Neutral Citation Number: [2021] EWHC 2010 (Ch)

Case No: BL-2021-000732

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

7 Rolls Building
Fetter Lane
London EC4A 1L

Date: 16th July 2021

Before:

MR JUSTICE ZACAROLI

Between :

(1) EMERALD PASTURE DESIGNATED ACTIVITY COMPANY **(2) EMERALD MOOR DESIGNATED ACTIVITY COMPANY** **(3) TRINITY INVESTMENTS DESIGNATED ACTIVITY COMPANY**	**Claimants**
- and –	
(1) CASSINI SAS **(2) CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK**	**Defendants**

Daniel Bayfield QC and Matthew Abraham (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimants**
Richard Handyside QC and Ryan Perkins (instructed by **Allen & Overy LLP**) for the **Defendants**

Hearing date: 13 July 2021

APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be NB 10.30 am on 16TH July 2021.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. The claimants ("Emerald") are lenders, and the first defendant ("Cassini") is the borrower, under a senior facilities agreement dated 28 March 2019 (the "SFA"). The SFA is governed by English law and has an exclusive jurisdiction clause in favour of the English courts.

2. By the claim, Emerald seeks declarations concerning Cassini's obligations under the SFA to provide information to the agent under the SFA (the "Agent"). The second defendant was, until recently, the Agent, but has now been replaced by GLAS SAS.

3. Cassini is subject to French insolvency proceedings (the "Sauvegarde"), opened on 22 September 2020, a form of debtor-in-possession safeguard proceedings for a company in financial difficulties that wishes to propose a restructuring plan to its creditors. These are main proceedings under the Recast European Insolvency Regulation, (EU) 2015/848 (the "Recast Insolvency Regulation"), which continues to apply in the UK in respect of the Sauvegarde, because it was commenced prior to 31 December 2020.

4. On 27 October 2020 the Agent (acting on the instruction of the Majority Lenders, as defined under the SFA) requested from Cassini information and access to books, accounts, records and the management of the group. Cassini refused to comply, contending that the effect of the Sauvegarde, as a matter of French insolvency law, is to render its obligations under the SFA unenforceable.

5. Emerald (which acquired commitments under the SFA after the commencement of the Sauvegarde) is concerned that Cassini will propose a restructuring plan that favours the shareholders over the creditors. It wishes to obtain the information requested by the Agent because, without it, it will not be able to put up meaningful resistance to the restructuring proposal.

6. By an Application Notice dated 12 April 2021, Cassini seeks a declaration that the English court has no jurisdiction to hear the claim. Of the three grounds of challenge asserted in the Application Notice, only one is now pursued. Cassini contends that the claim derives from and is closely linked to the Sauvegarde and thus falls within Article 6(1) of the Recast Insolvency Regulation. Article 6(1) provides as follows:

> "The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions."

7. The hearing of the application was expedited by order of Mann J dated 15 June 2021. This judgment deals solely with the jurisdiction challenge.

The relevant terms of the SFA

8. Under the SFA the lenders made available to Cassini a term loan facility and revolving facility in an aggregate amount of €573,000,000, together with an (undrawn) incremental facility of €114,000,000. Only the provisions relating to the provision of information are relevant for present purposes.

9. Clause 26.7 of the SFA provides:

> "The Company shall supply to the Agent… (d) promptly on request, such further information regarding the financial condition, assets or operations of the Group and/or any member of the Group as any Finance Party through the Agent may reasonably request."

10. Clause 28.25 provides:

> "If an Event of Default is continuing, each Obligor shall, and the Company shall ensure that each member of the Group will permit the Agent and/or the Security Agent and/or accountants or other professional advisors and contractors of the Agent or Security Agent, free access at all reasonable times and on reasonable notice at the risk and cost of the Obligor or Company to (a) the premises, assets, books, accounts and records of each Obligor and (b) meet and discuss matters with management."

11. An "Event of Default" includes the commencement of the Sauvegarde.

The claim

12. By its Part 8 Claim Form dated 2 March 2021, Emerald contends that, although there is under French law a prohibition and automatic stay on claims aimed at payment of a sum of money by Cassini or the termination of a contract for non-payment of a sum of money (the "French Moratorium") the opening of the Sauvegarde did not alter or affect Cassini's obligations under clauses 26.7 and 28.25 of the SFA.

13. In the prayer for relief in the Claim Form, Emerald seeks the following declarations:

> "(1) A declaration that clauses 26.7 and 28.25 are valid and binding obligations of [Cassini] and are capable of enforcement as against [Cassini].
>
> (2) A declaration that the October Request was a valid request pursuant to the terms of the SFA and complies with clauses 26.7 and 28.25 of the SFA.
>
> (3) A declaration that [Cassini] is in breach of clauses 26.7 and 28.25 of the SFA."

14. Although no defence has yet been served, Cassini has not suggested that there is any defence to the declaration sought other than one based on the impact of French insolvency law. This is reinforced by the submission of Mr Handyside QC (who appears for Cassini with Mr Perkins) that but for the question as to the effect of French insolvency law on the obligation to provide information, there would be no basis on which the court could grant declarations, since there would be no issue between the parties: *Rolls Royce plc v Unite the Union* [2009] EWCA Civ 387, per Aikens LJ at [120].

15. As to that question, it is Cassini's position that, under French law:

    (1) Since the characteristic performance of the SFA is the loan of funds, which has already occurred, the SFA is not a "current contract" (within the meaning of Article L.622-13 of the French Commercial Code); and

    (2) Since the SFA is not a "current contract" it is no longer enforceable (see paragraph 29 of the first witness statement of Mr Marc Santoni). Only the underlying debt subsists, which must be paid by way of dividends in the French insolvency proceedings (see paragraph 31 of Mr Santoni's first witness statement).

16. Emerald disputes that French law has such effect. If this claim is permitted to proceed, it will fall to be resolved by reference to expert evidence of French law.

The legal principles

17. There is broad agreement as to the principles to be applied.

18. First, as a matter of European law, jurisdiction in civil and commercial matters is primarily governed by Regulation (EU) No 1215/2012 (the "Recast Brussels Regulation"). The Recast Brussels Regulation does not apply to this claim, as the claim was commenced after 31 December 2020, but its interplay with the Recast Insolvency Regulation (which, as noted above, does continue to apply in this case) remains relevant. If the claim does not fall within Article 6(1), then the jurisdiction of this court over the claim is based on the exclusive jurisdiction clause in the SFA and common law principles.

19. Second, the Recast Brussels Regulation does not apply, however, to "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings": see Article 1(2)(b) (the "bankruptcy exception"). Instead, jurisdiction over such matters is governed by the Recast Insolvency Regulation. So far as possible, the Recast Brussels Regulation and the Recast Insolvency Regulation should "dovetail" with each other so that if a proceeding falls outside the scope of the Recast Brussels Regulation (because of the bankruptcy exception) it will fall within the Recast Insolvency Regulation, and vice versa: *Nickel & Goeldner Spedition GmbH v "Kintra" UAB* (Case C-157/13) [2015] QB 96 at [21].

20. Third, it is common ground that the Sauvegarde is itself a proceeding within the bankruptcy exception in the Recast Brussels Regulation.

21. Fourth, whereas the Recast Brussels Regulation is to be construed broadly, Article 6(1), which extends the Recast Insolvency Regulation to actions deriving from insolvency proceedings (as opposed to the proceedings themselves), is to be construed narrowly: see *Nickel & Goeldner v "Kintra"* (above), at [22].

22. Fifth, Article 6(1) contains two conditions: an action will only fall within it if (i) it derives directly from the insolvency proceedings and (ii) it is closely connected with them. The concept of actions deriving directly from the insolvency proceedings being excluded from the Recast Brussels Regulation first appears in the Jennard Report on the predecessor convention: the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (the "1968 Convention"). That report commented that "only proceedings arising directly from the bankruptcy and hence falling within the scope of the Bankruptcy Convention of the European Economic Community are excluded from the scope of the Convention". (The reference to the Bankruptcy Convention was to a planned convention on bankruptcy which was in fact never concluded and whose provisions were eventually adopted in Council Regulation (EC) No 1346/2000 on insolvency proceedings, later replaced by the Recast Insolvency Regulation.)

23. It was established, in relation to the 1968 Convention, that for decisions to be excluded from the 1968 Convention by the bankruptcy exception "they must derive directly from the bankruptcy or winding-up and be closely connected with the [relevant insolvency] proceedings": *Gourdain v Nadler* (Case 133/78) [1979] ECR 733, the Court of Justice (at [4]). That case concerned an application under Article 99 of the French Bankruptcy Act, under which the court could order the manager of a company to pay a certain sum to the company's assets to meet the company's debt. The Court, in concluding that this fell within the bankruptcy exclusion in the 1968 Convention, framed the relevant question as "whether the legal foundation of an application such as that provided for in Article 99 of the French Law is based on the law relating to bankruptcy and winding-up as interpreted for the purposes of the [1968] Convention".

24. It was common ground between the parties that despite some of the decisions of the Court of Justice of the European Union blurring the distinction between the two conditions now found in Article 6(1) (see the opinion of the Advocate General in *NK v BNP Paribas Fortis NV* (Case C-535-17) [2019] ILPr 10, at [45] to [58]), these are separate conditions, both of which must be fulfilled.

25. Sixth, the decisive criterion is not the procedural context of which the action forms part, but its legal basis: "Does the basis of the action find its source in the common rules of civil and commercial law or in the rules specific to insolvency proceedings?": *Re MF Global* [2015] EWHC 2319 (Ch), per David Richards at [43], citing the *Nickel & Goeldner* case (above). This formulation of the test is to be found in many recent decisions of the European Court: see,

e.g., *Tünkers France v Expert France* (Case C-641-16) [2018] ILPr 75, at [22] and *NK v BNP Paribas* (above), at [28].

26. Seventh, while "avoidance actions" are the only type of action mentioned in Article 6(1), it is not confined to such actions.

The parties' respective arguments on the application of the legal principles

27. The parties differ, however, in their approach to the application of the principles. For Emerald, Mr Bayfield QC and Mr Abraham stress that the question is whether the ***action*** itself derives from the insolvency proceeding. They contend that since the action is for declaratory relief in respect of a contract, its source is the common rules of civil and commercial law.

28. For Cassini, on the other hand, Mr Handyside QC and Mr Perkins focus on the ***issue*** raised by the action. They contend that since the only matter in issue in the action is whether the rights to information under the SFA are overridden by the Sauvegarde – and the principles of French insolvency law that govern the Sauvegarde – the real matter in issue concerns the effects of the insolvency proceedings so that the action falls within Article 6(1).

29. Mr Handyside relied, for this proposition, on four authorities.

30. The first is *German Graphics Graphische Maschinen GmbH v van der Schee* (Case C-544-2009) [2010] ILPr 1. It concerned the recognition and enforcement in the Netherlands of an order of a German court. By its order, the German court granted protective measures in favour of German Graphics, which had sold machines on retention of title terms to Holland Binding BV, a Dutch company, which then entered liquidation in the Netherlands. The CJEU concluded that the judgment fell within the scope of EU Regulation 44/2001, the predecessor to the Recast Brussels Regulation. At [29] the Court emphasised that it was the closeness of the link between the court action and the insolvency proceedings which was decisive. At [30] it held that the link was neither sufficiently direct nor sufficiently close to exclude the application of Regulation 44/2001. At [31], the Court noted that the only question before the German court related to the ownership of the machines situated on the premises of Holland Binding BV in the Netherlands, and that the answer to that question was independent of the opening of the insolvency proceedings: "The action brought by German Graphics sought only to ensure the application of the reservation of title clause in its own favour". At [32], the Court said:

> "In other words, the action concerning that reservation of title clause constitutes an independent claim, as it is not based on the law of the insolvency proceedings and requires neither the opening of such proceedings nor the involvement of a liquidator."

31. It does not appear to have been suggested in that case that any provision of Dutch insolvency law impacted on the claim of German Graphics. The distinction between the, or an, issue in the case and the legal basis of the

action itself did not, therefore, arise. While the Court referred, therefore, to the "only question before the court", I do not think this is authority for the proposition that the question whether an action is derived from the insolvency proceedings is to be determined by reference to whether an issue (or the issue) in the case concerns the insolvency law of the foreign member state. The way the question is expressed in [32] (quoted above) focuses (as the words of Article 6(1) do) on the legal basis of the action.

32. The second authority relied on by Mr Handyside is *F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"* (Case C-213/10) [2013] Bus LR 232. That case concerned an action to set aside a payment made by a German company to a Lithuanian company. The payment had been made prior to the German company's insolvency in order to put the money beyond its creditors' reach. Had the action been brought by the liquidator of the German company it would undoubtedly have been an insolvency claim. The liquidator had, however, assigned the claim to a third party. The CJEU concluded that the action by the assignee against the Lithuanian company was a civil or commercial matter which fell within the Recast Brussels Regulation. Whether or not the action was derived directly from the insolvency proceedings (which the Court left open) it was not closely connected with them. Mr Handyside relies on [38] of the judgment, where the Court said that it must be examined whether "in view of the specific characteristics of the action" it had a direct link with the insolvency of the debtor and was closely connected with the insolvency proceedings. As I have noted, it reached no decision on the question of "direct link". Since that (or more accurately, the question whether the action is "derived directly from" the insolvency proceedings) is the only issue in the present case, the Court's decision in *F-Tex* is of no assistance.

33. Thirdly, Mr Handyside relies on (although did not take me to any specific part of) *SCT Industri AB (in liquidation) v Alpenblume AB* (Case C-111/08) [2010] Bus LR 559. In that case, a judgment of an Austrian court declared that the transfer of certain shares by the liquidator of a Swedish company was invalid. The CJEU determined that the Austrian judgment fell within the bankruptcy exclusion. That was because the "transfer at issue in the main proceedings and the action for restitution of title to which it gave rise, are the direct and indissociable consequence of the exercise by the liquidator – an individual who intervenes only after insolvency proceedings have been opened – of a power which he derives specifically from the provisions of national law governing that type of insolvency": see [28]. Although it is true that this is an example of a case where the language of the judgment (see [25] to [26]) did not distinguish clearly between the two parts of the test (as pointed out by the Advocate General in *NK v BNP Paribas* (above)), the conclusion at [28] is clearly justified on an orthodox application of the requirement that the action must derive directly from the insolvency proceedings: the basis of the action found its source in the insolvency proceedings.

34. Fourthly, Mr Handyside relied on the recent decision of Cockerill J in *ING Bank NV v Banco Santander SA* [2020] EWHC 3561 (Comm). The facts of that case were complex. Marme Inversiones 2007 S.L.U. ("Marme") borrowed from a number of lenders, including ING. Marme entered Spanish

insolvency proceedings at a time when the principal sum and amounts in respect of interest remained unpaid. Under the Spanish insolvency proceedings, bids were invited for the assets and liabilities of Marme. A company called Sorlinda Investments S.L.U. ("Sorlinda") was the successful bidder. Accordingly, it acquired Marme's assets and assumed its obligations, including the obligations to ING. Sorlinda then merged with and became subsumed by Banco Santander SA ("Santander"). ING issued a claim in England against Santander seeking declarations that ING was entitled (1) to retain interest that it had received in respect of the loan agreement during the course of Marme's liquidation and (2) to recover interest under a related swap agreement.

35. Cockerill J concluded (obiter, having already decided that even if the Recast Brussels Regulation applied the English court did not have jurisdiction) that the action derived from and was closely connected to the Spanish insolvency proceedings and was thus excluded from the Recast Brussels Regulation.

36. Mr Handyside relies on the following passages in Cockerill J's judgment. At [155] to [156], she referred to *SCT Industries* (above) for the proposition that "the court has to characterise the matter "at issue" in the action. If the action is the direct consequence of liquidation proceedings and concerns, for example, the scope or exercise of powers by a liquidator to transfer assets or liabilities or the consequences thereof, it will fall under the Insolvency Regulation." At [177], in answering the first question (whether the action was derived directly from the Spanish insolvency proceedings), Cockerill J relied on the fact that the question pleaded was "Did Sorlinda become liable to ING for interest as a result of the Sorlinda Bid, as further actioned in the insolvency?". She identified that as the critical question because "on any analysis Santander simply succeeds to Sorlinda's position. The question, though on its face concerning a matter which is contractual (entitlement to interest) is answered by a response which on the face of it depends on the effects of the insolvency." Having referred to the pleading, which was to the effect that *as a result of the acceptance of Sorlinda's bid in the insolvency proceedings*, Sorlinda assumed Marme's liabilities to ING, she concluded at [178]: "The pleading therefore specifically raises a question of whether Sorlinda assumed a direct liability to all of Marme's creditors, including ING and the answer to that depends on the effect of the Liquidation Plan (governed by Spanish insolvency law), the Sorlinda Offer and the orders of the Spanish Insolvency Court as part of the conduct of the insolvency".

37. In considering the significance of Cockerill J's reference to the "matter at issue in the action" and to the response to the pleaded claim depending on "the effects of the insolvency", it is important to note that the critical feature, as I read Cockerill J's judgment, was that ING's claim was based on liabilities which Sorlinda (and thus Santander) had assumed by the insolvency process itself. The scope of the rights acquired by ING against Santander, which formed the legal basis of the claim, thus depended upon the provisions of Spanish insolvency law. It was that feature which underlaid the conclusion that the action was derived directly from the Spanish insolvency proceeding. I do not understand Cockerill J to have been saying that wherever the issue to be

determined in an action is one as to the effect of the foreign insolvency law, then the action falls within Article 6(1).

38. Accordingly, I consider that there is nothing in *ING v Santander* which detracts from, or places a gloss on, the requirement in Article 6(1) that the *action* must be derived directly from the insolvency proceedings and that the essential question in that regard is whether the basis of the action finds its source in common rules of civil and commercial law or in rules specific to insolvency proceedings.

Discussion and conclusion

39. It is helpful, in trying to identify the precise point in dispute between the parties in this case, to consider what the position would be if Emerald had sought an order that Cassini provide the information that had been requested by the Agent in October 2020. The only defence to that claim would be the same alleged principle of French insolvency law that is relied on by Cassini in opposition to the declarations. Mr Handyside accepted that he would be on much more difficult ground in contending that, merely because the only *issue* which the court would be called upon to decide was an issue as to the impact of French law on the contractual obligation to provide information, the claim was derived directly from the French insolvency proceedings.

40. When pressed, the only argument he identified was that based on the *ING v Santander* case, that jurisdiction turns on the nature of issue which the court is required to determine. I reject that argument, primarily for the reasons already given in discussing the *ING v Santander* case. The argument is also inconsistent in my judgment with the accepted requirement – in determining whether an action is derived directly from the insolvency proceedings – to ask whether the "basis of the action" finds its source in the rules specific to insolvency proceedings (per *MF Global*, above). The basis of an action for specific performance of the obligation under the SFA to provide information would in my view clearly be the common rules of civil and commercial law. The contract, which is the source of the obligation relied upon, exists independently of, and prior to, the Sauvegarde. A claim for specific performance of that obligation is on any view based upon it, even though the defence to that claim is based upon a principle of French insolvency law.

41. Mr Handyside referred, in support of his argument, to the Court of Justice's comment in *CeDe Group AB v KAN sp z oo* (Case C-198/18) [2020] 1 WLR 2871, at [30], that the Recast Insolvency Regulation "…is intended, in principle, to reach a correspondence between courts which have international jurisdiction and the law applicable to insolvency proceedings". Since Article 7(2)(e) of the Recast Insolvency Regulation provides that the law of the state of the opening of insolvency proceedings determines the effects of the insolvency proceedings on current contracts to which the debtor is a party, that points towards the French court having jurisdiction over the determination of that issue. He accepted that this was merely a pointer, however. In the case of proceedings to enforce the obligations under the SFA it would in my judgment be insufficient to outweigh the conclusion that the basis of the action was common rules of civil and commercial law.

42. Cassini nevertheless relies on the fact that Emerald has *not* by this action sought specific performance of Cassini's obligations under clauses 26.7 and 28.25 of the SFA. It has sought only declarations, and those declarations relate solely to the impact of the Sauvegarde on the obligations under the SFA. Accordingly, it contends that the legal basis of the action is indeed French insolvency law.

43. I agree with Mr Handyside that where a claim is brought seeking only declaratory relief, the legal basis of the claim is to be found by reference to the question which the declarations are intended to answer. I also accept that a claimant cannot escape the conclusion that the legal basis of a claim is the relevant foreign insolvency proceedings by framing the action as one for negative declaratory relief. If, for example, a claimant sought a declaration that a transaction it had entered into with a foreign debtor was *not* voidable pursuant to the foreign insolvency law relating to avoidance actions, that claim would be as much within Article 6(1) as would the anticipated avoidance action.

44. Attractively as these points were developed, however, I am not persuaded that they lead to the conclusion that the claim for declaratory relief in this case is within Article 6(1).

45. That is because I consider that the legal basis for the declarations sought remains the SFA, and thus the rules of civil and commercial law, notwithstanding that the only issue which the court would be required to determine is the impact of French insolvency law on the obligations under the SFA. The question which the declarations are designed to answer is the enforceability of the contractual rights.

46. In this respect, I do not think there is a relevant distinction between (1) a claim for specific performance of Cassini's obligation to provide information and (2) a claim for declarations that Cassini's obligation to provide information is enforceable and that Cassini is in breach of that obligation. In both cases, the legal basis of the claim is the obligation in the SFA. That has its source in the general civil law, and not specific rules relating to insolvency. A claim for a declaration, for example, that Cassini is in breach of the obligation to provide information requested by the Agent is as much a claim to vindicate Emerald's rights under clauses 27.6 and 28.25 as a claim for an order that Cassini perform those obligations.

47. As I have noted above, I consider that there would be no question that the English court has jurisdiction if the latter type of claim were brought (whether by amendment or otherwise), because such a claim would derive directly from the common rules of civil and commercial law, and not from the Sauvegarde or French insolvency law.

48. Cassini's case depends, in effect, on there being a distinction between (1) a case where the issue (as to the impact of French insolvency law on Cassini's obligation in the SFA) is hived-off for determination as a free-standing point before (if necessary) an order for specific performance is sought and (2) a case

where it is raised for determination only after the issue of a claim form seeking specific performance.

49. For the reasons I have set out above, I do not think that such a distinction is tenable. The artificiality of that distinction is emphasised by the fact that the problem – if there is one – with the claim as currently formulated would be overcome by a relatively straightforward change in the procedure. Two procedural routes were identified.

50. First, it appears that the only reason Emerald has not sought an order for specific performance within the current claim is because of a perceived inability to do so, as the relevant obligation (in each of clauses 26.7 and 28.25) is owed to the Agent. Upon my querying whether this is in fact correct, Mr Bayfield submitted that it is open to Emerald, as a direct party to the SFA, to amend to plead a claim for specific performance owed by Cassini to the Agent, based upon the request the Agent has already made in October 2020. That was for four reasons. First, there is nothing in the SFA which barred such an action. Second, clauses 2.4(b) and (c) of the SFA provide that the Finance Parties (which include Emerald) have separate and independent rights, and a Finance Party may separately enforce its rights under the SFA. Third, although it is the Agent that makes information requests, it does so as agent for the Finance Parties. Fourth, Cassini is obliged to provide such information as any Finance Party, through the Agent, may reasonably request (the Agent's role being purely administrative and mechanical). On the face of it, this would appear to be correct, although I recognise that Cassini did not have an opportunity to consider the point as it was only raised during the hearing.

51. Alternatively, since Emerald together with two other supportive lenders, constitute Majority Lenders under the SFA, they are in a position to direct the Agent (upon appropriate indemnities being provided) to bring an action – if necessary – for specific performance of the SFA.

Conclusion

52. For the above reasons, I conclude that:

(1) The claim for declaratory relief in the Claim Form does *not* derive directly from the French insolvency proceedings and is thus *not* within Article 6(1) of the Recast Insolvency Regulation;

(2) If the claim had been commenced prior to 31 December 2020, this court would have had jurisdiction under the Recast Brussels Regulation. Since it was commenced after that date, this court has jurisdiction over Emerald's claim by reason of the exclusive jurisdiction clause in the SFA, pursuant to common law principles.