NUZILIA BANKRUPTCY COURT

In re: La Buena Tienda, S.A., Debtor	Case No: 24-12712

SUBMISSION OF ARGUMENTS FOR PETITIONER REPRESENTED BY TEAM 9

INTRODUCTION

1. The time to determine the centre of main interests ("**COMI**") is the date of recognition proceedings. In any event, La Buena Tienda's ("**LBT**") COMI has always been in Utopia, and consequently no abuse of process could have occurred. There has been no violation of Nuzilian public policy. Even if there were a relevant Spanish public policy issue, it would be irrelevant in Nuzilia.

I. COMI IS DETERMINED AS AT THE DATE OF RECOGNITION PROCEEDINGS.

A. The US approach of determining COMI should be adopted.

2. The UNCITRAL Model Law on Cross-Border Insolvency ("**MLCBI**") which is incorporated into the Nuzilia Insolvency Statute ("**NIS**") does not dictate the time at which to evaluate COMI. National courts have made their own judgments, with two distinct approaches emerging:

    a. Upon the filing of the recognition application in respect of the foreign insolvency proceedings ("**the US approach"**), and

    b. Upon commencement of the foreign insolvency proceeding ("**the European approach"**).

3. The US approach evaluates COMI at the time the Chapter 15 petition is filed, which signifies recognition of proceedings: *Morning Mist Holdings v Krys.*[1] This approach has been favoured across common law insolvency hubs such as England[2] and Singapore.[3]

4. Since Nuzilian Chapter 10 proceedings derive from the US Bankruptcy code proceedings,[4] the US approach of evaluating COMI, under Chapter 15 on recognition of multiple proceedings, should be applied to evaluate COMI under the Nuzilian statute.

5. COMI should be evaluated at the time of the recognition proceedings- which is May 2023. At this time, the COMI is Utopia.

B. <u>The presumption that COMI should be at the registered office is inapplicable.</u>

6. Article 16(3) of the NIS, based on MLCBI, presumes the debtor's registered office to be COMI in the absence of proof to the contrary.

7. The presumption has been regarded as weak in European Insolvency Regulation ("**EIR**") cases: *Re Ci4net.com Inc.*[5] EIR cases are relevant to interpreting COMI with the MLCBI.[6] Accordingly, the presumption in Article 16(3) is weak.

8. The presumption is easily rebutted where: a) the registered office is simply a letterbox.[7] LBT's Spanish Office is a 'letterbox' since it only exists to fulfil the precondition of the 2026 Memoranda Notes, with a Madrid mailing address only existing for purely 'corporate purposes', b) the registered office is not the principal place of business,[8] which applies here since LBT's principal place of business is in fact Utopia since it serves as the central office of the company, solely managing its global distribution.

C. <u>COMI should be evaluated holistically, focusing on independent factors.</u>

[1] 714 F.3d 127, 133 (5th Cir. Apr. 16, 2013).
[2] *Re Toisa* (ICC, 29 March. 2019).
[3] *Zetta Jet Pte Ltd and others* [2019] SGHC 53.
[4] Footnote 2, moot problem.
[5] [2005] BCC 277.
[6] *Stanford International Bank Limited* [2009] EWHC 1441.
[7] *EIR: Eurofood IFSC Ltd* [2006] Ch 508 (ECJ).
[8] [2010] FCA 794 [25].

9. The evaluation of COMI depends on independent factors[9] such as the location of management, employees and financing: *Kapila, Re Edelsten* ("**Kapila**").[10] The most important factors have been deemed to include the location of headquarters and management.[11]

10. By February 2023, all these factors pointed towards Utopia as the COMI: 1) since 2001, Arcadia served as LBT's headquarters as it was the central office, 2) it has been the location of LBT's financing since 2001 since the CFO and accounting team are located in Utopia, 3) from Fall 2022 all employees and management and employees have been situated in Arcadia since all employees were moved to this office including the CEO who has sole control over strategic decisions.

D. <u>The rationale behind the use of COMI supports the COMI being in Utopia.</u>

11. The rationale behind COMI is that insolvency is a foreseeable risk, and thus should be based on a place known to the debtor's potential creditors: Virgos- Schmidt report ("**VS report**").[12]

12. Utopia is the place known to potential creditors: a) both offering memoranda make clear the Utopia office is responsible for all administrative operations, and that creditors would likely be subject to Utopian proceedings, b) creditors and customers were notified in 2022 that all service and account queries were managed in Utopia.

13. 'Interests' under COMI involve commercial, industry, professional and general economic activities.[13] Commercially, the company's central office is in Utopia. Professionally, all employees and management are in Utopia from Fall 2022. General economic activities are based in Utopia too since the Arcadia office has always managed financing.

14. The COMI must be ascertainable to third parties, including the objective observer.[14] This is Utopia, given creditors and customers were told their queries would be managed in Utopia.

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[9] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation [144].
[10] [2014] FCA 1112 [56–57].
[11] Ibid.
[12] M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996. Although based on EIR, relevant given COMI shares the same meaning for MLCBI: Stanford (n 6).
[13] Ibid.
[14] *EIR: Shierson v Vlieland-Boddy* [2005] 1 WLR 3966 [55].

II. EVEN IF THE DATE OF COMMENCEMENT OF FOREIGN INSOLVENCY PROCEEDINGS IS APPLICABLE, COMI IS UTOPIA.

E. The registered office presumption of COMI remains inapplicable.

15. Even if, as the Respondent contends, COMI is evaluated at the time of commencement of foreign proceedings: post- Summer 2022 following the boiler explosion, the COMI continues to be Utopia. The registered office presumption is rebutted since there is evidence to the contrary.

16. In addition, the shift in evaluation time does not change the fact that both offering memoranda emphasised that creditors would be subject to Utopian insolvency proceedings and that all LBT's administrative operations occurred in Utopia. Following the VS report rationale, Utopia is the COMI since it was the known place to LBT's creditors, even before Fall 2022.

F. The COMI continues to be in Utopia on a holistic evaluation.

17. Factors relevant for evaluating COMI under the MLCBI, and accordingly the NIS, are headquarters, management, and financing.[15] Since 2001, Utopia has fulfilled these factors making it the COMI at the time of commencement of proceedings.

18. Since 2001, Arcadia has served as LBT's headquarters for LBT as their central office and has also been the location of financing, with the CFO and accounting team located in Utopia. Management was also centered in Utopia given, out of those making management decisions, two officers were in Madrid, two in Utopia and one worked most frequently in Utopia. All factors holistically show Utopia is the COMI.

III. THERE WAS NO ATTEMPT TO SHIFT COMI SO THERE HAS BEEN NO ABUSE OF PROCESS.

19. COMI-shifting is only an abuse of process where COMI is manipulated in bad faith.[16] LBT was unaware of the Spanish order filed by the Respondent, and could not have consciously manipulated their COMI,[17] and hence no abuse of process occurred.

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[15] UNCITRAL MLCBI Guide (n 9) and *Kapila* (n 10).
[16] *re Creative Finance Ltd*. 2016 BL 8825 (Bankr. S.D.N.Y. Jan. 13, 2016).
[17] Footnote 3, moot problem.

20. Changing COMI is permitted where it is justified and legitimate for reasons such as to preserve going-concern value and maximise asset values.[18] Even if LBT is found to have changed COMI, this is not an abuse of process since any changes from Spain to Utopia were justified and legitimate as they were done to consolidate LBT's operations due to cash flow decreasing.

IV. THE CHAPTER 10 PLAN SHOULD NOT BE REFUSED ON GROUNDS OF PUBLIC POLICY.

A. The terms of the Chapter 10 plan do not violate the public policy of Nuzilia, and the Nuzilian Court should recognise the Chapter 10 proceedings and enforcement.

a) The public policy exception should be construed narrowly.

21. Article 6 of the NIS incorporates Article 6 MLCBI. Since the Nuzilia Bankruptcy Court has not previously interpreted this section, it is appropriate to consider its construction by non-Nuzilian courts to promote uniformity. This ensures greater consistency and predictable outcomes for creditors and investors, promoting broader investment and financial stability.[19]

22. Public policy should be interpreted restrictively: UNCITRAL official guidelines[20], *Hartford Computer Hardware Inc*.[21] The UNCITRAL Guide on Enactment[22] pinpoints the dichotomy between the notion of public policy on a domestic level and within international cooperation, to the effect that public policy in an international sense relates only to matters of fundamental principles (*Ephedra Prods. Liab. Litig*.). [23]

23. Although the narrow interpretation has not yet been adopted by the Nuzilian Court, it should apply a similar threshold to ensure universal application of the MLCBI. This is because Nuzilia, by incorporating the MLCBI, has contributed towards UNCITRAL's goals

[18] *re Ocean Rig UDW Inc*., 2017 570 B.R. 687.
[19] Article 8 UNCITRAL MLCBI.
[20] UNCITRAL MLCBI Guide (n 9).
[21] *Hartford Computer Hardware Inc*. 2012 ONSC 964 [17]-[18].
[22] (n 9) [103].
[23] *re Ephedra Products Liability Litigation* 349 B.R. 333, 336 (S.D.N.Y. 2006).

in promoting greater legal certainty and facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[24]

b) The 'public policy' claims are not capable of invoking Article 6.

24. The term of importance is that which compromises the climate change levy claim of c.$1 million without the approval of the Nuzilian Tax Authority as a general unsecured creditor. Ranked as a preferential debt under the NIS, s.4(4) provides that a company may not approve a restructuring plan that compromises a preferential debt, except with the concurrence of the preferential creditor concerned. Whilst Nuzilian law protects preferential creditors, Utopian law does not. However, mere conflict is insufficient to successfully invoke Article 6: *Iida v Kitahara.*[25]

25. There is no public policy which prevents approval of the Chapter 10 plan for three reasons: a) s.4(4) NIS does not apply to the Chapter 10 plan, b) the statute cannot be applied by analogy, and c) public policy cannot be drawn from the statute.

26. S.4(4) does not apply to a restructuring plan abroad by a foreign company because 'company' should be interpreted as meaning a Nuzilian company only. Since the plan was commenced in Utopia, s.4(4) cannot be relied upon by the Respondent.

27. Nor can s.4(4) be applied by analogy. It has been said in the Privy Council that applying legislation by analogy "as if" the foreign insolvency was a local insolvency "involves a fundamental misunderstanding of the limits of the judicial law-making power."[26] Even though the statute does not apply to the Petitioner, applying it by analogy "as if" it applied would be a "plain usurpation of the legislative functions."[27]

28. Nor can any public policy be drawn from a statute which does not apply to the actual circumstances.[28] Since it is established that s.4(4) prohibits only the acts of restructuring plans under Nuzilian law, a foreign restructuring plan cannot be considered a prohibited

[24] (n 9) Preamble.
[25] *Iida v Kitahara* (In re Iida) 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007).
[26] Ibid. [36], [38].
[27] Ibid. [63].
[28] Chitty on Contracts (34th edn, Sweet & Maxwell, 2022).

act. Public policy cannot be drawn from s.4(4) to apply it where, on a true construction of the statute, it is not applicable.

29. In any event, public policy cannot be used to indirectly enforce foreign revenue law.[29]

B. The public policy of Spain is not a relevant consideration, and in any event, the claims do not amount to a public policy exception.

a) Public policy of a foreign country is not a relevant consideration.

30. As a matter of principle, public policy of a foreign country, such as Spain, is not a relevant consideration when recognising a foreign judgment.[30]

b) Even if the public policy of a third country is a relevant consideration, the Spanish claims are not sufficient to invoke Article 6.

31. Whether the Chapter 10 plan should be refused on grounds of public policy is to be construed narrowly, and the Spanish claims fall short of this threshold. It is appropriate to consider the restrictive construction of Article 6 by non-Nuzilian courts to promote uniformity.[31]

32. The terms of importance are those that compromise the Respondent's claim for 15% of the principal amount of $8 million, with the remainder released and the claim derived from the sanction for 15% of the principal amount of €2 million, with the remainder released.

33. The disputed term relating to the Respondent's claim can be characterised by the principle that mere conflict between foreign and local law is insufficient to invoke the public policy exception (*Re Iida.)*[32] Under Spanish insolvency law, the Petitioner could not approve a restructuring plan that compromises preferential claims. However, Chapter 10 of the Utopian Bankr. Code §1029(b)(1) stipulates that the plan may be approved notwithstanding lack of acceptance by a class of interests if it does not discriminate unfairly - of which it does not since it compromises each general unsecured creditor in equal

[29] Dicey, Morris & Collins on the Conflict of Laws (16th edn, Sweet & Maxwell, 2023) 8-002 and *Skatteforvaltningen v Solo Partners LLP* [2022] EWCA Civ 234 [126].
[30] Ibid.
[31] Supra 21.
[32] (n 25).

proportions, to be paid 15% of the principal amount. Although the Spanish proceedings seek to enforce the principle of distributing a debtor's assets in accordance with the priority of each creditor, this enhanced protection to preferential creditors cannot be categorised as a fundamental principle of Spanish law pursuant to the notion that statute does not create public policy.[33]

34. Equally, the Petitioner did not engineer jurisdiction in Utopia since the offering memoranda make it clear that the Petitioner might be subject to bankruptcy proceedings in Utopia, which is less favourable to creditors than proceedings in Spain. It is therefore clear that Utopian bankruptcy proceedings were a foreseeable event.

35. With respect to the second term, the penalty claim issued by the Spanish Tax Authority cannot amount to a public policy claim. To do so would otherwise be indirect enforcement of a foreign tax claim which is unenforceable under the conflict of laws.[34] There is a "well-established and almost universal principle that the courts of one country will not enforce the penal and revenue laws of another country."[35] On this basis, the tax sanction cannot be brought as supporting evidence that there is a violation of Spanish public policy.

36. To characterise compromising a penalty claim as an abuse of process is to misinterpret the nature of such a claim. Whilst the court in *Re Gold & Honey*[36] held that violating an automatic stay violated the purpose of the stay - namely in preventing one creditor from obtaining an advantage over another - an analogy cannot be drawn with the claim. Compromising the sanction for 15% of its principal amount is not analogous to violating the purpose of the stay - an element of the penal function remains. It continues to function as a burden that the Petitioner must repay so it is tenuous for the Respondent to rely on 'abuse of process'.

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[33] Supra 30.
[34] Dicey, Morris & Collins (n 29).
[35] Ibid.
[36] *Re Gold & Honey* 410 B.R. 357 (Bankr. E.D.N.Y. 2009).