Neutral Citation Number: [2020] EWHC 3561 (Comm)

Case No: FL-2020-000002

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
COMMERCIAL COURT
QUEEN'S BENCH DIVISION
FINANCIAL LIST

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

Date: 21 December 2020

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

(1) ING BANK N.V. **Claimants**
(2) ING BANK N.V SPANISH BRANCH

- and –

BANCO SANTANDER S.A. **Defendant**

- -
- -

Felicity Toube Q.C. and Marcus Haywood (instructed by **Boies Schiller Flexner (UK) LLP**) for the **Claimants**
Robin Dicker Q.C. and Clara Johnson (instructed by **Clifford Chance LLP**) for the **Defendant**

Hearing dates: 3,4 November 2020
Draft Judgment sent to parties: 17 December 2020

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Monday 21 December 2020 at 16:00.

Mrs Justice Cockerill:

Introduction

1. This is the hearing of the Defendant's application dated 21 April 2020 (the "Application") seeking, amongst other things, a declaration that the Court does not have jurisdiction to hear the claim issued by the Claimants ("ING") by claim form dated 7 February 2020 (the "Claim").

2. The critical point in this application is whether this is a case about claims which a syndicate of eight lenders, including ING, had against Marme Inversiones 2007 S.L.U ("Marme") under a loan agreement (the "Loan Agreement") and related swap agreements (the "Swap Agreements") (together "the Marme Agreements") which were entered into between the lenders and Marme in September 2008, or whether it is about the effect of the ongoing liquidation of Marme in Spain on those claims. The Defendant Applicant says the latter, the Claimant Respondents say the former.

3. By way of explanation, the Defendant here is not Marme. It is Banco Santander SA ("Santander"). Santander is not and has never been a party to the Marme Agreements. Santander is the successor to a party (Sorlinda Investments S.L.U. "Sorlinda") who in some form assumed Marme's liabilities after Marme went into liquidation. However, in these proceedings ING seek declarations against Santander that they are entitled to retain interest which they received in respect of the Loan Agreement during the course of Marme's liquidation (the "Loan Interest"). They also claim interest from the Defendant in respect of the relevant Swap Agreement (the "Swap Interest").

4. The field of battle may be summarised in skeletal form thus. Santander contends that the court should refuse to exercise jurisdiction or order a stay because:

    i) The claim falls within the EU Insolvency Regulation on insolvency proceedings (the "Insolvency Regulation") and is excluded from the scope of the recast Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels Regulation") pursuant to Article 1(2)(b) of the Brussels Regulation.

    ii) Even if the Claim does not fall within the exception under Article 1(2)(b), ING cannot rely upon Article 25 of the Brussels Regulation.

    iii) As a matter of Spanish law, ING has not established that Sorlinda became liable to ING for Marme's liabilities.

    iv) There are in any event grounds for the Court to refuse to exercise its jurisdiction and/or to order a stay.

5. ING contends that:

    i) The bankruptcy/winding up exclusion in Article 1(2)(b) of the Brussels Regulation does not apply. The Claim is between two solvent entities in relation to contractual payment obligations under the Marme Agreements, and has no effect on Marme or any of its other creditors. The Claim does not derive directly from Marme's winding up nor is it closely connected with that winding up.

ii) The question of whether or not Santander is bound by the Marme Agreements is a question of English law having appropriate regard to the effect of the relevant "assumption" of Marme's obligations by Sorlinda (now Santander) as a matter of Spanish law.

iii) There is (at least) a good arguable case that as a consequence of the "assumption" Santander has a direct liability to ING under the Marme Agreements which are subject to the exclusive jurisdiction of the English courts.

iv) There are no grounds for the Court to refuse to exercise its jurisdiction and/or to order a stay.

6. For the reasons which I give below I conclude that the jurisdictional challenge succeeds on the Article 25 point, and also on the Insolvency Regulation point. The other grounds (assumption in Spanish Law and case management stay) would have failed.

Factual Background

7. On 12 September 2008, Marme (as borrower) and certain other parties (including ING as lender) entered into the Senior Loan Agreement pursuant to which a facility in the aggregate amount of €1,575,000,000 was made available to Marme for the purpose of the acquisition of the Ciudad Financiera, Boadilla Del Monte, Madrid (the "Ciudad Financiera") (the headquarters of Santander); Senior Loan Agreement, Clause 3.1.

8. Under the terms of the Senior Loan Agreement, ING advanced a total sum of €150,000,000 to Marme on terms, amongst other things, providing for the payment of interest on certain dates and on any overdue amount payable by Marme (the "Loan").

9. The rights of a Finance Party (which includes ING) under the Finance Documents are separate and independent rights. They give rise to a separate and independent debt that may be enforced separately.

The Swap Agreement

10. Under Clause 8.3 of the Senior Loan Agreement, Marme was obliged to maintain "Hedging Arrangements" in connection with interest payable under the Senior Loan Agreement.

11. Accordingly, on 12 September 2008, Marme entered into five Hedging Arrangements with various lenders (the Swap Agreements), including one with ING (i.e. the Swap Agreement). The Swap Agreement is a Hedging Arrangement and a Finance Document within the definition of those terms under the Senior Loan Agreement.

12. The Swap Agreement takes the form of an ISDA (Multicurrency – Cross Border) Master Agreement and Schedules. The Swap Agreement provides, amongst other things, that interest is payable by the Defaulting Party following Early Termination, from the relevant Early Termination Date to the date the interest is paid.

Governing Law and Jurisdiction Provisions of the Agreement

13. The Marme Agreements are each governed by English law: Clause 36 of the Senior Loan Agreement; Clause 13(a) of the Swap Agreement and paragraph (i) of Part 4 of the Schedule to the Swap Agreement.

14. As to jurisdiction:

    i) The Senior Loan Agreement contains an exclusive jurisdiction clause in favour of the English courts "*to settle any dispute arising out of or in connection with any Finance Documents*": Clause 37.1(a). As described above, the Swap Agreement is a Finance Document under the Senior Loan Agreement.

    ii) The Swap Agreement further provides that "*with respect to any suit, action or proceedings relating to [the Swap Agreement]…, each party irrevocably submits to the jurisdiction of the English courts*" where the agreement is subject to English law, as it is: Clause 13(b).

Default and Marme's Insolvency

15. Under the terms of the Senior Loan Agreement, the Loan fell due on the Final Maturity Date, being 12 September 2013. Interest also fell due on this date, being an Interest Payment Date. Neither the Loan nor interest thereon was paid on that date. Accordingly, interest continued to accrue on these overdue amounts from 12 September 2013 in accordance with Clause 8.4 of the Senior Loan Agreement.

16. On 4 March 2014, Marme entered into a voluntary insolvency process (*concurso voluntario*) in Spain pursuant to which the insolvency administrator of Marme (the "Marme IA") was appointed by the Spanish Insolvency Court. The process began with the "joint phase" under which the Marme IA produced an inventory of assets and provisional list of creditors. Marme entered liquidation on 4 March 2015, following the conclusion of the joint phase.

17. Between September 2014 and 2019 there were proceedings commenced by Marme in this court, as further set out below.

18. Under Spanish insolvency law, the insolvency administrator of Marme ("the Marme IA") was required to submit, for the approval of the Spanish Insolvency Court, a plan for the liquidation of Marme (the "Liquidation Plan"). The Liquidation Plan is the regulatory instrument for the insolvency and is governed by Spanish Insolvency Law. It regulates the debtor's sale of the assets and the satisfaction of the creditors' claims.

19. The initial Liquidation Plan was submitted to the Spanish Insolvency Court on 17 May 2015. The Liquidation Plan proposed a coordinated liquidation of Marme together with its direct and indirect holding companies, Delma Projectonwikkeling B.V. ("Delma") and Ramblas Investments, B.V. ("Ramblas").

20. In particular, the Liquidation Plan contained proposals for a buyer to purchase either (i) all of Marme's shares (with all of Marme's debt positions and security remaining in place), or (ii) all of its assets including all the share capital of Marme and/or Delma. Accordingly, under Paragraph 245 to 246 of the Liquidation Plan, potential purchasers were given two options:

> "245. Consequently, potential competitors may choose between:
> a) The transfer of assets and liabilities as a whole or globally by means of disposal their ownership.
> b) Transfer of all the representation of the capital stock of Marme and/or Delma.
> 246. In the first modality, the object of the transfer would be the assets, free of charges with the extinction of the mortgage and pledge rights that encumber them or with subsistence of the charges and encumbrances weighing on them, - in which case the consent of the holders thereof will be necessary - together with the liabilities that the acquirer assumes and pays for and that must be immediately paid or novated to be at their expense."

21. As a result, where a potential purchaser chose the first option the Liquidation Plan required a transfer/disposal of the "*assets and liabilities [of Marme] as a whole*".

22. The Liquidation Plan explained that one of the features of the insolvency of Marme which had to be taken into account in the Liquidation Plan was the "exceptional litigation" (covered in paragraphs 27 to 67 of the Liquidation Plan). There were several ongoing disputes involving Marme at the time. They included proceedings in the High Court commenced by Marme against the lenders under the Marme Agreements in September 2014 and ancillary proceedings brought in the Spanish Insolvency Court by various creditors challenging the classification of claims by the Marme IA.

23. In the light of this, the Liquidation Plan provided that:

    i) The offer must be to assume and repay in full all of Marme's liabilities which were not subject to ongoing litigation, even if the classification of such claims was being disputed (the "non-contingent liabilities"); and

    ii) As regards liabilities that were subject to ongoing litigation proceedings or disputes as regards their existence or quantum ("contingent liabilities"), the offer must make provision for them by either repaying the full amount, settling the dispute, depositing the full sum in a judicial bank account pending resolution of such disputes, or providing a first demand guarantee.

24. Paragraph 253 of the Liquidation Plan further provides as follows:

> "253. In the case of the acquisition of all the assets and liabilities of MARME, both by means of the acquisition of assets and liabilities, as well as the acquisition of the shares representing all the capital stock of the company, or the participations representing 100% of the capital of DELMA, the acquirer will assume the debts and obligations of the acquired bankrupt parties, except for the credit that DELMA has against MARME, which will be covered to the extent indicated by the offer".

25. As described in Chapter VII of the Liquidation Plan, the Marme IA had already received one acquisition offer as at the time of the Liquidation Plan. Accordingly, paragraph 272

of the Liquidation Plan provided that any further offers would at least have to match the terms of that offer as follows (emphasis added):

> "272. The offers for the acquisition of assets and liabilities that are made, which may be articulated by means of acquiring of all the participations of Marme or Delma, must comply with the following substantive requirements: …
>
> b) Assume all liabilities as a whole, in such a way as to fully satisfy all Marme's liabilities that are not the subject of any procedure or claim in relation to their existence or amount, even if they are credits in which their qualification is questioned.
>
> c) Regarding those Marme liabilities that are currently the subject of procedures or claims in about their existence or amount, it will choose to:
>
> (i) Pay the creditor the amount claimed by it;
>
> (ii) Settle the litigation in such a way that, for bankruptcy purposes, the disputed receivables in question is not required…
>
> (iii) Ensure the payment of the full amount of the disputed liabilities by means of a guarantee at the first request of a financial institution …"

26. A final version of the Liquidation Plan was approved by the Spanish Insolvency Court on 26 October 2015. The approval by the Spanish Insolvency Court was challenged by certain creditors, including ING, but the challenges were dismissed by the Court of Appeal of Madrid.

27. The Liquidation Plan was finalised on 13 July 2018 by Judicial Edict of the same date. It is common ground that the Liquidation Plan is the "regulatory instrument" for the liquidation, which "*regulates the debtor's sale of assets and the satisfaction of the creditors' claim*". Once approved, the Liquidation Plan governed the offers received for the assets.

28. The tender process commenced on 25 July 2018 with the publication of a Judicial Edict in the Spanish Official Gazette. In accordance with the Liquidation Plan, the Marme IA invited bids for the acquisition of Marme's assets, principally comprising the *Ciudad Financiera*.

29. Sorlinda submitted a bid (the "Sorlinda Bid"), as did Santander. The Sorlinda Bid was expressly stated to be made "pursuant to" the Liquidation Plan. In particular, the Sorlinda Bid was based upon the first of the alternatives proposed by the Liquidation Plan (referred to in Paragraph 20 above) namely, the "*transfer of [the] assets and liabilities [of Marme] as a whole*". The key terms of the Sorlinda Bid were that:

    i) Sorlinda would purchase all of Marme's assets free of charges and encumbrances;

ii) Sorlinda would take an assignment of certain of Marme's contracts, specified in Annex 1 (which did not include the Marme Agreements);

iii) Sorlinda would assume the liabilities of Marme listed in Schedules 2 and 3 through the payment of cash to Marme (in respect of the non-contingent claims) and through either subrogation to the existing proceedings or the provision of first demand bank guarantees (in respect of the contingent claims); and

iv) Sorlinda had the option of entering into separate agreements with Marme's creditors directly and paying the debts that they were owed by Marme, as an exception to the payment mechanism described above.

30. The key provision relied on states that Sorlinda will:

> "assume the liabilities of the insolvent company Marme, indicated in Schedules 2 and 3, through the payment of the same in cash, in the terms and to the extent established in the Co-ordinated Liquidation Plan, both through the cash to be paid by SORLINDA and the cash and bank available from Marme or, as regards the contingent claims, mainly that resulting from the termination, resolution, early cancellation, payment, classification, etc. of the swap agreements entered into between Marme and Bayerische Landsbank, HSH Nordbank AG, The Royal Bank of Scotland plc, Caixabank S.A. and ING Bank N.V. on 12 September 2008, securing this through subrogation in the lawsuit and, if applicable pursuant to the provisions of this Consolidated Improved Offer, through a bank guarantee payable on first demand for the total amount of the lawsuit in relation to the same as at the date it is determined pursuant to this Consolidated Improved Offer, issued in accordance with the terms of this Consolidated Improved Offer and by a financial institution supervised by a financial authority from an OECD country, which has obtained an "investment grade" credit rating in relation to its short-term liabilities …"

31. The Sorlinda Bid further provided that Sorlinda would "*assume all the liabilities from Marme as a whole, as reflected in Schedule 2*", "*assume the contingent claims against [Marme] listed in Schedule 3 in accordance with the Rules of the Offer*" and "*take over the position of Marme*". The claims listed in Schedule 2 of the Sorlinda Bid included the sums due under the Senior Loan Agreement, including interest. Schedule 3 of the Sorlinda Bid included the sums due to ING under the Swap Agreements, including interest due under those agreements.

32. As to the payment of the relevant creditors, the Sorlinda Bid made provision either for Sorlinda to pay off creditors: (i) directly; or (ii) indirectly through Marme:

> "'SORLINDA must immediately fulfil the payment obligations undertaken in this Consolidated Improved Offer through a transfer to Marme's account provided by the IA or to the Court deposit account (in accordance with the instructions of the IA in co-ordination with the Court). SORLINDA reserves the right to

> make direct payments to the creditors ... the IA shall keep the funds transferred by Sorlinda as a depository (i.e. in the name and for the account of Sorlinda) until the Court issues the Award Order [...]' (emphasis added)."

33. On 7 November 2018, Santander filed an objection to the Sorlinda Bid (the "Santander Objection") in which Santander contended that the Sorlinda Bid should be excluded from the bidding process on the grounds that, amongst other things, Sorlinda had not in fact undertaken to assume all Marme's debts, as required by the Liquidation Plan.

34. In its response dated 12 December 2018 ("Sorlinda's Response"), Sorlinda stated that:

> "[Santander] misses the truth in its complaint because it is not true:
> 1) That the interest should be limited to the delay;
> 2) That the interest should be limited to the swap dispute, since Sorlinda assumes the interest on all preference claims in general".

35. On 14 January 2019, the Spanish Insolvency Court issued a resolution approving the Sorlinda Offer as the best offer received, and acknowledged Santander's offer as the second best (the "Court Approval Order"). Santander, and the first Claimant (among others) appealed the decision. These appeals were dismissed by the Commercial Court of Madrid on 9 May 2019.

36. On 19 May 2019, the Spanish Insolvency Court rejected "appeals" against this Order made by various parties, including Santander and ING. In its judgment the Spanish Insolvency Court stated as follows:

> "… in relation to contingent credits, the bankruptcy administration states that the only contingent credit is that corresponding to the procedure initiated by Marme before the English Courts and, with respect to said credit, the Sorlinda offer [Sorlinda Bid] guarantees the entire principal and interest, …
>
> As the offer has been drafted, the entire principal and interest of the swap litigation are guaranteed, and since this possibility is admitted in the liquidation plan, the guarantee mechanism cannot now be considered as not covering all the contingent liabilities."

37. On 3 July 2019, Sorlinda and the Marme IA entered into a written protocol concerning the implementation of the Sorlinda Offer (the "Protocol"). This provided more detail as to the mechanism by which the Sorlinda Offer would be implemented. In relation to the "Payment of the consideration", Section 3 of the Protocol stated that payment of the non-contingent liabilities would be made: (i) by using "Cash" i.e. the amount of cash held by Marme on the implementation date; by (ii) using cash to be paid by Sorlinda to Marme; (iii) by the delivery of "Statements of Conformity" from any creditors with whom Sorlinda had settled debts; and (iv) through the deposit of €20 million. As regards the contingent liabilities, the Protocol stated that Sorlinda would procure first demand bank guarantees which would be deposited with a Spanish notary on 10 July

2019. Sorlinda also expressly reserved its rights to challenge the accrual of ordinary or default interest.

38. On 5 July 2019, Sorlinda procured two on demand guarantees in respect of: (i) the Early Termination Payment under the Swap Agreement, namely, the sum of €67,294,554.15 (the "Principal Guarantee"); and (ii) the Swap Interest allegedly accruing thereon (the "Interest Guarantee"). Both were deposited with a notary on the same date, as contemplated by the Protocol.

39. The Guarantees were granted by Santander (then a separate entity from Sorlinda) in favour of ING Bank. Under the Guarantees:

    i) ING is the "Beneficiary" of the Guarantees;

    ii) Santander is the guarantor (for or on the account of Sorlinda, with no mention being made of Marme); and

    iii) Santander is guaranteeing the obligations of Sorlinda (defined as the "Secured Party" in the Guarantees) to ING.

40. On 5 July 2019, Sorlinda also executed two notarial deeds recording the delivery of the Guarantees.

41. On 8 July 2019, the Marme IA published a report on the implementation of the Sorlinda Offer. The report confirmed that all the terms of the offer had been fulfilled by Sorlinda and asked the Spanish Insolvency Court to issue a transfer order in favour of Sorlinda.

42. On 16 July 2019, the Spanish Insolvency Court issued the transfer order (the "Transfer Order") pursuant to which the Ciudad Financiera was transferred to Sorlinda free of security.

43. The Claimants received a payment in respect of the Loan Interest and the Early Termination Payment during the course of Marme's liquidation (which is ongoing) but were not paid in respect of the Swap Interest.

Parenthesis: the Marme Proceedings in England

44. As noted above, on 10 September 2014, proceedings were commenced by Marme in England in respect of the Swap Agreements (the "Marme Proceedings"): These comprised two consolidated actions: (i) a claim by Marme for rescission of the Swap Agreements and counterclaims by four of the counterparties (including ING) for declarations as to the validity of the termination of the Swap Agreements and the sums due upon termination; and (ii) a claim by NatWest Markets Plc for similar declarations with respect to its swap.

45. In April 2015 and June 2015, Marme filed applications to stay these proceedings on grounds of jurisdiction (the "Marme Stay Application"), contending that the issues raised by the banks in their claims were properly before the Spanish Insolvency Court.

46. On 26 June 2016, Blair J dismissed the Marme Stay Application, declining to grant a stay and giving effect to the exclusive jurisdiction clause contained in the Swap

Agreements, in favour of the English Court: *Marme Inversiones 2007 SL v Royal Bank of Scotland Plc* [2016] EWHC 1570 (Comm).

47. On 25 February 2019, Picken J dismissed Marme's claim and granted the declarations sought by all the swap counterparties, including ING. This included declarations at to interest due under the Marme Agreements: *Marme v Natwest Markets Plc* [2019] EWHC 366 (Comm). Paragraph 4.4 of the Order ordered payment of the sum found due together with accruing interest.

48. I note here that neither party suggested that these decisions bound me, and there was almost no suggestion that they were of any assistance. The reality is that they dealt with entirely distinct points which do not affect the issue in this case.

The Sorlinda Plea and the Shareholder Plea

49. On 24 October 2019, Sorlinda issued a plea in Marme's liquidation seeking, amongst other things, a declaration that interest under the Marme Agreements was not payable by reason of the application of Section 59 of the Spanish Insolvency Act (the "Sorlinda Plea"). It also sought orders that any amounts paid to the Claimants, and the security posted in respect of such payments (i.e. the Principal and Interest Guarantees), should be returned to Sorlinda.

50. The Sorlinda Plea arose as a result of two recent decisions of the Spanish Supreme Court concerning the recognition and accrual of interest on secured loans after the opening of Spanish insolvency proceedings (the "Spanish Supreme Court Rulings"). The first, Spanish Supreme Court Ruling 112/2019 of 20 February 2019, held that secured claims do not accrue interest after the declaration of insolvency unless the creditor files a specific contingent claim for interest to be accrued. The second, Spanish Supreme Court Ruling no. 227/2019 of 11 April 2019, held that secured claims do not accrue default interest after the opening of insolvency proceedings at all. Shortly after these decisions emerged the parties appreciated that they might affect the present case and reserved their rights. The Protocol referred to above governed how affected matters would be dealt with pending the resolution of any dispute.

51. The Sorlinda Plea asserts that, as a result of the Spanish Supreme Court Rulings, the Loan Interest and the Swap Interest did not properly accrue and so were never payable by Sorlinda, and that the Claimants are also liable to return sums received.

52. ING places considerable reliance on this document because it states *inter alia* that: (i) "*Sorlinda has assumed all of Marme's assets and liabilities, whatever their amount*" and refers to Sorlinda having "*taken on liabilities*"; (ii) "*According to the [Liquidation Plan], the offers would not be made for a lump sum price, but rather would assume Marme's liabilities (whatever those were)...*"; (iii) Sorlinda had undertaken "*to assume, on a global basis the assets and liabilities [of Marme] at its own risk and peril*"; (iv) "*The condition imposed by the [Liquidation Plan] on the bidder was that it should take over, one way or another, whatever turned out to be Marme's liabilities*"; and (v) "*Sorlinda as the debtor subrogated to [Marme's] position as a result of the implementation of the offer*".

53. There is of course an issue between the parties on this, with Santander flagging the fact that the document does not say that it was an assumption of all liabilities and that it could only be seen at best as an agreement to assume liabilities that had actually arisen.

54. Nevertheless, on 16 December 2019, Sorlinda paid all the sums due under the Senior Loan Agreement to ING, including interest, indirectly through Marme (the payment to Marme having been made by Sorlinda on 10 July 2019).

55. On 19 December 2019:

    i) Santander paid (directly to ING) the Early Termination Amount due to ING under the Swap Agreement. However, Sorlinda failed to pay, and has not since paid, accrued interest thereon.

    ii) Sorlinda executed a Notarial Deed in connection with the release of the Principal Guarantee in which it stated that that had "*assumed all the assets and liabilities of Marme*" which "*include those coming from [the Senior Loan Agreement]; and (ii) [the Swap Agreements]*".

56. There are also proceedings, to similar effect to the Sorlinda Plea, by Marme's shareholders (the "Shareholder Plea") which was issued on 12 July 2019. Given the overlap between the Sorlinda Plea and the Shareholder Plea, Sorlinda also applied to have the writs consolidated. On 23 December 2019, the Claimants filed a motion in the insolvency proceedings, opposing consolidation of the Sorlinda Plea and the Shareholder Plea on the basis that the English Court had sole jurisdiction to hear the Sorlinda Plea.

57. On 2 January 2020, Sorlinda merged into Santander. As a consequence of the merger, Santander assumed all of Sorlinda's rights and liabilities.

58. On 7 February 2020, ING issued the Claim.

59. On 10 February 2020 the Spanish Court ordered that the admissibility of the complaint would be ruled on first. Soon after, on 20 February 2020, the Claimants filed a further motion before the Spanish Insolvency Court, opposing consolidation of the Sorlinda Plea and the Shareholder Plea on the grounds that the Spanish Court did not have jurisdiction, and relying, in particular, on the fact that it had issued proceedings in the High Court just two weeks earlier and arguing that the Spanish proceedings bore no relationship to insolvency proceedings because *inter alia* it was not addressed to the insolvent company but to ING and because the court was functus in relation to the question of assumption. Reference was also made to the *F-Tex* case (to which reference will be made later), asserting the reasoning to be fully applicable.

60. On 3 June 2020, the Spanish Insolvency Court consolidated the Sorlinda Plea with the Shareholder Plea and rejected the Claimants' motion that the Court decline jurisdiction.

61. The decision of the Spanish Insolvency Court described the claim as "*an incidental insolvency claim*" and indicated that:

> "It must therefore be decided whether or not the claim should be granted leave to proceed, and to this end it is necessary to

> establish whether the issue raised is relevant and has any connection with the insolvency proceedings….
>
> The aim of the claim is for a determination to be made as to whether the Supreme Court case-law opinions established in the Judgments of 20 February and 11 April 2019 can affect MARME's insolvency liabilities and the amount of the privileged credits acknowledged in the insolvency proceedings in favour of the ING group companies.
>
> From this perspective, the Court must find that the in limine litis proposed matter is related to the insolvency proceedings and there is no reason to not grant it leave to proceed, since it affects the acknowledgement of credits established in the list of creditors."

62. It thus found, having considered the basis in the Supreme Court decisions, that the Sorlinda Plea was "*related to the insolvency proceedings.*" It was however an interlocutory ruling, which specifically provided for there to be a motion for reconsideration. On 27 July 2020, the Claimants filed a "*declinatoria*", a further challenge to the jurisdiction of the Spanish Insolvency Court which is a motion to reconsider the earlier judgment.

The Applicable Legal Test

63. The legal test, for the purposes of the Application, is set out in *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3683 per Lord Sumption at [9], applying the test that he set out in *Brownlie v Four Seasons Holdings Inc* [2018] 1 W.L.R. 192 at [4]-[7].

64. In summary:

i) The onus is on ING to establish that they have a "good arguable case" that the English court has jurisdiction.

ii) The burden is on them to show that it has the "better argument on the material available" (making due allowance for the limitations of the material available at an early stage of the case).

iii) The standard is, for the purposes of the evidential analysis, between proof on the balance of probabilities (which is not the test) and the mere raising of an issue (which is not the test either).

iv) The test is context specific and flexible and, if there is an issue of fact, the court must use judicial common sense and pragmatism, not least because the exercise is to be conducted with due despatch.

65. ING urged me to follow the recent consideration of the test given by Sir Michael Burton in *Alta Trading Ltd v Bodsworth* [2020] EWHC 2757 (Comm) at [10] to [13]. In *Alta*, the Judge cited the three stage test in *Brownlie* at [7]:

> "What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

66. The Judge in *Alta* explained the application of the test as follows at [13]:

> "(i) In limb (i) the Court must decide if it can who has the better of the case. If it decides that the claimant has the better of the case, he will have a good arguable case or a plausible evidential basis. If the defendant has the better of the case then the claimant fails.
>
> (ii) Limbs (ii) and (iii). The judge may have to struggle because at the jurisdiction stage the evidence may be wholly uncertain and insufficient and, in particular, because there has been no testing of that evidence by cross-examination or otherwise, and usually no adequate disclosure of documents by either side. He or she may not be able to reach even a provisional conclusion as to which party has the better case, and even if the judge tried to do so he or she may well turn out to be wrong. In such a circumstance where the judge cannot decide, after conscientiously doing his or her best, who has the better of the case, then it is sufficient if the claimant has a plausible evidential basis and that will suffice for a good arguable case."

67. The application of that test would only have been controversial in relation to the third ground, which turns on the expert evidence.

Expert Evidence

Introduction

68. The parties have both filed detailed expert evidence which addresses in some detail the scope and effect of the assumption of liabilities under Spanish law in the context of Marme's liquidation.

69. It is common ground between the Spanish law experts that there was some form of "assumption" by Sorlinda (now Santander) of Marme's liabilities. However, there is a considerable divergence of views between the experts as to the nature and effect of that "assumption".

70. The evidence was primarily directed to Santander's third ground of jurisdictional challenge (whether there was any assumption as a matter of Spanish Law). In the end the main issues were rather different. Argument focussed on the question of jurisdiction

agreement and the Insolvency Regulation. Much of what has been said by the experts is not relevant for the purposes of the issues which I principally have to decide on this jurisdictional challenge.

71. It is therefore tempting to put the expert evidence last. However the evidence become of at least tangential relevance at a number of points in both the key arguments, and forms a certain amount of backdrop to that argument. In particular, in the context of the Insolvency Regulation argument the issue of the impact of insolvency law on the issue of assumption is live. I therefore deal with the expert evidence here, in particular as to the points which touch on the later arguments: (i) novation (ii) the structure and ambit of the argument as to "assumption" and (iii) my provisional conclusions as to the merits of the arguments (which are only relevant to a subsidiary point, late on in the judgment).

The experts

72. The Defendant has obtained reports from Professor Virgós, the Chaired Professor of Private International Law at Universidad Autónoma de Madrid. Professor Virgós was the Spanish delegate for the negotiations in connection with the Insolvency Regulation and co-authored the "*Report on the Convention on Insolvency Proceedings*" (the "Virgós-Schmit Report") which is a key document in the legislative history of the Insolvency Regulation and is regularly referred to by European courts (it will be seen cited below in the relevant authorities). It is regarded as an aid to the interpretation of the Insolvency Regulation: *Syska v Vivendi Universal SA* [2010] 1 BCLC 467 at [20] and *In re Stanford International Bank Ltd* [2011] Ch 33 at [36].

73. He is also the author, together with Professor Garcimartín, of "*The European Insolvency Regulation: Law and Practice"*. I was told that Professor Virgós is one of the most distinguished and well-known academic writers in relation to the Insolvency Regulation and one of the foremost experts on Spanish insolvency law, and that did not seem to be in issue.

74. The views of Professor Virgós may be summarised as follows:

    i) As a matter of Spanish law the term 'assumption' is not a technical concept with a unique meaning. When referred in the context of assumption of a debt, simply it means that a person is taking responsibility for that debt. There are different forms of assumption with different effects.

    ii) The assumption of liabilities that took place was not a "technical assumption of debts" but a way to calculate the price that Sorlinda would pay for Marme's assets, meaning that Sorlinda undertook to transfer to Marme's estate sufficient funds to cancel such debts within a certain term and to procure first demand bank guarantees to secure Marme's contingent (i.e. litigious) liabilities.

    iii) Sorlinda did not succeed or substitute Marme in the underlying agreements. Any replacement of the insolvent debtor with another debtor, or the novation of the contracts underlying Marme's debts without the maintenance of the security interest would have required, under applicable Spanish insolvency law, the express consent of the secured creditors, including ING. Sorlinda did not seek, and ING did not give, such consent.

iv) Sorlinda's assumption of debt was made *vis-à-vis* Marme and did not involve any assumption of liabilities, directly or indirect, to any of Marme's creditors, including ING, for which a specific agreement between Sorlinda and ING would have been required.

75. ING's expert is Professor Sastre. He was Professor of Commercial Law at the University of Barcelona between 2003 and 2015 and was Senior Judge on the First Chamber of the Supreme Court from 2013-2015. He has also participated in the drafting of amendments to the Spanish Insolvency Act ("SIA") on behalf of political parties, and has played a role on the Justice Commission of the Spanish Parliament defending such amendments, as well as before the Commission itself, defending the amendments introduced to Spanish Act 38/2011, for Insolvency Act Reform, of 10 October [*Ley de Reforma de la Ley Concursal*], as recorded in the work of Professor Emilio Beltrán (*Materiales de la Reforma Concursal* (2009-2011)). In 2011 he was awarded the Cross of Honour of the Order of Saint Raymond of Peñafort by Spain's Ministry of Justice in recognition of his meritorious career in teaching and the law profession.

76. The views of Professor Sastre may be summarised as follows:

i) An assumption of debts (*asuncion de deudas*) is a technical Spanish law concept by which an individual or entity (the new debtor) becomes liable for the obligations of the original debtor, creating a legal relationship between the new debtor and the creditor pursuant to which the new debtor is liable, in its own right, to the creditor.

ii) In the present case, it is clear that under the terms of the Liquidation Plan and the Sorlinda Bid (as approved by the Spanish Insolvency Court) Sorlinda assumed the obligations of Marme (in the sense in which this term is understood as a matter of Spanish law), including under the Marme Agreements together with interest.

iii) As a consequence of the assumption, Sorlinda became directly liable to ING under the Marme Agreements.

iv) The acts of Sorlinda subsequent to the Sorlinda Bid may be used as an aid to the construction of the relationship between the parties. They may also found an estoppel under Spanish law. In the present case, the conduct of Sorlinda both serves to confirm the assumption by Sorlinda of the liabilities of Marme under the Marme Agreements and also give rise to an estoppel.

v) The question of whether or not ING consented to Marme's release is not relevant for the purposes of determining whether Santander is liable for the assumed obligations, regardless of the fact that it was a secured obligation. However, as a matter of Spanish law, on the facts either (i) ING did so consent and/or (ii) that consent is irrelevant given the Spanish Insolvency Court's approval of the Sorlinda Bid.

Novation

77. It is common ground between the experts that Spanish Law recognises the concept of novation (replacement of the original debtor by a new debtor (*sustitución*)) and that it

can come into being without the consent of the original debtor. What it does however require, is the consent of the creditor. That is set out in terms in Article 1205 of the Spanish Civil Code:

> "Novation which consists in replacing the original debtor by a new debtor may take place without the former being aware of it but not without the creditor's consent."

78. It is common ground between the experts that whatever occurred in this case, it was not, as a matter of Spanish Law, a novation.

79. Having said that, Professor Sastre at one point suggested (effectively as a subsidiary point) that the absence of objection to the Marme Liquidation Plan could (and should) be taken as consent to Marme's release and Sorlinda's succession.

80. However it is quite clear that the Spanish Insolvency Court in fact stated that the creditors' consent was not required. There is no evidence that such consent was given. Indeed, there is no evidence that all of Marme's creditors consented, or even that they knew of the terms of the Liquidation Plan and Sorlinda Offer. The assertion that creditors' silence amounted to "clear and unequivocal" consent is hard to follow and cannot be accepted even as arguable.

81. It follows that the premise of this (tentative) argument fails. It was not pursued in oral submissions. I can therefore proceed on the basis that there was no novation under Spanish Law.

The arguments on the nature of the "assumption"

82. The question between the experts is whether there had been an assumption of liabilities in the sense of a succession or the assumption of a direct liability.

83. I can take Santander's evidence fairly briefly because it was clearly to the effect that there was not. Professor Virgós' evidence is that the assumption of liabilities by Sorlinda merely took the form of a commitment by Sorlinda to the Marme IA to pay a sum to the Marme IA, as consideration for the Ciudad Financiera, sufficient to enable Marme's liabilities in its insolvency to be discharged. That is one of three forms of "assumption" recognised by Spanish Law – a commitment by a third party to fund the original debtor (*asunción de cumplimiento*) under Article 1257 of the Spanish Civil Code, which he says only produces effects between the original debtor and the funder.

84. The other forms of what might be referred to as an assumption are:

    i) Novation, as referred to above;

    ii) A debtor being added so that the new and old debtors are jointly and severally liable (*asunción de deuda cumulative*). Again this is agreed not to be relevant here.

85. Professor Virgós' evidence explained how the form of assumption which he discerns arises where there is a sale of assets in the course of a liquidation which are subject to

security, and special mandatory rules under the Spanish Insolvency Law 22/2003 (the "IL") apply. He notes that under this regime assets may be transferred in one of two ways, both of which are for the protection of the secured creditor:

i) First, with survival of the security interest and subrogation to the debtor's obligation. This mode does not require the consent of the secured creditor (which would be required under non-insolvency rules). In such case, the secured liabilities will be excluded from the debtor's liabilities.

ii) Second, without the survival of the security interest. In this case, the secured claim must be settled by the Marme IA with the proceeds of the sale of the asset. As such, no subrogation or other form of succession occurs.

86. It is common ground that Sorlinda did not acquire Marme's assets subject to the security which the Claimants previously held. In such circumstances, and having regard to Articles 149(2) and 155(4) and (5) of the IL, Professor Virgós' evidence is that Sorlinda was not and could not have been subrogated to Marme's debt under the Marme Agreements. Rather, it simply paid a price for the purchase of the assets and, having done so, the assets were transferred to it by order of the Spanish Insolvency Court.

87. I turn now to the evidence of Professor Sastre. His evidence was in summary that:

i) The concept of "assumption" of debts is a technical legal concept of Spanish law, which has a precise meaning, giving rise to a valid, effective, and enforceable legal relationship either by way of bilateral agreement between the new debtor and creditor (with or without the consent of the original debtor), or by way of a unilateral undertaking by the new debtor (with or without the original debtor's or creditor's consent).

ii) It is possible for the old debtor (as well as the new debtor) to remain liable to the creditor after assumption, or for only the new debtor to be liable. Where the new debtor has assumed the liabilities, it will be liable to the creditor. The new debtor will be able to assert defences arising from the contract, but will not be able to assert either its own personal defences against the old debtor or any personal defences of the old debtor against the creditor.

iii) The assumption does not create a "new contract" governed by Spanish law, but rather it continues the old contract governed by English law.

iv) These rules on assumption apply where the old debtor is insolvent, just as they do where it is solvent, and in particular no consent is required by any creditor to the assumption.

v) The assumption was not merely an "internal assumption" (as between Sorlinda and Marme alone).

88. Professor Sastre agreed that the nature of the concept in issue here is the "contract with a stipulation in favour of a third party". His evidence at paragraph 5.10 of his report was:

> "A contract with a stipulation in favour of a third party is bilateral in its formation but triangular in its effects. It assumes the existence of three parties: the two contracting parties and a third party (each with their own interests). One of the contractors (known as the promisor) assumes an obligation before a third party (the beneficiary) as a result of having so agreed with the other contracting party (the promisee), without the need for consent from the beneficiary. The creditors of the promisee can be beneficiaries."

89. Professor Sastre also indicated the following at paragraph 5.13 of his evidence:

> "Sorlinda (the promisor and new debtor) assumed an obligation before those who were Marme's creditors and, in particular, before ING (the beneficiaries) because it agreed so with Marme (the promisee and old debtor), represented by its insolvency administrator. For that reason, Sorlinda can only raise against ING the personal defences Sorlinda may have against ING for whatever reason (e.g. setoff, if ING had a due and payable debt to Sorlinda), but not those Marme had against ING."

90. Professor Sastre indicated that there was an interplay between insolvency and the concepts of assumption, referring to a number of decisions of the Spanish Insolvency Court, though maintaining that the concepts of assumption were themselves unaffected by the insolvency.

91. Both parties referred to the Liquidation Plan and the Sorlinda Bid as supporting their case. ING submitted that:

    i) Sorlinda expressly assumed interest in full accrued and to be accrued, under the Senior Loan Agreement and the Swap Agreement, and it is a general principle of Spanish law that the assumption of a principal obligation carries with it an obligation also to pay interest.

    ii) The Liquidation Plan made it clear that in the case of the first of the options upon which any bid could be made there was to be a "*transfer of [the] assets and liabilities [of Marme] as a whole*".

    iii) At paragraph 246, the Liquidation Plan expressly requires that Marme's liabilities "*must be immediately paid or novated at [the acquirer's] expense.*"

    iv) The Sorlinda Bid makes it clear that Sorlinda was to "*assume the liabilities of the insolvent company Marme*" and to "*take over the position of Marme*".

92. ING also contended that the Guarantees are supportive of Professor Sastre's analysis. As noted above, under the Guarantees Santander guarantees the obligations of Sorlinda (defined as the "Secured Party" in the Guarantees) to ING (and not the obligations of Marme). It is inherent in this that Sorlinda (and not Marme) was primarily liable in respect of the relevant obligations being "secured" by the Guarantees.

93. Reliance was also placed by Professor Sastre on the subsequent Orders of the Spanish Insolvency Court, in approving the Sorlinda Bid and the conduct of Sorlinda following the approval of the Sorlinda Bid which he says also gives rise to an estoppel.

94. Santander's points on the Liquidation Plan were:

i) The Liquidation Plan gives effect to Articles 149 and 155 of the IL, as it contemplates the sale of the assets with security or without security. This provides that, where the assets are sold without security, the liabilities must be immediately "satisfied"; i.e. a sum equal to the value of the secured debts must be paid to the Marme IA and used by the Marme IA to discharge the relevant liabilities.

ii) Where, however, they are sold with security, the debts must be "novated" i.e. the acquirer will become the new debtor.

iii) In relation to non-contingent obligations, the Liquidation Plan provided that any offer had to "repay" them in full.

iv) In relation to liabilities that were subject to ongoing litigation, the offer had to either "repay" the creditor the amount claimed in full, settle the dispute in a way in which the claim was not enforceable for insolvency purposes, deposit the full amount due pending resolution of the dispute, or provide a first demand guarantee.

v) Further, in the event that there was a breach on the part of the offeror, or a failure to execute the offer in the period stipulated under the Liquidation Plan, this would result in the offer being terminated and the second best offer proceeding. This is inconsistent with there being a direct liability to the creditors, particularly one that arose some months prior to the Transfer Order in July 2019, and as a result of the Court Approval Order in January or May 2019.

95. Santander also pointed to the Sorlinda Offer:

i) Sorlinda explained that its offer was to "*assume the liabilities of the insolvent company Marme…through the payment of the same in cash…*" In other words Sorlinda would pay the Marme IA sufficient funds to enable the liabilities to be discharged.

ii) This is emphasised in other parts of the Sorlinda Offer: there are references to the "*acquisition …..which will be used by the IR to pay for the claims from creditors…*" and to Sorlinda being required to "*immediately fulfil the payment obligations undertaken…through a transfer to Marme's account provided by the IR…*".

iii) As regards the contingent claims, Sorlinda stated that it would take over Marme's procedural position in the litigation, but if that was not possible, it would grant a first demand bank guarantee. The premise of this was that Marme's liabilities had not been novated to Sorlinda.

iv) The "Total Consideration" offered by Sorlinda was made up of (i) the amount to be paid by Sorlinda to the Marme IA, (ii) the cash available in Marme, and (iii) the bank guarantee for all the claims relating to the Swap Litigation. It did not say that Sorlinda would incur a direct liability to creditors or take a transfer of any relevant contract under which a debt arose.

v) Sorlinda stipulated a number of conditions for the validity of its offer. The most important was that the transfer of the assets was to be free of any charges, encumbrances or obligations. This meant that the acquisition fell under Articles 149(2) and 155(4) and (5) of the IL.

96. Santander submitted that the effect of these documents was that Sorlinda agreed with the Marme IA that it would pay a sum sufficient to discharge the relevant claims against Marme as consideration for the transfer of the Ciudad Financiera, following which the assets would be transferred free of security. There was no need for Sorlinda to be subrogated to Marme's liabilities, because it had agreed to pay a sum that would enable the Insolvency Receiver to pay such liabilities, in consideration for the transfer. On the contrary, if Sorlinda had also been subrogated to the Marme Agreements, this would have resulted it in incurring the same liability twice.

97. This is said to be reflected in the structure of what was done and to be consistent with the Protocol which referred to the "consideration" being "paid" in respect of the non-contingent liabilities and with the Letter of Undertaking entered into on 25 July 2019, in which it was acknowledged that the Principal Guarantee was in respect of "*payment of Marme's potential liability*".

Provisional conclusions on the "assumption" issues

98. Ultimately, while I concluded that the points were arguable, it was my provisional view that Santander had much the better of the argument on this point. Having said that, had the case turned on this ground, I would have been minded to consider that, given the nature of the issue and the absence of cross-examination of the experts, I should not refuse to exercise jurisdiction.

99. The first point is that the structure which Professor Virgós set out and the analysis which he espoused was clear and rigorous. It was possible to follow it into the IL.

100. Professor Sastre's analysis appeared strained by comparison. It lacked the rigorous structure of Professor Virgós' argument and was far less easy to follow. He does not actually refer to succession – an odd omission given the nature of the debate. Neither does Professor Sastre deal with Professor Virgós' argument that any assumption may merely amount to a commitment by a third party to fund the original debtor which only produces effects between the original debtor and the funder.

101. Professor Sastre's attempts to keep the argument clear of the IL also did not convince. If the Liquidation Plan did not have to be viewed in the context of Spanish Insolvency Law (as was submitted) that point needed to be explained, which Professor Sastre did not do. It was not entirely clear how the Liquidation Plan and the Sorlinda Offer, once approved by the Spanish Court, amounted to the creation of a contract. Professor Virgós's evidence is that this has no basis in Spanish insolvency law and that point was not really grappled with by Professor Sastre. Nor did he address satisfactorily to my

mind why, given the obvious potential in the legislation for this route, the Liquidation Plan and the Sorlinda Offer together did not constitute a judicial arrangement governed by the IL.

102. There was also a degree of confusion as to how Marme was released from all its debts. This is a point which occurs against a background of the substantial agreement on novation. Professor Sastre was clear that novation required the creditor's consent.

103. Given that this form of assumption would, on his own case, require the "clear and unequivocal" consent of all of Marme's creditors, it is hard to understand how the same effect could be reached by a different means without such consent. That point was not dealt with clearly by Professor Sastre. This difficulty may explain why Professor Sastre made the unconvincing attempt outlined above to adopt the novation route by the back door.

104. There is also a commercial peculiarity with the approach advocated by Professor Sastre. He suggests that the assumption of liability by Sorlinda to the Claimants occurred on 14 January 2019, when the Sorlinda Offer was approved, or alternatively on 9 May 2019, when all challenges to that Offer were dismissed and that Marme's liability was also released, presumably at the same time. It is hard to see how that could make commercial sense, whether from the perspective of Sorlinda, the Marme IA or the Claimants. It would also be inconsistent with other key features of the implementation of the Sorlinda Offer. For example, the Guarantees which were executed on 5 July 2019 provided that they would only be enforceable if there was a final court decision stating that there was a truly enforceable debt against Marme (and not Sorlinda).

105. As for the reliance on the various documents including the Liquidation Plan and the Sorlinda Bid, there were plainly a lot of points going in each direction. There was certainly reference in the documents to assumption and to procedural succession. In the end I was not minded to place too much weight on the wording as to assumption, given that the issue which is now in play was brought into being by subsequent developments (specifically the Spanish Supreme Court Rulings). As regards procedural succession, that is not really of assistance where it is not clear what is meant by the term in context. In terms of the substance Santander's approach appears to me to be more robust. For example the Sorlinda Bid included a provision for Sorlinda to have an option to discuss and settle directly with a creditor; that would be inconsistent with the assumption of a direct liability to all creditors.

106. Further Santander's approach appears to be echoed by the way the Marme IA reported to the Spanish Insolvency Court prior to the court making the Transfer Order, which makes no reference to an assumption of liabilities, but rather simply to the production of the relevant documents and the payment of a cash deposit. There is a similar echo in the Transfer Order itself which refers to awarding Sorlinda certain assets "free of any charges and encumbrances".

107. In the circumstances, it appears to me that Santander has much the better of the argument that Sorlinda did not become directly liable to ING under Spanish law.

The Jurisdiction Clause

108. Technically this was Santander's second ground; but in practice it was the primary point on which it relied. Santander contends that ING cannot rely upon Article 25 of the Brussels Regulation because Santander is not a party to either of the Marme Agreements and did not agree to, or otherwise become bound by, the jurisdiction clauses on which ING relies.

109. That submission rests in essence upon three points:

i) There has been no novation or succession as a matter of English Law, which is the relevant law;

ii) There has been no agreement of jurisdiction clearly demonstrated; and

iii) To the extent relevant (and Santander contends that it is irrelevant because the question of whether Santander is bound is a question of English Law), there has been no assumption of liabilities under Spanish Law such that the Defendants are directly liable to the Claimants.

110. The structure which underpinned this was broadly accepted by ING. So it was common ground that ING must demonstrate a good arguable case either as to succession or as to consent. ING did not contend that there was specific consent. It was also common ground that the question of whether or not Santander is bound by the Marme Agreements is a question of English law.

111. However, ING contended that it could clear this hurdle on the basis that there is at least a good arguable case that as a consequence of its "assumption" of Marme's obligations, Sorlinda (now Santander) assumed a direct liability to ING under the Marme Agreements (and succeeded to the rights and obligations of Marme under those agreements) which are subject to the jurisdiction of the English courts.

112. In this context ING submitted that although it is common ground that the question of whether or not Santander is bound by the Marme Agreements is a question of English law, the Court will need "to have appropriate regard" to the effect of the relevant "assumption" of obligations as a matter of Spanish law. Here it is said that what happened in fact was a succession for the purposes of English Law in that there was a transfer of all rights and obligations.

Discussion

113. The underlying law as to the requirements of Article 25 was not much in issue. The following principles were essentially common ground:

i) Whether a person against whom jurisdiction is claimed under Article 25 has consented to jurisdiction involves an autonomous question of EU law: *Refcomp Spa v AXA Corporate Solutions Assurance SA* [2013] I.L.Pr. 17 at [39]-[40].

ii) The requirements in Article 25 are a derogation from the ordinary jurisdiction rules in Articles 2, 5 and 6 and as such must be strictly construed: *Refcomp SPA*; and *Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited v G.I.E. Vision Bail* [2005] 2 CLC 1135 at [26] (Cooke J).

iii) The Brussels Regulation seeks to ensure the foreseeability of jurisdiction, as stated in Recital 11: *Refcomp SPA* at [AG 48]. This means that the requirements of Article 25 should be interpreted so as to ensure that it is only applicable in clear cases and without having to delve into the merits of the underlying dispute: *Transporti Castelletti Spedizoni International SpA v Hugo Trumpy* [1999] I.L.Pr 492 at [48]-[49].

iv) Article 25 is limited to cases in which the parties have "agreed" on a court. It is the consensus which justifies the primacy granted to the choice of a court: *Profit Investment Sim SpA v Ossi* [2016] 1 WLR 3823 at [24] and [27].

v) Where the party against whom a jurisdiction clause is asserted is not a party to the contract, the necessary consent may be established where, applying the relevant national law, it can be shown that the third party succeeded to the rights and obligations of the original contracting party: *Partenreederei M/S Tilly Russ v Haven & Vervoerbedrijf Nova* [1985] 1 QB 931 at [24]; *Castelletti* at [82]; and *Coreck Maritime GmbH v Handelsveem B.V.* [2001] C.L.C. 55 at [23] and [25].

114. The critical point for the purposes of this case is that the position under any other law than the relevant national law is irrelevant. That can be seen clearly in *Knorr-Bremse Systems for Commercial Vehicles v Haldex Brake Products* [2008] EWHC 156 (Pat) per Lewison J at [30]:

> "…The principle that a successor is bound is part of the law of the Regulation; but whether there has been such a succession in any particular case is a question for the national law governing the substantive contract. (vi) If there has been no succession, the court seised must ascertain whether the person against whom the jurisdiction clause is invoked actually accepted the jurisdiction clause relied on against him. (vii) The court must decide this question by reference to the requirements laid down in the first paragraph of article 23 of the Regulation, which is also a matter of the law of the Regulation, rather than the national law applicable to the substantive provisions of the contract."

115. It is common ground that the governing law of the Marme Agreements is English law and that that is the relevant law for determining whether Santander is bound by succession. ING do not allege that the Marme Agreements were novated under English law. Their case is that there was a novation under Spanish law. In their solicitors' correspondence, it was explained that "*the reference to 'novation' at paragraph 19 of the Particulars of Claim is not a formal or technical reference to novation under English law*".

116. That point has not been resiled from; there was and could be no such novation, under English Law because (it is agreed) the Marme Agreements contain contractual prohibitions on assignment or transfer without the prior written consent of the lenders (and in the case of the Loan Agreement, the consent of all of the lenders) and ING do not contend that such consent was provided. Aside from novation there is no obvious route for succession as a matter of English Law. It is not, for example, suggested that Sorlinda succeeded to Marme as Santander has succeeded to Sorlinda.

117. On the face of it, that is the end of the matter. It would logically follow that if there was no novation or succession under English law, Santander could not become a party to those agreements by succession, and thereby bound to the jurisdiction agreements. The position under Spanish Law (and hence the argument on whether there was succession as a matter of Spanish Law) is irrelevant. Although it at first appeared that ING relied in this context on Spanish Law and the expert evidence to demonstrate succession as a matter of Spanish law, it was ultimately clear that it was conceded that this was not open to it as a matter of law.

118. The argument adopted by ING endeavoured to evade this logic. Starting from the succession cases (*Tilly Russ* etc) referred to above, it was argued (i) that the principles involved were not confined to bill of lading cases but were of broader application and (ii) that broader application could be accessed via the position in Spain. Despite the skill with which this argument was deployed it is not persuasive.

119. The argument starts with *Refcomp Spa v AXA Corporate Solutions Assurance SA* (Case C-543/10) [2013] I.L.Pr. 17 at [37]: as a consequence of the "assumption" there has been a "*transfer of all the rights and obligations for which [the contract] provides*".

120. However that passage has to be read in the context of the earlier passage at [34-36]:

> "…the Court also acknowledged that, in matters relating to maritime transport contracts, a jurisdiction clause incorporated in a bill of lading may be relied on against a third party to that contract if that clause has been adjudged valid between the carrier and the shipper and provided that, by virtue of the relevant national law, the third party, on acquiring the bill of lading, succeeded to the shipper's rights and obligations ….
>
> 35 The scope of that case law must, however, be assessed by taking account of the very specific nature of bills of lading which, as the Advocate General explained in point 54 of his Opinion, is an instrument of international commerce intended to govern a relationship involving at least three persons, namely the maritime carrier, the consigner of the goods or shipper, and the recipient of the goods. Under most legal systems of the Member States which agree on this matter the bill of lading is a negotiable instrument which allows the owner to transfer the goods, en route, to a purchaser who becomes as bearer of the bill of lading, the consignee of the goods and the holder of all the rights and obligations of the shipper in relation to the carrier.
>
> 36 It is in the light of that relationship of substitution between the holder of the bill of lading and the shipper that the Court considered that, by the effect of the acquisition of the bill of lading the holder is bound by the agreement on jurisdiction …. Conversely, where the relevant national law does not provide for such a relationship of substitution, the court hearing the case must ascertain whether that third party has actually accepted the jurisdiction clause …."

121. That makes it clear that the line of authority being considered is in real terms seen as confined to bills of lading cases (where the relevant national law recognises their negotiability). Also of interest is a further portion of paragraph [37] which contrasts the position with other forms of transfer:

> "In a chain of contracts transferring ownership, the relationship of succession between the initial buyer and the sub-buyer is not regarded as the transfer of a single contract or the transfer of all the rights and obligations for which it provides. In such a case, the contractual obligations of the parties may vary from contract to contract, so that the contractual rights which the sub-buyer can enforce against his immediate seller will not necessarily be the same as those which the manufacturer will have accepted in his relationship with the first buyer."

122. This approach can also be seen in *Coreck* where the CJEU held in relation to a jurisdiction agreement in a bill of lading:

> "[24] … the question whether a party not privy to the original contract against whom a jurisdiction clause is relied on has succeeded to the rights and obligations of one of the original parties must be determined according to the applicable national law.
>
> [25] If he did, there is no need to ascertain whether he accepted the jurisdiction clause in the original contract."

123. The same point is made in Dicey at 12-139:

> "If as a matter of national law [a] stranger has succeeded to the obligations of the contract, as well as the rights under it, he will be bound [by a jurisdiction clause] without the need for a separate signature or other acceptance of his own".

124. The authorities are clear that the principle, while it may not be definitively confined to bills of lading, is currently seen as arising in that context only. The principle is therefore not of wide application and has thus far been seen as specific to the area in which it was adopted.

125. I should therefore be very hesitant to apply this principle in this different context in any event. It seems to me that on any analysis what is happening in the context of a bill of lading transaction is very different from a novation or other form of succession. The magic of a bill of lading is that it is a negotiable instrument. The rights pass with the bill rather than by any assignment or novation. The rights pass together with the obligations. There is no possibility of any rights or obligations being carved out by some particular term of an agreement. Although the CJEU has not been completely explicit about it, I regard the better view as being that, as matters stand, the principle is indeed confined to bill of lading cases. I would therefore hold that even if ING were able to establish that there had been some other form of succession as a matter of English Law this principle would not apply.

126. But as matters stand I do not need to do so, because (as noted above) it is quite clear that there is no other relevant form of succession under English Law. It is common ground that, regarding the matter as one of English Law only, ING cannot succeed in establishing succession. There is not said to be a novation. There could, contractually, be no novation. There is no other relevant form of English Law succession which has been identified.

127. But this conclusion applies *a fortiori* when what is contended for is not a succession as a matter of English Law; and that is the situation here. As to what was contended for, Mr Dicker in reply described Ms Toube's submissions on this as *"uncharacteristically opaque"*. I would rather say that they defied her strenuous and skilful attempts to make the case coherent.

128. ING's contention was put slightly differently orally and in writing. In writing it was said that "*although it is common ground that the question of whether or not Santander is bound by the Agreements is a question of English law, the Court will need to have appropriate regard to the effect of the relevant "assumption" of obligations as a matter of Spanish law*".

129. This was based on the judgments in *Goldman Sachs International v Novo Banco S.A.* At first instance ([2015] 2 CLC 475) Hamblen J said as follows at [76]:

> "[76] The question whether a jurisdiction agreement is enforceable against someone other than the original party to the contract involves an inquiry as to whether that second party (NB) has succeeded to the rights and obligations of the original party (BES). That is an issue governed by the applicable national law, which in this case is English law as the law governing the contract: ….".

130. In the Court of Appeal ([2016] 2 CLC 690), Moore Bick LJ approved Hamblen J's statement, noting at [27]:

> "The judge recorded in … his judgment that it was for the English courts, applying English law, to decide whether any particular act of a resolution authority was a measure to which effect was to be given under English law. That is no doubt correct, as far as it goes, and indeed was not challenged by Novo Banco or Banco de Portugal, but it fails to take account of the fact that the obligation to recognise the August decision involves giving it the effect that it had in Portuguese law at the date when the respondents commenced these proceedings."

131. It is this latter part of the judgment which founds the argument. Ms Toube developed this orally as meaning that because there the court referred to the need to take account of what had happened in Portugal, here the court has to look at what happened in Spain as a matter of fact and then ask if those facts amounted to a succession or novation under English law (though it was really succession as opposed to novation which was argued for). It was contended that there was such a succession because there was an agreement by Sorlinda to assume all the obligations under the Marme Agreements. As Ms Toube put it:

> "… what factually happened here was that Sorlinda stepped into the shoes of Marme in relation to its obligations by saying: we assume the obligations as a whole, we subrogate into them, we have control over them, and we stand as the person who has now assumed all of these liabilities. We say that amounts to succession"

132. The effect of the "assumption" in the present case is therefore said to be that, despite the admitted absence of any English Law novation or succession, Santander as a matter of fact assumed a direct liability to ING under the Marme Agreements which amounts to the equivalent of such a novation or succession and is hence subject to the exclusive jurisdiction of the English courts.

133. There are three problems with this argument. The first is that it effectively misapplies the point which was being made in *Novo Banco*. That was a case which was dealing with a statutory transfer recognised as a matter of English law and the reference to what happened at a later date in the Portuguese court was relevant because of the recognition of that position as a matter of English Law. This case is not, on any analysis, a case of a statutory transfer.

134. The second is that, taken into this case, it involves eliding concepts. It says that though the requirements for novation as a matter of English law are not met because there is no prior written consent from the lenders, the court should treat there as being a novation because something else has happened which should be treated as equivalent or as a matter of Spanish Law has a similar effect (even though it would not be a novation under Spanish Law). Despite the attempt to maintain that this respected the requirement of regarding the matter from the perspective of English law, it is fairly obvious that this argument in fact completely undercuts that requirement. While what was contended for was a factual assumption, how is the effect to be ascertained other than by taking into account the position as a matter of Spanish Law? If one does not even look at Spanish Law is not the whole exercise impossibly impressionistic?

135. In argument I asked Ms Toube whether she was contending that in any case where there is an assumption elsewhere (under foreign law or as a matter of fact) of all liabilities and obligations, that must be regarded as a succession under English Law. Her unwillingness to commit to this formulation was telling; but there was no clear way to posit the point in any other way.

136. There is also the problem of whether one could in any event say that there was as a matter of fact (Spanish law) such an effect. Here the nature of the argument which Professor Sastre advocated for ING appears to be fatal. It was tolerably clear that the experts agreed that the type of "assumption" about which they were debating was not a novation. It was also tolerably clear, in particular from Professor Sastre's lack of mention of the concept, that he did not see the mechanism he identified as a succession. That conclusion is reinforced by the differences between the concepts outlined at paragraph 5.10 of Professor Sastre's report and paragraph 5.13 where he made clear that Marme's defences would disappear, leaving behind only the personal defences of ING. That is not any recognisable form of succession.

137. Finally he did not say that anything happened under Spanish law which the English court would regard as amounting to succession or novation, even if the Spanish court

would not. Faced with this, Ms Toube was forced to say that whether there was a succession as a matter of Spanish law was irrelevant and "*not a matter for the experts*". Ultimately, the argument came down to one which said if (regardless of the absence of succession or novation as a matter of English Law or Spanish Law) there is as a matter of fact a transfer of all the rights and obligations for which the contract provided, then there is *de facto* succession and it should follow that English Law treats it as if there were succession under English Law.

138. This effectively circles back to the point which I have dealt with above – namely that English Law should be taken as covering, under the umbrella of the *Tilly Russ* line of authorities, forms of succession other than that which pertains in relation to bills of lading. I have already rejected that argument. It also unacceptably steps outside the rule which requires the determination of the question by the relevant national law.

139. It follows that Santander's jurisdictional challenge succeeds on this first point. I will however consider the extremely interesting argument on the Insolvency Regulation for completeness, because it is logically prior to the Article 25 issue and because I would if necessary have held that Santander's challenge succeeds on this point also.

The Insolvency Regulation/Brussels Regulation dichotomy

140. It is not contentious that (assuming, contrary to the above, that the Article 25 issue fell to be decided in ING's favour) *prima facie* this Court has jurisdiction in respect of the Claim under the Brussels Regulation because (i) the Claim is a dispute in respect of an entitlement to interest under two commercial agreements and is thus a "civil and commercial" matter (ii) the Marme Agreements are subject to English law and confer jurisdiction upon the English courts in respect of disputes arising out of or in connection with them and (iii) the Claim concerns Santander's liability (if any) under those agreements. It therefore arises in connection with the Marme Agreements.

141. The first question is what is the relevance and effect of Article 1(2)(b) of the Brussels Regulation? That provides that the Regulation shall not apply to "*bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.*"

142. It is agreed that matters that fall within the Insolvency Regulation fall within the exception in Article 1(2)(b) and vice-versa. The two instruments are intended to "*dovetail almost completely with each other"* such that there is no overlap or gap between them.

143. It is similarly common ground that matters relating to the "conduct" of insolvency proceedings fall within the scope of the Insolvency Regulation (and, therefore, within the scope of the Article 1(2)(b) exclusion). It is a matter for the Court to determine whether a claim does concern the "conduct" of insolvency proceedings.

144. How one approaches this question was a matter of controversy between the parties, with ING saying one should start with the Brussels Regulation and Santander saying one gets there the other way, starting with Insolvency Regulation. I agree with Santander that notionally this should be possible, and that logically it should make no difference by which route one approaches the issue, in that because of the foregoing it should not actually matter which way one begins. However, to the extent that it matters, it is

probably right that one starts with Brussels Regulation, because of the balance evidenced in the authorities to which I will come.

145. However in the present case, where the application of Brussels Regulation absent the Insolvency Regulation is not controversial, but the application of the latter is contentious, there is little to be said on Brussels Regulation by way of introduction and it makes sense to outline the Insolvency Regulation before considering the authorities dealing with the balance between the two.

146. The purpose and aim of the Insolvency Regulation were not controversial. The Insolvency Regulation is designed to ensure that insolvency proceedings in Member States can operate efficiently and effectively, by requiring coordination of measures regarding an insolvent debtor's assets. This requires, amongst other things, avoiding incentives for parties to seek to obtain a more favourable legal position through forum shopping.

147. The Regulation provides that, accordance with the principle of proportionality, the Insolvency Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered on the basis of the insolvency proceedings and are closely connected with such proceedings.

148. It is also common ground that in order to achieve its aims, it is necessary and appropriate for the Insolvency Regulation to contain provisions on jurisdiction, recognition and applicable law which are binding and directly applicable in Member States. The Insolvency Regulation also seeks to provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and judgments handed down in direct connection with such insolvency proceedings. The following portions of the recital to the Insolvency Regulation are worth producing for reference at this point:

> "6. In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle. …
>
> 22. This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States."

149. The key articles of the Insolvency Regulation are as follows:

i) Article 3(1) provides that the courts of the Member State where the debtor has its centre of main interests shall have jurisdiction to open insolvency proceedings.

ii) Article. 4(1) provides that the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened. Article 4(2) provides that such law shall determine the conditions for the opening of those proceedings, their conduct and their closure, including the matters identified in sub-paragraphs (a) to (m) which include the powers of the liquidator, the effects of proceedings and the treatment of claims arising after the opening of insolvency proceedings.

iii) Article 16(1) provides that any judgment opening proceedings will be recognised in all other Member States. Article 25(1) provides that judgments handed down which concern the opening, the course and closure of insolvency proceedings shall be recognised with no further formalities. This also applies to judgments deriving directly from the insolvency proceedings and which are closely linked to them even if they were handed down by another court.

iv) Article 25(1) provides for the recognition of judgments which concern the course and closure of insolvency proceedings and judgments deriving directly from insolvency proceedings which are handed down by the court which has opened insolvency proceedings.

v) Article 25 (2) provides that the recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that the Convention is applicable.

150. The basic scheme of the Insolvency Regulation is therefore that, if insolvency proceedings are properly opened in a Member State, the courts of that Member State have jurisdiction, the conduct of that insolvency is governed by the law of that Member State, and judgments of the courts of that Member State concerning the course of the insolvency proceedings will be automatically recognised by other Member States, together with any judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

151. Santander sought to draw a distinction between core and ancillary matters under the Insolvency Regulation, placing on one side as core matters judgments concerning the opening, course and closure of the insolvency proceedings, and on the other as ancillary matters judgments deriving directly from the insolvency proceedings and which are closely linked to them. This is a distinction referred to by Professor Virgós and Professor Garcimartin in their work on the European Insolvency Regulation. However the core/ancillary categorisation is not one which is found in the authorities and it may be that it is not entirely exhaustive.

152. I conclude that the line between the two regulations has to be looked at overall, and not distinctly as regards core versus ancillary matters. Having said that, the point made by the Professors that "*The second group of cases [cases concerning judgments deriving from and linked to insolvency proceedings] may pose more problems of demarcation and deserve some additional clarification*" reflects a fairly clear truth, and one which is highly relevant here. Judgments dealing simply with the opening, or the specific

conduct of insolvency proceedings may provide few difficulties. Judgments deriving from and linked to such proceedings will be more difficult. So too may be the question of where in the scale falls a judgment which concerns but does not specifically and overtly concern, say, the opening or the conduct of insolvency proceedings. Such a judgment might be said to partake of either category.

153. When it comes to considering the line between the two regulations there is some law both here and in Europe which assists.

154. The starting point is that the Article 1(2)(b) insolvency exclusion is to be narrowly construed. In order for proceedings to fall within the scope of this exclusion it is not enough that they relate to winding up proceedings, rather it is necessary that they must derive directly from the winding-up and be closely connected with the winding-up proceedings. This is set out clearly in *Oakley v Ultra Vehicle Design Ltd (in liq.)* [2006] B.C.C. 57 at [42] per Lloyd LJ.

> "On this basis it has been held that a claim by a liquidator to recover pre-liquidations debts, although made in the course of the winding up and so, in a sense, relating to it, does not derive directly from it and is therefore not excluded from the Brussel Conventions (and therefore now not from the Regulation) by Art.1.2(b): see *Re Hayward (Deceased)* [1997] CH. 45 *and UBS AG v Omni Holdings AG (in liq).* [2000] 1 W.L.R. 916 [2000] B.C.C. 593. By contrast proceedings by a liquidator against a director or a third party to set aside a transaction as having been effected at an undervalue or on the basis of wrongful or fraudulent trading would be claims deriving from the winding up and therefore excluded from the Brussels Convention and now from the Judgments Regulation."

155. The next case to consider is *SCT Industri AB (In Liquidation) v Alpenblume AB* [2010] Bus LR 559. That case concerned Swedish insolvency proceedings in relation to SCT. The liquidator transferred some shares held by SCT to another company, which happened to be in Austria. The insolvency proceedings were then closed and SCT sought an order that the liquidator did not have power to dispose of assets in Austria (i.e. that the shares should be found to still be held by SCT). Having succeeded, it then brought proceedings in the Swedish court for restitution of title. That claim succeeded.

156. The case establishes 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. The key passage between [25]-[31] states as follows:

> " 25. In the light of the foregoing, it is therefore the closeness of the link, in the sense of the *Gourdain v Madler* [1979] ECR 733 case law, between a court action such as that at issue in the main proceedings and the insolvency proceedings, that is decisive for the purpose of deciding whether the exclusion in article 1(2)(b) of Regulation No 44/2001 is applicable.

> 27. …proceedings concerns solely the ownership of the shares which were transferred in insolvency proceedings by the liquidator on the basis of provisions, such as those enacted by the Swedish Law on insolvency.
>
> 28. In other words, 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.
>
> 30. Secondly, it is not disputed that, in the judgment of which recognition is sought before the referring court, the ground on which the Austrian court held invalid the transfer of the shares at issue in the main proceedings relates, specifically and exclusively, to the extent of the powers of that liquidator in insolvency proceedings and, in particular, his power to dispose of the assets situated in Austria. The content and scope of that decision and therefore intimately linked to the conduct of the insolvency proceedings".

157. Pausing here, the essence of the actual decision in SCT was as to the validity of something done as part of the insolvency proceedings. That makes it clearly a decision as to a pure insolvency issue as a matter of substance. It was also, as Virgós and Garcimartin note at p 2308 of their book, procedurally closely connected with the insolvency proceedings.

158. The next case is *Valach v Waldviertler Sparkasse Bank AG* [2018] I.L.Pr. 9, a claim concerning the restructuring of a company called VAV in Slovakia. The creditors' committee (part of the liquidation process) rejected a restructuring plan. The restructuring failed and VAV went into liquidation. Mr Valach contended that he had suffered loss because of this and sued Sparkasse as one of the objecting creditors – the claim being one for damages under the civil code.

159. The case emphasises the importance of the legal basis of the claim at [29]. In this case it was again held to be within the Insolvency Regulation because the obligations which formed the basis of the claimants' action against the defendant originated in rules which are specific to insolvency proceedings, and the link to the insolvency was obviously close.

160. The key passages are as follows:

> "26. Applying those principles, the Court has held that only actions which derive directly from insolvency proceedings and are closely connected with them are excluded from the scope of Regulation 1215/2012. Consequently, only those actions fall within the scope of Regulation 1346/2000 …
>
> 29. With regard to the first criterion, in order to determine whether an action derives directly from insolvency proceedings, the decisive factor applied by the Court to identify the area within which an action falls is not the procedural context of the

> action but its legal basis. According to that approach, it must be determined whether the right or obligation which forms that basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings. …
>
> 32. In the present case, the action for liability was brought by holders of shares in the company which was the subject of the insolvency proceedings, and by companies in business relationships with that company.
>
> 33. Moreover, the action aims in particular to determine whether the members of the committee of creditors, when rejecting the restructuring plan, which rejection lead to the opening of the winding-up proceedings, infringed their duty to act in the joint interest of all the creditors. …
>
> 35. The action for liability at issue in the main proceedings is thus the direct and inseparable consequence of the performance by the committee of creditors. …
>
> 38. In order to ascertain whether the liability of the members of the committee of creditors may be engaged because of the rejection of the restructuring plan, it will be necessary to analyse in particular the extent of that committee's obligations in the insolvency proceedings and the compatibility of the rejection with those obligations. Such an analysis clearly presents a direct and close link with the insolvency proceedings, and is therefore closely connected with the course of those proceedings".

161. Falling on the other side of the line was the case of *F-Tex SIA v Lietuvos-Anglijos UAB* "*Jadecloud-Vilma*" [2013] Bus. L.R. 232 [18] to [51] in which the insolvent company, which was registered in Germany, had transferred a sum of money to the defendant company registered in Lithuania, so there was a pre-liquidation transfer by the insolvent to a third party. The liquidator was entitled to issue proceedings to set aside the payment but did not. Instead it assigned all of the insolvent company's claims, including that claim, to a creditor and the creditor issued proceedings in Lithuania.

162. The question again was whether this was within the Brussels Regulation or subject to the Insolvency Regulation. The Court said:

> "37. Furthermore, unlike the case which gave rise to the judgment in *SCT Industri*, the present main proceedings do not relate to the validity of the assignment granted by the liquidator and the liquidator's power to assign his right to have a transaction set aside is not disputed….
>
> 40. It is true that it cannot be denied that the right on which the applicant in the main proceedings bases its action is linked with the insolvency of the debtor as it has its origin in the right to have a transaction set aside conferred on the liquidator …

> Nevertheless the question arises whether the right acquired, once it becomes owned by the assignee, retains a direct link with the debtor's insolvency.
>
> 41. That question may however remain open if it is evident that, in any event, the exercise by the assignee of the right acquired is not closely connect with the insolvency proceedings. …
>
> 43. … unlike the liquidator … the assignee can freely decide whether to exercise the right of claim he has acquired.
>
> 44. Second the assignee, when he decided to exercise his right of claim, acts in his own interest and for his personal benefit.
>
> 45. …Such a contractual stipulation is within the power of the parties as it is not disputed that the liquidator and the assignee could freely choose to express the consideration paid by the assignee in the form of a fixed sum or a percentage of any sums recovered.
>
> 46. Furthermore, under German law, which is, in the main proceedings, the law applicable to the insolvency proceedings, the closure of the insolvency proceedings has no effect on the exercise by the assignee of the right to have a transaction set aside which he has acquired. According to the German Government, that right might be exercised by the assignee after the closure of the insolvency proceedings. …
>
> 48. Consequently, and without the need to rule on the existence of any direct link between that action and the insolvency of the debtor, it must be held that that action is not covered by article 3(1) of Regulation No 1346/2000 and, symmetrically, that it does not concern bankruptcy or winding-up for the purpose of article 1(2)(b) of Regulation No: 44/2001".

163. This therefore was a case of a claim assigned to a third party, with the third party suing on the right which it had acquired. Save that the right derived from the liquidators' action, it had nothing to do with the liquidation. There was a historical link to the liquidation but the issues in dispute had effectively become separated from that process.

164. In *Tünkers France v Expert France* (Case C-641.16) [2018] I.L.Pr 7 a company (Expert Germany) manufactured components for the automobile industry and granted exclusive distribution rights to a company called Expert France. Expert Germany then went into liquidation in Germany and the liquidator transferred part of Expert Germany's business to a company called TM. There was no challenge to the validity of that assignment. TM then wrote to clients of Expert France, the company which had exclusive distribution rights, saying it had acquired Expert's business and asking them to place their orders with TM. The claim was brought by Expert France against TM and the basis of the claim was that the act of TM writing to clients of Expert France saying it had bought the business constituted unfair competition.

165. The Court held:

> "23…the action in the main proceedings aims to establish the liability of TM and TF, the first of those companies being the assignee of a part of a business acquired in the course of insolvency proceedings for allegedly committing acts of unfair competition detrimental to *Expert France*. In that action, *Expert France* does not challenge the validity of the assignment carried out in the course of the insolvency proceedings.
>
> 25…the dispute in the main proceedings concerns the conduct of the assignee alone.
>
> 26. Furthermore *Expert France* acted exclusively with a view to protecting its own interests and not to protect those of the creditors in the insolvency proceedings. …Therefore, the possible consequences of such an action cannot have influence on the insolvency proceedings.
>
> 28. …The Court has consistently held that it is the closeness of the link between a court action and the insolvency proceedings that is decisive for the purposes of deciding whether the exclusion in art. 1(2)(b) of Regulation 44/2001 is applicable.
>
> 29. …However, the acquired right, once it has become part of the assignee's assets, cannot retain a direct link with the debtor's insolvency in all cases".

166. As well as these cases ING drew attention to *Nickel & Goeldner Spedition GmbH v* "*Kintra*" *UAB* [2015] QB 96. That was a case where there was a debt claim arising from an international carriage of goods by road contract, the claimant being insolvent. The key passage is at [27].

> "…the legal basis thereof must be determined whether right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings".

167. ING also relied on *UB v VA* (case C-493.18) [2020] 1 WLR 2955 which was an action brought by the trustee in bankruptcy and in which the purpose was to obtain a declaration that certain acts were ineffective against the trustee in bankruptcy; in particular a declaration that the sale of immoveable property situated in another member state and the mortgage granted over it were ineffective as against a bankruptcy estate.

> "25. …, in the first place, it should be noted that, …, the court has held that article 3(1) of the Regulation confers on the courts of the member state which has jurisdiction to open insolvency proceedings international jurisdiction and which are closely connected with them …

> 26. Thus, in order to determine whether an action falls within the international jurisdiction of the courts of the member state within the territory of which the insolvency proceedings were opened, it is necessary to determine whether than action meets those two cumulative criteria.
>
> 27. With regard to the first criterion, in order to determine whether an action derives directly from insolvency proceedings, … it is clear from the court's settled case law that the decisive factor for determining the area within which an action falls is not the procedural context of the action, but its legal basis. According to that approach, it must be determined whether right or the obligation which forms the basis of the action derives from the ordinary rules of civil and commercial law or from derogating rules specific to insolvency proceedings ….
>
> 28. As regards the second criterion, for the purposes of determining whether an action is closely connected with insolvency proceedings, it is also settled case law that it is the closeness of the link between that action and the insolvency proceedings that is decisive …"

168. *Polymer Vision R&D Ltd v Van Dooren* [2012] I.L.Pr 14 was a domestic case about breach of contract or misrepresentation claims under a share sale agreement. The defendant was a Dutch bankruptcy trustee who said the dispute had to be decided in the Netherlands because it arose out of an agreement subject to Dutch law entered into in the Netherlands as part of the bankruptcy proceedings and related to an alleged misrepresentation that the Dutch bankruptcy trustee would accept the claimant as a secured creditor in the liquidation. Beatson J made the following relevant observations at [55-58]:

> "It is clear that the fact that a claim factually depends on the bankruptcy does not in itself suffice to bring it within art.1.2(b): see the claims of the trustees and liquidator in *Hayward (Deceased), Re, Ashurst v Pollard,* and *Byers v Yacht Bull Corp* and the claim against the liquidator in German Graphics. In the first three cases the claims did not suffice because they related to the acquisition of the pre-bankruptcy/insolvency property rights of the bankrupt/insolvent company by a trustee or a liquidator by virtue of the bankruptcy/insolvency….
>
> These cases concerned (see the Virgos-Schmit Report, para.196) "*the existence or validity under the general law of a claim (e.g. a contract) … [and] … actions to recover another's property the holder of which is the debtor*". Moreover, apart from German Graphics they involve '*actions that the debtor could have undertaken even without the opening of insolvency proceedings*'.
>
> ..The question, however, is whether it follows from the fact that a factual derivation is not per se sufficient in all cases, that it

> never suffices and that what might be called a direct juridical derivation is necessary. I do not consider that it does. …
>
> …the reason the link was insufficiently close in those cases was because the only relevance of the insolvency was that its opening transferred either the debtor's rights under the general law or the debtor's liabilities under the general law to the trustee/liquidator. They did not involve either the internal management of the insolvency process or the conduct of the insolvency office holder."

169. Later in the judgment (at [68 and following]) he concluded that the claims did fall within the Insolvency Regulation because they were effectively part of the insolvency proceedings which then enabled the property rights to be sold for the benefit of the general creditors.

170. Based on these cases ING submitted that this was a case on the Brussels Regulation side of the line for a number of reasons:

i) ING's claim is not against Marme, which is subject to Spanish insolvency proceedings; rather it is against Santander which is not subject to any such proceedings.

ii) The only parties involved are two solvent entities, Santander and ING.

iii) Further, the insolvency is now separate from this claim. The decision about what interest is due to ING from Sorlinda has no likely impact on Marme or its creditors, and if Marme's liquidation ceases, that will have no relevance to the Claim. Conversely, the outcome of these proceedings is irrelevant to Marme's insolvency. No assets will be recovered, and no liabilities will be increased or diminished *vis-à-vis* Marme.

iv) The legal basis of ING's claim is contractual, namely its contractual entitlement to interest under the Marme Agreements.

v) There is no question of the issues arising out of the "conduct" of Marme's winding up. The debt due from Santander to ING would continue to exist as between ING and Santander even after the conclusion of the Marme insolvency, because its existence is independent of those insolvency proceedings.

vi) The claim is not one that derives directly from the winding-up of Marme. The interest became due under the Senior Loan Agreement as a result of payment defaults which occurred prior to Marme's entry into insolvency. Further, the interest became due under the Swap Agreement after it was terminated on the basis of Marme's failure to pay (rather than its insolvency): see *Marme Inversiones 2007 SL v Natwest Markets Plc & Ors* [2019] EWHC 366 (Comm) at [487 to 489].

171. ING suggested that this is supported by the observations of Blair J in *Marme Inversiones 2007 SL v Royal Bank of Scotland Plc* [2016] EWHC 1570 (Comm) at [41] when dismissing the Marme Stay Application. However, it was common ground which

side of the line each fell in that case, and I do not therefore find this authority of assistance.

172. Overall, the centre of ING's submission was that whilst Sorlinda's rights and/or obligations in relation to the "assumption" of Marme's liabilities has its origin in Marme's winding up, as the "assumption" has now occurred, it has ceased to have any relevant link to Marme's winding up and the position of Sorlinda is directly analogous to that of a third party who has been assigned a claim by a liquidator. They rely heavily on the fact that as appears from the authorities above the balance of the authorities (see in particular *F-Tex* and *Tünkers*) suggest that claims brought against third parties by claimants who have been assigned claims by a liquidator to set aside transactions do not fall within the exclusion.

173. Santander says that the case is much more closely analogous to *SCT* and points to six indications as suggesting that the case falls into the Insolvency Regulation:

i) The legal basis of the claim is an assumption of liabilities, which (it is alleged) made Santander directly liable to, amongst others, ING, and a party to the Marme Agreements;

ii) ING seek relief against Santander based on matters that are core issues in the Spanish insolvency proceedings, and subject to the supervision, control and determination of the Spanish Insolvency Court;

iii) The declarations sought and claims made mirror the relief sought by the Sorlinda Plea (and the Shareholder Plea);

iv) The right to seek relief, as contained in the Sorlinda Plea, was expressly reserved in the Protocol and in the Letter of Understanding entered into by Sorlinda and the Claimants on 25 July 2019;

v) The English court, in accordance with Art. 25(1) (first sub-paragraph), is and will be required to recognise any judgment of the Spanish Insolvency Court on the Sorlinda Plea and the Shareholder Plea; and

vi) The Spanish Insolvency Court has already delivered a judgment in the Sorlinda Plea. That is a judgment which the English court is required to recognise under Art. 25 of the Insolvency Regulation.

Discussion

174. The authorities establish principles which were not really controversial. As can easily be seen, what was controversial is the application of those principles to this case, and indeed the characterisation of the relevant action so far as concerns these key points. Is the basis of the claim one which directly derives from the insolvency? And is it sufficiently closely linked to the insolvency proceedings?

175. The truth is that a fairly compelling case can be made for both analyses.

176. In dealing with these two weighty arguments I have found it best to take this as a two stage process. First, to ask myself explicitly the two questions established by the authorities: what is the legal basis of the claim – is it directly derived from the

insolvency? And how closely is the claim connected with the insolvency? Secondly, to review the indications provided by that analysis in the light of the established case law, in particular that which goes in the other direction.

177. Dealing with the first question, putting aside the various controversial questions as to the nature of the "assumption" and the abandoned plea of novation, or the division between insolvency liabilities and assumed liabilities which ING urged, the question which is pleaded is "*Did Sorlinda become liable to ING for interest as a result of the Sorlinda Bid, as further actioned in the insolvency?*" That is 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 effect of the insolvency. This can be seen from the following passages from the pleading:

> "18. On 7 November 2018 Sorlinda submitted a bid in Marme's insolvency proceedings in Spain, pursuant to the liquidation plan submitted by Marme Insolvency Administrator and approved by the Spanish court, to assume all of Marme's assets and liabilities, expressly including full interest accrued on the Senior Loan Agreement and on the Swap Agreement ….
>
> 20. As a result, from 14 January 2019, Sorlinda became liable to ING for all amounts due to ING either prior to that date or thereafter under the Senior Loan Agreement and all amounts due to ING Bank under the Swap Agreement.
>
> 23. On 19 December 2019:
>
> (a) …
>
> (b) €11,527,912.68 of interest had accrued on the Early Termination Amount from 20 November 2014 at the Default Rate … (the "Outstanding Swap Termination Payment");
>
> (c) Sorlinda failed (and Santander has since failed) to pay the Outstanding Swap Termination Payment. …
>
> 26. On 24 October 2019, Sorlinda (now Santander) filed a plea (the "Santander Plea") in the insolvency proceedings of Marme before Commercial Court No.9 Madrid seeking:
>
> (a) a declaration that Sorlinda has not assumed and is not bound to satisfy any amount for interest due under the Senior Loan Agreement and the Swap Agreement subsequent to the declaration of insolvency (of Marme)…"

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. It also raises an issue of the entitlement to interest after the insolvency was declared.

179. There is of course no pleaded response in this jurisdiction, but there seems no basis for concluding that Santander disputes the obligation to pay interest on a contractual basis, as opposed to on a basis derived from the ambit of the "assumption" which arose out of the insolvency. On the contrary, Santander positively asserts that, and that the current proceedings are effectively the mirror of the Sorlinda proceedings in Spain (as Mr Dicker put it in opening: "*the Sorlinda plea is effectively the reverse of the allegations in the particulars of claim*").

180. The same picture emerges from a consideration of the Sorlinda Plea itself where the critical question is what Sorlinda agreed to assume via the mechanism of the insolvency process. In relation to the offer what is said is that:

> "Accordingly, the offerors undertook to take on the Non-Contingent Liabilities (principal and interest on the Senior Facility) and to guarantee the Contingent Liabilities (NWM's interest on the Senior Facility and debt arising from Swaps). …
>
> In accordance with the CLP's requirements, Sorlinda said it would assume (Paragraph 2 B) "*all the liabilities from Marme as a whole*"….
>
> The indication by the IR of the existing claims in Marme's liabilities was foreseen in order for Sorlinda to take over the existing liabilities, and not others. The condition imposed by the CLP on the bidder was that it should take over, one way or another, whatever turned out to be Marme's liabilities."

181. Later, in the context of the "Consequences of the Judgment" the following submission is made:

> "In the Marme insolvency proceedings, we have seen that the IR included, in the List of Included Claims, the interest already accrued before the declaration of insolvency in favour of the Financial Creditors.
>
> However, the List of Contingent Claims did not include in favour of the Respondents any contingent claim for interest to accrue under the Senior Facility after the declaration of insolvency.
>
> Consequently, according to the doctrine resulting from this Supreme Court ruling, it must be understood that the Senior Facility has not accrued interest after the declaration of insolvency, or that, regardless of whether or not it is understood to have accrued, the creditor is not entitled to claim it.
>
> In either case, the Senior Creditors, including the Respondents, will only be entitled to the principal and interest already accrued

> as of the date of the declaration of insolvency, under the terms resulting from the List of Included Claims."

182. The Sorlinda Proceedings thus concern the effect of a Spanish Supreme Court judgment on the ambit of the "assumption" made via the insolvency process.

183. In my judgment to say that the basis of the claim is contractual because the sum claimed is an entitlement to interest is artificial, and ignores the point which is actually in contention. There is no question about whether interest is due under the original contract; what is in issue is whether that (valid) claim can be passed on to Santander. And the only reason there is an issue is because of the insolvency. But for the insolvency the issue would not arise. But of course a factual connection is not by itself enough (see *F-Tex).*

184. If one therefore asks oneself whether *"the right or obligation which forms that basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings"* the answer, looking to the substance of the dispute, must be that the source is in the rules relating to the conduct of the insolvency and not in ordinary rules of civil and commercial law.

185. The legal basis of the claim is inextricably part of an assumption of liabilities, which (it is alleged) made Santander directly liable to ING, and a party to the Marme Agreements. The claim seeks to have this court determine whether or not, as a matter of Spanish insolvency law, Sorlinda became liable to all the creditors of Marme, and, if it did, whether such liability extended to claims which are not admissible in the insolvency.

186. The relief sought asks for the answer to whether there is a right to interest in the insolvency, whether Santander assumed liability to ING for such sums, and whether any sums paid in the course of the insolvency are now recoverable from ING in the light of the recent Spanish Supreme Court Rulings. Logically this must be an allegation as to the effect of Spanish insolvency law and the conduct and effect of the insolvency proceedings of Marme. That this sits on top of an underlying liability is nothing to the point.

187. That this is so is seen by both parties' repeated reference in connection with this argument to the Liquidation Plan and the Sorlinda Offer as well as the orders of the Spanish Insolvency Court. The right to seek relief, as contained in the Sorlinda Plea, was also expressly reserved in the Protocol and in the Letter of Understanding entered into by Sorlinda and ING as part of the process of finalising the transfer consequent on the Sorlinda Bid.

188. The issues here do also mirror the claims which the Spanish Insolvency Court will have to decide and those too appear to turn directly on the admissibility of claims in the insolvency proceedings, the effect of the Spanish Supreme Court Rulings, and the terms of the Liquidation Plan and the Sorlinda Offer in the context of Spanish insolvency law.

189. This is therefore not a case where it is easy – or in fact possible - to divorce the case from the liquidation. Nor is it possible to express the point at issue without reference to the conduct of the insolvency, as seen in the extracts above. That in my judgment suffices to meet the "directly derived" test in the authorities.

190. That conclusion is only reinforced by a consideration of the Spanish Law expert evidence outlined above – and my preliminary conclusions as to the merits of that evidence. Both the question of the ambit of the "assumption" and the entitlement to post insolvency interest necessarily involve a consideration of Spanish insolvency law. To the extent that ING contended otherwise I found that contention, as noted above, unconvincing. The question of the liability of Sorlinda under the "assumption" will involve a consideration of Spanish insolvency law. That is not an incidental insolvency issue, but, as noted above, central to the actual issue between the parties.

191. As for the question of whether the case is closely linked to the insolvency proceedings, I would also answer that question in the affirmative. It is hard to see how that conclusion can be avoided in circumstances where there is this direct link to the insolvency based on this multiplicity of factors and where there are "mirror" proceedings in Spain as part of the insolvency process.

192. I should however make clear why turning to the second stage of the analysis I regard this case as distinguishable from the cases where proceedings were found not to fall within the Insolvency Regulation.

193. *F-Tex* was a case of a pre-liquidation transfer by the insolvent which the liquidator had the chance to challenge but did not. The court found that it fell outside the Insolvency Regulation based simply on the question of closeness of the link, without reaching a view on whether there was a direct link to the insolvency. It appears the Court regarded that as a rather difficult question, saying at [40] (before going on to say that it need not decide this point if the close connection test was not met):

> "It is true that it cannot be denied that the right on which the applicant in the main proceedings bases its action is linked with the insolvency of the debtor as it has its origin in the right to have a transaction set aside conferred on the liquidator by the national law applicable to insolvency proceedings. Nevertheless, the question arises whether the right acquired, once it becomes owned by the assignee, retains a direct link with the debtor's insolvency."

194. On close connection the Court noted that (i) the exercise of the right was subject to rules other than those applicable in the insolvency proceedings (ii) it could be exercised as a matter of choice by the assignee (iii) any exercise would be in the assignee's own interests (iv) the transfer of the right derived from a contractual stipulation and (v) the right survived the insolvency proceedings.

195. In my judgment, *F-Tex*, while having an obvious resemblance in the fact that the person claiming is an assignee rather than the liquidator, is different from the present case on both levels – and that difference derives to some extent from the nature of the right transferred. In that case what was transferred was a right to take an action (or not to take an action). It was a possibility not a concrete entitlement, as interest is. That makes the link more distant at both stages.

196. As to the nature of the claim and the directness of the link, one can see that the claim in that case was intrinsically a commercial claim; it was not an insolvency claim. If the liquidator had pursued it (and won) there would be more funds in the liquidation. The

liquidator in fact did nothing with it in the liquidation. By whomever it was asserted it could be asserted without reference to the liquidation.

197. Here the nature of the claim is one which is defined by something which took place in the liquidation, and the dispute effectively cannot be expressed without reference to the conduct of the liquidation. Although there is no challenge to the validity of the liquidator's actions, the proceedings do necessarily require a consideration of the ambit of those powers and the ambit of actions done as part of those powers. The question of to what extent Sorlinda assumed the relevant liability can only be answered by looking at the deal which was struck in the context of the Liquidation Plan (governed by Spanish insolvency law) and the statutory insolvency framework.

198. On close connection, the points relied upon by the Court are noted above. Although on one level fairly similar points could be made as were made in *F-Tex,* here the link is plainly closer – in part because of the nature of the right, and in part because it is a concrete right, tethered to the conduct of the liquidation. Looked at overall, what was being said in *F-Tex* was that the link to the liquidation was essentially an accident of history and the dispute was detached from that event. Here it is simply impossible to detach the dispute in that way.

199. The *Tünkers* case was also one which was very distinct from the present. This case of course did focus on the first question, that of the basis of the action. It is fair to say that the case does appear at [25] to potentially posit a dichotomy between cases where the dispute concerns the powers exercised by the liquidator and those where the proceedings concern the conduct of the assignee alone. It also at [26] makes a distinction between cases protecting the rights of creditors and ones where the claimant acts in its own interests alone. However, as with the *F-Tex* decision, one must be wary of reading across factors which weigh on the facts of a particular case, such that they form part of an evaluative exercise and turning them into rules in and of themselves. It does not appear to me that the court was in either case intending to do this.

200. This is particularly clear in *Tünkers* where at [29] the Court says: "*the acquired right, once it has become part of the assignee's assets, cannot retain a direct link with the debtor's insolvency in all cases.*" This makes clear that there can be a dispute about an acquired right pursued by an assignee which would still fall within the ambit of the Insolvency Regulation.

201. In *Tünkers,* any reading of the facts makes it tolerably clear that the nature of the claim was juridically entirely distinct from the insolvency and that its ambit was also free-standing. The insolvency was genuinely part of the backdrop only. In this case by contrast we have a situation where while the validity of the transfer to Sorlinda is not in issue there is still a dispute about the ambit of the transfer which was part of the insolvency, and that dispute is the very dispute which is in question.

202. The *Polymer* case is perhaps surprisingly helpful in discerning the line in this case. That case of course did concern the actions of the liquidator, and the question was really about discerning the point beyond which the actions of a liquidator would not be on the right side of the line.

203. But the issue which it identifies is that of a direct and close link to "*the internal management of the insolvency process or the conduct of the insolvency office holder*". In that case it was found in negotiations and settlement for the following reasons:

> "The negotiations with the claimants were (see [13]) instigated at the suggestion of the presiding judge in the second summary proceedings to enable the disputed intellectual property rights to be sold as part of the insolvency process. The supervisory judge in the bankruptcy played a part in the negotiations in the sense that he was sent copies of emails and expressed views, in particular (see [17]) in relation to the amount to be paid to Mr Ford. The statements made by the defendant during the course of the negotiations concerned the exercise by him of his powers as trustee—whether he would admit Mr Ford's claims and whether he would accord them priority in the bankruptcy. The settlement enabled the property rights to be sold for inter alia the benefit of the general creditors. Its terms largely concerned the future conduct of the bankruptcy process. Moreover, the defendant made it clear to Mr Ford's Dutch lawyers (see [15]) that it was a term of the agreement that the supervisory judge approve the settlement…
>
> The settlement was the direct consequence of the exercise by the defendant of power he had under Dutch law in relation to the conduct of PVL's insolvency proceedings. To regard the statements made in negotiations to settle a dispute about the way to conduct the insolvency process in the future and the resulting agreements as directly derived from and closely connected with the insolvency proceedings and thus within the *Gourdain* formulation is not to give art.1.2(b) of the Judgments Regulation and the Insolvency Regulation a broad interpretation."

204. Similarly in this case, despite Ms Toube's submissions to the contrary, I conclude that there is a direct and close link to the internal management of the insolvency process. It is *"about the insolvency itself in a direct and close link"*. It is fair to say that it is more complex than the links seen in the other cases to date. There are other indications to the contrary. The argument is plainly finely balanced. I have indeed considered whether it is a question which should fall on effectively the burden of proof – in that if it is not clear the narrowness of the window for the Insolvency Regulation should dictate that this falls into the Brussels Regulation.

205. However, on reflection I am persuaded that the authorities would deprecate such an approach; the two are complementary. Any case falls properly into one or the other. The fact that it is a fine line and some trouble to come to the conclusion does not absolve me from deciding which side of the line the case falls. Further, on pursuing the matter I was persuaded that the case does properly fall on the Insolvency Regulation side of the line, even bearing in mind the narrowness of the window, for the reasons which I have already expressed above.

206. I add finally that while I have not relied on the position in the Spanish Insolvency Court and the enforceability of such judgments to reach this conclusion, on the basis that it

appears that the decision of the June of this year is an interlocutory one, and may not at this stage be one which this court would be bound to recognise, and on the basis that it is plainly not a full decision on the merits, I do note that the conclusion to which I have come harmonises entirely with the approach taken thus far in the Spanish proceedings.

Stay

207. As a backstop Santander seeks a stay of the Claim on case management grounds pending the decision of the Spanish Insolvency Court. This point can be dealt with very briefly; it was wisely not really urged by Santander orally.

208. The point is that the court has an inherent power to order a stay to await the outcome of proceedings in a foreign court or arbitration in the exercise of case management. Santander submitted that there are good reasons why the Court should grant a stay, in particular that the Sorlinda Plea will determine the issues between the parties such that the claim will no longer be necessary, and that the claim concerns Spanish insolvency law, the construction of the Liquidation Plan and Sorlinda Bid and it is more appropriate for these matters to be heard in Spain. It is also said that a stay would be desirable so as to avoid the risk of irreconcilable judgments.

209. The problem for this argument is that the authorities are clear that such a stay is not granted except in very unusual and compelling circumstances

210. First, at a minimum – even in an ordinary case - a stay on case management grounds requires rare and compelling circumstances. The leading statement of the law here is that of Rix LJ in *Konkola Copper Mines plc v Coromin* [2006] 1 Lloyd's Rep. 410 at [63]: *"a case management stay is possible, but… it requires rare and compelling circumstances"*. That is of course binding on me, and further has since been followed in the Court, for example in *Equitas Ltd v Allstate Insurance Co* [2008] EWHC 1671 (Comm) [2009] Lloyd's Rep. I.R. 227 at [56] per Beatson J.

211. It was not suggested that any such circumstances exist in the present case. The factors relied on are no more than ordinary case management considerations, frequently encountered in litigation between international parties.

212. Those considerations do not all go in the same direction. For example, there are more than balancing arguments favouring this court. The question of whether or not Santander is bound by the Marme Agreements is a question of English law (having appropriate regard to the effect of the relevant "assumption" by Santander of Marme's obligations as a matter of Spanish law). The English Court is the natural forum to consider such questions of English law, as noted in *Fondazione Enasarco v Lehman Brothers Finance SA* [2014] EWHC 34 (Ch) at [56] by David Richards J.

213. Secondly however, a particularly significant point is the exclusive jurisdiction clauses in the Marme Agreements. There is authority that such a clause raises the bar for a case management stay still higher. As Beatson J said in *Equitas* at [66]:

> "Where there is such a clause, in view of the presumption that parties should litigate where they have agreed to litigate, the circumstances in which a case management stay would be

> possible must require rarer and more compelling circumstances than those envisaged by Rix LJ in Konkola's case…"

214. It is put perhaps even more clearly in *Mazur Media Ltd v Mazur Media GmbH* [2004] 1 WLR 2966 at [70] per Lawrence Collins J:

> "…it would require exceptionally strong grounds for the English court to exercise that power, particularly where (as regards the contractual claim) the parties have conferred exclusive jurisdiction on the English court. Otherwise, the court would be circumventing the Judgments Regulation by introducing *forum non conveniens* principles by the back door."

215. I conclude that if this had been a case where this court *prima facie* had jurisdiction, it would have been entirely inappropriate for this Court to refuse to exercise its jurisdiction or to grant a stay on case management grounds.

216. It is perhaps notable that the approach of Blair J when confronted with a similar argument in *Marme Inversiones 2007 SL v Royal Bank of Scotland Plc* [2016] EWHC 1570 (Comm) was to similar effect.