

CANADA / JUDGMENT

9019235 Canada Inc. v. Coast Fraser Enterprises Ltd.

2022 BCSC 1132

COURT

Supreme Court of British Columbia

DECIDED

5 July 2022

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2022 BCSC 1132 9019235 Canada Inc. v. Coast Fraser Enterprises Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

9019235 Canada Inc. v. Coast Fraser Enterprises Ltd.,

2022 BCSC 1132

Date: 20220705

Docket: S2010196

Registry: Vancouver

Between:

Ernst & Young Inc., in its Capacity as Court Appointed Monitor of 9019235 Canada Inc.

Plaintiff

And

Coast Fraser Enterprises Ltd.

Defendant

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiff:

W.E.J. Skelly

Appearing on behalf of the Defendant:

D. Bian

F. Hui

Place and Date of Hearing:

Vancouver, B.C.

May 12-13, 2022

Place and Date of Judgment:

Vancouver, B.C.

July 5, 2022

INTRODUCTION

- [1] On March 30, 2020, EncoreFX Inc. ("EncoreFX") made an assignment in bankruptcy pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA]. Ernst & Young Inc was appointed as EncoreFX's trustee in bankruptcy (the "Trustee").
- [2] In March 2021, EncoreFX's bankruptcy proceeding was continued as a restructuring proceeding pursuant to s. 11.6(b) of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36: EncoreFX Inc., 2021 BCSC 750 (the "Continuation Reasons"). Ernst & Young Inc. continues in its role as the Court's officer, but is now the court-appointed monitor (the "Monitor"). The Monitor is empowered to continue to collect in the assets of the Estate.
- [3] EncoreFX's circumstances and background leading up to the bankruptcy are outlined in the Continuation Reasons at paras. 6-12. As stated there, EncoreFX was in the business of providing foreign exchange (FX) risk management and cross-border payment services to its customers.
- [4] One of EncoreFX's customers was the defendant, Coast Fraser Enterprises Ltd. ("Coast"). Following the bankruptcy, the Trustee took certain steps to address certain contracts then existing between EncoreFX and Coast. Eventually those steps and Coast's reaction to them resulted in the Trustee terminating the contracts.
- [5] The Monitor claims that the result of the contract terminations is that Coast owes \$232,700 to EncoreFX. Coast has refused to pay that amount despite demand. The Monitor commenced this proceeding seeking judgment against Coast in the amount of \$232,700, plus interest and costs.
- [6] At the conclusion of the hearing of this application on May 12, 2022, I granted an order substituting EncoreFX's name in the style of cause with "9019235 Canada Inc." This relief arose because the Trustee sold the name ("EncoreFX") to another party and, in so doing, also agreed to change the name. For the sake of simplicity, I will refer to the claim as being brought by "EncoreFX", as the parties have done.

- [7] This hearing was convened as a summary trial. Coast raised no objection to proceeding in that manner. In addition, after hearing the parties, I am satisfied that a disposition by way of a summary trial is appropriate. In particular, I find that there is sufficient evidence before me upon which determine the facts and applicable law: Supreme Court Civil Rules, R. 9-7(15) (a)(i).
- [8] The Monitor's evidence included the Affidavit #1 of Peter Venetsanos sworn March 29, 2022. Coast's evidence is contained in the Affidavit of Diane Bian sworn May 6, 2022. Ms. Bian represented Coast at the hearing, along with another Coast representative, Frank Hui. Ms. Bian's evidence is largely confirmatory of the contractual relationship between Coast and EncoreFX. Unfortunately, however, various evidentiary difficulties arose with respect to much of Ms. Bian's evidence, including that it contained legal argument. To that extent, I have treated those statements in Ms. Bian's affidavit as such and not as evidence.

BACKGROUND FACTS

The Parties

- [9] EncoreFX was in the business of providing FX risk management and cross-border payment services predominantly to small and medium enterprise customers who import or export products to and from foreign markets, and base their pricing on foreign currencies. Among other things, EncoreFX sold FX derivative contracts (including forward contracts and options) to its customers in order to mitigate their exposure to fluctuating FX rates (the "EncoreFX Derivatives").
- [10] The EncoreFX Derivatives are referred to as "over-the-counter" derivatives because they are not traded on a market or securities exchange. Rather, the contracts are negotiated with each counterparty (EncoreFX and its customer) at the time they are consummated.
- [11] The "market value" of all EncoreFX Derivatives products sold to customers fluctuates every second of every day once entered into due to changes in underlying FX rates. At any given time, the market value of the derivatives is "out-the-money" (OTM), "in-the-money" (ITM), or "at-the-money". In simple terms, an OTM position means that the FX rate and other factors moved against the customer and, if the contract were to be liquidated, the customer would owe EncoreFX an amount equal to the dollar value of the OTM position. The opposite is true if the rate moved in favour of the customer; in that case, if the contract was liquidated, EncoreFX would owe the customer the dollar value of the ITM position.
- [12] Coast is an exporter of lumber and logs to Asian markets. As such, Coast earns revenue in US Dollars and incurs expenses in Canadian Dollars. The result is that Coast's financial performance can be greatly affected by the USD/CAD exchange rates as the rate fluctuates.

The Parties' Business Relationships

- [13] In March 2017, EncoreFX began doing business with Coast.

[14] New customers of EncoreFX were required to complete and execute a "New Account Application" form (the "NAA") in order to book EncoreFX Derivatives. The NAA includes various information about the applicant/customer and confirms the authorized signatory on the account, the authorized signatory to provide instructions, bank information and legal entity identifier information for applicants purchasing forward contracts or options.

[15] The most significant and relevant provision in the NAA is found at the end of the form and is described as the "Applicant Representations, Warranties and Covenants". It reads in part:

The undersigned confirms receipt, understanding and acceptance of the EncoreFX Master Terms and Conditions including Appendix A and agrees to be bound thereby and further agrees that all dealings between the Applicant and EncoreFX remain subject to the Master Terms and Conditions as updated from time to time. All statements and representations made herein are deemed repeated each time the Applicant purchases a derivatives product from EncoreFX.

[Emphasis added.]

[16] The document referred to above in the NAA - i.e. the Master Terms and Conditions ("MTC") - is the overarching contract between EncoreFX and its customers and governs any later specific FX transactions entered into between the parties. I will address the specific provisions of the MTC below.

[17] As part of its business, EncoreFX offered credit to certain of its customers in relation to the subsequent booking of EncoreFX Derivatives. Prior to granting credit to any customer, EncoreFX's credit department would perform a detailed credit assessment and, if credit was to be extended, EncoreFX would agree to terms that were in line with the customer's financial strength.

[18] Once the customer credit assessment process was finalized, and if credit was to be extended, EncoreFX would issue, and a customer would sign, a credit facility letter (CFL) that outlined the terms under which credit was granted. The CFL expressly provided that a customer would be required to pay margin deposits and additional margin deposits to EncoreFX to cover unfavourable market fluctuations (i.e., OTM positions) over and above a prescribed and predetermined mark-to-market (MTM) limit (the "MTM Limit"). Essentially, the MTM Limit was the extent of the credit allowed under the CFL.

[19] On April 26, 2017, Coast (via Ms. Bian) signed an NAA and she also received a copy of the MTC. Ms. Bian was also the authorized signatory and authorized representative on Coast's account.

[20] Mainly, Coast intended to enter into "forward contracts" with EncoreFX so as to "hedge" its position in respect of future USD/CAD exchange rates. Coast's goal was to secure more certainty in its business. Under these "forward contracts", Coast agreed to pay EncoreFX a specified US Dollar amount and, in return, EncoreFX agreed to pay Coast a Canadian Dollar amount at a specific exchange rate, both events to occur on a specific date in the future.

- [21] Years later, on November 21, 2019, EncoreFX also granted Coast a credit facility under a CFL for the purpose of extending credit when Coast booked any forward contracts and/or options with EncoreFX. I will summarize the terms of the CFL below.
- [22] In February/March 2020, just a month, if not weeks, before the bankruptcy, Coast booked five separate forward contracts with EncoreFX. The total value of these forward contracts was US\$5 million. This meant that Coast agreed to provide US\$5 million to EncoreFX and EncoreFX agreed to pay Coast Canadian Dollar amounts at an exchange rate ranging between 1.335-1.4, or totalling CA\$6.819 million. The future date for these payments (the "Value Date") was in all cases about one year later, namely in December 2020 or February/March 2021 (the "Coast Forward Contracts").

THE RELEVANT CONTRACTS

- [23] As of March 2020 (i.e., the bankruptcy), the entirety of the contractual relationship between EncoreFX and Coast included: 1) the NAA; 2) the MTC; 3) the CFL; and 4) the Coast Forward Contracts (collectively, the "Coast Agreements").
- [24] The NAA refers to Coast having accepted that all dealings between EncoreFX and Coast would be subject to the terms of the MTC. In addition, all of the Coast Forward Contracts expressly provide that:

The Customer agrees to all of the terms, covenants and conditions contained in the Master Terms and Conditions Agreement to be complied with or performed by the Customer.

- [25] Accordingly, both parties agree that the issues to be decided at this summary trial involve a consideration of the express contract terms contained in the MTC and CFL as they relate to the Coast Forward Contracts. Where EncoreFX and Coast part company is on the correct interpretation of those provisions.

The MTC

- [26] The relevant terms of the MTC, as referred to by both the Monitor and Coast, are reproduced in Schedule A to these reasons. In summary, the MTC provides:
- a) The Customer (Coast) is bound by the MTC (Article 1.1);
 - b) The MTC applies to all "Transactions" between the Customer and EncoreFX, defined as the specific "Services" contracted for by the Customer with EncoreFX (i.e., the Coast Forward Contracts) (Articles 2.1 and 23). As above, the Coast Forward Contracts specifically confirm the Customer's agreement to all terms, covenants and conditions in the MTC;
 - c) The "Services" include "foreign exchange Forward Contracts", which include the Coast Forward Contracts. EncoreFX may modify or discontinue the Services at any time and without advance notice. If that occurs, it does not affect any existing Transaction (Article 3.1);

- d) The Customer acknowledges having received and understood related documents, including any CFL (to the extent the Customer is granted credit in respect of any margins) (Article 4.1(h)(iii));
- e) A Customer shall be required to maintain margins with respect to any Transaction. If a CFL is entered into, EncoreFX may issue a Margin Call (as defined) to a Customer, in accordance with any CFL (Articles 5.2(d), 5.3(a)(b) and 23);
- f) Where a Margin Deposit is placed on a floating basis for a Forward Contract, the Customer agrees to submit to EncoreFX an Additional Margin Deposit when EncoreFX determines that the MTM potential loss on the Forward Contract exceeds the prescribed amount established with EncoreFX in any CFL. EncoreFX shall determine the MTM value of a Forward Contract at a given point on a daily basis on each business day based upon the Mid-Market Rate (defined as the mid-point between the "buy" and "sell" rates for a currency). The Customer agrees to accept and be bound by such MTM value determination made by EncoreFX (Articles 6.3 and 23);
- g) Upon the issuance of any Margin Call, the Customer is required to pay the Margin Deposit or Additional Margin Deposit to EncoreFX within two (2) business days (Articles 5.3(b) and (e), 6.3, 6.4 and 11.5);
- h) If the Customer fails to respond to the Margin Call, the Customer is in default under the Transaction, which shall cause a default under all pending Transactions. In that event, EncoreFX may at its sole discretion and without further notice and in addition to any other rights it may have: i) close the Customer's account and terminate the contract which relates to the specific Service or Transaction; and, ii) terminate and close any other pending Transaction/contract for Services with the Customer (Articles 5.3(b) and (e), 5.6, 6.3);
- i) With respect to any Forward Contract, if a Customer fails to pay any Margin Deposit, EncoreFX is no longer obligated to complete the Forward Contract and EncoreFX may sell the covering currency to terminate the Forward Contract and charge the Customer with the "damages, losses (including loss of profit), costs and expenses incurred by EncoreFX" (Articles 5.6 and 6.5);
- j) EncoreFX also has the right to refuse to provide the Services to a Customer any time for any reason whatsoever (Article 5.7);
- k) EncoreFX may suspend or terminate Services to a Customer at any time without notice (Article 11.1);
- l) In the event that a Customer has violated the terms of the MTC, including, but not limited to, by not performing any of its obligations under any Transaction, EncoreFX may, at its sole discretion, withhold Services from the Customer and/or terminate any pending Transactions immediately by providing written notice to the Customer. In the event that any Transaction is terminated based upon a Customer's violation of the terms of any Transaction or the MTC, EncoreFX is relieved of any and all of its obligations under the MTC to complete

any pending Transaction, including its obligations under any Transaction entered into prior to such termination (Article 11.4); and

- m) The MTC, except as supplemented by an additional agreement between the parties and the terms and conditions of each Transaction, constitutes the entire agreement between the parties regarding the Customer's use of the Services by the Customer (Article 22.10).

The CFL

[27] The relevant terms of the CFL, as referred to by both EncoreFX and Coast, are summarized as follows:

- a) the Hedging Limit for booking Forward Contracts was \$10 million;
- b) the MTM Limit was \$500,000 (\$400,000 with \$100,000 increments). With respect to the MTM Limit:
 - i. Coast was required to pay Margin Deposits to EncoreFX to cover unfavourable market fluctuations over the MTM Limit of \$500,000;
 - ii. the MTM position of all Hedging Contracts would be monitored and, if the net-aggregate OTM position was greater than \$500,000, Coast's position would be considered to be "in-call" for \$100,000;
 - iii. If Coast's account was "in-call", Coast was required to make the required margin payment/deposit within two (2) business days; and
 - iv. Margin payments/deposits would be refunded to Coast if the gross OTM position fell back below \$400,000.

[28] The default provision in the CFL (in the event of a failure to pay any Margin Deposit) mirror those found in the MTC:

Pursuant to the EncoreFX [MTC], in the event that a deposit or margin call is not received within 2 business days, EncoreFX shall at its sole discretion and without further notice, have the right to

i) close out the account and terminate the contract which relates to the specific Service or Transaction; ii) terminate and close out any other pending Transaction/contract for Services; . Should the Margin Deposit, the Additional Margin Deposit and any other deposit or funds on hand then held by EncoreFX not be sufficient to reimburse and indemnify EncoreFX for the Losses incurred, [Coast] agrees to forthwith pay to EncoreFX any additional amount required to cover such shortfall.

[29] Finally, other significant terms in the CFL relevant to Coast include:

These trading facility terms are offered to [Coast] based upon satisfactory review of [Coast's] foreign exchange requirements, financial standing, financial performance, credit history and other current market conditions and factors.

EncoreFX reserves the right to re-evaluate, amend or cancel these trading facility terms as required from time-to-time.

- [30] Accordingly, Coast would have been required to have made any necessary Margin Deposits in respect of the Coast Forward Contracts, save that the CFL afforded Coast a \$500,000 buffer in respect of any such Margin Call to the extent that the credit under the CFL continued to be offered by EncoreFX.

ENCOREFX'S INSOLVENCY

- [31] Beginning in March 2020, global FX markets began to observe atypical levels of volatility, mainly driven by the impact that COVID-19 was having on the global economy. In particular, the US Dollar strengthened in a significant way against some of the world's most traded currencies, including against the Canadian, Australian and New Zealand Dollars in which the majority of the EncoreFX Derivatives were booked.
- [32] Due to this market volatility, a number of EncoreFX's customers were OTM on their transactions and subject to Margin Calls. EncoreFX attempted to work with many of its OTM customers to address the outstanding Margin Calls, however many OTM customers' businesses had been negatively impacted by COVID-19 themselves and they were unable to honour the terms of their credit facility agreements.
- [33] Arising from nonpayment of Margin Calls by many of its customers, EncoreFX was itself in an "OTM" position with its banking counterparties. Accordingly, EncoreFX was required to pay significant additional margins to those counterparties to cover the value of OTM contracts.
- [34] In the days leading up to March 30, 2020, EncoreFX's management determined that, even if all OTM amounts owing to it from its Customers could be collected over time, EncoreFX's short-term liquidity was insufficient to meet its obligations to its own counterparties. As such, EncoreFX decided to suspend all trading activity as at Sunday, March 29, 2020 (prior to the opening of trading on Monday, March 30, 2020).
- [35] On Monday, March 30, 2020, EncoreFX filed an assignment into bankruptcy.

The Trustee Addresses the Coast Agreements

- [36] On April 2, 2020, the Trustee sent a letter to Coast advising Coast of the bankruptcy and that EncoreFX had suspended trading (the "Termination Letter"). Specific to Coast, the Trustee also advised Coast in the Termination Letter that:
- a) the Trustee was terminating the Services under the MTC. However, the Trustee also advised Coast that, subject to the terms of the MTC, all Transactions in place (i.e., the Coast Forward Contracts) would be carried out in accordance with Coast's instructions to the extent that EncoreFX was permitted by law to execute them; and

- b) the Trustee was terminating the CFL as of April 2, 2020, citing EncoreFX's right to cancel the credit facility from time to time (quoted above). The Trustee referenced the inability of EncoreFX to provide the credit terms. Finally, the Trustee stated that the cancellation was subject to Margin Calls and other ongoing obligations in connection with the Coast Forward Contracts.
- [37] As a result of the termination of the CFL, Coast's account was immediately in an OTM position since the \$500,000 credit facility or buffer under the CFL no longer existed. Accordingly, in the Termination Letter, the Trustee advised Coast that:
- a) under the MTC and under the CFL (now terminated), Coast's MTM position was OTM to the extent of CA\$226,300. The Trustee advised that this amount was due and owing as a Margin Call and was to be paid within two business days; and
- b) failure to pay the Margin Call would, in accordance with the MTC, allow EncoreFX to close Coast's account, terminate the Coast Forward Contracts and set off amounts owed against any losses EncoreFX incurred.
- [38] To allay any concerns that Coast may have had in relation to paying money to a trustee of a bankrupt company, the Trustee confirmed in its letter that the Margin Deposit demanded would be held in a trust account.
- [39] Mr. Venetsanos states that Coast's position under the Coast Forward Contracts, as identified in the Termination Letter, was calculated using the "Mid-Market Rate", as required by Article 6.3 of the MTC.
- [40] Coast did not pay the Trustee in response to the Termination Letter or respond in any other way to that correspondence.
- [41] On May 1, 2020, the Trustee wrote again the Coast, noting that the Margin Call had not been received. Accordingly, the Trustee notified Coast that it was in violation of the MTC, and that the Trustee had terminated all of the Transactions (i.e., the Coast Forward Contracts). The Trustee advised Coast that it had closed out all of the Coast Forward Contracts as at April 7, 2020, which was the third business day after the issuance of the Margin Call (the "Close-Out Letter").
- [42] Finally, in the Close-Out Letter, the Trustee advised Coast, that in accordance with the MTC, Coast was required to pay \$232,700 within two business days. Coast's MTM position under the Coast Forward Contracts, identified in the Close-Out Letter, was calculated using the "Mid-Market Rate" as of April 7, 2020, as referred to in Article 6.3 of the MTC.
- [43] Again, Coast did not respond to the Close-Out Letter; nor did it pay the Trustee \$232,700.
- [44] On June 26, 2020, the Trustee issued a final written demand to Coast for payment of \$232,700. No payment was received.

Coast's Evidence

[45] Ms. Bain states that the reason Coast sought to enter into the CFL with EncoreFX was to avoid continual Margin Calls for payment from EncoreFX and possible repayments by EncoreFX, given the constant fluctuations in exchange rates.

[46] In addition, Ms. Bain states that, if the Coast Forward Contracts had been performed by EncoreFX, Coast would have been in an ITM position of \$494,800 as of the Value Date.

Pleadings Summary

[47] In October 2020, the Trustee commenced this action, seeking recovery of the Margin Call from Coast (\$232,700).

[48] In November 2020, Coast filed its Response to Civil Claim (RTCC) through its counsel at the time. Essentially, Coast took the position that the margin terms set out in the CFL formed part of each Transaction/Coast Forward Contracts when they were booked. Coast further stated that the Trustee had to right to cancel the Coast Forward Contracts for lack of an MTM Limit arising from the cancellation of the credit facility under the CFL.

[49] In its Reply, the Trustee denies that Coast's interpretation of the Coast Agreements, including the MTC and CFL, is the proper interpretation.

ISSUES / ANALYSIS

[50] I am satisfied that both the Monitor and Coast had reasonably identified the issues to be considered.

Interpretation of the Contracts

[51] As I will discuss in more detail below, various issues arose as to the interpretation of the Coast Agreements, particularly the MTC and the CFL.

[52] The seminal decision relating to interpretation of contracts is found in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. Justice Rothstein summarized those principles as follows:

[47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" [citations omitted]. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(Reardon Smith Line, at p. 574, per Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement [citations omitted]. As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[64] I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15).

[Emphasis added.]

[53] Some aspects of Ms. Bain's evidence are what could be termed "surrounding circumstances", as discussed in *Sattva* at para. 47.

[54] However, Rothstein J. in *Sattva* was careful to outline the limits in a court's consideration of surrounding circumstances. He stated:

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement [citations omitted].

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (King, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or

reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[Emphasis added.]

- [55] Finally, the Court in *Sattva* at paras. 59-61 discussed the role of parol evidence in the interpretation exercise. While subjective intentions of the parties are not admissible, the surrounding circumstances may aid in the court's interpretation, so long as such evidence does not seek to change or overrule the plain meaning of words. In addition, such evidence must be "facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting" (para. 60).
- [56] The Monitor also refers to *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, where the Court was considering the role of "surrounding circumstances" in relation to standard form contracts. At paras. 27-32, the Court finds that surrounding circumstances have less relevance in respect of such contracts, but may still include the purpose of the contract, the nature of the relationship it creates and the market or industry in which it operates.
- [57] Within the context of these interpretation principles, various issues arise between the parties, which are addressed below.

Did the Trustee Affirm the Coast Forward Contracts?

- [58] Coast asserts, without authority, that EncoreFX's insolvency relieved it of any further obligation in respect of the Coast Agreements, including the Coast Forward Contracts. I know of no basis for such a proposition and I reject it.
- [59] EncoreFX's bankruptcy itself did not affect the existence of the contractual obligations in place between the parties. In particular, the MTC does not refer to EncoreFX's bankruptcy as an event of default under the MTC that would relieve Coast of any further obligations (contra Article 11.4 which refers to Coast's possible bankruptcy as allowing EncoreFX to withhold Services and terminate any pending Transaction).
- [60] Similarly, the fact that EncoreFX suspended trading just prior to the bankruptcy had no effect on the existence or validity of the Coast Agreements.
- [61] The powers and duties of a trustee in bankruptcy are set out in the BIA. Pursuant to s. 18(b) of the BIA, a trustee may carry on the business of the bankrupt until the date fixed for the first meeting of creditors. Similarly, after the first meeting and the appointment on inspectors, a trustee may choose to carry on the business of the bankrupt, if necessary for the beneficial administration of the estate: BIA, s. 30(1)(c).

- [62] Typically, a trustee will normally only operate a bankrupt's business with considerable caution and after gaining a full understanding of the risks and benefits that come with such a decision. This exercise will usually include an extensive consideration of which contracts are beneficial to the estate or not, leading to a decision as to which contracts will be affirmed and which will be disclaimed.
- [63] This was the scenario considered in *North America Steamships Ltd. (Re)*, 2007 BCSC 267 in the context of freight forward swap agreements. In that case, Justice Tysoe (as he then was) was considering a trustee's application concerning whether it had to affirm those agreements and, if so, what liability that would attract.
- [64] In *North America Steamships*, Tysoe J. found that a trustee is required to affirm a contract within a reasonable time, in order to rely on the contract and call for its completion. He further found that a trustee must elect whether to disclaim or affirm a contract within a reasonable time. He stated:
- [11] . In my view, such a requirement is reasonable and makes commercial sense. If a party to a contract becomes bankrupt, a question arises as to whether the obligations of that party under the contract will be performed. The bankrupt itself is no longer in a position to perform the obligations and one could consider the contract to be frustrated unless someone else standing in the place of the bankrupt (i.e., the trustee in bankruptcy) is prepared to perform the obligations. It is not reasonable for the other party to be bound to perform its obligations under the contract after the date of bankruptcy without knowing how the obligations of the bankrupt will be treated if they are not performed. If the other party performs its obligations, it is entitled to know that it will not simply become an unsecured creditor of the bankrupt if the obligations of the bankrupt under the contract are not performed. Thus, if the trustee in bankruptcy wants to benefit from the contract, it is incumbent on it to affirm the contract and thereby assure the other party that it will not be treated as an unsecured creditor of the bankrupt in respect of the obligations it performs after the date of bankruptcy.

...

- [17] A trustee in bankruptcy has two alternatives with respect to contracts entered into by the bankrupt. The trustee can either affirm or disclaim the contract. Support for this proposition is found in *Saan Stores Ltd. v. United Steelworkers of America, Local 596 (Retail Wholesale Canada, Canadian Service Section Division)* (1999), 172 D.L.R. (4th) 134 (N.S.C.A.) at p. 151:

As a general rule, with respect to contracts that a trustee can perform, the trustee may, within a reasonable time, elect to either adopt the contracts or to disclaim them (*Re Thomson Knitting Company* (1925), 2 D.L.R. 1007 (Ont. S.C.); *Houlden, L.W. and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada*, 3rd ed. (Toronto: Carswell, 1993) paragraph F45.2).

[18] The trustee cannot choose to do nothing. It must elect between the two alternatives because the other contracting party is entitled to know whether it will be a creditor of the bankrupt or a creditor of the bankruptcy estate (or the trustee personally) with respect to any unfulfilled obligations on the part of the bankrupt. The other contracting party is entitled to know which alternative the trustee is choosing irrespective of whether it is entitled to terminate the contract as a result of the bankruptcy.

[65] Coast contends that the Trustee failed to affirm the MTC and the Coast Forward Contracts; or alternatively, the Trustee failed to communicate its election to affirm them, such that it was freed of any further obligations under the Coast Forward Contracts. Coast further argues that the Trustee took no steps to complete the Coast Forward Contracts and that the Trustee cannot seek to benefit from the Coast Agreements without assuming the corresponding burden.

[66] In my view, Coast's arguments are without merit as contrary to the uncontroverted facts.

[67] In the Termination Letter, the Trustee expressly confirmed its intention to abide by the MTC and complete the Coast Forward Contracts, assuming there was no violation of the terms of the MTC. The Trustee stated:

If you have not violated the terms of the [MTC], all transactions which were entered into prior to termination will be carried out in accordance with your instructions to the extent EncoreFX is permitted by law to execute them.

[68] In the Termination Letter, when the Trustee referred to the termination of the "Services" as of April 2, 2020, it was clearly only referring to any future Transactions that Coast might have booked.

[69] In addition, the Trustee assured Coast in the Termination Letter that it would not be treated as an unsecured creditor with respect to the Coast Forward Contracts if the Margin Deposit was paid and then later had to be returned to Coast under the terms of the MTC (North America Steamships at para. 11). The Trustee advised that any payment or deposit would be held in a "trust account".

[70] Finally, Coast argues that EncoreFX could no longer perform its obligations under the MTC and the Coast Forward Contracts. There is, however, no evidence to support that contention. The Trustee confirmed in the Termination Letter and confirms now on this application that it was ready, willing and able to abide by the terms of the MTC and the Coast Forward Contracts until the Value Date in late 2020 or early 2021.

[71] I find that the Trustee affirmed the MTC and the Coast Forward Contracts within a reasonable period of time after the bankruptcy, such that they were extant between the parties in April/May 2020.

Was the Trustee Entitled to Terminate the CFL and Demand the Margin Call?

- [72] The central issue between the parties is whether the Trustee could, in accordance with the Coast Agreements, cancel the CFL and then demand the Margin Call. The Trustee says that it could; Coast says it could not.
- [73] Coast's position that the Trustee had no right to cancel or amend the "Margin Terms" (essentially the credit allowed (MTM Limit) under the CFL) is found in its RTCC, as follows:
12. The MTC and the CFL incorporated each other's terms by reference and formed part of a single agreement.
 13. Pursuant to the MTC and the CFL, the Margin Terms were incorporated and formed part of the terms applicable to a transaction at the time of booking. Once a transaction was booked, it was not open to EncoreFX to amend or cancel the Margin Terms.
 14. Accordingly, each transaction entered into by [Coast] was a contract between EncoreFX and [Coast] governed by (i) the specific terms of the transaction as agreed between EncoreFX and [Coast] and (ii) the provisions of the MTC and CFL.
- [74] Accordingly, the issue is whether the Trustee had the right to unilaterally cancel the CFL in respect of the Coast Forward Contracts that were already in place between the parties.
- [75] I have considered the entire contractual landscape between EncoreFX and Coast, being the NAA, MTC, the CFL and the Coast Forward Agreements.
- [76] In my view, this issue is best considered within the architecture of those various agreements and their relationship to each other.
- [77] The MTC is the overarching agreement between the parties. The MTC anticipates that Transactions will be booked in the future, which Transactions will be governed by the MTC. Indeed, each of the Coast Forward Contracts specifically provides that performance is referable to the terms of the MTC. In that event, I agree with Coast that the terms of the MTC are incorporated and formed part of the Transactions.
- [78] Accordingly, when a customer, such as Coast, booked a Transaction, the MTC governed the overall relationship in relation to the specific Transaction that had been booked. This (along with the NAA) would have been the entirety of the contractual relationship between EncoreFX and Coast from April 2017 and November 2019 (when the CFL was put in place) with respect to any Transactions booked over that time.
- [79] Under the MTC, two provisions specifically provide that EncoreFX may discontinue and terminate any "Services". Article 3.1 permits EncoreFX to modify or discontinue any "Service" without notice, provided that such modification or discontinuation has no impact on any existing Transaction between a Customer and EncoreFX. Article 11.1 allows EncoreFX to suspend or terminate "Services" to a Customer at any time without notice; however, Article 11.3 provides that, if a Customer is not in breach of the MTC, EncoreFX is required to carry out any Transaction entered into prior to the termination.

- [80] In that event, it is important to understand how the MTC defines "Services".
- [81] In Article 3.1, "Services" is defined as various EncoreFX Derivatives, including Forward Contracts, such as were booked by Coast and were the subject of the Coast Forward Contracts. Essentially, these are the Transactions, consistent with the definition of a "Transaction" in Article 23 of the MTC (defined as the specific Service(s) contracted for by the Customer with EncoreFX).
- [82] I agree that the CFL is not entirely divorced from the MTC terms. "CFL" is referenced in many MTC provisions, such as Articles 4.1(h), 5.3 (a) and (b), 6.3 and 6.4. in addition, the CFL refers to the MTC terms relating to any Margin Call under the CFL.
- [83] Having said that, the CFL is particularly directed toward the terms of the credit extended by EncoreFX and stands apart from the MTC to a degree. I agree with the Trustee that the CFL is a self-contained agreement to that extent. I also agree that, to the extent that credit had been provided by EncoreFX under the CFL, the ability of EncoreFX to terminate those credit facilities is not subject to the termination provisions of the MTC in relation to any extant Transactions, such as the Coast Forward Agreements. In particular, I rely on:
- a) Not every Customer of EncoreFX was issued credit pursuant to a CFL. CFLs were granted at the discretion of EncoreFX;
 - b) "CFLs" are defined in Article 23 of the MTC as "an agreement between EncoreFX and the Customer outlining the credit terms approved by EncoreFX and accepted by the Customer including transaction limits, margin and deposits". Accordingly, the existence of CFLs was clearly contemplated as a possibility in the MTC;
 - c) The provision of credit under a CFL is not encompassed within the definition of "Services" in Article 3.1 of the MTC;
 - d) It is only the "Services" (i.e., any future Transactions) that EncoreFX may terminate in the future, and subject to the requirement to carry out any Transactions entered into prior to that date. There is no provision in the MTC that would support a contractual commitment on the part of EncoreFX to continue to extend credit in respect of any extant Transaction (such as the Coast Forward Contracts);
 - e) Unlike the Coast Forward Contracts, the CFL did not state that Coast agreed to all of the "terms, covenants and conditions contained in the [MTC] to be complied with or performed by the Customer" that might have supported an incorporation of the MTC termination provisions into the CFL; and
 - f) There is also no provision in the CFL to suggest that EncoreFX was precluded from cancelling any credit facility with respect to extant Transactions. In fact, the terms of the CFL were specifically to the opposite effect: it was offered based on "current market conditions"; it was to be reviewed annually; and it expressly stated that EncoreFX would "re-evaluate, amend or cancel these trading facility terms as required from time-to-time".

- [84] I agree with the Trustee that it was an express term of the CFL that EncoreFX could unilaterally amend or cancel the credit terms at any time.
- [85] I also agree that, once the CFL was terminated, Coast's "buffer" had disappeared. Coast's ability to avoid paying margins up to the MTM Limit (as set out in the CFL) was eliminated such that the Trustee was entitled to issue the Margin Call. The cancellation of the CFL did not eliminate Coast's obligation to pay margins to EncoreFX under Articles 5.3(b) and 6.3 of the MTC if Coast was in an OTM position (which it was as of April 2, 2020).
- [86] Ms. Bian states in her Affidavit (para. 27) and in her submissions to the Court that Coast would not have booked the Coast Forward Contracts unless it had access to the credit facility under the CFL. In my view, these statements are not within the purview of proper "surrounding circumstances" as discussed in *Sattva*. Ms. Bian's evidence can only be described as her subjective intentions at the time of the booking of the Coast Forward Contracts. Further, Ms. Bian's evidence is only put forward to impermissibly detract from the ordinary meaning of the words used in the Coast Agreements, including the CFL. In that event, I have disregarded Ms. Bian's comments to that effect.
- [87] In its RTCC, Coast also contends that the Trustee repudiated the Coast Forward Contracts, the MTC and the CFL and that this repudiation was accepted. Coast says that this repudiation occurred by the Trustee's "unjustified Margin [C]all , including treating the Margin Terms as cancelled or amended" and by the Trustee's later actions in "unilaterally vary[ing]" and terminating the Coast Forward Contracts. Coast says that it accepted that repudiation and was therefore relieved of any further obligations under the Coast Forward Contracts.
- [88] In *Guarantee Co. of North America v. Gordon Capital Corp*, [1999] 3 S.C.R. 423 at para. 40, the Court describes that repudiation occurs when a party "by words or conduct evince[es] an intention not to be bound by the contract".
- [89] There is no basis here upon which to conclude that the Trustee acted so as to repudiate any of the Coast Agreements. To the contrary, the Trustee affirmed its intention to abide by the MTC and the Coast Forward Contracts. In addition, the Trustee acted pursuant to the CFL in terminating the credit facility. As I conclude above, the Trustee acted within its powers with respect to Coast Agreements, including the MTC and the CFL, and it did not act in such a way as to repudiate any of the Coast Agreements.
- [90] In addition, I have concluded that the Trustee was able to cancel or terminate the CFL and thereafter, make the Margin Call. Accordingly, no issues of repudiation arise, as contended by Coast.

Did the Trustee use the Correct Close-Out Date and Close-Out Rate?

- [91] Coast argues that there is no basis for valuing the Margin Call as of April 7, 2020, as set out in the Close-Out Letter. In its RTCC, Coast asserts:

33. By valuing the demand on April 7, 2020, the Trustee has arbitrarily applied an exchange rate that is more favourable to EncoreFX. This is inconsistent with the intention of the parties and the terms of the [Coast Forward Contracts].
- [92] The terms of the MTC specifically address how and when EncoreFX may close out Coast's account if non-payment of a Margin Call occurs.
- [93] Articles 5.3(b), 6.3, 6.4 and 6.5 provide that if a Margin Call, Margin Deposit or Additional Margin Deposit is not paid within two (2) business days, EncoreFX may terminate and close out the Transactions and set off amounts owed to the Customer (including gains on contracts closed out) against any Losses incurred and amounts owing to EncoreFX.
- [94] The Termination Letter is dated April 2, 2020. The window for payment by Coast would therefore have expired two (2) business days later, or by the end of the day on April 6, 2020. Coast either failed, refused or neglected to pay the Margin Call within those two (2) business days, as required under the MTC. Accordingly, the Trustee was entitled to close out the Coast Forward Contracts as of the next business day and calculate the value of those Transactions as of that date. Indeed, in the Close-Out Letter, the Trustee calculated the amounts as of the next business day, April 7, 2020.
- [95] I conclude that the Trustee properly used April 7, 2020 as the Close-Out Date in accordance with Articles 5.3(b), 6.3 and 6.5 of the MTC.
- [96] Coast also takes issue with the Close-Out Rate used by the Trustee. In its RTCC, Coast asserts:
23. Further, the quantum of the Margin Call was in breach of the MTC as, among other things, it calculated [Coast's] OTM Position using a rate other than the "Mid-Market Rate" (as required by section 7.9 of the MTC).
- [97] In default of payment of a Margin Call, and the close out of any Transactions, Article 6.5 provides that EncoreFX has the right to:
- (i) sell the necessary covering Current to terminate the Forward Contract(s), (ii) charge the Customer with the damages, losses (including loss of profit), costs, and expenses incurred by EncoreFX (the "Losses"), and (iii) apply the Margin Deposit, the Additional Margin Deposit and any other deposit or funds on hand then held by EncoreFX to pay the Losses.
- [98] Mr. Venetsanos states that Coast's Margin/OTM position was calculated using the "Mid-Market Rate" (MMR), as required by section 7.9 of the MTC. Mr. Venetsanos' reference to "section 7.9" is likely in error as Article 7 of the MTC addresses Option Contracts, which has no application here. Article 7.9 is, in any event, identical to Article 6.3 that refers to the valuation of a Forward Contract in a default situation as being based on the Mid-Market Rate:

EncoreFX shall determine the [MTM] value of a Forward Contract at a given point on a daily basis on each business day based upon the Mid-Market Rate. The Customer agrees to accept and be bound by such [MTM] value determination as made by EncoreFX.

[99] Ms. Bian says that the Trustee should have used the Bank of Canada closing rate, which she suggests is more accurate than the one used for the MMR. However, there is no reference in the MTC to the Bank of Canada rate as being the basis upon which the parties agreed to calculate the Close-Out amount. Despite Coast's argument that the MMR was "miscalculated", it has put forward no evidence to support the use of anything other than the rate used by the Trustee.

[100] Further, Article 23 defines "Mid-Market Rate" as a "rate derived from the mid-point between the "buy" and "sell" rates for a currency". There is no specific reference to who is to determine this "mid-point", other than the general reference in Article 6.3 of the MTC to a determination being made by EncoreFX. That is what the Trustee did in this case.

[101] I am satisfied that the Trustee's calculations of the MMR were properly made toward determining EncoreFX's "Losses" under the terms of the MTC. I agree with the Trustee that this is the amount that EncoreFX would have received had Coast not breached the MTC by failing to pay the Margin Call, assessed as of the date of the breach (i.e., April 7, 2020). Attached to Mr. Venetsanos' affidavit is the Schedule that was included with the Close-Out Letter. This Schedule identifies each of the Coast Forward Contracts and their respective values as of the date of the Close-Out Date.

[102] Finally, in its RTCC, Coast asserts:

6. Further, even if the Trustee's termination of the [Coast Forward Contracts] is effective, which is denied, EncoreFX's losses or damages are limited to the difference in the price paid by Encore FX in the purchase and sale of the relevant currency and what would have been paid or received had the [Coast Forward Contracts] been performed, which purchase or sale did not occur in any event.

[103] As best I can discern, Coast/Ms. Bian is asserting that, if the Trustee had performed the Coast Forward Contracts, Coast would have been ITM to the extent of \$494,800. She therefore argues that EncoreFX's losses are limited by that "fact" such that it had no amount of "Losses" were incurred by EncoreFX.

[104] This argument ignores reality. EncoreFX was contractually able to terminate the CFL and claim any margin that might have arisen through the withdrawal of the CFL. In the event of non-payment of the Margin Call, such as occurred here, the Trustee was contractually able to close-out the Coast Forward Contracts. It did so properly on the Close-Out Date of April 7, 2020. In addition, the Trustee properly used the MMR or "Mid-Market Rate" under Article 6.3 of the MTC to value the close-out position of the Coast Forward Contracts.

[105] It is unfortunate that Coast did not choose to continue with the Coast Forward Contracts by paying the Margin Call. By all accounts, if Coast had done so, it would have benefitted greatly by being significantly ITM. However, what could have happened in the future is hardly relevant to what did happen, all of which gave rise the Trustee properly exercising EncoreFX's contractual rights under the MTC. In that event, I agree with the Trustee that, even if the value of the Coast Forward Contracts would have been different at some future date, it is irrelevant to the determination of the issues here.

CONCLUSION

[106] The Monitor is granted judgment against Coast in the amount of \$232,700. In addition, the Monitor is granted pre-judgment interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 from April 7, 2020 to date of judgment. Finally, the Monitor is awarded its costs of this action on a party and party basis under Appendix B.

"Fitzpatrick J."

SCHEDULE A

MASTER TERMS AND CONDITIONS

ARTICLE 1 - APPLICANT BOUND

1.1 By completing and signing the document provided by EncoreFX entitled "New Account Application" form (the "Application"), the Customer shall be bound by these Master Terms and Conditions. For the purposes of these Master Terms and Conditions, "Customer" shall mean the entity identified on the first page of the Application in the box entitled "Applicant Legal Name".

ARTICLE 2 - APPLICATION

2.1 These Master Terms and Conditions apply to all Transactions entered into between the Customer and EncoreFX. Such Transactions and all related contracts or agreements between the Customer and EncoreFX will at all times be subject to the provisions of these Master Terms and Conditions, except to the extent modified expressly and clearly by the specific provisions of a Transaction.

ARTICLE 3 - ENCOREFX SERVICES

3.1 The services offered by EncoreFX to the Customer (the "Services") may include: iii) foreign exchange Forward Contracts Any or all of the Services offered may be modified or discontinued by EncoreFX at any time and without advance notice, and EncoreFX shall not be liable to the Customer for any loss resulting from such modification or discontinuance. Such modification or discontinuance by EncoreFX of Services shall not affect any existing Transaction between the Customer and EncoreFX.

ARTICLE 4 - REPRESENTATIONS AND WARRANTIES

4.1 The Customer hereby represents and warrants to EncoreFX that: .

(h) it has received and understands the following documentation:

(iii) Credit Facility Letter (to the extent the Customer will use Margin)

ARTICLE 5 - TRADE PROCESS

5.2 The following procedures shall apply with respect to the confirmation and completion of Transactions between the Customer and EncoreFX:

(d) Upon authorizing and accepting the Transaction the Customer shall forthwith make any required contractual payment to EncoreFX.

5.3 The following procedures shall apply with respect to payments made by the Customer to EncoreFX:

- (a) The Customer may be required to pay a deposit in order to effect the Transaction, as set out in the Credit Facility Letter. The deposit may be a fixed amount, a floating Margin Deposit or a combination of the two types of deposit, as specified by EncoreFX.
- (b) At the discretion of EncoreFX, certain Customers shall be required to maintain margins with respect to certain accounts or Transactions, as set out in the Credit Facility Letter. From time to time, EncoreFX may issue a Margin Call to such a Customer to ensure that the Customer is maintaining the appropriate deposit margin in its account. Upon the issuance of such a Margin Call, the Customer shall forthwith deposit the funds required to maintain the appropriate margin with EncoreFX. In the event that the Customer fails to either pay a deposit or respond to the Margin Call by depositing such required funds within two (2) Business Days, the Customer shall be in default under the Transaction, which shall cause a default under all pending Transactions and EncoreFX shall, at its sole discretion and without further notice and in addition to any other rights it may have herein, have the right to: i) close out the Customer's account and terminate the contract which relates to the specific Service or Transaction; ii) terminate and close out any other pending Transaction/contract for Services with Customer;
- (e) Under any circumstance in which monies are owed to EncoreFX by the Customer pursuant to this Agreement or any Transaction, EncoreFX will provide notice to the Customer of such outstanding amounts. Upon receiving such notice, the Customer shall have two (2) Business Days (unless otherwise agreed to in writing by EncoreFX) to provide such amounts to EncoreFX. Failure to provide the required amount to EncoreFX shall be a default under any and all contracts for Services and Transactions pending or in place with EncoreFX.

5.5 The terms and conditions contained herein are hereby incorporated into each Transaction entered into between the Parties.

5.6 EncoreFX shall be entitled to cancel any Transaction where the Customer has not carried out its obligations. The Customer shall reimburse EncoreFX for any losses, costs and expenses incurred as a result of such cancellation.

5.7 EncoreFX reserves the right to refuse to provide the Services to the Customer or enter into any Transaction with the Customer at any time for any reason whatsoever.

ARTICLE 6 - FORWARD CONTRACTS

6.3 Forward Contracts may require a Margin Deposit in an amount and on terms specified by EncoreFX which shall be stated in the Credit Facility letter. The Margin Deposit shall be the amount specified by EncoreFX when the Forward Contract is entered into. The Margin Deposit shall be either in guaranteed funds or by a bank letter of guarantee/credit (on terms and conditions satisfactory to EncoreFX including without limitation, the issuing bank and the maturity date) and must be paid within two (2) Business Days. In the event that the Margin Deposit is not received within two (2) Business Days EncoreFX shall at its sole discretion and without further notice, have the right to i) close out the Customer's account and terminate the contract which relates to the specific Service or Transaction; ii) terminate and close out any other pending Transaction/contract for Services with Customer; ... Where a Margin Deposit is placed on a floating basis for the Forward Contract the Customer agrees to submit to EncoreFX additional deposit funds/letter of guarantee (the "Additional Margin Deposit") when EncoreFX determines that the mark-to-market potential loss on the Forward Contract exceeds the prescribed amount established with EncoreFX in the Credit Facility Letter. EncoreFX shall determine the mark-to-market value of a Forward Contract at a given point on a daily basis on each business day based upon the Mid-Market Rate. The Customer agrees to accept and be bound by such mark-to-market value determination as made by EncoreFX.

6.4 EncoreFX shall have the right In its sole discretion, to notify a Customer at any time that an Additional Margin Deposit is required as determined by EncoreFX in accordance with Section 6.3. The Customer agrees that upon such notification from EncoreFX, the Customer will have two (2) Business Days from notification to provide to EncoreFX the Additional Margin Deposit. The amount of the Additional Margin Deposit shall be that amount determined by EncoreFX which is sufficient to ensure that the Margin Deposit together with the Additional Margin Deposit held by EncoreFX for the particular Forward Contract on a mark-to-market value is at least the minimum prescribed amount established by EncoreFX for the Forward Contract as established in the Credit Facility Letter.

6.5 Should the Customer not: (i) complete the Forward Contract by the required Settlement Date(s), or (ii) pay to EncoreFX any Margin Deposit including any required Additional Margin Deposit, then in that event, EncoreFX shall no longer be obligated to complete the Forward Contract and at EncoreFX's sole discretion, any other pending Transaction including any other Forward Contract(s) with the Customer. In addition, EncoreFX shall have the right to: (i) sell the necessary covering Currency to terminate the Forward Contract(s), (ii) charge the Customer with the damages, losses (including loss of profit), costs and expenses incurred by EncoreFX (the

"Losses"), and (iii) apply the Margin Deposit, the Additional Margin Deposit and any other deposit or funds on hand then held by EncoreFX to pay the Losses. Should the Margin Deposit, the Additional Margin Deposit and any other depositor funds on hand then held by EncoreFX not be sufficient to reimburse and indemnify EncoreFX for the Losses incurred, the Customer agrees to forthwith pay to EncoreFX any additional amount required to cover such shortfall.

ARTICLE 11 - TERMINATION

11.1 EncoreFX may suspend or terminate Services to the Customer at any time without notice.

11.3 Provided the Customer has not violated the terms of this Agreement, all Transactions which were entered into prior to termination shall be carried out in accordance with the instructions of the Customer relating to such Transactions. The Agreement shall continue until such time as all obligations of the Customer and of EncoreFX pursuant to such transaction have been performed.

11.4 Notwithstanding Section 11.3 hereof, in the event that the Customer has violated the terms of this Agreement in any way including, but not limited to, not performing any of its obligations under any Transaction, EncoreFX may, at its sole discretion, withhold the Services offered by EncoreFX from the Customer and/or terminate any pending Transactions immediately by providing written notice to the Customer of the termination and of its violation of the terms of this Agreement. In the event that any Transaction is terminated based upon a Customer's violation of any term or condition of the Transaction or this Agreement by the Customer, EncoreFX will be relieved of any and all its obligations under this Agreement to complete any pending Transaction, including its obligations under any Transaction entered into prior to such termination.

11.5 Subject to Section 11.4, within two (2) Business Days of termination, the Customer and EncoreFX shall settle all amounts due and owing under pending Transactions (including in EncoreFX's discretion Forward Contracts) and this Agreement.

ARTICLE 19 - LIMITATION OF LIABILITY/INDEMNITY

19.1 EncoreFX will not be liable to the Customer for any losses or damages suffered under this Agreement except to the extent that such losses or damages are directly attributable to the gross negligence or wilful misconduct of EncoreFX, its officers or its employees.

ARTICLE 22 - MISCELLANEOUS

22.10 This Agreement, except as may be supplemented by an additional agreement entered into between the Parties and the terms and conditions of each Transaction, constitutes the entire agreement between the Parties with respect to the use of the Services by the Customer

ARTICLE 23 - DEFINITIONS

"Credit Facility Letter" means an agreement between EncoreFX and the Customer outlining the credit terms approved by EncoreFX and accepted by the Customer including transaction limits, margin and deposits.

"Forward Contract" means an OTC Transaction that is not a Spot Transaction, whereby EncoreFX agrees to deliver a specific Currency to the Customer, or as directed by the Customer, at some point of time in the future.

"Losses" has the meaning ascribed thereto in Section 6.5 hereof.

"Margin Call" means a demand by EncoreFX on the Customer to deposit monies with EncoreFX for the purpose of ensuring that the Customer's margin account is brought up to the minimum margin requirements for the Transaction.

"Margin Deposit" means a good faith deposit placed by a Customer with EncoreFX as collateral to hold a position for a Forward Contract

"Mid-Market Rate" means a rate derived from the mid-point between the "buy" and "sell" rates for a currency.

"Services" has the meaning ascribed thereto in Section 3.1 hereof.

"Transaction" means the specific Service(s) contracted for by the Customer with EncoreFX.

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