IAN FLETCHER INTERNATIONAL INSOLVENCY LAW MOOT 2021

In the Matter of MI Co.

File reference: ICNAC No 9 of 2020

Appeal from: MI Co. v The Bank of Nuzilia [2020] ICNR 35

Judge: Judge Singh

Date of decision: 10 September 2020

Background

1. The ChenGroup (the "Group") comprises 10 hotels located in major tourist centres throughout the world whose clientele has almost exclusively been Chinese tourist groups. Four of the Group's hotels are located in the United States (one in each of Chicago, New York, Los Angeles, and Washington, D.C.). Of these, the hotel in Los Angeles is the Group's largest and historically most profitable hotel. The Group's other six hotels are located in Cairo, Paris, New Delhi, Rome, Sydney, and the nation of Nuzilia.

2. Each of the hotels (the "operating companies") is separately incorporated, and the shares of eight of them are owned by a corporation registered in the Marshall Islands. The shares in the Marshall Islands company ("MI") are in turn held by a holding company located in the Cayman Islands, which is in turn held by a holding company located in Hong Kong. The Hong Kong company is owned by a Chinese family, directly and through a series of family trusts. The Hong Kong company owns a management company, also incorporated in Hong Kong but doing business in each of the jurisdictions in which the hotels are located, that provides management services to all of the hotels. The shares in the remaining two hotels are directly owned by the Cayman Islands company. Paragraphs 3-5, immediately below, detail how the hotels were acquired and financed.

3. Three of the hotels – the ones in New York, Los Angeles, and Nuzilia – were acquired using funds loaned to MI by the Bank of Nuzilia ("the Bank") and

thereafter advanced to the operating companies. US $150 million is outstanding. The loan agreement between MI and the Bank, which is governed by the law of Nuzilia, provides that the borrower (MI) cannot change the location of its registered office or its center of main interests ("COMI") without the Bank's consent in writing. MI's debt to the Bank is guaranteed by all other members of the group and secured by a pledge of the shares of certain of the operating companies, as further explained below. These shares are certificated and are held in the Bank's vault in Nuzilia. The Bank has more than 100 branch offices in 10 countries throughout the world, but none in the United States.

4. The Group acquired its first five hotels (in, respectively, Cairo, Paris, New Delhi, Rome, and Sydney) prior to the Bank's involvement, using funds loaned to the Hong Kong company by a consortium of Chinese lenders. US $100 million is outstanding. As a condition of making its loan, the Bank insisted that MI be formed as a new holding company to own the shares of the five then existing operating companies, and the three new operating companies that were incorporated to acquire the hotels in New York, Los Angeles, and Nuzilia with the funds loaned by the Bank. The Bank also required a pledge of the shares of all eight operating companies as security for the loan. The Chinese lenders were aware of the formation of MI and the fact that the Bank would have a pledge of the shares of the eight operating companies then owned by the Group, including the five that they had financed. Neither step violated the loan agreements with the Chinese lenders, and they did not object.

5. After the Bank's loan closed, the Group borrowed another $70 million from two New York hedge funds and purchased two additional hotels located in the United States (the ones in Washington, D.C. and Chicago). The funds were borrowed by the Cayman Islands company, which became the direct owner of the two operating companies for those hotels, and it pledged the shares in those operating companies to the hedge funds.

6. Until recently the Group was very profitable, but its business has been decimated by the COVID-19 pandemic. The debt to the Bank, to the Chinese lenders, and the two hedge funds is in default, but the Bank is the only lender that has taken enforcement action. The Bank gave notice of default and notice of its intent to foreclose on the shares of the eight operating companies subject to its security agreement. Having no good options, MI, its affiliates and owners entered into a standstill agreement with the Bank providing that they would have six months to sell some or all of the hotels or otherwise pay off the debt. If they were unable to satisfy the debt after six months, they agreed not to interfere with the Bank's foreclosure of the shares. The standstill agreement incorporated the covenants in the loan agreement whereby MI agreed that it would not shift its registered office or its COMI from the Marshall Islands without the Bank's written consent.

7. The record is not clear to what extent the Group actually engaged in a good faith effort to find a buyer during the standstill period, but there is no dispute that the market for hotels is extremely depressed as a consequence of the pandemic.

8. In any event, during the six-month standstill period, the Group rented and opened a small office in Los Angeles, to which it relocated Andy Artful, who is an officer and director of MI and the Cayman company. All of MI's and the Cayman company's books and records were transferred from Hong Kong to the new office in Los Angeles. The management company, which had previously done business in Los Angeles relating to the hotel there, started managing all of the hotels from the Los Angeles office. Board of Directors meetings were held, by Zoom, with some participants joining from Los Angeles. The Group also incorporated under Delaware law a new subsidiary of the Cayman company, named FinanceCo., for the purpose of obtaining financing for the Group. The Group disclosed all of these actions in a press release that was publicly disseminated and emailed to the Bank, as well as to all of the Group's other creditors. The Bank took no overt action in response.

9. Then, three days before the end of the six-month standstill period, MI filed a chapter 11 petition in the United States Bankruptcy Court for the District of Delaware along with the Cayman Islands company and FinanceCo., the new finance company. Concurrently, it was announced that FinanceCo. had been successful in lining up debtor in possession financing for the chapter 11 proceedings and that this financing could be converted, on certain terms and conditions, into long-term exit financing for the Group.

10. The Bank is headquartered in Nuzilia. Nuzilia has a winding up and reorganization law that gives debtors some latitude in their efforts to reorganize, allows debtors to remain in possession, and has effective debtor in possession financing provisions. It also stays any action by a secured creditor to foreclose on the date a petition for reorganization is filed. However, the stay is limited in duration and the law places the onus on the debtor to "show cause" as to why the stay should continue beyond 21 days after the date of the petition. Nuzilian law permits a debtor to file in Nuzilia if the debtor has a "substantial connection" with Nuzilia. A debtor who is registered in Nuzilia, or who has valuable assets, or a place of business carrying on meaningful economic activity in Nuzilia, will meet the "substantial connection" requirement. Nuzilia has adopted the UNICTRAL Model Law on Cross-Border Insolvency ("MLCBI") and it was the first nation in the world to adopt the 2019 UNCITRAL Model Law on the Insolvency of Enterprise Groups ("MLEG").[1]

11. Shortly after MI's petition for chapter 11 reorganization was filed in Delaware, the Bank appeared for the limited purpose of moving to dismiss. The Bank made the following arguments: (i) that the petition was filed in bad faith, directly contravening the Group's agreement to sell the hotels or surrender the collateral; (ii) that the Group's blatant attempt to create jurisdiction in the United States was

[1] The MLCBI and the MLEG can both be found on the UNCITRAL website, www.uncitral.un.org. The Nuzilian enactments adopted the text of the MLCBI and MLEG without amendment.

unsuccessful, that MI's connection to the United States was artificial and manufactured, and that the operations of MI's affiliates in the United States were irrelevant; (iii) that MI's center of main interests or "COMI" was at its registered office in the Marshall Islands, that its claim of non-main status based on relocating one corporate officer was unacceptable forum shopping, and that the Bank could not have reasonably foreseen involvement in an insolvency proceeding in the United States; (iv) that the court should dismiss the case on *forum non conveniens* grounds; (v) that Nuzilia would never recognize the chapter 11 case or enforce a chapter 11 stay or the US court's confirmation of a chapter 11 plan as it would be contrary to the text and principles of the MLCBI and a violation of Nuzilian policy and law.

12. In response, the debtors, supported by the Chinese lenders and the hedge funds, made the following arguments: (i) that the chapter 11 proceedings were the Group's only chance for survival and for the preservation of any value for any party other than the Bank; (ii) that if the Bank were allowed to seize the shares, it could appropriate the entire value of eight of the hotels at a time of unprecedented international financial depression when there are simply no buyers for hotel properties at a fair price; (iii) that the MLEG, which Nuzilia has adopted, supports the continuation of the chapter 11 cases in that it contemplates an insolvency filing in one location and an effort to produce a "group solution" effective throughout a corporate group; (iv) that the purposes of the Model Laws would not be served by dismissal; (v) that the Bank had acted maliciously and in contravention of the legitimate interests of all other creditors when it required the formation of a new Marshall Islands subsidiary to be the artificial borrower of its debt, not least because the Bank was fully aware that the Marshall Islands have no reorganization law, and that a secured lender to a Marshall Islands entity cannot be prevented from seizing its collateral in the event of a default; and (vi) that the real violation of public policy would be a value-destructive outcome dictated by Marshall Islands' insolvency law.

13. The US Bankruptcy Court denied the motion to dismiss, and the debtors shortly thereafter filed a chapter 11 plan. In accordance with American "cramdown" principles, the plan provides that the Bank will receive deferred cash payments over ten years equal to the value of its collateral on the confirmation date ($60 million) and a payout of 5% on its $90 million deficiency claim. Under the terms of the chapter 11 plan, which has not yet been confirmed, the shares of the operating companies will continue to collateralize the Bank's debt, but it will be precluded from foreclosing on the shares as long as the reorganized debtors are not in default of the plan terms. Deeply dissatisfied with this state of affairs, the Bank gave notice of a foreclosure sale, to take place three weeks from now, on the shares of the hotels in accordance with Nuzilian secured transactions law.[2]

14. MI has now applied to the Insolvency Court of Nuzilia under the Nuzilian version of the MLCBI for recognition of the US chapter 11 case and a stay of the foreclosure proceedings brought by the Bank. Judge Ruchika J. Singh, in a written opinion set out below, granted the motion for recognition and entered an injunction staying the Bank's foreclosure proceedings. The Court granted permission for an interlocutory appeal to the Supreme Court of Nuzilia on the following two questions:

    (a) Whether the Court erred by recognizing the chapter 11 case as a foreign non-main proceeding under the MLCBI?
    (b) Whether the Court erred by entering an injunction, in reliance on the MLCBI and the MLEG, temporarily staying the Bank's foreclosure proceedings, on the grounds that (i) the Bank's collateral is properly administered in the chapter 11 case; and (ii) a temporary stay, at least at this juncture, would be consistent with Nuzilia's public policy?

[2] The Bank did not state whether it would participate further in the chapter 11 cases, but it had previously argued that if the debtors continued with their "unconscionable" efforts to "cram them down," it was not without recourse under US law. The Bank could make an election under section 1111(b) of the US Bankruptcy Code and retain a lien on the shares of the eight operating companies for the face amount of the debt, although it would have to give up its unsecured claim to do so.

15. In certifying the appeal on these two questions only, the Court specifically cautioned that it did not grant permission to appeal its refusal to recognize MI's chapter 11 case as a foreign main proceeding. It also noted that the parties had agreed that the requirements for a preliminary injunction are not at issue and should play no role in the appeal.

IN THE INSOLVENCY COURT OF THE REPUBLIC OF NUZILIA

Case No. 9/20

[2020] ICNR 35

IN THE MATTER OF MI CO.
AND IN THE MATTER OF CHAPTER 245 OF THE NUZILIAN REVISED LAWS

Between:

MI CO., a Marshall Islands Corporation,

Applicant

v.

THE BANK OF NUZILIA, a Nuzilian Banking Corporation,

Respondent

10 September 2020

DECISION OF THE HON. JUDGE RUCHIKA J. SINGH

Introduction

1. This is a proceeding brought by MI Co., a corporation registered in the Marshall Islands ("MI"), and a member of the ChenGroup of companies ("the Group"), against the Bank of Nuzilia (the "Bank"), a Nuzilian banking corporation, in which MI's foreign representative seeks recognition of its chapter 11 proceedings pending in the United States and an injunction preventing the Bank from foreclosing on the shares owned by MI in eight hotel operating companies located in various nations, including Nuzilia and the United States.

Applicable Statutes

2. The principal statute at issue is chapter 245 of the Nuzilian Revised Laws, the Nuzilian adoption of the Model Law on Cross-Border Insolvency ("MLCBI").[3] Article 15 of the MLCBI permits the "foreign representative" of a "foreign proceeding" to file a "petition for recognition."[4] Recognition may be granted to a "foreign main proceeding," which is a proceeding located in the jurisdiction where the debtor has its "center of main interests" or COMI, or to a "foreign non-main proceeding," which is a proceeding located at any other place where the debtor has an "establishment." See MLCBI Article 17(2). The statute does not define the term "COMI", but it establishes a presumption that the COMI is at the jurisdiction of the debtor's registered office. Article 16(3). The term "establishment" is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services." Article 2(f).

3. If recognition is granted to the representative of a "foreign main proceeding," an automatic stay goes into effect that would preclude the Bank from foreclosing on the shares, at least temporarily. Article 20(1)(b). If recognition is granted with respect to a "foreign non-main proceeding," a similar stay can be entered by the court. Article 21(1)(b). In addition, Articles 21(3) and 29(c) both provide that, in granting relief to a representative of a foreign non-main proceeding, "the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding."[5] Further, Article 6 of the MLCBI

[3] For convenience, the Court will use the article numbers in the MLCBI, as Nuzilia made no amendments to the Model Law when it was adopted. Similarly, when the Court refers to the Model Law on the Insolvency of Enterprise Groups ("MLEG"), which Nuzilia adopted without amendment in February 2020 as chapter 245A of the Nuzilian Revised Laws, it will use the article numbers in the MLEG.

[4] MI is acting in its own right as "debtor in possession" in the US chapter 11 case. By a resolution of its Board of Directors it was appointed foreign representative of its estate for purposes of bringing this proceeding, It is common ground that MI's chapter 11 case is a foreign proceeding and that MI has capacity to act as foreign representative.

[5] Article 19 of the MLCBI also provides that the court can enter provisional relief, including a temporary stay, pending entry of an order of recognition, if it is urgently needed "to protect the assets of the debtor

provides that no provision thereof "prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."

Arguments of the Parties

4. In proceedings in this Court, MI first argued that its US chapter 11 case should be recognized as a foreign main proceeding, with a stay pursuant to Article 20 of the MLCBI to enter automatically upon recognition. MI contended that although the statute establishes a presumption that the location of the debtor's registered office is its COMI, the presumption can be rebutted and the location of the registered office has never been considered the sole determinant of a debtor's COMI.

5. MI further argued that even if this Court were not to grant recognition as a foreign main proceeding, the U.S. case would be eligible for recognition as a foreign non-main proceeding. There can be no dispute, it contended, that there were operations in the United States at the time the chapter 11 case was filed and that these operations included "non-transitory economic activity with human means." Once non-main recognition is granted, the Court is empowered to enter an injunction and protect MI's principal assets, the shares of eight hotel operating companies, from the Bank's foreclosure action. According to MI, none of the foregoing implicates any question of good faith or public policy of the State of Nuzilia and is entirely consistent with the purposes of the MLCBI and the MLEG.

6. The Bank of Nuzilia responded that the COMI of MI was initially in the Republic of the Marshall Islands and remained there despite MI's flagrant attempt to forum shop by renting an office and relocating a single officer and director to Los Angeles in the United States. According to the Bank, recognition of the US chapter 11 case

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or the interests of the creditors". This Court entered such an order, staying the Bank's foreclosure proceedings, pending this decision on recognition and further relief.

as a non-main proceeding would allow MI to circumvent the purpose of the loan and standstill agreements and eliminate the Bank's contractual protection against harassment and delay. It is no accident that the assets of MI, the shares of eight hotel operating companies, are held in Nuzilia, as this protects the Bank's legitimate interests as a secured creditor. Under the foregoing circumstances, the Bank contended, recognition of the unconscionable forum shift to the United States, whether styled recognition of a main or non-main proceeding there, would only reward bad faith and violate the public policy of Nuzilia as well as the purposes of both the MLCBI and the MLEG.

7. MI's reply was that there is no real issue of good faith, as the Group is merely trying to preserve value for all of its creditors by submitting to the jurisdiction of an insolvency court. In MI's view, no public policy was violated, directly or indirectly, by the filing of a chapter 11 case in the United States. According to MI, public policy would actually be subverted if a court recognized the Marshall Islands as the immutable location of any insolvency proceeding involving MI, as it would give a lender the ability to require a borrower to file in a jurisdiction where the lender's rights as secured creditor could not be restricted. The transfer of operations to the United States was in accord with the policy of the Nuzilian laws, in that it was undertaken for the purpose of protecting all the creditors of the Group, was publicly disclosed, and is likely to result in the preservation of value that, in a time of crisis, could otherwise be maliciously seized by a single secured lender.

8. The parties agreed that there is no issue as to the requirements under Nuzilian law for the entry of a preliminary injunction.

9. The Court held hearings remotely over the course of two days at which the parties adduced facts to support their respective positions and made their arguments. Rather than set forth the facts separately, the relevant facts are discussed together with the two issues under consideration.

Main Recognition under the MLCBI

10. MI initially sought recognition of its US chapter 11 case as a foreign main proceeding. The MLCBI provides that a foreign main proceeding is a proceeding in the debtor's centre of main interests or "COMI." COMI is not defined, but the statute establishes a presumption that the COMI of an entity is the place of its registered office. Although simple application of this presumption would locate MI's COMI in the Marshall Islands, we acknowledge that cases in foreign jurisdictions have looked to a myriad of other factors to locate the COMI of a debtor and, in effect, rebut the presumption.[6] These factors include the location of an entity's officers and directors, the place of meetings of its Board of Directors or other governing body, and the location of its books and records and creditors. In an early case in the United States, the Bankruptcy Court, affirmed by the District Court, identified the following factors as bearing on the COMI of a debtor:

> the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes. *In re SPhinX, Ltd.,* 351 B.R. 103, 117 (Bankr.S.D.N.Y.2006), aff'd. 371 B.R. 10 (S.D.N.Y. 2006), cited with approval and applied by the U.S. appellate court in *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.),* 714 F.3d 127, 137 (2d Cir. 2013).

11. Nevertheless, even though in another case a litigant may be able to overcome the presumption that COMI is at the jurisdiction of a debtor's registered office based on the so-called *SphinX* factors, this is not such a case. MI agreed specifically that it would not change its COMI from the Marshall Islands without the Bank's consent in writing. Although MI argues that any insolvency filing constitutes a violation of a loan agreement, this was not a breach as a consequence of financial distress.

[6] In the absence of any applicable Nuzilian authority on point, it is appropriate to consider the construction of the MLCBI by foreign courts. Article 8 of the MLCBI provides, "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."

MI agreed a second time in a standstill agreement that it would not change its COMI from the Marshall Islands without the Bank's consent in writing. There is no question that MI and its affiliates were represented by first-rate counsel when they agreed to the formation of a Marshall Islands subsidiary and that they were aware of the implications, and there is no question that they were similarly represented and aware of the implications when they signed the standstill agreement. The Chinese lenders, who were, along with the Bank, the Group's other major creditors, were informed and did not object. The hedge funds were aware of the standstill agreement and did not object. As the Bank contended, instead of finding a buyer for the hotels, MI and its owners had "contumeliously" subverted the purpose and intent of their agreement by purporting to change MI's COMI.

12. The Bank's use in argument of the word, "contumeliously," is taken from the decision of the High Court of Hong Kong in *In the Matter of China Fishery Group,* [2018] HKCFI 2622 (14 January 2019). The debtor in that case was one of a group of companies owned by Chinese principals that had no business or operations in the United States. The principal debtor was a holding company incorporated in the Cayman Islands and had entered into a forbearance agreement with a lender in which it agreed to sell a business (owned by subsidiaries) within a fixed period in return for the lender's agreement to withdraw liquidation proceedings filed in the Caymans. The debtor had breached the agreement by filing a chapter 11 case in the United States, and a chapter 11 trustee had been appointed. The chapter 11 trustee sought the assistance of the Hong Kong Court in the form of an order for disclosure of certain information; the Court denied the application and in the strongest language found the US case to be wholly illegitimate, stating

> This application invites me to overlook the Companies' conduct and proceed on the basis that it has nothing to do with the Trustee. It seems to me that this approach ignores the fact that the Chapter 11 proceedings, and consequently the Trustee's appointment, is the consequence of what appears to be a conscious fraud on the part of the Ng family [the owners] on HSBC [the lender] and this Court. Public policy considerations weigh heavily in favour of declining to provide any form of assistance to a process that arises in this way.

> These public policy considerations in my view more than outweigh the more general public policy reasons that underpin the open justice principle and which might normally, I accept, justify making the order that is sought by the Trustee. Decision at para. 34.

There is every reason to believe that the Bank was aware of the *China Fishery* case when it drafted the standstill agreement, and that it wanted to avoid a chapter 11 filing by MI in the United States.

13. The Bank argues that the instant case cannot be distinguished from *China Fishery* and that recognition of the chapter 11 proceedings or any part thereof would reward bad faith and violate any reasonable public policy. The Court agrees that MI's breach of its agreements with the Bank not to attempt to change its COMI was sufficiently serious that this Court will not recognize its COMI as located in any other jurisdiction than the Marshall Islands. Moreover, this decision appears sufficiently clear that this Court refuses MI permission to reargue it on appeal. On the other hand, contrary to the Bank's further argument, this conclusion cannot be carried over to the question of non-main recognition.

Non-main Recognition under the MLCBI

14. MI alternatively seeks recognition of its chapter 11 case as a foreign non-main proceeding. Unlike the COMI definition, the definition of non-main proceeding includes the requirement that the debtor have an "establishment" in the jurisdiction where the proceeding was commenced, with establishment defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and good or services." These terms were evidently borrowed from the EU Insolvency Regulation,[7] which, in its original form, was drafted at about the same time as the MLCBI. In the EU Regulation, the requirement was evidently designed to preclude recognition of proceedings based solely on the presence of assets and thereby to limit the number of proceedings that could be recognized and would likely be opened. In the EU

[7] Regulation (EU) 2015/848 on insolvency proceedings (recast) [2015] OJ L141/19.

Regulation, recognition is mandatory and can be enforced by the Court of Justice of the European Union. In a system based on the MLCBI, there is no such thing as mandatory recognition, and it is unclear to this Court that it makes sense to attempt to preclude foreign proceedings based on the existence of assets if such proceedings are permitted by foreign law and opened thereunder. Once an insolvency case is opened and ongoing, the relevant question should be whether it should be entitled to relief, not whether it might have been better not to open it in the first place.

15. In any event, in the absence of any Nuzilian authority, we again look to foreign decisions on the recognition of a foreign non-main proceeding. In *Re Videology Ltd.,* [2018] EWHC 2186 (Ch., [2019] B.C.C. 195, the English court declined to recognize a US chapter 11 case as a foreign main proceeding under the English MLCBI because the debtor was incorporated in England but found it was appropriate to recognize the case as a foreign non-main proceeding due to the undoubted presence of an establishment in the United States. In *In re British American Ins. Co.*, 425 B.R. 884 (Bankr. S.D. Fla. 2010), judicial managers had been appointed for the same insurance company in separate liquidations in the Bahamas and Saint Vincent and the Grenadines ("SVG"). Both petitioned for recognition in the United States as either a foreign main proceeding or, alternately, as a foreign non-main proceeding. The Court found that the insurance company's relationship with the Bahamas was solely based on its registration there, and nothing else, and it denied recognition as a main or a non-main case. Regarding the SVG proceeding, the Court found there was a place of operations in SVG where the debtor conducted non-transitory economic activity, and it recognized the SVG proceeding as a foreign non-main proceeding.

16. In *In re Servicos de Petroleo Constellation S.A.,* 600 B.R. 237 (Bankr. S.D.N.Y. 2019), ten members of an integrated corporate group that owned and operated drilling rigs filed MLCBI petitions in New York, seeking recognition and ultimate enforcement of a Brazilian jointly administered judicial reorganization

proceeding. The parent holding company was incorporated in Luxembourg and had several of its directors located there. Most of the operating subsidiaries were registered in the British Virgin Islands ("BVI") or in Luxembourg but had no operations in those countries. All of the operations of the operating companies and most of their personnel were located in Brazil or in its offshore waters. The BVI companies had filed insolvency petitions in the BVI and joint provisional liquidators had been appointed, but the BVI proceedings were described as "soft-touch" proceedings that would adopt the terms of the restructuring to be proposed by the debtors in the Brazilian reorganization case. After an exhaustive factual analysis of the factors used in the *SphinX* case and discussed above, and giving due regard to the place of registration, the US Bankruptcy Court found that the COMI of the parent was in Luxembourg but that it would recognize the company's Brazilian case as a non-main proceeding.[8]

17. In the instant case, based on the record of the hearing, it is clear that the books and records and one officer and director of MI had been relocated to the United States about a month before the chapter 11 filing. The Court finds accordingly that MI had an establishment in the United States and that its chapter 11 case was prima facie entitled to recognition as a foreign non-main proceeding even though main recognition is not appropriate.

18. The remaining question is whether MI's conduct was sufficiently "contumelious" that the Court should nevertheless deny non-main recognition. The Bank did not obtain a covenant from MI that it would never open operations in the United States, and it was fully aware that MI owned several hotels in the United States and had to maintain them. The Bank argues that the relocation of one of MI's officers and directors and its books and records to the United States was bad faith

[8] The Court also noted, "there may be no statutory and practical effects of distinguishing recognition as a foreign main proceeding as opposed [to] recognition as a foreign non-main proceeding."

forum shopping that should be rejected by this Court, but it was hardly "contumelious."

19. Again, in the absence of any Nuzilian authority, the Court finds that applicable foreign authority is useful. In *In re Ocean Rig UDW Inc.,* 570 B.R. 687 (Bankr. S.D.N.Y. 2017), *appeal dismissed for lack of appellate standing,* 585 B.R. 31 (S.D.N.Y. 2018), *affirmed*, 764 F. Appx. 46 (2d Cir. 2019), involved a shift of the COMI of several related debtors, rather than the creation of an establishment, but significantly the Court rejected the proposition that all forum shopping is bad. In that case the principal debtor was a holding company formed in the Marshall Islands that owned the shares of the three other debtors, which in turn directly or indirectly owned a fleet of deep-water oil drilling rigs located throughout the world. The parent purported to move its COMI from the Marshall Islands to the Cayman Islands, changing its registration, establishing an office there and filing schemes of arrangement in the Cayman court. However, the other three debtors had not changed their registrations. On their petition to obtain recognition in the United States of the Cayman proceedings as foreign main proceedings, the debtors established that they had never performed any business in the Marshall Islands, that they had publicly disclosed their change of COMI, which had the support of most of their creditors, that they had bank accounts and books and records and personnel in the Cayman Islands, and that no evidence in the record suggested that their COMI was anywhere other than the Caymans. Based on these findings the Court held that the debtors had not manipulated their COMI in bad faith, stating:

> The Court finds that the Foreign Debtors purposefully established the Cayman Islands as their COMI before the Petition Date. The Foreign Debtors' actions in doing so were not taken in bad faith. There is no evidence in the record pointing to any 'insider exploitation, untoward manipulation, [and] overt thwarting of third-party expectations,' that would support denying recognition here. The evidence establishes that the Foreign Debtors had a legitimate, good faith purpose for shifting their COMI from the RMI [Republic of the Marshall Islands] to the Cayman Islands. 570 B.R. at 706-07.

20. The facts here have many similarities. Whereas MI and its affiliates agreed specifically that they would not move their COMI from the Marshall Islands, and presumably that they would not seek main proceeding recognition of an insolvency case from any other jurisdiction, neither MI nor any other member of the Group agreed that it would not claim non-main status from another jurisdiction. Indeed, the Bank's testimony on the subject of reasonable intentions was mixed. The Bank claimed in its written submissions that it had priced the loan after consideration of the ease of foreclosure in the Marshall Islands, but there was no testimony at the hearing on this point. The Bank officer in charge of the Group's account testified only that he was "surprised" by a filing in the United States, although he also admitted that he was aware that the Group always had significant ties to the United States and that some of MI's financial interests were in the United States – two of the eight hotels. As a matter of policy, the position of MI and its affiliates that they had, and still have a "legitimate, good faith purpose", for their filing in the United States, namely, to effect a reorganization that will benefit all of their creditors and not advantage one of them to the exclusion of all others, is more compelling than that of the Bank, which says that a lender should be able to deprive a borrower of any chance to reorganize by choosing the law of a jurisdiction that does not recognize reorganization procedures.

21. It is thus worth noting that the Bank's attachment to the Marshall Islands is entirely artificial and does not evidence the best of faith. The Bank officer admitted at the hearing that the Bank had never had any connection with the Marshall Islands and had insisted that the Group form a subsidiary there on the assumption that there would be no way for MI to contest a foreclosure if the Bank initiated collection proceedings. The evidence at the hearing established that no representative of the Bank or MI or any of the other members of the Group ever set foot in the Marshall Islands and that the MI books and records were never located there. At the hearing the Bank officer could not even locate the Republic of the Marshall Islands on a map of the Pacific. The same officer admitted that the Bank had received notice of the shift of some of MI's operations to the United

States and understood that MI might file a proceeding in the United States. However, the Bank concluded that it could not call a default under its loan agreement or the standstill agreement as MI's registered office remained in the Marshall Islands and as the Bank intended to argue that its COMI remained there.

22. While the chapter 11 filing admittedly was inconsistent with the standstill agreement, the Bank officer admitted at the hearing that he understood that the Group could file an insolvency petition during the standstill period notwithstanding the agreement. He could not identify any special damage the Bank had suffered other than the passage of time. In this Court's view, MI's breach of the standstill agreement is an entirely different matter from its breach of the loan agreement. Under Nuzilian law, an agreement not to file an insolvency case is a nullity. On the other hand, an agreement by a borrower that it would not change its COMI is enforceable. As a consequence, the Court cannot find that an insolvency filing in a jurisdiction that has a modern, viable insolvency law is in bad faith merely because it breaches a standstill agreement. Any other rule would deter debtors in financial straits from entering into standstill agreements that, if successful, would avoid the costs and travails of formal insolvency proceedings.

23. It remains to be seen whether MI will be able to confirm a chapter 11 case that treats the Bank and all others fairly and equitably, which MI says is its goal. It should be noted, however, that an entity that is guilty of an insolvency-related default or other breach does not forfeit its opportunity to cure the default. The decisions of the Singapore High Court in the *Zetta Jet* proceedings are instructive. There a parent company registered in Singapore, Zetta Jet Singapore, and its US subsidiary, established in California, filed chapter 11 cases in the United States. A shareholder of the Singapore company obtained an injunction in Singapore enjoining further proceedings in the US. The case nonetheless proceeded in the US, was eventually converted to a liquidation under chapter 7, and the chapter 7 trustee moved for recognition in Singapore. In its first decision, the Singapore court found that recognition of a case that had been carried on in violation of the

Court's injunction would undermine the administration of justice and should be denied, but it granted limited recognition so that the trustee could seek to set the injunction aside or appeal. *Re Zetta Jet Pte Ltd.,* [2018] SGHC 16. The trustee moved to set aside the injunction, and in a second decision the Singapore court found that the injunction should be lifted because the COMI of the company, although registered in Singapore, was properly in the United States. This Court similarly finds that MI did not forfeit the right to claim non-main status for its case in the United States merely because that filing was inconsistent with its standstill agreement. Recognition of MI's U.S. case as a foreign non-main proceeding does not end the analysis, however.

Relief under the MLCBI: temporary injunction

24. The further question is whether MI is entitled to an injunction preventing the Bank from exercising its rights under its security agreement and foreclosing on the shares of the eight hotels. As noted above, the parties have agreed that the requirements for a preliminary injunction under Nuzilian law – such as irreparable injury and probability of success on the merits – are not at issue. At issue is the Bank's contention that MI is not entitled to interfere with the Bank's rights as a secured creditor for two reasons – one based on the MLCBI and the other on the terms of the loan agreement.

25. The Bank's first argument is based on Article 21(3) and Article 29(c) of the MLCBI. Both provide, in almost identical terms, that in granting, extending or modifying relief to a representative of a foreign non-main proceeding, "the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding." Although two of MI's principal assets, namely two of its hotel properties, are located in New York and Los Angeles in the United States, the shares of these operating companies, the only property that MI can claim as its own, reside in a Bank vault in Nuzilia. The Bank asserts that these

shares cannot be properly administered in a chapter 11 case located in the United States.

26. The parties have not directed us to any authority construing these provisions of the MLCBI. Nevertheless, the Court is convinced that the discretion that is obviously granted to a court under Articles 21(3) and 29(c) of the MLCBI should not be construed so restrictively as to render non-main recognition ineffective. The Guide to Enactment, which is an authoritative UNCITRAL text with background and explanatory information on the MLCBI, explains that relief in favor of a foreign non-main proceeding should not give unnecessarily broad powers to a foreign representative of a non-main proceeding and "that such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding." There is no other proceeding regarding MI, and therefore no danger of inconsistent relief being granted.

27. This Court does not lightly disregard conduct in breach of a contractual obligation. However, although MI violated its standstill agreement, it submitted to a court's jurisdiction in order to reorganize for the benefit of all of its creditors in the face of a pandemic of unprecedented dimensions. Every insolvency filing arguably violates a debtor's agreements with its creditors but should not thereby be rejected as "contumelious" and a "conscious fraud." It is worth noting that the creditors in the *China Fishery* US case did not move to dismiss that proceeding; they instead moved for a trustee, thereby implicitly recognizing that a US case might be the only way for a court to take jurisdiction over the international group and attempt to effectuate a reorganization as opposed to a ruinous liquidation. *In re China Fishery Group Limited (Cayman),* 2016 WL 6875903 (Bankr. S.D.N.Y. Oct. 28, 2016).

28. In this Court's view, a creditor's demand that a holding company be organized in a jurisdiction like the Marshall Island so that its right to foreclose cannot be restricted should not be viewed as the vindication of a valid public policy. The

reverse – a debtor's submission to the jurisdiction of a court under a modern, responsible insolvency law, in an effort to complete a fair reorganization and rehabilitation – should not lightly be deemed in bad faith and a violation of public policy. We recognize that some bankruptcy courts in the United States have pushed the envelope and have taken jurisdiction of cases with the most peripheral relationship to that nation. Nevertheless, the US courts have dismissed chapter 11 proceedings that have no connection to the United States and also no prospect of being enforced abroad. See Adrian Walters, *U.S. Bankruptcy Jurisdiction: Exorbitant or Congruent?* 17 J. of Corporate Law Studies 67 (2017). Furthermore, unlike *China Fishery,* MI is not wholly without any connection with the United States. It did not violate the terms of its loan agreement with the Bank by relocating a single officer and director of MI to the United States. The registered office remained in the Marshall Islands.[9]

29. Recognition, at least at this juncture, of the chapter 11 proceedings and the stay entered thereunder is consistent with insolvency procedures that have been adopted in many jurisdictions. For example, in 2019 the European Union issued a Directive on Preventive Restructuring Frameworks.[10] Article 6 of the Directive deals with a stay of enforcement actions in support of the negotiation of a restructuring plan. Like the chapter 11 stay, a stay under Article 6 is conditioned on adequate protection to affected creditors, and it may be denied if it is not necessary or would not achieve its intended purpose. Unlike the chapter 11 stay, it is expressly limited in duration (to a maximum of four months, subject to judicial

[9] The Court also takes note of the fact that relevant foreign authority recognizes that the phrase "manifestly contrary to…public policy" in Article 6 of the MLCBI should be construed very narrowly and limited to the most egregious violations of basic national policies. See, e.g., the decisions of the U.S. courts in the *Fairfield Sentry* and *Ocean Rig UDW* cases cited above, both of which rejected the proposition that recognition of the foreign proceeding would violate U.S. public policy and should be denied under Article 6 of the Model Law. See 714 F.3d at 139 and 570 B.R. at 706-707.

[10] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 [2019] OJ L172/18.

extension to a maximum of twelve months). Nuzilian law does not establish a maximum duration for a stay, but the debtor can be required at any time after the initial 21 days of a reorganization proceeding to show cause as to why the stay should continue. In any event, the Court finds that a stay at this juncture is fair, particularly in light of the unprecedented economic effect of a worldwide pandemic.

30. Finally, in this Court's opinion, the decisive factor is the adoption in Nuzilia of the new MLEG. The MLEG recognizes the need to deal with the insolvency of international corporate groups and the difficulties inherent therein, and it extends many of the MLCBI principles to corporate groups. The ChenGroup is just such a group, owning hotels located in jurisdictions throughout the world. MI alone owns shares in hotels that are located in seven jurisdictions and accordingly the Bank's collateral was always dispersed. Even if one ignores the location of the hotels and the changes leading up to the chapter 11 filing, the Group was managed by companies located in Hong Kong, the Marshall Islands and the Cayman Islands and owned by a family located in the People's Republic of China. In any event, the MLEG is based on the premise that a "planning proceeding" in which a "group representative" is appointed should attempt to formulate a "group solution" to deal with the insolvency of the entire corporate group. It does not override the interests of any separate proceedings opened for any member of the group. The group solution is subject to the approval of the court in separate proceedings for members of the group, and members retain their freedom of action, but they also have an obligation to communicate and coordinate where feasible.

31. Nor does the MLEG ignore the COMI concept. According to Article 2(g) of the MLEG, the planning proceeding may be located only in a jurisdiction that is the COMI of a "necessary and integral" member of the group.[11] If one or more

[11] The Court notes that the United States appears to be the COMI of two entities that are "necessary and integral" members of the group, namely the management company now headquartered in Los Angeles, and FinanceCo., which was able to obtain essential financing not only for the chapter 11

members of the group have a separate COMI, the planning proceeding is directed to cooperate in a joint effort to achieve the best result for creditors and all other stakeholders. By adopting the MLEG, Nuzilia has recognized the need to deal with the insolvency of corporate groups such as the Group in a manner that takes into account all of their complexities.

32. The United States has not adopted the MLEG and the chapter 11 proceedings there were not denominated a "planning proceeding." However, they appear to bear the hallmarks of a planning proceeding, and as such to have a particularly strong claim to recognition and relief in the form of a stay. Recognition simply gives this international proceeding a chance to formulate a "group solution" that is sorely needed during a time of pandemic. This is particularly true because the only relief at issue is recognition of MI's chapter 11 case and a temporary stay of the Bank's foreclosure. We leave for another day whether to recognize the chapter 11 plan, if one is confirmed, and whether to recognize the stay permanently.[12]

33. In conclusion, for the foregoing reasons, the petition for recognition is granted and the US chapter 11 case is recognized as a foreign non-main proceeding. The injunction heretofore entered pursuant to Article 19 of the MLCBI is continued pursuant to Article 21 thereof.

IT IS SO ORDERED.

s/ Ruchika J. Singh, B.J.

proceedings but thereafter. Thus the United States is a proper location for a planning proceeding for the Group as a matter of Nuzilian law.

[12] There is conflicting foreign authority as to whether we can recognize a chapter 11 plan, including a discharge, under the MLCBI. See generally, Walters, *Modified Universalisms and the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law,* 93 Am. Bankr. L.J. 47 (2019); Westbrook, *Chapter 15 and Discharge,* 13 Am. Bankr. Inst. L. Rev. 503 (2005). There is no Nuzilian authority on point.

ENDORSEMENT

The Bank of Nuzilia has requested that permission be granted for an interlocutory appeal to the Supreme Court of Nuzilia. The Court recognizes that there are substantial grounds for a difference of opinion on the issues considered in this decision and that the issues are novel and important. Permission to appeal is granted on the following two issues:

(a) Whether the Court erred by recognizing the chapter 11 case as a foreign non-main proceeding under the MLCBI?

(b) Whether the Court erred by entering an injunction, in reliance on the MLCBI and the MLEG, temporarily staying the Bank's foreclosure proceedings, on the grounds that (i) the Bank's collateral is properly administered in the chapter 11 case; and (ii) a temporary stay, at least at this juncture, would be consistent with Nuzilia's public policy?