IN THE SUPREME COURT OF NUZILIA

Between

Geldbank AG

Appellant

and

Administrator of Wonderphone GmbH

Respondent

SUBMISSION FOR THE APPELLANT

Represented by Team 1

I. The learned trial judge erred in finding that Wonderphone's centre of main interests ('COMI') was Mercuria.

1. A 'foreign main proceeding' ('FMP') is a foreign proceeding held in the state where the debtor has its COMI. Article 16(3) of the *Cross-Border Insolvency Act* (Nuzilia) ('*CBIA*') creates a rebuttable presumption that a corporation's COMI is located in the state of its registered office.[1]

2. Wonderphone's COMI is thus presumed to be in Germany, as provided by its articles of association and the Frankfurt court company register.[2] This presumption has not been displaced.

3. COMI is a 'fact-sensitive' enquiry of where a corporation conducts the administration of its interests *regularly*, based on *objective* criteria *ascertainable by third parties*.[3] Thus, factors adduced to rebut the art 16(3) presumption must be sufficiently transparent and ascertainable.[4]

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[1] *Cross-Border Insolvency Act 2016* (Nuzilia) art 16(3) ('*CBIA*').

[2] *Re Eurofoods IFSC Ltd (C-341/04)* [2006] ECR 3854, I-3862 [17] ('*Eurofoods*'); Judgment 7 [15].

[3] UNCITRAL, *UNCITRAL Model Law Cross-Border Insolvency with Guide to Enactment* (UNCITRAL, 2013) 70–1 [145] ('*CBL Guide*'); *Stanford International Bank* [2011] Ch 33, 69 [57] ('*Stanford*').

[4] *Eurofoods* (n 2) I-3868 [32].

4. Where there has been a COMI shift close to the date of insolvency proceedings being opened, the court should carefully scrutinise the factors submitted.[5] In addition, the advent of a 'borderless marketplace'[6] driven by the COVID pandemic renders attempts to assign assets, liabilities and operations to particular states increasingly futile. This creates a stronger presumption in favour of the incorporation jurisdiction. Note also that the directing centre—that is, Germany—should take precedence over the day-to-day operation of the business.[7]

5. There is no element of settled permanence in Wonderphone's Mercurian activities;[8] meanwhile, a COMI that is regular and ascertainable is not easily subject to tactical removal.[9] Until early 2021, Wonderphone's board of directors, overall corporate headquarters, and accounting functions were conducted from Germany.[10] Although Wonderphone's books and records were moved to Mercuria, there was no fundamental change to Wonderphone's manner of doing business. The overall control, direction and business strategy of the company remained in Germany—where most of its directors are located.[11]

6. A creditor should be able to rely on representations by its debtor about the relevant jurisdiction.[12] The learned trial judge failed to take into account creditor perceptions in her assessment of COMI.

    6.1. All of Wonderphone's assets are pledged as security under the Term Loan Agreement—a substantial undertaking.[13]

    6.2. Geldbank also sought express assurance from Wonderphone that its COMI would remain in Germany.[14] This served to provide certainty for Geldbank as to in which jurisdiction insolvency proceedings would take place.[15]

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[5] *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, [55].
[6] Judith Wade, 'Where is a Corporation's "Centre of Main Interests" in International Insolvency?' (2008) 16(1) *Insolvency Law Journal* 127, 144.
[7] See, eg, *Re Tradex Swiss AG* (2008) 384 BR 34.
[8] *Eurofoods* (n 2) I-3868 [32].
[9] *In Re Fairfield Sentry Ltd*, 714 F3d 127, 137 (2nd Cir, 2013) ('*Fairfield*').
[10] Background 1 [4].
[11] Judgment 7 [15].
[12] *Eurofoods* (n 2) [118]; *Moore, as Debtor-in-Possession of Australian Equity Investors v Australian Equity Investors* [2012] FCA 1002, [19].
[13] *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* [2016] VSC 308, [108].
[14] Ibid [69]; Judgment 6 [9].
[15] *Re Videology Pty Ltd* [2018] EWHC 2186, [69] ('*Videology*').

7. Facts that can only be discovered upon inquiry cannot be used to rebut the art 16(3) presumption.[16]

    7.1. The COMI shift was not a matter in the public domain capable of ascertainment by third parties.[17] Creditors were not notified that Wonderphone's COMI had changed.[18] Wonderphone failed to draw attention to the change of address in commercial correspondence, or to make the new location public through any other appropriate means.

    7.2. By contrast, the jurisdiction readily ascertainable by third parties is Germany, discoverable through a simple search of the company register in the local Frankfurt court.[19]

8. The learned trial judge and Wonderphone ascribed significant weight to 'ensur[ing] [Wonderphone's] survival' because it is one of 'Nuzilia's biggest employers'.[20] However, the success of the Plan is not salient; it is neither ascertainable by third parties nor objective.[21] Rather, the learned trial judge's comment contradicts one of the central aims of *CBIA*, being to prevent parties from transferring assets across borders to advance their legal position.[22]

9. Referring to paragraphs [4]–[8], the weight of the evidence has not risen to the threshold of rebuttal. Therefore, the location of the registered office should be taken to be Wonderphone's COMI by default.

II. Recognising the Mercurian judgment would be manifestly contrary to the public policy of Nuzilia.

10. Article 7 of the *Recognition of Foreign Judgments (Insolvency) Law 2019* ('*ROFJIL*') allows this court to refuse recognition of an 'insolvency-related' judgment', if recognition would be manifestly contrary to Nuzilia's public policy, including Nuzilia's fundamental principles of procedural fairness.

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[16] *Stanford* (n 3) 56.
[17] Ibid 39.
[18] This was a determinative factor in several cases: see, eg, *Hellas Telecommunications (Luxemburg) II SCA* [2010] BCC 295.
[19] Background 1 [1].
[20] Judgment 11 [37].
[21] *Eurofoods* (n 2) I-3868 [32].
[22] *CBIA* (n 1) Recitals 4, 2, 8.

11. The notion of 'public policy' is grounded in national law and may differ from state to state.[23] Public policy may relate to any rule of national law,[24] and the jurisprudential focus of 'public policy' has been on *legal* rights and duties.[25] The learned trial judge erred by suggesting[26] that domestic laws cannot be considered part of a state's public policy. (Note that 'public policy' for *ROFJIL* purposes is conceptually analogous to 'public policy' in the UNCITRAL Model Law on Cross-Border Insolvency.[27])

12. There are three reasons why recognising the Mercurian judgment would be 'manifestly contrary' to Nuzilian public policy.

12.1. Firstly, the Nuzilian right to set-off is a fundamental right to be protected.[28]

12.1.1. Set-off rights are governed by both comprehensive legislation and common law in Nuzilia, including *CBIA* and the *Insolvency Law of 1965.* Under these laws, a bank is permitted to take into account any right of set-off when calculating a debt.[29] Contrary to Wonderphone's contention at first instance,[30] recognition of a foreign judgment which denies this legal right is not merely 'one of two equally valid, but policy-neutral approaches.'

12.1.2. In *HIH*, Lord Neuberger identified set-off rights as a 'main substantive feature'[31] of the English insolvency regime. His Lordship suggested that had the 'main substantive feature[s]' of England's insolvency regime differed from Australia's, then their Lordships may not have acceded to the Australian request.[32] In the instant case, it is a 'main substantive feature' that differs—being set-off rights. Both Nuzilian common law[33]

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[23] UNCITRAL, *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment* (UNCITRAL, 2019) 49 [71] ('*MLRE Guide*').
[24] *MLRE Guide* (n 23) 49 [72].
[25] See, eg, *Re Juergen Toft*, 453 BR 186 (Bankr SDNY, 2011). See also *Re Gold & Honey*, 410 BR 357 (Bankr EDNY, 2009) ('*Gold & Honey*').
[26] Judgment 13–14 [46]–[47].
[27] *MLRE Guide* (n 23) 49 [73]–[74].
[28] *Re Qimonda AG*, 462 BR 165, 185 (Bankr ED Va, 2011) ('*Qimonda*'); *Gold & Honey* (n 25) 372.
[29] Judgment 9 [25].
[30] Judgment 13 [46].
[31] *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, 873 [67] (Lord Neuberger).
[32] Ibid 876–7 [81] (Lord Neuberger).
[33] Judgment 7 [12].

and the *Nuzulian Insolvency Law of 1965*[34] permit set-off, whereas Mercurian law does not.[35]

12.1.3. In *HIH*, Lord Hoffmann also said that whether the court will protect rights of set-off will 'depend upon the degree of connection which the mutual debts have with' Nuzilia.[36] There is a close nexus in the instant case. The Term Loan and Swap Agreement are governed by Nuzilian law,[37] and this was a deliberate and explicit choice by Geldbank.[38] The funds from the Term Loan were also, 'in large measure', used to expand Wonderphone's manufacturing capacity in Nuzilia.[39]

12.2. Secondly, refusing to recognise the Mercurian judgment ensures the integrity of Nuzilian contract law. Set-off was a legitimate and reasonable expectation of the contracting parties;[40] Geldbank explicitly chose to contract with Wonderphone on the understanding that Nuzilian law was to 'provide a particular level of protection for creditors'.[41] Unlike in *HIH*, it is not an 'entirely adventitious circumstance'[42] that Nuzilian law governs the Term Loan and Swap Debt. A reliable system of contract should protect innocent contractors' rights. It should also refuse to reward Wonderphone for breaching its contract with Geldbank.[43] (That is, Wonderphone should not be allowed to be in a better financial position by virtue of shifting its COMI without Geldbank's express consent.)

12.3. Thirdly, the availability of set-off is essential to the financial health of the Nuzilian economy; it serves to safeguard the Nuzilian banking industry[44] against another 'total collapse'.[45] Moreover, protecting the right to set-off ensures that the Nuzilian banking industry remains consistent with international standards, which favour allowing set-off.[46]

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[34] Judgment 7 [13].
[35] Judgment 9 [24].
[36] *HIH* (n 31) 860 [25] (Lord Hoffmann).
[37] Judgment 7 [11].
[38] Judgment 12 [42].
[39] Judgment 6 [9].
[40] Jason Fu, 'Cross-border insolvency in Bermuda: *Cambridge Gas* revisited' (2018) 31(4) *Insolvency Intelligence* 118, 121–2.
[41] Judgment 7 [11], 12 [42].
[42] *HIH* (n 31) 863 [35] (Lord Hoffmann).
[43] Judgment 6 [9].
[44] Judgment 9–10 [25].
[45] Judgment 9–10 [25].
[46] Judgment 9–10 [25].

12.4. Fourthly, the learned trial judge erred in finding[47] that Wonderphone's status as one of Nuzilia's biggest employers is a 'public policy' factor that militates in favour of recognition.

12.4.1. As noted at paragraph [11], the jurisprudential focus of 'public policy' has been on legal rights and duties or broad rather than domestic economic concerns like employment.

12.4.2. Paragraph [12.3] (regarding the health of the Nuzilian banking industry) is distinguishable from employment concerns, because the Nuzilian legislature has deliberately chosen to make the protection of the banking industry a public policy focus, through 'law and detailed regulations', following the 2008 global financial crisis.[48]

III. Recognition should be refused pursuant to art 14(f) of *ROFJIL*.

13. Pursuant to art 14(f) of ROFJIL, this court may refuse recognition and enforcement of the Mercurian judgment if (i) the judgment materially affects the rights of creditors generally; and (ii) the interests of creditors and other interested persons were not adequately protected in the proceeding where the judgment was issued.

14. Article 14(f)(i) is satisfied because the Mercurian judgment 'confirm[s]' or 'approve[s]' a 'compromise or agreement' that Wonderphone has proposed to its creditors. The Mercurian Plan[49] is 'plan of reorganisation'.

15. Article 14(f)(ii) is satisfied for two reasons:

15.1. Firstly, depriving Geldbank—and any other bank lenders who are creditors-cum-debtors—of set-off rights is 'not adequately protect[ing]' their interests. Courts worldwide have consistently maintained that the right of set-off is a fundamental right that must be adequately protected by the foreign jurisdiction.[50] Recognition would extinguish the choice of law clause in the contract. This is because the Plan operates to discharge Wonderphone's contractual obligations to Geldbank. Furthermore, *ROFJIL* confines itself to procedural aspects and does not include rules on choice of law.[51] Therefore, it

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[47] Judgment 11 [37], 14 [49].
[48] Judgment 9–10 [25].
[49] Judgment 8 [17].
[50] *Re Swissair Schweizerische Luftverkehr-Aktiengesellschaft* [2010] BCC 667, 672 [14]–[15]; *Re Sivec Srl*, 476 BR 310, 328–9 (Bankr ED Okla, 2012).
[51] *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802, 30.

is argued that Geldbank's substantive rights cannot be overridden by invoking the relief provisions in *ROFJIL*.

15.2. Secondly, the majority of creditor interests were not 'adequately protected'. Five[52] out of seven lending banks[53] voted, and 60% of the voting banks voted 'yes'.[54] This means that three banks voted 'yes'. Two banks voted 'no', of which Geldbank was one.[55] The sixth and seventh banks were absent. However, their consent should not be assumed. It is reasonably inferable that the sixth and seventh banks were unaware of the ballot: the time period between Wonderphone's COMI shift (the first quarter of 2021[56]) and Wonderphone's proposal of the Plan (30 May 2021[57]) was brief. Moreover, given the meeting's importance to the bank lenders' rights, the sixth and seventh banks would likely have attended had they been aware. Accordingly, it is likely that a majority of bank lenders' (four out of seven) interests were not adequately protected in the Mercurian proceeding. It is also worth noting that from a Nuzilian perspective, creditors' rights in a cramdown are only 'adequately protected' when at least 75% of votes by value approve of the reorganisation.[58] Presently, that threshold has not been met: either 60% (three out of five) or 42% (three out of seven) voters have voted 'yes'.

IV. Recognition should be refused pursuant to art 14(g) of *ROFJIL*.

16. This Court may refuse recognition and enforcement of the Mercurian judgment if the Mercurian court did not satisfy at least one[59] of the jurisdictional conditions set out in art 14(g)(i)–(iv) of *ROFJIL*.

17. Geldbank objected to the jurisdiction of the Mercurian court.[60] Thus, it did not 'explicit[ly] consent' to the Mercurian jurisdiction under art 14(g)(i).

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[52] Judgment 8–9 [22].
[53] Judgment 8 [17].
[54] Judgment 8–9 [22].
[55] Judgment 13 [44].
[56] Clarifications 5 [38].
[57] Judgment 8 [17].
[58] Judgment 12 [42]
[59] *MLRE Guide* (n 23) 60 [110]–[111].
[60] Judgment 8–9 [22].

18. Additionally, Geldbank 'took no other substantive point on the merits or otherwise of the Plan'.[61] Geldbank only voted[62] in an attempt to protect its own interests, but this did not constitute 'presenting their case without objecting to jurisdiction'.[63] Thus, art 14(g)(ii) is not satisfied. Also, the Mercurian judgment is awaiting appeal. It follows that Geldbank likely has a prima facie case—so it cannot be assumed that 'an objection to jurisdiction would not have succeeded'.

19. The Mercurian court approved the Plan pursuant to s 111 of the *Mercurian Insolvency and Reorganization Law 2006*.[64] This is not a basis on which a Nuzilian court could have exercised jurisdiction, since it is a Mercurian statute. Art 14(g)(iii) was not satisfied.

20. The jurisdictional basis of the Mercurian judgment was 'incompatible' Nuzilian law, such that art 14(g)(iv) was not satisfied.[65]

    20.1. An approach that permits set-off is diametrically opposed to one that disallows it. Depending on which approach is taken, the difference to a creditor-cum-debtor can be profound. In Nuzilia, Geldbank would ultimately 'profit' ($20 million) * (pari passu dividend).[66] Meanwhile, in Mercuria, Geldbank will ultimately 'lose' $14 million after it is paid out by Wonderphone on 31 December 2026.

    20.2. Also, Mercuria's laws for approving a 'scheme' differ substantially from Nuzilia's laws so as to be incompatible. In Mercuria, the approval threshold is over 50% by voters, and 50% by value;[67] in Nuzilia, it is over 50% by votes, and *75% by value*.[68] As explained at paragraph [15.2], the Mercurian Plan would not have passed in Nuzilia.

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[61] Clarifications 3 [24].
[62] Judgment 13 [44].
[63] *MLRE Guide* (n 23) 60–1 [113].
[64] Judgment 8 [17].
[65] *MLRE Guide* (n 23) 61 [115].
[66] Judgment 10 [28].
[67] Judgment 8 [17].
[68] Judgment 8 [18].