Neutral Citation Number: [2020] EWHC 2642 (Comm)

Case No: CL-2020-000597

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2020

Before :

MR JUSTICE FOXTON

- -

Between :

LOPESAN TOURISTIK SA

Claimant

- and -
(1) APOLLO EUROPEAN PRINCIPAL FINANCE FUND III (DOLLAR A) L.P.
and Defendants (2) and (3)

Defendants

- -
- -

David Peters (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Laurence Rabinowitz QC, Richard Mott and **Michael Watkins** (instructed by **Latham and Watkins LLP**) for the **Defendants**

Hearing date: **30 September 2020**

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.

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MR JUSTICE FOXTON

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"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed 10:00 AM Thursday 8th October 2020"

MR JUSTICE FOXTON:

1. This judgment following the expedited hearing of:

   i) the Claimant's ("Lopesan's") application for directions for an expedited trial with a view to having its dispute with the Defendants ("Apollo") determined before the end of this year; and

   ii) Apollo's application for a stay of proceedings under Article 30(1) of the recast Brussels Regulation 1215/2012 ("Brussels Recast").

INTRODUCTION

2. The disputes arise out of a Sale and Purchase Agreement ("the SPA") between Lopesan as seller and a Spanish company called Oldavia ITG SLU ("Oldavia") as buyer, for Lopesan's interest in the Buenaventura hotel in Spain ("the Hotel"). The Hotel is owned by Creative Hotel Buenaventura SAU ("the Company"). The SPA is governed by Spanish law and contains an exclusive jurisdiction clause in favour of the Spanish courts.

3. Oldavia, on the evidence before me, is a special purpose vehicle through which Apollo, who are private equity interests, acquired the Hotel for c.€93 million. That funding commitment was reflected in the terms of an Equity Commitment Letter ("the ECL"), under which Apollo promised Oldavia, on the terms and conditions set out in the ECL, to provide it with the funding required to complete the SPA, which obligation was expressly made enforceable by Lopesan under the Contracts (Rights of Third Parties) Act 1999. The ECL is governed by English law and contains an exclusive jurisdiction clause in favour of the English courts.

4. One important provision in the ECL is clause 5.1 which provides:

> "The Investors' obligation to fund … the Commitment is subject to the terms of this Letter and to (a) the execution and delivery of the Sale and Purchase Agreement and (b) the Purchaser becoming obligated unconditionally under the Sale and Purchase Agreement to effect the Completion. **The obligation of the Investors to fund … the Commitment will terminate automatically and immediately (at which time the Investors' obligations under this Letter shall be discharged)** upon the earlier to occur of (i) the consummation of the Completion, (ii) the valid termination of the Sale and Purchase Agreement in accordance with its terms, (iii) **1 January 2021** or (iv) the assertion by the Seller … of any claim against any Investor … in connection with the Sale and Purchase Agreement, except for (x) claims by the Seller against the Purchaser under the Sale and Purchase Agreement and (y) claims by the Seller against the Investors to enforce the Purchaser's rights under this Letter".

(emphasis added).

5. Clause 3.1 of the SPA created a condition precedent to the obligation to complete which it is common ground was satisfied. However, completion did not take place, and there are disputes between Lopesan and Oldavia as to whether Oldavia was or is

obliged to complete under the SPA. I shall say a little more about those disputes later in this judgment.

6. On 12 August 2020, Lopesan commenced proceedings against Oldavia in Madrid (as it was obliged to do) seeking specific performance of Oldavia's obligation to complete under the SPA. It is common ground that those proceedings will not be determined for at least 12 months. On 20 August 2020, Lopesan wrote to Apollo seeking confirmations and undertakings intended to ensure that, if the specific performance claim against Oldavia succeeded, Apollo would provide the funds to Oldavia to allow completion to occur. It swiftly became apparent during those exchanges that Apollo disputed that Oldavia was under any obligation to complete, and as a result that it was under any corresponding obligation to put Oldavia in funds to enable it to complete, and further, that it was Apollo's position that if no order for specific performance was obtained against Oldavia before 1 January 2021, the obligations under the ECL would cease.

7. Against that background, on 15 September 2020 Lopesan issued proceedings seeking to enforce its rights as a third party beneficiary under the ECL by way of an order for specific performance of Apollo's obligation to put Oldavia in funds. Lopesan also issued an application for a speedy trial of that action to ensure judgment was delivered before 1 January 2021. That application was brought on at very short notice, and Apollo sought an adjournment, saying it had not had sufficient time to respond, and that it intended to seek a stay of these proceedings under Article 30(1) of Brussels Recast, which it had not had time to do.

8. In the event, the parties were able to agree a highly expedited timetable for the hearing of the two applications a week later. I am grateful to both legal teams for the considerable effort which went into getting this hearing ready at such short notice, and to both Mr Peters and Mr Rabinowitz QC for submissions which were, at all times, clear, appropriately focussed and realistic.

THE ISSUE WHICH ARISES AS TO THE 1 JANUARY 2021 DATE

9. The issue which is driving Lopesan's application for an expedited trial is the potential argument (which Apollo is clearly reserving the right to make) that Apollo's obligations will lapse on 1 January 2021, even if, before that date, Oldavia came under a legal obligation to complete the SPA: the Lapse Argument. Lopesan denies that this is the effect of the ECL on its proper construction, and Apollo's primary case is that Oldavia did not come under an obligation to complete under the SPA. The Lapse Argument, therefore, only becomes significant if both Lopesan's and Apollo's primary arguments are wrong.

10. The parties did not make submissions on the Lapse Argument, although I did explore Apollo's case with Mr Rabinowitz QC. In circumstances in which it is the Lapse Argument which is driving the expedition application, I have concluded that it is appropriate to give some consideration to the merits of the argument, with a view to forming at least a prima facie impression as to how significant the argument is likely to be. It is often appropriate when the court is considering whether to make a procedural order for it to form an impression, without making a determination, as to the strength of a legal argument: e.g. in sufficiently clear cases when deciding whether to order security for costs as noted in Keary Developments v Tarmac

Construction Ltd [1995] 3 All ER 534, 540; when considering whether to permit a late amendment as noted in Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm), [38(b)]) or when deciding whether to grant an extension of time to make an application (e.g. Terna Bahrain Holding Co WL v Bin Kamel Al Shamsi [2013] 1 All ER (Comm), [31]).

11. I formed the impression that the Lapse Argument is weak for the following reasons.

12. First, Apollo's obligation under the ECL arises not when Completion actually takes place (indeed that would be too late), but is an obligation to provide the funds required "to complete the acquisition", and to do so "immediately prior to the Completion date" (clause 2.1 of the ECL). Similarly clause 5.1 refers to Apollo's obligation "to fund the Commitment", and is said to be subject to the conclusion of the SPA and "the Purchaser becoming obligated unconditionally under the Sale and Purchase Agreement to effect the Completion". That might suggest that it is Oldavia's obligation unconditionally to effect completion which triggers the performance of Apollo's obligation to fund.

13. Apollo's argument appears to be that the words "required by the Purchaser to complete the acquisition" in clause 2.1 have the effect that if Oldavia decides not to complete, Apollo's obligation to fund does not arise. Mr Davies, in his witness statement, explained:

> "On a true construction of the ECL, the obligation to fund the Commitment only arose if Oldavia required the funds to complete under the SPA, and the funds were not required for that purpose because completion did not occur …
>
> The Defendants also observe that on the Claimant's own case, there is no prospect of that state of affairs changing at any point prior to 1 January 2021 when the ECL will terminate in accordance with its own terms. Oldavia has refused to complete, and it is the Claimant's own case that there is no prospect of the Madrid Court ordering Oldavia to do so before that date".

14. While the ultimate merits of that argument are a matter for another day, it might be thought a commercially surprising outcome if, by a simple decision not to perform its contractual obligations under the SPA, Apollo (through its SPV) could prevent its funding obligation arising, and it might be thought that the words "required by the Purchaser to complete the acquisition" mean required by Oldavia to perform its contractual obligations, whether it wants to or not. Apollo's argument might be thought to become even more surprising when:

    i) clause 3.1 expressly provides that Apollo's funding obligation arises when all condition precedents have been satisfied other than those "not satisfied as a result of a breach by the Purchaser" (something scarcely consistent with Apollo's funding obligation not arising if Oldavia wrongfully refused to complete); and

    ii) consistently with that, clause 3.2 provides for the position when the SPA is terminated "due to a failure of the Seller to close the transactions contemplated therein" but says nothing about such a failure by Oldavia.

15. I also had some difficulty in understanding how far the argument based on the words "required by the Purchaser" went. Mr Rabinowitz QC (who, to be fair to him, had not come to court to argue this point, and was merely providing an initial reaction in response to impromptu questioning from the court) explained Apollo's position as follows:

    i) If Oldavia disputed that its obligation to complete had arisen, Apollo's funding obligation did not arise because there would be no completion.

    ii) If the Spanish court ordered Oldavia to complete, Apollo's funding obligation would then arise, but only if the ECL had not lapsed.

    iii) If the Spanish court ordered Oldavia to complete, but Oldavia refused to complete that would give rise "to a very interesting question".

    iv) If the Spanish court (on the unproven hypothesis that it is able to do so) refused to order specific performance but only the payment of damages, Apollo's funding obligation would not arise even if Oldavia had come under an obligation to complete.

16. The distinction drawn between the position where Oldavia owes a primary obligation to complete, and one where that primary obligation has been supplemented by a tertiary obligation arising from a court order, might be thought to appeal only to the most devoted rights theorist. In so far as the touchstone of Apollo's obligation is when completion would take place in fact, it would seem to follow that a contemptuous refusal by Oldavia to complete in defiance of a court order would help "run down the clock" so far as Apollo is concerned.

17. If Apollo's obligation to fund had accrued before 1 January 2021, then conventional principles of construction would suggest that clear words would be required for that obligation to lapse on 1 January 2021 – whether by applying the principle in Modern Engineering (Bristol) Ltd v Gilbert Nash (Northern) Ltd [1974] AC 689, an argument based on the fact that Apollo was the *proferens* of the ECL (if that survives as an independent rule of construction) or the possible application, given Oldavia's status as an SPV through which Apollo effected its investment, of the presumption when interpreting a contract that a party cannot take the benefit of its wrong.

18. Approached from that perspective, it might well be thought that the provision for the ECL to terminate automatically on 1 January 2021 was intended to address the position when Oldavia's obligation to complete had not arisen by that date, because conditions precedent to completion had not been satisfied. In this regard, the SPA itself contains no long stop date for completion, save such as would follow from the deadline for addressing the clause 3.1 condition of European Commission approval for the acquisition, which was to be satisfied by 28 February 2020 "unless the Parties agree to an extension of the said term". In this regard, it might prove to be of some relevance that in another contract entered into between the same economic interests as part of the same overall transaction, relating to the acquisition of another Spanish hotel (the Hotel Faro), the date of 1 January 2021 was the date by which certain conditions precedent had to be satisfied, and was also the termination date in the ECL for that transaction (in which context, the date would appear to be addressing the date

by when the obligation to fund must first arise, rather than when it would terminate in all circumstances and for all purposes).

19. Finally, clause 5 carves out from those circumstances in which the ECL will automatically terminate if Lopesan commences proceedings against either Apollo or Oldavia, proceedings to enforce the SPA or the ECL. It does, therefore, appear to have been within the parties' contemplation that legal proceedings might have to be brought under either or both contracts. In those circumstances, it might be thought that any provision by which the ECL would terminate during the course of such proceedings if they had not reached fruition by 1 January 2021 would have been clearly stated.

20. By contrast, if Apollo's argument that nothing other than completion under the SPA can trigger its obligation under the ECL is correct, then it is not clear how Lopesan will be any better off by obtaining a determination before 1 January 2021 that Oldavia is obliged to complete under the SPA. Whatever else the English court might do, it cannot order Oldavia (who is not before it) to complete under the SPA (a dispute over which the Spanish court has exclusive jurisdiction). It seems clear from Mr Davies' witness statement that it is indeed Apollo's position that determination of Lopesan's claim before 1 January 2021 will not take the Lapse Argument off the table if specific performance has not been ordered in the Spanish proceedings by that date.

21. For those reasons, I approach the expedition application against a background in which:

    i) I accept that the Lapse Argument is likely to be in play in this dispute.

    ii) For the reasons which I have given, my impression at the moment without the benefit of argument is that the Lapse Argument is weak.

    iii) At least on my present understanding of the Lapse Argument, holding the full trial of the dispute between Lopesan and Apollo before 1 January 2021 may not avoid the Lapse Argument arising, if it does have merit.

THE EXPEDITION APPLICATION

22. While the stay application is in many ways the logical place to start, Mr Rabinowitz QC accepted that if I were to conclude that expedition was appropriate, that might constitute a strong reason not to stay the action under Article 30(1), in circumstances in which expedition is not possible in Spain.

23. There was no dispute as to the considerations which are relevant to my decision whether or not to order expedition. In short, there are four factors I must consider:

    i) First, a threshold question of whether, objectively, there is urgency.

    ii) Second, the state of the court's list and the impact of expedition on other court users.

    iii) Third, the procedural history including whether there has been any delay.

    iv) Fourth, whether there will be any irremediable prejudice to the respondent.

Apache Beryl I Limited v Marathon Oil [2017] EWHC 2258 (Comm); WL Gore Associates v Geox Spa [2008] EWCA Civ 62 and CPC Group v Qatari Diar Real Estate [2009] EWHC 3204 (Ch), [84]-[89].

Is the trial urgent?

24. If there is a realistic prospect that Lopesan's rights under the ECL are contingent on judgment being obtained before 1 January 2021, then that clearly would make the action objectively urgent, nonetheless so because the Lapse Argument only arises if both parties' primary cases fail.

25. Lopesan further relies on the fact that a claim for damages may well be more time-consuming, complex and expensive than the claim to enforce the ECL prior to expiry. That was a matter which weighed with Males J when ordering expedition in Apache Beryl. It is not clear to me, however, whether this argument raises a separate issue to that which I have already considered: if Apollo's obligation to fund has already accrued and survives, then it will be open to Lopesan to seek specific performance of it at the appropriate time. If it has not already accrued and the ECL terminates before it does, it is difficult to see how any damages claim will arise.

26. In this case, the degree of urgency falls to be qualified by my assessment that the Lapse Argument is weak, and that (at least on certain formulations of Apollo's case) a trial before 1 January 2021 will not necessarily resolve it. However, given what must inevitably be the incomplete information available when an application for expedition is made, my answer to the question of whether Lopesan's claim is urgent is a qualified yes.

The state of the Court's list

27. The Commercial Court's list is busy, particularly in the second half of term when any trial would have to take place. There are already a number of substantial trials due to start this term, as is usual at the beginning of the legal year, all of which have been fixed for a considerable time. If the trial were to require more than one Commercial Court week (an issue to which I return below) the impact of expedition on the list would be particularly significant. Like Males J in Apache Beryl, I must approach this application on the basis that if I accede to it, it may (but not necessarily will) be necessary to stand out another case. If a compelling case for expedition is made out, then the Commercial Court will find a way of accommodating the trial, as it has done for many other expedited trials. However, I am entitled to have regard in the overall balancing exercise to the fact that an expedited trial of all issues will not be easy to accommodate, and will carry a significant risk of prejudicial consequences to other court users.

Delay

28. That brings me to the question of delay. Mr Peters accepted with commendable realism that Lopesan could have started proceedings before it did, and possibly as early as June 2020. On the evidence before me, the dispute with Oldavia had crystallised by the end of April 2020, attempts at without prejudice discussions had come to an end by the end of May, and Lopesan had English and Spanish lawyers on board by June. In those circumstances, the three months or so which passed before

these proceedings were issued and an application for expedition made must be regarded as a lost opportunity. I accept that the management of Lopesan were faced with pressing work in their efforts to re-open the Hotel for the summer (a step which they would no doubt say will be in the best interests of Apollo if they become the beneficial owners of the Hotel), but Lopesan's decisions as to its business priorities, however, understandable, have had a significant consequence in halving the time available to conduct a trial before the 1 January 2021 deadline. While I accept that expedition would still have been required had proceedings been commenced in June, the court and the parties would have had a great deal more room to play with than the two and a half months now available.

29. Like Males J in Apache Beryl, I regard Lopesan's delay as a factor weighing against expedition. If, however, I was satisfied to the requisite degree of assurance that a fair trial could take place between now and the end of term, the fact of delay would not be decisive. As Lord Neuberger noted in Gore at [37], it would be disproportionately penal to refuse the application on this ground if expedition was otherwise appropriate.

Prejudice

30. That brings me to the issue of prejudice, and whether the case can be ready for trial. On the information currently available to me, I am not satisfied that it is possible fairly to bring the whole dispute on for trial before the end of term, even allowing for the fact that the Commercial Court is entitled to expect well-resourced parties to seek to "rise to the occasion" when there are strong commercial reasons for the expedited determination of a business dispute.

What are the issues?

31. The first difficulty is that, on the information before me, there is real uncertainty as to the issues which will arise at trial, and in particular as the extent of any factual or expert disputes. The evidence served by Apollo has identified a number of issues which will arise, in addition to the legal arguments as to the effect of the ECL. Lopesan's position in response is much less developed.

32. First, there is an issue as to whether there was an oral agreement between Lopesan and Oldavia to terminate the SPA reached on 13 and/or 19 April 2020, together with the associated legal argument of Spanish law as to whether any such agreement would be legally effective in the face of a No Oral Modifications clause in the SPA. That appears to be a relatively self-contained dispute, with limited disclosure (the time period in issue is very focussed, and there seems little scope for extended factual matrix evidence on a dispute as to whether there was an agreed termination), which raises a very limited issue of Spanish law. However, this issue will involve some documentary, witness and expert evidence, to which any additional issues will be an inevitable accretion.

33. Next, there is the argument that Lopesan has breached various representations and warranties as to the conduct or state of the business or its finances, which it is said were required to be repeated at completion, by which date the Hotel had had to close its doors to all but existing guests for the duration of their stays. This raises an issue of substance, on which there are clearly arguments to be made on both sides. It is

difficult to determine the precise scope of the dispute at this stage, but the issues are potentially wide-ranging:

i) First, there will be issues of construction of the particular representations and warranties, their application to the particular circumstances of the Covid 19 pandemic, the precise nature of Lopesan's obligation to ratify the representations and warranties on completion (and whether that simply involved a contractual obligation to put Oldavia in the same position as if the representations and warranties made on signing had extended to the position on completion, or whether it was necessary for there to have been no relevant change between the two dates) and as to what remedies followed from breach, including whether this was a condition of Oldavia's obligation to complete, gave Oldavia a right to terminate and/or simply generated an indemnity obligation on Lopesan's part.

ii) Second, there may well be issues of fact as to precisely what the position was at completion, and whether it marked a change from the way in which the business had been conducted at the date the SPA was concluded. The difficulty here is that there are a number of representations and warranties potentially engaged, which might raise their own specific factual issues as well as the more general issue that the Covid-19 regulations forced the Hotel to stop taking new paying guests. For example:

    a) Paragraph 23.2 of Schedule 7.1 of the SPA involves a warranty that "there is no information that has not been provided to the Buyer and whose delivery would have meant that a reasonable investor would have withdrawn from signing this Agreement or would have done so in terms and conditions substantially different from those agreed herein". That potentially raises issues as to what information was or was not provided to Oldavia, what was known to it anyway, and what effect the information would have had on a reasonable investor.

    b) Paragraph 4.8 of Schedule 7.1 provides that "the Business of the Company has been operated in the ordinary course, and so as to maintain it as a going concern", and that the Company "has not entered into any unusual contract or commitment or otherwise departed from the ordinary course of business". That potentially raises issues as to the types of contracts the Company entered into during lockdown, whether they were "unusual" by reference to its prior period of operation, and whether it remains a "going concern" (which might engage issues of accountancy evidence).

    c) Paragraph 10.2 of Schedule 7.1 is a warranty concerning payments out of the Company's bank accounts, which provides that no payments have been made other than in the ordinary course of business and that "the balance of the accounts is not substantially different from the balances shown on the statement". That potentially raises factual enquiries not simply as to the balances of the accounts (however many there may be) but also the nature and character of any payments out of them.

d) Paragraph 12 of Schedule 7.2 is a warranty that the Company's accounts and receivables are valid and legitimate and that payment terms were in line with industry practice and those applied in previous years. That raises the possibility of at least some enquiry into the effect of the pandemic into the recoverability of receivables, and into any agreements to adjust payment terms.

e) There are a number of other warranties potentially engaged – paragraph 17 relating to labour and social security; paragraph 18.3 concerning titles and permits; and paragraph 21 concerning the status of current contracts.

34. Mr Peters might well be right that the true scope of dispute in relation to these issues proves to be narrower than at first apparent, with the real dispute between the parties being whether the effects of legislation and regulations introduced to address the pandemic and which have impacted the Hotel fall within the terms of the various representations and warranties. But, at least on the information now available, I am far from confident that will be the position, and there must be a very real risk that an attempt to try all of the issues in the case will give rise to wide ranging factual disputes.

35. Third, there is the related argument that Lopesan breached its duty under clause 5.3 of the SPA to "promptly notify [Oldavia] of any fact or circumstance which may affect the validity and accuracy of the Representations and Warranties at Completion Date". That is likely to raise similar factual issues to the previous defence, and potentially additional arguments as to what Lopesan knew and what Apollo knew. In addition, it is an issue which carries with it a real potential for further amendment of Apollo's position following disclosure. In other contexts in which failure to disclose cases are run, it is very common to find the pleaded case being amplified or supplemented to reflect additional information which arises from disclosure in the litigation. There is also a claim for breach of obligations relating to the management of the Company between signature of the SPA and completion, which raises similar factual issues.

36. Fourth, there is an argument that the SPA has been discharged due to force majeure or change of circumstances. At first blush, that is an issue which is likely to be decided on the basis of more general factors and legal argument, rather than a granular analysis of Lopesan's disclosure. However, this would have to be added to all of the other issues in play, adding to the cumulative burden.

37. Finally, there is an argument that Lopesan miscalculated when setting the Completion Date, and set the wrong date. That appears to be a make-weight argument, which does not raise any disputed issues of fact and which could readily be resolved.

Is there time for the issues to be fairly resolved in a trial by the end of the year?

38. Mr Peters provided the court with a draft timetable, which sought to give an indication of the directions which might be made to bring the case on for trial in the second week of December. It is not intended to be a criticism of Mr Peters' timetable when I observe that it bore all of the signs of an impressive attempt to fit a quart into a pint pot. It assumed that there would be no requests for further information, no reply witness statements, no supplemental experts' reports and no PTR (although I accept

that it will by no means always be necessary to provide for these steps when expedition is under consideration).

39. More significantly, the periods for seeking, producing and considering disclosure and resolving disputes as to disclosure are very tight, and there is no slack to allow for any amendments or attempted amendments. The majority of the disclosure will be in Spanish, requiring translation for review by members of the English legal team or use at trial. Even if confined to a two or three month period, the representations and warranties in issue appear to engage (as one would expect) many different aspects of the operation of a hotel business, and some comparison with the Hotel's pre-Covid operation is likely to be required. I do not think that it is an answer to this disclosure concern that the burden of providing disclosure will largely fall on Lopesan, because Lopesan's disclosure will be important to Apollo's efforts to prove its factual case, and because the issues raised, and the context in which they would arise, would not readily lend themselves to the drawing of adverse inferences from any gaps in disclosure. As I have said, there appears to be a real risk of the factual case concerning clause 5.3 of the SPA expanding after disclosure. In addition, Lopesan's response to the key issues in the case will emerge for the first time in its Reply, raising the risk of a rejoinder for which no provision has been made.

40. The length of trial is also unclear, but Mr Peters realistically accepted, as he had to, that a trial of all the issues might well run into a second Commercial Court week (particularly given the potential need for interpreters for Spanish speaking witnesses). Nor was there allowance for expert evidence other than that of Spanish law, should that be necessary.

41. For these reasons, I have concluded that this timetable is simply too tight for a fair trial of all the issues to take place before the end of term, and that embarking on the attempt would carry a very high risk either of failure (with an adjournment part way through) or a risk of unfairness to both parties if the case ploughed on regardless.

Conclusion on the expedition application

42. Taking into account all of the relevant matters, and in particular:

    i) the qualified nature of the urgency given my provisional views of the merits of the Lapse Argument, and the fact that an expedited trial might well not take the Lapse Argument off the table if it has merit;

    ii) the impact on the list and other court users of seeking to hold a trial spanning two Commercial Court weeks in December;

    iii) the delay on Lopesan's part between June and September 2020 in seeking a trial (particularly given the matters in iv below) and

    iv) a very real risk that the trial preparations could not be fairly undertaken in the period of just over two months available;

    I have concluded that it would not be appropriate to order an expedited trial of the whole dispute. I will leave the issue of whether the possibility of some other form of

expedited procedure should be left open until I have considered Apollo's application for a stay under Article 30(1).

THE ARTICLE 30(1) STAY APPLICATION

The applicable principles

43. Recital (21) to Brussels Recast provides:

> "In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of lis pendens and related actions…"

44. Cases of *lis pendens* and related actions are addressed by Section 9 of Brussels Recast, where two different scenarios are catered for. Article 29 deals with the situation (which does not arise here) where the English court is seised of proceedings when the courts of another Regulation country are already seised of a dispute involving the same cause of action and the same parties. In that situation, the court seised second must grant a stay.

45. Article 30, under which Apollo's application is made, provides:

> "1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
>
> 2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
>
> 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

46. It is agreed that Article 30(2) does not apply here because the Spanish court cannot take jurisdiction over the claim under the ECL (any more than the English court can take jurisdiction over the claim under the SPA). Apollo's application is therefore brought under Article 30(1).

47. There has been some debate as to whether actions are related for the purposes of Article 30 only when the actions can in fact be heard and determined together, or whether actions are related where they would be heard and determined together but for some external factor (such as exclusive jurisdiction agreements or subject-matter limits on the jurisdiction of a particular court) which prevents this. That debate was thought to have been settled, so far as English law is concerned, by the Court of Appeal in JSC Commercial Bank Privatbank v Kolomoisky [2019] EWCA Civ 1708, [182]-[192]. There are passages in the judgment of the Court of Appeal in Euro Eco Fuels (Poland) Ltd and others v Szczecin and Swinoujscie Seaports Authority and

others [2019] 4 WLR 156 (in particular at [52-53] and [61]) which appear to proceed on the basis that Article 30(1) does not apply where there is no real possibility of the two actions being heard together. To the extent that the decisions are inconsistent, I intend to follow the decision in Privatbank for the reasons given by Butcher J in Federal Republic of Nigeria v Royal Dutch Shell Plc and ors [2020] EWHC 1315 (Comm), [77](1)-(3). I will not lengthen this judgment by repeating those reasons here, particularly in circumstances in which Mr Peters did not suggest that the court had no discretion to order a stay under Article 30(1) in this case.

48. However, I accept Mr Peters' submission that a practical inability to achieve an outcome where both cases are heard and determined together will be a factor which weighs against granting a stay as a matter of discretion, and that "absent some strong, countervailing factor, the fact that proceedings cannot be consolidated and heard together will be a compelling reason for refusing a stay" (Privatbank, [210]).

49. Further, where the factor which prevents the two actions being heard together is an exclusive jurisdiction clause, that of itself will constitute a powerful (although not insuperable) factor against staying proceedings which have been brought in the parties' chosen jurisdiction pending the determination of proceedings elsewhere: The Alexandros T [2013] UKSC 70, [93-94] approving Cooke J in JP Morgan Europe Ltd v Primacom AG [2005] 1 CLC 493, [65]; Generali Italia SPA v Pelagic Fisheries Corporation [2020] EWHC 1014, Comm), [117]; Nomura v Banca Monte Dei Paschi [2014] 1 WLR 1584, [78-9].

50. I do not accept that this is only a factor when the other proceedings have themselves been commenced in breach of contract. Recital (19) of Brussels Recast records that:

> "The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation".

51. In both Pelagic and Nomura, the principle was applied in circumstances in which the court was proceeding on the basis that the other proceedings had not been commenced in breach of contract, and this issue was specifically addressed by Eder J in Nomura, [80] in the following terms:

> "It is fair to say that the reasoning of Cooke J would seem to proceed on the basis that the foreign proceedings were brought in breach of the exclusive jurisdiction clause. In the course of argument, I asked Mr Handyside whether it was the claimant's case that there was such a breach in the present case, i e that the Italian proceedings were a breach of the exclusive jurisdiction clause. (That was, of course, the subject matter of para (iv) of the declarations sought which was abandoned by the claimant as noted in para 4 above.) His response was, in effect, that the claimant reserved its position in that regard and that he did not seek to rely on such breach in the context of the present application. In any event, it seems to me that whether or not the Italian proceedings constitute a breach of the exclusive jurisdiction clause, the crucial point for present purposes is that the effect of the exclusive jurisdiction clause is that the claimant is contractually entitled to bring these present proceedings in England (at least so far as ISDA, master agreement and asset swap transactions are concerned). As I say, that is in

> my view a very significant factor against the grant of a stay. In particular, it seems to me that the court should, so far as possible, give effect to the parties' bargain and be very slow indeed to exercise a discretion in a manner the effect of which would be to destroy such bargain".

52. I agree with that analysis. The importance of respecting the parties' choice of exclusive jurisdiction is as much concerned with allowing proceedings a party has commenced in the court of choice to be heard there as it is with preventing proceedings from proceeding elsewhere than before the chosen court.

53. Mr Rabinowitz QC referred to two cases in which an Article 30(1) stay was granted even though proceedings had been commenced in this jurisdiction pursuant to an exclusive jurisdiction clause. In circumstances in which there is no suggestion that an exclusive jurisdiction clause precludes an Article 30(1) stay, there must be a limit to the benefit to be derived from the conclusion reached in other case on their own particular facts. However, neither case in my view reduces the weight to be accorded in any stay decision to the fact that proceedings have been commenced in England pursuant to an exclusive jurisdiction clause.

54. In the first, Lehman Brothers Bankhaus AG v CMA CGM [2013] EWHC 171 (Comm), Walker J granted a stay of English proceedings in circumstances in which the same issue of French law arose between the same parties in French proceedings (such that its determination there would be binding – a factor which Professor Briggs QC emphasises in the context in which he discusses the case, *Civil Jurisdiction and Judgments* 6th para. 2.285 footnote 1640), and in which Walker J appears to have formed the view that the issue of French law did not fall within the English jurisdiction clause in any event ([72] and [76-78]). The second, FKI Engineering Ltd v Striborg Ltd [2011] 1 WLR 3266, was also a case in which the other proceedings involved a determination of the same issue between the same parties. It was a case in which there were two agreements – an assignment agreement with an exclusive jurisdiction clause in favour of the German courts, which purported to assign the benefits of a business sale agreement which contained an exclusive jurisdiction clause in favour of the English courts. The stay, therefore, concerned only one aspect of the parties' dispute, one which went to the root of whether the claimant was party to the exclusive jurisdiction clause in the business sale agreement at all, and where the validity of the assignment was an issue which the claimant had specifically agreed (on its case in a manner binding on the defendant) was subject to the exclusive jurisdiction of the German courts.

55. Finally, so far as other factors material to the stay application are concerned, I was referred to the judgment of Lord Clarke in The Alexandros T, [92]:

> "In Owens Bank Ltd v Bracco (Case C-129/92) [1994] QB 509, at paras 74-79, Advocate General Lenz identified a number of factors which he thought were relevant to the exercise of the discretion. They can I think briefly be summarised in this way. The circumstances of each case are of particular importance but the aim of Article 28 is to avoid parallel proceedings and conflicting decisions. In a case of doubt it would be appropriate to grant a stay. Indeed, he appears to have approved the proposition that there is a strong presumption in favour of a stay. However, he identified three particular factors as being of importance: (1) the extent of the relatedness between the actions and the risk of mutually

> irreconcilable decisions; (2) the stage reached in each set of proceedings; and (3) the proximity of the courts to the subject matter of the case. In conclusion the Advocate General said at para 79 that it goes without saying that in the exercise of the discretion regard may be had to the question of which court is in the best position to decide a given question".

56. Notwithstanding Advocate General Lenz's reference to "a strong presumption", it has been held that the burden of proof is on the applicant in the ordinary way: FKI, [131] and Nomura International Plc, [73].

Should a stay be granted in this case?

57. It is common ground that the Spanish and English proceedings are related and that the Spanish court is first seised. Any issue arising in the English proceedings which concerns the issue of whether Oldavia was obliged to complete the SPA necessarily arises in Spain. I also accept that the degree of relatedness is high (although there is not a 100% overlap) and that the Spanish courts have much closer proximity to the subject matter of the case, involving, as it does, issues as to the effect of Covid-19 and the Spanish government's response to it on a Spanish hotel, and the legal effects of those and other matters on a contract governed by Spanish law.

58. However, Mr Rabinowitz QC accepts that if the English proceedings are stayed, it will not be possible to hear and determine the claims in the English and Spanish proceedings together, given the conflicting exclusive jurisdiction clauses in the ECL and the SPA. He also accepted that the decision (whether on issues of law or fact) in the Spanish proceedings would not be binding in the English proceedings, although he pointed to the fact that if Lopesan fails in the Spanish proceedings, that will in practice be determinative of the English proceedings, and that findings of law in the Spanish proceedings will have a strong evidential value in the English proceedings.

59. Absent the English jurisdiction clause, there would be a powerful case for a stay in this case. However, I have concluded that the case is not so powerful as to overcome the significance of the English jurisdiction clause, when taken in conjunction with the fact that it is not possible to hear and determine the cases together.

60. In particular, in this case, the parties have deliberately structured the transaction so that claims under the ECL would be heard in a different jurisdiction to claims under the SPA, even though it is plain from the terms of clause 5.1(b) and (ii) of the ECL that issues as to whether Oldavia had become unconditionally obliged to complete under the SPA and whether the SPA had been "validly terminated in accordance with its terms" were within the contemplation of Lopesan and Apollo as issues which might arise under the ECL. The fact that the ECL gave the English court exclusive jurisdiction to hear claims by Lopesan against Oldavia to require Oldavia to enforce Apollo's funding obligation merely serves to confirm the parties' clear commercial choice to split the issues of jurisdiction between England and Spain by reference to the agreement which was being enforced, regardless of the issues or parties.

61. That choice having been made, no doubt for good commercial reasons, and the events which have transpired being a scenario which must have been squarely within the parties' contemplation, it would take a very strong case to justify staying proceedings brought as of right here pending the outcome of proceedings in another jurisdiction.

The closer proximity of the Spanish courts to the dispute, nor its status as the natural forum to determine issues of Spanish law, are not sufficient to justify a stay, both because this must have been obvious to the parties when they put this arrangement in place, and because the parties expressly agreed not to raise any objections to proceedings in England on the ground that proceedings have been brought in an inconvenient forum. I do not suggest that this last factor is determinative or that it precludes an Article 30(1) stay. There is a public, as well as a purely private, interest in avoiding irreconcilable judgments within the Brussels Recast regime. However, the factor that the parties wanted the dispute to be determined in their chosen forum regardless of whether another court might be a more convenient forum is a factor which weighs in the balance against a stay.

62. In addition, while the stay will only be temporary, it is a stay pending the determination of an action which is in its infancy, not yet having reached a stage when a defence has been served, and which will take over 12 months to conclude (and very possibly longer than that). Indeed, the logic of Apollo's position must be that the English action would be put on hold until all potential appeals in Spain had been exhausted, as only then would the final rulings on the issues of Spanish law be known.

63. Finally, while there is a risk of irreconcilable judgments here, the consequences of such irreconcilability is less stark than in some cases. To obtain effective relief, Lopesan will have to win in England and Spain. If Lopesan wins in Spain but loses in England, it will obtain judgment against Oldavia but be unable to enforce it. If it wins in England and not Spain, then there will never be any completion under the SPA, and either Apollo will never have to perform the obligation which the English court has found it owes, or it will be able to recover any payment made (which, on conventional grounds, would be paid subject to a purpose trust, the extent of which would be defined by the English court's judgment, and would fall to be repaid if that purpose became impossible of fulfilment). To that extent, the position is much less stark than that frequently encountered on case management stay applications where, for example, the principal debt arises under a contract which gives exclusive jurisdiction to an arbitration tribunal, and a "see to it" guarantee gives exclusive jurisdiction to the English court.

64. For those reasons, Apollo's application for a stay is dismissed. However, if there is a material change in circumstances, including a change arising from the decisions which the English court makes in managing the litigation, it will be open to Apollo to make a further stay application, perhaps on more limited grounds.

THE FUTURE COURSE OF THE ACTION

65. I referred above to the fact that it is not presently clear what the issues will be in the action. In particular, it is not clear, how far some of the factual grounds for Apollo's defence will be in issue, and whether there are potentially decisive issues of law which are capable of being determined on assumed facts at a hearing this term which could be heard within a Commercial Court week.

66. In these circumstances, I have decided to make the following orders with a view to allowing the future conduct of the case to be considered at a case management hearing to be listed, if possible, on 23 October 2020:

i) Apollo shall serve its Defence by 12 October 2020.

ii) That Defence is to be accompanied by a schedule of the Spanish law propositions relied upon, with a sufficient (but not exhaustive) identification of the principal legal source relied on.

iii) Lopesan shall serve its Reply by 19 October 2020, accompanied by a similar schedule.

iv) On 19 October 2020, both parties must also exchange lists of their own documents relevant to the issue of whether there was an oral agreement to terminate the SPA on 13 and/or 19 April 2020.

67. The Court can then give further consideration to the progress of this action.