



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) assessment** for **Module 2A** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2A. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student ID.assessment2A]**. An example would be something along the following lines: 202223-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2024** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).

ANSWER ALL THE QUESTIONS

Please note that all references to the “MLCBI” or “Model Law” in this assessment are references to the Model Law on Cross-Border Insolvency.

QUESTION 1 (multiple-choice questions) [10 marks in total] 7 marks

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which one of the following international organisations' mandate is to further the **progressive harmonization of the law of international trade**?

- (a) World Trade Organization.
- (b) The United Nations Commission on International Trade Law.**
- (c) The United Nations Conference on Trade and Development.

Question 1.2

Which trend(s) and process(es) served as a **proximate cause** for the development MLCBI?

- (i) Rise of corporations.
- (ii) Internationalisation.
- (iii) Globalization.
- (iv) Universalism.
- (v) Territorialism.
- (vi) Technological advances.

Choose the correct answer:

- (a) Options (i), (ii), (iii), (iv) and (vi).**
- (b) Options (i), (ii), (iii) and (iv).
- (c) Options (ii), (iii), (iv) and (vi).

(d) All of the above.

Question 1.3

Which of the following statements **incorrectly** describe the MLCBI?

- (i) It is legislation that imposes a mandatory reciprocity on the participating members.
- (ii) It is a legislative text that serves as a recommendation for incorporation in national laws.
- (iii) It is intended to substantively unify the insolvency laws of the foreign nations.
- (iv) It is a treaty that is binding on the participating members.

Choose the correct answer:

- (a) Options (ii), (iii) and (iv).
- (b) Options (i), (ii) and (iv).

(e) Options (i), (iii) and (iv).

- (c) All of the above are incorrect.

Question 1.4

Which of the below options reflect the **objectives** of the MLCBI?

- (i) To provide greater legal certainty for trade and investment.
- (ii) To provide protection and maximization of value of the debtor's assets.
- (iii) To provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtors.
- (iv) To facilitate the rescue of financial troubled businesses.
- (v) To ensure substantive unification of insolvency laws of member-states.

Choose the correct answer:

(a) Options (i), (ii), (iii) and (iv).

- (b) Options (ii), (iii) and (v).
- (c) Options (ii), (iv) and (v).
- (d) None of the above.

Question 1.5

Which **two** of the below hypotheticals demonstrate a more likely **precursor to a “cross-border insolvency”**?

- (i) An insolvency proceeding is commenced in jurisdiction A, but a significant asset is located outside of jurisdiction A.
- (ii) An insolvency proceeding is commenced in jurisdiction A and immediately transferred to a foreign jurisdiction B.
- (iii) An insolvency proceeding is commenced in jurisdiction A, in which a group of affiliated debtors has its COMI as well as all assets and liabilities.
- (iv) An insolvency proceeding is commenced in jurisdiction A, but certain liabilities are governed by laws of a foreign jurisdiction B.
- (v) An insolvency proceeding is commenced in jurisdiction A, but all *de minimis* assets are located in foreign jurisdictions.

Choose the correct answer:

- (a) Options (i) and (ii).
- (b) Options (ii) and (iii).
- (c) Options (iii) and (v).
- (d) Options (i) and (v).**

Question 1.6

A restructuring proceeding is commenced in jurisdiction A by a corporation with COMI in jurisdiction A and an overleveraged balance sheet. The court in jurisdiction A, overseeing the restructuring, entered a final and non-appealable order, approving the compromise and restructuring of the debt. The entered order, by its express terms, has a universal effect. Based on these facts alone, what is the **effect** of such order’s terms in jurisdiction B if jurisdictions A and B do **not** have a bilateral agreement?

- (a) Binding within jurisdiction B.
- (b) Binding within jurisdiction B, but certain actions need to be taken.
- (c) No effect within jurisdiction B.**
- (d) Likely no effect within jurisdiction B.**
- (e) Not enough facts provided to arrive at a conclusion.

Question 1.7

Which of the following statements set out the reasons for the development of the Model Law?

- (i) The increased risk of fraud by concealing assets in foreign jurisdictions.

- (ii) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (iii) To eradicate the use of comity.
- (iv) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

Choose the correct answer:

- (a) Options (i), (ii) and (iii).
- (b) Options (i), (ii) and (iv).**
- (c) Options (ii), (iii) and (iv).
- (d) All of the above.

Question 1.8

Which of the statements below are incorrect regarding COMI under the MLCBI?

- (i) COMI is a well-defined term in the MLCBI.
- (ii) COMI stands for comity.
- (iii) The debtor's registered office is irrelevant for purposes of determining COMI.
- (iv) COMI is being tested as of the date of the petition for recognition.

Choose the correct answer:

- (a) Options (i), (ii) and (iii).**
- (b) Options (ii), (iii) and (iv).
- (c) All of the above.**
- (d) None of the above.

Question 1.9

In the event of the following concurrent proceedings, indicate the order of the proceedings in terms of their hierarchy / primacy:

- (i) Foreign main proceeding.
- (ii) Foreign non-main proceeding.
- (iii) Plenary domestic insolvency proceeding.

Choose the correct answer:

- (a) Options (ii), (i) and then (iii).
- (b) Options (i), (ii) and then (iii).
- (c) Options (iii), (i) and then (ii).
- (d) Options (iii), (ii) and then (i).

Question 1.10

Which of the statements below are correct under the MLCBI?

- (a) The foreign representative always has the powers to bring avoidance actions.
- (b) The hotchpot rule prioritises local creditors.
- (c) The recognition of a foreign main proceeding is an absolute proof that the debtor is insolvent.
- (d) None of the above are correct.

QUESTION 2 (direct questions) [10 marks in total] 10 marks

Question 2.1 [maximum 3 marks] 3 marks

What is the key distinction between the application of the MLCBI and the European Union (EU) Regulation on insolvency proceedings? Also describe one key benefit and disadvantage of each approach.

The key distinction between the MLCBI and the EU Regulation on Insolvency (EIR) lies in the scope of application. The MLCBI is a global initiative by UNICTRAL that provides guidance on a procedural framework for cooperation among states as relates to access, recognition, relief, and cooperation. Its application is thus universal to the extent that states have enacted the MLCBI and adopted the same as domestic law. On the other hand, the EIR, which is an initiative of the European Union, is a regulation which upon adoption becomes domestic law that only applies to the EU Member states except Denmark which opted out¹. The MLCBI is thus a soft law instrument while the EIR is a binding legislative instrument.

Further, the MLCBI attempts to create a cooperation and coordination framework among states in the administration of cross border insolvency while the EIR provides for a more prescriptive approach to dealing with cross border insolvency matters more particularly recognition and enforcement. The MLCBI approach is less intrusive as it allows states to determine whether they will adopt it or not. Further Article 6 of MLCBI protects sovereignty of enacting states by allowing them to decline or limit recognition and reliefs based on public policy considerations thus recognising the differences in law, legal systems and political and self-interest of each state. Member states have less room to determine

¹ CMS Cameron McKenna Nabarro Olswang LLP - The Recast EU Insolvency Regulation becomes effective today at <https://www.lexology.com/library/detail.aspx?g=30af655e-c3c3-41d4-80d8-65803b2a1877> , accessed on 5 February 2024

certain aspects of the operation of the EIR and states may not adopt it as it has a likely impact on the local laws and their implementation.

Additionally, the MLCBI provides for a template for a predictable procedure for applying for recognition and assistance to foreign courts and foreign representatives. On the converse, recognition under the EIR is automatic². The commencement of insolvency proceedings in any EU state gives effect to the insolvency proceedings in all other EU state without the requirement for publication.

The key benefit of the MLCBI is the universal approach which has contributed significantly to the administration of cross border insolvency matters. The MLCBI also allows states to adopt it and modify the application as necessary thus creating flexibility.

On the other hand, the key benefit of the EIR is the uniformity and certainty that the EIR has created in the EU economic block regarding dealing with cross border insolvency due to its binding nature. This inspires investor confidence as it creates predictability in dealing with issues within the EU.

The disadvantage of the MLCBI is that it is not binding on any state and states may adopt and modify as desired or as per their policy and political interests. This creates uncertainty in its application, thus hindering attempts to create certainty in the global economy regarding cross border insolvency.

Conversely, the disadvantage of the EIR lies in its limited scope of application which excludes states outside the EU. Further, the adoption of the EIR as a domestic law as drafted without modification is disadvantageous as it does not take into consideration the diverse policy and political interests of individual states.

Question 2.2 [maximum 2 marks] 2 marks

Explain what the court should primarily consider using its discretionary power to grant post-recognition relief under Article 21 of the MLCBI.

The primary consideration courts need to make while granting discretionary relief in both foreign non main and foreign main proceedings is the adequate protection of the interests of creditors in the enacting state as envisioned in Article 21(2) of the MLCBI.

According to Article 21(3), the Courts in granting discretionary post recognition relief in non-main foreign proceedings must be satisfied that the relief being granted relates to assets that under the law of the enacting state should be administered under the foreign non main proceeding or that the relief is related to information that is necessary in the foreign non main proceeding.

Further, the relief granted under Article 21 must not interfere with the administration of another insolvency proceeding, particularly the main proceeding and should also not contravene public policy as safeguarded under Article 6.

While exercising its discretionary power, the court should also attempt to foster cooperation in management of cross border insolvency matters.

² A Comparative Analysis Of The UNCITRAL Model Law On Cross-Border Insolvency And Eu Insolvency Regulation 2017, Against The Background Of Various Sources Of Cross border Insolvency Law by Primrose E.R. Kurasha at <https://upjournals.up.ac.za/index.php/pslr/article/view/1902/1784> , accessed on 23 January 2024

Question 2.3 [2 marks] 2 marks

Explain the protections granted to creditors in a foreign proceeding under Article 13 of the MLCBI.

Article 13 of the MLCBI provides for the anti-discrimination principle enshrines the principle of equal treatment of domestic and local creditors. The provisions grant foreign creditors access rights and rights similar to local creditors of the enacting state as far as commencement and participation in insolvency proceedings are concerned. However, the rights under Article 13 do not affect the ranking of claims provided that the claims of foreign creditors are not treated to be of lesser priority by the virtue of the creditor being foreign alone. There are additional exceptions to the application of Article 13 that allows enacting states that do not recognise foreign tax and social security claims to exclude the same.

The protections provide the bare minimum ranking of foreign claims and thus offers comfort to investors in international trade that the treatment of claims of all creditors will be fair and just. As such, any discrimination will amount to breach which can then be raised by the foreign representatives who are granted access to the courts of the enacting state under the MLCBI.

Question 2.4 [maximum 3 marks] 3 marks

What is a key distinction with respect to the relief available in foreign main versus foreign non-main proceedings?

One of the principles underpinning the MLCBI is the protection of primary insolvency proceedings. This is evidenced by the provisions of Article 29 and 30 which address the hierarchy of proceedings where concurrent proceedings exist.

The key distinction with respect to the relief available in foreign main versus foreign non-main proceedings is the automatic relief in foreign main and the discretionary relief in foreign non-main proceedings.

With the foreign main proceeding having supremacy to the foreign non main proceeding, Article 20 of the MLCBI provides for an automatic mandatory relief following the recognition of a foreign main proceeding. The automatic relief is aimed at allowing the foreign representative to organise an orderly and fair cross border insolvency proceeding and administration of the debtors' assets. The automatic relief may include a stay on commencement or continuation of any action against the debtor or their assets and suspension of dealing with the assets of the debtor. Further, in foreign main proceedings, courts may grant additional relief including the examination of witnesses, preservation of assets and delivery of documents.

On the other hand, the relief available upon recognition of foreign non main proceedings is discretionary and is aimed at protecting the interests of the creditors and preserving the assets of the debtor, particularly those situated in the enacting state. Additionally, under Article 23, the relief available regarding power to avoid antecedent transactions in a non-main proceeding is likely to be more restrictive than for a main proceeding. The courts while granting the discretionary relief often considers the interest of all stakeholders, the connection of the debtor with the court's jurisdiction including presence of assets or significant creditors as well as domestic policies.³

³ Norton Rose Fulbright - Overview of the key Chapter 15 decisions in 2019 accessed on 5 February 2024 at <https://www.nortonrosefulbright.com/en-us/knowledge/publications/1496f7a8/key-chapter-15>

It should be noted that the interim collective relief prior to recognition if an application for recognition has been made by the foreign representative, which relief terminates upon the recognition decision being made, is available to both foreign main and foreign non main proceedings.

QUESTION 3 (essay-type questions) [15 marks in total] 11 marks

Question 3.1 [maximum 4 marks] 3 marks

A debtor has its COMI in Germany and an establishment in Bermuda, and both foreign main and foreign non-main proceedings as well as the recognition proceedings in the US have been opened. In this scenario, explain where the foreign proceedings must have been filed, and the likely result.

Under the principles of the MLCBI, a foreign proceeding can either be a foreign main proceeding or a foreign non main proceeding. The distinction is drawn based on whether the debtor has a Centre of Main Interest or an establishment in the jurisdiction where the foreign proceeding is filed. Based on the above facts, the debtors Centre of Main Interest is in Germany and thus the foreign main proceeding must have been filed in Germany for it to be recognised in the US as such. Additionally, the debtor has an establishment in Bermuda, therefore for purposes of recognition a proceeding opened in Bermuda is a foreign non main proceeding.

Concerning the likely result of the opened recognition proceedings in the US, since the US is an enacting state of the MLCBI following the adoption of the Model Law through Chapter 15 of the United States Bankruptcy Code, both the proceedings in Bermuda and Germany will be subject to the interim collective relief if the foreign representative makes an application for such relief after filing an application for recognition.

If the Courts of the US are satisfied that the proceedings qualify as foreign proceedings and that a foreign representative is in place, the Courts will rely on the provisions of Article 16 of the MLCBI to presume that the foreign proceedings, the foreign representative, and the documents filed in the recognition application are authentic and thus dispense with the evidentiary burden of proof for an efficient recognition proceeding. The court will then offer the appropriate reliefs.

About the foreign main proceedings in Germany, they qualify for an automatic relief following recognition under the provisions of Article 20 of the MLCBI. The US Bankruptcy Code further provides that such relief shall only be granted if the court is satisfied that the assets of the debtor and the interests of the creditors and other interested parties, including the debtor are sufficiently protected.⁴

If the US Court recognises the foreign non main proceedings, the US Courts can grant reliefs which must relate to the assets that under the law of the US should be administered in the Bermuda proceedings or concerns information required in the Bermuda insolvency proceeding. The relief in the Bermuda proceeding must also not interfere with the administration of another insolvency proceeding, especially the proceeding in Germany. This is in compliance with Article 21 of the MLCBI as adopted by the US under Section 1521 (c) of the US Bankruptcy Code.

The reliefs that may be granted include stay of commencement or continuation of action concerning the debtors' rights, obligations, and liabilities, stay of execution against the debtors' assets and suspension of the right to transfer, encumber or otherwise dispose of the debtor's assets.

⁴ Section 1522 of the US Bankruptcy Code Chapter 15 at <https://www.law.cornell.edu/uscode/text/11/1522>, accessed on 6 February 2024

The consequence of recognition for each of the proceedings above is to grant the foreign representative standing to initiate action under the laws of US, intervene in local proceedings in US where the debtor is a party and grant them the right to avoid antecedent transactions.

Full response requires definitions with reference to respective Art.2 MLCBI, as well as procedural provisions Art.17 and 6 MLCBI

Question 3.2 [maximum 3 marks] 3 marks

Joint provisional liquidators commenced a recognition proceeding in the US and immediately were sued and served with discovery in connection with their alleged tortious interference with contract rights of the US-based vendors of the foreign debtor. Explain the likely outcome.

While the provisions of Article 10 of the MLCBI on safe conduct clarifies that a recognition application alone does not place a foreign representative, in this case, joint liquidators, under the jurisdiction of the enacting state, US, concerning matters unrelated to insolvency, there is an exception for instance a tort or misconduct by the foreign representative may be a ground for the court of the enacting state to exercise its jurisdiction against the foreign representative. Additionally, the United States Bankruptcy Code, 11 U.S.C. sect. 1509 (e)⁵, provides that a foreign representative is subject to applicable non-bankruptcy law and must therefore comply with court orders.

In the present case, the suit against the joint provisional liquidators on allegations of tortious interference with contract rights of the US-Based vendors of the foreign debtor may be heard and determined under the US Law, thus bringing the joint liquidators under the jurisdiction of the US courts.

Since the outcome of the suit may affect the administration of the debtors' assets, particularly with respect to the US creditors and potential action, the joint liquidators may seek an interim collective relief as provided by Article 19, seeking the court's intervention to stay the suit by the US based vendors pending the determination of the recognition application.

Furthermore, the joint liquidators act as agents of the debtor and as such if the recognition application is granted as prayed, under Article 20, the stay orders that suspend commencement or continuation of action against the debtor, their assets, rights, and obligations may kick in as far as the actions of the joint liquidators relate to these aspects.

In addition to the reliefs granted under Article 20, the joint liquidators may seek additional reliefs under the provisions of Article 21 (g) to suspend the action by the US Based creditors citing the likelihood of the suit for tortious interference to adversely affect the outcomes for all other creditors as well as the general administration of the estate of the debtor.

The likely outcome will be dependent on the findings of the US court as regard the jurisdiction of the courts to determine the matter, whether the joint provisional liquidators are covered by the immunity under Article 10 and whether the discovery outcome is likely to be in the interest of the various stakeholders, particularly the creditors and the protection of the debtors' assets.

Question 3.3 [maximum 4 marks] 4 marks

⁵ Whether or not the court grants recognition, and subject to sections 306 and 1510, a foreign representative is subject to applicable nonbankruptcy law.

A foreign representative who administers assets in a debtor-in-possession-like restructuring proceeding in the UK commences a recognition proceeding in the US, setting the recognition hearing 35 days after the petition date due to the availability of the court. There is no litigation pending or threatened against the foreign debtor, but US-governed leases and intellectual property licenses have *ipso facto* clauses (that is, bankruptcy-triggered terminations) that are not enforceable under the US Bankruptcy Code. Based on these facts, explain what steps, if any, should the foreign representative take to protect the assets and why?

Based on principle, Section 365 (e) of the US Bankruptcy Code expressly prohibits terminations of executory contracts and unexpired leases based on the insolvency of a debtor. The rationale is to accord all creditors fair treatment, since there are creditors who may be relying on the ongoing leases or contracts, while allowing the office holders to attempt to rehabilitate the debtor's financial position. The foreign representative should therefore, as part of executing their mandate as office holder, assume the leases and the intellectual property licenses and treat them as assets of the debtor's estate in as far as the law in US allows post recognition. However, should the creditors attempt to enforce the ipso facto clauses, the foreign representative may consider the options discussed in the subsequent paragraphs.

Since the foreign representative has commenced proceedings in the US for recognition, they can seek interim relief for the 35 days as per Article 19 pending the determination of the recognition application. The interim relief to be sought should be at the discretion of the court and should relate to the suspension of the right to encumber or otherwise deal with the assets of the debtor to bar the creditors from enforcing the ipso facto clauses. This would create a protection around the leases and intellectual property assets of the debtor against any pre-emptive action.

Assuming the restructuring proceedings are recognised as such, the automatic relief available under Article 20 of the MLCBI will apply. The US court may grant relief including the stay of actions and legal proceedings and entrusting the administration and realisation of debtors' assets to the foreign representative as envisioned under Article 21. The courts further have the power to hand over all the assets of the debtor in US to the foreign representative provided the interests of all local creditors are protected. The foreign representative will therefore have to show that the restructuring plan will achieve a better outcome for all creditors if all the assets are placed under their control and enforce the reliefs granted to prevent any attempts by the US creditors to enforce the ipso facto clauses.

From a practical perspective, the foreign representative may also consider engaging US based legal counsel in line with the principles of cooperation in the MLCBI to facilitate negotiations with the creditors whose contracts have ipso facto clauses. This may result into the foreign representative entering into agreements with the creditors to maintain the use of the assets towards achieving a better outcome for all creditors.

In conclusion, the position of the US law on bankruptcy triggered terminations provides a safeguard that allows the foreign representatives to reap the benefits of executory contracts and unexpired leases while administering the estate of the insolvent debtor.

Question 3.4 [maximum 4 marks] 1 mark

A foreign representative, who administers the assets of an insolvent debtor in an insolvency proceeding pending in Country A (where the foreign debtor has its registered office and not much more), commenced a proceeding in Country B to recognise the foreign proceeding as the foreign main proceeding in order to sell certain assets within the territorial jurisdiction of Country B, but unfortunately the insolvency court considering the petition for recognition denied the recognition of

the foreign proceeding as a foreign main proceeding. Explain what may or should the foreign representative do next? What should the foreign representative have done at the outset?

From the onset, prior to filing the recognition proceedings, the foreign representative should examine the business and affairs of the debtor to determine whether Country A would qualify as a Centre of Main Interests (COMI) of the debtor. This analysis should consider the definition of COMI as provided under Para 12(e) of Article 2 of the MLCBI (?) i.e., the place where the debtor conducts central administration of its interests on a regular basis and is ascertainable by third parties such as creditors. Based on the facts presented, it may not be sufficient to say that the location of the registered office alone will be conclusive proof of COMI. Additionally, the foreign representative should have also considered all the other affairs of the debtor including location where financing was organised and authorised, location of books and records, primary bank of the debtor as well as office operations and address that the debtor's creditors are aware of.

The outcome of the above analysis may present a more likely COMI, where most operations and administration take place. This would then have advised on the location of filing of the main proceeding which in turn affects whether the proceedings would be recognised as main proceedings or non-main proceedings.

Assuming the facts be as they are, the foreign representative may have also benefited from a well drafted petition justifying why the COMI is in country A, the basis of that decision and provided sufficient evidence to convince the court that the only ascertainable COMI of the debtor is in country A and thus the proceedings should be recognised as foreign main proceedings.

As envisioned in Article 26 of the MLCBI, communication between the foreign representatives and competent courts in foreign jurisdictions is encourage for an efficient management of the insolvent debtor's assets. The foreign representatives may explore direct communication with the court by any means appropriate to the court to bring to the attention of the court the intention to sell assets in country B and elaborate why the assistance of the court would be beneficial to achieve a better outcome for the creditors.

Following the denial by the court to recognise the proceeding as a foreign main proceeding, the foreign representative should review the decision of the court to understand the grounds of denial and determine whether to seek a review from the same court or appeal the decision of the court subject to the procedural laws of country B. The provisions of Article 17(4) allow the court to modify a recognition decision. The UNCITRAL Legislative Guide offers recommendations on appeal and review of recognition decisions. Paragraph 120 of the Guide to Enactment of the MLCBI and Recommendations (?) 137 and 138 address the right to appeal and review. The Guide further recommends that such appeals should be heard promptly.

Should communication, review and appeal options fail to grant the desired outcome to the foreign representative, the foreign representative may consider re-evaluating strategies including communication with the competent authority in charge of insolvency matters in the country considered highly likely to be the COMI. This may be towards initiating primary proceedings in the country which the foreign representatives appointed in that jurisdiction may then seek recognition in Country B in collaboration with the existing foreign representative in Country A. While this option may be procedurally long, it may be explored as the only alternative to accessing the assets situate in B, assuming the administration and realisation of assets is only possible where foreign main proceedings are involved.

This answer should be based on the foreign non main proceeding. The references should be made to the MLCBI (eg article 17) and applied to this case. The references made to the paragraphs in the Guide concern Article 13 or 16 MLCBI. Article 2 para 12(e) MLCBI does not exist.

QUESTION 4 (fact-based application-type question) [15 marks in total] 9 marks

Assume you received a file for a new client of the firm. The file contains the facts described below. Based on these facts, analyse key filing strategy to ensure a successful restructuring – specifically, whether to apply for recognition of main or nonmain proceeding or both (in light of COMI / establishment analysis), what papers need to be submitted, and what relief should be requested on day one of the filing.

The client is a Cayman Islands incorporated and registered entity. It is a financial service holding company for a number of direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States. Globe Holdings was initially formed as a Canadian company in 2009, under the laws of Ontario, Canada. A year later, following certain reverse merger transactions, it filed a Certificate of Registration by Way of Continuation in the Cayman Islands to re-domesticate as a Cayman Islands company and changed its name to Globe Financial Holdings Inc. When it re-incorporated in the Cayman Islands in 2010 (from Canada), Globe Holdings provided various notices of its re-incorporation, including in the public filings with the Securities and Exchange Commission (SEC). Around that time, Globe Holdings retained its Cayman Islands counsel Cedar and Woods, which has regularly represented Globe Holdings for over a decade. Globe Holdings has a bank account (opened just a few days ago) in the Cayman Islands from which it pays certain of its operating expenses. Globe Holdings often holds its board meetings virtually, and not physically in the Cayman Islands, and, having obtained support for a bond restructuring, all its regular and special board meetings have been organized by its local Cayman counsel virtually. The client also maintains its books and records in the Cayman Islands. Its public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes disclosed that Globe Holdings is a Cayman Islands company and explained the related indemnification and tax consequences resulting from Globe Holdings' place of reformation.

Globe Holdings has no business operations of its own. The business is carried out through its non-insurance company non-debtor subsidiaries that are all incorporated under the US laws and operating in the US. All employees are in the US. The headquarters are also in the US.

In April 2017, Globe Holdings offered and issued USD 25,000,000 in aggregate nominal principal amount of 6.625% senior unsecured notes due in 2023 (referenced above as the Notes) governed by New York law.

In 2019, Globe Holdings recorded on its consolidated balance sheet a significant increase in liabilities. As a result, Globe Holdings worked with external professional advisors to undertake a formal strategic evaluation of its subsidiaries' businesses. In September 2020, Globe Holdings announced that it was informed its shares would be suspended from the NASDAQ Stock Market due to delinquencies in filing its 10-K. Thereafter, on November 6, 2020, its shares were delisted from the NASDAQ stock market.

An independent third party is actively marketing the sale of the corporate headquarters located in New York including the land, building, building improvements and contents including furniture and fixtures.

Despite these efforts to ease the financial stress, the culmination of incremental challenges consequently resulted in Globe Holdings being both cash flow and balance sheet insolvent.

Globe Holdings retained Cedar and Woods, its long-standing Cayman Islands counsel, to advise on restructuring alternatives. Upon consultations with Cayman counsel and its other professionals, Globe Holdings ultimately determined that the most value accretive path for the Noteholders was to commence a scheme under Cayman Islands law, followed by a chapter 15 recognition proceeding in the United States, most notably to extend the maturity of the Notes and obtain the flexibility to pay the quarterly interest “in kind”.

Globe Holdings expeditiously secured the support of the majority of the Noteholders of its decision to delay interest payments and restructure the Notes through a formal proceeding. Thereafter, on August 31, 2021, about 57% of the Noteholders acceded to the Restructuring Support Agreement (RSA) governed by the New York law. The RSA memorialized the agreed-upon terms of the Note Restructuring. When Globe Holdings approached its largest Noteholders regarding the contemplated restructuring, their expectations were that any such restructuring would take place in the Cayman Islands, which is reflected in the RSA.

On July 4, 2023, the client, in accordance with the terms of the RSA, applied to the Cayman Court for permission to convene a single scheme meeting on the basis that the Noteholders, as the only Scheme Creditors, should constitute a single class of creditors for the purpose of voting on the Scheme.

On July 26, 2023 the Cayman Court entered a convening order (the Convening Order) on the papers, among other things, authorizing the client to convene a single Scheme Meeting for the purpose of considering and, through a majority vote, approving, with or without modification, the Scheme. The Scheme Meeting was held in the Cayman Islands at the offices of Cedar and Woods. Given the Covid-19 pandemic, Scheme Creditors were also afforded the convenience of observing the Scheme Meeting via Zoom and in person via a satellite location in New York. Following the Scheme Meeting, the chairman of the Scheme Meeting (presiding over the meeting in person) reported to the Cayman Court that the Scheme was overwhelmingly supported by the Noteholders, with 91.83% in number and 99.34% in value voting in favor of the Scheme. The Sanction Hearing was held, and an order sanctioning the Scheme (the Sanction Order), which was filed with the Cayman Islands Registrar of Companies the same day.

During all of this time, a class action litigation was in the US was brewing but has been filed yet.

Based on the facts presented, a key filing strategy to ensure a successful restructuring would involve an analysis of the Centre of Main Interest (COMI) and the establishment of Globe Financial Holdings Inc. (the Debtor) to determine the nature of recognition proceedings to be filed. The following paragraphs will discuss the COMI and establishment analysis to draw a conclusion on whether to file for the recognition of the Cayman’s scheme as a foreign main or foreign non main proceeding in the U.S, the nature of application to be made in the US and the accompanying documents as well as the reliefs to be sought. Further, options to mitigate the brewing class action and ensure a successful restructuring will be explored.

First, we will explore the likely COMI of the Debtor. Article 16 of the MLCBI, Article 3 of the European Regulation and Section 1516 (c) of the US Bankruptcy Code provide that the COMI of a debtor is presumed to be the debtor’s registered office unless it can be shown that the COMI is elsewhere. The courts⁶ have also established that the COMI presumption may be overcome particularly in the case of

⁶ ABC Learning, 445 B.R. 318, 328 (Bankr. D. Del. 2010); aff’d, 728 F.3d 301 (3d Cir. 2013) accessed on 13 February 2024 at <https://casetext.com/case/in-re-abc-learning-centres-ltd>

a ‘letterbox’ company not carrying out any business” in the country where its registered office is located.

Certain factors as discussed by Martin Glenn, Chief United States Bankruptcy Judge in *re Modern Land (China) Co.*,⁷(the China Case) will be relevant in determining the Debtor’s COMI in the present case. These include:

- (a) the place of incorporation of the Debtor which is in the Cayman Islands.
- (b) In addition to re-incorporating as a Cayman Islands entity, the Debtor provided various notices including SEC filings notifying third parties of its Cayman’s reincorporation thus the Debtor identifying as a Cayman company.
- (c) The prospectus provided in connection with the issuance of the Notes at SEC disclosed that the Debtor was a Cayman company.
- (d) The books and records of the Debtor are maintained in the Cayman Islands.
- (e) Further the long-standing counsel of the Debtor, Cedar and Woods, and its other professionals are Cayman based.
- (f) Additionally, most restructuring activity is in Caymans and done by Cayman actors, including the organization of the regular and special board meetings following the support for bond restructuring by the Cayman counsel.
- (g) The supervision of the Debtor’s restructuring by the Cayman Court under the Restructuring Support Agreement (RSA) also points towards restructuring activities being organized in Cayman.
- (h) The scheme meetings were also held in the Cayman Islands at the offices of Cedar and Woods and chaired by an individual who was present in person thus the assumption that they reside in Cayman (the habitual residence of an individual would determine the COMI).
- (i) The expectations of the creditors were that the restructuring would take place in the Cayman Islands as per the RSA.
- (j) Since COMI is being tested as at the date of the recognition proceeding, the bank account opened for payment of certain operating expenses in Caymans a few days before the restructuring proceedings, would be a relevant fact for consideration as it does not signify COMI manipulation of COMI shifting in bad faith.

Aligned with the decision of the Court in *re Eurofood IFSC Ltd*⁸ where the Court held that the COMI must be identified based on criteria that are objective and ascertainable by third parties, the facts present enough evidence to conclude that the COMI of the Debtor is in Cayman Islands and therefore the restructuring proceedings in Cayman Islands qualify for recognition as foreign main proceedings.

Having established the COMI of the Debtor, we will further assess the Debtor’s establishment pursuant to the provisions of the MLCBI to determine whether the proceedings could be recognised as foreign non main proceedings. Section 1502(2) of the US Bankruptcy Code defines an establishment as any place of operations where the debtor carries out a non-transitory economic activity. In determining whether an establishment exists, the factor to consider are as follows:

- (a) The economic impact of the Debtor’s operations on the market. Since all the business of the Debtor is conducted through its non-insurance company non-debtor subsidiaries

⁷ In *re Modern Land (China) Co.*, 641 B.R. 768, 772 (Bankr. S.D.N.Y. 2022) at <https://casetext.com/case/in-re-modern-land-china-co-1>

⁸ Case 341/04, 2006 WL 1142304 (E.C.J. May 2, 2006) accessed on 13 February 2024 at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62004CJ0341&from=MT>

incorporated under US Laws, headquartered in US and with employees based in US, it can be concluded that the economic impact of the Debtor's operation is in the US.

- (b) The presence of an asset and minimal management or organization can also determine an establishment as was held in *re Millennium Global Emerging Credit Master Fund Ltd.*,⁹. In the present case, Debtor has corporate headquarters in the US which include land, building, building improvements and contents including furniture and fixtures. This qualifies for the presence of an asset which would make the US an establishment.
- (c) Similarly, in the Millennium Global case, the courts held that the objective appearance to creditors whether the Debtor has a local presence can also be used to determine establishment. The Debtor in the present case facilitated the participation of creditors in the Scheme meetings via Satellite location in New York, the Notes and the RSA was governed by US law and employees were based in the US thus creating an objective appearance of presence hence the US can be concluded to be an establishment.

Having satisfactorily established that the COMI of the Debtor is in Cayman Islands and the establishment in the US, and based on the fact that the Sanction Order has been filed with the Registrar of Companies, making it binding, the next step in the filing strategy would be to institute Chapter 15 recognition proceedings in the US seeking the recognition of the Cayman Scheme as a foreign main proceeding.

Pursuant to Article 15 of the MLCBI and Section 1515 of the US Bankruptcy Code, an application for recognition of a foreign proceeding in which a foreign representative, in this case a Restructuring Officer¹⁰ (RO), has been appointed should be accompanied by certain documents. In the case study, the papers that the RO needs to submit to the US Court to give effect to the Cayman Scheme are as follows:

- (a) Petition for recognition of the Cayman Scheme, the RO and related relief under Chapter 15 of the Bankruptcy Code.
- (b) Certified copy of the Sanction Order commencing the Scheme and appointing the RO.
- (c) Certified copy of the Convening Order.
- (d) Certified copy of the minutes of the Scheme Meeting and resultant resolutions.
- (e) Certified copy of the Restructuring Support Agreement.
- (f) Certified copy of the approval of Noteholders to the RSA.
- (g) A certificate from the Cayman Court affirming existence of the Scheme and RO's appointment.
- (h) A statement identifying all foreign proceedings with respect to the Debtor that are known to the RO.
- (i) A statement explaining the legal consequences of the Cayman Scheme on Noteholders and other creditors.
- (j) A translation of all the above documents if required by the US Court.

The US Courts will then rely on the recognition presumptions under Article 16 of the MLCBI to presume the authenticity of the documents as well as the existence of a foreign proceeding and the appointment of the RO. If the requirements of Article 15 are met, then recognition is granted as a matter of course. This is in line with several decisions of the US Courts, including the Agrokor case

⁹ Case 458 B.R. 63, 81 n.41 (Bankr. S.D.N.Y. 2011) accessed on 13 February 2024 at [In re Millennium Global Emerging Credit Master Fund Ltd., 458 B.R. 63 | Casetext Search + Citator](#)

¹⁰ Harney's Legal Guide - The Cayman Islands insolvency reform: Restructuring officer and refined scheme of arrangement accessed on 13 February 2024 at <https://www.harneys.com/media/mmzhwltv/legal-guide-the-cayman-islands-insolvency-reform-restructuring-officer-and-refined-scheme-of-arrangement.pdf>

where the decision of a foreign court exercising proper jurisdiction was recognized and enforced in the US.

In terms of relief, under Section 1519 of the US Bankruptcy Code, the RO should seek that the Court grant's an interim relief on day one, pending a ruling on the recognition petition, staying execution against the Debtor's assets and entrusting the RO with the administration of the Debtor's assets to ensure the Scheme is able to meet its obligations following the extension of maturity of the Notes and settle the quarterly interests in kind from the Debtor's assets.

Since there is a brewing class action litigation in the US, the initial relief should also relate to the stay of commencement of any action concerning the Debtor's assets, rights obligations and liabilities as well as relief to suspend the right to transfer, encumber or otherwise dispose of the assets of the Debtor under Article 20 of the MLCBI. This would cover the class action as well as the actions of the third party who is actively marketing the sale of the headquarters and related assets. The RO may also seek assistance from the court to gather and preserve the assets of the Debtor in the US to ensure a successful restructuring.

In granting relief, the court must be satisfied that the interests of the local creditors and all stakeholders are protected, the relief relates to assets that should be administered under the Cayman Scheme and that the relief does not interfere with the administration of the Cayman Scheme.

Finally, to address the brewing class action litigation in the US, the RO should explore cooperation, coordination, and communication mechanisms under the MLCBI to avert any potential challenges that the local creditors may prefer against the recognition proceedings. However, should the proceedings be challenged, the RO should equally put in place a strategy to defend against the potential legal challenges. For instance, should the noteholders object to the recognition application, the RO should have in place a contingency plan to seek liquidation in Cayman Islands and realize the US assets subject to recognition to honor the Debtor's obligations.

Good argumentation, however omitting the counter (rebuttal) arguments for COMI in Caymans (and reference to Art.21). Definitions could have been more complete with respective references to MLCBI (eg. Art.2); and conclusions could have been substantiated with Art. 19 as well as Art. 22 and 6.

*** End of Assessment ***

Marks awarded: 37 out of 50