IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 53

Originating Summons No 1391 of 2017

In the matter of Section 354B and the Tenth Schedule of the Companies Act (Cap. 50)

And

In the matter of Article 15 of the UNCITRAL Model Law on Cross-Border Insolvency

And

In the matter of the Appointment of Chapter 7 Trustee in the United States Bankruptcy Court in the Central District of California – Los Angeles Division Lead Case No.: 2:17-bk-21386-SK (Zetta Jet USA, Inc., a California Corporation) jointly administered with 2:17-bk-21387-SK (Zetta Jet Pte. Ltd., a Singaporean corporation) dated 29 September 2017

And

In the matter of ZETTA JET PTE. LTD. and ZETTA JET USA, INC

(1) ZETTA JET PTE. LTD.
(2) ZETTA JET USA, INC
(3) Jonathan D. King, solely in his capacity as the duly appointed US Bankruptcy Trustee of Zetta Jet Pte. Ltd. and Zetta Jet USA, Inc

… *Applicants*

And

Asia Aviation Holdings Pte Ltd

… Intervener

JUDGMENT

[Insolvency Law] — [Cross-border insolvency] — [Recognition of foreign insolvency proceedings]

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Aedit Abdullah J:

Introduction

1 The present case follows on from my earlier decision in *Re Zetta Jet Pte Ltd and Others* [2018] SGHC 16 ("*Zetta Jet (No 1)*"), in which I granted only limited recognition on an application by a US Bankruptcy Trustee for recognition of US bankruptcy proceedings under the UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) ("the Model Law"). The Model Law has the force of law in Singapore pursuant to s 354B of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"), as enacted under the Tenth Schedule of the Companies Act ("the Singapore Model Law").

2 In *Zetta Jet (No 1)* at [36], limited recognition was given to allow the US Bankruptcy Trustee to apply to set aside or otherwise appeal a separate injunction granted by the High Court that enjoined bankruptcy proceedings in the US. I gave parties the liberty to revisit the issue of wider recognition upon

the conclusion of the injunction proceedings. As it was, the injunction was discharged by consent. The applicants now seek full recognition of the US bankruptcy proceedings.

Facts

3 The background to this application is set out in *Zetta Jet (No 1)* at [2]–[10], and will be briefly recounted here.

Parties

4 Zetta Jet Pte Ltd ("Zetta Jet Singapore") is a Singapore-incorporated company that wholly owns Zetta Jet USA, Inc ("Zetta Jet USA"), a company organised under the laws of the State of California. The principal business of Zetta Jet Singapore and Zetta Jet USA (collectively "the Zetta Entities") is in aircraft rental and charter. Jonathan D. King ("King", used interchangeably with "the Trustee") is the Chapter 7 Trustee of the Zetta Entities.

5 The Zetta Entities are part of a wider group consisting of 16 other entities organised under the laws of the British Virgin Islands ("BVI"). The wider group will be referred to as "the Zetta Jet Group".[1]

6 The intervener in this application, Asia Aviation Holdings Pte Ltd ("AAH", used interchangeably with "the Intervener"), is a 34% shareholder of Zetta Jet Singapore. Zetta Jet Singapore's shareholders are AAH, Truly Great Global Limited ("TGGL"), Stephen Matthew Walter ("Walter") and James Noel Halstead Seagrim ("Seagrim"). Their relationship is governed by a Shareholders' Agreement dated 26 February 2016 ("the SHA").

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[1] Seagrim's OS 1391 Affidavit at para 21(b).

Background to the dispute

7 In 2017, voluntary Chapter 11 bankruptcy proceedings were filed against the Zetta Entities in the US Bankruptcy Court in the Central District of California – Los Angeles Division. A worldwide automatic moratorium in the US came into effect. Shortly thereafter, AAH and TGGL commenced an action by way of Suit No 864 of 2017 ("S 864/2017") in Singapore against Zetta Jet Singapore, Walter and Seagrim for commencing the Chapter 11 proceedings in alleged breach of the SHA.

8 On 19 September 2017, AAH and TGGL obtained an injunction to prevent Zetta Jet Singapore, Seagrim and Walter from taking further steps in relation to the bankruptcy filings in the US Bankruptcy Court ("the Singapore injunction"). On 1 November 2017, TGGL discontinued its action, leaving AAH as the sole plaintiff in S 864/2017.

9 Notwithstanding the issuance of the Singapore injunction, the US bankruptcy proceedings continued. On 5 October 2017, King was appointed the Chapter 11 Trustee of the Zetta Entities in the US bankruptcy proceedings. The proceedings were subsequently converted to Chapter 7 proceedings and King was appointed the Chapter 7 Trustee in the proceedings. On 11 December 2017, the US Bankruptcy Court authorised the Trustee to commence recognition proceedings in Singapore. The Trustee did so on 13 December 2017.

10 In *Zetta Jet (No 1)*, I found that the flouting of the Singapore injunction undermined the administration of justice in Singapore: at [25] and [29]. I therefore ordered that recognition would be denied under Art 6 of the Singapore Model Law, save for limited recognition only for the purposes of allowing the Trustee to apply to set aside the Singapore injunction: at [34] and [36].

11 On 9 March 2018, Zetta Jet Singapore filed an application to set aside the Singapore injunction. On 12 July 2018, the injunction was discharged by consent of the parties involved. The consequences of such discharge by consent on recognition is disputed in the present application before me.

The parties' cases

The legal framework

12 The applicants have applied under Art 15 of the Singapore Model Law for recognition of the US bankruptcy proceedings in which King has been appointed as Trustee. Under Art 17 of the Singapore Model Law, the court must recognise a foreign proceeding if the stipulated conditions under Art 17(1) are met. Article 17(1) of the Singapore Model Law is subject to Art 6, which allows a Singapore court to refuse recognition if such recognition would be "contrary" to the public policy of Singapore.

13 Under Art 17(2) of the Singapore Model Law, the foreign proceeding must be recognised as a foreign *main* proceeding if it is taking place in the State where the debtor has its centre of main interests ("COMI"); the foreign proceeding is recognised as a foreign *non-main* proceeding if the debtor has an establishment within the meaning of Art 2(*d*) in the foreign State.

14 The focus of the parties' cases has been on the location of Zetta Jet Singapore's COMI. No issue arises in respect of Zetta Jet USA, which was incorporated in the US. Unless otherwise specified, any references in this judgment to disputed COMI issues generally should be taken as a reference to Zetta Jet Singapore's COMI only.

Summary of the applicants' case

15 The applicants note that no issue has arisen in relation to Zetta Jet USA's COMI (see *Zetta Jet (No 1)* at [20]). Zetta Jet USA's COMI is the US. On that basis, the US bankruptcy proceedings in relation to Zetta Jet USA should be granted recognition as a foreign main proceeding under Art 17(1) read with Art 17(2)(*a*) of the Singapore Model Law.[2]

16 The applicants ask the court to revisit the question of where Zetta Jet Singapore's COMI is located. If found that it is also in the US, the US bankruptcy proceedings in relation to Zetta Jet Singapore should also be recognised as a foreign main proceeding under Art 17(1) read with Art 17(2)(*a*) of the Singapore Model Law.[3]

17 The applicants argue that there is no public policy issue which would require the court to refuse to recognise the US bankruptcy proceedings in relation to Zetta Jet Singapore and the Trustee appointed for those proceedings. AAH did not enter any appearance in the US bankruptcy proceedings, despite informing the judge who granted the injunction in S 864/2017 that it would take steps to resist the US bankruptcy proceedings in the US Bankruptcy Court. In any event, the most important public policy consideration in this case is to ensure the orderly and efficient recovery of assets for the benefit of Zetta Jet Singapore's creditors: *In re ABC Learning Centres Ltd* 728 F 3d 301 (3rd Cir, 2013). Public policy also requires the court to have regard to the international basis of the Model Law and the promotion of its uniform application, as required under Art 8 of the Singapore Model Law.[4]

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2 Applicant's Further Submissions at paras 34–36.

3 Applicants' Further Submissions at paras 37–39.

4 Applicants' Further Submissions at paras 40–58.

18 Next, the applicants submit that whatever test is applied to ascertain Zetta Jet Singapore's COMI and whichever date is taken to be operative in this determination, Zetta Jet Singapore's COMI would be found to be in the US. That said, the applicants favour the US approach in assessing COMI as at the time of the filing of the recognition application to the recognising court.[5]

19 In the alternative, the applicants submit that even if the US proceedings in relation to Zetta Jet Singapore are not a foreign main proceeding, the court had earlier found that Zetta Jet Singapore had an establishment within the meaning of Art 2(*d*) of the Singapore Model Law in the US (see *Zetta Jet (No 1)* at [20]). Accordingly, the US bankruptcy proceedings in respect of it should be recognised as a foreign non-main proceeding under Art 17(1) read with Art 17(2)(*b*) of the Singapore Model Law.[6]

20 Following from these submissions, in the event that the US bankruptcy proceedings relating to the Zetta Entities are recognised, the applicants submit that the various orders prayed for should also be granted, including orders under the Singapore Model Law for:

(a) the Trustee's recognition as a foreign representative within the meaning of Art 2(*i*);[7]

(b) the stay of proceedings under Arts 20(1) and 20(2);[8]

(c) the Trustee's empowerment to examine witnesses, take evidence and obtain delivery of information under Art 21(1)(*d*);[9]

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5 Applicants' Further Submissions at paras 61–127.

6 Applicants' Further Submissions at paras 145–148.

7 Applicants' Further Submissions at paras 149–166.

8 Applicants' Further Submissions at paras 149–166.

(d) the Trustee's entrustment with the administration and realisation of assets of the Zetta Entities;

(e) the Trustee's empowerment to appoint of a local representative under Art 21(1)(*e*);[10]

(f) the Trustee's standing to make applications under Art 23(1);[11] and

(g) the granting of additional reliefs available to a liquidator appointed in Singapore under Art 21(1)(*g*).[12]

Summary of the Intervener's case

21 In respect of the determination of Zetta Jet Singapore's COMI, the Intervener relies on its previous arguments in *Zetta Jet (No 1)*: Zetta Jet Singapore's senior management, employees, facilities, operations, business and creditors were all located in Singapore. These factors also indicate that the company had no establishment in the US. Accordingly, the US bankruptcy proceedings in relation to Zetta Jet Singapore are neither foreign main nor non-main proceedings under Art 17(2) of the Singapore Model Law.[13]

22 As for the question of recognition, the Intervener argues that the Trustee's breach of the Singapore injunction in continuing the US bankruptcy proceedings amounted to contempt, and remained so even after the discharge of the injunction. The Intervener cites *Pertamina Energy Trading Ltd v Karaha*

9 Applicants' Further Submissions at paras 167–180.

10 Applicants' Further Submissions at paras 181–193.

11 Applicants' Further Submissions at paras 194–203.

12 Applicants' Further Submissions at paras 204–237.

13 Intervener's Submissions dated 12 January 2018 at para 76.

Bodas Co LLC and others [2007] 2 SLR(R) 518 ("*Pertamina*"), which is to be preferred to contrary authority in *Nikkomann Co Pte Ltd and others v Yulean Trading Pte Ltd* [1992] 2 SLR(R) 328 ("*Nikkomann*").[14] The Intervener also notes that it had consented to the discharge of the injunction: (a) on the basis that it was accepted that *Pertamina* was the correct statement of the law; and (b) in view of the implicit concessions that the Trustee had made that showed that he was aware or wilfully blind that he had breached and continued to breach the Singapore injunction.[15]

My decision

23 I accept that Zetta Jet Singapore's COMI is to be determined as at the date of the recognition application, following the US position. In any event, the evidence before me indicates that whichever alternative date is considered, its COMI was in the US. No reason remains to deny recognition on the basis of public policy following the consensual discharge of the injunction. Accordingly, the US bankruptcy proceedings in relation to Zetta Jet Singapore are to be recognised as a foreign main proceeding.

24 Aside from the matters examined below, I am satisfied that the other provisions of the Singapore Model Law are met.

Issue 1: Whether the US proceedings are a "foreign proceeding" under the Singapore Model Law

25 The US bankruptcy proceedings in relation to the Zetta Entities were originally restructuring proceedings under Chapter 11 of the Bankruptcy Code 11 USC (US) (1978) ("the US Bankruptcy Code"), but were subsequently

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14 Intervener's Submissions dated 16 November 2018 at paras 15–16.

15 Intervener's Submissions dated 16 November 2018 at para 17.

converted to Chapter 7 proceedings, *ie*, liquidation proceedings. These are clearly a "foreign proceeding" within the meaning of Art 2(*h*) of the Singapore Model Law.

Issue 2: Zetta Jet Singapore's COMI

26 There are two issues to be discussed in relation to the determination of Zetta Jet Singapore's COMI:

(a) The date at which such assessment is to be made, namely, whether the court should assess the location of the debtor's COMI on the date of the foreign application commencing foreign insolvency proceedings; the date when recognition is applied for; or the date the recognising court hears the issue of whether recognition should be granted.

(b) The approach to be taken in assessing what constitutes the COMI of a particular debtor company.

27 I am of the view that the determination of the debtor's COMI is to be made as at the date of the application to this court for recognition, and that in assessing where the COMI lies, the court's focus would be on where the primary commercial decisions are made for the debtor. This would generally be the place of registration unless otherwise shown in a particular case. The enquiry would be dependent on the circumstances of each case and no general rule can be laid down. In many cases, it may be that the factors relevant in the assessment essentially balance each other out; in such cases, the presumption under Art 16(3) of the Singapore Model Law in favour of the place of the debtor's registered office would have to come into play.

The interpretative approach to be adopted

28 The concept of the COMI lies at the heart of the regime created by the Model Law, in force in Singapore with certain modifications to adapt it for application in Singapore, as enacted under the Tenth Schedule of the Companies Act pursuant to s 354B of the Companies Act. The location of the debtor's COMI determines whether foreign insolvency proceedings qualify as a "foreign main proceeding" within the meaning of Art 2 of the Singapore Model Law:

> **Article 2. Definitions**
>
> 2. For the purposes of this Law —
>
> …
>
> (f) "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has its centre of main interests;
>
> (g) "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment;
>
> …

Foreign main proceedings qualify for more extensive reliefs than foreign non-main proceedings: only foreign main proceedings qualify for automatic reliefs under Art 20(1) of the Singapore Model Law.

29 The term "COMI" is not, however, defined in the Model Law or the Singapore Model Law. There is only a presumption under Art 16(3) of the Singapore Model Law that the place of the debtor's registered office is its COMI:

> **Article 16. Presumptions concerning recognition**
>
> …
>
> 3. In the absence of proof to the contrary, the debtor's registered office is presumed to be the debtor's centre of main interests.

30 While there is reference to a presumption here, I do not read Art 16(3) of the Singapore Model Law to constitute a rebuttable presumption of law in the typical sense, which would require the party rebutting the presumption to prove on the balance of probabilities that the presumption does not apply. I see nothing in the Model Law itself, as enacted in the legislative materials, or in the commentaries to the Model Law which would require such an approach.

31 Considering the text of Art 16 of the Model Law and the Singapore Model Law, the guides to enactment provided by UNCITRAL, and the fact that the Model Law is to operate across jurisdictions, I am of the view that the usual rule generally requiring that rebuttal of a legal presumption is to be made out on the balance of probabilities does not apply here. Instead, I regard the presumption under Art 16 to operate as a starting point subject to displacement by other factors depending on the circumstances of the specific case. Art 16 refers to "the absence of proof to the contrary", which to my mind does not require proof on the balance of probabilities; it allows for the presumption to be rebutted simply on the presence of proof, *ie*, evidence, to the contrary.

32 I do note that the Singapore legislation did not adopt the same language as the US enactment which does refer to "evidence". US Bankruptcy Code § 1516(c), which incorporates Art 16(3) of the Model Law into US law, reads:

> (c) In the absence of evidence to the contrary, the debtor's registered office … is presumed to be the center [*sic*] of the debtor's main interests.

I do not, however, understand that difference to mean that the Singapore courts adopt a stricter standard in respect of the Art 16(3) presumption.

33 I have noted that there is language in the US cases which may seem to require some weighing of the evidence when considering if the presumption

should be rebutted. In so far as these cases establish that there needs to be consideration and assessment of the evidence, I would, with respect, agree. I understand the US cases to require that there be proof of the debtor's COMI, but not that the presumption is rebutted on the preponderance of the evidence as required in Singapore law generally. For example, in *In re Fairfield Sentry Ltd.* 440 BR 60 at 63–64 (Bkrtcy SDNY, 2010) ("*Fairfield Sentry (Bankruptcy Court)*"), Judge Burton R. Lifland at first instance referred to the applicant's burden in that case to "persuade the Court by a preponderance of the evidence" that the debtor's COMI was in the BVI. Judge Lifland noted that although US Bankruptcy Code § 1516 created a rebuttable presumption in favour of the BVI as the COMI, the court could not "rely solely upon this presumption, but rather must consider all the relevant evidence": at 64. Judge Lifland's approach did not appear to be disturbed on appeal: see *In re Fairfield Sentry Ltd.* 714 F 3d 127 at 137–139 (2nd Cir, 2013) ("*Fairfield Sentry (CA)*").

34 Given the absence of actual statutory guidance under the Model Law beyond the presumption in Art 16(3) as to what constitutes the debtor's COMI, resort has to be had to guidance issued by UNCITRAL as well as case law from other jurisdictions. In respect of the latter, I am mindful that there may be differences in legislative backgrounds, particularly as regards European and English cases. These jurisdictions additionally consider the applicable EU legislative materials:

> (a) the ***Regulation on insolvency proceedings***, EC Council Regulation No 1346/2000, [2000] OJ L 160/1 <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32000R1346> (accessed 19 November 2018) ("the EIR"); and

(b) the ***Regulation on insolvency proceedings (recast)***, EU Parliament and Council Regulation No 2015/848, [2015] OJ L 141/19 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848> (accessed 19 November 2018) ("the Recast EIR"), which replaced and supersedes the EIR, and applies to insolvency proceedings opened after 26 June 2017.

35 I note that the Model Law concept of COMI owes much to the EU Convention on Insolvency Proceedings (23 November 1995), 35 ILM 1223 ("EU Convention on Insolvency Proceedings"), which was subsequently adopted by and reproduced as the EIR: see *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* vol 1 (Look `Chan Ho gen ed) (Globe Law and Business, 4th Ed, 2017) ("*Cross-Border Insolvency: A Commentary*") at p 171. That being said, there are differences in the structure of the UNCITRAL and EU regimes, which, on occasion, may lead to different nuances at least. I am also mindful that there are variations in the enactment of the Model Law itself, in various jurisdictions, which may be material.

36 Guidance may also be taken from the guides issued by UNCITRAL:

(a) the "Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency", UNCITRAL, 30th Sess, UN Doc A/CN.9/442 (1997) ("the 1997 Guide"); and

(b) the "UNCITRAL Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency" (2013) <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> (accessed 19 November 2018) ("the 2013 Guide").

These guides will collectively be referred to as "the Guides".

37 Section 354B(2) of the Companies Act refers to the 1997 Guide as a relevant document in the interpretation of the Singapore Model Law. This is of course a deliberate legislative endorsement of the 1997 Guide; the 2013 Guide which introduced a number of amendments is not given official status in Singapore law. Nonetheless, the 2013 Guide should not be entirely ignored. Consistency and comity should be pursued as far as possible in the interpretation of the provisions of the Model Law. Where there is any conflict between the two Guides, the 1997 Guide trumps. But where the 1997 Guide is silent, the court may consider the 2013 Guide in its interpretation of the Singapore Model Law and in assessing its statutory objectives.

38 Finally, I bear in mind the preamble to the Singapore Model Law, emphasising cooperation and efficiency between the courts of states involved in cross-border insolvency, and Art 8 of the Singapore Model Law, which requires regard to be paid to the Singapore Model Law's international origin and the promotion of uniformity in its application. I am of the view that the Singapore courts should attempt to tack as closely as possible to the general interpretive trends taken in other jurisdictions that apply the Model Law in its various enactments.

Relevant date for determining the COMI

39 Different approaches exist as to the relevant date for determining COMI. The applicants canvass each approach, arguing that whichever date is chosen, Zetta Jet Singapore's COMI will be found to be in the US. No issue arises as to Zetta Jet USA's COMI.

The English (and European) position

40 The English approach is as laid down in cases such as *In the Matter of Videology Limited v In the Matter of the Cross-Border Insolvency Regulations 2006* [2018] EWHC 2186 (Ch) ("*Videology*") and *In re Stanford International Bank Ltd and another* [2010] 3 WLR 941. Applying the Model Law as incorporated into English law in Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030) (UK) Sch 1 and the Recast EIR, English courts determine the debtor's COMI as at the date of the application to open insolvency proceedings abroad.

41 The applicants argue that this approach is influenced by the fact that the Recast EIR uses the COMI concept to determine (a) if the proceeding is one to which the Recast EIR applies; and (b) which EU Member State the proceeding may be commenced in. This view is supported by Recital (23) of the Preamble to the Recast EIR, which states that the "[Recast EIR] enables the main insolvency proceedings to be opened in the Member State where the debtor has [its COMI]".[16] Additionally, Art 3(1) of the Recast EIR states:

> *Article 3.* **International jurisdiction**
>
> 1. The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interest shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

42 The applicants thus argue that the COMI concept is used differently in the Recast EIR and in the Model Law. The Model Law uses the COMI concept at a later stage, as a means of determining the relief to be granted to the relevant foreign proceedings if so recognised: see Art 20(1) of the Model Law.

[16] Applicants' Further Submissions at para 84.

Furthermore, citing *Cross-Border Insolvency: A Commentary* at p 172, the use of the present tense in Arts 2(*f*) and 17(2)(*a*) of the Model Law indicates that "COMI is to be determined at the time of the application for recognition".[17]

43 I have considered the reasoning in two cases discussed in the applicants' submissions:[18]

(a) In *Videology*, Mr Justice Snowden stated that under the Recast EIR, the date at which the company's COMI must be determined is that at which the request to open insolvency proceedings is made: at [49], citing *Interedil Srl v Fallimento Interedil Srl* Case C-369/09, [2011] ECR I-9939 at [55], [2012] Bus LR 1582, <http://europa.eu.int/eur-lex/en/index.html> (accessed 19 November 2018) ("*Interedil*"), a decision by the European Court of Justice ("ECJ").

(b) In *Interedil* at [54], the ECJ noted that in light of Art 3(1) of the Recast EIR, the last place in which a debtor's COMI was located is to be regarded as the relevant place for the purpose of determining the court having jurisdiction to open the main insolvency proceedings. The ECJ at [55] then referred to the case of *Susanne Staubitz-Schreiber* Case C-1/04, [2006] ECR I-701 at [29], <http://europa.eu.int/eur-lex/en/index.html> (accessed 19 November 2018) ("*Staubitz*"), which held that the courts of the Member State in which the COMI was situated at the time when the request was launched retains jurisdiction to rule on the proceedings, even where the COMI is transferred after the request to open insolvency proceedings is lodged. This led to the conclusion that it is the location of the debtor's COMI at the time the debtor lodges the

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17 Applicants' Further Submissions at paras 85–87.

18 Applicants' Further Submissions at paras 81–82.

request to open insolvency proceedings that is relevant to determine the court having jurisdiction.

44 In view of this analysis of *Interedil* and *Videology*, I am satisfied that the applicants' submissions are correct. The English position regarding the relevant date flows from the European position, which utilises the COMI concept to determine which EU Member State's courts have jurisdiction to open the main insolvency proceedings. These considerations and requirements do not apply under the Model Law and in Singapore. There is thus no constraint requiring a Singapore court to adopt the English position.

The Australian position

45 Australia applies the Model Law as incorporated into Australian law under Cross-Border Insolvency Act 2008 (Cth) sch 1. The debtor's COMI is determined as at the time of the hearing of the recognition application, but regard may be had to historical facts which led to the position at the time: *Moore, as Debtor-in-Possession of Australian Equity Investors v Australian Equity Investors* [2012] FCA 1002 ("*Moore*") at [18]–[19], and applied in *Legend International Holdings Inc (as debtor in possession of the assets of Legend International Holdings Inc) v Legend International Holdings Inc* [2016] VSC 308 ("*Legend*") at [96], and *Wood v Astra Resources Ltd (UK Company No 07620218)* [2016] FCA 1192 at [12].

46 The basis of the Australian position appears to be that the debtor's COMI is to be determined at the point the court is required to give a decision on recognition. I consider the merits of this position in greater detail below.

The US position

47 Chapter 15 of the US Bankruptcy Code incorporates the Model Law into US law. The US cases are consistently clear that the debtor's COMI should be determined as at the filing of the application for recognition: *In re Betcorp Ltd* 400 BR 266 at 290–292 (Bkrtcy D Nev, 2009), *In re Ran* 607 F 3d 1017 at 1025–1026 (5th Cir, 2010) ("*Ran*"). This approach considers the language adopted in US Bankruptcy Code § 1502, which defines a "foreign main proceeding" as "a proceeding in the country where the debtor has the center [*sic*] of its main interests". In *Ran*, the US Court of Appeals for the Fifth Circuit noted that Congress's use of the present tense required the courts to view the COMI determination in the present, *ie*, "at the time the petition for recognition was filed".[19]

48 The Court in *Ran* put forward an additional reason for adopting this approach: examining a debtor's COMI at the time the petition for recognition is filed allows for the harmonisation of transnational insolvency proceedings. Limiting the inquiry to the time of filing avoids a detailed examination of the operational history of the applicant, which may entail conflicting COMI determinations by different courts.[20]

49 The applicants note that this position has been maintained in subsequent cases including *Fairfield Sentry (CA)* at 137 and *In re Ocean Rig UDW Inc* 570 BR 687 at 704 (Bkrtcy SDNY, 2017).[21] I note that the US position has the advantages of simplicity and adherence to the plain language of the Model Law.

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19 Applicants' Further Submissions at paras 96–99.

20 Applicants' Further Submissions at para 100.

21 Applicants' Further Submissions at paras 101–102.

The 1997 and 2013 Guides

50 The applicants note that the 1997 Guide, which is silent on the relevant date for the COMI determination, is the guide which the Singapore Parliament considered when enacting the Singapore Model Law.[22] Conversely, the 2013 Guide expressly states at para 31 that a debtor's COMI should be determined as at the date of the commencement of the foreign insolvency proceedings. Taking the date of commencement to determine the COMI provides a test that can be applied with certainty to all insolvency proceedings: see paras 159–160 of the 2013 Guide.

51 At this point, I should note that these Guides can provide such guidance as to promote the uniform and consistent interpretation of the Model Law. However, they must always be subject to the interpretation of the Model Law provisions as enacted in each jurisdiction, and the relevant considerations of policy which may point in favour of one outcome or another. I have reservations about adopting the approach advocated in the 2013 Guide, which is essentially that adopted by Europe and England. Certainty is also well-served by the adoption of the US position, though possibly, with respect, not the Australian position.

The preferred approach

52 The positions regarding the relevant date to determine COMI are:

(a) **The English and European position and the position taken in the 2013 Guide**: The date of the commencement of the foreign insolvency proceedings.

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22 Applicants' Further Submissions at paras 111–112.

(b) **The Australian position**: The date of the hearing of the recognition application.

(c) **The US position**: The date the application for recognition is filed.

53 Having considered parties' submissions and the above analyses, I accept that determining the debtor's COMI as at the date the recognition application is filed, *ie*, the US position, provides greater certainty and better accords with commercial realities and the language of the provisions of the Model Law.

54 The applicants point to three reasons for preferring the US position:[23]

(a) Arts 2(*f*) and 2(*g*) of the Singapore Model Law, which define foreign main and non-main proceedings, refer to proceedings that are "taking place". The use of the present tense contemplates that foreign proceedings are underway at the time the debtor's COMI is being ascertained. This is in line with the US position.

(b) The US position would allow the court to account for shifts in the debtor's COMI in the period between the commencement of the foreign insolvency proceeding and the date the recognition application is filed.

(c) The debtor's operational history should not be considered as part of the COMI determination, so as to avoid a meandering inquiry.

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[23] Applicants' Further Submissions at paras 122–141.

55 Considering the applicants' submissions, I note the following factors that militate in favour of Singapore's adoption of the US position over the English position.

56 First, the definitions in Art 2 of the Singapore Model Law do not expressly specify the date at which COMI is to be ascertained. The definitions do, however, use the present tense, which seems to indicate that what matters is the situation at the point of the application for recognition.

57 Second, postponing the COMI determination until the application for recognition is made accepts that, in contemporary practice, various entirely legitimate measures may be taken to shift a debtor's COMI to another jurisdiction, for instance, to create a jurisdictional nexus for the opening of insolvency proceedings. Such measures may not all be in place by the time of the foreign insolvency application, *ie*, the operative date under the English and European position. It is not objectionable to grant companies the discretion to select the jurisdiction that will offer the best prospects for achieving an effective restructuring solution: see Sundaresh Menon, Chief Justice, Supreme Court of Singapore, "The future of cross-border insolvency: Some thoughts on a framework fit for a flattening world", keynote address at the 18th Annual Conference of the International Insolvency Institute 2018 (25 September 2018) at paras 32–39 <https://www.iiiglobal.org/sites/default/files/media/keynote%20address%20delivered%20by%20Chief%20Justice%20Sundaresh%20Menon.pdf> (accessed 19 November 2018). Indeed, granting debtors the flexibility to make such COMI shifts is a recognition of their autonomy. An applicant company in ordering its affairs is to be given some leeway in choosing an appropriate forum in which to seek reorganisation. The courts should take a neutral stance as to any purported changes in COMI so as to recognise the applicant's autonomy

and to give effect to any preference exercised by the applicant, subject to any public policy concerns.

58 That said, this is not to sanction a free-for-all: limits exist. An applicant company cannot, for instance, seek to evade responsibilities to its employees by seeking reorganisation in a wholly unrelated jurisdiction, and recognition may be denied in such a situation. If, for instance, and subject to considered arguments on this issue, a COMI shift was opportunistically pursued to evade the criminal laws of the recognising court or to cause prejudice to creditors, then the application for recognition of the foreign proceedings may be denied. It may also be that such denial would not turn on whether the conditions for recognition under Art 17(1) of the Model Law were fulfilled, but rather as being contrary to public policy. We will have to see how the arguments are made in such a case. But short of evasion of criminal or similar laws, and generally provided that there are commercial reasons for choosing one jurisdiction over another, I am doubtful that a Singapore court would be overly exercised by the applicant's choice of a particular court to commence insolvency proceedings in.

59 With that consideration in mind, ascertaining the debtor's COMI as at the date of the hearing for recognition facilitates an applicant's ability to seek restructuring in an appropriate forum. Jurisdiction may be assumed by the restructuring court on a number of grounds, not all of which will necessarily establish that the applicant's COMI is in that jurisdiction. That, however, is a separate analysis; what matters for the recognising court is that the requirements of the Model Law are met at the point of the application for recognition.

60 Having preferred the US position to the English position, I now consider the Australian position vis-à-vis the US position. It would seem that the Australian approach is based on the need to give effect to the language of the

Model Law. I am, however, unable to find in the language of the Singapore Model Law anything that distinguishes the date of the *application* from the date of the *hearing* as the relevant date for determining the COMI. I am also of the view that the Australian position leaves the date of the ascertainment of the debtor's COMI uncertain: a bright-line rule would be preferable. Finally, although the Australian position gives the recognising court greater leeway in ascertaining the debtor's COMI, I do not think that in practice there would be much difference in result between the Australian and US positions.

61 All things considered, the ascertainment of COMI as at the date of the application has the advantage of greater certainty, given the possible vagaries of hearing diaries in all jurisdictions. I therefore prefer the US position to the Australian position.

Factors to be considered in determining COMI

62 Having determined the relevant date for the COMI determination, which factors does the court consider in the COMI assessment? A summary of the approaches taken in various jurisdictions follows.

The English and European approach

63 English and European cases, particularly *In re Eurofood IFSC Ltd* (Case C-341/04) [2006] 1 Ch 508 ("*Eurofood*") and *Interedil*, provide useful guidance. They highlight the need for objective criteria that would allow for ascertainment of the COMI by third parties: *Eurofood* at [33], *Interedil* at [49].

64 The English High Court of Justice in *Videology* took the following approach:

(a) English courts are to apply the ECJ's tests in determining a company's COMI: at [28]. *Eurofood* and *Interedil* were applied to determine if the presumption of COMI in the place of the debtor's registered office had been displaced: at [32].

(b) In view of the Recitals and Art 3(1) of the Recast EIR, the factors relied upon to rebut the presumption had to be both objective and ascertainable by third parties. The fact that a parent company in another state controlled the economic choices of a subsidiary was insufficient to rebut the presumption: at [33], citing *Eurofood* at [33]–[37].

(c) On the facts of the case, Mr Justice Snowden concluded that the presumption that the company's COMI was in the place of its registered office had not been displaced. The UK, the place of the debtor company's registered office, was also where the company's trading premises and staff were located; where its customer and creditor relationships were established; where it administered its relations with trade creditors on a day to-day basis; and where its main assets, namely, the receivables and cash at bank, were located. Importantly, representations were made to the company's main finance creditor that the UK was where its COMI was located: at [72]. These were all factors that were visible and immediately ascertainable by customers and trade creditors of the company, and which ultimately displaced the factor that the company's senior management was located in the US: at [73].

65 I note also that Recital (28) of the Preamble to the Recast EIR, which *Videology* considered at [31], states:

> (28) When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their

> perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of [COMI], informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.

66 Although the Recast EIR and its Recitals are not part of Singaporean law, the recognised need for objective criteria ascertainable by third parties and the focus on the debtor company's place of central administration are clearly applicable to the Singaporean context.

The Australian approach

67 In *Legend*, Randall AsJ of the Supreme Court of Victoria considered various factors in this analysis, including the location of the debtor company's assets; the residence of its directors; its principal place of business, the activities of its wholly owned subsidiary; its operations, including its day-to-day activities; and where the auditing of its accounting was attended to. In the circumstances, it was found that the preponderance of the debtor company's activities was conducted in Australia, and Australia was thus the company's COMI. The presumption of COMI in the place of the company's registered office, *ie*, Delaware, was therefore displaced: at [98]–[123].

68 The Australian approach also entails consideration of where the debtor conducts the administration of its interests on a regular basis: *Moore* at [19]. The COMI should also be ascertainable by third parties, creditors, and potential creditors; for this to be the case, the court must have regard to the need for an element of permanence: *Moore* at [19], *Kapila, in the matter of Edelsten* [2014] FCA 1112 at [53], *Legend* at [91].

69 I also highlight the broad-ranging approach taken in *Young, Jr, in the matter of Buccaneer Energy Limited v Buccaneer Energy Limited* [2014] FCA 711 at [7]–[14]. Jagot J noted that although the company was registered in Australia, its main activities and that of its subsidiaries were in the US. Its COMI was thus the US; ignoring the company's group structure would be to ignore the commercial realities which the Model Law attempts to address.

The US approach

70 The US courts have adopted the term "nerve centre", focussing on where the debtor company performs its most important and consequential business decision-making functions: *In re Railpower Hybrid Technologies Corp* Case 09-41498-WWB at 8 (Bkrtcy WD Pa, 2009), *Fairfield Sentry (Bankruptcy Court)* at 64–65. We have not had the occasion to consider the US cases in extensive detail, but I am concerned that the focus on the company's "nerve centre" is perhaps too narrow where the language of the Model Law is concerned, given that the analysis is concerned more broadly with where the company's "centre of main interests" is located.

71 That being said, the US cases do look at a similarly broad range of factors in the COMI determination, as in other jurisdictions, including the location of the debtor's headquarters; the location of its management; the location of its primary assets; the location of the majority of its creditors; and the jurisdiction whose law would apply to most disputes: *Fairfield Sentry (CA)* at 137, *In Re SPhinX, Ltd.* 351 BR 103 at 117 (Bankr SDNY, 2006).

The Singaporean approach

72 We have not had the occasion yet, at least in a written judgment, to consider the interpretation of COMI under the Singapore Model Law. I

previously applied a common law COMI test when deciding recognition issues in *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] 4 SLR 312 ("*Opti-Medix*") and *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] 5 SLR 787. In particular, I was satisfied in *Opti-Medix* that despite the debtor companies' incorporation in the BVI, their common law COMI was in Japan where the companies carried on business. I thus granted full recognition to the relevant Japanese insolvency orders and the Tokyo District Court-appointed bankruptcy trustee: at [24] and [25].

73 Singapore has since adopted the Model Law. It would be preferable if the common law and Model Law conceptions of COMI were aligned as far as possible.

74 Turning to the Guides for reference, the 1997 Guide is quite laconic; para 72 only states that COMI as used in Art 2(*b*) of the Model Law is used also in the EU Convention on Insolvency Proceedings. No commentary is made regarding Art 16(3) of the Model Law. In comparison, the 2013 Guide describes the COMI concept as fundamental to the operation of the Model Law; proceedings commenced in a company's COMI are accorded deference and automatic relief: para 144. The 2013 Guide then states, at para 145:

> In most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the foreign proceeding has commenced is the debtor's centre of main interests. The factors are the location: (*a*) where the central administration of the debtor takes place, and (*b*) which is readily ascertainable by creditors. …

This approach echoes the approach taken in the Recast EIR.

75 In addition, the 2013 Guide at para 147 also highlights additional COMI factors which could be considered by the recognising court as applicable:

> … [T]he location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

76 I have noted at [30] and [31] that I do not understand the Singapore Model Law to require that the Art 16(3) presumption be rebutted on the balance of probabilities. In determining a debtor's COMI under the Singapore Model Law, the court would first presume that the place of the debtor company's registered office is its COMI. This presumption would be displaced if it is shown that the place of the company's central administration and other factors point the COMI away from the place of registration to some other location. The COMI factors should be those that are objectively ascertainable by third parties generally, with a focus on creditors and potential creditors in particular. This follows the English, European and Australian positions.

77 *Eurofood* at [33] noted that objectivity and the possibility of ascertainment by third parties are necessary to ensure legal certainty and foreseeability concerning the determination of which EU Member State's courts have jurisdiction to open main insolvency proceedings. Although this consideration does not strictly apply in Singapore, there remains a need to ensure that creditors especially can predict when an insolvency proceeding

might subsequently be granted recognition as a "foreign main proceeding", given the automatic reliefs that follow under the Model Law.

78 In this respect, I would also consider it material, in determining which factors to take into consideration for the COMI determination, to consider how likely it is that a creditor would weigh a particular factor in his mind. I would focus on those factors that a creditor would take into account in his deliberations as to whether to afford credit to the applicant company. For instance, where a company is clearly involved in cross-border activities, a creditor may not regard the location of assets as being significant if it is expected that the assets in question, *eg*, vessels or planes, would move around as part of the company's operations. It may be in such a situation that the location of the company's fixed assets plays a greater role.

79 I also accept that there should be an element of settled permanence or intended permanence in the factors considered, which would assist creditors in their weighing of the relevant factors and the risks entailed in granting credit. As such, a change in COMI would be tolerated, even just ahead of an insolvency filing, provided that there is a clear ascertainable intention to make such a COMI change lasting, rather than vacillating.

80 The US approach of identifying the company's "nerve centre" is useful, but I would not regard this factor as determinative. It would be one of several factors that need to be weighed in the round. I would focus on the centre of gravity of the objectively ascertainable factors, if that helps the analysis: balancing all the relevant factors, where does the mass settle in the end? It will be a robust, entirely qualitative analysis especially since the proceedings will not involve a full trial of the facts, but that is, I believe, what is intended under the Model Law.

81 Flowing from that, where there are disputed facts, the court will have to make the best conclusions it can in the circumstances. Where the scale does not clearly tip either way, the location of the registered office will be taken to be the COMI by default. And, as is the case here, if there are background disputes between shareholders affecting questions of management and direction, that again may, on the facts, lead to the conclusion that the presumption or default position should be upheld.

82 As the analysis requires a consideration of factors relevant to the creditor's understanding, the court's focus is on actual facts on the ground rather than on legal structures. The court's inquiry in this regard is broad-ranging, looking at the company's activities in and connections to a particular locale. In some situations, it may be that the actual activities on the ground mean that little distinction is drawn in reality between a company and other members in its group. That should be taken into account in determining the company's COMI. This approach may be contrasted to other situations where the concept of separate corporate identity is maintained: the purpose of those legal doctrines is different. COMI determination is not concerned with corporate identity as such, unlike, say, determinations of corporate liability or attribution.

83 Accordingly, I am of the view that in ascertaining a specific company's COMI, there is no need to maintain strictly the distinction between different entities within a group. It is possible for the analysis to be made of the activities of an entire group of companies, rather than of the specific debtor company in question. In this case, some of the COMI factors relate to the activities of the Zetta Entities and the Zetta Jet Group generally, and not Zetta Jet Singapore itself.

84 In any event, I do not think there is a significant difference in the position of the applicants and the Intervener as to the law on the determination of COMI.

Consideration of factors in the present application

85 I will assess the various factors raised by the parties in the following categories:

(a) the location from which control and direction was administered;

(b) the location of clients;

(c) the location of creditors;

(d) the location of employees;

(e) the location of operations;

(f) dealings with third parties; and

(g) the governing law.

I will also deal briefly with the applicants' argument that the location where the foreign insolvency representative, *ie*, the Trustee, operated from should be considered.

86 The COMI determination takes into account the facts as they were at 13 December 2017, the date of the applicants' recognition application. That said, as noted above at [23], the analysis will be unchanged regardless of the date considered.

Location from which control and direction was administered

87 The applicants contend that control of Zetta Jet Singapore resided in the US, particularly after 17 August 2017 when Geoffrey Owen Cassidy ("Cassidy") and June Tang Kim Choo ("Tang") were removed from their positions in the Zetta Jet Group. Following their removal, the Zetta Entities were managed exclusively from the US;[24] operational decisions were also made in the US.[25] The Intervener relies on the fact that Cassidy was the managing director of Zetta Jet Singapore prior to his "improper removal" before the commencement of the Chapter 11 proceedings.[26]

88 I accept that at least following Cassidy's ouster, control and direction of Zetta Jet Singapore resided in persons located in the US. I note that there was a dispute about whether Cassidy's removal was proper, but this does not affect my finding. In determining COMI, the court only needs to consider the question of actual control of the debtor company, leaving the resolution of any underlying legal dispute to the appropriate forum and process.

Location of clients

89 The applicants argue that the clients were primarily based in the North America and Europe.[27] The Intervener does not refute this.[28]

90 The presence of clients in a given location does not by itself establish the debtor's COMI; the relevance of this factor arises primarily through its

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24 Seagrim's OS 1391 Affidavit at paras 32, 50 and 51.

25 Andrew Payne's ("Payne's") 2nd Affidavit at para 94(b).

26 Cassidy's 1st Affidavit at paras 16 and 20.

27 Seagrim's OS 1391 Affidavit at para 66.

28 Intervener's Submissions dated 12 January 2018 at para 76(f).

connection with other factors such as whether these clients are creditors, and the location of funds, assets and management. I would not in the circumstances of this case attach much weight to this factor.

Location of creditors

91 The Intervener contends in submissions that Zetta Jet Singapore has creditors in Singapore.[29] In contrast, the applicants state that its creditors were largely based in the US; ten of its top 20 unsecured creditors were located in the US as at 15 September 2017, the date of the commencement of the US Chapter 11 proceedings.[30]

92 I accept the evidence of the applicants that at least half of the primary unsecured creditors were located in the US. But that by itself would not be sufficient to lean the conclusion regarding the COMI towards the US, as the position with respect to the creditors would appear, on the applicants' own evidence, to be mixed.

Location of employees

93 The Intervener argues that Zetta Jet Singapore employed 176 employees who were mostly based out of the US.[31] The applicants refute this, saying that there were only 60 employees based in Singapore, with the remaining employees based elsewhere. Those in Singapore played primarily back-end functions, in low-level administrative roles. The applicants' assertion of the limited roles of the employees in Singapore was not backed up by more than an organisation chart[32] and a page in the Zetta Jet Singapore employee handbook,

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29 Intervener's Submissions dated 12 January 2018 at para 76(f).

30 Payne's 1st Affidavit at para 43(f).

31 Cassidy's 1st Affidavit at para 12.

which directed employees to direct questions and suggestions to Seagrim or to Eric Rastler, the Zetta Jet Group's Chief Pilot.[33]

94 I find that there is insufficient evidence as to the level or responsibility of the employees stationed in Singapore. In the circumstances, this does not play a material role in the ultimate determination.

Location of operations

95 The applicants rely on the fact that Zetta Jet Singapore's business was conducted primarily in the US: a large majority of the flights that it and Zetta Jet Group chartered occurred within the US. These flights could only be operated with US Federal Aviation Authority certification of the planes, which Zetta Jet USA maintained.[34] The Intervener argues that no maintenance facility or offices were in effect maintained in the US: while a flight operation centre was supposedly maintained in the US, most operations were conducted by the Singapore operation centre, which housed most of the operations staff; all flight scheduling and operations were conducted in Singapore.[35]

96 I am of the view that in this specific case, the locus of operations was of less relevance than perhaps in other cases. Where and how the business activities of the Zetta Entities were conducted would not have been of much relevance and not appreciable to a creditor, especially since the company was concerned with flights, at least some of which presumably would be international in nature. Some dispersal of operations would have been expected. The administration would seem to be split in some way between the US and

32 Payne's 2nd Affidavit at para 94 and Exhibit "AP-23".

33 Seagrim's OS 1391 Affidavit at paras 71 and 80 to 82 and Exhibit "JS-1", Tab 21.

34 Seagrim's OS 1391 Affidavit at paras 42–46.

35 Cassidy's 1st Affidavit at para 12.

Singapore. I cannot conclude that this points clearly in either direction. I also find that the location of assets would not perhaps be readily apparent to a creditor, nor would a creditor likely consider it significant, given the nature of the business of transporting persons. It would have been otherwise had the business been one of largely domestic inland transport. Accordingly, I give this factor less weight in the analysis.

Dealings with third parties

97 The applicants rely on the fact that the Zetta Entities were understood to be US-based by customers and creditors. The Zetta Entities were marketed on their website and social media as operating out of Burbank, California.[36] The applicants refer to communications to key customers, vendors and creditors that their points of contact after 17 August 2017 following the removal of Cassidy and Tang would be Walter, Michael Maher, the newly-appointed Chief Executive Officer of the Zetta Jet Group, and Seagrim, who were all US-based. The applicants also point to the Zetta Jet Group's website which indicated that the US was the location of Zetta Jet Group's business.[37] These factors are significant pointers which were readily perceivable by third parties that indicated that the COMI was in the US.

98 The Intervener alleges that Zetta Jet Singapore conducted sales and marketing for its flights all over the world, implying that it was not US-centred.[38]

99 In so far as dealings with creditors are concerned, I would accept that it is relevant that representations pointed to the Zetta Jet Group as being located

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36 Seagrim's OS 1391 Affidavit at paras 60, 86 and 87.

37 Seagrim's OS 1391 Affidavit at para 35.

38 Cassidy's 1st Affidavit at para 12(e).

in the US, reinforcing the expectations of at least some of the creditors that they were dealing with a company that would have a strong connection to the US.

The governing law

100 Neither side invokes the use of a particular law or choice of jurisdiction. In general, I would think that this is of less relevance in most situations given the demise of the rule in *Gibbs* outside England and its associated jurisdictions.

Location that the foreign representative was operating from

101 The applicants point to the fact that the US-based Trustee undertook efforts to restructure Zetta Jet Singapore from the date of his appointment to the cessation of the business of the Zetta Entities, *ie*, from 5 October 2017 to 30 November 2017.[39]

102 However, I would not take the foreign representative's actions as being relevant in the ascertainment of COMI. The work being done by the foreign representative would flow from the assumption of jurisdiction by the foreign court on whatever basis it considers appropriate.

103 I am mindful that I differ in this regard from the approach of the US courts in cases such as *Fairfield Sentry Ltd (CA)*, which held that "any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis": at 137. I am not, however, convinced that it is proper to consider such activities in determining COMI.

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[39] Payne's 4th Affidavit at Exhibit "AP-37", Tab 2.

The final assessment

104 On an overall assessment, the following significant factors displace the presumption that Singapore, the place of Zetta Jet Singapore's registered office, was its COMI:

(a) central management and direction of Zetta Jet Singapore were conducted from the US at all relevant times;

(b) corporate representations indicated it operated from the US; and

(c) a substantial portion of its creditors were located in the US.

105 The fact that Zetta Jet Singapore's administration and operations were carried out at least to some extent in Singapore is outweighed by the abovementioned factors. I am not sure that any distinction can be drawn between administration and operations. For that reason, I am the of the view that in these circumstances, the presence of employees in Singapore will be at best a neutral factor in determining COMI.

106 I am also of the view that the location of Zetta Jet Singapore's assets, namely, the planes, is incidental and not indicative of the location of its COMI. It is to be expected for a business of this nature that its assets may be dispersed in the location most appropriate from time to time. The fact that US air certification was required for Zetta Jet Singapore to operate its flights in the US is also a neutral factor, and ultimately does not assist in the COMI determination.

107 On the facts, the most important factor to my mind is the location of the primary decision-makers. I am therefore satisfied on the evidence that Zetta Jet Singapore's COMI was at the material times located in the US.

Issue 3: Whether the public policy exception applies

108 The Intervener argues that there was continued breach of the Singapore injunction on the applicants' part; this breach was still contempt even if the injunction was subsequently discharged: *Pertamina* at [82]. *Pertamina* is to be preferred to *Nikkomann* at [62], which held that the discharge of an order would not leave the putative contemnor with any liability for penalties.[40]

109 The Intervener had consented to the discharge on the basis that the law was set out in *Pertamina*. King had made implicit concessions that he was aware or wilfully blind that he had breached and continued to breach the Singapore injunction. The application to discharge the injunction was only made after King had failed to obtain full recognition in *Zetta Jet (No 1)* and after the Australian courts observed in parallel proceedings that the Singapore injunction enjoined him.[41] King accepted on 12 July 2018, at the hearing where the injunction was set aside, that in the event the injunction was discharged, any breach or contempt that he committed prior to the discharge would not be excused.[42]

110 The applicants first argue that there is no public policy issue that should lead the court to refuse to recognise the US bankruptcy proceedings and the Trustee. No concessions had been made: King had been advised by US counsel that the injunction "did not bite on him", and thus had not sought to discharge the injunction earlier.[43]

111 Second, the effect of the Intervener's arguments on continued breach would be that the Trustee can never obtain recognition in Singapore. The

40 Intervener's Submissions dated 16 November 2018 at paras 15–16.

41 Intervener's Submissions dated 16 November 2018 at para 17.

42 Intervener's Submissions dated 16 November 2018 at para 22.

43 Applicants' Further Submissions at paras 43–46.

applicants highlight that the US bankruptcy proceedings are still underway and that the Intervener could have entered an appearance or resisted those proceedings. Moreover, the Singapore injunction had been discharged, and the court discharging the injunction had observed that the basis of the injunction was no longer extant.[44]

112 Third, public policy does not call for recognition to be refused. The first and most important public policy consideration is to protect the general body of Zetta Jet Singapore's creditors and to ensure that the Trustee maximises recovery for all of them, giving priority to creditors over shareholders. The Intervener had cynically sought to prioritise the rights of shareholders over the rights of creditors in procuring the Singapore injunction. The Intervener's public policy arguments ought to be disregarded, or weighed against the overwhelming public policy concerns pointing in favour of allowing the application.[45]

113 Fourth, the applicants highlight the overwhelming evidence of Cassidy's wrongdoing and the Intervener's deliberate deception in its *ex parte* application to procure the Singapore injunction. The applicants call the court to make a finding with regard to the Intervener's wrongful procurement of the Singapore injunction.[46]

114 Finally, the applicants argue that the present case is unlike the US decision in *In re Gold &Honey, Ltd.* 410 BR 357 (Bankr ED NY, 2009) ("*Gold & Honey*"), which the Intervener relied upon in *Zetta Jet (No 1)*. *Gold & Honey* involved a situation where the recognition of foreign receivers would directly

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44 Applicants' Further Submissions at paras 47–48; Agreed Bundle of Documents ("ABOD"), Tab 19, Notes of Evidence ("NE") (12 July 2018) p 3 ln 25–31.

45 Applicants' Further Submissions at paras 49–54.

46 Applicants' Further Submissions at para 55.

contradict local proceedings that sought to maximise the recovery for the entire pool of creditors. Recognition would have resulted in an irremediable situation. In comparison, S 864/2017 is a civil suit brought by one shareholder against two other shareholders of Zetta Jet Singapore, and Zetta Jet Singapore itself. The recognition of the US bankruptcy proceedings and the Trustee will not undermine any claim the Intervener may make in the US proceedings or separately against the other shareholders.[47]

115 Having considered these submissions, I set out my decision as follows.

The allegedly continuing breach

116 The fact that the parties had by consent agreed to the discharge of the Singapore injunction would seem to point to the conclusion that there was no continuing breach of the injunction. The Intervener's argument, though, is that the applicants' initial breach of the injunction was not cured by subsequent discharge of the injunction.

117 This is a question that engages domestic public policy considerations. In determining these issues, the court is not primarily concerned with the desires or interests of the body of Zetta Jet Singapore's creditors as a whole or even of those in Singapore, but with the administration of justice in Singapore.

118 Whether or not breach or contempt continues after an order is discharged would be a matter dependent on the facts. I am wary of enunciating a general rule. The Intervener relies on *Pertamina* at [82], which cites Mark S W Hoyle, *Freezing and Search Orders* (Informa, 4th Ed, 2006) ("Hoyle") at paras 9.17:

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47 Applicants' Further Submissions at paras 59–61.

> The following observations in a leading textbook are also apposite (see *Hoyle* … at para 9.17):
>
> > It is no defence to contempt proceedings to allege that the order should not have been made, or has been discharged. **An order of the court must be obeyed while it stands, and a breach is still contempt even if, at a later stage, the order is in fact discharged.** The same principle applies if the original order was wrongly made; the defendant's remedy is to apply for its immediate discharge while keeping to its terms.
>
> [emphasis added in bold italics]

119 The Intervener contrasts *Pertamina* with *Nikkomann* at [62]:

> … In *Hallmark Cards Inc v Image Arts Ltd* [1977] FSR 150, however, Buckley LJ said:
>
> > While the order stands, the party who refuses access to his premises is in default of the order. But if the party against whom the order is made were to succeed in getting the order discharged, I cannot conceive that that party would be liable to any penalties for any breach of the order of which he may have been guilty while it subsisted, for if the order is discharged upon the footing that it ought not to have been made, then the contempt is in truth no contempt, although technically no doubt there is contempt.

120 I read the extract from *Pertamina* to mean that an order of the court must be obeyed while it stands; a breach of a court order is still contempt even if, at a later stage, the order is in fact discharged. I do not read *Nikkomann* as taking a different position, as the Intervener suggests. Indeed, opprobrium attaches at the point of breach regardless of what happens after.

121 I would, with respect, prefer to weigh the original injunction order, the breach of the order and the circumstances of any purported rectification to consider the consequences that follow for a putative contemnor. But while the applicants' wrong remains a breach of the Singapore injunction after its discharge and may be pursued as contempt, it does not follow that such failure

to comply remains a ground for refusal of recognition, whether under the Singapore Model Law or the common law. Recognition was refused in *Zetta Jet (No 1)* because the US Trustee had flouted an express order of court; he breached the Singapore injunction by pursuing US bankruptcy proceedings, which undermined the administration of justice in Singapore: at [29]. However, if the order is discharged and the court issuing the order is content to let the order be discharged, recognition no longer undermines the administration of justice in Singapore. It may be that contempt proceedings may be continued for such breaches in some situations, but that is a separate matter.

122 Thus the fact that the Intervener may have consented to discharge on the basis that contempt may still exist does not determine the question of whether recognition should be granted. The Intervener may indeed pursue contempt proceedings against the applicants if it wishes, but the fact that contempt may have been committed does not in itself give rise to grounds for continued non-recognition of the US bankruptcy proceedings.

The general interests of creditors

123 The other point of public policy raised by the applicants is that there is a countervailing public policy consideration of ensuring that the general interests of creditors are protected. I do not accept the applicant's arguments as regards public policy and do not find this consideration material in the application of Art 6 of the Singapore Model Law.

124 Briefly, the public policy concern identified in *Zetta Jet (No 1)* at [29] was simply that recognition of a foreign insolvency proceeding pursued in breach of an injunction issued by a co-ordinate court would undermine the administration of justice in that co-ordinate jurisdiction. That policy

consideration overrides all others, including those raised by the applicants. On the facts, the objectives of facilitating the uniform and orderly distribution of assets cannot override the paramount public policy of upholding the administration of justice in Singapore.

125 Flouting a Singapore order will carry consequences. Those advising in restructuring and insolvency matters abroad would do well to take note of that. Those breaching orders issued by Singaporean courts may not need to come to Singapore and may feel that they can thumb their noses with safety from foreign shores. But should they ever need to look to assets or information in Singapore, they will have to answer for their conduct. In the present case, the consensual discharge resolved the issue for the Trustee. The same result may not arise in other cases.

Orders made

126 Prayer 1 in Originating Summons No 1391 of 2017 ("OS 1391/2017") is for the US bankruptcy proceedings to be recognised as a foreign main proceeding within the meaning of Art 2(*f*) of the Singapore Model Law. For the reasons above, Prayer 1 is accordingly granted.

127 Prayer 2 in OS 1391/2017 is for the Trustee to be recognised as a foreign representative within the meaning of Art 2(*i*) of the Singapore Model Law. No issue arises on that score, and Prayer 2 is also granted.

128 Automatic stay reliefs flow from the recognition of the US bankruptcy proceedings as a foreign main proceeding: Art 20(1) of the Singapore Model Law. Prayer 3 in OS 1391/2017, which covers this, is granted. Prayer 4, which deals with the situation in which the US bankruptcy proceedings are recognised as a foreign non-main proceeding, is not in play.

129 Of the other operative prayers in OS 1391/2017, I grant as follows:

(a) I grant Prayer 5 to allow the Trustee to examine witnesses, take evidence, and obtain delivery of information concerning the Zetta Entities' property. I regard such powers as necessary for the proper conduct of the insolvency proceedings whether here or in the US. If any party takes specific objection to the powers granted to the Trustee in these orders, these objections will be considered separately.

(b) I also grant Prayer 6 to allow the Trustee to be entrusted with the realisation of the Zetta Entities' assets located in Singapore, save that the Trustee should apply to court for leave to repatriate any assets to locations outside of Singapore. I would also limit realisation of the assets to the extent that powers granted under Prayer 6 shall not be exercised within Singapore to prejudice rights granted by Zetta Jet Singapore to any person in respect of any real property located in Singapore.

(c) Prayer 7(a) seeks to allow the Trustee to apply to the court under Art 23(1) of the Singapore Model Law for orders under or in connection with avoidance provisions in the Companies Act and s 73B of the Conveyance and Law of Property Act (Cap 61, 1994 Rev Ed). The applicants highlight the need to be granted standing to protect the integrity of Zetta Jet Singapore's assets, and note that there are at present no other insolvency proceedings against Zetta Jet Singapore.[48] I am satisfied that the Trustee should be able to pursue claims under Art 23(1) of the Singapore Model Law in the circumstances. Any potential prejudice faced by Singapore creditors is addressed by the requirement that the Trustee apply for leave before any assets are repatriated.

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48 Applicant's Further Submissions at paras 201–202.

(d) Prayer 7(b) seeks relief under Art 21(1)(*g*) of the Singapore Model Law to grant the Trustee powers available to a liquidator under Singapore insolvency law. I am satisfied that such powers should be granted to the Trustee to allow him to pursue an orderly liquidation.

130 Several of the other Prayers in OS 1391/2017 are in the circumstances not necessary and accordingly no orders are made on these.

131 I will see parties to settle the scope of the orders and determine their precise wording, and will give directions on cost submissions. In the meantime, time for appeal is extended.

Aedit Abdullah
Judge

Tan Mei Yen, Thenuga Vijakumar, and Oh Teng Chew, Dennis (Hu Tingchao) (Oon & Bazul LLP) for the applicants;
Rajaram Muralli Raja, Jerrie Tan Qiu Lin and Kyle Gabriel Peters (Straits Law Practice LLC) for the Intervener.