

NUZILIA BANKRUPTCY COURT

In re:

La Buena Tienda, S.A.,

Debtor.

Case No.: 24-12712

SUBMISSION FOR RESPONDENT REPRESENTED BY TEAM 27

I. The appropriate time for determining the centre of main interests (“COMI”) of La Buena Tienda (“LBT”) is the date commencing the involuntary bankruptcy proceeding in Spain.

1. The applicable time for evaluating COMI should be the date commencing the foreign insolvency proceeding.¹ In the present case, it is the time when the Spanish proceeding was commenced.
2. The date commencing the foreign proceeding is more appropriate given its strengths compared with the date applying for recognition.

2.1 Firstly, determining COMI by the date commencing the foreign proceeding promotes greater cooperation and legal certainty.² By this approach, the outcome of determining COMI would be fixed and consistent in different jurisdictions as the debtor’s activities after the commencement of a foreign proceeding are excluded.³ On the contrary, the date applying for recognition would be volatile and the COMI assessment might lack unification.⁴ Therefore, the date commencing the foreign proceeding is to be preferred.⁵

¹ UNCITRAL, *UNCITRAL Model Law Cross-Border Insolvency with Guide to Enactment* (2013) [159] (“MLCBI Guide”). See also Case C-1/04 *Susanne Staubitz-Schreiber* [2006] ECR I-701 [29]; Case C-369/09 *Interedil Srl* [2011] ECR I-9939 [55]; *Re Videology Ltd* [2018] EWHC 2186 (Ch) [49]; *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974 [55(1)].

² *Kapila, Re Edelsten* [2014] FCA 1112 [37] and [38].

³ *In re Paul Zeital Kemsley*, 489 BR 346, 359 (Bankr SDNY 2013).

⁴ *In re Millennium Global Emerging Credit Master Fund Ltd*, 458 BR 63, 72 (Bankr SDNY 2011).

⁵ *Kemsley* (n 3) 359; *Millennium* (n 4) 72.

- 2.2 Secondly, choosing the date applying for recognition might lead to a risk of abusive forum shopping.⁶ There is the possibility that the debtor conducts a COMI shift before applying for recognition in a certain jurisdiction for improper purposes like achieving additional relief and evading legitimate creditors from obtaining benefits.⁷ If courts failed to identify this opportunistic COMI shift and granted recognition to the debtor, the outcome would be unfavourable and cause prejudice to creditors.
3. The applicable date for determining COMI in this case should be the date commencing the insolvency proceeding in Spain, instead of the time commencing the seeming insolvency proceeding in Utopia.
- 3.1 Firstly, like the Nuzilian recognition proceeding, the Utopian proceeding also began after the Spanish proceeding.⁸ To obtain consistency of LBT's COMI, as well as avoid intentional COMI shift out of bad faith⁹ conducted by LBT between the Spanish and Utopian proceedings, the date commencing the Spanish proceeding should be a better choice in determining LBT's COMI.
- 3.2 Secondly, the Utopian proceeding should not have been filed. Only the debtor who has its COMI in Utopia could file Chapter 10 proceedings in the courts of Utopia.¹⁰ LBT, whose COMI is in Spain, is not eligible for commencing a foreign insolvency proceeding in Utopia. Therefore, the Utopian proceeding could not have been opened and the time of its commencement is not likely to be used to determine COMI. On the contrary, the Spanish foreign proceeding is ongoing and its commencing time is appropriate for the COMI assessment.
4. Accordingly, the appropriate time for determining LBT's COMI is the date commencing the Spanish insolvency proceeding where LBT has its COMI. The Utopian and Nuzilian proceedings are irrelevant to decide such timing.

⁶ *Millennium* (n 4) 75; *Kemsley* (n 4) 359.

⁷ *In re Creative Finance Ltd*, 543 BR 498, 524 (Bankr SDNY 2016).

⁸ Background [2].

⁹ *Petition of Ernst & Young, Inc*, 383 BR 773, 780 (Bankr D Colo 2008).

¹⁰ Background [note 2].

II. LBT's COMI was in Spain.

5. The COMI of LBT should be in Spain. The COMI could be simply presumed as the place where the debtor registered when there is no proof to the contrary.¹¹ In conformity with this presumption, the LBT has been maintaining its office registered under Spanish law since 1980.¹²
6. In addition to the rebuttable presumption, the COMI of the debtor could be assessed based on two criteria. First, COMI shall be the place where the debtor administers its interests centrally and regularly.¹³ Second, the central administration in the place of COMI shall be objective and ascertainable by third parties (including creditors, potential creditors¹⁴ and investors¹⁵) who observe and perceive objectively what the debtor conducts.¹⁶
7. The non-exhaustive factors¹⁷ showing that LBT conducts central administration in Spain are as follows.

7.1 Firstly, COMI should be the place where the company's day-to-day operations are coordinated, directed, and carried out.¹⁸ LBT had its day-to-day operation conducted in Spain. In addition, the fact that LBT's headquarters and executive offices are in the same State where the company's major business also takes place contributes greatly to determining COMI.¹⁹ Three of the five senior executive officers who administered major interests²⁰ of LBT were residing in Spain.²¹ More importantly, CEO entitled to make final decisions worked in LBT's Spanish office and controlled solely the main business of LBT, including the manufacture and sale of products.²² In terms of major business, since the

¹¹ UNCITRAL Model Law Cross-Border Insolvency ("MLCBI"), art 16(3); *In re SPhinX Ltd*, 351 BR 103, 117 (Bankr SDNY 2006).

¹² Background [9].

¹³ *MLCBI Guide* (n 1) [145]; Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) art 3(1).

¹⁴ *Kapila* (n 2) [53].

¹⁵ *Millennium Global Emerging Credit Master Fund Ltd*, 474 BR 88, 93 (SDNY 2012).

¹⁶ *MLCBI Guide* (n 1) [145]; EIR Recast (n 13) [30].

¹⁷ *SPhinX* (n 11) 117; *MLCBI Guide* (n 1) [147].

¹⁸ *Hertz Corp v Friend*, 559 US 77, 88 (2010); *Central West Virginia Energy Co v Mountain State Carbon LLC*, 636 F.3d 101, 107 (4th Cir 2011).

¹⁹ *Hertz* (n 18) 89.

²⁰ *Re Zetta Jet Pte Ltd* [2019] SGHC 53 [21]; *Legend International Holdings Inc v Legend International Holdings Inc* [2016] VSC 308 [98].

²¹ Background [11].

²² Background [11] and [16].

cross-border sale is incident to the clothing manufacture,²³ the major business of the LBT who manufactures locally but sells products globally shall be its Spanish extensive manufacturing operations.²⁴ These facts indicate the unshakable status of its Spanish office as the place where the core and regular operations of LBT are conducted.

7.2 Secondly, the location of assets is also a crucial factor in assessing COMI.²⁵ For LBT, Spain is the place where it has primary assets located. While the assets of a cross-border corporation are often placed in more than one State, the COMI is the place where “management direction and control of assets” are found.²⁶ Since assets like products are always in a state of flux, the location of fixed assets of the company has greater significance in assessing COMI.²⁷ In the case of LBT, its fixed assets include a manufacturing facility in Spain and offices established in both Spain and Utopia. Among these, the facility shall be considered as one of the primary assets of LBT since it is always at the centre of LBT’s business operation and strategic decision.

8. The following factors could explain why LBT’s COMI in Spain is ascertainable by third parties.

8.1 Firstly, LBT’s extensive manufacture in Spain is easily ascertainable by a substantial proportion of its creditors and potential creditors. The ascertainability means that the factors determining the debtor’s COMI are permanent²⁸ in the public domain, and can be perceivable “in the ordinary course of business with the company”.²⁹ The clothing manufacture of LBT in Spain is consistent throughout its history, playing a fundamental and permanent role in its running.³⁰ The ordinary and daily manufacturing and selling business of LBT also tend to establish numerous legal relationships between LBT and other parties,³¹ especially creating LBT’s obligations as

²³ Background [9].

²⁴ *Continental Coal Corp v Roszelle Bros*, 242 F 243, 247 (6th Cir 1917).

²⁵ *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd*, 389 BR 325, 336 (SDNY 2008).

²⁶ *Re Stanford International Bank Ltd & Ors* [2009] EWHC 1441 (Ch) [66].

²⁷ *Zetta* (n 20) [78].

²⁸ See above note 14.

²⁹ *Stanford* (n 27) [70].

³⁰ Background [9] and [21].

³¹ *In re British-American Insurance Co Ltd*, 425 BR 884, 901, 914 (Bankr SD Fla 2010).

a debtor. The tag with the words “*Fabricado en Madrid*” could be found in every product sold by LBT,³² which indicates its deep relationship with Spain to the public.

8.2 Secondly, the memoranda provided along with the “2025 Notes” and “2026 Notes” issued by LBT shall be less considered when determining its COMI. The indentures of two Notes are only available through certain paid-subscription-based databases.³³ It is then understandable that the warning of the possibility of a Utopian bankruptcy in memoranda³⁴ is not likely to be noticed by creditors like Rhapsody, who have neither long-term business transactions, nor notes transactions with LBT. The factors like memoranda that could be attained only through inquiry do not conform with the criterion of ascertainability.³⁵

9. In conclusion, considering the rebuttable presumption of COMI and LBT’s central administration ascertainable by third parties, LBT’s COMI should be in Spain.

III. The terms of the Chapter 10 Plan violate the public policy of Nuzilia and Spain. And it is imperative for the Nuzilian court to decline the recognition and enforcement of the Chapter 10 Plan.

10. The recognition of the Chapter 10 Plan would manifestly violate the public policy of both Nuzilia and Spain with international character, as explicitly prescribed under Article 6 of MLCBI.

11. The wording of Article 6 of MLCBI, in particular the expression of “manifestly”, also incorporated in the *Nuzilia Insolvency Statute*, indicates that the interpretation of public policy should be narrowly construed, emphasising that this doctrine shall be served as a last resort.³⁶ Normally, courts would only invoke the public policy exception when constitutional or fundamental statutory rights are severely impinged.³⁷ In the present case, there are three reasons why recognition would

³² Background [9].

³³ Clarifications.

³⁴ Background [15].

³⁵ *Stanford* (n 27) [62].

³⁶ *MLCBI Guide* (n 1) [101]-[104]. See also Richard Sheldon QC (Gen Ed), *Cross-Border Insolvency* (4th Ed Bloomsbury Professional 2015).

³⁷ *In re Qimonda AG*, 462 BR 165, 183 (Bankr ED Va 2011).

manifestly contravene public policy.

12. Firstly, the Chapter 10 Plan seeks to compromise Rhapso's claim for 15% of the principal amount³⁸ that is expected to enjoy a preferential ranking³⁹ under Spanish law. The Plan, however, infringes upon such preferential rights. Recognising a foreign proceeding that extinguishes priority claims may severely diminish the value of a constitutional right and unjustly impede the legitimate protection of creditors' interests. The priority of Rhapso's claim should not be undermined, as it is interconnected with the fundamental principles of insolvency law and the constitutional property rights of creditors.
13. Secondly, the Plan seeks to compromise the sanction for the environmental breach, wrongly exempting LBT from liability for negligence or fraud.⁴⁰ This sanction, linked to the public interest, also enjoys a preferential treatment and must not be compromised. The obligation of LBT to cover the reparation cost arises from Spanish law and European Directive guidance and predates the initiation of bankruptcy proceedings. It contributes to the restoration of the contaminated area in the interest of public health⁴¹ and should be distinct from private claims.⁴² Such sanction claim should not be compromised since it is payable for the governmental benefit and not for actual pecuniary loss.⁴³ Otherwise, the opportunity to gain exoneration from previous misconduct could lead to debtors using bankruptcy to avoid the payment of fines and penalties.⁴⁴
14. Thirdly, the compromise of the climate change levy claim infringes upon three fundamental rights or principles pertaining to public policy, specifically: the state's tax authority, the priority of creditors, and societal environmental interests.

14.1 Chapter 10 Plan infringes upon Nuzilia's tax sovereignty, a principle deeply rooted in the notion that all individuals should be subject to the same taxation laws, irrespective of their financial solvency.⁴⁵ It is fundamental that the government be able to collect taxation so as to maintain the State.⁴⁶ Without

³⁸ Background [36].

³⁹ Background [5(b)].

⁴⁰ Background [37].

⁴¹ EU Directive 2004/35/CE Preamble [8].

⁴² *Orphan Well Association v Grant Thornton Ltd* [2019] SCC 5 [122].

⁴³ 10 Utopian Bankr Code §523.

⁴⁴ Australian Bankruptcy Act 1966 (Cth) (Act), Section 58(3), 60(1)(b), 82(3).

⁴⁵ *Akers (as joint foreign representative) v Saad Investments Company Limited* [2013] FCA 738 [43].

⁴⁶ *Akers* (n 45) [45].

the consent of tax authorities, the Chapter 10 Plan violates fundamental rights enshrined in Nuzilian law.

14.2 Environmental claims are one category of public duties, which are claims owed to citizens and that neither regulator nor government should gain financially from the enforcement of relevant obligations.⁴⁷ Such claim does not stay upon insolvency procedure and continues to be binding on the estate.⁴⁸ In accordance with the Nuzilian law, the levy is a preferential claim⁴⁹ and primarily focuses on mitigating the negative impact of human activities, which result in protecting natural ecosystems and humanity.⁵⁰ As a result, it enjoys the preferential treatment. However, the Chapter 10 Plan falsely cancelled the preferential of such levy claim.⁵¹

14.3 The environmental interests, also, should be encompassed within the scope of public policy. Firstly, environmental interests are closely linked to the fundamental right to health⁵² and constitute a part of public policy. Furthermore, the term “public policy” can be comprehended by examining how it is interpreted in other regimes of insolvency law, especially those that bear similarity to the public policy exception. To illustrate, environment claims are normally fall within the scope of exceptions to the automatic stay, such as obligations to prevent environmental damage,⁵³ or threats to public health and safety.⁵⁴ Such arrangements inherently suggests the link between environmental claims and public policies, which is fundamental to the general society as a whole. Therefore, recognising the Chapter 10 Plan will jeopardize Nuzilia’s environmental interests.

15. In compliance with the established legal framework and the operative function of the public policy exception, the Nuzilian court should decline the recognition and enforcement of the Chapter 10 Plan.

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⁴⁷ See above note 45.

⁴⁸ *Akers* (n 45) [118].

⁴⁹ Background [34].

⁵⁰ United Nations, United Nations Framework Convention on Climate Change, Preamble.

⁵¹ Background [35].

⁵² OHCHR, *The Right to Health Fact Sheet No. 31* [3].

⁵³ UNCITRAL, *Legislative Guide on Insolvency Law*, 86 [35].

⁵⁴ 10 Utopian Bankr Code §362(b)(4).