



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).
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- 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] 6 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).
- (c) Options (i), (iii) and (iv).
- (d) 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] **8 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.

Enactment of the MLCBI is not substantive and binding on enacting states, but rather a “soft law” recommendation to the legislative bodies of each state on how to formulate their own state’s legislation, whilst the EU Regulation is substantive legislation that is imposed and binding on each EU member state.

An advantage of having a hard law regulation such as the EU Regulation is that it provides certainty, consistency and enforceability to all parties engaging in business in the EU, whilst the flipside is that encroaches on state sovereignty to create and regulate its own laws. A soft law approach such as the MLCBI on the other hand does not fetter state sovereignty in that it allows the enacting state to formulate and enforce its own laws within the principles contained in the MLCBI, but this does detract from certainty, consistency and enforceability that gives parties engaging in business peace of mind.

Question 2.2 [maximum 2 marks] **0 mark**

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

Essentially the court’s discretion on whether to grant relief under Article 21 turns on whether or not granting the particular relief is appropriate in the circumstances. Non-exhaustive factors include; whether the proceeding is recognized as a foreign main or foreign non-main proceeding, whereas in the former automatic relief is granted upon recognition whilst in the latter instance relief is at the discretion of the court, and; whether local creditors would be adequately secured prior to allowing the handover of assets into the control of the foreign representative.

The court primarily considers the creditors' interests

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 prevents a foreign creditor from being discriminated against merely based on the fact that the creditor in question is not a national of the state wherein insolvency proceedings are being conducted. The article provides protection in the sense that a foreign creditor would not be worse off than a local creditor of the same class (i.e. secured, preferred or concurrent).

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?

Upon recognition of a foreign main proceeding, Article 20 of the MLCBI provides for an automatic moratorium against individual civil proceedings and execution relating to a debtor's assets, rights, obligations and liabilities, as well as immediate relief against dissipation of assets. Whilst, on the other hand, recognition of a foreign non-main proceeding grants the foreign representative no automatic relief and any relief should be specifically sought under Article 21 of the MLCBI by the foreign representative, whereafter the court may exercise its discretion on whether to grant same.

Aside from the automatic moratorium versus discretionary relief available depending on the recognition of main or non-main proceedings, the foreign representative should still apply to court for the powers such as the right to dispose assets or examination of witnesses contained in Article 21 notwithstanding the classification of the foreign proceeding as main or non-main.

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

Question 3.1 [maximum 4 marks] 2 marks

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

The foreign main proceeding should have been filed be in Germany as the debtor's centre of main interest is located in this jurisdiction. A foreign non-main proceeding can be initiated in Bermuda by virtue of the fact that the debtor has an establishment as defined in Article (f) in this jurisdiction. Should the debtor neither have its centre of main interest located in the US or at the very least an establishment in the US, an insolvency proceeding originating from the US will not be recognized as a foreign proceeding by other enacting states for the purposes of applying the MLCBI.

A foreign representative appointed in accordance with the foreign main or foreign non-main proceeding (i.e. either the German or Bermudan representative) may apply for recognition in the US and may be granted relief on this basis.

In the event that both the foreign main and non-main proceedings are recognised by the US Court, primacy will be given to the foreign main proceeding over the foreign non-main proceeding.

Answer should be substantiated with discussion and references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 17, 6..

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.

The so-called “safe conduct” rule contained in Article 10 of the MLCBI resonates in Section 1510 of the US Bankruptcy Code in that the mere filing of recognition proceedings under Section 1515 of the Code does not subject the petitioning foreign representative to the jurisdiction of the US Court for any other purpose other than obtaining recognition. It should however be noted that Article 10 does not absolve the foreign representative from all proceedings that may be brought against the representative or the debtor’s estate but rather shields the representative to the extent necessary in order to reach the court without harassment.

In this instance, due to the alleged tort committed by the foreign representative, the court may find that it has jurisdiction to determine this matter based on Section 1509(2). In which case, the foreign representative should comply with the discovery process.

Question 3.3 [maximum 4 marks] 4 marks

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?

The validity of an *ipso facto* clause is a policy decision of a state. Whilst *ipso facto* clauses are valid and enforceable in UK law, Section 365(e) of the US Bankruptcy Code prohibits the termination or modification of an unexpired lease due to either of the parties to the lease entering insolvency proceedings. However, it should be noted that in terms of Section 365(e)(2) of the US Bankruptcy Code, as confirmed in *In re Trump Entertainment Resorts Inc*, intellectual property licenses which contain *ipso facto* clauses, are valid and enforceable.

As confirmed in the *Fibria Celulose S/A v Pan Ocean Co Ltd* case, the US Court cannot enforce a foreign legislative mechanism which is contrary to the laws of the US and therefore the *ipso facto* clause relating to the leases is void and unenforceable.

In both instances, it would be prudent for the foreign representative should apply for interim relief to the applicable US Court in terms of Article 19(1)(c), read with Article 21(1)(g) of the MLCBI, to enable the foreign representative to exercise the duty and options provided to a to a US trustee/liquidator by Section 365 of the US Bankruptcy Code. Essentially, this will enable to the foreign representative to sufficient interim standing to exercise his/her discretion on whether to assume or reject the US-governed leases and intellectual property licenses.

Question 3.4 [maximum 4 marks] 2 marks

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?

It seems clear that the insolvency proceedings in Country A was not commenced where the debtor's COMI is located and is therefore a foreign non-main proceeding as defined in Article 2(c), read with 2(f) of the MLCBI. In the event that there were no exigent circumstances relating to the potential dissipation of the assets located in Country B which might have prompted the representative to apply for recognition of the proceeding as a foreign main proceeding merely to obtain the automatic relief, the the foreign representative should rather have opted for a petition for recognition of the foreign proceeding as a foreign non-main proceeding under Article 17(2)(b) from the outset.

The power to realize assets located in an enacting state under Article 21(1)(e) remains at the discretion of the court, whether or not the proceeding is recognised as main or non-main. In both instances the relief under Article 21(1)(e) should be specifically sought by way of petition to the court.

In this scenario, the foreign representative should either re-apply to the court for recognition as a foreign non-main proceeding, or with the court's condonation, amend the recognition petition to request recognition as a foreign non-main proceeding. In whichever case, the representative should in its petition specifically seek the Article 21(1)(e) relief, which the court may grant at its discretion.

Full answer requires a discussion and reference to Art.16 MLCBI for "rebuttable COMI presumption".

QUESTION 4 (fact-based application-type question) [15 marks in total] 12 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.

Applicability of the MLCBI

Despite the fact that the Cayman Islands have not adopted the MLCBI, the principles contained therein are followed by Cayman Island Courts in the interest of comity. The United States however have adopted and implemented the MLCBI, which principles are contained in Chapter 11 of the US Bankruptcy Code. In the instance of Global Holdings which relate to an inbound request by a non-enacting state to an enacting state, the principles contained in the MLCBI serve as a useful guideline for the facts contained in this scenario.

Centre of Main Interest (“COMI”).

The COMI of a debtor is a decisive factor to consider when assessing a cross-border insolvency scenario. The COMI will dictate whether a foreign insolvency proceeding will be considered a main or non-main foreign proceeding, which in turn will command, *inter alia* the automatic relief available to a foreign representative tasked with the administration of a debtor which has interests in different states and the process to be followed. The MLCBI does not define a debtor’s COMI, however, it does create a presumption in Article 16(3) that:

“In the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of any individual, is presumed to be the centre of the debtor’s main interest.”

It has been argued that Article 16(3) above is slightly vague in more complex instances. Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency Law (“GEI”) elaborates on the above presumption, by providing factors to consider when determining a debtor’s COMI. The principal factors are twofold; (i) where the administration of the debtor takes place, and (ii) which is readily ascertainable by creditors. If the principal factors are insufficient to determine the COMI, non-exhaustive additional factors include; location of the books and records, location where financing was organized and authorized, location of the debtors’ assets, location in which the debtor is subject to governmental supervision.

The GEI submits that in instance where a debtor has recently moved its COMI, the receiving court should consider the secondary factors more carefully. Consideration should also be given to whether the debtor in question was aware of its impending insolvency and might have been guilty to the practice of forum shopping.

Considering the framework above in the scenario of Globe Holdings, especially with regard to the fact that the company moved its COMI prior to insolvency proceedings, it should be fairly straightforward in determining that the COMI of Globe Holdings is located in the Cayman Islands. The rationale is that it is readily ascertainable by creditors that Globe Holdings is a Cayman Island Company in that its prospectus provided to noteholders and its SEC public filings indicates that Globe Holdings is a Cayman Islands company subject to the Cayman Island regulation.

Foreign Proceeding

Section 101(23) of the US Bankruptcy Code defines a “foreign proceeding” similar to the definition contained in Article 2(a) of the MLCBI:

“... a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation”.

A formal scheme of arrangement under Section 86 of the Cayman Islands Companies Law 2013 (revision) satisfies the above definition and has been acknowledged by US Courts (such as *In re Ocean Rig UDW Inc.*) as a foreign proceeding. Accordingly, the scheme of arrangement contemplated for Global Holdings under Cayman Island Companies Law will be eligible to be recognized under Chapter 11 of the US Bankruptcy Code.

Foreign main proceeding, procedure and timing.

As discussed above, it is clear that the COMI of Global Holdings is situated in the Cayman Islands and therefore a foreign main proceeding within the definition of Section 1502(4) of the US Bankruptcy Code, which defines a “foreign main proceeding” in essentially the same terms as Article 2(b) of the MLCBI:

“... a foreign proceeding pending in the country where the debtor has its center of main interest.”

Again, the scheme of arrangement contemplated *in casu* is eligible for recognition under Section 1517(b)(1) US Bankruptcy Code as a foreign main proceeding should the statutory procedural requirements be met.

Section 1515 of the US Bankruptcy Code, dictates that a foreign representative as defined in Section 101(23), may petition a US Court for recognition of the foreign proceeding, which petition should be accompanied by English translations of the following:

- 1) A certified copy of the decision commencing such a foreign proceeding and appointing the foreign representative.
- 2) A certificate from the foreign court affirming the existence of such foreign proceeding and the appointment of the foreign representative; or
- 3) In the absence of the abovementioned, any other evidence acceptable to the court of such foreign proceeding and the appointment of the foreign representative.
- 4) A statement identifying all foreign proceedings that the foreign representative is aware of.

In the instance of Global Holdings, it is not clear as to whether a restructuring officer or liquidator has been appointed in accordance with the Cayman Island Companies Law. In the event that a restructuring officer or liquidator is not appointed, existing management of the company maintains control. Should this be the case, it is uncertain whether the US Court will recognize existing management, a director for instance, as a foreign representative for the purposes of applying for recognition. It might therefore be advisable to appoint a restructuring officer for this reason.

Another question is when to institute recognition proceedings. The scheme of arrangement contemplated in terms of Cayman Companies Law is essentially a three-step process, which commences with convening hearing, then a scheme meeting and thereafter a sanction hearing. Only once an order is granted at the sanction hearing does the arrangement come into effect and is binding upon all the creditors. It therefore begs the question as to in which of the aforementioned stages does the foreign representative apply to the US Court for recognition.

In *in re Boart Longyear* an Australian scheme of arrangement was recognized as a foreign main proceeding prior to the sanction stage. It can therefore be argued that precedent exists for the recognition proceedings to be initiated once the first convening hearing has been successful.

Interim relief

Section 1519 of the US Bankruptcy Code provides for interim urgent relief that may be granted to a foreign representative upon filing a petition for recognition. Again, this Section resonates that interim relief contained in Article 19 of the MLCBI.

In this instance, the foreign representative who is petitioning the US Court for recognition, may apply in terms of Section 1519(a)(3), read with Section 1521(a)(7) for an automatic stay in action proceedings against Global Holdings as would have been afforded to a trustee of an insolvent estate in terms of Section 362(a)(1).

Good essay.

The conclusive remarks should also include reference to Articles 20 through 22 MLCBI (as applicable) and Art.6.

A “what if” discussion on COMI rebuttal would have completed the application of law to the facts of the case.

*** End of Assessment ***

Marks awarded: 37 out of 50