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CR 2022 000033

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF GLOCIN LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 22/07/2022

Before :

ICC JUDGE BARBER

Between :

GLOCIN LIMITED

Applicant

- and -

BANCIBO SE

Respondent

Mr. Richard Bowles (instructed by Gardner Leader LLP) for the **Applicant**
Mr. Andrew Vinson (instructed by IMD Solicitors LLP) for the **Respondent**

Hearing date: 27 June 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be sent to The National Archives for publication. The date and time for hand-down is deemed to be 9.30 a.m. on 22 July 2022

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ICC Judge Barber

1. At a hearing on 27 June 2022, I struck out a winding up petition presented on 10 January 2022 by the Respondent (Bancibo) against the Applicant (Glocin) and dismissed a related application of Bancibo dated 21 April 2022, with written reasons to follow. This judgment sets out my reasons for that decision.

Introduction

2. This is the hearing of
 - (1) Glocin's application dated 18 January 2022 to strike out the Petition as an abuse of process and/or to restrain advertisement; and
 - (2) Bancibo's application to vary the terms of an interim order dated 19 January 2022 restraining advertisement to allow it to inform a third party of the existence of the Petition.

Background

3. Glocin is a company registered in England and Wales. It operates an exclusive international technology product platform which is made available to clients allowing them access to products they would not otherwise be able to access on the regular market. Mr Ales Kohoutek ('AK') is the chief executive officer of Glocin. He is based in the Czech Republic.
4. Bancibo is a company incorporated under the laws of the Czech Republic. It has a number of subsidiaries, including Bancibo UAB, a wholly owned Lithuanian subsidiary ('UAB'), Alpin Treuhandund Beratungs AG, a wholly-owned Swiss subsidiary ('ATB AG') and Summit Wealth Management AG, a wholly-owned Swiss subsidiary ('SWM AG').

The Contracts

5. On 20 June 2021, Glocin and Bancibo entered into three contracts concerning investment by Glocin in UAB, ATB AG and SWM AG respectively (collectively 'the Contracts' and in singular 'the Contract'). The Contracts were all in materially identical terms.
6. The underlying projects to be funded and arrangements for their funding were as follows:
 - (1) UAB was to obtain and thereafter operate under a licence of an electronic money issuer (institution) under Act No XI-1868 of the Republic of Lithuania. Glocin's role was to finance the project. Glocin invested €471,500 prior to the execution of the Contract and agreed, pursuant to Clause 3.2 of the Contract, to provide further contributions to Bancibo for the operation of UAB in amounts sufficient for its maintenance;
 - (2) ATB AG was to obtain and thereafter operate under a licence allowing it to provide various loan and payment services within the Swiss Confederation. Glocin's role was to finance the project. Glocin invested €398,103 prior to the execution of the Contract

and agreed, pursuant to Clause 3.2 of the Contract, to provide further contributions to Bancibo for the operation of ATB AG in amounts sufficient for its maintenance; and

(3) In relation to SWM AG, a subsidiary approved by the Swiss Financial Market Supervisory Authority to conduct business as a financial intermediary, Bancibo planned to pursue conducting Forex trading business. Glocin's role was to finance this project. Glocin invested 500,000 CHF prior to the execution of the Contract and agreed, pursuant to Clause 3.2, to provide further contributions to Bancibo that the operation of SWM AG in amounts sufficient for its maintenance.

7. The Contracts were written in both Czech and English. They all state that they are governed by Czech law and are subject to the jurisdiction of the courts of the Czech Republic.

8. Clause 3.2 of each of the Contracts provides as follows:

‘The Investor [Glocin] shall provide a further contribution to the Entrepreneur [Bancibo] for the operation of the Company [respectively UAB, ATB AG and SWM AG] in amounts sufficient for its maintenance, and this contribution shall form part of the Investment. The amount of the contribution shall be determined by mutual agreement of the Parties [Glocin and Bancibo], according to the needs of the Company.’

9. Clause 3.4 of each of the Contracts went on to provide:

‘The Investor shall furthermore increase its Investment by the payment to the Entrepreneur in the following cases:

3.4.1 When agreed between the Investor and Entrepreneur.

3.4.2 When prompted to do so by the Entrepreneur in cases where changes in legislature or decisions of the Regulator, require or recommend an increase in the Capitalisation of the Company in order to function as a payment institution or other activity necessary or expedient for the continuation of the Project; the Investor shall fund 100% of these increases

For the avoidance of doubt, the Parties hereby state that this Agreement does not pertain to any direct payments from the Investor to the Company, unless a separate agreement of the Investor and Entrepreneur specifies such a form of payment.’

10. The parties started to perform the Contracts. It is not in dispute that Bancibo issued certain invoices which were then paid by Glocin.

The Invoices

11. On 10 November 2021, Bancibo issued three invoices which were not accepted or agreed by Glocin. These invoices were:

- (1) Invoice No 2101064 in the sum of €76,158;
- (2) Invoice No 2101065 in the sum of €172,675.50; and
- (3) Invoice No 2101066, in the sum of €68,942.17.

(‘the Invoices’)

12. Each of the Invoices contained a payment deadline of 15 November 2021 and was issued ostensibly pursuant to Clauses 3.2 or 3.4. Each of the Invoices was issued by Bancibo unilaterally, that is to say, without any prior express agreement between Bancibo and Glocin as to the sums demanded by it.
13. Glocin objected promptly to the Invoices. On 11 November 2021, Glocin wrote to Bancibo and set out why it disputed the Invoices. Among other things, Bancibo’s attention was drawn to Clause 3.2 of the Contracts and the need for the contributions made by Glocin to Bancibo to be ‘determined by mutual agreement’. Glocin also made clear that it had been informed by independent third parties that the costs contained in the Invoices were substantially greater than the amounts actually required for the maintenance of UAB, ATB AG and SWM AG. Glocin went on to propose that Bancibo undertake audits of UAB, ATB AG and SWM AG in order to identify the actual state of progress being made and to determine the amount required for the financial maintenance of each. Glocin confirmed that it would fund the audits.

The Statutory Demand

14. On 17 November 2021, Bancibo’s lawyers, Vancura & Vancurova (‘V & V’) wrote to Glocin. V & V’s letter made no reference to Glocin’s letter dated 11 November 2021 but instead confirmed that a statutory demand was to be served at Glocin’s registered office. A copy of the statutory demand was enclosed with the letter. The letter stated that if no payment was made within 21 days of service of the demand, Bancibo would present a winding up petition.
15. On 18 November 2021, Bancibo served Glocin with the statutory demand in the sum of £268,362.90 (€317,775.67).

Request for an Undertaking not to present

16. On 6 December 2021, Glocin, via its English solicitors, wrote to Bancibo stating that the debt was disputed on substantial grounds, as the sums demanded in the Invoices (i) had not been mutually agreed and (ii) reflected sums that were in excess of the reasonable maintenance costs of the subsidiaries in question. Glocin accepted that it was liable to make payments to Bancibo for the operational maintenance of the subsidiary companies but stated that it would only do so pursuant to the Contracts. Glocin stated that, in the absence of agreement as to the quantum of contribution, the Contracts granted Bancibo no right to raise invoices in amounts determined by them alone. Glocin further stated that insolvency proceedings in England and Wales were inappropriate and that if Bancibo wish to pursue a claim in respect of the Invoices, it should first issue proceedings within the jurisdiction of the Czech Republic. Glocin requested appropriate undertakings not to present.

17. On 8 December 2021, Bancibo responded by its solicitors V & V, indicating that it considered the Invoices were due and owing, on the ground that Glocin had paid previous invoices comprised of the same sums. (I pause here to note that this remains Bancibo's stance in the present application). Bancibo accepted that the Invoices contained additional sums totalling €40,000 in respect of new expenses which went beyond those reflected in earlier invoices and undertook not to present in respect of those additional sums. It declined, however, to undertake not to present in respect of the balance. Bancibo went on by its letter of 8 December 2021 to raise issues concerning AML and the personal insolvency of Mr Kohoutek in the Czech Republic. It also asserted that Glocin was insolvent in light of its unaudited financial statement for the year ended 30 June 2020.
18. On 17 December 2021, Glocin's Czech lawyers wrote to Bancibo raising further issues with the Invoices under the Czech Civil Code. Glocin maintains that this is a further problem with the Invoices; that they are not enforceable under the Czech Civil Code.
19. On 6 January 2022, Glocin's English solicitors responded to V & V's letter of 8 December 2021 with evidence of Glocin's solvency. By this letter Glocin continued to dispute the Invoices on the basis that the invoiced sums had not been agreed as required by the Contracts and stated that in any event, as a matter of Czech law, no sums would be due under the Invoices in the absence of documentation evidencing the amounts claimed. Whilst making clear that it remained Glocin's position that the debt was disputed on substantial grounds, Glocin offered to pay immediately any element of the Invoices for which evidence was provided pursuant to the Czech Civil Code. The letter concluded by again demanding that Bancibo undertake not to present a petition.

Presentation of the Petition

20. On 10 January 2022, Bancibo presented the petition. It was served upon Glocin's registered office in England the following day.

Request for an undertaking not to advertise

21. On 14 January 2022, very shortly after learning of the petition, Glocin's English solicitors wrote to Bancibo setting out Glocin's intention to apply to strike it out and requesting that Bancibo undertake not to advertise the petition until the later of 26 January 2022 and the result of the intended strike out application. The letter requested a response by noon on 17 January 2022 and confirmed that if the deadline was not met, an application would be made. On 17 January 2022 (no response having been provided), Glocin wrote again, reiterating its request for an undertaking and informing Bancibo that the application would now be made. The requested undertaking was not provided by the specified deadline. Accordingly, the strike out application was issued.

Hearing of 19 January 2022

22. At a hearing on 19 January 2022, an interim injunction was granted, restraining advertisement until the business day following the return date of 27 June 2022 set for the final hearing of the strike out application. Directions were given for the filing of evidence in response and reply. By paragraph 3 of the order of 19 January 2022, permission was given for the parties to adduce expert evidence 'on Czech Law... in

particular on the issue of the interpretation of Clauses 3.2 and 3.4 of the Contracts ... and validity of the invoices dated 20 November 2021...', together with attendant directions. The order also gave permission to apply (inter alia) to vary the timetabling.

Events since hearing of 19 January 2022

23. By letter dated 11 February 2022, Glocin formally withdrew from the Contracts and issued a final demand under Section 142A of the Civil Procedure Code. Glocin maintains that, as a matter of Czech law, the effect of this withdrawal is that the Contracts 'are cancelled from the outset (ex tunc) and are considered as if they have never been concluded' (Kohoutek, para 13). Following its formal withdrawal from the Contracts, on 14 March 2022, Glocin commenced unjust enrichment proceedings in the Czech Republic pursuant to section 142A of the Civil Code seeking the return of a sum of approximately €2.5 million said to have been paid by Glocin to Bancibo pursuant to the Contracts ('the Unjust Enrichment proceedings').

Bancibo Application

24. On 21 April 2022, pending the return date for the hearing of the strike out application, Bancibo issued the Bancibo Application and (having described the application as 'urgent' in its covering letter to the Court) procured an urgent listing of it in the ICC Judge Interim Applications list on 25 April 2022, seeking a variation of the interim restraint on advertisement to enable Bancibo to inform AK's bankruptcy trustee of the petition. Bancibo gave Glocin less than three days' notice of the hearing date. It remains unclear why Bancibo described the matter as urgent when filing the application.
25. The Bancibo Application was an unusual application. Bancibo maintained that AK's bankruptcy trustee was investigating the transfer by AK of shares in Glocin to a Mr Jan Kohoutek and that a variation of the restraint on advertisement would 'allow the trustee in bankruptcy to take such steps as are appropriate to preserve the value of his claim to the shares in [Glocin]' (Bancibo's skeleton argument dated 22 April 2022). This was not a good reason for varying or lifting a restraint on advertisement of the petition ahead of determination of the issue whether Bancibo had locus to present it in the first place. Another point raised by Bancibo in the evidence in support of its application was the possible impact of AK's Czech insolvency process on his ability to represent or give instructions on behalf of Glocin. That, however, was not a matter requiring notice of the petition to be given to AK's trustee either. Any issue as to the impact of AK's Czech insolvency process on his ability to represent or give instructions on behalf of Glocin could easily have been addressed in the submissions of the existing parties to the strike-out application, without any involvement of AK's trustee. In the event, the point was not pursued in the strike-out application before me.
26. In fact, by the time that the Bancibo Application was issued on 21 April 2022, a company registered in the US known as Global Commodity Investments LLC ('GCI') had issued proceedings in the Czech Republic to claim that it (and not AK) owned the shares ('the GCI proceedings'). GCI's claim is consistent with a confirmation statement dated 1 July 2021 filed at Companies House recording that it owns the shares in Glocin. The GCI proceedings were issued on 25 March 2022. Those proceedings are

currently before the Municipal Court in Prague and will determine the ownership of the shares and in particular whether they fall within AK's insolvency estate.

27. In the event, no substantive relief on the Bancibo Application was granted on 25 April 2022. At that hearing, ICC Judge Mullen gave directions for the filing of evidence on it and adjourned it to be heard together with the strike-out application before me on 27 June 2022, with costs reserved. By the time of the hearing before me, Mr Vinson accepted that the Bancibo Application was redundant either way 'as either the petition will proceed, the restraint order will lapse and notice will be able to be given of it, or it will be dismissed' (skeleton argument at paragraph 27).

Czech Payment Order

28. On 23 May 2022, Glocin obtained a payment order in the Unjust Enrichment Proceedings (by way of a Czech summary procedure akin to a conditional judgment in default of defence) from the court in the Czech Republic against Bancibo in the sum of €1,050,000 plus interest and CZK 1,535,110.50. Bancibo has since filed a defence dated 3 June 2022 in the Unjust Enrichment Proceedings, the result of which is that the payment order has been set aside and the proceedings will take their normal course to trial.

Glocin Application: legal principles

29. It was common ground that the test on this application is whether the petition debt is genuinely disputed on substantial grounds: *Re a Company* [2013] EWHC 4291 (Ch). As explained by Hildyard J in *Coilcolour Ltd v Camtrex Ltd* [2015] EWHC 3202 (Ch) at [32], [34] and [35] (a case on restraining presentation, but equally applicable on present facts):

'[32] The court will restrain a company from presenting a winding up petition if the company disputes, on substantial grounds, the existence of the debt on which the petition is based. In such circumstances, the would-be petitioner's claim to be, and standing as, a creditor is in issue. The Companies Court has repeatedly made clear that where the standing of the petitioner, and thus its right to invoke what is a class remedy on behalf of all creditors, is in doubt, it is the court's settled practice to dismiss the petition. That practice is the consequence of both the fact that there is in such circumstances a threshold issue as to standing, and the nature of the Companies Court's procedure on such petitions, which involves no pleadings or disclosure, where no oral evidence is ordinarily permitted, and which is ill equipped to deal with the resolution of disputes of fact.

...

[34] Further, it is an abuse of process to present a winding up petition against a company as a means of putting pressure on it to pay a debt where there is a bona fide dispute as to whether that

money is owed: Re a Company (No 0012209 of 1991) [1992] BCLC 865.

[35] However, the practice that the Companies Court will not usually permit a petition to proceed if it relates to a disputed debt does not mean that the mere assertion in good faith of a dispute or cross-claim in excess of any undisputed amount will suffice to warrant the matter proceeding by way of ordinary litigation. The court must be persuaded that there is substance in the dispute and in the company's refusal to pay: a 'cloud of objections' contrived to justify factual enquiry and suggest that in all fairness cross examination is necessary will not do.'

Bancibo's position

30. Bancibo accepts that contributions under Clause 3.2 must be agreed. It contends, however, that the sums in the Invoices forming the subject matter of petition were tacitly agreed, by payment of prior invoices in the same or substantially the same sums.

Glocin's position

31. Glocin maintains that

(1) any agreement between the parties as to the sums claimed by the Invoices pursuant to Clause 3.2 must be in writing;

(2) even if agreement could be tacit, there was no tacit agreement; the mere payment of given sums or heads of expense demanded in earlier invoices does not automatically signify agreement to such sums being charged in future invoices. Clause 3.2 of the Contracts required Glocin to provide, in the case of each of the three subsidiaries, contributions 'for the operation of the Company *in amounts sufficient for its maintenance*' and 'according to the *needs* of the Company'; what amount would be 'sufficient for its maintenance' and what the Company's 'needs' were at any given time would vary as the projects progressed. It was a moving target;

(3) there is a substantive requirement under Czech Law that Bancibo provide proof that the sums claimed were actually incurred and fall within Clause 3.2 and, in the absence of such proof, Glocin is entitled under 1912(1) of the Czech Civil Code to withhold payment;

(4) Bancibo's failure to provide information about the sums claimed in the Invoices when requested to do so by Glocin was a breach of its obligations under 1975 of the Czech Civil Code to provide the 'assistance' necessary to assist Glocin to discharge the debt; under Czech law, the effect of this breach is to 'exclude' any default on the part of Glocin;

(5) Glocin has formally withdrawn from the Contracts with the effect that they are cancelled from the outset. It has a cross-claim against Bancibo for €2.5 million for

unjust enrichment in respect of sums already paid pursuant to the Contracts, which it is currently pursuing in the Czech courts.

The Evidence

32. For the purposes of this hearing, I have considered the following witness statements and their respective exhibits

(1) the witness statements of Olexandr Kyrychenko dated 7 January 2022, 9 February 2022, 21 April 2022, 6 June 2022 and 16 June 2022 respectively;

(2) the witness statements of Jack Hobbs dated 18 January 2022, 30 May 2022 and 6 June 2022;

(3) the witness statement of Jiri Kubelka dated 9 February 2022;

(4) the witness statement of Ales Kohoutek dated 9 March 2022;

(5) the expert report of Petr Elias dated 9 February 2022 ('the Elias Report');

(6) the expert report of Bohumil Havel dated 6 February 2022 ('the Havel Report');

(7) the joint experts' statement dated 9 March 2022 ('the Joint Report').

I have also read and considered other documents contained in the agreed hearing bundles before me, to which reference will be made where appropriate in this judgment.

Mr Kubelka

33. Mr Kubelka, a director of Bancibo, sets out his account of arrangements with Glocin in his witness statement dated 9 February 2022. At paragraphs 8 to 11, he describes the arrangements thus:

'[8] During the initial stage of the joint venture project as to the Companies, Glocin and Bancibo did not enter into any formal contract, relying simply on verbal agreement that Glocin would fund any operational costs of the Companies for which Bancibo would issue monthly invoices as well as invoices for occasional one-off expenses.

[9] Indeed, this arrangement had taken place over 10 months and continued until the Contracts.... were signed by Bancibo and Glocin. The parties cooperated under the assumption that the contracts would eventually be signed and have been working on negotiating the wording since at least December 2020.

[10] I enclose herewith, at Exhibit JK1/1 invoices, together with rationale for such invoices for the period of August 2020 to June 2021 showing that Glocin were requested to pay for the operational expenses of the Companies. I can confirm that payments were made in accordance with such requests up till and

including payments for expenses made in August 2021, invoiced in September 2021.

[11] Nothing other than the invoices or the rationale for the invoices was sought by Glocin and it was effectively agreed by the conduct of the parties that funding of the Companies would take place in this manner. Short discussions were sometimes held verbally on personal meetings or telephone.’

34. Exhibited to Mr Kubelka’s statement is an email dated 1 December 2020 from Mr Kohoutek of Glocin to Mr Kubelka, written a few months before the Contracts were signed off. Mr Kubelka attempts to play down the significance of this email, but it makes telling reading. Insofar as material, it provides as follows:

‘Mr Kubelka,

It is good that the contracts are revised word by word. It is just really strange that everything takes so long. It has already been three months since we paid you a deposit for banking software while you have not even signed the contract on its acquisition to this day. Therefore, I ask, on what basis was the deposit collected by you? Why did you ask us to pay almost half of the estimated price of the software although even after three months from the time of payment from our side you have not set any legal ground on the basis of which Probanx could demand payment from us? And I’m not even talking about the fact that you didn’t consult with us at all about the decision to buy the software from Probanks. We paid more than 50 thousand EUR for a security project that we have not even seen...

Don’t get mad Mr Kubelka, but we still don’t have a signed control agreement for ATB, not to mention UAB... We pay exorbitant amounts for the monthly administration of both companies only on the basis of the [breakdown] of costs you declared while we have no idea how much everything really costs and whether these fees are for what you declare. We are investing insanely high funds, often clients’ funds, which we had to start covering by selling your own GLOCIN shares which are basically not covered by you - just a gentleman’s agreement. Above all that, these are not easy times, the implementation time is incredibly long and the result is not visible anywhere yet.

Don’t be mad at me, but I had to write this to you ... even the card program which was supposed to work from May does not work. At the same time, we did not cause anything that would cause a delay in the project... We still pay - as a party that “shook hands” with you at the beginning of the cooperation with you to agree on a project that is quite important.

We have a huge responsibility for our clients who trust us – still! But if the situation continues to develop in this way, I am afraid that trust is going to be disrupted.

The fact that no contract for banking software has been signed on your part so far even though you collected more than CZK 5.3 million for the purchase of this software three months ago does not indicate a well-run project. I feel that the path we have taken is not only thorny but I'm also beginning to worry about it being a dead end. Please be aware that we are investors who pay for basically everything and we only pay for it because we really just shook hands with each other ... However, this gentleman's agreement will not be enough for our investors (now also shareholders) in the future...

Therefore, please do everything as it should be. We will finally conclude control agreements for both financed companies. Let's finally do something that will move us forward. Let's communicate ... Let's get ATB at least to license ... so we can finally start making money with this company.

I apologise for the content of this email but I couldn't keep it in my head any more.'

35. This email evidences serious concerns which Glocin had about the funding arrangements in December 2020. It forms part of the relevant backdrop to the Contracts subsequently put in place. Mr Kubelka maintained at paragraph 19 of his witness statement that the concerns expressed in the email of 1 December 2020 were allayed and the parties went on as before. He stated that nothing changed after the parties entered the Contracts. As put at paragraph 13 of his witness statement:
- 'Simply, the parties wished to formalise the joint ventures, and continued to work on them exactly as before the signature of the Contracts.'
36. Mr Kohoutek disputes this.
37. Mr Kubelka goes on in his witness statement to point out that the sums set out in the Invoices relied upon for the purposes of the Petition are the same or substantially the same as those set out in earlier invoices which had been paid by Glocin without demur.
38. He blames the refusal to pay the Invoices on Bancibo's discovery of compliance issues with Glocin which it raised with Glocin; firstly, that Mr Kohoutek is in an insolvency process in the Czech Republic and secondly, the alleged involvement of a Mr Maros Miklas with Glocin's operations. Mr Miklas is said to have been found guilty of fraud or similar offences in the market for commodity derivatives in the past.
39. Mr Kubelka does not, however, exhibit to his witness statement any correspondence between Bancibo and Glocin on either of these two issues in the run-up to Glocin's refusal to pay the Invoices. The first correspondence in evidence raising these two issues is V & V's letter to Glocin dated 17 November 2021, which post-dates Glocin's

refusal to pay the Invoices and its letter of 11 November 2021 explaining why it was doing so. In addition, his theory on the reason for Glocin's refusal to pay does not sit that well with the earlier concerns expressed in Mr Kohoutek's email of 1 December 2020 - or indeed with Glocin's open offer, by letter dated 6 January 2022, to pay for operational costs said to be set out in the Invoices as soon as evidence of those costs was provided.

Mr Kohoutek

40. By his witness statement of 9 March 2022, Mr Kohoutek, chief executive officer of Glocin, accepts that initial cooperation between the parties commenced some 18 months before the Contracts were executed in June 2021, on the basis of oral agreement alone. His evidence, however, is that the oral agreement was that Glocin 'would pay the reasonable operational expenses incurred by ... UAB, ATB AG and SWM AG providing always that those costs were properly incurred and legitimate operational expenses': para 6. As he put it:

'There was never an understanding or agreement that Bancibo would have a unilateral ability to require Glocin to pay all operational costs of the subsidiary companies (whether reasonable or not) or for them to charge in excess of those necessary operational costs.'

41. In support of his position, Mr Kohoutek referred to correspondence in evidence dating from March 2021 in which he had queried certain items contained in the invoice breakdowns provided by Bancibo. As he put it (at paragraph 7):

'the very fact that Mr Kubelka provided any evidence of invoice breakdown was because there was an understanding that Glocin would be required to agree the reasonable expenses of the subsidiaries before any invoices became binding upon Glocin. If there was no requirement for Glocin to agree the operational expenses there would be no need for Bancibo to provide any breakdown to Glocin at all'.

42. Contrary to Mr Kubelka's assertion (at paragraph 15 of his witness statement) that it was 'understood and agreed between the parties' that the operating expenses would increase as the subsidiaries approached product launch, Mr Kohoutek states (at paragraph 6):

'At the commencement of the project it was understood that the maintenance costs would be higher but as the project progressed these costs would reduce as the subsidiary companies became increasingly self -dependent.'

43. I pause here to note that Mr Kohoutek's evidence on this issue is supported by the Contracts. Clause 2.1.3, for example, provides for upkeep of the management team of each subsidiary company to be borne by the subsidiary from funds provided by the Investor to the Entrepreneur 'up till the moment when the Company shall itself be able to bear the costs of the upkeep from its operational income'.

44. Mr Kohoutek confirms by his witness statement that Glocin was concerned that the costs being invoiced by Bancibo were very high, unevidenced and unexplained, pointing by way of example to his email to Mr Kubelka dated 1 December 2020 quoted previously in this judgment. He rejects Mr Kubelka's evidence that Glocin simply accepted that costs would not be proven by additional documents. As put at paragraph 8 of his statement:

‘If this was the case then there would be no need for the subsequently executed Contracts to include an express term that such costs required mutual agreement between the parties’

45. Mr Kohoutek's evidence was that as time went by,

‘costs continued to mount and Glocin did not begin to see any evidence of progress being made’.

46. In addition, he states that ‘from information provided by third parties it had become clear that the costs put forward as reasonable expenses by Bancibo were excessive and did not reflect costs [required for] the maintenance of the subsidiaries’ (Kohoutek, paragraph 11).

47. Mr Kohoutek maintains that it was against that backdrop that, when presented with the Invoices, which provided no explanation as to the legitimacy or reasonableness of the expenses contained in them, Glocin decided not to agree the Invoices and instead to write to Bancibo by letter of 11 November 2021 referred to at paragraph 13 above.

48. Mr Kohoutek explains (at paragraph 11 of his statement) that he had demanded the audits referred to in his letter of 11 November 2021 ‘in order to find a way through this issue and to ensure the continuance of the cooperation between Bancibo and Glocin’, his reasoning being:

‘Completion of these steps would have resulted in either (1) identifying the element of the Invoices that reflected the reasonable expenses sufficient to the maintenance of the subsidiaries which could have been agreed to by Glocin; or (2) sufficient evidence being provided to enable Glocin to agree the costs as provided if they were indeed accurate.’

49. Instead of agreeing to these proposals (or indeed coming up with a nuanced alternative itself), Bancibo responded six days later by serving a statutory demand.

The Experts

50. It is common ground that the Contracts are governed by Czech Law. The parties have provided experts' reports on Czech Law:

- (1) Glocin has provided the expert's report of Petr Elias; and
- (2) Bancibo has provided the expert's report of Bohumil Havel.

51. It is common ground that this court should treat expert evidence of foreign law as evidence of fact.
52. It is unfortunate that the parties did not agree one set of questions for each of the experts to address. There is, however, sufficient overlap for current purposes.
53. The experts are at odds on a number of fundamental issues.
54. Mr Elias considers that any agreement as to amount under Clause 3.2 should be in writing. Mr Havel disagrees.
55. Even leaving to one side the disagreement between the experts on whether any agreement on amount should be in writing and proceeding on the basis that tacit agreement by conduct was possible as a matter of Czech law, the experts disagree on what is required, under Czech Law, to demonstrate tacit agreement by conduct.
56. Mr Havel stated in his report that ‘if it was clear from the cost information’ that a given cost is a recurring cost (wage or salary or rent), ‘recurring payment of these costs is to be understood as tacit consent with the same future costs.’ Mr Elias, however, was of the view that the payment of invoices in similar sums over a four month period post-execution of the Contracts did not of itself mean that Glocin had given implied consent to Bancibo in relation to the Invoices.

57. As put by Mr Elias in section 3 of his report:

‘As a legal professional in such situation, I expect more details on how consent was given by the Investor and also more proofs of this declaration shall be presented’

58. In section 4 of his report, Mr Elias added on this issue:

‘... one of the criteria that applies when interpreting a legal act is the subsequent conduct of the parties. Under this criterion, any conduct or behaviour of the parties following the conclusion of the contract from which the meaning of the contractual provisions can be inferred may be taken into account ...

Repeated payments according to the previous invoices can be viewed as a subsequent conduct. However, the Article 3.2 of the contract clearly states that the amount of the contribution shall be determined by the parties by mutual agreement according to the current operational needs of the Subsidiary. From this provision it is clear that the contributions will be individual, according to the current situation, and will not be in the form of beforehand fixed-price amounts for an indefinite period of time. Therefore, the contract requires an agreement between the parties in case of each contribution or clear agreement of repeated costs for a definitive period of time.

However, the previous payments do not give a precedent that there is no need for an agreement for future contributions and

that the Investor (Glocin) has given its implied consent to any future payments. If so, it would constitute an absurd conclusion that the entrepreneur (Bancibo CZ) can charge the Investor (Glocin) with any amounts without the possibility of control by the other party.

If Bancibo CZ claims that there was an implied agreement made by the parties within informal communication on contribution payment, it has to be evaluated under Section 1756 of the Civil Code: *'If a contract is not concluded in words, the will to stipulate its elements must be obvious from the circumstances; in doing so, account is taken of the conduct of the parties as well as issued price lists, public offers and other documents'*

The implied agreement could be arranged without words in written or oral form, but it has to be done obviously without reasonable doubts that the true will of parties was to reach an agreement, esp. it has to be obvious that there was an offer of agreement and an appropriate acceptance of the second party without any stipulation. The implied agreement cannot be mistaken only with acceptance of performance of duties between parties.'

59. The experts also differed on whether Bancibo was required to provide evidence of the amount, necessity or expediency of the costs in respect of which a contribution from Glocin was sought under Clause 3.2.

60. Mr Havel maintained that:

'it is a matter of de facto conduct of the Parties, how they understood contractual rules in this respect, and/or how they implemented them, provided, that one may not conclude that the only possible interpretation was particular proof of costs ...

At the same time, it could be recognised that it would be in line with the Contracts and general Article 3.2 for the Contracting Parties to have establish[ed] the practice of explaining the costs reimbursed at a specific request, or for establishing the practice of specific costs proof or explanation between the Parties - however, but these both are issues of factual findings'

61. Mr Havel also opined that (with emphasis in the original):

'The specific legal title to the obligation to provide a contribution, i.e. to bear the costs, is thus a contribution agreement, for which the Contracts do not specify anything else in terms of performance. *It was not agreed that the amount or effectiveness of the costs be required for rise of the claim, but it was agreed that it must be related to the operation of the Company or the provision of a management team.* As I stated

above, the specific interpretation, resp. compliance with Article 3.2 of the Contracts is a matter of the actual conduct of the Parties and not any specific regulatory agreement of the Parties in the Contracts’

62. I pause here to observe that Mr Havel appears to have overlooked the word ‘sufficient’ in Clause 3.2.

63. When asked whether the failure to provide documentary evidence proving the existence of costs and their effectiveness could amount to a delay on the part of the creditor under Section 1968 of the Civil Code, Mr Havel reasoned (with emphasis in the original):

‘there is no requirement in the Contracts to prove the costs or their effectiveness, because the Parties have not agreed on anything in this respect, i.e. the general legal rules and established practice of the Parties apply ... *The Contracts themselves do not provide for any requirements for proving costs, only their material connection with the provision of the management team and the operation of the Company is assumed, i.e. their non-documentation cannot per se be understood as a delay on the part of the creditor under Section 1968 of the Civil Code, and thus neither as an obstacle preventing satisfaction of the debt on the part of the debtor.* If it were clear from the conduct and actions of the Parties that prior checking had been or should have been applied, that partial costs had been documented from the outset, in other words, if there were practices of the Parties to implement this, the subsequent behaviour of the Parties could be understood as interpretation of Article 3.2 of the Contracts and if the Entrepreneur did not document them, he would not provide the necessary cooperation and it would be possible to apply Section 1968 of the Civil Code’

64. In contrast, Mr Elias maintained that Bancibo was required to provide evidence of the amount, necessity and expediency of the costs in respect of which a contribution from Glocin was sought under Clause 3.2. He also contended that any failure to comply with such an obligation would either defer or negate any liability on the part of Glocin to pay the invoiced sums, under Sections 1912(1) and 1975 of the Czech Civil Code.

65. On Mr Elias’ construction of Clause 3.2,

‘Glocin’s obligation to contribute is subject to two conditions: (i) the obligation to contribute is based on the operational needs of the Subsidiary, i.e. that the Subsidiary is unable to pay its own expense; and (ii) the amount of the contribution was agreed by the Parties.’

66. In Mr Elias’ view, in addition to the question whether the parties can be said to have agreed a contribution under Clause 3.2 in a given amount, a distinct question to be addressed is whether that given amount is ‘truly needed for the operational needs of the Subsidiary’. In this regard, Mr Elias considers the onus to be on Bancibo:

‘it should be proved by the entrepreneur (Bancibo CZ) that he issued the Invoices in respect with clause 3.2 and the costs are duly evidenced esp. in accounts of the Subsidiary.’

67. Mr Elias considers Clause 3.2 to impose mutual obligations in this regard:

‘In case of doubts that the conditions for the contribution are met, the Investor (Glocin) under section 1912 (1) of the Civil Code is entitled to wait with a performance of his obligation until the counter obligation of the entrepreneur (Bancibo CZ) is provided or ensured to him’.

68. Section 1912(1) of the Civil Code provides:

‘(1) A person who is to perform in advance in case of a mutual performance may withhold such a performance until the mutual performance is provided or insured to him, but only if the performance of the other party is jeopardised by circumstances which occurred in respect of the other party of which he was not and should not have been aware at the conclusion of the contract’

69. Mr Elias is also of the view that (with emphasis in the original):

‘... in the situation when the investor asked for more details of the requested contribution and he probably had not received them then section 1975 of the Civil Code could apply: *A creditor is in default if he fails to accept a properly offered performance or fails to provide the debtor with the assistance necessary to discharge the debt.*

If this situation could be qualified as a default of the creditor that discredits a performance of debtor obligation due to absence of creditors assistance, then the Entrepreneur’s default excludes the Investor’s default.’

70. In this regard, Mr Elias considers Glocin’s letter of 11 November 2021 to be pertinent:

‘I have seen a formal request of the Investor (Glocin) in letter written to entrepreneur (Bancibo CZ) as of November 11, 2021 to provide more detailed information and documents related to the Invoices. The ongoing Bancibo CZ reply did not provide closer insight whether the Invoices with attached table set a necessary amount of contribution to operational needs of the Subsidiary. I cannot judge whether the Invoices are issued duly. This must be determined at trial where the Entrepreneur (Banzibo CZ) should clearly present his statement about the circumstance related to the cooperation of the parties in this matter and also he should provide evidence related to his statements.’

71. Overall, Mr Elias concludes that:

‘there are many reasonable doubts that have to be cleared by the entrepreneur (Bancibo CZ) to prove the existence of his claims raised from the Invoices and to prove the default of the Investor (Glocin). In this moment the claims are not clearly reasoned and proved, therefore a wide consideration of evidence should be carried out because the available documents cannot provide simply the answer as to whether the claims raised by Bancibo are justified.

From my perspective, if Bancibo CZ cannot provide clear statement and proofs that the contribution was necessary to cover operational need of Subsidiary, it raises first significant doubt. The second doubt raises the absence of evidence (documents, electronic communication or witness testimony) proving the existence of Glocin’s consent to the amount of the contribution as clause 3.2 clearly requires agreement between the parties. If the doubt will not be settled the claim could be qualified as raised from ineffective clause 3.2 of the Contract. Also application of section 1912 of the Civil Code could be more likely than not.

The objective of Bancibo CZ that the previous invoices were duly paid so Glocin approved the amount of the contribution for ‘pro futuro’ with made payments has to be supported by wider variety of proofs otherwise it stands alone against the grammatical and systemically interpretation of the Contract’

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72. Notwithstanding a two hour meeting, the experts remained at odds and stood by the views expressed in their respective reports. Mr Havel did however accept that ‘Whether the invoice was rightfully issued’ was a ‘factual determination’ which he was ‘unable to make’. Whilst noting that earlier invoices had been paid, he stated that it was ‘presumed that the invoicing entity would be able to substantiate the correctness of the invoice in the event of a query’.
73. I pause here to note that despite Glocin’s requests, Bancibo has proffered no accounting or other documentary evidence to substantiate the sums claimed by the Invoices which form the basis of the petition or to demonstrate that such sums fall within Clause 3.2.

Clause 3.4

74. There was no evidence before me to suggest or support the conclusion that Bancibo was entitled under Clause 3.4 to any of the sums claimed in the Invoices. Bancibo was only entitled to claim payment under Clause 3.4 without agreement in circumstances where one of the objective conditions set out in that clause occurred. There was nothing before me to suggest that any of the objective conditions had been satisfied. Mr Elias did not consider a claim under Clause 3.4 to be made out. Entitlement under Clause 3.4 was not seriously pursued by Bancibo at the hearing before me.

Solvency

75. Bancibo maintained that Glocin was insolvent. The accounting evidence before me however supports the conclusion that Glocin is both cashflow and balance sheet solvent. In any event, proof of insolvency alone would not assist Bancibo. As rightly conceded by Mr Vinson in closing, if Bancibo does not have standing to present a petition, the point does not arise.

Discussion and Conclusions

76. On the evidence before me, the petition debt is clearly disputed on substantial grounds.
77. In my judgment, Glocin has established a strongly arguable case that
- (1) there was no agreement, tacit or otherwise, of the sums claimed in the Invoices which form the subject matter of the petition, as required by Clauses 3.2 and 3.4;
 - (2) Bancibo's failure to provide information about the sums claimed in the Invoices when requested to do so by Glocin was a breach of its obligations under 1975 of the Czech Civil Code to provide the 'assistance' necessary to assist Glocin to discharge the debt; and that, under Czech law, the effect of this breach is to 'exclude' any default on the part of Glocin; and
 - (3) Glocin is entitled under 1912(1) of the Czech Civil Code to withhold payment in light of Bancibo's failure to provide proof that the sums claimed were actually incurred and fall within Clause 3.2.
78. By his skeleton argument, Mr Vinson invited me to 'note the credentials of Mr Havel', pointing out that among other matters he chaired the Commission on Bond Law in the Civil Code and co-authored the Czech Insolvency Act. The issue for this court is not, however, which expert has the best credentials.
79. Whilst I have some reservations about Mr Elias' conclusion that agreements on contributions under Clause 3.2 must be in writing, his expert views on (1) the inadequacies of the evidence of tacit consent relied upon by Bancibo and (2) the legal consequences of Bancibo's failure to provide evidence of the sums claimed, were well-reasoned and persuasive.
80. Moreover ultimately, the test is not which expert's evidence is to be preferred, but rather, whether Glocin has demonstrated substantial grounds for disputing the petition debt. In my judgment it has.
81. Given that expert evidence on foreign law is treated by the court as evidence of fact, the substantial disagreement between the experts in this case on a number of material issues going to the liability or otherwise of Glocin under the Contracts for the sums forming the subject matter of the petition is of itself a further reason why this matter is entirely unsuitable for disposal by way of petition.
82. For all these reasons, I shall strike out the petition.
83. In the light of my conclusions set out at paragraphs 76 to 81 above, it is strictly unnecessary for me to consider whether Glocin has also demonstrated a strongly arguable cross-claim in a sum equalling or exceeding the petition debt. For the sake of

completeness, however, I confirm that I accept Mr Vinson's submission that there is insufficient evidence in the strike-out application before this court on the cross-claim for the strike-out application to have succeeded on that ground.

84. I shall also dismiss the Bancibo Application. For reasons explored at paragraphs 25 to 27 above, this was an unusual application. Whilst it was not argued before me, on any footing it is now redundant and should be dismissed.
85. I shall hear submissions on costs on the handing down of this judgment.

ICC Judge Barber