Neutral Citation Number: [2018] EWHC 169 (Comm.)

IN THE HIGH COURT OF JUSTICE **Claim No. CL-2016-000108**

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

His Honour Judge Waksman QC sitting as a Judge of the High Court

Date: 7 February 2018

BETWEEN

(1) LIC TELECOMMUNICATIONS SARL
(2) EMPRENO VENTURES LIMITED

Claimants

- and -

(1) VTB CAPITAL PLC
(2) DELTA CAPITAL INTERNATIONAL AD
(3) MAZE SARL
(4) MILEN VELTCHEV
(5) VIVA TELECOM (LUXEMBOURG) SA
(6) SPAS RUSEV
(7) V TELECOM INVESTMENT SCA
(8) V2 INVESTMENT SARL

Defendants

Stephen Rubin QC, Alexander Milner and Max Kasriel (instructed by Fried Frank Harris Shriver & Jacobson (London) LLP, Solicitors) for the Claimant

Timothy Howe QC and David Caplan (instructed by White & Case LLP Solicitors) for the First Defendant

Craig Orr QC and Saul Lemer (instructed by DAC Beachcroft LLP, Solicitors) for the Second and Fourth Defendants

Rachel Oakeshott (instructed by Mishcon de Reya LLP, Solicitors) for the Third Defendant

Graham Chapman QC and Thomas Ogden (instructed by CMC Cameron McKenna Nabarro Olswang LLP, Solicitors) for the Fifth Defendant

The Sixth to Eighth Defendants did not appear and were not represented

Hearing dates: 11-14 and 18 December 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.

INTRODUCTION

1. This is my judgment on a trial of preliminary issues. The issues all concern aspects of Luxembourg law. The underlying case is about a disputed sale of shares in a company which is one of the main players in the Bulgarian telecommunications industry.

The Parties

2. The Second Claimant ("Empreno") is a BVI company. It is the indirect 100% owner of the First Claimant, LIC Telecommunications SARL ("LIC"), a Luxembourg company. Both Claimants are alleged to ultimately owned beneficially by a Russian businessman, Dmitry Kosarev, and this is assumed for present purposes. LIC is a 43.3% shareholder in the Seventh Defendant, V Telecom Investment SCA ("V Telecom"), a Luxembourg limited partnership. V Telecom in turn owns 100% of the Eighth Defendant, V2 Investment SARL ("V2"), another Luxembourg company. Prior to the disputed share sale, V2 owned 100% of the shares in Inter V Investment SARL ("Inter V"), also a Luxembourg company but not a party to this action. Inter V was the 100% owner of the shares in Viva Telecom Bulgaria EOOD, a Bulgarian company which lay at the head of the Vivacom Group of Bulgarian telecommunications companies ("the Group").

3. The First Defendant, VTB Capital Plc ("VTBC") is an English financial and banking services company regulated by the Financial Conduct Authority. It is an indirect subsidiary of JSC VTB Bank ("VTB"), a state-owned Russian bank. Pursuant to a written agreement dated 6 November 2013 ("the Loan Agreement"), VTBC, together with Corporate Commercial Bank ("CCB"), a Bulgarian bank ultimately owned by Tsvetan Vassilev, agreed to lend to Inter V €150m ("the Loan"). The Loan Agreement is governed by English law. By a further written agreement dated 22 November 2013 (" the Pledge Agreement"), and as security for Inter V's obligations under the Loan Agreement, V2 granted to VTBC a first-ranking pledge over its 100% shareholding in Inter V ("the Pledge"). The Pledge Agreement is governed by Luxembourg law.

4. VTB is the ultimate 100% owner of a Guernsey company called Crusher Investment Ltd ("Crusher"). Crusher owned 33.3% of the shares in V Telecom.

5. I shall refer to the shares in Inter V as "the Shares".

6. The Second Defendant, Delta Capital International AD ("Delta") and the Third Defendant, Maze SARL ("Maze"), are Bulgarian and Luxembourg companies respectively, which were nominees of VTBC as directors of V Telecom, V2 and Inter V.

7. The Fourth Defendant, Milen Veltchev, is a former Bulgarian Minister of Finance and is now the CEO of VTB Capital AD, a Bulgarian affiliate of VTB. He is also a director of and a shareholder in Delta. His brother is a Managing Director of a company within the VTB group and a shareholder in Delta.

8. The Fifth Defendant, Viva Telecom (Luxembourg) SA ("Viva Luxembourg"), is a Luxembourg company incorporated in February 2015. It acquired the Shares from VTBC as pledgee, pursuant to the sale transaction which has generated the present dispute. The Sixth Defendant, Spas Rusev, is a Bulgarian businessman said to be an associate of Mr Veltchev and has been a director of Viva Luxembourg since 13 October 2015.

The Sale of the Shares

9. The Loan should have been repaid by 22 May 2015 but it was not. VTBC subsequently took steps to enforce its security in the form of the Shares as pledged to it by V2. The upshot was that by an agreement dated 24 November 2015 ("the Sale Agreement"), VTBC sold the Shares

to Viva Luxembourg ("the Sale"). V2 was not a party to that agreement and while it has been joined as a Defendant to this action it has chosen to play no part in it. It did not object as borrower either to the fact or manner of the Sale either at the time or subsequently.

10. The shares were sold for €330m. The Claimants allege that this was on any view a sale at a gross undervalue because at the time they were worth at least €473m.

The Claim

11. The essence of the claims made by the Claimants is that the Sale was rigged and was the product of a conspiracy between VTBC and some of the other Defendants to remove control of the Bulgarian telecommunications industry, or at least a substantial part of it, away from the Claimants, since V2 was now no longer the owner of the Shares. Moreover, to the extent that the excess of the sale monies over the debt owed by Inter V was paid back to Inter V (or V2), it was much less than it should have been because of the sale at an undervalue.

12. It is necessary now to set out a substantial part of the allegations made in the Amended Particulars of Claim because first, those allegations (other than as to Luxembourg law) are to be assumed to be true in this preliminary issue trial and second, the precise way in which the Claimants put their claim is important for present purposes.

13. As to the relevant factual background, the Claimants allege as follows:

    (1) by September 2012, it had been agreed that CCB would acquire a 73% interest in V Telecom (and hence the Group); part of that interest would be held through LIC and part of it would be held, for the purpose of security only, by Crusher, on the basis that VTBC was financing part of CCB's acquisition costs;

    (2) ultimately, the shareholding became 76.6% because certain minority shareholders did not take up their full allotment. That percentage was represented by LIC's 43.3% interest and Crusher's 33.3% interest in V Telecom. Notwithstanding the latter shareholding, this was intended to be only a temporary interest held by Crusher for VTBC for the purposes of security only, and CCB was intended to be the beneficial owner of the entire 76.6%;

    (3) Crusher's 33.3% security interest was held by it pursuant to a Total Return Swap Agreement dated 5 September 2012 ("the TRS Agreement") whereby a subsidiary of CCB called Technology Centre-Institute of Microelectronics ("TC-IME") would make payments to Crusher (representing repayments of VTBC's part-financing of CCB's acquisition of V Telecom) and in return, upon full payment or termination of the TRS Agreement, Crusher would redeliver its 33.3% shareholding;

    (4) thus far, neither Empreno nor Mr Kosarev were involved;

    (5) it was an implied term of the Loan Agreement that VTBC would not unreasonably obstruct repayment of the Loan in order to take advantage of its position as secured creditor;

    (6) under the Pledge Agreement, VTBC could enforce the Pledge following the occurrence of a Declared Default. If that happened, then by clause 9.1(b) enforcement could be effected in various ways including "upon mutual agreement in a private transaction at normal commercial conditions", "on a stock exchange" or "by public auction".

    (7) by clause 10.2 of the Loan Agreement, Inter V would have to pay a Duration Fee of about €2m if the Loan was not refinanced by 22 November 2014; in around July 2014

the Group started to explore possibilities to refinance the Loan. Because of EU and US sanctions against VTB, a number of Western banks withdrew their interest in doing so. Accordingly, the Group approached VTBC to refinance the Loan itself but it refused. Later, a company called Gemcorp offered to provide a new loan of €171m but this was blocked by VTBC which instructed Maze and Delta to abstain from voting on it and influenced the minority shareholders to vote against it.

(8) on 3 November 2014, VTBC did offer to refinance the Loan but it provided that €25m of the new loan would be paid out to Crusher by way of a "special distribution" for which there was no proper commercial justification and so the Group did not take up that offer. Because there was no refinancing in place by 22 November 2014 Inter V had to pay the €2m fee;

(9) then, in January 2015, Mr Vassilev sold his (CCB's) interests in the Group to entities controlled by a Mr Louvrier; this was followed by an attempt on the part of VTB to gain control of the entire 76.6% of the shares but it failed; instead, in July 2015, Empreno (and hence Mr Kosarev) acquired the 76.6% shareholding from Mr Louvrier, comprising the 43.3% held by LIC and the 33.3% being held by Crusher as security;

(10) in April 2015, VTBC made a further offer to refinance the loan but again this was on condition that there would be a "Special Distribution" to Crusher, this time for €29.8m, which was again refused; but on 10 June 2015 VTBC, Delta and Inter V entered into a standstill agreement whereby VTBC and Delta agreed not to exercise certain rights under the Loan Agreement, including the right to demand accelerated payment of the Loan and the right to enforce the transaction security ("the Standstill Agreement"). The standstill period thereunder has been successively extended and was due to expire on 10 March 2016;

(11) nonetheless, during the standstill period, steps were taken to enforce the sale of the shares held by VTBC as security and it appointed Ernst and Young LLP, London ("EY") as its special adviser in this regard;

(12) in October 2015, Empreno sought information from VTBC about what was happening in this process but was not provided with any;

(13) on 20 October 2015, the Schneider Media & Holding Group made an offer to buy the Shares and certain intra-group loans and this offer valued the Group business at €850m;

(14) on 22 October 2015, Seren and Titan, the directors nominated by LIC, and Mr Tennenbaum, the director nominated by the minority shareholders, all resigned as directors of the Group companies. Thus LIC had no representation on the relevant boards which gave VTBC the opportunity to exercise complete control over the affairs of the Group including with regard to the Loan and the sale of the Shares; (I interpose to say that it is not pleaded, nor do I know, why those directors resigned, nor do I know whether they have by now been replaced);

(15) on 28 October and prior to the service of any default notice under the Loan Agreement, Empreno offered to refinance the Loan itself for a three month period; while VTBC said that it would consider any serious offer, the reality was that VTBC made no real effort to engage with Empreno on this and insisted upon detailed information requirements. Nonetheless, after VTBC sent to Empreno a draft non-disclosure agreement on 10 November which Empreno returned on 12 November with some amendments, VTBC then said that the terms of this agreement were not negotiable;

(16) on the following day, it was reported that the sale of the shares had taken place on 19 November; three potential buyers were said to be Mr Rusev, Mr Schneider and a Panos Germanos, but Mr Rusev was said to be the party likely to succeed since he was being supported by VTB;

(17) Empreno expressed its concerns about what appeared to be a pre-ordained sale but said it was still willing to provide the information sought by VTB as long as the shares were not sold in the meantime;

(18) on 20 November, VTBC announced that it had sold the shares at auction for €330m; it transpired that the purchaser was a consortium which included Mr Rusev and VTBC and which effected the purchase through Viva Luxembourg;

(19) the sale of the shares was in fact unlawful because:

(a) no acceleration notice under the Loan Agreement had been served so there was no event of default for the purpose of the Pledge Agreement;

(b) VTBC had agreed not to serve such a notice under the Standstill Agreement until March 2016;

(c) there had been in place since 7 April 2015 an attachment order made by the Luxembourg Tribunal d'Arrondissement on the application of the Bulgarian prosecuting authorities ("the Attachment"); and

(d) accordingly a purported acceleration notice served by VTBC on 24 November was too late and was anyway of no effect;

(20) in the meantime, Crusher had become obliged under the TRS Agreement to release the 33.3% shareholding held as security because TC-IME had made the necessary repayments; moreover, the TRS Agreement had terminated early due to the insolvency of TC-IME and the effect of this was that Crusher was then obliged either to return the shares or to pay their value; on 17 July 2014 it had elected to return the shares but never did so; as a result, TC-IME brought arbitration proceedings against Crusher which are ongoing;

(21) it follows from the above that the Claimants' case is that at all material times they have been the indirect owners of 43.3% of the Shares now sold to Viva Luxembourg.

14. Against that background the particular legal claims made by the Claimants may be summarised as follows: first, as to liability:

(1) Article 6-1 of the Luxembourg Civil Code ("the Code") provides that any act which manifestly exceeds the bounds within which rights are normally exercised gives rise to civil liability ("abuse of rights");

(2) Article 1382 of the Code (the general tort law) provides that any act of a person which causes damage to another person obliges the person at fault to pay compensation; Article 1384 provides that a party is liable not only for damage caused by his own actions but also for damage caused by the actions of persons for whom he is responsible;

(3) Under the general principle of Luxembourg law known as *fraus omnia corrumpit* ["fraud vitiates everything"] ("FOC"), a transaction which takes place under fraudulent conditions is liable to be set aside on the application of an interested party and each party ordered to make restitution to the other of what it has received under the transaction;

(4) The Defendants are at fault and/or have abused their rights and/or have acted in breach of the Law on Commercial Companies and have thereby caused damage to the Claimants and are accordingly liable to compensate them pursuant to Article 1382 and/or Article 6-1 (paragraph 54);

(5) VTBC was at fault and/or has abused its rights because:

(a) it sold the Shares or caused them to be sold in breach of the Loan Agreement and/or the Standstill Agreement;

(b) it sold the InterV shares or caused them to be sold in breach of the Attachment;

(c) it acted in breach of the Pledge Agreement and/or Article 11 of the Luxembourg Law on Financial Collateral Arrangements of 5 August 2005 ("the FCL") by failing to dispose of the shares in a permitted manner; in particular, the purported auction was not a public auction and/or was not a proper auction conducted *bona fide* in the best interests of the creditors and shareholders of the Group. Rather, it was a dishonest sham intended to give the false appearance of being a genuine sale at arm's length for a fair value while in fact delivering the Shares at an undervalue to the purchasing consortium; further details of the inadequacy of the sale process are then given in paragraph 55 (3) (i) - (viii);

(d) VTBC did not purport to or in fact sell the Shares *"upon mutual agreement in a private transaction at normal commercial conditions"* because they were not sold under such conditions and V2 had not consented to that transaction;

(e) in breach of the implied term of the Loan Agreement, VTBC unreasonably obstructed the repayment of the Loan;

(f) VTBC also sought to exclude LIC from being in a position to influence V2 and InterV by instructing the corporate administration agents in Luxembourg to frustrate or unreasonably delay the appointment of representatives of LIC on the relevant corporate boards;

(g) it also made deceitful statements to Empreno in relation to the auction process;

(h) finally, it procured and/or assisted in the wrongful conduct of Delta, Maze, Mr Veltchev, Mr Rusev and Viva Luxembourg;

(6) Delta and Maze as directors of InterV, and Mr Veltchev as a director and representative of Delta, were at fault and/or have abused their rights and/or have acted in breach of the Luxembourg Law on Commercial Companies because in breach of their duties, they failed to take any or sufficient steps to ensure that the Shares were not disposed of by VTBC or alternatively that any auction was conducted fairly, honestly and lawfully so as to realise the greatest possible benefit for V2 and its shareholders. Instead they colluded with VTBC by permitting it to dispose of the shares through a sham "auction" process so that VTBC itself and related parties gained control over the Group's business and assets;

(7) it is to be inferred from the circumstances of the sale that Mr Rusev and Viva Luxembourg (to which Mr Rusev's actions were to be attributed) wrongfully colluded and conspired with VTBC to ensure that the Shares were sold to Viva Luxembourg pursuant to the sham "auction" process, in disregard of the Claimants' rights;

(8) the purported auction of the Shares was not a proper auction conducted *bona fide* in the best interests of the creditors and shareholders of the Group but a dishonest sham intended to deliver the InterV shares to the Defendants or related parties at an undervalue, in fraud of the Claimants. Such conduct on the part of VTBC, Mr Rusev and Viva Luxembourg engaged the FOC principle, such that the auction and the purported sale of the Shares to Viva Luxembourg are liable to be set aside and the Shares or their value restored to V2;

(9) the sale of the Shares in breach of the Attachment was a criminal offence and a civil tort on the part of VTBC, Mr Rusev and Viva Luxembourg, actionable at the suit of the Claimants.

15. Then, as to loss and damage and relief sought:

(1) the purported auction and the Sale are liable to be set aside pursuant to the FOC principle, so that the Claimants are entitled to and claim an order requiring the Defendants to return the Shares or procure their return or restore their value to V2;

(2) further or alternatively, as a result of the Defendants' fraud, fault and/or abuse of their rights or conspiracy to injure by unlawful means the Claimants have suffered loss and damage:

(a) if the Defendants had not acted fraudulently or been at fault or abused their rights then Empreno would have bid or procured a bid by a related party for the Shares in any auction process. The Claimants have therefore lost the opportunity to gain control over the business and assets of the Group;

(b) alternatively, Empreno would have been provided with the documentation relating to the "auction" and would have been in a position to and would have participated in the auction or procured the refinancing of the Loan before any sale of the Shares took place. On any view, therefore, the Claimants were deprived of their substantial economic interest in the business and assets of the Group;

(c) in the further alternative, the InterV shares would have been sold to the highest bidder for substantially more than the €330m offered by Mr Rusev. The Claimants would have benefited to the extent of 43.3% of the excess sale proceeds;

(3) the Claimants are entitled to and claim damages to compensate them for the loss of their interest in the InterV shares and/or the opportunity to acquire control over the Group; such damages are to be calculated by reference to:

(a) the amount of money which would put the Claimants in the position they would have been in but for the Defendants' wrongful conduct. In particular, but for the Defendants' wrongful conduct the Claimants would have acquired control over 100% of the Shares and the Group. The Claimants are therefore entitled to damages in an amount equal to the difference between the present value of the Shares and their value as at November 2015; alternatively

(b) the Claimants lost the opportunity to purchase or acquire control over the InterV shares and are entitled to damages accordingly on a loss-of-chance basis;

(c) in the further alternative, the damages are to be calculated by reference to the value of the 43.3% indirect shareholding in the Vivacom Group companies which the Claimants lost as a result of the Defendants' unlawful actions;

(4) under Luxembourg law, the Claimants as companies indirectly interested in V2 through their 43.3% holding in V Telecom are entitled to claim compensation by way of damages in tort and/or damages or compensation in lieu of an injunction or other orders designed to reverse the Defendants' abuse of their rights; the loss the Claimants have sustained is not a pure monetary loss but rather the loss of a commercial position through loss of control of or the opportunity to acquire control of the Group; and/or their claims arise out of their exclusion from the sale process in which they would or might have succeeded in acquiring the Shares if they had been allowed to participate. They thereby lost the valuable chance or opportunity to participate and are entitled to recover damages on that basis; and/or

(5) under Article 6-1 any abuse can be reversed or eliminated so far as possible by the court. The Claimants are entitled to any remedy that the court can fashion to reverse or eliminate the abuse, including ordering the return of the shares to V2. The fact that Viva Luxembourg has obtained rights in respect of the shares does not preclude an order for the return of the shares to V2 since Viva Luxembourg is the creature of VTBC and/or Mr Rusev and is thus not a bona fide purchaser for value and does not take the shares without notice of the Claimants' and V2's rights; and anyway, the shares are subject to criminal attachments and no sale of the shares was legally permissible by virtue of such attachments; and/or

(6) the Claimants' loss of their valuable commercial interest in Viva Bulgaria through the sale of the shares in InterV is in any event sufficiently direct, certain and personal to give rise to a right to compensation;

(7) there is then a claim for interest and also for a declaration that V2's shares in InterV were sold unlawfully and at an undervalue.

The Defences

16. No defences have been served by Mr Rusev, V Telecom or V2. For present purposes, it suffices to say that the Defences served by the other defendants say, in summary:

(1) all allegations of wrongdoing are denied; in particular, the Sale was not in any way rigged or improper;

(2) Luxembourg law governs the claims, save that VTBC says the issue of applicable law is a matter for trial and Delta and Mr Veltchev say the claims are governed by English law;

(3) as a matter of Luxembourg law, even if the facts alleged in the Amended Particulars of Claim (as summarised above) were true, no viable claims arise.

17. Further, and again in summary:

(1) as an overarching point, the principle of FOC does not apply here;

(2) the claim to set aside the Sale must fail because the Claimants were not party to the Sale Agreement or the Loan or Pledge Agreements; any exception to the Luxembourg rule of privity does not apply and in any event the effect of the FCL is to prevent any such claims;

(3) any claim by the Claimants for damages for loss of their indirect interest in the Shares must fail because it is purely reflective of the loss suffered by V2 as the direct owner of the Shares;

(4) any further claim by the Claimants for damages, based on their inability to purchase the Shares (instead of Viva Luxembourg) or a lost opportunity to do so, must also fail because it is too remote in terms of causation and/or is too uncertain and/or the FCL, again, operates to prevent such a claim;

(5) any claim for declaratory relief must fail since it is parasitic upon the substantive claims succeeding which they do not.

18. The Claimants in turn rejected those defences. In particular, they say that FOC does apply, both in support of the claim to set aside the Sale and so as to disapply any rule against the recovery by way of damages of any reflective loss, the other damages claims are not too remote and the FCL does not act as a bar to any of its claims.

The Position of V2

19. Although joined, no substantive claim is made against V2. Nor it is alleged here that it (or Inter V) was part of the conspiracy. V2 has made no claim against VTBC as far as I am aware. Nor is it alleged that V2 is now dysfunctional as a company. There is merely a reference to the resignation of certain nominated directors (see above). In interlocutory applications made by LIC to the Luxembourg District Court for a receivership order over the Shares and injunctive relied against Viva Luxembourg and Inter V (which failed) V2 was added as a party. However it seems in the end to have taken no part and no substantive order was sought against it.

THE PRELIMINARY ISSUES

20. On 11 November 2016 VTBC applied for a trial of certain preliminary issues of Luxembourg law and this led to a consent order being made on 24 November 2016 for such a trial. Following some later amendments, the Preliminary Issues for determination by me are defined as follows:

"As a matter of Luxembourg law:

(i) are the Claimants precluded from claiming damages or monetary compensation in tort or in lieu of an injunction as pleaded in paragraphs 66-67 of the Amended Particulars of Claim in respect of their (alleged) loss of an indirect interest in the InterV Shares through their (claimed) 43.3% holding in V Telecom and/or their (alleged) loss of 43.3% of any excess sale price; and/or

(ii) are the Claimants precluded from claiming damages or monetary compensation as pleaded in paragraph 66-67 of the Amended Particulars of Claim and paragraphs 71-73 and 87 of the Further Information in Response to the Request by the Second and Fourth Defendants in respect of their (alleged) loss of a valuable chance or opportunity to participate in the EY Sale Process and acquire the InterV Shares and/or control over the Vivacom Group; and/or

(iii) are the Claimants precluded from claiming any order(s) requiring the setting aside of the sale of the InterV Shares and/or the return of the InterV Shares (or their value) to V2, on the basis of the principle of fraus omnia corrumpit and/or the doctrine of

actionable abuse of rights under Article 6-1 of the Luxembourg Civil Code, as pleaded in paragraphs 65 and 67(3) of the Amended Particulars of Claim; and/or

(iv) are the Claimants precluded from claiming a declaration that V2's shares in InterV were sold unlawfully and at an undervalue, as pleaded in paragraph (I) of the prayer in the Amended Particulars of Claim;

by reason of the fact that (a) their (alleged) interest in the InterV Shares was indirect, via V Telecom and V2 and/or (b) they were not parties to the Facility Agreement, the Pledge Agreement or the Standstill Letters or the agreements affecting the sale of the InterV Shares to Viva Luxembourg and/or by reason of (c) the application of the Law of 5 August 2005 on Financial Collateral Agreements and/or its effect on third parties and/or (d) the absence of any legal right of the Claimants to participate in the EY Sale Process (or any other enforcement process)?"

21. In this judgment I shall deal with Issue (iii) first, to be followed by Issues, (i), (ii) and (iv).

THE NATURE OF THIS TRIAL

22. It is submitted by the Claimants that notwithstanding the agreed direction that there be a trial of the Preliminary Issues referred to above, the hearing before me more accurately represented applications by the Defendants to strike out all or part of LIC's claims or for summary judgment against them. Accordingly, unless it could be shown by the Defendants that such claims had no real prospect of success in the relevant respects, the claims must be allowed to go to a full trial hereafter. The Claimants rely in particular on the use of the word "precluded" in the agreed order. I reject this submission. This is and has been a trial in the usual way. The fact that it is confined to particular issues and that they concern foreign law makes no difference. Nor does the fact that the Defendants have accepted that they bear the burden of persuading me that their contentions as to the effect of Luxembourg law (itself, strictly, a question of fact for this Court) are correct. The standard of proof for the Defendants is the usual one, namely whether, on the balance of probabilities, they are correct in their contentions as to all or any part of the Preliminary Issues.

23. It is true that if, on closer analysis, it transpired at the hearing of preliminary issues that real difficulties arose, such as serious and unresolved issues of fact which could affect how all or any of the issues (for example of law) would be decided, or that the overlap of the preliminary and other issues would render it difficult to isolate them, or that circumstances now arose which meant that any preliminary issue findings would be of little or no real utility, or that a particular issue was not in truth within the agreed Preliminary Issues at all, then of course, the Court has the power to make no order one way or the other. See, for example, the decision of Neuberger J in *Steele v Steele* 27 April 2001. The possibility of such difficulties is of course why any court, when considering whether or not to order preliminary issues, must ensure that it is an appropriate case so to direct. The reason why a court can in the event decide to make no order at all on a preliminary issue is because there will still be a "main" trial later at which it can be decided.

24. But unless circumstances like those arise here, the Court must make a determination on the Preliminary Issues on the material before it, and that is the approach I shall take.

THE EVIDENCE

25. Since the issues all concern the effect of Luxembourg law, the witness evidence at trial has been confined to that given by two experts. The Claimants' expert is Mr Marc Thewes, a

Luxembourg Advocate since 1991. He is also a member of the Luxembourg Council of State and a lecturer at the University of Luxembourg. He has also published extensively.

26. The Defendants' expert is Prof André Prüm. He holds the Chair in Finance and Business Law at the University of Luxembourg and served as Founding Dean of the Faculty of Law, Economics and Finance at that University from 2005-2012. He has also been heavily involved in the modernisation of Luxembourg financial law including securitisation. He has also published extensively.

27. Both experts produced initial reports and then three supplemental reports on the following dates: 20/21 March, 20 June, 3 October and 14 November 2017. I shall treat these as four consecutive reports and refer to them as "Thewes 2", for example. The experts also produced two joint memoranda of discussions between them, dated 16 May and 24 October 2017. They were cross-examined extensively at this trial.

28. Notwithstanding extensive closing submissions made by the parties suggesting that one or other of the experts were essentially unreliable, I took the view that in general they gave helpful and knowledgeable evidence. Sometimes, I accept, Prof Prüm's greater specialist knowledge gave him an advantage. On the other hand, he sometimes over-used his expertise. And on occasion, Mr Thewes' references were incomplete or inaccurate. Further, both experts were inclined sometimes to act more as advocates for the party instructing them than as dispassionate analysts of the legal materials. In the end, none of this prevented me from reaching clear views on the issues. To a large extent this was because both experts relied heavily on case-law (even though there is no strict doctrine of precedent) or on academic materials; and in truth I could often discern for myself what a particular case did or did not decide, whether it was distinguishable and what the significance of a particular article was.

ISSUE (iii) – THE CLAIM TO SET ASIDE THE SALE

Introduction

29. This claim only affects VTBC and Viva Luxembourg.

30. As refined in argument and cross-examination of the experts, three issues arise:

    (1) Does FOC apply here?
    (2) If it does, is there the required *concert frauduleux*?
    (3) If so, is the claim nonetheless prevented by the FCL?

31. I deal with each in turn.

FOC

Introduction

32. In the end, it was common ground between the experts that FOC and *concert frauduleux* are separate but related concepts. In brief, if FOC is made out in principle, so as to nullify or set aside a particular transaction, the Court may not be able to grant that remedy if one of the parties to the impugned transaction had acted in good faith - because then, his rights would be overridden by the order in favour of the Claimant. However, no such problem arises if that party had not acted in good faith but instead had colluded in the fraud perpetrated or intended to be perpetrated by the other party to the transaction i.e. if there was a *concert frauduleux* between them. In such a case, a third party claimant otherwise entitled to invoke FOC would not be debarred from the remedy. See paragraphs 31-33 of Thewes 2 and paragraphs 13 (1) (c) and (2) (b) of the first joint statement. Although in his closing oral submissions, Mr Rubin QC suggested at one point that it was not necessary to show FOC as a first condition of the

claim to set aside, but only *concert frauduleux*, I reject that suggestion. It is not supported by the expert evidence.

33. That being so, the first question in this context is whether in principle FOC can apply at all, on the assumed facts. FOC, and not merely a cause of action in tort based on fraud, is necessary here because the latter would not entitle the Claimants to an order setting aside the Sale but merely damages.

34. It is fair to say that the argument made by the Defendants at this trial that the requirements of FOC have not been made out was not really highlighted previously in discussions about the Preliminary Issues. However, it was clearly raised in Prüm 2 (paras. 3.24-3.37), Prüm 4 (para. 2.23 (a)), the first joined memorandum (para. 13(2)a) and then in paragraphs 81 (1) and 129 (2) (a) of VTBC's opening submissions. It was later canvassed with both experts in oral evidence. Further, the applicability or otherwise of FOC was addressed in closing submissions.

35. Accordingly, there can be no procedural objection (and none was taken) to my consideration of the first challenge under this issue which is the lack of any operative FOC.

The three requirements

36. Both experts also agreed in the end that for FOC to apply, three separate elements must be made out as stated in a leading article on the subject, "Theory of fraud in French law: *fraus omnia corrumpit* - old law, new opportunities?" by Catherine Pédamon, to which I shall refer simply as "Pédamon". Although addressed to French law it is common ground that Pédamon applies equally to Luxembourg law.

37. Having reviewed the relevant legal materials Pédamon adopts the thesis propounded by Mr. Vidal, that the three necessary elements are (1) a mandatory rule (2) the intention to elude its application and (3) the use of efficient means to defraud a party. These are then elaborated upon:

    (1) as to the mandatory rule, the fraud must seek to undo or avoid its enforcement whether the rule be legal contractual general or specific; there is no limit to the mandatory rule so long as it produces a binding effect which the fraudulent party has to respect when its conditions of enforcement are met;

    (2) the relevant fraudulent intention is the intention to elude the application of the mandatory rule or to use deceitful means in order to achieve the unlawful outcome in an apparently lawful fashion; the evasion of the mandatory rule may be as to its letter or its spirit;

    (3) the means used to elude the mandatory rule must be efficient in the sense that they have actually caused prejudice to the innocent parties by means of the breach (in a broad sense) of the mandatory rule.

38. Pédamon then usefully sums up the "corrective mechanism" constituted by FOC as allowing "the setting aside of the unlawful outcome reached through ingenious, but lawful, subterfuges."

39. Thus explained, FOC is readily understandable. A right possessed by A, or the spirit of that right, cannot be circumvented by an apparently lawful act committed by B where B has done so with a fraudulent intent as against A. The essential remedy is to nullify or set aside the apparently lawful act. The doctrine is thus all about the disapplication or unwinding of the legal act which B could otherwise invoke as a justification for what it has done. This is implicit

in the translation of FOC as "fraud vitiates everything" and there is an obvious parallel with the principle of English law that "fraud unravels all".

40. A good example of the principle in action is the Court of Cassation case of *Barilla* 27 June 1989. Here, shareholders in the holding company were not permitted to transfer their shares to a new shareholder without the consent of the company's board. The defendant sold its shares to a shell company which was already a shareholder in the holding company. Strictly, therefore, no approval was necessary. But all of this was a device because two months later the shares in the shell company were sold to a competitor of the holding company. Any sale of the shares directly to the competitor would have required the necessary board approval. The shell company, the defendant and the competitor knew of the approval requirement and had colluded to evade it. The court held that the sale of the shares to the shell company should be set aside. Thus, in this case, (a) the mandatory rule sought to be evaded was the board's power of veto (b) the defendant intended that evasion in fraud of the holding company and (c) had achieved it by the apparently lawful act of transfer to the shell company first and then the onward sale of shares in that company to the competitor. Thus the three requirements were made out and the case also shows that the relevant mandatory rule need only be broken as to its spirit.

FOC in this case

41. In our case, the act impugned and sought to be set aside is the Sale. As for fraudulent intention directed towards the Claimants, this must be assumed for present purposes. But that then leaves the question of the identity of the mandatory rule which protects some right of the Claimants and which has been broken or evaded. How this element was said to be satisfied in this case does not appear clearly from the Amended Particulars of Claim. But it was developed in argument.

42. In the course of that argument the Claimants have shifted ground somewhat as to the mandatory rule relied upon. In the end, and as I find it, the Claimants relied on essentially two rules:

    (1) the first is the rule constituted by the existence of a cause of action in tort where the claimant has been damaged by the wrongful act of another; such a rule, it was said, protected the negative right on the part of the Claimants not to have a tort committed against them ("tortious rights");

    (2) the second is the rule arising from what are said to be the Claimants' contractual rights arising out of their direct shareholding in V Telecom and their indirect shareholding in Inter V and the Group ("contractual rights").

43. As for the mandatory rule in respect of tortious rights, I reject it. In reality it is tautologous. Everyone has a right not to be a victim of an actionable tort but I fail to see how that can be sufficient for a mandatory rule. If it was, then it would follow that in every case where there was an underlying cause of action in tort based on fraud, the first element of FOC would also be made out. That cannot be right. Moreover, Mr Thewes did not really advance it.

44. As for the mandatory rule in respect of contractual rights, this was developed as follows: in cross-examination, and in answer to a question from me, Mr Thewes said that the mandatory rule arose out of the corporate structure set up so that the previous owner of LIC, namely CCB, could hold a 43.3% interest (and indeed, beneficially, a 76.6% interest) in V Telecom and thereby indirectly in the Group. He placed emphasis on the underlying shareholders' agreement made on 31 October 2012 between the various then shareholders in V Telecom, which included CCB, LIC and (as holder of security) Crusher. What that agreement does is to

regulate the relationship between the shareholders. A brief reference to it was made as part of the narrative background in paragraph 14 of the Amended Particulars of Claim. However no particular right in favour of LIC arising out of that agreement was relied upon by Mr Thewes as having been violated or evaded. Instead he simply referred comprehensively to the fact of the "corporate structure". But at the end of the day, all this amounts to is saying that (a) LIC was an indirect shareholder in Inter V and thus the Group, and (b) that LIC was the object (or at least one object) of the Defendants' fraud because they intended by the Sale to diminish its economic interest in the Group. I follow all of that, and subject to questions of reflective loss and causation (see below) I see how this gives rise to the Claimants' claim for damages in fraud. However, I do not see how the fact of LIC's economic interest thus described, as an indirect shareholder, amounts to a "mandatory rule" for present purposes. No case was cited which suggests anything like this. The fact that the alleged fraudulent act may damage the economic interests of a claimant is not the same as saying that a particular mandatory rule has been broken or circumvented. The existence of a cause of action in tort based on fraud, well-established in Luxembourg law, is not the same as FOC. A further suggestion made on behalf of the Claimants was that in truth all that was needed to get FOC off the ground, as it were, was to show that the Claimants had a sufficient interest in the matters complained of to allow them to have standing to bring a claim. I do not intend to rehearse in detail the arguments about this matter: for present purposes, insofar as the threshold requirements for standing or admissibility are something less than the establishment of the three elements of FOC (which at times the Claimants seemed to suggest), the satisfaction of the former can be no substitute for establishing the latter.

45. Moreover, it is not as if the Amended Particulars of Claim even alleges any breach of the shareholders' agreement (to which VTBC was not a party) and in respect of which Crusher (which was) is not a Defendant in this action.

46. So the first requirement of FOC has not been made out.

47. I should deal with one additional point. It is said that a further subsidiary requirement for the operation of FOC is that it can only be used where there is no other means of redress. Or as it is put in Pédamon

> "…it is limited to the cases where….no other legal instruments such as, among others, civil liability or abuse of right, that regulate similar reprehensible acts can be implemented."

48. It is said by the Defendants here that this claim, based on FOC, is not a claim of last resort because in truth it would be open to V2 to bring its own claim in respect of the Sale, it has not done so and it is not alleged that has been disabled from doing so or is dysfunctional. Alternatively, the Claimants, as indirect shareholders, could take protective steps if it was dysfunctional, in respect of, and on behalf of V2, to enable it to make a claim. The Claimants retort that such steps are very difficult in practice to achieve. While I incline to the view on the legal materials and expert evidence that there is such a subsidiary rule, it seems to me that the best time to assess whether in fact there were other remedies open to the Claimants (and of course they do make a claim here for damages, as to which see below) would be after the main trial. And a final view on the existence and extent of this rule is better made in that context. Moreover, because of my finding as to the failure to satisfy the mandatory rule requirement, the point does not strictly arise.

49. Finally, insofar as it was suggested (faintly as it seemed to me) that in truth all that the Claimants needed to show here was the relevant *concert frauduleux* and not FOC, that is not supported by the expert evidence.

50. As a result, FOC cannot be made out, even on the assumed facts and so the claim to set aside is indeed precluded. This conclusion makes it unnecessary for me to deal with the other objections to the claim to set aside encompassed in Issue (iii) but since they have been very fully argued and lest the case goes further, I deal with them below.

FCL

Introduction

51. The argument made by VTBC and Viva Luxembourg against the claim to set aside the Sale is that this is precluded by the operation of the FCL. A welter of case-law and other legal materials has been put before me and the experts have been cross-examined extensively on the subject. However it is neither necessary nor proportionate for me to deal with all of these materials nor every single point made in respect of them. I will deal below with what I consider to be the key points but I should highlight at the outset what seems to me to be the overriding consideration. This is that in my view it is quite clear from the decision of the Court of Appeal in *Pillar Securitisation v New Kaupthing Bank and others* 12 July 2017 Judgment no. 132 IV-COM ("*Pillar")* that the FCL is no bar to a claim to set aside and therefore reverse a fraudulent or bad faith enforcement of a pledge after its enforcement has taken place, as opposed to during the enforcement process. And as I shall explain, I do not consider that *Pillar* is inapplicable here on the basis that the claim there was made by the actual pledgor, and not some more remote party. While, as I have stated above, there is no doctrine of strict precedent in Luxembourg law, it is plain from both experts' evidence that the case-law is nonetheless considered important; it can be seen from the academic writing and in the actual decisions that real weight is given to prior decisions certainly at an appellate level. That must count for more than the view of an expert, even one as eminent as Prof Prüm that *Pillar* is simply wrong. Equally, the fact that it is going on a further appeal to the Cour de Cassation is of no real relevance. I must decide what Luxembourg law is and what a putative Luxembourg court would do, on the basis of the materials presently before me.

The Directive

52. The FCL transposes into domestic law the provisions of EC Directive 2002/47/EEC on Financial Collateral Arrangements. These include arrangements whereby a collateral provider gives financial securities to the collateral taker in respect of financial obligations, or transfers title to the collateral taker as security. The collateral covered includes shares in companies. The Directive provides various ways in which to secure the more efficient operation of financial collateral arrangements whether in terms of their validity or the ability of others to challenge them or their execution.

53. The following recitals are significant:

    (1) Recital (3) says that a Community regime should be created for the provision of securities and cash as collateral which will contribute to the integration and cost-efficiency of the financial market as well as to the stability of the financial system in the Community;

    (2) Recital (10) says that the validity, perfection or enforceability of a financial collateral arrangement should not be made dependent on the performance of formal acts such as execution of documents in particular forms. However the Directive must provide a balance between market efficiency and the safety of the parties to the arrangement and third parties so as to avoid among other things the risk of fraud. This balance should be achieved through the scope of the Directive which covers only those financial

collateral arrangements providing for some form of dispossession and where they are evidenced in writing;

(3) Recital (17) states that the Directive provides for rapid and non-formalistic enforcement procedures to safeguard financial stability. However the Directive balances this with the protection of the collateral provider and third parties by explicitly confirming the possibility for member states to keep or introduce into their national legislation an *a posteriori* [ie after the event] control which the Court can exercise in relation to the realisation or valuation of financial collateral and the calculation of the relevant financial obligations. Such control should allow for the judicial authorities to verify that the realisation or valuation has been concluded in a commercially reasonable manner.

54. Article 4 of the Directive deals with enforcement of financial collateral arrangements and by paragraph 1, Member States are to ensure that on the occurrence of an enforcement event the collateral taker shall be able to realise any financial collateral provided under the security financial collateral arrangement, subject to certain conditions.

55. Article 5 then says that Member States shall ensure that a financial collateral arrangement can take effect notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider or collateral taker. However paragraph 6 states that the above provisions are without prejudice to any requirements under national law to the effect that the realisation or valuation of financial collateral and the calculation of the relevant financial obligations must be conducted in a commercially reasonable manner. Article 8 then continues this theme by stating that certain insolvency provisions should be disapplied. Member States must ensure that a financial collateral arrangement may not be declared invalid or void or reversed on the sole basis that it has come into existence at a time when winding-up proceedings or reorganisation measures are in place.

56. It was not seriously argued before me that the relevant required insulation of such collateral agreements and the enforcement thereof was essentially concerned with challenges arising out of insolvency or similar proceedings affecting the giver of the collateral. By the same token, however, both experts agreed that the FCL could go, and in some respects has gone, further than the Directive required.

The FCL's Explanatory Note

57. Both experts agreed that in interpreting the FCL a relevant guide consists of the Explanatory Statement given when the FCL Bill was put forward ("the Note"). The following parts are material:

(1) Pages 4-5 referred to the Directive and the aim, among other things, to remove uncertainties from collateral arrangements, generated by the law on insolvency proceedings, and that it set out simple procedures to carry out collateral in order to avoid the "contagious effects of bankruptcies";

(2) Page 5 states that a large portion of the provisions of the Directive already appear in Luxembourg law; sometimes the Directive goes further than Luxembourg law and sometimes not as far as it. Further, there were three objectives in enacting the FCL. The first was to group all financial collateral arrangements together in a single text; the second was that, in order to ensure "the continuous legal security of existing arrangements and allow Luxembourg to remain a beacon regarding financial collateral", earlier legislation would be retained in so far as it went beyond the minimum required by the Directive; thirdly the FCL would create a largely similar

level of legal security and solidity for the various types of financial collateral arrangements. So one form of guarantee should be used because of its nature and specific characteristics and not because it offers greater legal security. Certain inequalities between guarantees relating solely to the fact that different types were introduced at different times would be eliminated.

(3) Then, in relation to Article 20 of the FCL which is material to our case (see below), the Note stated that "the goal of sheltering financial collateral arrangements from potentially being challenged and offering lenders a framework in which they can operate in complete safety must be read in the context of the recent Council Regulation… relative to insolvency proceedings." This Regulation had stated that opening insolvency proceedings did not affect the actual right of a creditor over certain property of the defaulting debtor. Reference is also made to the "*Lex concursus"* which is insolvency law. I interpose to say that thus far, this part of the Note seems to suggest that the scope of Article 20 is essentially concerned with insolvency challenges to the enforcement of collateral and in that respect, consistent with the Directive. The Note went on to say that "the purpose of the government bill is to make financial collateral arrangements unassailable so as to benefit from the exception described above. This does not, however mean that no sanctions exist. In case of fraudulent collaboration between parties, the latter may still be punished under civil liability."

The FCL itself

58. As for the FCL itself, I would refer to the following provisions:

(1) Article 11 (1) provides for different means of enforcing the collateral which includes "private sale, under normal market conditions, by sale in the market or by public sale";

(2) Art. 20. (1) provides that:

> "The financial guarantee agreements for assets as well as the events triggering the enforcement of the guarantee, the netting agreements and the detailed assessment and performance methods agreed by the parties, in accordance with this law, are valid and enforceable upon all third parties, commissioners, official receivers, liquidators; and other similar bodies, notwithstanding the existence of reorganisation measures, winding-up proceedings or the occurrence of any other situation involving domestic or foreign aid;

(3) Article 20 (4) provides that:

> "With the exception of the provisions of the law of 8 December 2000 on excessive indebtedness, the provisions of Book III, Title XVII of the Civil Code, of Book 1, Title VIII, and of Book III of the Commercial Code, together with any domestic or foreign provisions governing reorganisation measures, winding-up proceedings, other situations of assistance and seizures or other measures covered by point b) of article 19 are not applicable to financial guarantee agreements and to netting agreements and do not act as an obstacle to the performance of these agreements and to the performance by the parties of their obligations, notably regarding retransfer or reassignment."

59. As to the scope of Article 20 (4), it is common ground that Book III of the Commercial Code is concerned with insolvency dealings. Prof Prüm said in evidence (though not in his report) that some of the other disapplied provisions did not deal exclusively with insolvency, but that point was not developed further. However he did say that the case law shows that it has not been restricted to insolvency situations. He also stated that in any event Article 20 (1) was entirely general in its operation, given its wording. That proposition I do not accept-the latter part of that Article makes plain that it is concerned only with various forms of insolvency. I return to these matters below.

The Issues

60. The key points made by the Defendants in support of the overarching proposition that irrespective of any other points, the FCL simply precludes the Claimants' claim to set aside the Sale, are as follows:

    (1) the FCL is of very wide scope and is not limited to insolvency situations. Indeed it applies to fraud claims as well, whether made in or outside the insolvency;

    (2) in the light of earlier case law and principle, the actual decision of the Court of Appeal in *Pillar* is wrong and I should not apply it;

    (3) in any event it can clearly be distinguished because the party seeking the reversal of the pledge enforcement there was the pledgor, as opposed to the Claimants in this case.

61. In order to deal efficiently with those points, it makes sense to set out all of the relevant case-law first and explain what it does or does not decide. I do so in chronological order.

Munus: District Court, 20 May 2010

62. This case held, citing the FCL, that the remedy for a challenge to the sale of pledged assets which was not undertaken in a commercially reasonable manner was damages not annulment. It does not appear to have been an insolvency case, but on the other hand it was not a fraud case either.

Landsbanki: Court of Appeal, 3 November 2010

63. This was an interim application to suspend the realisation of certain pledges. The Court held that by reason of the FCL it could not take measures which would result in the suspension of part of the liquidation process and render inoperative the financial collateral arrangements. It went on to say that when, as here, the pledges had been realised, it equally followed that on an interim basis, previously recorded transactions could not be challenged. I see that, but this case says nothing about such a challenge after a trial on the merits. Moreover, in that case, there was no urgency and damages would be adequate. I agree with Mr Thewes that this decision does not determine what a Court might do after a trial on the merits. It is fair to say, however, that the challenge to the pledge does not appear to be insolvency-based although the pledgee seems now to have been in liquidation.

Elf Aquitaine: Court of Appeal, 8 February 2012

64. Here, the Court of Appeal rejected various challenges to the enforcement of a pledge which involved whether a prior demand was required as a matter of law. The FCL was invoked, but only to support the contention that certain provisions in the Commercial Code which otherwise required such a formal demand would be disapplied here. This case is of no real assistance here.

Stabilus: District Court, 16 November 2012

65. Here, the debtor secured its liabilities by granting to the creditor some pledges over its shares in another group company, and other assets. Following notices of default, the creditor took steps to enforce the pledges and then to sell on the shares to third parties. The Administrator of Stabilus sought an order that the sale of the shares was null and void and they should go back to the debtor. The argument was that the shares had not been realised in a commercially reasonable manner. It was also said there was a fictitious price.

66. The creditor opposed the principal claim on the basis that the Administrator had no standing before the Court because the insolvency proceedings which affected Stabilus could have no effect on the enforcement of the pledges by reason of the express terms of Articles 20 (1) and

(4) of the FCL. The District Court held that the Administrator was relying upon Articles 445, 446 and 448 of the Commercial Code but these had been expressly excluded by Article 20 (4) of the FCL. The Court went on to say that the penalty for failing to sell the shares in a commercially reasonable manner was damages not annulment. It also referred to Recital 17 of the Directive referred to above.

67. The Court then said this:

> "it follows from this that financial collateral arrangements, like the agreed methods for valuation and enforcement, cannot be challenged and no third party, including the administrator can request that they be annulled.… The administrator is thus not legally invested with the right to bring an action for annulment of share sale agreements which means that the claim for the two sale contracts to be annulled must be declared inadmissible."

68. From this, Prof Prüm suggested that the Court was dismissing the alternative FOC claim, separately to the Article 448 claim, but also on the basis of FCL. He also suggested that the reference to "no third-party" meant that the Court was laying down a rule that to the extent that any challenge could still be made to the enforcement of security, it certainly could not be made by a third party which would include parties in the position of the Claimants here.

69. In my judgment this is too much to read into the decision. I quite accept that the Court must have been dismissing the alternative FOC claim (noted at p1197) but I think they did so on the footing that it was really no different from the Article 448 claim, arising as it was in the insolvency context. It is noteworthy that in the translation of the "Grounds for the decision", there is no specific reference to the FOC claim (or some of the other alternative claims) at all. Accordingly, I do not accept that this case shows that the FCL applies in the non-insolvency context and nor does it show that the FCL will rule out any claim based on FOC, so far as annulment is concerned. Finally, I do not think that anything can really be read into the expression "no third-party" here, so as to distinguish it, for example, from the actual pledgor. There was no need to make any such distinction in that case and on the face of it the Court was saying that where the FCL applied, no-one could seek annulment.

70. There was some argument before me as to whether the Administrator was acting in his capacity as trustee for the insolvent company or rather as representing the company's creditors. I do not think anything turns on this since the Court clearly treated his claim as being based on the insolvency provisions.

71. Finally, if the Court was really suggesting that there could be no ability for any person to challenge the enforcement of a security on the grounds of fraud, after the event, that simply flies in the face of the decision of the Court of Appeal in *Pillar*.

Pillar: District Court, 10 July 2013

72. A company called R Capital was the sole shareholder in a company called Immo-Croissance ("IC"). IC owed Kaupthing Bank (" KB") €122m on a loan which had fallen due on 31 October 2008. The loan was effectively unsecured. KB agreed to refinance the loan but only on condition that R Capital guaranteed the indebtedness of IC which guarantee was secured by a pledge of the shares in IC given by R Capital as pledgor or to KB as pledgee. The new loan agreement was made on 19 December 2008. However, no drawdown of the refinancing funds could take place until and unless certain conditions had been fulfilled by 30 January 2009, including the creation of certain charges. Such conditions were not fulfilled by 30 January 2009. Nonetheless, KB informed IC on 3 February 2009 that the new funds were available, they were then drawn down but then 15 minutes later, KB demanded immediate repayment and terminated the new loan on the basis of non-fulfilment of the conditions. That allowed it

to enforce the pledges over the shares which it did on the following day. By the time of the proceedings, KB's claims to the shares had been assigned to Pillar Securitisation ("Pillar").

73. At first instance, R Capital challenged the enforcement of the pledge on various grounds. These included the contention that KB had deliberately engineered the default in order to avail itself of securities (including the shares) which it did not previously have. This was an improper use of its rights and amounted to bad faith.

74. In this regard, the District Court of Luxembourg held on 10 July 2013 that when exercised in bad faith, the enforcement of guarantees was of no effect and accordingly the enforcement of the pledge here would be declared void. In addition, R Capital sought the return to it of the pledged shares still in the possession of KB. To this, Pillar objected on the basis that all of this was precluded by FCL. However, the Court said that:

> "If this Law therefore permits enforcement of the pledge under conditions of apparent regularity without the intervention of a judge and if, in principle, the pledgee debtor is not entitled to invoke any objection which impedes the realisation of the pledges, [nonetheless] the Law does not prevent a trial judge who has established an act of manifest fraud, under penalty of depriving the secured creditor of any right of recourse, from ordering the return of assets found to have been improperly appropriated."

75. It went on to say that in the circumstances there, the shares should be returned to IC, they still being in the possession of KB.

76. "After a trial" in my judgment means after a trial on the merits of the underlying transaction which is challenged; while the initial operation of the Pledge cannot be interfered with, that does not preclude the court from reversing the enforcement once there has been a decision on the substantive merits.

77. It is right to say that the Court did not rule out the FCL because the challenge was not insolvency-based. It did not address that point at all and of course there was no need to since it was the fraud which permitted it not to apply the FCL. On any view, the court clearly took the view that there were limits to the FCL.

Pillar: Court of Appeal, 12 July 2017

78. It makes sense here to move straight to the decision on appeal albeit much later. Here Pillar argued that the FCL prevented the after-the-event reversal of the enforcement of the Pledge. In its judgment dated 12 July 2017, the Court held that there had to be limits to the operation of the FCL:

> "While the ratio legis as set out by the appellant is valid for the pledgee creditor, the regulated financial guarantees must also inspire sufficient confidence in the minds of the constituents that they will not be surrendered to their creditors and that their legitimate rights will not be unduly sacrificed. The principles of accessory and execution of good faith of the conventions viewed to this balance….. If it transpires, as in the present case, that the pledged claim has not fallen due as a result of the expiry of the contractual term, but only by virtue of the pledgee's [corrected from pledgor's] abusive conduct, the retroactive loss of the obligation of the claim shall remove any normal recourse by the pledgee to the agreed-upon pledge. It follows that the parties are to be put back in the same situation as before the forfeiture of the term wrongly caused by the pledgee creditor."

79. The Court went on to hold that the parties must be put into the position they were in immediately prior to KB's abusive acts. Those acts started when KB permitted drawdown when the conditions had not been met. If the drawdown was reversed, then the parties would be back in the position they were in, after the second conditional loan agreement had been made but the conditions had not yet been fulfilled so as to permit drawdown. Since there was (now) no drawdown under the second loan there was now no termination of that loan for default and no basis to enforce the pledge. The parties therefore do not find themselves in a contractual situation but in the situation of parties bound by a conditional contract whose

condition has not been fulfilled. What the Court of Appeal did, therefore, was to unwind or reverse the bad faith acts of KB. The consequence was to set aside the enforcement of the pledge and return the shares to R Capital although the number of shares to be transferred back was clarified. Subject to that, the decision (and reasoning) of the court at first instance was upheld.

80. The effect of all of this, of course, was that IC was still liable to pay the original loan and it would be in default, unless it could procure drawdown of the refinancing to be constituted by the new loan. However, the Court did not refer to that as part of its judgment. IC had been joined in the proceedings as a third party and it was a wholly-owned subsidiary of R Capital. In those circumstances it is perhaps not surprising that IC did not object to the course which R Capital was asking the court to take.

81. In my judgment, none of the reasoning of the Court of Appeal concentrated on the fact that the party seeking the annulment was the pledgor as opposed to some other party. It did not need to deal with such a point, if any. But as with the District Court, it took the view that the operation of the FCL (so as to prevent any form of claim save as to damages) was indeed limited in the case of fraud. I say more about the effect of *Pillar* below but now return to the chronology of cases.

Spanish and Portugese: District Court, 29 January 2014

82. The context here was a *lis alibi pendens* challenge brought on behalf of the insolvent pledgor which was the subject of extant insolvency proceedings in Spain. Those proceedings had included an order to nullify an amendment to the credit agreement which included a pledge. The challenge was resisted by the pledgee who also applied for declarations as to the validity of the securities. The Court observed briefly, among other things, when finding for the pledgees, that the Spanish proceedings were irrelevant because the FCL would prevent any attempt to nullify performance of the pledge. That brief observation in that particular context and in the absence of a fraud claim is not of much assistance. Moreover, there was an insolvency background albeit not in Luxembourg.

F Capital ISCA: Court of Appeal, 27 January 2016

83. This was an interlocutory attempt to stop the enforcement which was the subject of *Courtepaille* (see below). The Court held that such relief should not be granted by reason of the FCL. But the issue in our case is not the grant of interlocutory relief to stop enforcement taking place, but rather a possible reversal after a substantive trial. It is right, however, that the challenge did not appear to be insolvency-based.

LIC: District Court, 9 December 2016

84. This concerns LIC's interim applications referred to in paragraph 19 above. They were refused on various grounds but one was the operation of the FCL. The Court referred to *Landsbanki* and *F Capital ISCA* (both cases of interim applications – see above) and took the same view – that interlocutory interference in the enforcement process causing "paralysis" was not permitted. But again, that is not the position here which contemplates a trial on the merits.

BES: District Court, 7 April 2017.

85. This was a case concerning whether the Luxembourg Court had territorial jurisdiction. It was a claim by the administrator of a bankrupt company to challenge pledge agreements made between the company and the creditor, and the later realisation of the pledges. The argument was that there had been fraudulent collusion between directors of the company to permit the pledge agreements to be made. The pledge agreement was subject to Portuguese law and

jurisdiction. The creditor claimed that the Court must give effect to the clause. The Court held that the claim based on FOC was to seek the nullity of the agreement but if so, that was caught by the jurisdiction clause in favour of Portugal. However, there was a separate claim being a "Paulian" action brought under Article 448 of the Commercial Code on the basis that payments made in fraud of creditors are void. Here, however, while the Court said it had jurisdiction, it then ruled out the nullity claim because of the operation of Article 20 (4). However, there could be "civil liability" which I consider means a damages claim. In so doing, the Court clearly took the view that the proper characterisation of the claim was indeed under Article 448, being the insolvency-based version of the more general "Paulian" action available under Article 1167 which the claimant also invoked. That being so, it is not easy to read that case as holding that the scope of FCL goes wider than an insolvency claim. Nor did it rule out a nullity claim based on fraud because of FCL: there, the Court simply said that it had no territorial jurisdiction.

Mag Import: District Court, 24 May 2017

86. This was a sequel to the decision in *Spanish and Portuguese* (see above). The court having permitted enforcement of the pledges, the banks appropriated the pledged shares in part to cover the legal expenses which they incurred in the earlier proceedings. The claimant company from those proceedings said that it should be reimbursed such expenses. The court refused on the basis that this was nothing more than a further attempt to have the Court interfere in the pledge enforcement proceeding which was still ongoing and again it invoked FCL. The Court did however observe as follows:

> "An *a posteriori* judicial control of the pledge enforcement, in the context of a civil liability action, and a prudent attitude on the part of the courts called upon to prevent or suspend the enforcement of a financial collateral arrangement should therefore be the rule, and should guide the examination of the appropriateness of the measure being sought; according to one author, such a measure should only be imposed on the courts in cases of obvious abuse or illegal acts that may result in irreparable damage."

87. That observation does therefore contemplate that there may be exceptional cases where prevention or suspension of enforcement might be justified. The case certainly does not assist the Defendants.

Courtepaille: District Court, 12 July 2017

88. Here, the pledgor, Fondation Capital, contended on various grounds that the enforcement of the pledge given by Courtepaille some four years after the pledge had been made was void. The subject matter of the pledge was FC's shareholding in the Courtepaille group. One initial objection to the admissibility of the claim was that it was prevented by the FCL. The Court rejected this and followed the first instance decision in *Pillar*.

89. The Court took the view that the original draft of the FCL and certain academic writing suggested that the only remedy for an abusive or fraudulent enforcement of a financial guarantee was "civil liability" following an oversight of the transaction " a postiori". Read in context, it is difficult to see how "civil liability" here meant anything other than a claim in damages. However, the court then considered *Pillar* at first instance and noted that in this decision, the court had found that:

> "the obvious fraud of the cancellation of a financial guarantee contract for fraud or abuse is an exceptional breach of [i.e. exception to] the principle set forth by the jurisprudence according to which financial guarantee contracts cannot be challenged as to their validity or their agreed-upon evaluation or execution."

And so

> "whether or not the enforcement of the pledges is fraudulent by nature should be examined, with the knowledge that a declaration of invalidity due to fraud is only foreseeable if the alleged fraudulent intent is unequivocal".

90. It went on to say that as a result the cancellation of a financial guarantee contract for fraud or abuse was an exceptional "breach" of the principles set forth by the FCL jurisprudence and *Pillar* was expressly followed.

91. Accordingly, the court in *Courtepaille* was not prepared to reject FC's claim as inadmissible. In fact, having then gone on to consider the underlying merits, the Court found that there was no fraud or abuse anyway and so dismissed the claim. It is argued that the reasoning of the Court here was self-contradictory. In my view it was not: the Court was saying first that absent *Pillar* the suggestion was that there could only be a damages claim. But having regard to *Pillar* that view could not now be correct. This does rather emphasise the weight given to the decision in *Pillar*.

Analysis

92. Prof Prüm says first that *Pillar* is wrongly decided and points out that it is being appealed further to the Court de Cassation. But these are not reasons for me to disregard it. That is so especially here, when, properly analysed (see above) it cannot really be said that there is a solid body of earlier case-law which is clearly at odds with it. And as far as principle is concerned, even allowing for the fact that Article 20 might apply to non-insolvency challenges, it does not follow that the FCL has gone so far beyond the Directive as to outlaw any form of claim to set aside after the event.

93. In the alternative, Prof Prüm suggests that *Pillar* should be confined to its own facts. In other words, even if it meant that a pledgor could obtain an annulment after the event (which he somewhat grudgingly accepted was not now "absolutely inconceivable") there would be no basis for applying *Pillar* to our case where the party seeking annulment was a third party. He raised the spectre of the floodgates being opened to claims to set aside being made by all and sundry. I do not think there is anything in this. On the hypothesis that the Claimants here were able to satisfy the pre-conditions of FOC and *concert frauduleux* they cannot then be described as strangers to the pledge enforcement. And although Prof Prüm warned against the notion that the party enforcing the security should have to have regard to the interests of others (because this would defeat the spirit of the FCL) he accepted that there could not be anything wrong in obliging a bank which was engaged in the fraudulent enforcement of a pledge in having regard to the interests of those affected.

94. Nor, in my view, can anything be read from *Pillar* to suggest that the Court would have acted differently if the claimant was not the pledgor but some other party who had otherwise been able to establish an FOC claim to annul.

95. At one stage Prof Prüm also suggested that the result in *Pillar* might be justified (but distinguishable from this case) on the basis that what the Court in fact did was to invalidate or nullify the entire (second) loan - as if that might somehow make the fraud so serious that here (and only here) FCL might not apply, or because the consequent reversal of the security's enforcement could be regarded as a mere by-product. However, as explained above, the Court did not nullify the loan - it simply reversed the particular abusive acts complained of which had led to the calling-in of the second loan. Further, it is hard to see why fraud in the making of the loan should be permitted a remedy but not fraud in the enforcement of the pledge. In either event, the actual enforcement of the pledge was interfered with, albeit after the event.

96. In that vein, Mr Chapman QC also suggested that *Courtepaille* was not so significant since it had talked about the "cancellation" of the guarantee contract in *Pillar*, when that was not the

outcome. I do not think there is anything in this. The use of the word "cancellation" (in the translation) is probably just shorthand, the real point being that the Court saw that there could be an exception to the operation of FCL in cases of "clear fraud or abuse involved in the enforcement of the pledges".

Conclusion

97. In those circumstances, and even in the absence of a doctrine of strict precedent, I consider that I should proceed upon the basis that a hypothetical Luxembourg Court trying this case would follow *Pillar* unless it could be sensibly distinguished and I do not think that it can. In the event, the question is academic.

Concert frauduleux

98. It is common ground (and it is in any event the case) that in addition to establishing FOC, in this case *concert frauduleux* must also be shown. Since the impugned act here is the Sale and since the parties to that sale were the defendants VTBC and Viva Luxembourg, both alleged to have conspired in the fraud, it might be thought that *concert frauduleux* is easily made out.

99. However, at paragraph 3.50 of his first report, Prof Prüm opined that:

> "in my opinion a third party would only be able to overcome the prohibition on interfering with the enforcement of a pledge on the basis of privity if it proves that there is a conspiracy between both the pledgor and the pledgee - and also, in the case of an enforcement by way of sale, the purchaser of the pledged assets as well. This is because the prevention or reversal of enforcement action affect the rights of all those persons. It would in particular keep alive or revive the debt that the enforcement action would have extinguished or did extinguish. The imposition of such a consequence on a debtor in circumstances in which the debtor did not requested and in which it was not part of any conspiracy would in my opinion be seen as manifestly unjust by a Luxembourg Court and would be rejected."

100. Accordingly, since the *concert frauduleux* alleged here is not said to include the parties to the Loan Agreement or Pledge Agreement (which parties would include V2 and Inter V) it cannot be made out. There was no authority cited for Prof Prüm's view here and it did not seem to me to be required by the principle underlying the *concert frauduleux* requirement as explained above.

101. Furthermore, the fact that the result of the reversal of the impugned act might lead to the reinstatement of the original loan obligation (as in *Pillar*) does not seem to me to make any difference. To take this case as an example, if the result is that Inter V still owed the money, if it went into default and then VTBC exercised its rights as pledgee but properly this time, the loan liability could be discharged but now the Claimants could have no complaints. After all, the Loan Agreement and the Pledge Agreement are not themselves impugned.

102. I did not find Prof Prüm's answers to these points in questions by me at the hearing to be convincing. In the end he seemed to modify his position such that while the establishment of *concert frauduleux* did not require that the parties to other agreements be conspirators, at least, the court when deciding whether or not to grant the remedy of setting aside would look to the interests of other affected parties. That much I can see and obviously if, for example, in *Pillar* the relevant shares had already been sold by KB to an innocent third party, the court might well have taken a different view. But that did not happen here and in our case Viva Luxembourg still has the Shares.

103. It was pointed out to me later that some of my questions of Prof Prüm were asked on a false basis because they assumed that in *Pillar* the underlying borrower was not even a party to the case and yet the Court was prepared to make the setting aside order even though the borrower would be affected by the reversion to the original loan liability with the second loan being conditional only. In fact, it is clear that the borrower had been joined in the proceedings as a

third party and appears to have been represented. I accept that this was an error on my part. But it did not affect the fundamental point which was whether, in truth, *concert frauduleux* strictly required a conspiracy between other contracting parties. In our case, that would be a nonsense since on the face of it, V2 was the party whose shares had now been transferred and was obviously not a conspirator, nor is this alleged. In my judgment, the true context for arguments about other parties is simply the discretion of the court to make an order to set aside, once the right to such an order in principle has been established.

104. Here, the other affected party is said principally to be V2, the pledgor. But it is a party to these proceedings and has chosen to take no part notwithstanding the impact upon it of any order to set aside the sale of the Shares. It could have, but has not, made its own challenge. On that basis, there is simply no material before me to say that if in principle a set-aside is appropriate it should not be made because it would revive the original debt owed by Inter V.

105. Mr Thewes accepted that third-party interests should be considered, but again, not in the context of establishing *concert frauduleux* but rather discretion.

106. Accordingly, had it been necessary, I would have found that *concert frauduleux* was made out here. As for considering the position of other parties as a matter of discretion, that would have been a matter for the main trial if it was otherwise shown that the appropriate remedy was the setting aside of the Sale.

Conclusion on Issue (iii)

107. The claim to set aside is precluded because of the Claimants' inability to show all the elements of FOC. Had they been able to, then *concert frauduleux* would have been made out and there would be no bar as a result of the FCL.

ISSUE (i) – THE DAMAGES CLAIM BASED ON DIMINUTION OF LIC'S INDIRECT SHAREHOLDING

Introduction

108. In the end, this point is of a narrow compass. Both experts agree that there is a rule of Luxembourg law that a party who has a cause of action against another cannot claim damages for a loss which is purely reflective of another party's loss. The paradigm example is where (as here) the loss is claimed by a shareholder in a company which loss arises from the damage done to the company itself. In this case, the relevant company is V2 whose assets (the Shares) are said to have been wrongfully depleted and the shareholder is the indirect 43.3% shareholder in V2 (via V Telecom). The rule against reflective loss is of course well known in English law although its precise scope may not be identical.

109. If the rule against reflective loss applies here, it is common ground that it would be fatal to the Claimants' claim for damages based on the loss of value of their indirect shareholding.

The Application of FOC

110. However, the Claimants invoke FOC as the antidote. They argue that it has the effect here of disapplying the rule against recovery for reflective loss.

111. As to that, for the reasons given above in respect of Issue (iii), FOC is inapplicable because there is no relevant mandatory rule which has been violated or circumvented. On that basis alone this damages claim must fail.

112. However, there is another reason why, in my judgment, FOC cannot apply. The third requirement of FOC is some act on the part of the defendant, or some reliance by it upon a legal rule, by which it would circumvent the mandatory rule in favour of the claimant, if there

was one. In this context, the impugned act on the part of the Defendants is said to be their reliance upon the rule against reflective loss itself. Put simply, the fraudulent defendants have hidden behind that rule, as it were, to defeat the Claimants' otherwise legitimate damages claim.

113. I reject that argument essentially for the reasons summarised by Mr Howe QC in his oral closing submissions at pages 36-39 and 56-61 of the transcript for Day 5. In short, FOC is not designed to set aside a legal act or reliance upon a legal rule which exists irrespective of the alleged fraud. Put another way, the use of the rule against reflective loss was no part of the relevant fraudulent act here which was stated to be the Sale and which is the only "thing" which the Claimants seek to set aside.

114. Nor, on a proper analysis, has there been shown to be any case where the Court has employed FOC to disapply the rule against reflective loss. The Court of Appeal case of *Bourg* 10 July 2002 was relied upon by Mr Thewes but it was not a case where the court actually applied FOC with that result. *Bourg* was a claim by the partners in a limited partnership (not by the partnership itself) that the manager appointed by the partnership had entered into certain transactions in excess of its powers. Where the individual partners had not consented to that excess, the court said that they had their own personal claim to invalidate the transaction. This was because the power to give consent lay in the partners individually and so their personal rights were violated. The legal personality of the partnership was not involved. The court did go on to say that "fraud is an exception to all the rules" and if the fraud, also alleged as against the manager, was established then "the authors… of the fraud cannot take refuge behind the legal personality of the partnership to defeat the invalidity action brought by the victims". In fact, the court went on to say that the claim which would be granted there was the excess of powers claim because the fraud claim was subordinate to it. It is also worth noting that the court had earlier distinguished the position of partners from shareholders in a company, saying that the primary position of partners in the partnership meant that the attribution of legal personality to the limited partnership did not deprive them of any right of action. Accordingly, I do not think that *Bourg* assists the Claimants here.

115. Further, although Mr Thewes referred to some other cases where shareholders had been permitted to challenge transactions, this was where they had taken interim measures on behalf of the company so those cases do not help.

116. I put to Mr Thewes in a question the situation where there was a rule of substantive law that prevented a particular head of damages from being claimed. If it was a fraud case and FOC otherwise operated, would FOC then disapply that rule of substantive law so that a normally prohibited head of loss could be claimed? Mr Thewes said that it did not, but this was simply because any such rule would be based on statute and was not judge-made, as with the rule against reflective loss. I did not find that distinction persuasive at all, since if the fraud had relied upon a particular rule of law as the means of the fraud (for example in relation to registration of property interests) FOC would in principle operate to disapply it, statute-made or not. While it is clear from Pédamon that the type of act or rule which may be disapplied is not confined, that does not help the Claimants because the impugned act or reliance upon a rule has to be part of the fraudulent evasion of the mandatory rule.

117. In the end, it was not clear to me that Mr Thewes was still positively maintaining that FOC would disapply the reflective loss rule but if he was, then in my view he was wrong.

118. The Claimants sought to make inroads to this analysis by suggesting that the extent to which the Defendants "consciously took advantage of the Claimants' legal situation as indirect shareholders is an area of factual enquiry that can only be investigated at trial" – see paragraph

101 of their Closing Submissions (and also Mr Rubin QC's oral closing at Day 5 pages 154-155). The problem with that is that is no part of the Claimants' pleaded case that the Defendants did rely consciously, as it were, on the rule against reflective loss or the notion of separate legal personalities and it seems intrinsically unlikely to me. So this does not alter my conclusion that FOC cannot be invoked to help the Claimants here.

119. This conclusion is in keeping with what in my view is the essence of FOC which is to reverse the effect of the fraudulent act and as part of that process disapply any rule relied upon to give effect to it. In this case, that has nothing to do with the rule against reflective loss.

120. This makes it strictly unnecessary for me to deal with the further point made by Ms Oakeshott that FOC was not even pleaded as against Maze in respect of this claim. But for the record, I should say that as matters stand, I do not consider that it was.

121. Accordingly, the claim here based on reflective loss is precluded.

ISSUE (ii) – THE CLAIM FOR DAMAGES BASED ON DIRECT LOSS

122. Prior to trial, the focus of the dispute here was (a) whether the FCL debarred such a claim and (b) whether the absence of any legal right to participate in the EY sale process meant that no claim for damages on the footing of losses suffered as a result of the Claimants not being able to acquire the Shares was possible.

123. However, the challenges said to be the subject-matter of this issue have expanded. They were most comprehensively stated (and argued) on behalf of Delta and Mr Veltchev as follows:

(1) as a matter of causation, the claim must fail; and/or

(2) it must fail for lack of certainty; and/or

(3) any claim of this kind is limited to the remedy of reliance expenditure (i.e. not loss of profit) by operation of the Luxembourg law doctrine of "culpa in contrahendo'; and/or

(4) the FCL precludes it; and/or

(5) the claim assumes that the Claimants would have participated in an unlawful sale but if so, they cannot claim damages.

124. I deal with each in turn.

Causation and certainty

125. Here I deal with points (1) and (2) together. I do not accept that these matters form part of the Preliminary Issues at all. The fact that the Defences served take these (as well as other) points does not mean that they do so form part. Moreover, at first blush, they appear to raise issues of fact not issues of Luxembourg law. The answer to that objection is said to be that Luxembourg law (like English law) imposes threshold requirements on the recovery of damages - in short there must be a real causal link between the act complained of and the loss, and the loss should not be wholly speculative or uncertain. But that does not alter the conclusion that it will be necessary to consider the facts in detail, here on the basis of a counterfactual: "what would be the position if the Defendants had not undertaken the fraudulent and rigged sale complained of?" in circumstances where it is plain (and pleaded) that the Claimants sought to take part in the sale process but were shut out.

126. It is said that the causation and uncertainty points are within this Preliminary Issue because they depend to some extent on the fact that the Claimants are only indirect shareholders in Inter V and were not party to any of the relevant agreements. To some extent that is right, but that is not why those particular facts were raised in the context of the Preliminary Issues. In

my judgment this argument is simply an *ex post facto* attempt to widen the scope of the ordered Preliminary Issues to which there was no consent.

127. The one specific point that was raised here, and which is legitimate, is whether the absence of any legal right to take part in the EY Sale process precludes this claim without more. That is clearly stated within the Preliminary Issues. However, while Prof Prüm initially sought to say that such a right was necessary in order to be able to claim such damages he later accepted (Day 2/165) that if it was the case on the facts that absent the fraud the Claimants would have acquired the shares and made a profit, causation "in principle shouldn't present a serious issue".

128. And as to certainty, Prof Prüm accepted (Day 2/150) that if there is a real and substantial loss of a chance then the court can consider it, and that is essentially a factual question. In my view, that is not or not much different from the English law on loss of chance claims.

129. In addition, of course, the Claimants plead (in paragraph 66 (1) and (2) of the Amended Particulars of Claim) that in the absence of the fraud they would have acquired the shares or certainly would have had an opportunity to do so. Mr Orr QC argued that these facts should not be assumed (unlike other parts of the Amended Particulars of Claim) for these purposes because they were really dealing with the quantification of any damages claim which has not yet arisen. I disagree, I think that paragraphs 64 and 66 of the Amended Particulars of Claim are all of a piece. If they are assumed to be true then, unless absence of a legal right to participate in the sale is a bar as a matter of law, this claim cannot be said to be precluded. The reason why this debate over the Amended Particulars of Claim has arisen at all is because, in my judgment, a generalised objection on the grounds of causation or uncertainty was never part of the Preliminary Issues to begin with.

130. Prof Prüm later suggested that the speculative part of the claim here was not so much the loss of opportunity but the claim for the loss of profits which would have resulted. He based this on a decision from 1993 cited by Prof. Ravarani which disallowed damages for future loss of profit in connection with an artwork where it was hypothetical as to whether that artwork would ever increase in value beyond its current value. That decision, unsurprising on the facts, is of no assistance here. Had the Claimants acquired the Shares, absent the fraud, it is quite impossible to assert at this stage that they could not have risen in value. Indeed, in paragraph 25B (3) of their Amended Reply, the Claimants allege that the value of the Shares is likely to have risen. In any event all of this is a matter for another day.

131. Since this point on causation and uncertainty is pre-eminently one of fact which cannot in truth be decided at this stage, the answer is to say that any issue of causation and certainty is a matter for trial. Further, (a) this was not part of the Preliminary Issues and so does not need to be decided now and (b) given the assumed facts, it cannot be said to be precluded as a matter of law in any event. The only other point which needs to be recorded here is that I reject the suggestion that a prior legal right to participate in the sale is a necessary precondition to any claim for direct loss to proceed.

Culpa in contrahendo

132. This concept of Luxembourg law can be briefly stated. If one party to contractual negotiations breaks them off in bad faith, the innocent party may in certain circumstances be able to bring a claim in damages. However, such damages will be limited to wasted expenditure on the negotiations and the like, or as we might say in English law, reliance losses. There is no possibility of claiming loss of profits i.e. loss of bargain - understandably since no bargain was in fact reached. This is a claim which I am prepared to accept for present purposes is to be classified as a tort claim.

133. I do not see that this point was included in the Preliminary Issues either. However, both experts have dealt with it orally and in writing, it is a short point and so I will deal with it. The argument is that since part of the Claimants' claim is that at one stage in the sale process they were "strung along" by VTBC, believing that they would be entitled to bid for the Shares but in truth VTBC never intended to deal with them, this is analogous to the *culpa in contrahendo* situation. But if so, any claim to damages must be limited to reliance losses.

134. No case was cited by Prof Prüm for this proposition. He accepted in cross examination that the situation here was not directly comparable to the *culpa in contrahendo* situation but simply argued that the principle should be applied by parity of reasoning. Mr Thewes disagreed, stating that this particular principle was of a very limited ambit and there was no justification for extending it to a very different tort claim such as this involving fraud. See paragraphs 43-46 of Thewes 4 and Day 4/79-80.

135. In this regard reliance was placed on the decision of the Court of Appeal in *Irthum* 2 November 2016. Here there were various appeals concerned with damages claims for breach of partial contracts alternatively damages for the abusive or bad faith termination of contractual negotiations. The Court of Appeal upheld the latter claim describing the bad faith of the terminating party as constituting "tortious intent" and saying that in such a case damages for loss of profit cannot be claimed but only wasted costs. Otherwise the court would be indirectly giving effect to a contract not in fact made. I understand all of that but this case simply does not assist on the correct measure of loss in a fraudulent conspiracy claim such as the one before me even if one of the many allegations is that there was a point at which the Defendants purported to allow the Claimants to participate in the bidding process but without any real intent to do so.

136. In this case, and subject to other points such as causation or reflective loss, if liability is established for fraud, the court is going to have to undertake the exercise of determining what would have happened with the Shares had the fraud not taken place. That is not because it is entertaining an illegitimate claim for breach of contract but rather assessing damages for tort based on fraud. And the fact that both this case and those founded upon c*ulpa in contrahendo* are classified as torts makes no difference. Nor does the fact that there may be some claims based upon c*ulpa in contrahendo* where the bad faith of the party at fault borders on dishonesty. That hardly means that any such claim must be always equated with the claim brought in tort based on fraud even if there is an element of "stringing along" in furtherance of the conspiracy.

137. Finally, although Mr Thewes did mention it in his oral evidence in passing, I did not understand the Claimants to be arguing that it was necessary to show FOC in order to disapply the restrictive rule in c*ulpa in contrahendo* cases. Nor is it so necessary. The simple point is that the rule does not apply to this claim.

FCL

138. There is no reason why the FCL should prevent this damages claim. There is in truth no case showing that the FCL should prevent any claim for damages involving the abusive or fraudulent enforcement of security, pledge or otherwise. Indeed, a number of cases have, as I have shown above, expressly stated that where the FCL applies, the innocent party is limited to the remedy of "civil liability" i.e. damages.

139. That a damages claim can arise in the context of a fraudulent enforcement of a pledge cannot in any way be said to run counter to the policy underlying the FCL. That policy was designed to prevent any interference with the process of enforcement of securities. But it is absurd to

suggest that if the pledgee was acting fraudulently he is now insulated for all purposes from any claim made by the victim of the fraud brought *a posteriori*.

140. Moreover, if (as I have found) the FCL would not in fact prevent an action to set aside a fraudulent enforcement of the pledge after it has taken place (and provided FOC and *concert frauduleux* can be made out etc) then there is no reason why a damages claim such as this should be precluded.

Participation in an unlawful sale

141. Finally, Delta and Mr Veltchev contend that since it is alleged (in paragraph 49 of the Amended Particulars of Claim) that the Sale was itself unlawful, any claim for damages founded upon a hypothetical participation of the Claimants in such a sale, absent the fraud, cannot succeed.

142. The Claimants' first point is that this argument forms no part of the Preliminary Issues. Indeed it does not. Delta and Mr Veltchev say that it does because it can be brought within the strict wording of that part of the Preliminary Issues which refers to the preclusion of claims because the Claimants had no legal right to participate in the EY sale process. That is so even though it is acknowledged that the "no legal right" point when raised by way of amendment was an entirely different one, namely that the Claimants could not assert their direct damages claim if they would never have been entitled legally to demand participation in the process. I have dealt with and rejected that point in paragraphs 127 and 131 above. Nonetheless it is suggested that as a matter of pure language this point would also encompass the argument that the Claimants had no legal right to participate in the process because it was in fact unlawful. That suggestion is not merely unmeritorious - it is misconceived. There was never any agreement before the trial that this point should form part of the Preliminary Issues and neither expert dealt with it. The fact that the unlawfulness point is now pleaded in the Amended Defence of Delta and Mr Veltchev and that it has been responded to by the Claimants is beside the point.

143. For that reason alone, I decline to deal with this matter.

144. It is in any event inappropriate as a Preliminary Issue and in my judgment falls into the same category as the causation and certainty arguments. Precisely what would have happened absent the fraud is not a matter with which I am concerned at this stage. But certainly, it is far from clear that had the fraud (and all that went with it) not taken place any enforcement of the pledge would necessarily be unlawful. It seems to me that it might well have been lawful preceded, for example, by a proper acceleration notice and steps taken to deal with the Standstill Agreement, the Attachment and so on. Indeed, the Claimants have made clear in paragraph 25B (2) of their Amended Reply that they could and would have been able to participate in a process which, absent the fraud, would have been lawful. In answer to this, Delta and Mr Veltchev argue that this cannot be gone into because the Court must assume that the allegation made in the Amended Particulars of Claim that the sale which did take place was unlawful is true. But it does not follow that any hypothetical sale absent the fraud may not have been unlawful. And in any event, had this matter been proposed properly as a Preliminary Issue, there may well have been a discussion about what should be assumed or not assumed on the question of unlawfulness.

145. As a result, the position is that all parties may keep their powder dry, as it were, on the unlawfulness argument, which will be a matter for trial.

Conclusion on Issue (ii)

146. My conclusions are therefore as follows:

(1) the claim for direct loss is not and cannot be precluded by operation of the FCL;

(2) the fact that the Claimants may not have had an enforceable right to take part in any sale of the Shares does not debar this claim;

(3) the principle of *culpa in contrahendo* is not applicable here so as to limit the extent of damages recoverable;

(4) all other matters relating to this claim are matters for trial.

147. I should add that at various points, it was suggested that the Claimants' Article 6-1 claim against the Defendants for abuse of rights (as distinct from fraud) had been abandoned or was hopeless. It is not necessary for me to deal with that issue at this stage.

OVERALL CONCLUSION

148. It follows that, in broad terms, I consider that the answer to the question of preclusion in respect of Issues (i) and (iii) is "yes" and in respect of Issue (ii) is "no".

149. As far as the declaratory relief sought, which forms Issue (iv), after circulation of this judgment in draft the parties made some points arising out of how I had dealt with it and disagreed about how I should deal with it. Although the point is a relatively narrow one, rather than determine it on paper now and because some Counsel are not presently available, I will leave over this question to the consequentials hearing. All further questions of drafting the appropriate order, together with other consequential matters will be dealt with hereafter. I am indebted to all Counsel for their excellent oral and written submissions.