



Claim No. CL-2020-000092

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

**BETWEEN:**

**CRF I LIMITED**

**Claimant**

**and**

**(1) BANCO NACIONAL DE CUBA**

**(2) THE REPUBLIC OF CUBA**

**Defendants**

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**AMENDED POINTS OF DEFENCE**

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1. These **Amended** Points of Defence are served by the Defendants in respect of the Assignment and Immunity Issues as defined in the Order of Richard Salter Q.C. (sitting as a Deputy Judge of the High Court) dated 4 March 2021 (the “**Order**”). They are served without prejudice to the rights, privileges and immunities to which the Defendants are entitled (including, but not limited to, those arising under the State Immunity Act 1978: the “**SIA**”). In serving these **Amended** Points of Defence:
  - a. The Defendants rely on the undertaking given by CRF and recorded in the recitals to the Order that CRF will not contend that by serving evidence, making submissions and/or otherwise engaging with, *inter alia*, the matters addressed in the Order, either of the Defendants has taken any step in the proceedings within the meaning of s2 of the SIA, or otherwise submitted to the jurisdiction



of the English Court, and that all of their rights, privileges and immunities remain unaffected (including, but not limited to, those arising under the SIA).

- b. The Defendants reserve their right to raise any limitation defence available to them in these proceedings and nothing in these Amended Points of Defence constitutes a waiver of any such defence or an acknowledgement of any debt or claim, whether in respect of the alleged obligations at issue in these proceedings or at all.

2. In these Amended Points of Defence:

- a. Unless otherwise stated, references to paragraph numbers are to paragraphs of the Amended Points of Claim.
- b. For convenience only, certain headings and defined terms used in the Amended Points of Claim are adopted. No admissions are made thereby.
- c. The Defendants join issue with CRF on the Amended Points of Claim. Save as expressly set out in these Amended Points of Defence, each and every allegation in the Amended Points of Claim is denied as if it were separately set out and separately denied.
- d. References to Cuban legislation, regulations and/or rules are without prejudice to the expert evidence that the Defendants will seek to adduce in due course in accordance with any directions given by the Court.

3. As pleaded below, the Amended Points of Claim are vague, ambiguous and inadequately particularised in a number of important respects, such that the Defendants do not understand the case they have to meet. These Amended Points of Defence are served without prejudice to the foregoing. The Defendants reserve the right to amend these Amended Points of Defence if and insofar as CRF properly pleads its case by providing further and better particulars.

### Introduction

4. Paragraph 1 is noted.



5. Paragraph 2 is admitted. CRF (previously known as Cuba Recovery Fund I Limited) is and was at all material times a ‘vulture fund’ which invests in distressed Cuban sovereign debt for enforcement purposes.

6. As to paragraph 3:

a. The first sentence is admitted, save that prior to 28 May 1997, BNC was not a commercial bank but Cuba’s central bank with certain commercial functions. The Defendants will rely on the full terms of Law 13 of 1948 at trial for their true meaning and effect.

b. As to the second to fourth sentences:

i. It is admitted as a materially accurate summary of Decree Law 172 that it, *inter alia*: (i) established BCC as Cuba’s central bank, transferring that role from BNC to BCC; and (ii) maintained BNC’s commercial functions.

ii. The allegation that BNC was, and that Decree Law 172 maintained BNC’s alleged functions as, a “*manager of Cuban sovereign debt incurred prior to 1997*” is vague, ambiguous and inadequately particularised, such that the Defendants do not know the case they have to meet. The same is true of the allegation that Decree Law 181 “*endorsed*” these alleged functions.

iii. Without prejudice to the foregoing:

1. Even prior to Decree Law 172, at all times material to the present proceedings, BNC had no sovereign treasury functions and no authority to enter into, amend or assign guarantees on behalf of Cuba. Those functions were exercised (from 1976) by the State Finance Committee and (from 1994) by the Ministry of Finance and Prices. The Defendants will rely, *inter alia*, on Law 1323 of 1976, Decree Law 67 of 1983, and Decree Law 147 of 1994.

2. That remained the position after Decree Law 172, save that BNC’s remit was further curtailed by the transfer of the role of



central bank to BCC. Paragraph 6(b)(1) above is repeated; and the Defendants will rely, *inter alia*, on Decree Law 192 of 1999, Decree Law 347 of 2017 and Agreement 8301 of the Executive Committee of the Council of Ministers dated 26 January 2018.

3. The First Special Provision of Decree Law 172 provided that BNC remained responsible for the “*recording, oversight, service and monitoring of the foreign debt that the Cuban State and the National Bank of Cuba have contracted with foreign creditors to date*”. However, it is denied (if alleged) that this authority extended to (i) consenting to assignment of any guarantees issued by Cuba in respect of such debt, including the IBI Guarantee; and/or (ii) if it matters, acting as a “*manager of Cuban sovereign debt incurred prior to 1997*”. At all material times, BNC was required to discharge its functions in accordance with applicable Cuban law and regulations and to act solely within the scope of its authority. This position was maintained by Decree Law 181 (as amended by Decree Law 294 of 2012), which remains in force today.
    - iv. The Defendants will rely on the full terms of Decree Law 172 and Decree Law 181 at trial for their true meaning and effect.
  - c. As to the fifth sentence, it is admitted that BNC was the obligor under the alleged obligations at issue in these proceedings when those obligations were first assumed. For the reasons pleaded below, it is denied that BNC owes any such obligations to CRF.
  - d. In the circumstances, save to the extent expressly pleaded above, the paragraph is denied.
7. As to paragraph 4, it is admitted that Cuba was the guarantor in respect of the IBI Agreement when that agreement was first made. For the reasons pleaded below, it is denied that CRF is entitled to the benefit of the IBI Guarantee.





## The alleged 'sovereign debt' obligations

8. As to paragraph 5:

- a. The document referred to by CRF as the "Credit Lyonnais Loan" was an agreement between Credit Lyonnais and BNC whereby Credit Lyonnais agreed to maintain and extend the maturity date of existing deposits made with BNC on 28 February 1983. That document was not itself a loan and no monies were advanced pursuant to it. It is referred to in these Amended Points of Defence as the "**Credit Lyonnais Agreement**".
- b. The Credit Lyonnais Agreement was described on its face as "*Short-Term Non-Trade Related Indebtedness*" and was entered into by BNC in the exercise of Cuba's sovereign authority.
- c. The relevant provisions of the Credit Lyonnais Agreement include the following:
  - i. Clause 17(A) provided that the Credit Lyonnais Agreement would benefit and be binding upon the original contracting parties, their respective successors "*and any permitted assignee or transferee*".
  - ii. Clauses 17(C)(1) and (2) provided that any assignment by the lender other than to an entity affiliated with it required the prior consent of the borrower (BNC), such consent not to be unreasonably withheld. The requirement for BNC's prior consent was a condition precedent to valid assignment, such that there could be no valid assignment unless BNC's prior consent was obtained.
  - iii. Clause 17(C)(3) provided that any permitted assignee shall be entitled to the benefit of the Credit Lyonnais Agreement and shall be bound by the obligations of the lender thereunder. Accordingly, in the event that an assignment was purportedly made without receiving the prior consent of BNC, such assignment would be invalid and the purported assignee would not be a permitted assignee. The purported assignee would not



therefore be entitled to the benefit of the provisions of the Credit Lyonnais Agreement.

- d. The Defendants will rely on the full terms of the Credit Lyonnais Agreement at trial for their true meaning and effect.

9. As to paragraph 6:

- a. For the reasons pleaded below, it is denied that BNC owes CRF the Credit Lyonnais Debt, or any sums under or in respect of the Credit Lyonnais Agreement at all. For the same reasons, it is denied that any sums, whether as principal or interest, are “*outstanding*” as far as CRF is concerned.
- b. Without prejudice to the foregoing, the principal sum that was the subject of the Credit Lyonnais Agreement was DEM 25,500,000 when that agreement was made. No admissions are made as to alleged interest on that principal sum.
- c. In the circumstances, save to the extent expressly pleaded above, the paragraph is denied.

10. As to paragraph 7:

- a. The document referred to by CRF as the “IBI Loan” was an agreement between IBI and BNC whereby IBI agreed to maintain and extend the maturity date of existing deposits made with BNC on 28 February 1983. That document was not itself a loan and no monies were advanced pursuant to it. It is referred to in these Amended Points of Defence as the “**IBI Agreement**”.
- b. The IBI Agreement was described on its face as “*Short-Term Non-Trade Related Indebtedness*” and was entered into by BNC in the exercise of Cuba’s sovereign authority.
- c. The relevant provisions of the IBI Agreement include the following:
  - i. Clause 17(A) provided that the IBI Agreement would benefit and be binding upon the original contracting parties, their respective successors “*and any permitted assignee or transferee*”.



- ii. Clauses 17(C)(1) and (2) provided that any assignment by the lender other than to an entity affiliated with it required the prior consent of the borrower (BNC), such consent not to be unreasonably withheld. The requirement for BNC's prior consent was a condition precedent to valid assignment, such that there could be no valid assignment unless BNC's prior consent was obtained.
- iii. Clause 17(C)(3) provided that any permitted assignee shall be entitled to the benefit of the IBI Agreement and shall be bound by the obligations of the lender thereunder. Accordingly, in the event that an assignment was purportedly made without receiving the prior consent of BNC, such assignment would be invalid and the purported assignee would not be a permitted assignee. The purported assignee would not therefore be entitled to the benefit of the provisions of the IBI Agreement.
- d. The Defendants will rely on the full terms of the IBI Agreement at trial for their true meaning and effect.

11. As to paragraph 8:

- a. For the reasons pleaded below, it is denied that BNC owes CRF the IBI Debt, or any sums under or in respect of the IBI Agreement. For the same reasons, it is denied that any sums, whether as principal or interest, are "*outstanding*" as far as CRF is concerned.
- b. Without prejudice to the foregoing, it is admitted that the principal sum of the IBI Agreement was DEM 5,750,000 when that agreement was made. No admissions are made as to alleged interest on that principal sum.
- c. In the circumstances, save to the extent expressly pleaded above, the paragraph is denied.

12. As to paragraph 9:

- a. This is admitted as a materially accurate summary of the effect of the IBI Guarantee (save that the reference to 'IBI' in the second line should be to





‘BNC’). The IBI Guarantee was provided by Cuba in the exercise of its sovereign authority.

- b. The relevant provisions of the IBI Guarantee include the following:
  - i. Clause 3(A) provided that the guarantee shall benefit the lender under the IBI Agreement and its “*successors and assignees*”.
  - ii. Clause 3(B) provided that the lender under the IBI Agreement could assign its rights under the guarantee but that where BNC’s consent is required to the assignment under the IBI Agreement, the corresponding assignment under the guarantee shall require the prior written consent of Cuba, such consent not to be unreasonably withheld. The requirement for Cuba’s prior consent was a condition precedent to valid assignment, such that there could be no valid assignment unless Cuba’s prior consent was obtained.
  - iii. Clause 3(B) also provided that any permitted assignee shall be entitled to the benefit of the guarantee to the same extent as if it were an original party in respect of the rights assigned to it. Accordingly, in the event that an assignment was purportedly made without receiving the prior consent of Cuba, such assignment would be invalid and the purported assignee would not be a permitted assignee. The purported assignee would therefore not be entitled to the benefit of the provisions of the IBI Guarantee.
- c. The Defendants will rely on the full terms of the IBI Guarantee at trial for their true meaning and effect.
- d. For the reasons pleaded below, it is denied that CRF is entitled to the benefit of the IBI Guarantee and, accordingly, it is denied that Cuba has any obligation to CRF in respect of the IBI Agreement or the IBI Debt, whether as alleged or at all.
- e. In the circumstances, save to the extent expressly pleaded above, the paragraph is denied.





13. Without prejudice to the Defendants' position on limitation, as pleaded at paragraph 1.b) above, paragraph 10 is denied for the reasons pleaded below.

**Alleged waiver of sovereign immunity**

14. Paragraphs 11 to 13 are admitted as a materially accurate summary of the effect of Clause 22 of the Credit Lyonnais Agreement and Part III(F) of the Particulars thereof, Clause 22 of the IBI Agreement and Part III(F) of the Particulars thereof and Clause 7(B) of the IBI Guarantee. For the avoidance of doubt, it is denied (if alleged) that any waiver extended to (i) any rights or immunities that may not be waived by *inter partes* agreement, and/or (ii) any immunity against enforcement in respect of any specific assets. The Defendants will rely on the full terms of the Credit Lyonnais Agreement, the IBI Agreement and the IBI Guarantee at trial for their true meaning and effect. For the reasons pleaded below, it is denied that CRF has the benefit of the provisions pleaded in paragraphs 11 to 13 or any provisions of the Credit Lyonnais Agreement, the IBI Agreement or the IBI Guarantee at all.

15. As to paragraph 14:

- a. In CRF's skeleton argument in support of an abandoned application for default judgment, it was alleged that the "only exception" to sovereign immunity relevant to CRF's claims was that contained in s2 of the SIA. It appears that CRF no longer relies on that section. In any event, for the reasons pleaded below, it is denied that s2 of the SIA has any application in this case.
- b. For the reasons pleaded below, the benefit of the IBI Guarantee was not validly assigned to CRF. CRF is a stranger to the IBI Guarantee and has no cause of action in respect of it at all. Accordingly, it has no standing to argue in these proceedings that Cuba has submitted to the jurisdiction of the English court.
- c. Without prejudice to the foregoing, the IBI Guarantee was a guarantee given by Cuba, acting in its capacity as a sovereign state, in respect of an obligation which was assumed by BNC in the exercise of Cuba's sovereign authority (BNC being the central bank of Cuba at the relevant time). It is denied that the IBI Guarantee was a commercial transaction, whether within the meaning of



s3(1)(a) and s3(3)(b) or (c) of the SIA or at all. For the same reasons, Cuba is entitled to and relies upon its immunity arising under, *inter alia*, s1 of the SIA.

- d. Further, in circumstances where CRF is a stranger to the IBI Guarantee, the present proceedings do not 'relate to' a commercial transaction within the meaning of s3(1) of the SIA or at all. In the circumstances, it is denied that the 'commercial transaction' exception in s3 of the SIA applies in these proceedings.
- e. In the circumstances, save to the extent expressly pleaded above, the paragraph is denied.

16. As to paragraph 15:

- a. For the reasons pleaded below, the benefit of the Credit Lyonnais Agreement and the IBI Agreement were not validly assigned to CRF. CRF is a stranger to the Credit Lyonnais Agreement and the IBI Agreement and has no cause of action in respect of them at all. Accordingly, it has no standing to argue in these proceedings that BNC has submitted to the jurisdiction of the English court.
- b. Without prejudice to the foregoing, BNC is and was at all material times a 'separate entity' within the meaning of s14(1) of the SIA. The Credit Lyonnais Agreement and the IBI Agreement were entered into by BNC in the exercise of Cuba's sovereign authority (BNC being the central bank of Cuba at the relevant time). It is denied that they were commercial transactions, whether within the meaning of s3(1)(a) and s3(3)(b) or (c) of the SIA or at all.
- c. Further, in circumstances where CRF is a stranger to the Credit Lyonnais Agreement and the IBI Agreement, the present proceedings do not 'relate to' a commercial transaction within the meaning of s3(1) of the SIA or at all. Accordingly, it is denied that the 'commercial transaction' exception in s3 of the SIA applies in these proceedings.
- d. In the circumstances, the present proceedings relate to a 'thing done' by BNC in the exercise of Cuba's sovereign authority and the circumstances are such that Cuba would have been entitled to immunity had it entered into the Credit



Lyonnais Agreement and the IBI Agreement. BNC is therefore entitled to and relies upon its immunity arising under, *inter alia*, s14(2) of the SLA.

e. In the circumstances, save as expressly pleaded above, the paragraph is denied.

17. Paragraph 16 is denied for the reasons pleaded above.

### **BNC as alleged agent for Cuba**

18. As to paragraph 17:

- a. BNC's alleged authority to act on behalf of Cuba, whether actual or apparent/ostensible, is a matter for Cuban law. By its reliance on Cuban laws in support of its allegations of agency, it appears that this is accepted by CRF.
- b. The first sentence is denied. At all material times and in all matters relating to the alleged assignments at issue in these proceedings, BNC was acting solely on its own behalf and not as agent for Cuba.
- c. As to the second and third sentences, the allegation that BNC was "*authorised to act on Cuba's behalf in relation to sovereign debt obligations*" is vague, ambiguous and inadequately particularised, such that the Defendants do not know the case they have to meet. Without prejudice to the foregoing, it is denied:
  - i. that BNC was authorised on behalf of Cuba to make the alleged assignments at issue in these proceedings;
  - ii. that Law 930 was in effect until 13 October 1984 (it had been derogated from by Law 1298 of 1975); and
  - iii. that Decree Law 84 of 1984 restated (or provided) that BNC was authorised to act on Cuba's behalf in relation to sovereign debt obligations (paragraph 6(b) above is repeated).
- d. As to the fourth sentence, it is unclear whether CRF intends to allege any distinction between "*sovereign debts*" and "*foreign debts*" and, if so, the relevance thereof. The alleged obligations at issue in these proceedings were





assumed by BNC in the exercise of Cuba's sovereign authority. Paragraph 6 above is repeated.

- e. As to the fifth sentence, the allegations made in respect of Decree Law 192 are vague, ambiguous and inadequately particularised, such that the Defendants do not know the case they have to meet. Without prejudice to the foregoing, Articles 54 to 56 of Decree Law 192 of 1999 prohibit BNC from taking any relevant steps in relation to the Credit Lyonnais Agreement and Debt, the IBI Agreement and Debt and the IBI Guarantee (including in particular their assignment) without the express authorisation of the Ministry of Finance and Prices and the approval of the Council of Ministers. No such authorisation was provided in respect of the alleged assignments at issue in these proceedings, which were void and of no effect. It is admitted that Decree Law 192 of 1999 remains in force today. Paragraph 6 above is repeated.
- f. As to the sixth sentence, Decree Law 361 of 2018 gives further powers to BCC, but does not affect the limits on BNC's functions and authority as set out herein.
- g. The Defendants will rely on the full terms of Law 930 of 1961, Law 1298 of 1975, Decree Law 84 of 1984, Decree Law 172 of 1997, Decree Law 181 of 1998, Decree Law 192 of 1999 and Decree Law 361 of 2018 at trial for their true meaning and effect.
- h. In the circumstances, save as expressly pleaded above, the paragraph is denied.

19. As to paragraph 18:

- a. BNC's alleged authority to act on behalf of Cuba, whether actual or apparent/ostensible, is a matter for Cuban law. Cuban law has no concept of apparent/ostensible authority. In the circumstances, the paragraph is denied. If (which is denied) English law applies, the paragraph is denied for the reasons pleaded below.
- b. As to paragraph 18.1:





- i. Save that the reference to paragraph 11 in the first sentence is presumably intended to be a reference to paragraphs 3 and/or 17, the first sentence is admitted and paragraphs 6 and 8 above are repeated.
  - ii. The second sentence is vague, ambiguous and inadequately particularised, such that the Defendants do not know the case they have to meet. Without prejudice to the foregoing, it is denied save insofar as it is consistent with paragraphs 6 and 18 above (which are repeated).
  - iii. In the circumstances, save as expressly pleaded above, the subparagraph is denied.
- c. As to paragraph 18.2:
- i. The allegation that “*matters concerning*” the Credit Lyonnais Agreement and Debt, the IBI Agreement and Debt and the IBI Guarantee were “*dealt with*” by BNC is vague, ambiguous and inadequately particularised, such that the Defendants do not know the case they have to meet.
  - ii. Without prejudice to the foregoing, it is denied that BNC had authority to act on behalf of Cuba in relation to the alleged assignments at issue in these proceedings and paragraph 18 above is repeated. Further, it is denied that BNC and/or Cuba represented that BNC did have such authority, whether to CRF or at all.
  - iii. In the circumstances, save as expressly pleaded above, the subparagraph is denied.
- d. As to paragraph 18.3:
- i. The allegations as to what unidentified “*participants*” in the “*Cuban sovereign debt market*” are alleged to have “*understood*” are vague, ambiguous and inadequately particularised, such that the Defendants do not know what case they have to meet. The same is true of the allegation that BNC acted as Cuba’s agent “*concerning ... sovereign debt obligations*”.



- ii. Without prejudice to the foregoing: (i) the alleged understandings of unidentified participants are irrelevant to the question of BNC's alleged apparent/ostensible authority in respect of the alleged assignments at issue in these proceedings; and (ii) any reasonable participant would have known of the limits on BNC's functions and authority as set out in paragraphs 6 and 18 above.
  - iii. In the circumstances, save as expressly pleaded above, the sub-paragraph is denied.
- e. As to paragraph 18.4:
- i. It is admitted that the quoted words appeared on BNC's website.
  - ii. It is denied that the true meaning and effect of the quoted words was that BNC was "*duly authorised to act in relation to the sovereign debt obligations of Cuba*", whatever that vague, ambiguous and inadequately particularised allegation is intended to mean. In particular, it is denied, if it is alleged, that this amounted to a representation that BNC was authorised to act as Cuba's agent in respect of the alleged assignments at issue in these proceedings. BNC was not authorised to do so and paragraph 18 above is repeated.
  - iii. Further or alternatively, CRF makes no allegation that it viewed and/or relied upon the quoted words on BNC's website, whether at the time of the alleged assignments at issue in these proceedings or at all. In the circumstances, the fact that the quoted words appeared on BNC's website is irrelevant in any event.
  - iv. In the circumstances, save as expressly pleaded above, the sub-paragraph is denied.
- f. As to paragraph 18.5:
- i. The allegations as to what unidentified "*reasonable participants*" in the "*Cuban sovereign debt market*", including CRF's unidentified alleged "*predecessors in title*", are alleged to have "*understood*" are vague,



ambiguous and inadequately particularised, such that the Defendants do not know what case they have to meet. The same is true of the allegation that BNC was authorised to act on Cuba's behalf "in relation to Cuba's sovereign debt obligations".

- ii. Without prejudice to the foregoing, the alleged understandings of unidentified participants are irrelevant to the question of BNC's alleged apparent/ostensible authority in respect of the alleged assignments at issue in these proceedings.
- iii. CRF is put to strict proof as to its knowledge and that of its alleged predecessors in title. The Defendants will say that, at all material times, CRF and its alleged predecessors in title knew or ought to have known that BNC was not authorised to act on Cuba's behalf as its agent in respect of the alleged assignments at issue in these proceedings. In support of this plea, the Defendants will rely on, *inter alia*, (i) the Notice of Assignment and Agreement to be Bound, which was addressed to BNC "as Borrower" and Cuba "as Guarantor" and which was signed by BNC "as Borrower"; and (ii) the fact that the limits on BNC's functions and authority, as set out in Cuban legislation pleaded in paragraphs 6 and 18 above, were a matter of public record and would have been known to any reasonable participant in the relevant market.
- iv. It is denied that any of the matters pleaded by CRF in paragraph 18 and its sub-paragraphs are a sufficient basis for the allegation that Cuba placed BNC in a position which would lead CRF to believe that BNC was authorised to act on Cuba's behalf as its agent or otherwise in respect of the alleged assignments at issue in these proceedings. It is further denied that any of those matters support an allegation that Cuba represented that BNC was authorised to act on its behalf in relation to such matters.
- v. In the circumstances, save as expressly pleaded above, the sub-paragraph is denied.
- g. As to paragraph 18.6:





- i. For the reasons pleaded above, it is denied that Cuba made any such representations, whether as alleged or at all.
- ii. It is denied that CRF communicated solely with BNC in respect of the alleged assignment of the IBI Guarantee. The same is true of the alleged assignment of the Credit Lyonnais Agreement and Debt and the IBI Agreement and Debt. The Notice of Assignment and Agreement to be Bound was addressed to BNC “*as Borrower*” and separately to Cuba “*as Guarantor*”. For the reasons pleaded above, BNC had no authority to act on behalf of Cuba as its agent in respect of any of the alleged assignments at issue in these proceedings, which CRF knew or ought to have known. Accordingly, the alleged assignments were invalid and of no effect.
- iii. Without prejudice to the foregoing, CRF is put to strict proof as to each and every alleged representation which it and each and every one of its unidentified alleged predecessors in title are said to have relied upon in respect of any alleged assignment of the Credit Lyonnais Agreement and Debt, the IBI Agreement and Debt and the IBI Guarantee. Without prejudice to the foregoing, the Defendants will say that any such reliance was unreasonable and/or irrational, *inter alia*, for the reasons pleaded at paragraph 19(f) above.
- iv. In the circumstances, save as expressly pleaded above, the sub-paragraph is denied.
- h. Save as expressly pleaded above, paragraph 18 and each of its sub-paragraphs is denied.

**BNC’s employees and alleged agents**

20. The issue of whether and to what extent the officers and employees of BNC were authorised to act on its behalf as its agents, including the issue of their actual and/or apparent/ostensible authority, is governed by Cuban law. Further, Cuban law governs (i) the attribution to BNC and/or Cuba of any act of a person purportedly acting on behalf of BNC and/or Cuba, and (ii) BNC’s capacity to enter into any legal transaction,





including its capacity to consent to any alleged assignments. Without prejudice to the expert evidence that the Defendants will seek to adduce in due course in accordance with any directions given by the Court, the Defendants will say as follows:

- a. Article 41 of the Cuban Civil Code provides that the capacity of legal persons is determined by applicable legislation, and by the statutes or regulations governing that legal person. Pursuant to Sections 2, 15 and/or 17(a) of Decree Law 181, Resolution 10 of the President of BNC dated 26 April 2016 approved the “Rules governing Authorisations and Use of Signatures” (the “BNC Rules”). As a matter of Cuban law, the BNC Rules and Decree Law 181 pursuant to which they were enacted, govern, *inter alia*, the scope of authority of BNC’s officers and employees to bind BNC, the attribution to BNC of any acts of such officers and employees, and BNC’s capacity to enter into any legal transaction, including its capacity to consent to any alleged assignments.
- b. Section 1 of the BNC Rules provides that authority may be conferred on certain officials and employees of BNC “through the granting of use of banking signatures, so that they may act in the name and on behalf of [BNC] under the rules herein and thus enter into any relevant banking transaction”. Section 4 of the BNC Rules provides for three categories of BNC signatures: ‘Type A’, ‘Type B’ and ‘Type C’ (the types of signature correlating to different ranks of BNC officials).
- c. Section 17 of the BNC Rules provides, *inter alia*, that a transaction which exceeds US\$5 million may only be authorised: (i) individually by the President of BNC; or (ii) by two BNC officials having ‘Type A’ signatures, one of whom must be the Director of Documentary Credit, the Director of Operations, the Director of Accounting, the Chief Operating Officer, or a Vice-President. The Defendants will also rely on Section 6 of the BNC Instructions and Procedures Handbook (the “**BNC Handbook**”).
- d. Article 67 of the Cuban Civil Code provides that any act performed in breach of a legal provision is null and void, which includes an act performed without complying with the requisite formalities. That includes the signature formalities contained in the BNC Rules and the BNC Handbook.

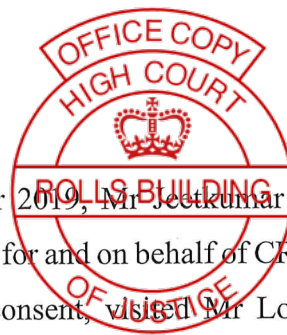


dd. Further or alternatively, (i) an act of an official and/or employee of BNC that does not comply with the foregoing requirements is not attributable to BNC, and/or (ii) a purported transaction that does not comply with those requirements is *ultra vires* and void.

e. Cuban law has no concept of apparent/ostensible authority.

21. As to paragraph 19:

- a. It is denied, if alleged, that Mr Lozano was ever a member of the Board of Directors of BNC. By Resolution 26/2018 dated 1 July 2018, the President of BNC appointed Mr Lozano to the position of “*Director of Management of Operations of [BNC], with category of manager*”. That was the position occupied by Mr Lozano at the time of the purported assignments at issue in these proceedings.
- b. The scope of Mr Lozano’s functions and authority was limited by, *inter alia*, the BNC Rules and the BNC Handbook. In particular, in circumstances where the value of each of the Credit Lyonnais Agreement and Debt and the IBI Agreement and Debt was in excess of US\$5 million, Mr Lozano lacked authority to act in his sole name on BNC’s behalf in respect of any alleged assignment of those alleged obligations. For the reasons pleaded at paragraph 20 above, Mr Lozano could only act in respect of any such assignment together with at least one other ‘Type A’ signatory. This was reflected, amongst other places, in a book of signatures of BNC’s authorised signatories, compiled by BNC on a regular basis and circulated to third parties with which it dealt, including ICBC (the “**Signature Book**”).
- c. To the knowledge of CRF, at its instigation and with its support and encouragement, Mr Lozano acted beyond the scope of his authority, contrary to the interests of BNC, and in breach of the requirements in the BNC Rules and the BNC Handbook, in relation to the alleged assignments at issue in these proceedings in return for a financial inducement promised and/or paid by CRF’s duly authorised agent acting on its behalf, in particular:



- i. Between about 25 and 29 October 2019, Mr Jeetkumar Gordhandas, who was at all material times acting for and on behalf of CRF as its agent and with CRF's knowledge and consent, visited Mr Lozano on two occasions at BNC's headquarters in Havana, Cuba. The purpose of those meetings was to facilitate the implementation of the proposed assignments. During the course of those meetings, Mr Gordhandas provided Mr Lozano with a financial inducement of 200 Cuban Convertible Pesos (equivalent to around 5,000 Cuban Pesos), in return for expediting the procedural steps required to effect the proposed assignments. Mr Gordhandas also promised Mr Lozano a payment of £25,000 in return for his continued assistance with this unlawful scheme.
- ii. On or about 25 November 2019 Mr Lozano caused his secretary to draft a letter addressed to Mr Gordhandas at CRF which purported to confirm BNC's agreement to the proposed assignment of the Credit Lyonnais Agreement and Debt and the IBI Agreement and Debt from ICBC to CRF. Mr Lozano placed his sole signature on that document and subsequently sent it to CRF together with a copy of the Notice of Assignment and Agreement to be Bound, signed by him in his sole name and stamped with BNC's seal. At all material times, Mr Lozano was, as CRF knew, purporting to act on behalf of BNC (and not Cuba) but was acting beyond the scope of his authority contrary to BNC's interests and in breach of, *inter alia*, the BNC Rules and the BNC Handbook as pleaded at paragraph 20 above.
- d. By Judgment 38/2021 of the Criminal Chamber of the Popular Provincial Court of Havana, Mr Lozano was found guilty of, *inter alia*, the criminal offence of bribery in respect of his role in the alleged assignments at issue in these proceedings.
- e. For the reasons pleaded at paragraphs 18 and 19 above, BNC had no authority to act on behalf of Cuba in respect of the alleged assignments at issue in these proceedings. Further, it is denied, if it is alleged, that Mr Lozano had any authority to act on behalf of Cuba in respect of any of the alleged assignments at issue in these proceedings. Alternatively, if (which is denied) Mr Lozano did





have any such authority, Mr Lozano's acts were in excess such authority for the reasons pleaded above and were in breach of the Cuban law provisions pleaded at paragraph 25 below.

- f. In the circumstances, at all material times Mr Lozano's acts in respect of the purported assignments at issue in these proceedings were beyond the scope of his authority and this was known to, or ought to have been known to, CRF. Further or alternatively, such acts were not attributable to BNC or Cuba and/or any purported transactions said to result from such acts were *ultra vires* BNC. Such acts and/or purported transactions were therefore void and of no effect. Paragraphs 20 above and 25 below are repeated. Accordingly, Mr Lozano's acts were ineffective to bind either BNC or Cuba.
- g. In the circumstances, save to the extent expressly pleaded above, the paragraph is denied.

22. As to paragraph 20:

- a. Mr Lozano's alleged authority to act on behalf of BNC, whether actual or apparent/ostensible, is a matter for Cuban law. Cuban law has no concept of apparent/ostensible authority. In the circumstances, the paragraph is denied. If (which is denied) English law applies, the paragraph is denied for the reasons pleaded below.
- b. As to paragraph 20.1:
- i. Mr Lozano's position at BNC was as pleaded in paragraph 20(a) above. By appointing him to the position of "*Director of Management of Operations of [BNC], with category of manager*", BNC represented that he had the authority usually to be expected of the Director of Management of Operations of BNC in particular, rather than any bank in general. In the context of the alleged assignments at issue in the present proceedings, that representation was limited to the authority usually to be expected of the Director of Management of Operations of BNC discharging its legal functions in accordance with Cuban law and regulations. Paragraph 20 above is repeated. Accordingly, allegations





as to the usual authority of a director of an unidentified bank operating in an unidentified market are irrelevant.

- ii. Mr Lozano's authority (usual or otherwise) did not extend to the assignment of debt obligations in Mr Lozano's sole name on behalf of BNC, but was instead limited to making such assignments in accordance with the requirements of the BNC Rules and BNC Handbook, including in particular the requirement to have the signature of at least one other 'Type A' signatory of BNC. Paragraph 20 above is repeated. It is denied, if it is alleged, that Mr Lozano's authority (usual or otherwise) extended to acting on behalf of Cuba.
  - iii. In the circumstances, save as expressly pleaded above, the subparagraph is denied.
- c. Paragraph 20.2 is vague, ambiguous and inadequately particularised, such that the Defendants do not know the case they have to meet. Without prejudice to the foregoing:
- i. It is denied that Mr Lozano was authorised to assign the Credit Lyonnais Agreement and Debt, the IBI Agreement and Debt or the IBI Guarantee in his sole name and paragraph 20 above is repeated.
  - ii. It is further denied that BNC presented Mr Lozano to unidentified persons or to CRF as having such authority as alleged. At all material times, to the extent that BNC presented Mr Lozano as having any authority in respect of the alleged assignments at issue in the present proceedings, which is denied, that authority was presented as being limited in the manner pleaded at 22.b) above.
  - iii. It is denied, if it is alleged, that Mr Lozano had authority to act on behalf of Cuba or to assign or otherwise deal with any guarantees issued by Cuba (including the IBI Guarantee). Mr Lozano had no such authority and was not presented by BNC or Cuba as having such authority, whether to CRF or at all.



- iv. In the circumstances, save as expressly pleaded above, the subparagraph is denied.
- d. Paragraph 20.3 is vague, ambiguous and inadequately particularised, such that the Defendants do not know the case they have to meet. Without prejudice to the foregoing:
- i. Allegations as to what matters BNC is said to have “*generally*” entrusted to Mr Lozano in respect of unidentified “*sovereign debt obligations*”, together with allegations as to what Mr Lozano is said to have been presented to unidentified persons as being authorised to do in respect of such unidentified obligations, are irrelevant to the question of Mr Lozano’s alleged apparent/ostensible authority in respect of the alleged assignments at issue in these proceedings.
  - ii. Further, allegations as to what unidentified “*participants*” in the “*Cuban sovereign debt market*” are alleged to have understood Mr Lozano to have been authorised to do in respect of unidentified “*sovereign debt obligations*” are similarly irrelevant.
  - iii. Paragraph 22(c)(ii) above is repeated.
  - iv. In the circumstances, save as expressly pleaded above, the subparagraph is denied.
- e. As to paragraph 20.4:
- i. It is denied that Mr Lozano was listed as a director of BNC on its website and in the Official Cuban Gazette. The representation alleged is accordingly denied (and paragraph 22(b) above is repeated).
  - ii. In any event, allegations as to representations said to have been made to unidentified “*participants*” in the “*Cuban sovereign debt market*” in respect of generalised “*sovereign debt obligations*” are irrelevant to the question of Mr Lozano’s alleged apparent/ostensible authority in respect of the alleged assignments at issue in these proceedings.



- iii. Paragraph 22(c)(ii) above is repeated.
- iv. In the circumstances, save as expressly pleaded above, the subparagraph is denied.
- f. As to paragraph 20.5:
- i. For the reasons pleaded in this paragraph 22 above, it is denied that BNC made the representations as to Mr Lozano's authority as alleged, whether to CRF or its alleged predecessor in title, ICBC.
  - ii. Without prejudice to the foregoing, CRF is put to strict proof as to its alleged understanding and the alleged understanding of ICBC at the material times including, without limitation, the precise reasons for such alleged understanding.
  - iii. Without prejudice to the foregoing, the Defendants will say that any such alleged understanding was unreasonable and/or irrational, *inter alia*, because, at all material times, CRF and its alleged predecessors in title knew or ought to have known that Mr Lozano was not acting on behalf of BNC or, to the extent alleged, Cuba, as their agent in relation to the alleged assignments at issue in these proceedings. In support of this plea, the Defendants will rely on, *inter alia*, the facts and matters pleaded at paragraph 21 above and ICBC's prior dealings with BNC.
  - iv. In the circumstances, save as expressly pleaded above, the subparagraph is denied.
- g. As to paragraph 20.6:
- i. For the reasons pleaded in this paragraph 22 above, it is denied that BNC made the representations as alleged.
  - ii. Without prejudice to the foregoing, CRF is put to strict proof as to each and every representation which it and ICBC are said to have relied upon in respect of any alleged assignment of the Credit Lyonnais Agreement and Debt, the IBI Agreement and Debt and the IBI Guarantee. Without





prejudice to the foregoing, the Defendants will say that any such reliance was unreasonable and/or irrational, *inter alia*, for the reasons pleaded at paragraph 22(f) above.

- iii. The Defendants are unable to admit or deny the allegation that ICBC was acting as agent for CRF. However, on CRF's own case, it is fixed with the knowledge of ICBC as to the limitations on Mr Lozano's authority to act on behalf of BNC, including, in particular, by reason of ICBC's receipt of the Signature Book and its prior dealings with BNC. Paragraph 21 above is repeated.
- iv. In so far as CRF and/or ICBC dealt with Mr Lozano in relation to the alleged assignments at issue in these proceedings, they did so: (i) in respect of the Credit Lyonnais Agreement and the IBI Agreement only (and not the IBI Guarantee); (ii) in Mr Lozano's position as Director of Management of Operations of BNC only (and not in connection with Cuba); (iii) in circumstances where, to the knowledge of CRF, Mr Lozano was acting in breach of, *inter alia*, the BNC Rules as pleaded at paragraph 20 above; and (iv) so far as CRF is concerned, in furtherance of the unlawful scheme pleaded in paragraph 21(c) above.
- v. In the circumstances, save to the extent expressly pleaded above, the sub-paragraph is denied.
- h. Save to the extent expressly pleaded above, paragraph 20 and each of its sub-paragraphs is denied. Further or alternatively, BNC and Cuba will say that any purported acts by Mr Lozano were not attributable to BNC or Cuba and/or any purported transactions said to result from such acts were *ultra vires* BNC. Such acts and/or purported transactions were therefore void and of no effect. Paragraphs 20 above and 25 below are repeated.

23. As to paragraph 21:

- a. At all material times, Ms Marti was employed by BNC as a Manager within the Foreign Debt Department, in accordance with her appointment to that role by Resolution 27/2018 of the President of the BNC. It is denied that Ms Marti had



“responsibility for assignment of debts”, whatever that vague and imprecise phrase is intended to mean. Ms Marti was a ‘Type A’ signatory within the meaning of the BNC Rules, as reflected in, amongst other places, the Signature Book. Ms Marti’s ‘responsibilities’ and authority were limited accordingly.

- b. The scope of Ms Marti’s functions and authority was limited by, *inter alia*, the BNC Rules, Resolution 27/2018 and the BNC Handbook. In particular, in circumstances where the value of each of the Credit Lyonnais Agreement and Debt and the IBI Agreement and Debt was in excess of US\$5 million, Ms Marti had no authority to act in her sole name on BNC’s behalf in respect of any alleged assignment of those alleged obligations. For the reasons pleaded at paragraph 20 above, any such assignment or consent thereto required the signature of either the President of BNC acting in his sole name or at least two ‘Type A’ signatories acting together.
- c. For the reasons pleaded at paragraphs 18 and 19 above, BNC had no authority to act on behalf of Cuba in respect of the alleged assignments at issue in these proceedings. Further, it is denied, if it is alleged, that Ms Marti had any authority to act on behalf of Cuba in respect of any of the alleged assignments at issue in these proceedings.
- d. In the circumstances, save to the extent expressly pleaded above, the paragraph is denied. Further or alternatively, BNC and Cuba will say that any purported acts by Ms Marti were not attributable to BNC or Cuba and/or any purported transactions said to result from such acts were *ultra vires* BNC. Such acts and/or purported transactions were therefore void and of no effect. Paragraphs 20 above and 25 below are repeated.

24. As to paragraph 22:

- a. Ms Marti’s alleged authority to act on behalf of BNC, whether actual or apparent/ostensible, is a matter for Cuban law. Cuban law has no concept of apparent/ostensible authority. In the circumstances, the paragraph is denied. If (which is denied) English law applies, the paragraph is denied for the reasons pleaded below.



b. As to paragraph 22.1:

- i. At all material times, Ms Marti was a ~~Manager~~ within BNC's Foreign Debt Department. By appointing her to that position, BNC represented that she had the authority usually to be expected of such a manager of BNC in particular, rather than any bank in general. In the context of the alleged assignments at issue in the present proceedings, that representation was limited to the authority usually to be expected of such an employee of BNC discharging its legal functions in accordance with Cuban law and regulations. Paragraph 20 above is repeated. Accordingly, allegations as to the usual authority of an employee of an unidentified bank operating in an unidentified market are irrelevant.
- ii. Ms Marti's authority (usual or otherwise) did not extend to the assignment of debt obligations in her sole name on behalf of BNC, but was instead limited to making such assignments in accordance with the requirements of the BNC Rules and BNC Handbook, including in particular the requirement to have the signature of at least one other 'Type A' signatory of BNC. Paragraphs 20 and 23 above are repeated. It is denied, if it is alleged, that Ms Marti's usual authority extended to acting on behalf of Cuba.
- iii. In the circumstances, save as expressly pleaded above, the sub-paragraph is denied.

c. As to paragraph 22.2:

- i. To the knowledge of BNC and its directors, Ms Marti was not held out as having authority to act in the manner alleged. At all material times, Ms Marti was held out as having only such authority as was consistent with her actual authority, as pleaded above.
- ii. Further or alternatively, to the extent that Ms Marti was held out as having such authority as alleged, which is denied, this was not a holding out by BNC or with its knowledge or consent. Accordingly, any such holding out was of no effect.





iii. In the circumstances, save as expressly pleaded above, the subparagraph is denied.

d. As to paragraph 22.3:

i. It is admitted that the words "*Assignment of Debt*" appeared in Ms Marti's email signature line. It is denied that this represented, whether to CRF or at all, that Ms Marti was authorised to act in her sole name on behalf of BNC in relation to the assignment of debts in general, or in relation to the alleged assignments at issue in the present proceedings. Those words simply described the general area of BNC's operations in which she worked.

ii. Further, CRF knew or ought to have known that this was the case, *inter alia*, (i) because it would or should have informed itself of the scope of authority of the relevant employees at BNC with whom it and/or ICBC were dealing in connection with the purported assignment of the Credit Lyonnais Agreement and the IBI Agreement; and/or (ii) as a result of the Signature Book which had been sent to ICBC and as a result of ICBC's prior dealings with BNC. The Defendants note in this regard CRF's pleaded case that ICBC acted as its agent when it dealt with Ms Marti (for example at paragraph 22.5). Whilst the Defendants are unable to admit or deny that allegation, on CRF's own case it was fixed with ICBC's knowledge as its agent.

iii. In the circumstances, save as expressly pleaded above, the subparagraph is denied.

e. As to paragraph 22.4:

i. For the reasons pleaded in this paragraph 24 above, it is denied that BNC made the representations as to Ms Marti's authority as alleged, whether to CRF or to ICBC.

ii. Without prejudice to the foregoing, CRF is put to strict proof as to its alleged understanding and the alleged understanding of ICBC at the



material times including, without limitation, the precise reasons for such alleged understanding. Without prejudice to the foregoing, the Defendants will say that any such alleged understanding was unreasonable and/or irrational in circumstances where CRF and ICBC (acting as CRF's agent on CRF's own case, as to which no admissions are made) knew or ought to have known that Ms Marti's authority was limited as aforesaid. Paragraphs 23 and 24(d) above are repeated.

- iii. In the circumstances, save as expressly pleaded above, the subparagraph is denied.
- f. As to paragraph 22.5:
- i. For the reasons pleaded in this paragraph 24 above, it is denied that BNC made the representations as alleged.
  - ii. Without prejudice to the foregoing, CRF is put to strict proof as to each and every representation which it and ICBC are said to have relied upon, and precisely what each of CRF and ICBC allegedly understood from each and every alleged representation. Without prejudice to the foregoing, the Defendants will say that any such reliance and/or understanding was unreasonable and/or irrational, *inter alia*, for the reasons pleaded at paragraph 24.e) above.
  - iii. The Defendants are unable to admit or deny the allegation that ICBC was acting as agent for CRF. However, on CRF's own case, it is fixed with the knowledge of ICBC as to the limitations on Ms Marti's authority to act on behalf of BNC, including, in particular, by reason of ICBC's receipt of the Signature Book and its prior dealings with BNC.
  - iv. It is admitted that CRF and ICBC 'dealt' with Ms Marti in the limited sense that they corresponded with her to provide documents she had requested on behalf of BNC (and not Cuba) in relation to the purported assignment of the Credit Lyonnais Agreement and the IBI Agreement (but not the IBI Guarantee) solely for the purpose of fulfilling her administrative duties.



- v. In the circumstances, save to the extent expressly pleaded above, the sub-paragraph is denied.
- g. Save to the extent expressly pleaded above, paragraph 22 and each of its sub-paragraphs is denied. Further or alternatively, BNC and Cuba will say that any purported acts by Ms Marti were not attributable to BNC or Cuba and/or any purported transactions said to result from such acts were *ultra vires* BNC. Such acts and/or purported transactions were therefore void and of no effect. Paragraphs 20 above and 25 below are repeated.

### Alleged assignment of the alleged 'sovereign debt' obligations

25. The issue of whether BNC and/or Cuba consented to the alleged assignments at issue in these proceedings is a matter for Cuban law, as to which paragraphs 18 and 20 above are repeated. Further:
- a. Article 56 of Decree Law 192 prevents any public sector entity (which includes BNC) from taking any step towards the performance of a "*public credit operation*" without obtaining the prior consent of the Cuban Ministry of Finance and Prices. Once the relevant steps towards performance of the "*public credit operation*" have been taken, as approved by the Ministry of Finance and Prices, the Cuban Council of Ministers must approve the "*public credit operation*" prior to its execution. A "*public credit operation*" includes the assignment of a "*public debt*" within the meaning of Articles 54 and 55 of Decree Law 192. That includes any purported assignment of the Credit Lyonnais Agreement and Debt, the IBI Agreement and Debt and the IBI Guarantee.
- b. The approval process set out in Articles 54 to 56 of Decree Law 192 is a condition precedent to any assignment of a "*public debt*" (including the Credit Lyonnais Agreement and Debt, the IBI Agreement and Debt and the IBI Guarantee). These are mandatory provision of Cuban law which cannot be derogated from by agreement.
- c. Article 67 of the Cuban Civil Code provides that any acts performed contrary to a legal provision are null and void, which includes acts performed without





complying with the requisite formalities. That includes the approval process set out in Articles 54 to 56 of Decree Law 192.

d. Further or alternatively, BNC is not capable under Cuban law of consenting to any assignment of a “public debt” without following the approval process set out in Articles 54 to 56 of Decree Law 192. Any act of a BNC official and/or employee purporting so to consent is *ultra vires* and void.

26. As to paragraphs 23 to 25, paragraphs 8 to 12 above are repeated. Save to the extent they are consistent with paragraphs 8 to 12 above, they are denied.

27. As to paragraphs 26 and 27:

- a. CRF bears the burden of proving its title to sue. It is noted that CRF has advanced no case that ICBC’s alleged predecessors in title had validly acquired the rights in issue.
- b. Save that it is denied (i) that Cuba’s consent was obtained in the manner alleged or at all, and (ii) that title to the Credit Lyonnais Agreement and Debt, the IBI Agreement and Debt and/or the IBI Guarantee was validly assigned to ICBC, including by reason of a failure to comply with the Cuban law requirements pleaded above, CRF is put to proof of the matters alleged in these paragraphs (including, in particular, that BNC gave its prior consent to the alleged assignments in accordance with the relevant contractual provisions).
- c. In the circumstances, ICBC was not a permitted assignee of the Credit Lyonnais Agreement and Debt, the IBI Agreement and Debt or the IBI Guarantee. In the circumstances, it was unable to validly assign any rights or obligations relating to the Credit Lyonnais Agreement and Debt, the IBI Agreement and Debt or the IBI Guarantee to CRF and any such purported assignment was void and of no effect.

28. As to the first sentence of paragraph 28, the email is admitted but it is denied that ICBC thereby requested BNC’s consent as alleged (rather, Mr Dagba asked what documents will be required from ICBC and/or CRF “*in order to consent to this transfer*”). The second sentence is denied and paragraphs 18 and 19 above are repeated.



29. Paragraph 29 is admitted, save that (i) the emails of 8 May 2019 and 20 May 2019 did not contain a request for consent as alleged; and (ii) it is denied that any request for consent was impliedly a request for consent to assignment from Cuba.

30. As to paragraph 30:

a. The first sentence is admitted, save that the purpose for Ms Marti's request for various documents included the need to carry out preliminary due diligence in relation to the proposed assignee (CRF).

b. As to the second sentence:

i. It is apparent from the wording of Ms Marti's email that BNC was prepared to consent to the proposed assignment "*in principle*" only, solely on its own behalf, and not on behalf of Cuba. For the reasons pleaded at paragraphs 23 and 24 above, Ms Marti was not authorised to provide BNC's actual consent to the proposed assignments and this was known or ought to have been known to CRF. In the circumstances, Ms Marti's email was not capable of amounting to BNC's and/or Cuba's prior consent to the proposed assignments and her email cannot reasonably and/or rationally have been understood as such by CRF.

ii. BNC's actual consent to the proposed assignments, which could only be provided in a manner consistent with the requirements of the relevant contracts and of Cuban law pleaded at paragraphs 20 and 25 above, was subject to receipt of further information and the satisfactory review of that information in accordance with BNC's internal procedures contained in, *inter alia*, the BNC Handbook.

iii. BNC did not provide its consent in a manner consistent with the requirements of the relevant contracts and of Cuban law pleaded at paragraphs 20 and 25 above or at all. Nor was any consent provided by or on behalf of Cuba. Further or alternatively, if (which is denied) Ms Marti's email is to be construed as consenting to the alleged assignments, her purported acts were not attributable to BNC or Cuba and/or any purported transactions and/or consent said to result from such



acts were *ultra vires* BNC. Such acts and/or purported transactions and/or consent were therefore void and of no effect. Paragraphs 20 and 25 above are repeated. Accordingly, the purported assignments were void and of no effect.

- iv. In the circumstances, save as expressly pleaded above, the paragraph is denied.

31. As to paragraph 31:

- a. It is admitted that ICBC and CRF executed the Notice of Assignment and Agreement to be Bound.
- b. For the reasons pleaded above, it is denied that this document validly assigned legal title to the Credit Lyonnais Debt, the IBI Debt or the IBI Guarantee. The purported assignment was void and of no effect.

32. As to paragraph 32, it is admitted that a copy of the Notice of Assignment and Agreement to be Bound was delivered to Mr Lozano by a Cuban lawyer instructed by CRF. It is denied:

- a. that notice was thereby given to Cuba as alleged or at all;
- b. that the assignment was valid for the reasons pleaded above; and
- c. (if alleged) that such delivery was in accordance with the applicable requirements. The Defendants will refer, as necessary, to Clause 20 of the CL Agreement, Clause 20 of the IBI Agreement and/or Clause 4 of the IBI Guarantee.

33. As to paragraph 33, paragraph 21 above is repeated. Save to the extent it corresponds precisely with what is pleaded above, the paragraph is denied. Further, BNC and Cuba will say that the Cuban law requirements set out at paragraphs 20 and 25 above were not complied with at any material time with the result that any purported acts of Mr Lozano were not attributable to BNC or Cuba and/or any purported transactions and/or consent said to result from such acts were *ultra vires* BNC. Such acts and/or purported transactions and/or consent were therefore void and of no effect.





34. For the reasons pleaded above, paragraph 34 is denied.

**Disputing the alleged assignment to CRF**

35. Paragraph 35 is admitted. For the reasons pleaded above, the purported assignments at issue in these proceedings were void and of no effect.

36. As to paragraph 36:

- a. The first sentence is not understood. Paragraphs 35 and 46-50 of the First Witness Statement of Benjamin Davies set out the Defendants' case that their prior consent to the purported assignment had not been obtained. That remains their case. To the extent that there is any difference between the Defendants' case as set out in the Witness Statement of Benjamin Davies, and as set out herein, that is because CRF's own case as advanced in the Amended Points of Claim is materially different to its case hitherto. Paragraphs 28 to 34 above are repeated.
- b. Save to the extent that it is consistent with paragraphs 28 to 34 and 36(a) above, the second sentence is denied.
- c. As to paragraph 36.1:
  - i. The first sentence is admitted and paragraph 30 above is repeated.
  - ii. As to the second sentence, the email contained a request for documents which did not amount to any representation as alleged or at all. Alternatively, if (which is denied) any representation was made (i) it was made on behalf of BNC only and, for the reasons pleaded above, it is denied that it was intended to be and/or was capable of being and/or was reasonably and/or rationally understood by CRF to be a representation on behalf of Cuba; and (ii) it is denied, if it is alleged, that it amounted to a representation that the purported assignment would be effective without the prior consent of BNC and Cuba and without satisfaction of the conditions precedent pleaded at paragraphs 8 to 12 and 25 above.



- iii. In the circumstances, save as expressly pleaded above, the subparagraph is denied.
- d. As to paragraph 36.2:
- i. Save to the extent expressly pleaded above, the alleged representation is denied and it is denied that any representation was made by or on behalf of Cuba. Accordingly, CRF's alleged reliance on the alleged representation as pleaded is denied.
  - ii. Without prejudice to the foregoing, any alleged reliance was unreasonable and/or irrational for the reasons pleaded above.
  - iii. For the reasons pleaded above, it is denied that the Notice of Assignment and Agreement to be Bound was valid and effective, whether on the date it was executed or at all.
  - iv. In the circumstances, save as expressly pleaded above, the subparagraph is denied.
- e. Paragraph 36.3 is denied for the reasons pleaded at paragraphs 21 and 33 above.
- f. As to paragraph 36.4:
- i. The President of BNC sent a letter dated 30 December 2019 to CRF's then solicitors (Gibson Dunn & Crutcher LLP). That letter was sent on behalf of BNC only and not on behalf of Cuba. The President of BNC was not authorised to act on behalf of Cuba in this regard, nor was Cuba aware of this letter at the time. It was sent in response to a letter before action seeking payment of the Credit Lyonnais Debt, the IBI Debt, under the IBI Guarantee and a further alleged guarantee obligation which formed the basis of a now-abandoned claim advanced by CRF.
  - ii. The letter dated 30 December 2019 contained the quoted words and it is admitted that it did not contest the validity of the purported assignments at issue in the present proceedings. It is denied, if it is alleged, that this (i) constituted and/or was intended to be and/or was capable of being



and/or was reasonably and/or rationally understood by CRF to be an acknowledgement of the validity of the purported assignments and/or a waiver of BNC's and/or Cuba's contractual rights and/or their rights arising under, *inter alia*, the SIA and/or the Cuban laws and regulations pleaded above; and (ii) was capable of founding an estoppel as alleged by CRF (or at all).

iii. In the circumstances, save to the extent expressly pleaded above, the sub-paragraph is denied.

g. As to paragraph 36.5:

i. Save to the extent expressly pleaded above, the alleged representations are denied and it is denied that any representations were made by or on behalf of Cuba. Accordingly, CRF's alleged reliance is denied.

ii. Without prejudice to the foregoing, any alleged reliance was unreasonable and/or irrational for the reasons pleaded above.

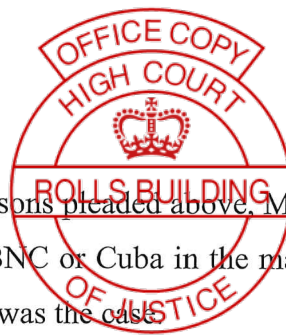
iii. In the circumstances, save to the extent expressly pleaded above, the sub-paragraph is denied.

h. As to paragraph 36.6, the allegations of waiver and estoppel are vague, ambiguous and inadequately particularised, such that the Defendants do not know the case they have to meet. Without prejudice to the foregoing, for the reasons pleaded above, it is denied that any of the alleged facts and matters (i) constituted and/or was intended to be and/or was capable of being and/or was reasonably and/or rationally understood by CRF to be an acknowledgement of the validity of the purported assignments and/or a waiver of BNC's and/or Cuba's contractual rights and/or their rights arising under, *inter alia*, the SIA and/or the Cuban laws and regulations pleaded above; and (ii) was capable of founding an estoppel as alleged by CRF (or at all).

i. In the circumstances, save as expressly pleaded above, paragraph 36 and each of its sub-paragraphs is denied.

37. As to paragraph 37:





- a. The first sentence is admitted. For the reasons pleaded above, Mr Lozano was not authorised to act on behalf of either BNC or Cuba in the manner alleged, which CRF knew or ought to have known was the case.
- b. In the circumstances, the second sentence is denied.

38. As to paragraph 38:

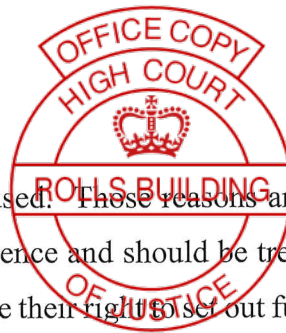
- a. Each of BNC and Cuba were entitled to reasonably withhold their prior consent in circumstances where:
  - i. For the reasons pleaded at paragraph 21 above, CRF was actively engaged in bribing Mr Lozano to act contrary to BNC's interests and, to the extent relevant, contrary to Cuba's interests in order to achieve the proposed assignments.
  - ii. Whilst the proposed assignor (ICBC) is an international bank, CRF is a vulture fund, the purpose of which is to purchase Cuban sovereign debt for the purposes of rapid and aggressive enforcement action. Accordingly, CRF would not be a responsible creditor of a sovereign state. That is evidenced by a Bloomberg Article dated 3 May 2018 which reported that CRF had hired lawyers to represent it in claims against Cuba allegedly valued at more than US\$1.3 billion and that this included potential litigation (although the manner in which CRF has allegedly acquired the debts in question remains unclear). The Defendants reserve their right to set out further reasons in their evidence in accordance with the Court's directions in due course.
- b. In the circumstances, save as expressly pleaded above, the paragraph is denied.

**Further requests for consent to assignment**

39. Paragraph 39 is admitted. For the reasons pleaded above, CRF's primary case is denied.

40. As to paragraph 40:

- a. The first sentence is admitted. Byrne and Partners LLP (now PCB Byrne LLP) provided a brief and non-exhaustive summary of the reasons why consent to the



proposed assignments was reasonably refused. These reasons are repeated in these Amended Points of Defence by reference and should be treated as being incorporated herein. The Defendants reserve their right to set out further reasons in their evidence in accordance with the Court's directions in due course. Paragraph 38(a) above is repeated.

- b. In the circumstances, the refusal of consent to the proposed assignments was reasonable and the second and third sentences are denied.

41. As to paragraph 40A:

- a. It is denied that the Notice of Assignment and Agreement to be Bound was valid for the reasons pleaded above.
- b. It is denied that BNC's and Cuba's refusal to consent to the proposed assignments on 23 November 2020 was unreasonable for the reasons pleaded at paragraph 40 above.
- c. It is admitted that, by the Second Notice of Assignment and Agreement to be Bound, ICBC purported to assign the legal title to the Credit Lyonnais Debt, the IBI Debt and the IBI Guarantee to CRF. In circumstances where each of BNC and Cuba had reasonably refused to provide their prior consent to such purported assignment, it was void and of no effect.
- d. In the circumstances, save to the extent expressly pleaded above, the paragraph is denied.

42. As to paragraph 40B, it is admitted that CRF's lawyers (Memery Crystal LLP) purported to give notice of assignment as alleged. For the reasons pleaded above, it is denied that this was valid or effective.

43. For the reasons pleaded above, paragraph 40C is denied.

#### **Alternative claim for declaratory relief**

44. For the reasons pleaded above, paragraph 41 is denied.

#### **Claims against the Defendants**



45. As to paragraphs 42 to 45, for the reasons pleaded above, it is denied that CRF is entitled to the relief sought or to any relief, whether for the reasons alleged or at all.

ALISON MACDONALD Q.C.

ANTON DUDNIKOV

MARK BELSHAW

ALISON MACDONALD Q.C.

ANTON DUDNIKOV

MARK BELSHAW

**Statement of Truth**

The Defendants believe that the facts stated in these Amended Points of Defence are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. I am duly authorised to sign this statement of truth on behalf of the Defendants.

Signed: 

Name: BEN DAVIES

Position: PARTNER, PCB BYRNE LLP

Date: 17/01/2022