Neutral Citation Number: [2017] EWHC 2620 (Comm)

Case No: CL-2015-000258

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2017

Before :

MR JUSTICE ROBIN KNOWLES CBE

- -

Between :

VR GLOBAL PARTNERS, L.P. **Claimant**

- and -

EXOTIX PARTNERS LLP **Defendant**

- and –

CVI EMCVF LUX SECURITIES TRADING SÀRL
Third Party

- -
- -

Tom Smith QC and Robert Amey (instructed by **Brown Rudnick LLP**) for the **Claimant**
Andrew George QC and Flora Robertson (instructed by **Jones Day**) for the **Defendant**
James MacDonald and Stephanie Wood (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Third Party**

Hearing dates: 9, 10, 11, 15, 16, 18 May 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE ROBIN KNOWLES CBE

Mr Justice Robin Knowles :

Introduction

1. In 2007 a US$55 million loan facility was made available to Ukrainian borrowers known as Interpipe.

2. The facility was arranged by Citibank, and in subsequent years the facility was amended. Loan Star was a participant in the facility and in 2013 transferred a portion of its commitment to the Third Party in this litigation ("CVI").

3. By trades documented in two trade confirmations dated 13 August 2014 a US$ 10 million portion of the loan ("the Traded Portion") was sold by CVI to the Defendant ("Exotix") and in turn by Exotix to the Claimant ("VR").

Express terms

4. The sale from CVI to Exotix was subject to the following express terms, among others:

> "14(5) [CVI and Exotix] understand and accept that this trade is subject to the issuance by the [National Bank of Ukraine: "NBU"], of an amendment or a supplement to any registration certificate issued to any Borrower in relation to the Credit Agreement or some similar evidence of acceptance reasonably satisfactory to [CVI] and [VR], and reflecting the relevant transfers, substantially, in accordance with Clause 22.8 (Filing of Transfer Certificates with the NBU) ("NBU Registration").
>
> 14(6) The parties agree and acknowledge that if proof of NBU Registration has not been received by 30th November 2014 then this trade may be unwound at [VR's] option in the manner set out in the following paragraph. [CVI, Exotix and VR] may, on or before 30th November 2014, review the situation and may agree that a further review period be set.
>
> 14(7) If [VR] elects to unwind the trade in accordance with the preceding paragraph, then (1) [CVI, Exotix and VR] shall enter into a multilateral netting agreement with the intention of returning the parties, to the extent possible, to the positions they were in prior to the Trade Date, and (2) [CVI and VR] shall enter into an agreement whereby the Traded Portion (or the amount thereof outstanding at that date) shall be transferred directly between the two parties. [CVI and Exotix] shall, and [Exotix] shall procure that [VR] shall, act in good faith towards each other in relation to any unwinding of this transaction."

5. The sale from Exotix to VR included comparable (express) terms, so far as material to the outcome of this litigation. The final sentence of clause 14(7) provided that: "[Exotix and VR] shall, and [Exotix] shall procure that [CVI] shall, act in good faith towards each other in relation to any unwinding of this transaction."

6. Other express terms are relevant, but it is probably more convenient if I identify these later in this judgment.

The dispute

7. In the event, no proof of NBU Registration was received by 30th November 2014. The parties did not agree a further review period.

8. The market had moved against the Traded Portion and VR elected to unwind the trade. Its entitlement to do so, and the consequences of its doing so, are the subject of this litigation.

9. In my judgment the answer to the litigation as a whole is plainly revealed by the facts. I shall take these first, as I find them to be as a result of the documents and evidence given at trial. I confine myself to the facts necessary to decide the litigation. There were many points of detail that ultimately made little contribution.

10. Commercially, a great deal of the argument is ultimately between VR and CVI. I express my gratitude to Mr Andrew George QC and Ms Flora Robertson for Exotix for ensuring that their examination of witnesses and their oral submissions did not involve any duplication with those of other counsel, while their written argument concisely and properly advanced their clients' case.

The material facts

11. The possibility that the deadline of 30th November 2014 might not be met, and therefore that the option to unwind might become exercisable, was appreciated by all parties. As November arrived this appreciation caused VR to strive to avoid the risk of matters ending where they did: the option exercised but that exercise challenged by CVI.

12. In late October CVI noted internally that an amendment agreement had been prepared and it was proposed to add VR "before circulating for signature from the other lenders". By 4th November it was still "with Interpipe for their approval to circulate to the lenders".

13. By 13th November an update was circulated within CVI that Interpipe had requested and been provided with a breakdown of PIK (or payment in kind) interest calculations within the transfer certificates, and Interpipe's "sign off on this" was awaited "and then [Citi] will circulate the agreement to the lenders". Mr Carlisle of CVI received an internal email later that day saying there was a "need to keep up with this monitoring" since there was the 30th November deadline.

14. It transpired there was a discrepancy concerning the PIK interest. The discrepancy was minor, but it nonetheless had to be addressed in the documentation before NBU Registration could take place. The issue was raised on Wednesday 19th November 2014 by Citibank, and the next day, the Thursday, Citibank sent through trade certificates (and an accession agreement) with an amendment made in handwriting. At

the same time Ms Kylueva of VR gave her attention to the calculation of the PIK interest.

15. On Friday 21st November 2014 at 10.02 Exotix emailed VR and referred to obtaining VR's "sign off" on the amended transfer certificate and accession agreement. At 14.45 (UK time) that day Ms Klyueva of VR emailed Mr Goldsworthy of Exotix that "We are ok to sign the amended transfer certificate and accession agreement". I accept her evidence that she expected to receive typed versions for signature. I also fully understand why: this was in accordance with VR's internal policy and previous - even if not invariable - practice with Exotix. I add that one of the expert witnesses, Mr Ognevyuk, brought out particularly clearly the reluctance that can be experienced in Ukraine to trust hand amended documents.

16. Ms Klyueva's mind was also focussed that Friday afternoon on the desirability of arranging for VR authorised signatories to sign all required documents at the same time. She emailed Mr Goldsworthy to ask whether other documents required amendments. He replied that "we think that it [sic] there is only a need to amend the Pricing Letter" and attached a typed amended pricing letter. It was now 16.52 UK time on Friday 21st November.

17. I am quite satisfied that both Exotix (by Mr Goldsworthy, who I found to be a conscientious and straightforward person, making the best assessment I can) and CVI (by Mr Carlisle) took the view by that Friday afternoon that it was unrealistic for NBU Registration to be obtained by 30th November. As a result, priority was given to the alternative of seeking to agree an extension to the deadline. As Mr Goldsworthy put it "the priority moved from" the amended transfer certificate to the question of the extension agreement. Consistently Mr Goldsworthy, as he left for a period of leave that evening, did not brief his colleague to chase for an amended transfer certificate.

18. Also consistently (and on the specific evidence of Mr Goldsworthy, which I accept) at no point the following week did Exotix chase VR for an executed amended transfer certificate. And when Citibank chased Exotix and CVI on the Tuesday and Wednesday of that following week for an executed amended transfer certificate neither of them responded and neither of them forwarded Citibank's emails to VR. In my judgment CVI and Exotix would have chased if they had thought and still intended that NBU Registration could be done by the deadline. These features attracted understandable emphasis from Mr Tom Smith QC and Mr Robert Amey for VR.

19. Taking a perfectly reasonable view of Mr Goldsworthy's message from the end of Friday, on Monday morning 24th November Ms Klyueva arranged the necessary authorised signatures to the amended pricing letter alone, sending this to Exotix at 12.48 UK time that day.

20. Having heard the evidence at trial, I consider no criticism is warranted of VR or of Exotix. In particular, Ms Klyueva did all that could reasonably be expected of her in the circumstances: this included promptly confirming readiness to sign an amended transfer certificate and an accession agreement, and seeing to the prompt execution of the only document provided to her in typed form, i.e. the amended pricing letter.

21. There was focus from CVI on how Ms Klyueva and Mr Makhin of VR read an email of 19th November dealing with initialling a hand amended version of a transfer certificate. I found both to be frank and credible witnesses throughout their oral testimony, despite some unhappy paraphrasing in their written witness statements. As a result Mr MacDonald was able for example to secure from Mr Makhin a frank acceptance that the email contained "a clear instruction … to the parties to initial the schedules page on the transfer certificate". And from Ms Klyueva a frank acceptance that "Unfortunately, perhaps, I didn't read it quite as carefully as I should have done".

22. But it is important to be realistic. What is more important in context is not whether this email among many was absorbed but whether, if any other party was expecting more than was forthcoming in response to that email, whether in terms of more content or more speed, that other party followed up and explained.

23. In any event I find that even had VR provided a signed transfer certificate in the version that had been amended in manuscript (rather than typed up), neither Exotix nor CVI would have used it to attempt to obtain NBU Registration by 30th November. This is because of the view they took by the afternoon of Friday 21st November that it was unrealistic to obtain NBU Registration in that timeframe.

24. I heard expert evidence called by each party on the question of obtaining NBU Registration, and specifically how long was required after lodging documents with the NBU before obtaining NBU Registration. All experts had a valuable contribution to make. Something of the uncertainties of the process of preparing for registration, and of the process of registration within the NBU, was itself revealed by the fact that their expert predictions differed. None caused me to conclude that the view held by Mr Goldsworthy on Friday 21st November that it was unrealistic to obtain NBU Registration by the 30th November was other than a reasonable and sensible view. Indeed, as I have said, it was a view shared by CVI.

25. I accept that Mr Antonenko, the expert witness called by CVI, might – especially with his internal knowledge having worked as a former director of the Registration and Licensing Department at the NBU - have expressed a different view at the time, but that does not mean that Mr Goldsworthy's view was not within the range of reasonable opinion.

26. The miscalculation made, by CVI and Exotix, was on the question whether VR would agree an extension of the deadline. I do not think Exotix is to be criticised for its miscalculation, or for that matter CVI for its miscalculation.

Clause 14(6)

27. On the true construction of Clause 14(6) no party was under an obligation to agree to extend the deadline of 30th November. The word "may", in context, makes this plain in my judgment.

28. I must also reject an argument by CVI that a term that VR would take reasonable steps to agree "a further review period" for NBU Registration was to be implied into the trade confirmation between VR and Exotix.

29. That argument was founded on the proposition that the suggested implied term was "obvious and/or necessary". In my judgment it is neither. It was argued that without the alleged implied term there was some redundancy in the (express) reference to the parties reviewing the situation. I cannot accept that. By that reference, the parties were simply and sensibly and usefully identifying an activity that might result in an extension.

Good faith

30. A requirement of "good faith" is included in clause 14(7) of the trade confirmations for both trades.

31. CVI argues that this required faithfulness to an agreed common purpose, and fair dealing. And the purpose of VR's option to unwind was, it is submitted, to provide it with a hedge against the regulatory risk of non-registration and not the economic risk of the market moving against its purchase.

32. An understanding of the purpose of the option is to be derived objectively from the words and context of the transaction. Nonetheless it is valuable to note the useful contribution made by Mr Deitz of VR when cross examined on this subject by Mr MacDonald:

> "… our concerns included ability to enforce. It also included our ability to risk manage the position. The fact that 90 days – it is very unusual for us. If we were to posit a slightly different scenario in which we had purchased Interpipe bonds rather than loans, we would have during those intervening days on every day had the ability to consider our position and decide whether we wanted to sell that position or not.
>
> In the loans we took an additional risk because we didn't have that ability, and for us – to continue, that's a position of vulnerability we don't like to be in, and it was important for that reason as well to have the provision in the confirm. We needed some sort of long stop date."

33. The contract for the sale of the Traded Portion from Exotix to VR included the following express term, also referencing good faith, set out in the relevant trade confirmation:

> "14(8) [VR] will in good faith take all reasonable actions open to it to assist in obtaining NBU Registration".

34. With the benefit of hearing the witnesses called by each, I am satisfied that Exotix and VR acted at all times in good faith and at all times dealt fairly.

35. Even if the purpose of VR having the option to unwind was (as CVI argues) to provide it with a hedge against the regulatory risk of non-registration with the NBU, there was no absence of good faith in VR exercising the option when that regulatory risk had not been removed by the agreed date. That position is not disturbed by the fact that the exercise of the option was to VR's economic advantage.

36. I add that the good faith required in clause 14(7) in any event concerns the process of unwinding rather than the exercise of the option. I do not accept the argument by CVI that the requirement has "limited if any utility" if confined to the process of unwinding – it is precisely in that process that circumstances may be encountered that clause 14(7) has not expressly provided for.

37. And as for clause 14(8), there was no "reasonable action open to [VR] to assist" in obtaining NBU Registration that, acting in good faith, VR failed to take. Mr James MacDonald and Ms Stephanie Wood for CVI urged that the obligation was context sensitive and included "seeking clarification, being proactive, chasing Citi, being frank about extension agreement and assisting the process in any reasonable way". If a step was open, and it was a reasonable step, then it had to be taken, they submitted.

38. I accept that context is important in applying the obligation, but the obligation is probably best understood without further elaboration. In the present case the sequence of events shows, in my assessment, VR taking the steps that it was reasonable to expect of it, in the context and over the period in question to 30th November 2014. It is helpful to recall here the force in Mr George QC's point in oral opening argument that the contract setting was not one in which the parties intended and sought to have a race against time.

39. When the sequence of events is looked at closely, with the benefit of hearing those of the witnesses involved who were called, I do not consider further clarification or activity (including chasing Citi) was required as a reasonable step. And there was no lack of frankness over the extension agreement.

Cooperation

40. An equivalent term to clause 14(8) is not to be found in the trade confirmation between CVI and Exotix. However CVI argues that a term is to be implied into that confirmation that "Exotix would (1) co-operate with CVI, and would procure that VR cooperated with CVI and Exotix, towards obtaining NBU Registration; and (2) would not prevent or hinder NBU Registration taking place, and would procure that VR would not prevent or hinder NBU Registration taking place."

41. In the event, I need reach no conclusion on the contention that there was this implied term as alleged by CVI. I do say however that there are at least aspects of the contention that present real difficulty for CVI.

42. In the present case, on the facts, in my judgment Exotix did co-operate with CVI, VR did cooperate with CVI and Exotix towards obtaining NBU Registration, and neither Exotix nor VR prevented or hindered NBU Registration taking place.

43. I add that to reach a view on cooperation, and on the question of prevention or hindrance, some regard must be had to what CVI itself did or did not do. It did not chase or act or identify where clarification was needed, in areas where it now says others should have acted or chased or sought clarification.

44. I do not have a full account from CVI. Mr Carlisle was not called by CVI, despite CVI having served two witness statements from him. The recollection of Mr Ramli,

who did give evidence for CVI, I found to be poor. Such account as I do have from CVI does not persuade me that, after 21st November 2014, it was working towards NBU Registration by 30th November.

45. CVI advanced the submissions at the trial that it thought an extension would be forthcoming and that had it been aware that VR had no intention of agreeing the extension agreement CVI would also have asked Citi to speed up the process. These submissions further confirm to me that CVI had formed the view that an extension would be forthcoming and therefore that things were not proceeding too slowly. The problem was that its view about the extension was mistaken, and not, in my judgment, as a result of anything said by VR or Exotix.

Clause 28

46. Both trades were additionally expressed to be "… subject to the Standard Terms and Conditions … of the Loan Market Association ('LMA') as in effect on the Trade Date".

47. The relevant LMA Standard Terms and Conditions were those in effect dated 3 March 2014. By Clause 28 of those terms Exotix agreed with CVI and VR agreed with Exotix "… to take any further action and to execute any further documents and/or instruments as [CVI in the CVI/ Exotix trade; Exotix in the Exotix/VR trade] may reasonably request to give effect to the transaction".

48. Although reliance was placed on this clause at trial, there was no failing on the part of Exotix or VR as regards their obligation to take action and execute documents where CVI (in the CVI/ Exotix trade) and Exotix (in the Exotix/VR trade) made a reasonable request to give effect to the transaction.

Agency

49. CVI suggested that Exotix was its "agent for the purposes of passing information to and receiving information from VR in connection with" NBU Registration and an extension.

50. There is no foundation for this argument on the facts. Exotix was a broker but it took on no agency and it acted as principal in each trade. Furthermore Clause 14(10) of the trade confirmation between Exotix and CVI provided expressly that neither was "obliged to share any information in connection with the Sale/Purchase or any other information possessed by it with the other party." No later communication between Exotix and CVI, and specifically those involving Mr Goldsworthy, Mr Carlisle and Mr Jones, credibly imposed the alleged responsibility on Exotix.

Unwinding

51. CVI advanced a further argument. This concerns the unwinding. The relevant clause provides that "[CVI, Exotix and VR] shall enter into a multilateral netting agreement with the intention of returning the parties, to the extent possible, to the positions they were in prior to the Trade Date".

52. The further argument is that the relevant parties cannot be returned to the position they were in prior to the trade date because the market moved against the Traded Portion between the trade date and exercise of the option and one or other party has to bear that market risk. CVI argues this should be VR, pointing to the words "to the extent possible", and urging that "nothing in the clause says it should be CVI", that there is no good reason for it to be CVI, and that its argument is consistent with common sense.

53. In my view the further argument cannot succeed. The position the parties were in prior to the trades was that CVI owned the asset and Exotix and VR owned the purchase monies. The option in practice cancelled the sales where the ultimate seller did not deliver NBU Registration on time. I add that on the evidence I am satisfied that CVI fully appreciated the risk it took when agreeing the option and the 30th November date.

Conclusion

54. In my judgment, VR succeeds on the claim, and Exotix succeeds as against CVI. I invite the parties to discuss the appropriate and most useful and practical form of Order, and I will be pleased to consider this with counsel.