

## IAN FLETCHER INTERNATIONAL INSOLVENCY LAW MOOT 2022

The High Court of Nuzilia (Chancery Division)

In the Matter of Wonderphone GmbH

Appeal from: Administrator of Wonderphone GmbH v Geldbank AG [2021] ICNR 45

Judge: Judge Solomon

Date of decision: 24 September 2021

### **Background**

1. Wonderphone GmbH (“Wonderphone”) is a German limited liability company. It is registered in the company register of the local court in Frankfurt, Germany. Its articles of association provide that the company’s seat is Frankfurt, Germany. The shares of Wonderphone, through a series of family trusts, are held by a Chinese citizen, Mr Huang.
2. Wonderphone manufactures and sells mobile phones. In the late 1990s, its business was focused on Europe. In the early 2000s, Wonderphone quickly expanded and started to sell its phones worldwide. Originally, all of its directors were based and worked in Frankfurt. Wonderphone has two major factories, one in Mercuria and one in Nuzilia.
3. In recent years, the focus of Wonderphone’s business has moved to Asia, and also to the region in which Mercuria and Nuzilia are located. As a result of this development, a regional headquarters was set up in Mercuria which was responsible for the day-to-day management of Wonderphone’s business in Asia, and in Mercuria and Nuzilia.
4. Wonderphone’s largest factory is located in Nuzilia. Its phones are distributed by way of local branches. Until earlier this year, Wonderphone’s board of directors, overall corporate headquarters, and accounting functions remained in Frankfurt, Germany.
5. Geldbank AG (“Geldbank”), a bank incorporated in Germany, is one of Wonderphone’s principal creditors. Wonderphone is indebted to Geldbank on a term loan (the “Term Loan”), under which USD 100 million is owing. The loan is governed by Nuzilian law. Under the Term Loan agreement, Wonderphone pledged all its assets, including its factory in Nuzilia, as security. Wonderphone also agreed that it would not shift its centre of main interests (“COMI”) or its registered office from Germany without Geldbank’s express written consent. In the circumstances as detailed in the judgment of Judge Solomon, Geldbank itself is indebted to Wonderphone under an interest rate swap agreement in the amount of USD 80 million (the “Swap Debt”).

6. By early 2021, Wonderphone was in serious financial difficulty. This was in part due to a loss of a major patent lawsuit in Europe, and in part due to a worldwide shortage of microchips needed for the production of the phones following the Covid-19 pandemic. To address its financial problems, Wonderphone hired Andy Artful, an international restructuring expert.
7. Mr Artful recommended that the company's corporate headquarters be moved from Frankfurt to Mercuria, a common law jurisdiction, with convenient flight connections to Nuzilia.
8. Based on this advice, Wonderphone appointed Andy Artful as director and chief restructuring officer of Wonderphone and relocated him to Mercuria. The two other directors still live in and work from Frankfurt. However, all of Wonderphone's books and records were transferred from Frankfurt to the office in Mercuria. Board meetings were held by Zoom. Day-to-day business was conducted by Andy Artful's staff who also worked in the office in Mercuria. The articles of association of Wonderphone were not amended and they still provide that Frankfurt is the "seat" of the company as a matter of German law.
9. Subsequently, Wonderphone filed for Administration in Mercuria pursuant to the Insolvency and Reorganization Law of 2006 of Mercuria. In the course of this insolvency proceeding, the Administrator proposed a compromise (the "Plan") to its creditors. Geldbank vigorously, but ultimately unsuccessfully, challenged the jurisdiction of the court in Mercuria to preside over the convening of creditors' meetings and the approval of the Plan. The Plan was approved by a meeting in Mercuria convened pursuant to section 111 of the 2006 Law and sanctioned by the Companies Court of Mercuria.<sup>1</sup> The Mercurian court also entered judgment ordering Geldbank to pay the Swap Debt. Geldbank filed an appeal against both decisions. Under the law of Mercuria, this appeal does not have suspensive effect. Due to the backlog in the docket of the Supreme Court of Mercuria, a decision on the appeal is not expected before 2023.
10. Both Nuzilia and Mercuria are common law jurisdictions. Subject to the differences spelt out in the judgment of Solomon J, the insolvency law of Mercuria is similar to English law. Nuzilia has enacted the UNCITRAL Model Law on Cross-Border Insolvency ("the Cross-Border Model Law") as well as the UNCITRAL Model Law on

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<sup>1</sup> A compromise under section 111 of the 2006 Law is analogous, though not identical to, a scheme of arrangement under Part 26 of the UK Companies Act 2006. See further the judgment of Solomon J below at paras [16]-[17].

Recognition and Enforcement of Insolvency-Related Judgments (“the Insolvency-Related Judgments Model Law”). Nuzilia has chosen the first option under Article 15(1) of the latter instrument, such that an insolvency-related judgment recognized or enforceable in Nuzilia shall be given the same effect it has in the originating State.

### **The application at first instance**

11. Wonderphone represented by its Administrator sought:
  - i. an order in Nuzilia recognizing the Mercurian section 111 proceeding as a foreign main proceeding; and
  - ii. an order in Nuzilia recognizing the Mercurian judgment that Geldbank is liable to pay the Swap Debt in full.
12. Geldbank resisted the claim on two principal bases, contending that:
  - i. Wonderphone’s COMI is located in Germany. The relocation of its corporate headquarters to Mercuria is a blatant attempt at forum-shopping in order to avail Wonderphone of the more favorable restructuring possibilities under Mercurian law.
  - ii. Also, Geldbank, in any event, is not liable to pay the Swap Debt to Wonderphone because Nuzilian law governs both the Swap Debt and the Term Loan, and Nuzilian law permits Geldbank to set-off the Swap Debt against the Term Loan debt, thus discharging Wonderphone’s claim against Geldbank, and reducing Geldbank’s claim against Wonderphone to USD 20 million. The High Court should not recognize the judgment of the Companies Court of Mercuria sanctioning the Plan to the extent that it deprives Geldbank of its right of set-off pursuant to Nuzilian law on the basis that this would be contrary to a fundamental public policy of Nuzilia.

### **Findings**

13. Judgment was given by Her Honour Judge Solomon of the High Court of Nuzilia.
14. Her Honour recognized the Mercurian proceeding as a foreign main proceeding under the Cross-Border Model Law.
15. On the issue of set-off and public policy, Her Honour referred to the Insolvency-Related Judgments Model Law, in particular Article 7. Her Honour held that Mercurian law in this respect, while being different from the law of Nuzilia, and that of most other countries, did not violate Nuzilian public policy.

## **Grounds for Appeal**

16. Permission has been granted to Geldbank to appeal to the Nuzilia Supreme Court on two grounds:

- i. whether the Mercurian section 111 proceeding should be recognized in Nuzilia as a foreign main proceeding; and
- ii. whether Articles 7, 14(f) and (g) of the Insolvency-Related Judgments Model Law prevent enforcement in Nuzilia of the Mercurian Court's judgment in Wonderphone's favour with regard to the Swap Debt.

IN THE HIGH COURT OF NUZILIA (CHANCERY DIVISION)

Case No. 7/21

[2021] ICNR 45

IN THE MATTER OF WONDERPHONE GMBH

Between:

Adminstrator of Wonderphone GmbH

*Applicant*

v.

Geldbank AG,

*Respondent*

24 September 2021

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**DECISION OF JUDGE REBECCA SOLOMON**

Introduction

1. These are proceedings brought by Wonderphone GmbH (“Wonderphone”), a company incorporated in Germany, against Geldbank AG (“Geldbank”), a bank incorporated in Germany.
2. Wonderphone seeks
  - i. recognition of its insolvency proceeding in Mercuria as a foreign main proceeding under the UNCITRAL Model Law on Cross-Border Insolvency (the “Cross-Border Model Law”);<sup>2</sup> and
  - ii. an order pursuant to the Recognition of Foreign Judgments (Insolvency) Law of 2019 (the “ROFJIL”) recognizing the Companies Court of Mercuria’s judgment that Geldbank is liable to pay in full USD 80 million under the terms of an interest rate swap agreement (the “Swap Agreement”).
3. The ROFJIL is a Nuzilian statute that enacts in this jurisdiction with effect from 11 January 2019 the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (the “Insolvency-Related Judgments Model Law”). This follows on from the

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<sup>2</sup> I note that Wonderphone only seeks recognition on the ground that its COMI was in Mercuria. It does not base its claim on an establishment in Mercuria.

Cross-Border (Insolvency) Law of 2010, which enacted in this jurisdiction the Cross-Border Model Law with effect from 1 January 2011.

4. Each of the Insolvency-Related Judgments Model Law and the Cross-Border Model Law have been enacted in Nuzilia without modification from the original text.<sup>3</sup> The section numbering of the respective laws precisely follows the article numbers of the UNCITRAL Model Laws. For ease of reference, I shall refer in this judgment to the Articles of the Model Laws.

### Background

5. Wonderphone operates through branches throughout the world. Its business is the manufacture and sale of mobile phones. The parties are in disagreement as to the location of its centre of main interests (“COMI”).
6. Wonderphone’s seat is, and always has been, in Frankfurt, Germany. Originally, its directors were based and worked in Frankfurt. Wonderphone has two major factories, one in Mercuria and one – its largest – in Nuzilia.
7. In recent years, the focus of Wonderphone’s business has moved to Asia, and also to the region in which Mercuria and Nuzilia are located. As a result of this development, a regional headquarters was set up in Mercuria which was responsible for the day-to-day management of Wonderphone’s business in Asia, Mercuria and Nuzilia. The directors and the overall corporate headquarters remained in Germany.
8. Wonderphone generally obtains financing its business through bank lending. There are currently seven bank lenders. Three of these lenders are banks incorporated in Mercuria.
9. Wonderphone is indebted to Geldbank on a term loan made in 2018 under which USD 100 million is owing (the “Term Loan”). The funds obtained by this loan were used, in large measure, to expand Wonderphone’s manufacturing capacity in Nuzilia. As a result of the insolvency proceedings affecting Wonderphone, to which I refer below, this amount is due and payable. Under the Term Loan agreement, Wonderphone pledged all its assets, including the factory in Nuzilia, as security. Wonderphone also agreed that it would not shift its COMI or its registered office from Germany without Geldbank’s express written consent.
10. In addition, Geldbank is indebted to Wonderphone under the Swap Agreement which Geldbank required Wonderphone to enter as a condition of the Term Loan. Interest rates

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<sup>3</sup> With one exception. Nuzilia has not enacted the optional paragraph 14(h) of the Insolvency-Related Judgments Model Law.

have moved in Wonderphone's favour since the inception of the Swap Agreement, such that it is substantially "in the money". As a result of Wonderphone's insolvency, the Swap Agreement has automatically terminated. As the non-defaulting party, Geldbank is entitled to calculate the sum due upon termination, and it has calculated that it owes USD 80 million to Wonderphone (the "Swap Debt").

11. Both the Term Loan and the Swap Agreement are governed by Nuzilian law. I will need to return to the relevance of Nuzilian law later in this judgment, but for now I note two important features of Nuzilian law relating to set-off.
12. First, under the common law of Nuzilia, where a debt and a cross-demand are sufficiently closely related to each other, then there is substantive set-off between the two. This means that the amount which one party is entitled to claim from the other is treated as being discharged, to the extent of the cross-claim, by that cross-claim. It is common ground in this case that the Term Loan and the Swap Debt are sufficiently closely connected that substantive set-off operates between them under Nuzilian law.
13. Second, under the Nuzilian Insolvency Law of 1965, set-off is permitted in an insolvency proceeding between mutual debts arising between a creditor and the insolvent debtor. Accordingly, an account is to be taken of debts due either way as at the date of the commencement of the insolvency proceeding and only the net balance is either provable in the insolvency of the debtor, or recoverable from the creditor (as the case may be).
14. By early 2021, Wonderphone was in serious financial difficulty. This was in part due to a loss of a major patent lawsuit in Europe, and in part due to a worldwide shortage of microchips needed for the production of the phones following the Covid-19 pandemic. To address its financial problems, Wonderphone hired Andy Artful, an international restructuring expert.
15. Based on Mr Artful's advice, Wonderphone appointed him as director and chief restructuring officer of Wonderphone and relocated him to Mercuria. The two other directors still live in and work from Frankfurt. However, all of Wonderphone's books and records were transferred from Frankfurt to the office in Mercuria. Board meetings were held by Zoom. Day-to-day business was conducted by Andy Artful's staff who also worked in the office in Mercuria. The articles of association of Wonderphone were not amended and they still provide that Frankfurt is the "seat" of the company as a matter of German law.
16. On 15 March 2021, Wonderphone filed for a process in Mercuria known as "Administration". This is a procedure available for companies that are insolvent, under which an insolvency professional – called an "Administrator" – is appointed by the Court

to administer the affairs of the company with a view, primarily, to seeking a reorganization of the company's affairs. If a reorganization cannot successfully be achieved, then the Administrator is entitled to apply to the court for an order converting the Administration to a winding-up proceeding.

17. On 30 May 2021, and as part of a wider restructuring of Wonderphone's affairs, the Administrator of Wonderphone made a proposal to its seven lending banks, which include Geldbank. This was done pursuant to section 111 of the Mercurian Insolvency and Reorganization Law of 2006. Section 111 provides that an insolvency professional, such as an Administrator, may propose a compromise or arrangement (called a "Plan") to the company's creditors, or one or more classes of its creditors. The creditors (or classes of creditors) vote on the Plan. If it is approved by a majority by value and in number of those creditors who vote (or those creditors in each class that vote) at a meeting ordered by the court, then the court may decide to sanction the Plan. The court is not bound to do so, but as a matter of discretion, the court will sanction the Plan if, in its opinion, the Plan is fair and reasonable, taking into account the interests of all stakeholders of the company.
18. It may be important to note that there is a similar procedure in Nuzilia, under which a company can propose a "Scheme" to its creditors, or one or more classes of them. There is, however, an important difference: under the Nuzilian Scheme jurisdiction, it is necessary to obtain approval of a majority in number of creditors voting (or each class of creditors voting) at a meeting, but a majority by value (in each case) of 75%.
19. In very simplified terms, Wonderphone's Mercurian Plan provides for the debt due to each of the banks to be cancelled and replaced with New Notes, with a face value equal to two thirds of the value of the existing debt and a deferred maturity date of 31 December 2026. However, in calculating the amount of debt due to the banks, no set-off is permitted under Mercurian law.
20. It is common ground between the parties that the banks form a class of creditors for the purposes of section 111 of the Mercurian Insolvency and Reorganization Law of 2006, and that it is permissible under Mercurian law for the Plan to subsist solely between Wonderphone and the creditors within that class.
21. Accordingly, the Plan purports to extinguish the Term Loan owed to Geldbank in exchange for New Notes with a face value of USD 66 million, payable on 31 December 2026. But Geldbank remains liable to Wonderphone for the Swap Debt in the sum of USD 80 million.
22. Five of the bank lenders voted at the meeting convened by the Companies Court of Mercuria to consider the Plan. It was approved by a majority of 65% by value and 60% by number of

those attending and voting. Geldbank entered a limited appearance and challenged the Mercurian Court's jurisdiction, arguing that the steps engineered by Mr. Artful to shift Wonderphone's COMI to Mercuria violated the Term Loan agreement and were a blatant attempt at forum shopping. However, on 30 June 2021 the Mercurian Court held that there were sufficient links between Wonderphone and Mercuria such that the Court had jurisdiction. Moreover, having already granted permission to Wonderphone to convene the meeting which voted to approve the Plan, the Court went on to make an order sanctioning the Plan.<sup>4</sup> Because Geldbank had a branch office in Mercuria it was subject to the Mercurian Court's general jurisdiction.

23. Geldbank filed an appeal against this decision. I am informed by counsel that due to the inundation of the Mercurian Supreme Court with cases following the Covid-19 pandemic, it is highly unlikely that the appeal will be resolved before 2023. It appears that, under the procedural law of Mercuria, Geldbank's appeal does not have suspensive effect.
24. I heard evidence from a single joint expert in Mercurian law. That evidence established that, upon the insolvency of a corporation, there is no set-off of any kind allowed as between the insolvent debtor and its creditors (irrespective of whether there would, but for the insolvency, have been any other form of set-off between them under Mercurian law or under any applicable foreign law). Instead, any creditor of the insolvent debtor, who owes a separate debt to the debtor, must prove for the full amount of its debt without deduction of the cross-claim and remains liable to the debtor on the cross-claim without deduction for the debt due from the debtor.
25. I also heard evidence from an expert in Nuzilian banking practice. Her evidence was to the following effect. The global financial crisis of 2008 caused the almost total collapse of the Nuzilian banking system and widespread damage to the Nuzilian economy. Since that crisis, banks incorporated in Nuzilia are required by law and detailed regulations to maintain a certain proportion of their assets as capital. The regulations are complex, and I need not refer to them in detail. However, the regulations permit a bank, when calculating the value of an asset consisting of a debt due from another entity (or the value of a liability due to another entity) to take into account any right of set-off under the law applicable to that debt. For example, if a bank is owed USD 1 million by an entity, X, and owes that entity USD 1 million, then if the bank has the right to set-off the debt due from X against the debt it owes to X then, for regulatory purposes, the asset has no value (and there is no corresponding

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<sup>4</sup> Mercurian law, as does Nuzilian law, uses terminology derived from UK law in this regard. Plan sanction under these laws is equivalent to plan confirmation in other jurisdictions, including the United States.

liability to X). The right of set-off enshrined in Nuzilian law is regarded as fundamental to the banking community since, if set-off did not apply, then it would have to account separately for an asset of USD 1 million (the debt due from X) and a liability of USD 1 million (the debt due to X). For this reason, many banks (and certainly those incorporated in and conducting business primarily in Nuzilia) contract on the basis of Nuzilian law, precisely because Nuzilian law permits set-off both in a solvent situation (the substantive set-off to which I referred earlier) and in an insolvent situation (the provision of the Insolvency Law of 1965 to which I also referred earlier). Also, in light of the high degree of internationalization of the banking industry, the Nuzilian expert testified that similar rules are in force in most, if not all other countries.

26. By this claim, Wonderphone (represented by its Administrator) seeks (1) an order recognizing its insolvency proceedings in Mercuria and (2) an order that Geldbank pay the Swap Debt in full.

#### The Issues

27. Geldbank resists the claim on several grounds. First, it contends that the proceeding in Mercuria was not a foreign main proceeding since Wonderphone's COMI was located in Frankfurt, Germany, where, pursuant to the articles of association, the debtor has its "seat". The move of the debtor's headquarters to Mercuria was a blatant attempt to forum shop and avail Wonderphone of Mercuria's favourable restructuring laws. Also, under the terms of the Term Loan agreement, Wonderphone was prohibited from changing its COMI or registered office without Geldbank's prior written consent.

28. Also, Geldbank contends that it is, in any event, not liable to pay the Swap Debt to Wonderphone because Nuzilian law governs both the Swap Debt and the Term Loan, and Nuzilian law permits Geldbank to set-off the Swap Debt against the Term Loan debt, thus discharging Wonderphone's claim against Geldbank, and reducing Geldbank's claim against Wonderphone to USD 20 million. This Court should not recognize the judgment of the Mercurian Court sanctioning the Plan to the extent that it deprives Geldbank of its right of set-off pursuant to Nuzilian law on the basis that this would be contrary to a fundamental public policy of Nuzilia.

29. Finally, Geldbank argues that recognition in Nuzilia of the various determinations of the Mercurian Court is not in the interests of justice before the appeal against these determinations is finally disposed of in Mercuria.

30. Wonderphone, on the other hand, argues that it has engaged in a *bona fide* attempt at restructuring. Contrary to Geldbank's argument, it contends that Nuzilian public policy requires recognition of the insolvency proceedings and their outcome in Mercuria because this is the only practical way to reorganize the company's affairs and thus preserve thousands of jobs in Nuzilia provided by Wonderphone's factory, which is one of Nuzilia's largest employers.

31. I will address these issues in turn.

Recognition of the Mercurian proceeding as a foreign main proceeding

32. Article 15(1) of the Cross-Border Model Law enables a foreign representative to apply to this Court for recognition of a foreign proceeding, either as a foreign main proceeding or a foreign non-main proceeding.

33. The parties agree that the Mercurian proceeding is a "foreign proceeding" to which the Cross-Border Model Law applies. It is also agreed that the Administrator who proposed the Plan is a "foreign representative".

34. Wonderphone seeks recognition of the Mercurian proceeding as a "foreign main proceeding". The term "foreign main proceeding" is defined by Article 2(b) of the Cross-Border Model Law as follows:

foreign main proceeding means a foreign proceeding taking place in the State where the debtor has the centre of its main interests...

35. To determine whether the Mercurian proceeding is a foreign main proceeding it is necessary to decide the location of Wonderphone's COMI.

36. While Wonderphone's seat remains in Frankfurt, Germany as a matter of German law, I note that in Mercuria there is a major factory. Also, for several years now there has been in Mercuria a regional headquarters running Wonderphone's business for Asia, and for the region of Mercuria and Nuzilia. In addition, three (out of seven) of the bank creditors are from Mercuria.

37. Wonderphone has also submitted evidence from an expert in banking law that a similar plan could not have been introduced in Germany, and that the only chance to rescue Wonderphone was the Plan under Mercurian law. While admittedly this may be a close case, I think courts in a case like this have considerable discretion. Here, the fact that Wonderphone is one of Nuzilia's biggest employers and that it seems that the Mercurian proceeding is the best way to ensure its survival, heavily militates in favour of recognition.

The effect of the Plan on Nuzilian law governed debt

38. The Supreme Court of Nuzilia has held that the rule which derives from the English case of *Antony Gibbs & Sons v Société Industrielle et Commerciale des Metaux* (1890) 25 Q.B.D. 399 is abrogated by Nuzilia's enactment of ROFJIL. It is, therefore, not in dispute between the parties that, in principle, a foreign plan can operate to modify or discharge a debt even if this debt is governed by Nuzilian law.
39. It is accepted by Geldbank that the Mercurian insolvency proceedings are an "insolvency proceeding" within Article 2(a) of the Insolvency-Related Judgments Model Law. Geldbank also concedes that the Administrator is an "insolvency representative" within Article 2(b), that the judgment of the Mercurian Court sanctioning the Plan is a "judgment" within Article 2(c), and that the judgment is an "insolvency-related judgment" within Article 2(d).
40. Moreover, Geldbank accepts that none of the grounds to refuse recognition in Article 14 apply, other than those contained in sub-paragraphs (f) and (g).
41. Geldbank contends, however, that Article 14(f) provides a ground to refuse to recognize the judgment of the Mercurian Court. Article 14(f) reads as follows:
- "The judgment: (i) materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and (ii) the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued."
42. Geldbank contends that its interests, and the interests of any other creditors whose debts were governed by a law other than Mercurian law (which included all of the lending banks subject to the Plan) were not adequately protected. It contends 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. In particular, while Nuzilian law contains provisions which enable contractual rights of creditors to be varied by a majority rule principle, the relevant majority is 75% by value of all creditors (and a majority in number) who vote on a Scheme. Mercurian law exposes creditors to a fundamentally different risk – namely that their contractual rights can be varied by a simple majority in value (and number) of those creditors that vote on a plan.

43. Furthermore, Geldbank contends that the judgment of the Mercurian Court should not be recognized pursuant to Article 14(g) of the ROFJIL.
44. I am not so persuaded. Geldbank, while disputing the jurisdiction of the Mercurian Court, participated in the Mercurian proceeding and filed its claim there. Also, it voted on the Plan. Under these circumstances, I think that the Mercurian Court was entitled to exercise jurisdiction and enter judgment in Wonderphone's favour with regard to the Swap Debt.

#### Rights of set-off and public policy

45. Geldbank's alternative argument is a variation on its first. It contends that even if the overriding of its choice of Nuzilian law to govern its relationship with Wonderphone is an accepted consequence of the enactment in Nuzilia of the Insolvency-Related Judgments Model Law, it is different when it comes to its choice of Nuzilian law to govern its entitlement to set-off. Specifically, it contends that there is a fundamental public policy in Nuzilia that set-off rights between banks and their counterparties are respected, and given effect to, even where one or other of the bank or its counterparty is insolvent. It would be contrary to that public policy to enforce the Wonderphone judgment in a manner which deprived Geldbank of its right of set-off. This court is not prevented from taking any action otherwise governed by the Insolvency-Related Judgments Model Law, by Article 7, "if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness" of Nuzilia.
46. Wonderphone contends that the Nuzilian law of set-off does not reflect a public policy, or a fundamental principle of procedural fairness, but merely one of two equally valid, but policy-neutral, approaches to the conundrum thrown up by the *pari passu* principle which is inherent in any insolvency where those who are owed money by the insolvent estate also owe money to the insolvent debtor. One approach (that adopted in Mercuria) is to regard the claim against the person proving in the estate as an asset of the estate which is to be got in and made available for all creditors, and that it would be contrary to the *pari passu* principle to allow that person to treat itself as paid in preference to other creditors of the estate, by setting of the cross-claim that it owes to the debtor. The other approach (that adopted in Nuzilia) is to view the *pari passu* principle as applying only to the net amount, after set-off, owing to each creditor of the estate.
47. In my judgment, Wonderphone is correct on this point. Set-off has been treated, in more than one jurisdiction, as a substantive principle which, as a matter of policy and justice, cannot be disapplied in favour of the rules of a foreign insolvency law. So, for example, in

*Re HIH Casualty & General Insurance Limited* [2008] 1 WLR 852 at [15]- [17] Lord Hoffmann, when commenting on the earlier decision of Sir Richard Scott VC in *BCCI (No.10)* [1997] Ch. 213, described the rules of set-off under English law as “a matter of substantive justice between the parties”. In *BCCI (No.10)* Scott V-C held that he had no jurisdiction to disapply English rules of insolvency set-off, and he directed funds to be withheld by liquidators in England to compensate creditors who would be disadvantaged by the fact that the law of the main insolvency proceedings in Luxembourg (where distributions were to be made) did not, as a matter of Luxembourg public policy, permit set-off. In *HIH*, Lord Hoffmann (with whom Lord Walker agreed) was of the opinion that the decision in *BCCI* was correct on its facts, because the debts in question in *BCCI* were the result of transactions having a close connection to England, and so “justice required” that the English rules of set-off should apply to them.

48. While Mercurian law on set-off seems to follow a somewhat unusual approach, I note that the Insolvency-Related Judgments Model Law is choice-of-law blind. I do not think that the Nuzilian rules of set-off are part of Nuzilian public policy. Indeed, it would be extremely parochial for a country to elevate its domestic law to the level of public policy simply on the ground that the foreign court has applied a rule unknown to its own legal system or different from the rule that this Court would apply in comparable circumstances.
49. Also, I note that, unlike in *BCCI*, the case at bar involves a foreign (namely German) bank. On the other hand, as I have pointed out above, it seems that Nuzilian public policy should favour, rather than bar recognition in light of Wonderphone’s importance as one of Nuzilia’s largest employers. Under these circumstances, an invocation of the public policy exception seems unwarranted.

### Conclusion

50. For these reasons, I will recognize the proceeding in Mercuria as a foreign main proceeding, as well as (admittedly, with some reluctance) the judgment of the Mercurian Court ordering Geldbank to pay the Swap Debt to Wonderphone.

### Judgment of Judge Solomon on Permission to Appeal

Geldbank seeks permission to appeal from my judgment. I recognize that the issues the parties have raised involve novel points of law on which there is no prior authority in Nuzilia. I also anticipate that the Supreme Court of Nuzilia may have the benefit of a wider citation of case law and analysis of the UNCITRAL Model Laws from other jurisdictions than I have had at the hearing before me. Accordingly, I consider that it is appropriate to grant permission to appeal directly to the Supreme Court of Nuzilia on the following two grounds:

- i. whether the Mercurian section 111 proceeding should be recognized in Nuzilia as a foreign main proceeding; and
- ii. whether Articles 7, 14(f) and (g) of the Insolvency-Related Judgments Model Law prevent enforcement in Nuzilia of the Mercurian Court's judgment in Wonderphone's favour with regard to the Swap Debt.