IN THE SUPREME COURT OF NUZILIA

Between

Geldbank AG

Appellant

and

Administrator of Wonderphone GmbH

Respondent

SUBMISSION FOR THE RESPONDENT

Represented by Team 1

I. The learned trial judge was correct to recognise the Mercurian proceeding as a foreign main proceeding under art 17(2)(a) of the *Cross-Border Insolvency Act 2016* (Nuzilia) ('*CBIA*').

1. A 'foreign main proceeding' ('FMP') is a foreign proceeding held in the state where the debtor has its centre of main interest ('COMI'). Article 16(3) of the *CBIA* creates a rebuttable presumption that a corporation's COMI is located in the state of its registered office.

2. Wonderphone's COMI is presumed to be in Germany.[1] The mere presence of proof that 'central' administration is in another state is sufficient to rebut the art 16(3) presumption.[2] Further, a COMI assessment based on a company's full operational history is undesirable, because that would make it more difficult to pinpoint a single COMI, whilst also frustrating the harmonisation of transnational insolvency proceedings.[3]

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[1] Judgment 7 [15].

[2] *Re Videology Pty Ltd* [2018] EWHC 2186, [44] ('*Videology*').

[3] *Re Fairfield Sentry Ltd*, 714 F3d 127, 134 (2nd Cir, 2013) ('*Fairfield*').

3. Wonderphone has branches across Asia and Europe, and it sells its products worldwide.[4] Two directors reside in Germany and the other in Mercuria, with meetings held over Zoom. Wonderphone's board of directors and the senior managers operate from different jurisdictions. In this case, the most ascertainable company presence to third parties will be where Wonderphone's interests are actually administered by senior management, rather than where the occasional policy direction is set.[5] Accordingly, the learned trial judge was correct to focus on where Wonderphone conducts its day-to-day corporate activity and management.[6]

4. Three factors support the learned trial judge's finding[7] that Wonderphone's COMI is Mercuria.

   4.1. First, Wonderphone's business office, and its books and records prior to the commencement of foreign proceedings, are all located in Mercuria.[8] Wonderphone performs its accounting functions and day-to-day administration for Asia, Nuzilia and Mercuria from its Mercurian office.[9] This includes the employment of staff, including senior management and a director to direct, control, and coordinate[10] the core of its commercial activities from Mercuria.[11] The range of activities taking place in Mercuria outweighs the sole activity undertaken in Germany demonstrates that the direction, control, and coordination of Wonderphone takes place primarily in Mercuria.

   4.2. Second, the movement of all bank accounts to Mercuria represents a significant shift in location of Wonderphone's principal assets.[12] Furthermore, Wonderphone does not hold physical assets in Germany. Its only known assets are located in Mercuria and Nuzilia.[13] Payments relating to the Term Loan would be made from this jurisdiction.[14]

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[4] Background 1 [2].

[5] *Re Eurofood IFSC Ltd* [2006] Ch 508, 540–2, [24]–[37]; *Videology* (n 2) [43]; *Re Zetta Jet Pty Ltd* [2019] SGHC 53, [31] ('*Zetta*').

[6] *United States Foodservice v Long Island Restaurant* (2008) US Dist Lexis 2366, 8–9.

[7] Judgment 11 [35]–[37].

[8] Judgment 7 [15].

[9] Judgment 11 [36].

[10] Judgment 7 [15].

[11] *Re Millennium Global Emerging Credit Master Fund Limited*, 474 BR 88, 94 (SDNY, 2012).

[12] *Re SPhinX Ltd*, 351 BR 103, 117 (Bankr SDNY, 2006).

[13] Judgment 6 [6].

[14] Judgment 6 [9]

4.3. Third, a substantial portion of Wonderphone's creditors are located in Mercuria.[15] The perception of creditors is that only a limited range of matters are dealt with on behalf of Wonderphone by senior management in Germany. The other six creditors were not privy to the details of Wonderphone's arrangement with Geldbank.

5. The following additional, objective indicia support the rebuttal of the art 16(3) presumption:

5.1. Liquidation activities and administrative functions may also be relevant to an analysis of COMI.[16] Andy Artful's restructuring efforts, including all financial restructuring negotiations, took place in Mercuria.[17]

5.2. Wonderphone essentially maintains a mailbox registration in Germany. This is a strong factor pointing away from a Germany COMI.[18] The court was not presented with any substantial evidence that indicated any real connection with Germany, beyond Wonderphone's articles of association and the company register.

5.3. Whilst two Wonderphone directors resided in Germany, meetings took place over Zoom.[19] Thus, any control they exercised over Wonderphone originated from Mercuria.

6. Geldbank's contention that this change amounted to 'forum shopping'[20] is unfounded. A debtor is entitled to freely shift its COMI.[21]

6.1. Wonderphone's appointing of Andy Artful to the position of Chief Restructuring Officer and relocating of him to Mercuria evinces a clear, ascertainable intention to make Wonderphone's COMI shift permanent.[22]

6.2. The clause under the Term Loan prohibiting COMI migration regulates Wonderphone's relationship with one creditor. It is a contractual breach that has little bearing on the COMI analysis or on recognition under art 17(2)(a). The

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[15] See, eg, *In the Matter of Sendo Ltd* [2005] EWHC 1604 (Ch); Judgment 11 [36].
[16] *Fairfield* (n 3) 137.
[17] *Re Hellas Telecommunications (Luxemburg) II SCA* [2010] BCC 295, [5]; Judgment 7 [14]–[15].
[18] *Re Bear Stearns High-Grade Structured Credit,* 389 BR 325, 336 (SDNY, 2008).
[19] Judgment 7 [15].
[20] Judgment 8–9 [22].
[21] *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966, [55].
[22] *Zetta* (n 5) [79].

shift of COMI to Mercuria was intended to facilitate Wonderphone's Asia focus—it was a bona fide attempt at restructuring company affairs.

7. On the above analysis, the learned trial judge was correct to hold[23] that Wonderphone's COMI is in Mercuria.

II. Recognising the Mercurian judgment would not be manifestly contrary to the public policy of Nuzilia.

8. The learned trial judge was correct to find[24] that recognising the Mercurian judgment would not manifestly contravene Nuzilian public policy within the meaning of art 7 of the *Recognition of Foreign Judgments (Insolvency) Law 2019* ('*ROFJIL*').

9. The qualifier of 'manifestly' signals that art 7 is to be interpreted restrictively.[25] It should be used as a last resort.[26] To deny recognition is tantamount to applying a territorialist approach to asset recovery—limiting the *CBIA's* effectiveness as a universalist instrument whilst compromising the primacy of the principal proceedings in Mercuria. Thus, the learned trial judge was correct to grant comity.[27]

10. There are three reasons why recognition would not be manifestly contrary to public policy.

    10.1. Firstly, Nuzilian set-off law is 'merely one of two equally valid, but policy-neutral approaches'.[28] The right of set-off is neither a principle of procedural fairness[29] nor a constitutional guarantee.[30] The mere fact that there is a conflict between the Mecurian and Nuzilian law is insufficient to invoke the public policy exception. It is no answer that the application of foreign law renders some creditors better off and others worse off—this is a natural, almost inevitable consequence of differing regimes.[31] The public policy exception cannot be used to escape alleged commercially unfavourable outcomes, and to usurp the

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[23] Judgment 11 [35]–[37].

[24] Judgment 14 [49].

[25] UNCITRAL, *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment* (UNCITRAL, 2019) 41 [73] ('*MLRE Guide to Enactment*').

[26] Michael A Garza, 'When Is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy' (2015) 38(5) *Fordham International Law Journal* 1587, 1622–8.

[27] *Re HIH Casualty & General Insurance Limited* [2008] 1 WLR 852, [15]–[17] ('*HIH*').

[28] Judgment 13–14 [46]–[47].

[29] *MLRE Guide to Enactment* (n 25) 41 [72].

[30] Ibid.

[31] *HIH* (n 27) 79.

primacy of Mercuria as the main forum. Article 1(d) of *ROFJIL*'s Preamble fortifies this proposition, as it seeks '[t]o promote comity and cooperation between jurisdictions regarding insolvency-related judgments'.

10.2. Secondly, a necessary function of insolvency laws is to alter or diminish contract rights. There is no reason to suggest that set-off rights hold any special status.[32] A choice of contract law may determine a contract's validity and its interpretation, but only insolvency law can determine the effect of insolvency on that contract.[33] *ROFJIL* intends to operate to modify the whole Swap Debt involuntarily. It does not follow that certain 'carve outs' apply. Indeed, this would lead to inconsistent outcomes. Wonderphone's breach of contract[34] is a private matter which cannot be elevated to public policy. *Gold & Honey*, for instance, is distinguishable because Invoking the public policy exception where there has been a deliberate violation of a criminal statute (contempt of court)[35] with *worldwide effect on any person*[36] is different to invoking it where there has been a breach of contract between *two private parties*: the promisor and the promisee. The proper remedy in such a circumstance is not art 7 of the *ROFJIL*. The proper remedy is to sue for breach of contract under Nuzilian law.

10.3. Thirdly, the public policy exception should not be invoked merely because Geldbank asserts that 'it explicitly chose to contract with Wonderphone on the basis of Nuzilian law, in the knowledge that Nuzilian law provides a particular level of protection for creditors.'[37] It should have been a reasonable expectation[38] of Geldbank that it may be denied a set-off. Geldbank is a bank lender: a sophisticated commercial entity. It contracted with Wonderphone, a multinational corporation, which already had a regional headquarters set up in Mercuria,[39] as well as a major factory in Mercuria.[40] In a geographically dynamic market,[41] it was always a real possibility that Geldbank's COMI might someday

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[32] Cf Wonderphone's submissions at first instance: Judgment 13 [45].

[33] See, eg, *Re Energy Coal SPA*, 582 BR 619 (Bankr D Del, 2018); *Re Metcalfe & Mansfield Alternative Investments*, 421 BR 685 (Bankr SDNY, 2010).

[34] Judgment 10 [27].

[35] *Re Gold & Honey,* 410 BR 357, 372–3 (Bank EDNY, 2009) ('*Gold & Honey*').

[36] Neil Hannan, *Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer, 2017) 191–2.

[37] Judgment 12 [42].

[38] Jason Fu, 'Cross-border insolvency in Bermuda: Cambridge Gas Revisited' (2018) 31(4) *Insolvency Intelligence* 118, 121–2 citing *Pacific Andes Resources Development Ltd* [2016] SGHC 210, [158].

[39] Judgment 6 [7].

[40] Judgment 6 [6].

[41] Judgment 6 [7].

change to a jurisdiction disallowing set-off, such as Mercuria. This would (or should) have formed part of Geldbank's pre-contractual risk calculus.

11. The learned trial judge was correct in finding[42] that Wonderphone's status as one of Nuzilia's biggest employers is a public policy factor militating in favour of recognition.

    11.1. *ROFJIL*'s Preamble states at art 1(f) that its purpose is to complement *CBIA*. Meanwhile, *CBIA*'s Preamble at para (e) states that its purpose is the '[f]acilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.' Analogous is *Qimonda*, where recognition was refused on the basis that it would deprive United States patent holders of a key statutory protection, thereby undermining the public policy of promoting technological innovation.[43] Clearly, courts are willing to take into account domestic economic concerns when deciding whether or not to invoke the public policy exception. Employment is another example of a domestic economic concern. The learned trial judge was, thus, correct in finding[44] that the potential loss of thousands of jobs was a factor militating against the invocation of the public policy exception.

12. Whether the court will protect rights of set-off will 'depend upon the degree of connection which the mutual debts have with' Nuzilia.[45] Although the contract was governed by Nuzilian law,[46] both Wonderphone and Geldbank were based in Germany at the time of contracting.[47] True it is that the loan funds were used, 'in large measure', to expand Wonderphone's manufacturing capacity in Nuzilia.[48] However, nothing on the facts suggests that this was a term of the contract. How Wonderphone chooses to spend the loan funds after obtaining them has no bearing on the inherent nature of the contract. The loan is most closely connected with Germany.

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[42] Judgment 11 [37].

[43] *Re Qimonda AG*, 462 BR 165, 183–5 (Bankr ED Va, 2011). See also Garza (n 26) 1620–1.

[44] Judgment 11 [37].

[45] *HIH* (n 27) 860 [25] (Lord Hoffmann).

[46] Judgment 7 [11].

[47] Judgment 5 [1], 6 [6].

[48] Judgment 6 [9].

III. The learned trial judge was correct in not invoking art 14(f) of the ROFJIL to refuse recognition.

13. It is conceded that the Mercurian judgment does affect the rights of creditors generally, pursuant to art 14(f)(i).

14. However, the interests of creditors and other persons were adequately protected in the Mercurian proceeding, pursuant to art 14(f)(ii).

14.1. First, contrary to Geldbank's submission at first instance,[49] Mercurian law does not 'expos[e] creditors to a fundamentally different risk'. The risk is substantively similar in that creditors' rights can be varied by ballot in either jurisdiction. The sole difference is that a 75% approval rate of all creditors is required in Nuzilia, as opposed to 50% in Mercuria.[50] However, by number, only a simple majority is required in both Nuzilia and Mercuria. Evidently, the difference between the two regimes is not substantial. Thus, Geldbank's interests were not prejudiced by the Mercurian proceeding—rather, their interests were adequately protected.

14.2. Secondly, the interests of *other* creditors were adequately protected. It is an inevitable commercial reality that a scheme of arrangement may spell different outcomes for different creditors in the same class. Hence, art 14(f)(ii)'s language calls for a more holistic examination of *all* creditors' rights, rather than of one particular creditor.[51] Most of the lending banks subject to the Plan had likely contracted with Geldbank under a law other than Mercurian law.[52] Yet it was still approved by a majority of 65% in value and 60% by number of voting creditors.[53] Thus, it is reasonably inferable that the class of creditors to which Geldbank belonged determined that it was in its interests to approve the Plan. Accordingly, the interests of the general body of creditors were adequately protected, notwithstanding the existence of individual dissenters.

14.3. Third, the interests of the debtor and its employees were adequately protected. Article 14(f)(i) requires a consideration of the interests of 'other interested persons', a term synonymous with 'stakeholders'.[54] The Plan was a practical

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[49] Judgment 12 [42].
[50] Judgment 12 [42].
[51] *SNP Boat Service SA v Hotel le St James*, 483 BR 776, 783–4 (SD Fla, 2012).
[52] Judgment 11 [36]; 12 [42].
[53] Judgment 8–9 [22].
[54] *MLRE Guide to Enactment* (n 25) 59 [108].

way of reorganising Wonderphone's affairs and ensuring its survival as a going concern.[55] It also preserved the jobs of thousands of Nuzilian employees.[56]

IV. Article 14(g) of the ROFJIL is not applicable to refuse recognition.

15. This court may rely upon the 'safe harbour'[57] provided by art 14(g)(iv). The Mercurian court exercised jurisdiction on a basis that was 'not incompatible' with the law of Nuzilia.

    15.1. Article 14(g)(iv)'s language—framed as a double negative, rather than 'was compatible'—fortifies UNCITRAL's intention of 'discourag[ing] courts from refusing recognition and enforcement ... in cases in which the originating court's exercise of jurisdiction was not unreasonable.'[58]

    15.2. As explicated at [14.1], it would have been just as possible to vote on a scheme and modify creditors' rights in Nuzilia: it was only the voting threshold that differed.

Word Count: 2,461 words

[55] Judgment 11 [30], 11 [37], 14 [49].
[56] Judgment 11 [30], 11 [37], 14 [49].
[57] *MLRE Guide to Enactment* (n 25) 60 [111].
[58] Ibid 61 [115].