclaims that were tried.
- [42] At the close of trial a further development occurred, in that the U.S. government and those of other countries imposed further sanctions upon Russian persons and entities following Russia's military action in relation to Ukraine starting in February this year. VTB Bank was one of those entities affected. Again, unravelling the effect of this upon the events of this claim was beyond the scope of the trial. In light of this development and following discussion between the parties and the Court at the beginning of oral closing submissions on 3rd March 2022, the Court ordered a stay of the determination of the issues concerning whether IVC and/or the Note were blocked (the 'Blocked Property Issues') for the purposes of U.S. sanctions legislation, in the following terms (as summarised in the Court's order dated 9th March 2022):

"AND UPON the Court noting that it was minded to stay the determination of the Blocked Property Issues identified in paragraph 1 of the Order of the Court dated 27 January 2022 pending the filing of further expert evidence as to what impact the current situation with Russia and Ukraine might have on the United States of America

OFAC's determination of whether the Note is 'blocked property' for the purposes of U.S sanctions regulations

AND UPON the parties agreeing that the Blocked Property Issues be stayed with liberty to apply and that the Court proceed to determine the remaining BVI contractual issues identified in the Annex to the Order of the Court dated 2 December 2021

[...]

IT IS HEREBY ORDERED AND DIRECTED THAT:

[...]

5. The trial of the Blocked Property Issues be stayed with liberty to apply to fix a further hearing.

[...]"

- [43] Returning to the matters before the Court at trial, Credorax considered that, barring a new licence, formal guidance or authorization from OFAC, Credorax is unable to make payment to IVC directly, without it and its directors breaching the laws of the U.S. and risking serious consequences and sanctions. Credorax believes it is also not permitted to arrange for some other third person to make payment on its behalf without itself being in breach of the OFAC regulations. Similarly, says Credorax, the U.S. directors cannot wilfully 'turn a blind eye' to facilitate payment being made by a non-US executive without the risk of committing personal criminal offences. Credorax maintained that payment under the Note cannot be performed in a manner which does not contravene the laws of the U.S. Moreover, U.S. Dollar payments of the magnitude in question (about US\$45 – 50 million) would inevitably have to clear through the U.S., which means the underlying issue with respect to IVC is present no matter who or where the party attempting payment is.
- [44] IVC's demand for payment on 18th May 2021 was made after attempts had been made to have discussions between the parties, through U.S. Counsel, to agree a way forward. Credorax's evidence was that it would not engage in any dealings with respect to the Note absent OFAC's guidance. IVC's position was that Credorax's concerns were entirely misplaced.
- [45] A hard copy of the formal demand for payment was received by Credorax, this Court finds, on 23rd May 2021. In consequence, repayment fell due on 30th May 2021. Further discussions ensued, and IVC, by an email dated 1st June 2021, agreed to defer further steps to enforce its rights under the Note until 30th June 2021.
- [46] There was other activity on the IVC side around this time. By way of background to this 'activity', Mr. Manuylov explained that, as at April 2018, IVC was owned by RITL. Above RITL,

in its ownership structure, there were a number of intermediate companies, also incorporated and registered in the Bahamas, and the Trustee of an irrevocable and fully discretionary trust of which Mr. Vekselberg was or is a beneficiary. Mr. Manuylov gave evidence that he was informed by representatives of RITL that neither the Trustee, nor any of the intermediate companies, are U.S. persons or resident in the U.S. Mr. Manuylov maintained that it was incorrect of Credorax to say that IVC was designated as a 'blocked' entity. Mr. Manuylov also gave evidence that RITL had not been designated as a 'blocked' entity, and, specifically, that IVC 'was never part of Renova Group' (as mentioned in the Press Release). The impression thus given by Mr. Manuylov was that Credorax's concerns and indeed understanding of the application of U.S. 'blocking' sanctions to IVC, and thus the Note as one of its assets, was mistaken.

[47] Mr. Manuylov gave evidence of the following changes that took place:

"Following the designation of Mr. Vekselberg as a Specially Designated National ("SDN") by OFAC on 6 April 2018, RITL replaced IVC as the General Partner with IZIT, and sought to sell its interest in IVC to a third party. RITL removed IVC Ltd. as General Partner and appointed IZIT pursuant to its discretionary power under Article ..., by giving IVC Ltd. notice on 26 September 2018.... IVC Ltd. did not participate or provide any assistance in any way in its replacement."

[48] 'IZIT' is a reference to IZIT Management Limited, the Second Defendant.

[49] The Defendants contend that IZIT (a Cayman Islands company) obtained possession and control of the Note in its capacity as new General Partner of IVC and that IVC Ltd. (also a Cayman Islands company) no longer retained any possession or control of the Note. Hence, according to the Defendants, from 26th September 2018 onwards, the Note was indisputably not in the possession or control of any U.S. person and could not therefore be 'blocked' property.

[50] Mr. Manuylov explained that there was a further change. He stated that:

"On 9 November 2018, Managa, a company at that time incorporated and registered in the Republic of the Marshall Islands, purchased all of the limited partnership interest in IVC from RITL pursuant to the terms of a sale and purchase agreement (the "Managa SPA")."

[51] Managa was incorporated in the Marshall Islands before being redomiciled in the BVI. Mr. Manuylov gave evidence that Managa is 'directly majority owned' by one Mr. Boris Gerts, an Israeli investor, with Mr. Manuylov himself owning 4% of its shares (from 2021). Mr. Manuylov

stated that Mr. Gerts also owns IZIT. Mr. Nachman's evidence is that Credorax understands Mr. Gerts to be a long-time friend and associate of Mr. Vekselberg, and that there persists a lack of clarity as to the ownership of IVC.

[52] Mr. Manuylov stated that Managa had decided, 'after due diligence', to acquire IVC for Euros 60 million in November 2018. Mr. Manuylov gave evidence that whilst RITL itself was not on the U.S. Department of Treasury's list of 'blocked' persons or entities, RITL 'encountered considerable difficulties' in receiving payment from Managa for the sale of IVC on account of RITL's connection with Mr. Vekselberg, in consequence of which the consideration was converted into an interest free loan, denominated in Russian Roubles, payable in instalments. Mr. Manuylov gave evidence that all outstanding consideration has since been paid, through a Russian based bank.

[53] The Defendants' position was that this reorganisation of IVC meant that IVC automatically became 'unblocked' (if, contrary to their primary position, that IVC and its assets had indeed become 'blocked').

[54] Credorax's position is that this change of IVC's General and Limited Partners did not have that effect. Credorax maintained that even if the sale to Managa was as described and Mr. Vekselberg no longer had any interest in IVC, Credorax believed, upon professional legal advice, that as a matter of US law this sale did not stop IVC being a 'blocked person' or its property ceasing to be 'blocked property', because OFAC would need formally to confirm any unblocking once an entity and its property has been 'blocked' subject to U.S. jurisdiction, which appears not to have been done.

[55] Certain other aspects of Mr. Manuylov's evidence can conveniently be mentioned here. To underline his contention that IVC was not a 'blocked' entity, he gave evidence that:

"Since December 2018, IVC has sold four of its other portfolio companies, in total for approximately USD25 million. Some of these transactions were denominated in U.S. Dollars. IVC has received full payment, including in relation to transactions denominated in U.S. Dollars."

[56] Contrary to Mr. Manuylov's contention that IVC was not a 'blocked' entity, Credorax gave evidence that Mr. Intrater, the person primarily responsible for managing the business of IVC Ltd. (the General Partner of IVC before IZIT took over as the General Partner), had informed

Credorax in April 2018 that Mr. Vekselberg had been sanctioned and, that as a result, IVC became a 'blocked person' and the Note 'blocked property' as a result of the 50% rule. Credorax stated that Mr. Intrater had also informed Credorax that a 'blocking report' had been filed with OFAC by a company called Renova U.S. Management LLC. Credorax also gave evidence that on 27th September 2019, Mr. Intrater submitted an 'Annual Report of Blocked Property' to OFAC, in which he stated that (amongst other matters) various assets of IVC – including the Note – were 'blocked' property, and subsequently, on 12th November 2019, Mr. Intrater declared on oath that certain of IVC Ltd.'s and others' property was 'blocked'.

[57] Mr. Manuylov has taken issue in his evidence with the detail of such statements by Mr. Intrater and of Credorax's contentions in respect of them. Credorax's answer was in essence to say that IVC's representative, Mr. Intrater, was eminently well placed to have confirmed whether or not IVC and its property were blocked, without doubt upon professional legal advice.

[58] The summary of the parties' respective positions given above is not intended to be a narrative, nor summary, of the debate which flowed between them in correspondence before the commencement of these proceedings, nor of the totality of the factual evidence. It does, though, encapsulate the parties' perspectives. It is clear that the parties were far apart. Credorax had concerns that OFAC might view steps by Credorax to repay the Note as a breach of the sanctions placed upon Mr. Vekselberg. IVC, on the other hand, urged that Credorax should have no concerns at all; when looked at closely, it should be readily apparent that IVC was never a 'blocked' entity and whatever might have been OFAC's perceptions of a connection between IVC and Mr. Vekselberg and 'Renova Group', in April 2018, with the subsequent sale of RITL's interest to Managa and change of General Partner to IZIT, both of which are manifestly majority owned by Mr. Gerts, that connection has gone. Thus, according to IVC, its status and that of its property should cause Credorax no hesitation in making the repayment as demanded.

[59] The difference between the parties, at its core, is that IVC focussed upon a position that OFAC would be wrong to treat the Note as 'blocked', whereas Credorax considered that what instead mattered is whether OFAC might treat IVC and the Note as 'blocked' (irrespective of whether OFAC is ultimately right or wrong about this). Credorax fears that OFAC may take adverse action against Credorax if it attempts to repay the Note. If OFAC does so, then catastrophic consequences for Credorax are easy to imagine. It would be utterly useless cold comfort to

Credorax if, after the catastrophe, OFAC should be proven wrong. It can thus be seen that these two positions, proceeding, as they do, from different bases and on differing tracks, are incapable of meeting.

[60] Credorax's reaction to the 18th May 2021 Demand Letter and the difficulties Credorax perceived that IVC's position placed Credorax in, was eventually to file this claim on 23rd August 2021, which it slightly amended on 29th August 2021. Credorax also applied for and obtained an injunction against IVC and IZIT on 31st August 2021 enjoining them from declaring an Event of Default under the Note, and from enforcing their repayment and security rights under the Note.

[61] There was correspondence between the parties following the 18th May 2021 Demand Letter, before this claim was filed. That letter had concluded with the following statement:

"Unless payment of the Outstanding Balance is made as demanded in this Demand, [IVC] will proceed to declare an Event of Default pursuant to clause 2 of the Note and clause 7 of the Note Purchase Agreement."

[62] Clause 2 of the Note materially provides:

"2. **Events of Default.** The occurrence of any of the following events, unless remedied within the grace period set forth in the applicable sub-section below (if at all), or if otherwise agreed in writing by the Holder, shall constitute an **"Event of Default"** under this Note and the other Transaction Documents (it being understood that for purposes of this Section 2, the term "Company" shall include any and all of the Company's subsidiaries, unless otherwise noted herein):

(a) *Failure to Pay.* The Company shall fail to pay (i) when due any Principal Amount on the due date hereunder; or (ii) any Interest payment or other payment required under the terms of this Note or any other Transaction Document on the date due, provided that such payments shall not have been made within twenty (20) Business Days of the Company's receipt of a written notice notifying the Company of such failure to pay;"

[63] It should also be said that by clause 3 of the Note:

"3. **Rights of Holder upon Default.**

(a) Upon the occurrence of any Event of Default (other than an Event of Default described in Sections 2(e) and 2(f) above), the Holder may, by written notice to the Company, declare the Outstanding Balance to be immediately due and payable without presentment, demand, protest or any other notice of any kind, all of which are hereby expressly waived, anything contained herein or in the other Transaction Documents to the contrary notwithstanding.

(b) Upon the occurrence of any of the Events of Default described in Sections 2(e) and 2(f) above, immediately and without notice, the Outstanding Balance shall automatically become immediately due and payable, without presentment, demand, protest or any other notice of any kind, all of which are hereby expressly waived, anything contained herein or in the other Transaction Documents to the contrary notwithstanding.

(c) In addition to the foregoing remedies, upon the occurrence and during the continuance of any Event of Default, the Holder may exercise any other right, power or remedy granted to it by the Transaction Documents or otherwise permitted to it by law, either by suit in equity or by action at law, or both. The Company shall pay all reasonable costs and expenses incurred by or on behalf of Holder in connection with Holder's exercise of any or all rights and remedies under this Note, including, without limitation, reasonable and properly incurred attorney's fees, whether or not any lawsuit is ever filed with respect thereto."

[64] Clause 7 of the Note Purchase Agreement moreover provides:

"7. **Events of Default.** The Events of Default set forth in the Note shall be deemed Events of Default hereunder. If, at any time, any Event of Default shall occur that is continuing and not cured within grace periods set forth in the Note or if otherwise agreed in writing by the Holder, all obligations under this Agreement and the other Transaction Documents shall become immediately due and payable and the Holder may exercise any security interest it so holds in or to any of the property or assets of the Company in accordance with the terms expressly set forth in the Note."

[65] On 1st June 2021, Mr. Manuylov, on behalf of the Defendants, sent an email to Credorax's general Counsel informing the latter that 'it is our current intention to defer steps to enforce our rights until 30 June 2021 is entirely without prejudice to our rights.' This was to facilitate further discussions.

[66] Unfortunately the discussions did not result in the agreement that the parties had hoped for. On 2nd August 2021 IVC sent another formal letter to Credorax, giving Credorax formal notice pursuant to clause 2(a) of the Note, stating that '[u]nless you remedy your failure [to pay in accordance with the 18th May 2021 Demand Letter] within 20 Business Days of receipt of this Notice, and in accordance with clause 2(a) of the Note, an Event of Default will occur'.

[67] The letter concluded with:

"Please now remedy your failure to pay without delay and in any event within the contractual grace period of 20 Business Days from receipt of this Notice. Please make the payment to the bank account indicated in the Demand.

All of our rights and remedies are reserved with respect to the occurrence of an Event of Default and, specifically, our right to take any and all steps expressly permitted under the Note, the Note Purchase Agreement and the Floating Charge.”

[68] Credorax replied on 15th August 2021, stating that although it was willing to pay, it could not lawfully make the payment demanded and informed that unless IVC should undertake, by 19th August 2021, not to enforce its entitlements, Credorax would apply to the BVI courts for relief. IVC responded on 19th August 2021, declining to give the undertaking requested, but, under a general reservation of rights, pronounced itself ‘content for the time being not to appoint a receiver pursuant to the floating charge between [IVC] and Credorax dated 15 November 2016’.

[69] Credorax, for its part, rejected this as inadequate, and gave IVC until noon on 23rd August 2021 to give the undertaking sought. Credorax here also represented that it was able to pay.

[70] Following the commencement of these legal proceedings, the proceedings were then case managed in such a way as to identify a number of issues that this BVI Court could and should determine in any event, and to defer determination upon certain matters which, although strictly speaking within this Court’s jurisdictional purview according to BVI law, were pending determination by OFAC. This Court gave case management directions to give both sides opportunity to adduce factual and expert evidence. Pleadings were dispensed with, in the interests of bringing the substantive determination, by way of a trial, of these proceedings forward as soon as reasonably practicable.

The issues for determination

[71] The issues for determination were helpfully identified by the parties’ learned Counsel and can be stated thus (issues (1) to (6) below, being the Blocked Property Issues, the determination of which was stayed pursuant to the Court’s order of 9th March 2022, and issues (7) to (11) being the BVI contractual issues with which the Court is presently concerned which consider the BVI law position, assuming (but without any final finding) in Credorax’s favour that the Note was blocked property):

- (1) Whether the Note ever became ‘blocked property’ within the meaning of U.S. sanctions legislation and, in particular, whether it ever (1) fell within the description of ‘*property and*

interests in property that are in the United States' or (2) came 'within the United States, or ... within the possession or control of any United States person';

- (2) Whether, even if the Note became 'blocked' property from 6th April 2018 onwards, it ceased to be blocked property following the sale by RITL of its limited partnership interests in IVC to Managa in November 2018 by means of a sale and purchase transaction which occurred outside of the US;
- (3) Whether IVC itself was ever a 'blocked' entity so that even the sale of IVC by RITL to Managa had to have been approved by OFAC in order for IVC to cease to be a fifty-percent-owned entity and for the Note to cease to be blocked property;
- (4) What is the status of an OFAC assessment under U.S. sanctions legislation and/or the relevant U.S. system of law with respect to whether specific property is 'blocked' property or a specific entity is a 'blocked' entity within the meaning the U.S. sanctions legislation;
- (5) Whether there is, in practice, any real risk of OFAC taking adverse action against the Claimant or its U.S. directors if this Court (as the exclusively competent court) were to rule that, as a matter of BVI law, the Claimant is required to meet its payment obligations under the Note and Note Purchase Agreement;
- (6) Whether under U.S. sanctions legislation the fact that a promissory note may be 'blocked' property prevents the accrual of interest under the note in accordance with its terms;
- (7) Whether, as a matter of BVI law, the Claimant's payment and other obligations under the Note, Note Purchase Agreement and Floating Charge should be treated as having been frustrated;
- (8) Whether, as a matter of BVI law, the Claimant's obligations should be treated as having been rendered unenforceable as a result of supervening illegality;
- (9) Whether, if the Claimant and/or its U.S. directors are prevented from repaying (and fail to repay) the Note as a result of U.S. sanctions legislation, an Event of Default has nevertheless occurred within the proper meaning of clause 2(a) of the Note;
- (10) Whether the Defendants are entitled to the relief counterclaimed at paragraph 77 of the First Affidavit of Mr. Manuylov ('Manuylov 1');
- (11) If the Claimant's obligations have been frustrated or rendered unenforceable by reason of supervening illegality, what are the resulting consequences as a matter of BVI law;
 - (i) Whether Credorax's payment obligation may be 'excused and/or modified', such as by the Court treating payment of the amount accrued and due under the terms

of the Note to a 'blocked' U.S. account of the type described in the OFAC Licence as being payment in accordance with the terms of the Note;

- (ii) Whether, and, if so, in what amount (including as to interest or other measure as to the time value of money), Credorax would be required to provide restitution to IVC in the event that the Claimant's payment obligation were frustrated or otherwise enforceable as a matter of contract law;
- (iii) Whether IVC's entitlement to interest under the Note was suspended for the period when it might have been unlawful for the Claimant to attempt to repay the Note under US law other than as directed by OFAC.

Discussion on whether IVC and the Note were/are 'blocked'.

- [72] The Court heard extensive expert evidence concerning the application of U.S. sanctions, the legislative basis for them, and how OFAC applies them in practice. The expert evidence was given by two experts – one for each side.
- [73] The Claimant's expert was Mr. Matthew Tuchband, a U.S. lawyer currently in private practice specialising in sanctions law, who worked in the Office of the Chief Counsel (Foreign Assets Control) of the U.S. Department of the Treasury from 1998 to 2019. Mr. Tuchband served as Deputy Chief Counsel in that Office for several periods amounting to over 16 months, as well as Acting Chief Counsel. Mr. Tuchband's experience in these roles included having a direct hand in creating, interpreting, enforcing, litigating, removing, or otherwise implementing several dozen economic sanctions programs.
- [74] The Defendants' expert was Mr. Michael William (Will) Schisa, also a U.S. lawyer currently in private practice specialising in sanctions law. Mr. Schisa served from June 2007 to March 2017 as an attorney in the same department as Mr. Tuchband, as an Attorney-Adviser until 2013, when he was promoted to Senior Counsel.
- [75] Both Mr. Tuchband and Mr. Schisa were helpful and the Court thanks them for their insights. There was a considerable level of agreement on key aspects between them. That said, they represented a range of views on the implementation of U.S. sanctions law by OFAC staff, with Mr. Tuchband broadly representing Credorax's view and Mr. Schisa broadly representing the Defendants' view.

- [76] The Court takes from this divergence two main points. The first is that the interpretation and implementation of U.S. sanctions involves a discernment process (one could say judgment process, although it should be understood that the consideration is more an administrative than a judicial process) carried out by human beings, against the backdrop of rules of some complexity and of apparent debatable efficacy. Thus, it is not possible to predict with mechanical certainty how OFAC will view a particular situation and apply the rules. The second is that, nonetheless, a range of views can be expected within which reasonable persons could disagree.
- [77] In the present case, in-depth consideration was given by the experts to many facets of the sanction issues. This was due to the focus the parties respectively had had on the case with regard to matters of U.S. sanctions law. Much of this proved to be unnecessary, however, because this Court ultimately has to apply BVI law to the key questions before it, not U.S. sanctions law.
- [78] The parties also adduced witness of fact evidence going to questions whether or not the Note and IVC should be treated as 'blocked'.
- [79] In this regard, the Defendants relied solely upon evidence from Mr. Manuylov. The Claimant contended that it was remarkable that the Defendants were relying solely upon the evidence of Mr. Manuylov, and not Mr. Intrater or Mr. Gerts, nor, for that matter, Mr. Vekselberg. Mr. Manuylov, for his part, observed the Claimant, was strikingly of little assistance on key issues, such as of the agreement between the principals by which the ownership interests in IVC were transferred to Managa, or as to the source of the monies by which (ostensibly) this change of ownership and control transaction was to be paid for.
- [80] Curiously, as well, there was also an agreement that payment of the purchase price would be deferred until a considerably later date. Whilst the Defendants put forward an explanation for this, it could also be an indicator that this was not a genuine commercial arm's length transaction.
- [81] Credorax also contended that Mr. Manuylov's evidence had been misleading, in that he stated that this transaction had been entered into after 'due diligence' by Managa. This 'due diligence'

turned out to involve merely the provision of information by RITL to Managa concerning the assets of IVC and in particular a description of those assets. Credorax's point here was that if this transaction had genuinely been at arms' length and commercial, and not a window-dressing exercise, then more due diligence could reasonably have been expected.

[82] Credorax contended that it was significant that, as emerged at trial but was not disclosed beforehand, Mr. Manuylov had earlier been representing the family office of Mr. Vekselberg in its dealings with IVC and other portfolio companies, having had this role since autumn 2017.

[83] Credorax also considered it to be implausible that Mr. Manuylov claimed to have resigned from Mr. Vekselberg's team at a time when he was managing Mr. Vekselberg's interests in IVC, only to be approached supposedly out of the blue 6-8 weeks later by both Renova and Mr. Gerts' team to assist in effecting a transfer of the partnership interests to Mr. Gerts and then to manage those interests on behalf of Mr. Gerts. Credorax suggested thereby that what was 'really' going on was that Mr. Manuylov was continuing to manage Mr. Vekselberg's interests, which had simply been pushed underground and covered by Mr. Gerts.

[84] Another aspect that Credorax considered to be significant was that although Mr. Gerts has a number of companies through which he holds investments and assets, for some reason, which Mr. Manuylov was not able to explain, the transfer was structured in such a way that Mr. Gerts would hold the shares in IZIT and Managa personally. Obviously, without any evidence from Mr. Gerts, Mr. Gerts was not amenable to cross-examination; thus, the Court would be left with no more than what the documents appeared to show. Credorax's point here appears to be that it was unlikely to have been a coincidence that Mr. Gerts would be seen to be holding the shares in IZIT and Managa personally: a probable explanation is that Mr. Gerts (and his friend Mr. Vekselberg) wanted thereby to make an unsubtle statement to OFAC (and anyone else who might be watching) that plainly Mr. Gerts and not Mr. Vekselberg was the underlying beneficial owner of those shares. Credorax's further suggestion appears to be that by making such a heavily underlined statement, this was part of the erection of an artifice that Mr. Gerts had taken over Mr. Vekselberg's interests in IVC.

[85] It bears stating that this Court does not know to what standard OFAC inquired into the ownership structure of IVC, and on the basis of what documentation, information or investigations OFAC concluded (if indeed it did) that IVC is not or no longer a 'blocked' entity.

- [86] This Court does not wish in any way to undermine or detract from OFAC's determination, such as it may have been. In any event, as earlier indicated, by its order dated 9th March 2022 the Court in agreement with the parties ordered a stay of the determination of the Blocked Property Issues pending determination of the BVI contractual issues.

Discussion on methods of payment – overview of the parties' competing submissions

- [87] Credorax made the following outline submissions in closing after the evidence phase of the trial, pertaining to methods of payment of the sums due pursuant to the Note.

- [88] First, clause 6(f) of the Note required payments to be made in U.S. Dollars. A U.S. Dollar transfer of the amount required to pay the Note (being tens of millions of Dollars) would inevitably have to pass through the U.S. banking system. That is supported by clear evidence from Mr. Nachman, who has some 20 years' experience in the banking and financial services sector: he has stated that a U.S. Dollar payment of the magnitude required to repay the Note would '*inevitably have to clear through the United States*'. Payment under the Note therefore requires Credorax to transfer money into the U.S. banking system for transmission to IZIT's nominated bank account, and this would be unlawful under U.S. law.

- [89] In response to this straightforward case, the Defendants have sought to identify elaborate – and in a number of cases wholly impracticable – ways in which Credorax could attempt to effect repayment so as to avoid the U.S. financial system. None has any merit, submitted Credorax.

- [90] First, the Defendants contend that Credorax would be free to arrange payment into IZIT's nominated account with VTB Bank in Germany '*in cash*'. There are a number of difficulties with that suggestion, submitted Credorax.

- (1) First, there is no evidence at all that a sum of US\$45million could be paid into the VTB account in cash, less still that such a sum could be paid into the account by a person who is not the account holder. There are plenty of reasons why such a transaction may not be permitted (e.g., money laundering requirements). There was no suggestion in Mr. Manuylov's Affidavit or Mr. Schisa's Expert Report on behalf of the Defendants that payment could be made to the VTB Bank account in cash.

- (2) Nor is there any evidence that Credorax would be able to obtain US\$45million in cash. A bank or other financial institution may reasonably expect to understand the purpose to which a cash sum of US\$45million is to be applied, and it would not be surprising if they were to refuse to provide it once they learned that payment was to be made in cash in order to avoid U.S. sanctions laws that would apply if the transaction was made through the banking system in the ordinary way.
- (3) The suggestion that Credorax could pay in cash is obviously theoretical rather than real. Commercial transactions of US\$45million are not settled in cash in the modern day.
- (4) Moreover, even to obtain US\$45million in cash would inevitably require Credorax to utilise the U.S. banking system. The problem therefore remains.
- (5) Lastly, on a proper construction of the Note, the requirement on Credorax was to pay by bank transfer, not to pay in cash. Whilst in certain banking relationships a client may be able to demand withdrawals from his or her bank in cash, Credorax does not have a banking relationship with IVC.

[91] Second, the Defendants suggest that Credorax could open an account at VTB Bank, transfer the Dollar amount due under the Note to that account, and thereafter instruct the bank to transfer the U.S. Dollar amount to IZIT's account at the same bank. However, again, there are a number of difficulties with this suggestion.

- (1) The only evidence on this point is a footnote in the report of Mr. Schisa.² There is little weight to be placed on this evidence: Mr. Schisa gave evidence as a U.S. sanctions law expert. In any case, there is no evidence that VTB Bank would necessarily process the transaction in this case without remitting funds through the U.S. banking system.
- (2) Nor is there any evidence that Credorax would be able to open a bank account at VTB Bank for the purposes of making such a payment. The only evidence on this point was in Mr. Nachman's cross-examination, where he explained that any bank would want to carry out due diligence and money-laundering checks and would require an explanation as to the purpose of opening the account before being prepared to do so. That is

² At paragraph 4.2, footnote 3.

particularly so where the person seeking to open the account is itself a financial institution (as is Credorax). He stated:

“...actually something that worries large banks significantly is when a smaller bank tries to open an account with them. So during the due diligence process there would need to be specific disclosures on the purpose of why we will be seeking to open such accounts in how much monies are we expected to bring in or send out, the frequency of such transactions, the denomination of such transactions and who would be the beneficiaries of such transactions. ... This is standard operating practice.”

- (3) The likelihood must be that – having gone through that process and been told that Credorax wished to utilise the bank account to make a payment that it could not make from its account in the U.S. because it would breach U.S. sanctions law – the bank would decline to open the account or allow it to be used for that purpose. At the very least, there is no evidence that it would be likely to do so.
- (4) In any case, the opening of a new bank account would require the approval of Credorax’s board of directors. Given that Credorax’s board requires a quorum of *at least* 2 directors, this would require the involvement of a U.S. director and so would involve a breach of U.S. sanctions law.
- (5) The Defendants seek to overcome this last issue by contending that any director or officer of Credorax already has authority to do anything necessary to repay the Note pursuant to the written resolution of Credorax’s board dated November 2016 approving the entry into the Note, Note Purchase Agreement and the Floating Charge authorised each director and officer of Credorax to execute and deliver each ‘Transaction Document’ and ‘to do all such acts or things, as such director or officer may in his sole discretion consider necessary or desirable to implement and give effect to the Transaction Documents and the transactions contemplated thereby’. The point is flawed, contended Credorax. The ‘Transaction Documents’ are defined for these purposes to include, amongst others, the Note, the Note Purchase Agreement and the Floating Charge. As a matter of construction, the ‘transactions contemplated’ by the Transaction Documents for these purposes are the specific transactions which the Transaction Documents effect. The Board was plainly not giving authority to any director or officer to effect repayment of the Note in unspecified and unknown circumstances at some unknown time in the future.

- (6) A third suggestion made by the Defendants which emerged in the cross-examination of Mr. Nachman was that Credorax could procure that a subsidiary with an account outside the U.S. make the payment to the account with VTB Bank. That suggestion fails for the simple reason that, for the subsidiary to discharge a liability of Credorax, Credorax itself would have to direct it to do so (as being a form of distribution by the subsidiary to Credorax). There would otherwise be no legal basis for the subsidiary to make the payment. If Credorax were to direct a subsidiary to make the payment, it could do so only by resolution of its board and, as above, that would necessarily entail action in the U.S. in breach of U.S. sanctions law.
- (7) The fourth proposal by the Defendants is that Credorax should pay an equivalent amount in Euros to a Euro-denominated account held by IZIT at VTB Bank. This proposal was made by the Defendants for the first time on 9th February 2022, after the close of evidence and shortly before trial in these proceedings. Credorax has therefore not had any opportunity to adduce evidence concerning the Defendants' proposal. That should be the end of the point. In any case, the proposal is flawed:
- (i) As set out above, under the Note the obligation of Credorax is to pay, and the entitlement of the noteholder is to receive payment in, U.S. Dollars: clause 6(f). Credorax is not obliged to repay the Note in Euros.
 - (ii) Clause 9(l) of the Note Purchase Agreement does not assist the Defendants here. That provision permits a provision of the Note Purchase Agreement which in its application to any person or circumstances or in any jurisdiction shall be held to be invalid or unenforceable to be 'reformed' to be valid and enforceable to the extent permitted by law. Here the Defendants do not seek to reform a provision of the Note Purchase Agreement to render it valid and enforceable, but to impose an entirely new and different obligation on Credorax.
 - (iii) There is equally no obligation on Credorax to accept a new and different obligation to repay the Note in Euros, as the Defendants have proposed. Nor can this be said to amount to self-induced frustration or a failure by Credorax to do what is within its power to bring about valid performance: Credorax has done nothing to prevent the performance of its obligations under the Note. In any case, the act of agreeing to such an amendment to the Note and Note Purchase Agreement would

itself constitute a dealing in the Note and therefore would be prohibited under U.S. sanctions law.

- (iv) The same problems as to board approval would arise in relation to (1) the opening of a Euro-denominated account in the name of Credorax and (2) the approval of the payment to IZIT's account. Moreover, any transfer into the Euro-denominated account by Credorax from its existing bank accounts would again necessarily involve a transaction through the U.S. financial system.
- (8) On the basis that none of the Defendants' alternative proposals work, Credorax must then inevitably make any payment through the U.S. banking system. To this the Defendants have two responses.
- (9) They contend, first, that the place of performance is Germany, being the place where IZIT's nominated account is situated, and not the U.S. That, however, is to approach the question of the place of performance too narrowly. The correct test is, in any case, illegality at the place where *any* act has to be done in performance of the obligation. The payment into the U.S. banking system is an integral part of performance of the contract, and that step has necessarily to be undertaken in the U.S. Second, the Defendants contend that the steps taken in the U.S. are merely preparatory to the contractual performance required under the Note. But that too is flawed. The act of making payment through the U.S. banking system is an inherent part of performance of the contract. Both points are supported by the decision of Staughton J in **Libyan Arab Foreign Bank v Bankers Trust Co**,³ who concluded at 762C-D that a CHIPS or Fedwire transfer of U.S. Dollars would involve some illegal action in the US.
- (10) Two further points arise. First, the effect of the nomination of the bank account by IZIT was that it became impossible for Credorax lawfully to perform the contract. The contract should therefore not be enforced under the principle in **Foster v Driscoll**.⁴ The decision in **Foster v Driscoll** was applied and approved by the House of Lords in **Regazzoni v KC Sethia (1944) Ltd**.⁵ In that case the Court of Appeal held that contracts which had been entered into by parties to finance the supply of whisky into the

³ [1989] QB 728.

⁴ [1929] 1 KB 470 (CA).

⁵ [1958] AC 301.

U.S. in breach of provision laws were unenforceable and all claims on those contracts should be dismissed. The case established the principle that:

“an English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign...country some act which is illegal by the law of such country notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing the contract to be performed legally” (at 521-522 per Sankey LJ).”

In this case, the parties agreed to allow the noteholder to nominate an account to which the Note should be repaid after the Note had been entered into. In assessing the object and intention of the parties in respect of the nomination of the bank account, therefore, one has to assess the object and intention of the Defendants just as much as if the parties had then agreed between themselves that payment should be made to that account. There is no reason in principle to distinguish between the situation in which one party decides, under an agreed contractual mechanism, how the contract is to be performed, and the situation in which both parties do so. In this case, the object and intention of the Defendants, in seeking performance by Credorax of the Note in a way which would necessarily contravene U.S. sanctions law – rather than by payment into a blocked account in the U.S. in accordance with a licence from OFAC – was that Credorax would make the payment in breach of U.S. sanctions law. The obligation to pay into IZIT’s nominated bank account should not, therefore, be enforced.

- (11) Second, even if (contrary to all the points above) Credorax were liable to make payment to the IZIT’s nominated account under the Note, the Court should nonetheless maintain the injunction against the enforcement of the Floating Charge in respect of the Note. The Court has a broad discretion to grant injunctive relief and it should do so to prevent a BVI entity from being compelled to act in a way which would infringe U.S. sanctions law and expose the entity and its U.S. directors to the risk of serious criminal sanctions (including the possibility of imprisonment) in the U.S.

[92] Credorax seeks to rely upon the principle in **Ralli Bros v Compania Naviera Sota y Aznar**⁶ that a contractual obligation to pay money will be suspended⁷ where, after the contract is concluded, it becomes illegal for that obligation to be performed where performance includes

⁶ [1920] 2 KB 287.

⁷ *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 at 772B-D (Staughton J); *Banco San Juan Internacional Inc v Petróleos De Venezuela SA* [2020] EWHC 2937 (Comm) at [77] (Cockerill J).

the doing in a foreign country of something which the laws of that country make it illegal to do so. As learned Counsel for Credorax explained, in that case, Spanish owners of a vessel sought to recover freight from the charterers in England notwithstanding that it exceeded the amount payable under Spanish law. The English Court of Appeal held that the charterparty was an English contract but since that part of the contract dealing with the obligation of the charterers to payment of the freight had to be performed in Spain, that part of the contract was invalid and could not be enforced against the charterers. Credorax argued that this principle should be applied in the present case, such that, assuming the Note is blocked property under U.S. sanctions law, Credorax's obligations under the Note have been suspended and rendered unenforceable as a result of the supervening illegality.

[93] The Defendants submitted the following, by way of a summary of their headline propositions, in response.

[94] First, it appears that Credorax's arguments of frustration and supervening illegality are restricted to its attempt to rely on the **Ralli Bros** principle. No argument is advanced to justify the frustration (or suspension) of its payment obligations under the Note otherwise than by reference to the **Ralli Bros** principle.

[95] The Defendants agree with Credorax's approach in the above regard. As confirmed by Cockerill J in **Banco San Juan Internacional Inc v Petróleos De Venezuela SA**, at [76] and [77],⁸ in the context of English law contracts:

- (1) The general rule is that illegality under foreign law does not frustrate or otherwise relieve a party from performance of an English law contract;⁹ and
- (2) The **Ralli Bros** principle operates as a limited exception to this general rule, by providing that an obligation under an English law contract is invalid and unenforceable, or suspended in the case of a payment obligation, in so far as the contract requires performance in a place where it is unlawful under the law of that required place of performance.

⁸ [2020] EWHC 2937 (Comm).

⁹ In this respect, Cockerill J cited from and followed Marcus Smith J's judgment in *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch), at [187].

[96] Furthermore, submitted the Defendants:

- (1) The **Ralli Bros** principle provides that the Court will not enforce a contract if the performance of that contract 'necessarily requires' an act in a friendly foreign State which would be unlawful by the law of that State.¹⁰
- (2) So, for the principle to apply, the performance of the contract must necessarily require or involve the performance of an act illegal at the place of performance. The principle does not apply if the contract could be performed in some other way which is legal (i.e., where only one of a number of means of performance would be unlawful). Nor is it of any application if the illegal act has to be performed somewhere else (i.e., other than at the place of performance required by the contract).¹¹
- (3) Consistent with the above, there is a firmly established line of authority that 'it is immaterial whether one party has to equip himself for performance by an illegal act in another country' and that the **Ralli Bros** principle:

"excuses performance of an obligation where performance would be illegal by the law of the country where the obligation is to be performed but does not excuse performance where, although performance of the obligation is not illegal in the country where performance is to take place, steps necessary to enable a party to perform its obligation would be illegal in the country where such steps would be taken."¹²

- (4) Hence, it matters not that, prior to rendering the actual performance required by the contract, the party relying on the **Ralli Bros** principle may have (or chooses) to engage in preparatory steps which are illegal by the law of the country where such steps are taken. The unlawfulness of merely preparatory steps in the place where such steps are taken does **not** engage the **Ralli Bros** principle if the contractually required performance is not itself unlawful at the place of performance.

¹⁰ Banco San Juan, at [62]. See also the quotation from Lord Collins NPJ's judgment in *Ryder Industries v Chan* [2015] HKCFA 85, at [39], as quoted at para. 97(4) of C's Skeleton.

¹¹ Banco San Juan, at [79].

¹² Banco San Juan, at [80] – [81], quoting from Staughton J's speech in *Libyan Arab* (at 744G-H) and also Teare J in *Unitech* (at [104]).

- (5) Further still, the party relying on the **Ralli Bros** principle will in general not be excused from providing the required contractual performance if it could have done something to bring about valid performance and failed to do so.¹³

[97] In relation to application of the **Ralli Bros** principle to the facts of the present case, the Defendants submitted as follows.

[98] When embarking upon this exercise, it is critical to bear in mind that the Experts are agreed that there is **no unlawfulness under U.S. sanctions law** and **no risk of enforcement action by OFAC, even if the Note is blocked property**,

“if ... Credorax is able to repay the Note without involving its U.S. Directors or any other U.S. person and without involving the U.S. financial system or otherwise engaging in any transaction with a nexus to the United States”.

[99] The Experts further agree that they ‘both have never seen OFAC pursue an enforcement action in a context where such a transaction did not involve any U.S. person, the U.S. financial system, or other nexus to the United States’.¹⁴

[100] So far as the present facts are concerned, **first**, it is important to note that **the relevant contractual performance under the Note and Note Purchase Agreement is not required of Credorax in the U.S.** In particular, clause 1(d) of the Note Purchase Agreement requires ‘all cash payments due under the Note’ (which, pursuant to clauses 1(a) and 6(f) of the Note, are due in U.S. Dollars) to be made ‘in immediately available funds’ to such bank account as IVC notifies to Credorax. By letters dated 18th May 2021 and 9th February 2022, IVC has notified Credorax that payment was required into an account of IZIT (for and on behalf of IVC) at VTB Germany (i.e. in Germany). Payment in Germany would not necessarily have required the performance of any unlawful act within the U.S. because Credorax was free to arrange the necessary U.S. Dollar payment into the nominated bank account in cash (either in whole or in part) or by any other available means of payment that would not involve any transfers within the U.S. financial system. The position will be the same with respect to the new account at a non-U.S. bank outside the U.S. that IVC further intends to notify to Credorax pursuant to clause 1(d) in order to address the recent sanctioning of VTB Germany.

¹³ Banco San Juan, at [84].

¹⁴ JSI paragraph 6.1.

[101] As to payment in cash, whether in whole or in part:

- (1) Clause 1(d) of the Note Purchase Agreement refers to Credorax's obligation to '*make all **cash** payments due under the Note*' (emphasis added) and Credorax (at paragraph 64 of Nachman 1) interpreted IVC's demand dated 18th May 2021 as being for '*payment ... in cash*' to the notified account. It is open to Credorax to discharge its payment obligation by depositing cash into the notified account, i.e., payment in the form of cash would be a lawful means of payment.
- (2) Just as Staughton J had held in **Libyan Arab** that the procurement of USD 160 million in U.S. Dollar bills for deposit in an English account would not involve any relevant unlawfulness within the U.S. because the procuring of the relevant cash even from the U.S. or a U.S. bank would be merely preparatory to contractual performance,¹⁵ the deposit of cash into the notified account outside the U.S. in discharge of the payment obligation under clause 1(d) would plainly not involve any unlawfulness within the U.S.

[102] In this regard, Credorax's learned Counsel suggested in opening that **Libyan Arab Bank** is distinguishable from the present case because that was a case where the payment obligation was owed by a bank to its customer and the customer had a right to seek the return by the bank of its deposit in cash. Credorax's learned Counsel was right about what was at issue in **Libyan Arab Bank**, but this misses the point of the analogy between **Libyan Arab Bank** and this case for present purposes, which is that:

- (1) clause 1(d) of the Note Purchase Agreement leaves it open to Credorax to make the relevant payment by cash deposit into the notified account if it so wishes; and
- (2) the procurement of cash by Credorax **in order to equip itself for compliance with clause 1(d)**, even if this involved obtaining the U.S. Dollar bills from the U.S. or a U.S. bank, would **not** engage the **Ralli Bros** principle because (consistent with Staughton J's reasoning in **Libyan Arab Bank** at 745H) such action would be merely preparatory to performance rather than the required performance itself (i.e. the actual deposit into the account outside the U.S.) under clause 1(d).

¹⁵ **Libyan Arab Bank** at 745H.

- (3) As to other available means of payment, **even an account transfer would not necessarily require or involve unlawful acts within the U.S. because it is possible to make U.S. Dollar transfers otherwise than through the U.S. financial system.**
- (4) For instance, it was open to Credorax to open an account at VTB Germany (and it will be open to Credorax to open an account at the replacement non-U.S. bank to be subsequently notified by IVC), transfer the U.S. Dollar amount due under the Note to that account, and thereafter instruct the bank to transfer the U.S. Dollar amount to IZIT's account at the same bank (i.e. an in-house transfer within the notified non-U.S. bank). This is the so-called '*correspondent bank transfer*' described by Staughton J in **Libyan Arab Bank** at 750D-F, 751B and 752C, which the Judge described as 'relatively simple and involves no action in the United States' since all that would happen would be that the notified bank would, by internal accounting entries, effect the change in who it owes the money to (i.e. in this instance, from Credorax to IVC), without need for any transfer or clearing through the U.S. financial system. Mr. Schisa describes this kind of transfer outside of the U.S. financial system as '*... "on-us" payments where both the originator and beneficiary hold a U.S. Dollar account at the same non-U.S. bank*'.¹⁶
- (5) During cross-examination, Mr. Tuchband fairly accepted that the above type of transfer of U.S. Dollars outside of the U.S. financial system and without the involvement of a U.S. bank was a possibility and that he had heard of this type of transfer happening during his time at OFAC, though he qualified such occurrence as '*very rare*'. However, the latter characterisation does not alter the fact that this form of in-house transfer has been known at least since the **Libyan Arab Bank** decision in 1987 to be a relatively simple form of transfer which requires no action within the U.S.
- (6) There has simply been no satisfactory explanation offered by Credorax as to why it could not have taken steps to effect an in-house U.S. Dollar transfer of the amount due under the Note to the same bank as that where IVC held its U.S. Dollar account (i.e. until now, VTB Germany, as notified in IZIT's letter of demand dated 18th May 2021 and hereafter the further non-U.S. bank to be notified to Credorax). There is a bare assertion on the part of Credorax that Credorax's bank accounts '*are all situated in the*

¹⁶ Mr. Schisa 1, footnote 3.

US' and '*a US Dollar payment of the order of magnitude of the Note would inevitably have had to be paid through the US banking system*'. But the former statement begs the question why Credorax could not have taken steps to open a U.S. Dollar account at the bank where IVC has its U.S. Dollar account and transferred the relevant amount of U.S. Dollars to that account, before a subsequent onward transfer of the amount to IVC's account; and the latter statement altogether ignores the well-known possibility of an in-house transfer of U.S. Dollars outside the U.S. financial system as considered in **Libyan Arab Bank**. Moreover, Credorax's opening of a U.S. Dollar account at the bank notified by IVC and intermediate transfer of the required U.S. Dollar amount to that U.S. Dollar account would not themselves attract the operation of the **Ralli Bros** principle because they are preparatory acts rather than the actual performance required under clause 1(d) of the Note Purchase Agreement.

- (7) In fact, it would also have been (and it remains) open to Credorax to suggest any other non-U.S. bank outside the U.S. at which it would be comfortable opening a U.S. Dollar account to which it could transfer the required U.S. Dollar amount in order for an in-house transfer thereafter to take place in favour of IVC. For its part, IVC stands ready, willing and able to consider any non-U.S. bank candidates that Credorax may have in mind, including, e.g., in Israel or Malta (where the largest part of the Credorax Group's operations is based and where group subsidiaries already have accounts), where IVC may be able to open a U.S. Dollar and/or Euro account(s).
- (8) Finally, it is suggested by Credorax that the possibility of an in-house transfer of U.S. Dollars at the same bank 'plainly does not apply in this case, and could never reasonably have been expected to apply'. This, however, is an entirely bare and unreasoned assertion. It is also wrong because a party seeking to rely on the **Ralli Bros** principle must do whatever it can to bring about valid performance; otherwise, it is not entitled to rely on the principle and will not be excused from providing the relevant contractual performance. It matters not for this purpose that it was not specifically contemplated at the time of execution of the Transaction Documents that compliance with clause 1(d) of the Note Purchase Agreement would or might require Credorax to open a new bank account in order to be able to effect an in-house transfer at the bank notified by IVC. As a precondition to its entitlement to rely on the **Ralli Bros** principle, Credorax is obliged to consider all realistic options by which it could make payment of

the Note in funds that become immediately available to IVC as contemplated in clause 1(d). So far, Credorax has singularly failed to do so.

- (9) **Secondly**, even if Credorax's chosen method of payment were to involve transfers of U.S. Dollars within the U.S. financial system **before the required payment reached IVC's notified account outside the United States**, such U.S.-based transfers would be **merely preparatory** to the contractual performance required under clause 1(d) (namely, actual receipt of the U.S. Dollar amount due into the notified bank account outside the United States) and would **not** therefore attract the operation of the **Ralli Bros** principle or operate to excuse Credorax's performance pursuant to clause 1(d). It has not been explained by Credorax why the transfers of U.S. Dollars within the U.S. financial system before the relevant amount of U.S. Dollars is credited to IVC's account at a non-U.S. bank outside the United States should not be seen as merely equipping Credorax for the performance actually required under clause 1(d) of the Note.
- (10) It is vital to understand in this connection, as held by Teare J in **Unitech** (at [104]) and approved by Cockerill J in **Banco San Juan** (at [81]), that the **Ralli Bros** principle 'does not excuse performance where, although performance of the obligation is not illegal in the country where performance is to take place, steps necessary to enable a party to perform its obligation would be illegal in the country where such steps would be taken'. Thus, it is no answer for Credorax to say that a transfer of U.S. Dollars into IVC's nominated account outside the United States would necessarily involve intermediate U.S. Dollar transfers within the U.S. financial system. The key point remains that clause 1(d) of the Note Purchase Agreement does not itself require or provide for any performance within the U.S.; it merely requires the provision of immediately available funds in the account notified by IVC outside the U.S. Hence, any intermediate U.S. Dollar transfers within the U.S. financial system, **even if necessary to enable the crediting of the relevant amount of U.S. Dollars in IVC's notified account outside the United States**, would be merely equipping Credorax to provide the performance required under clause 1(d); such intermediate transfers would not be the required performance itself. Hence, the **Ralli Bros** principle could not operate to excuse or suspend Credorax's obligation to pay the required U.S. Dollar amount into the non-U.S. bank account notified to it.

(11) **Thirdly**, if (contrary to the foregoing) payment in U.S. Dollars would necessarily involve illegality within the U.S., IVC has (through IZIT's letter dated 9th February 2022) offered to Credorax **the option of paying the outstanding U.S. Dollar equivalent amount in Euros** (U.S. Dollars and Euros being fungible for this purpose), so as to obviate the need for any intermediate or ancillary transfers of U.S. Dollars within the U.S. financial system. There are **two contractual mechanisms** pursuant to which payment in Euros can be accommodated under the Note and Note Purchase Agreement notwithstanding the provision in clauses 1(a) and 6(f) of the Note that payment is to be made in U.S. Dollars:

- (i) If and to the extent that Credorax's obligation to make payment as specified in the Note and/or Note Purchase Agreement were to be considered invalid or unenforceable as a result of U.S. sanctions law (as contended by Credorax), IVC is entitled to request payment in an alternative currency such as Euros pursuant to clause 9(l) of the Note Purchase Agreement, this being the least extent to which the express contractual terms may be *'reformed to be valid and enforceable to the fullest extent permitted by law'* for the purposes of clause 9(l).
- (ii) Further or alternatively, since both clause 9(b) of the Note Purchase Agreement and clause 6(c) of the Note permit amendments to the terms of the Note and Note Purchase Agreement upon the written consent of Credorax and IVC, it is within Credorax's gift to consent to IVC's offer to accept payment of the U.S. Dollar amount due under the Note in Euros.

[103] In his oral opening, learned Counsel for Credorax made the point that this is not a case where this Court as the court of the forum can order payment in the currency of the forum (in the same way e.g. that in **Libyan Arab Bank** Staughton J considered that the English court could order payment in pounds sterling as an alternative to U.S. Dollars as the underlying currency of the transaction). In the present case, however, learned Counsel's point is irrelevant, because the Defendants are not relying on Euros as being the local currency of this forum (which, of course, is the U.S. Dollar). Rather, the Defendants are relying on existing contractual mechanisms (as described above) as affording Credorax the option to pay the U.S. Dollar amount in an equivalent Euro amount so as to ensure valid and lawful

performance of its payment obligations under the Note even if the Note were considered blocked property as a matter of U.S. sanctions law.

- [104] The existence of such an option is highly relevant to the question whether, as a precondition to being able to rely on the **Ralli Bros** principle, Credorax has done all that it could in order to bring about valid performance of its payment obligations. Similar considerations were taken into account by Cockerill J in **Banco San Juan** (at [111]-[112]) when considering the potential applicability of the **Ralli Bros** principle: e.g., the fact that the defendant who sought to rely on the principle could agree a new mandate with any bank anywhere in the world capable of initiating a U.S. Dollar transfer, or that it could sell Euros (its main transaction currency) in order to purchase U.S. Dollars from a non-U.S. financial institution to fund the required U.S. Dollar payment to the claimant, or that 'outside the terms of the Credit Agreements' there was 'plainly a possibility of payment being made in euros to a bank outside the US' even if this would 'require a variation of the Credit Agreements' in circumstances where the claimant 'was amenable to such a variation, if it were to result in payment'.
- [105] The Euro option is particularly important in the present case because, as appears from the contents of the Annual Report and Financial Statements of Credorax Bank Limited (Credorax's main operating subsidiary) for the year ending 31st December 2020, the largest proportion of the Credorax Group's revenues is generated in Euros and Credorax as the parent of the group must therefore be capable of repaying or procuring the repayment of the Note (if necessary after raising third party finance) in Euros, without engaging the U.S. financial system. Mr. Nachman accepted during his cross-examination that Credorax could borrow in Euros and also open a bank account in any currency (including in Euros) anywhere in the world (subject to compliance with AML procedures). Mr. Tuchband accepted during his cross-examination, as is self-evidently the case, that repayment of the Note in Euros via a non-U.S. bank outside of the U.S. would not entail any unlawfulness under U.S. sanctions law or engage the U.S. financial system.
- [106] Credorax submitted that the Euro option '*raises issues of law not included in the Issues for Trial, and issues of fact (potentially including expert evidence) not covered in the existing evidence*'. The Defendants submitted that there is, however, nothing in these points.

- (1) The onus is on Credorax as the party seeking to rely on the **Ralli Bros** principle to demonstrate that it has done all it can to bring about valid performance of its payment obligations under the Note.
- (2) In circumstances where Credorax has been determined to find obstacles with respect to U.S. Dollar payments, it was natural for the Defendants to suggest an alternative currency of payment that would not engage the U.S. financial system, without Credorax being required to pay more than the U.S. Dollar amount due under the Note at the time of payment. Addressing the Euro point is therefore part and parcel of Issue 8 and must be addressed by the Court during the course of this trial.
- (3) The expert evidence (on both sides) available to the Court points to Euro payments between non-U.S. banks (or indeed within the same non-U.S. bank) outside the U.S. as having no inter-action at all with the U.S. financial system. It is impossible to see why they should.

[107] **Fourthly**, to the extent that Credorax refuses to take any steps to facilitate an in-house transfer of U.S. Dollars within the bank account notified by IVC or to consent to payment in Euros, so as to avoid any difficulties that may be caused by transfers within the U.S. financial system, **it will have failed to do what is within its power to bring about valid performance** and will therefore not be entitled anyhow to rely on the **Ralli Bros** principle. In such a scenario, any professed disability on its part in making payment under the Note would properly be treated as self-induced.

[108] **Fifthly**, contrary to Credorax's submissions and Mr. Nachman's evidence, **there is no question of Credorax's U.S. directors having to engage in conduct that is likely to attract enforcement action by OFAC or that is otherwise unlawful under U.S. sanctions law because, pursuant to the pre-6th April 2018 authority contained in the November 2016 Resolutions, all necessary steps to repay the Note (in any of the ways described above) can be taken by Credorax's non-U.S. director/CEO (i.e. Mr. Igal Rotem) or other non-U.S. officers of the company.** In particular:

- (1) There is indisputable evidence that, by means of written resolutions signed by each of its Board directors in November 2016 (the '**November 2016 Resolutions**'), Credorax

had authorized both the execution of the Transaction Documents and the implementation of the '*transactions contemplated*' by the Transaction Documents, including therefore the repayment of the Note in accordance with its terms, long before Mr. Vekselberg was added to the SDN List.

- (2) The terms of the November 2016 Resolutions, which Mr. Nachman confirmed were never revoked and therefore remain valid and effective resolutions of Credorax, deserve careful consideration. Paragraph 1 provided that '*The Transaction Documents **and the transactions contemplated thereby** be and are hereby approved*' (emphasis added). Paragraph 3 provided that:

*"Each director and officer of the Company be and is hereby authorized to execute and deliver on behalf of the Company each Transaction Document ... and to do all such acts or things as such director or officer may in his sole discretion consider necessary or desirable to implement and give effect to the Transaction Documents **and the transactions contemplated thereby**"* (emphasis added).

Para. 14 further provided that:

"Each director and officer of the Company be and is hereby authorized for and on behalf of the Company ... to do all such acts or things as may be necessary or desirable to give effect to the foregoing resolutions".

- [109] On their plain and ordinary meaning therefore, the November 2016 Resolutions authorized Credorax (which is a BVI, i.e. non-U.S., entity) to repay the Note and further authorized each and any of its directors or officers to do **all such acts or things as such director or officer may in his or her sole discretion consider necessary or desirable to repay the Note**. As a result of the November 2016 Resolutions, any non-U.S. director or non-U.S. officer of Credorax (e.g. the CEO Mr. Rotem, the Credorax Company Secretary, or Credorax's General Counsel, Mr. Nathan Shaked) would have (and has) authority to arrange for payment of the Note by any necessary or desirable means, including by means of cash, an in-house transfer of U.S. Dollars at the bank notified by IVC (or other non-U.S. bank that Credorax may wish to suggest to IVC), or in Euros, as earlier discussed.

- [110] Consistent with the passing of the November 2016 Resolutions, Credorax's representation and warranty at clause 2(c) of the Note Purchase Agreement was that '[t]he Company has the

requisite ... authority to enter into and consummate the transactions contemplated by each of the Transaction Documents and otherwise to carry out its obligations hereunder and thereunder' and that 'the consummation by it of the transactions contemplated hereby and thereby have been duly authorized by all necessary action on the part of the Company'. In the same vein, the 'CEO Certificate' delivered by Credorax to IVC pursuant to clause 4(c)(i)(C) of the Note Purchase Agreement recorded that the November 2016 Resolutions were a true, correct and complete copy of the resolutions of the Credorax Board of Directors '*authorizing the Company to enter into the [Note Purchase] Agreement and the other Transaction Documents **and each of the transactions contemplated by the Agreement and other Transaction Documents***' (emphasis added). The representation and warranty in clause 2(c) and the CEO Certificate were of one piece with the November 2016 Resolutions.

[111] The effect of the clause 2(c) representation and warranty and CEO Certificate is also to operate as a contractual estoppel precluding Credorax in these proceedings from denying that the Credorax Board of Directors has authorized the repayment of the Note in accordance with its terms, as set out in the November 2016 Resolutions. For the applicable legal principle in this respect, see Spencer Bower: Reliance-Based Estoppel (5th edn., Bloomsbury 2017), paragraphs 8.67-8.70 and **Springwell Navigation Corp v JP Morgan Chase Bank**.¹⁷

[112] The Defendants' submission is that it is plain and obvious, on the ordinary and natural construction of the November 2016 Resolutions, that they granted authority not only to execute the Transaction Documents, but also to implement the '*transactions contemplated thereby*', including therefore authority for Credorax to pay principal and interest in accordance with the terms of the Note and Note Purchase Agreement. As appears from the terms of the Note and Note Purchase Agreement and as confirmed by Mr. Nachman during his cross-examination, those transactions included:

- (1) grant of a USD25 million loan by IVC to Credorax – see recital A and clause 1(b)(ii)(i) of the Note Purchase Agreement;

¹⁷ [2010] 2 CLC 705, at [3]-[4] of the headnote and [143], [144], [155], [156] and [165]-[170] (Aikens LJ).

- (2) execution and delivery of the Note by Credorax to IVC, with registration of the Note in IVC's name in Credorax's records – see clause 1(b)(ii)(ii) of the Note Purchase Agreement;
- (3) use of the proceeds of IVC's loan to repay amounts owing to an existing lender defined as "ION" – see clause 1(c) of the Note Purchase Agreement;
- (4) payment by Credorax to IVC of all amounts due under the Note, including interest – see clause 1(d) of the Note Purchase Agreement and clauses 1(a) and 1(b) of the Note;
- (5) grant of a BVI law floating charge by Credorax to IVC to secure Credorax's payment obligations under the Note – see clause 1(e) of the Note Purchase Agreement; and
- (6) potential conversion of the amounts outstanding under the Note into shares of Credorax in certain situations – see clause 4 of the Note.

[113] In light of the above, it is plain that Credorax's payment (or repayment) of the principal and interest due under the Note was one of the key transactions contemplated by the Transaction Documents and that that transaction, together with the other transactions described above, were authorized pursuant to the November 2016 Resolutions.

[114] The ordinary and natural interpretation of the November 2016 Resolutions is clear enough as set out above, but it is also instructive to test the correctness of that interpretation using business common sense. It would be absurd to suppose that the moment after the November 2016 Resolutions had been passed, a reasonable bystander (or indeed any of the director signatories) would have thought that all that they had authorized was the **mere signing** of the Transaction Documents, and that the actual implementation and carrying into effect of each and every transaction described in the Transaction Documents would thereafter be a matter for the grant of fresh Board authority as and when those transactions came up. That is clearly not what was contemplated in the November 2016 Resolutions themselves or the CEO Certificate; nor was it Mr. Nachman's understanding in light of his oral evidence. Indeed, Credorax has only disclosed the November 2016 Resolutions (and the 27th January 2019 resolution below) in response to a request for production of all Board resolutions relating to the conclusion **and performance** of the Transaction Documents.

- [115] The above authority from the Credorax Board should also be understood in the context of the additional Deed of Waiver, Consent and Covenant (**'Deed of Waiver'**) which was contemporaneously executed by the largest (majority) shareholders of Credorax and the company itself, pursuant to which those shareholders waived their pre-emption rights in the event that IVC exercised its conversion rights under the Note. Specifically, the shareholders (including the Ordinary A Shareholder FTV Management IV, LLC) agreed to give their irrevocable consent to Credorax's **'execution and performance of the Transaction Documents'** (emphasis added) and their irrevocable confirmation that Credorax *'may give effect to ... all transactions contemplated by the Transaction Documents'* (paragraphs 1(a) and 1(c) of the Deed of Waiver). The irrevocable consent with respect to performance of the Transaction Documents plainly included consent to and approval of the performance of Credorax's payment obligations in accordance with the terms of the Transaction Documents.
- [116] In addition to the Deed of Waiver, the Ordinary A Shareholder also gave its specific approval to the transactions contemplated by the Transaction Documents by means of a separate written resolution that **'[t]he Transaction Documents and the transactions contemplated thereby be and are hereby approved'**. This language is identical to the language of the November 2016 Resolutions and plainly comprises approval of the performance of Credorax's payment obligations under the Transaction Documents.
- [117] Yet further evidence of the validity and breadth of the November 2016 Resolutions takes the form of the amendment of the terms of the Note and Note Purchase Agreement in June 2018 (by which the Maturity Date was extended by 1 year), which was signed by Credorax's CEO, Mr. Rotem, without any further Board resolution.
- [118] If necessary, the Defendants also rely upon a further Board resolution of Credorax dated 27th January 2019, which expressly authorized any two of four Israeli members of its management (Mr. Nathan Shaked,¹⁸ Mr. Sharon Ekstein,¹⁹ Mr. Aviram Shemer²⁰ and Mr. Rotem²¹), by

¹⁸ Credorax's General Counsel.

¹⁹ Credorax's Chief Business Operations Officer and Chief Human Resources Officer.

²⁰ Credorax's Chief Financial Officer. It is understood that Mr. Shemer may also have U.S. nationality and residence.

means of their joint signatures together with Credorax's company seal or printed name, to *'bind the Company for all types of actions, dealings, undertakings, commitments, agreements or transactions, without limitation in amount and for any matter whatsoever'*.²² This further Board resolution formally confirms (if confirmation were needed) that payment of the amount outstanding under the Note can be arranged to be made by duly authorized and named officers of Credorax other than its U.S. directors. As to Credorax's attempts to undermine the relevance of the 27th January 2019 resolution:

- (1) Mr. Nachman's evidence that the resolution was not passed with specific reference to the Note may be correct, but (i) the ascertainment of the true scope of the authority created by the resolution is a matter of objective construction of the resolution, (ii) in any event, as Mr. Nachman confirmed, the resolution was passed with respect to the transactions of Credorax and its subsidiaries entered into in the ordinary course of their business, and (iii) the payment by Credorax of what is due under the Note would be a transaction in the ordinary of Credorax's business.
- (2) As to the objective construction of the resolution, it is concerned with *'[the] grant [of] signatory rights'*²³ on behalf of Credorax and its subsidiaries²⁴ *'[w]ith respect to any transaction, commitment, obligation or any other operation in the Company'*²⁵. The four signatories identified in the resolution were at the time (and still are) senior members of the executive management of Credorax and its subsidiaries; three of them (Mr. Shaked, Ms. Ekstein and Mr. Rotem) being Israeli citizens and residents and the fourth (Mr. Shemer) being a U.S. citizen and resident. By paragraph 2 of the resolution, the signing authority of any two of these individuals on behalf of Credorax and its subsidiaries was expressed to extend to *'all types of actions, dealings, undertakings, commitments, agreements or transactions, without limitation in amount'*. Such authority was very broadly expressed and, on the ordinary and natural meaning of those words, would clearly extend to authority to commit Credorax to pay or procure payment of the Note by any available legitimate means.

²¹ Credorax's Chief Executive Officer.

²² Per paragraph 2 of the 27th January 2019 resolution.

²³ Per the first recital.

²⁴ Per the definition of the Company as *"including any of the Company's subsidiaries, if applicable"*.

²⁵ Per the paragraph just below the table of signatories.

- (3) In circumstances (as described above) where payment can be made without the involvement of any U.S. director of Credorax or any other U.S. person and without use of the U.S. financial system, the Experts are fully agreed that '*OFAC is unlikely to find that Credorax would violate U.S. sanctions law by engaging in such a repayment transaction*'. On this basis, it is impossible to see how there can be any question of unlawful conduct at the contractual place of performance that is capable of engaging the **Ralli Bros** principle. Credorax's argument to the contrary wrongly ignores the Board authority already in place prior to 6th April 2018 for any non-U.S. director or officer of Credorax to do all acts or things necessary or desirable to enable payment of the amounts due under the Note by means which do not engage the U.S. financial system.

The Court's consideration and findings on methods of payment

- [119] In this Court's respectful judgment, the key question to which the Court must have regard is whether performance of Credorax's payment obligations under the Note **necessarily** involves the commission of an illegal act in another country. The key word here is 'necessarily'. This is clear from the judgment of the English High Court, per Staughton J., in **Libyan Arab Bank v Bankers Trust Co.**²⁶ There, Staughton J. stated the following principles:

"...I conclude that it is immaterial whether one party has to equip himself for performance by an illegal act in another country. What matters is whether performance itself necessarily involves such an act."²⁷

- [120] On the following page in the law report, Staughton J repeated this point by referring to a passage from the judgment of Sankey L.J. in **Foster v Driscoll** at pages 521 -522:

"An English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally."²⁸

- [121] Moreover, on the same page in **Libyan Arab Bank v Bankers Trust Co.:**

²⁶ [1989] 1 QBD 728.

²⁷ [1989] 1 QBD 728 at 744H.

²⁸ [1989] 1QBD 728 at 745E.

"This case accordingly raises only the other principle, that performance is excused if it necessarily involves doing an act which is unlawful by the law of the place where the act has to be done."²⁹

- [122] The genesis of the requirement of necessity in the performance of an obligation derives from the English Court of Appeal case of **Ralli Bros v Compania Naviera Sota y Aznar**³⁰ where the following underlying rationale was explained:

"Professor Dicey at p. 553 of the 2nd ed. of his Conflict of Laws makes the following statement accepted by both parties in the present case as an accurate statement of the law. "A Contract (whether lawful by its proper law or not) is, in general, invalid in so far as (1.) the performance of it is unlawful by the law of the country where the contract is to be performed," and at p. 563 "When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place." This last statement is, in substance, identical with a passage in the judgment of Lord Esher in *Chatenay v. Brazilian Submarine Telegraph Co.* (1)(1) [1891] 1 Q. B. 79, 83."

- [123] In **Libyan Arab Bank v Bankers Trust Co.** the English High Court had to consider a similar situation to that which has arisen here, namely whether Bankers Trust Co. could lawfully make payment in London following a similar sanction imposed by the U.S. targeting Libya. The English High Court received detailed expert evidence on the workings of a variety of possible banking transactions which, in simple terms, would amount to payment of money at or through a bank. A similar problem arose there, in that using the U.S. banking system to make the payments there in question would constitute an illegal act within the U.S. The English High Court approached the matter by considering whether a number of different payment methods necessitated an illegal act within the U.S. The payment methods considered included the legally possible, but logistically very onerous measure of paying in U.S. Dollar or Pound Sterling bills. The English High Court was very much alive to the fact that settlement of high value obligations in the *bona fide* commercial world is generally not done in bank notes, but it considered that this was a permissible manner of proceeding, which did not necessitate the commission of an illegal act in the U.S.³¹ The logistical burden of making, in that case, payments of over US\$130 million and US\$160 million in U.S. Dollar bills did not excuse Bankers Trust Co. from its obligation to pay the Libyan Arab Bank.

²⁹ [1989] 1 QBD 728 at 745F.

³⁰ [1920] 2 KB 287.

³¹ See, e.g., at page 755 B- H.

- [124] If that was the correct approach in **Libyan Arab Bank v Bankers Trust Co.**, an English law case from the 1980s which is, in common parlance, ‘still good law’, there is no reason why it should be treated as incorrect or inapplicable in the present case, where the amounts of money concerned are much smaller. I accept Credorax’s submission that commercial transactions of US\$45million are not settled in cash in the modern day. Clearly they are not, because of the logistical burden involved, but that is to miss the point. The point is that it is possible and lawful to make the payment in this way. There is no evidence in this case that making payment in currency bills is unlawful or impossible. I shall therefore assume that it was both possible and lawful to do so.
- [125] Another way in which the English court in **Libyan Arab Bank v Bankers Trust Co.** considered that it would be possible and lawful for a payment to be made, after hearing extensive independent expert evidence on the matter, was by way of an account transfer between two accounts held by different beneficiaries with the same bank.³² The English High Court there opined that such a transfer would not in principle be contrary to U.S. law, because no action in the U.S. would have been required in respect of an in-house transfer at a bank outside the U.S.³³
- [126] Credorax could also have discharged its obligations by making an in-house transfer at a bank outside the U.S. where both Credorax and IVC held, or established, an account, had Credorax been called upon to do so.
- [127] IVC argued that Credorax could also discharge its payment obligations in a different currency, such as in Euros. IVC contended that it would be prepared to accept such payment. Credorax, for its part, argued that its payment obligation was to pay in U.S. Dollars; thus it could insist upon that, since to pay in a different currency would amount to a substantial change in its contractual obligations. I agree with IVC that this view is mistaken, as money is fungible. Credorax adduced no evidence that making payment in Euros, as opposed to in U.S. Dollars, would cause it any difficulty or prejudice, nor indeed that this would make any difference whatsoever to Credorax. I am persuaded that this was a purely technical argument on the part

³² At page 750E.

³³ At page 762A.

of Credorax designed to resist making a payment, which, for Credorax's own reasons, it does not immediately want to make in whole or part.

[128] The short point from the above is that performance by Credorax of its contractual obligations, as called upon by IVC to do, did not necessarily involve the performance of an illegal act by Credorax in the U.S. This is fatal to Credorax's claim, because, as stated in **Ralli Bros v Compania Naviera Sota y Aznar**,³⁴ a contract is, in general, invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed. Here, this Court has no reason to find otherwise than that it was possible as well as lawful for Credorax to perform the repayment obligations of the contract in question in Germany, as called for by IVC, and it was not unlawful by U.S. law for this to be done. That is the end of the matter.

[129] But Credorax put considerable store by an argument that even performance of its actual payment obligations outside the U.S. would necessarily involve some kind of act within the U.S., as it would require some action by Credorax's Board of Directors, a majority of which are citizens and residents of the U.S. This argument does not save Credorax's position.

[130] Counterintuitive and commercially perverse though this may seem, this Court is constrained to treat the eventual illegality of acts preparatory to performance as irrelevant as a matter of BVI law. As Staughton J stated in **Libyan Arab Bank v Bankers Trust Co.**:³⁵

"From that case I conclude that it is immaterial whether one party has to equip himself for performance by an illegal act in another country. What matters is whether performance itself necessarily involves such an act."

[131] Applying legal, as opposed to commercial logic, this analysis is unimpeachably correct: it is performance that the law is concerned with and nothing else. The case which led Staughton J to this conclusion was **Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financiere S.A.**,³⁶ and in particular the judgment of Denning MR at page 114, from which Staughton J quoted extensively.

³⁴ [1920] 2 KB 287.

³⁵ At page 744H.

³⁶ [1979] 2 Lloyd's Rep. 9.

[132] Furthermore, it is trite and not in dispute between the parties that a corporation can only act through human agents. On the facts of the matter, there would appear to be no reason why Credorax's Board of Directors could not have been reconstituted to give it a majority of persons who were not U.S. residents or citizens – Credorax need not have been fixed with a set of agents, a Board of Directors, incapable of acting lawfully under U.S. law. However, there was no need here to look at such an eventual and apparently obvious solution. This is because the evidence before the Court is that persons who are not citizens or residents of the U.S. had already been authorized and empowered to act on behalf of Credorax to ensure the payment obligations could and would be met, before the sanctions were imposed, thereby bypassing the Board's incapability. No steps were thus needed to reconstitute the Board of Directors. This was so as a consequence of the Credorax Board resolutions of November 2016 and January 2019, as IVC has argued. Credorax sought to argue that these resolutions do not have this effect, but I find that they do.

[133] The November 2016 Resolutions would be meaningless and pointless if they did not. Whilst it could be said that the resolution of January 2019 is of so general a nature that a bank might be reluctant, or indeed unwilling, to accept payment instructions on the strength of it, the November 2016 Resolutions were specific to Credorax's borrowing from IVC pursuant to the Note and related Transaction Documents. The November 2016 Resolutions conferred authorization upon non-U.S. citizens and residents to perform 'each of the transactions contemplated by the [Note Purchase] Agreement and other Transaction Documents'. This must sensibly include paying off the loan, as that was a transaction contemplated by the Transaction Documents. It would require violence to language, logic and commonsense to hold a position that repayment of a loan in accordance with its agreed terms is not a transaction contemplated by the said contract.

[134] Credorax contended that even if this was the effect of those resolutions, a bank would require to see a specific Board of Directors' resolution recording the company's decision to make the payment. In this regard, Credorax relied upon Mr. Nachman's evidence. Whilst Mr. Nachman is undoubtedly experienced in the financial services industry, including on banking matters, he is not independent and not an expert witness, in the sense of a witness who gives independent expert evidence. Mr. Nachman is a witness of fact. Thus, his evidence in relation to general propositions pertaining to banking practice warrants being accepted with some care, as well as with reservations as to its limits. It would in my respectful judgment be an evidential step too

far for this Court to conclude on the strength of Mr. Nachman's evidence that a processing bank would refuse to accept the November 2016 (and/or January 2019) Resolutions.

[135] Whilst it is possible that a bank might refuse to do so, Credorax did not adduce evidence that it had tried to get a processing bank to accept the November 2016 and/or January 2019 Resolutions but that they had been rejected. Credorax's evidence in this regard thus remained in the realm of theory. It also remains possible that a bank might seek and obtain a legal opinion upon the validity and effect of the November 2016 and/or January 2019 Resolutions that would cause the bank to be content with these. Without expert or factual evidence on this, it would be evidentially baseless for the Court to assume such refusal is more likely than not.

[136] Lastly, I accept IVC's argument that payment by Credorax into a blocked account would not satisfy Credorax's obligation pursuant to 1(d) of the Note Purchase Agreement to make payment in 'immediately available funds'. The whole point about that provision was to make it clear that IVC should immediately be able to use the money. If it were paid into a blocked account, it stands to reason that IVC would not be able to do so. Where, as here, Credorax actively wished to make payment in a manner which it knew would mean that the funds would not immediately be available to IVC, payment of the monies by Credorax into a blocked account would not satisfy its contractual duty.

[137] In light of these findings, the Court thus answers the issues postulated by the parties (assuming but without finding that the Note was blocked property) as follows:

- (1) Whether, as a matter of BVI law, the Claimant's payment and other obligations under the Note, Note Purchase Agreement and Floating Charge should be treated as having been frustrated.

This Court's finding

Negative.

- (2) Whether, as a matter of BVI law, the Claimant's obligations should be treated as having been rendered unenforceable as a result of supervening illegality;

This Court's finding

Negative.

- (3) Whether, if the Claimant and/or its U.S. directors are prevented from repaying (and fail to repay) the Note as a result of U.S. sanctions legislation, an Event of Default has nevertheless occurred within the proper meaning of clause 2(a) of the Note;

This Court's finding

The Claimant was not prevented from repaying the Note as a result of U.S. sanctions legislation; thus, an Event of Default has occurred within the proper meaning of clause 2(a) of the Note, and this took place on 2nd September 2021.

- (4) Whether the Defendants are entitled to the relief counterclaimed at paragraph 77 of Manuylov 1;

This Court's finding

Positive.

- (5) If the Claimant's obligations have been frustrated or rendered unenforceable by reason of supervening illegality, what are the resulting consequences as a matter of BVI law;
- (i) Whether Credorax's payment obligation may be 'excused and/or modified', such as by the Court treating payment of the amount accrued and due under the terms of the Note to a 'blocked' U.S. account of the type described in the OFAC Licence as being payment in accordance with the terms of the Note;
 - (ii) Whether, and, if so, in what amount (including as to interest or other measure as to the time value of money), Credorax would be required to provide restitution to IVC in the event that the Claimant's payment obligation were frustrated or otherwise enforceable as a matter of contract law;
 - (iii) Whether IVC's entitlement to interest under the Note was suspended for the period when it might have been unlawful for the Claimant to attempt to repay the Note under US law other than as directed by OFAC.

This Court's finding

The Claimant's obligations have not been frustrated or rendered unenforceable by reason of supervening illegality.

Disposition

[138] On 8th September 2022, this Court delivered the following order upon judgment:

1. The declarations and orders sought by the Claimant in its Amended Fixed Date Claim Form are refused;
2. The injunction orders set forth in paragraph 3 of the Order of 31st August 2021 will be discharged. The order contained in this clause is stayed until the expiry at 4 p.m. BVI time of 10 clear business days of the date upon which the written reasons in final form are communicated to the parties' legal representatives, or further order. For the avoidance of doubt, the Defendants remain prohibited from declaring an Event of Default until the said stay be lifted. Further, for the avoidance of doubt, the Defendants are prohibited from invoking and/or relying upon an Event of Default until the said stay be lifted or other earlier order;
3. The following declarations sought by the Defendants are granted, that:
 - (i) the Note, the Note Purchase Agreement and the Floating Charge remain in existence, in full force and effect and capable of performance by the Claimant;
 - (ii) The First Defendant was entitled under clause 1(d)(i) of the Note to issue to the Claimant the formal written demand for payment of the outstanding principal and interest dated 18th May 2021 and that, upon the Claimant's failure to pay the sum thereby demanded within 5 business days of delivery of the demand (which delivery occurred on 23th May 2021) and upon the Claimant failing to remedy that default within a further 20 business days of receipt of the written notice of the failure to pay issued by the First Defendant and dated 2nd August 2021, an Event of Default occurred under clause 2(a) of the Note on 2nd September 2021; and
 - (iii) The Claimant is not excused by reason of the sanctions from complying with its outstanding obligations under the Note and remains bound to comply with and perform those obligations.

4. The Court shall hear the parties further in relation to the orders appropriate to be made consequent upon (a) the declarations made in this Order; (b) the effect of sanctions upon VTB Bank; and (c) any applications made by the parties as a result of these latter sanctions.
 5. The Claimant shall bear the Defendants' reasonable costs of these proceedings to 8th September 2022, to be assessed if not agreed, subject to the Court hearing further submissions on the incidence and quantum of discrete costs issues which may be controversial between the parties, and as to the time for agreement between the parties;
 6. The parties have liberty to apply generally.
 7. The time for appeal from this Order shall run from the date this Order is entered or the written reasons in final form are communicated to the parties, whichever is the later.
- [139] The Court will also hear the parties on the applicable rate of post-judgment interest and upon any other consequential matters arising from the Court's findings.
- [140] The Court trusts that it has adequately explained the reasons for its decision and takes this opportunity to thank the parties' learned Counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar