



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] 8 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] 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 European Union Regulation on Insolvency Proceedings (EIR) is that the MLCBI is a model law, or draft legislation, which States can choose to adopt with or without modification, whereas the EIR is a Regulation which, once adopted, becomes part of the domestic law of each EU Member State.

The benefit of having a model law like the MLCBI is that it provides legislative guidance in an attempt to provide consistent laws across multiple States that can be followed should a cross border insolvency situation arise. States are given flexibility on policy decisions, whilst being encouraged to adopt practices that have been widely recognised as good practices internationally. The downside of this is that, as States can choose to make modifications, it isn't designed to substantively unify the laws of different States. It is also not compulsory, so some States may choose not to adopt it into their domestic legislation, and there is no requirement for reciprocity.

The benefit of Regulations such as the EIR is that once they are adopted, they become binding on each Member State. This provides a high degree of consistency and transparency. If an insolvency proceeding is brought in any one EU Member State, it will be recognisable and enforceable in all the other 26 EU Member States. The problem, however, is that these Regulations, similar to Treaties and Conventions, can take some time to be established in cross border insolvency. Due to the complexity of cross border insolvency, it can take some time and prove difficult to agree.

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.

Article 21 covers the post-recognition relief that can be granted upon recognition of a foreign proceeding, whether that be in a foreign main or non-main proceeding. There are two primary considerations that the court should consider when granting this relief.

Firstly, the court has to consider what relief is necessary to protect not only the assets of the debtor, but also the interests of any creditors. The list of relief that could be made available is in paragraph 1 of Article 21, however this list is not exhaustive, therefore the court can grant other relief that may be available under the laws of the enacting State. This consideration is further emphasised in paragraph 2 regarding the distribution of assets, which can only be granted "provided that the court is satisfied that the interests of creditors in this State are adequately protected"¹.

Secondly, in regard to a foreign representative of a foreign non-main proceeding, when granting relief the court must consider whether it concerns assets that should be administered or information that is required in that foreign non-main proceeding. The court needs to consider whether granting such relief would interfere with the administration of another proceeding, in particular the main proceeding. Relief may not be granted if this is the case.

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 could be described as an anti-discrimination rule, in that it ensures that foreign creditors are given the same rights as local creditors regarding the commencement of, and participation in, insolvency proceedings involving the same debtor in the enacting State. This access to proceedings does not affect the ranking of claims in the proceedings. If a foreign creditor were to bring a claim, they shall not be ranked lower or given lower priority than that of generally unsecured claims solely for being a foreign creditor.

Having this access right, as well as others that can be found in the MLCBI, means that a foreign representative can use the tools available to participate in the proceedings without the need for separate proceedings in the enacting State. This reduces times and costs, which can be of some comfort to foreign investors, knowing that recoveries can be maximised without the need for timely and costly domestic proceedings. The clarity and transparency that the MLCBI can provide in this regard could encourage foreign investors, having clear knowledge of the access, and relief, that is available.

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?

The Model Law on Cross-Border Insolvency (MLCBI) makes 3 types of relief available. There is pre-recognition relief (Article 19), relief upon recognition of a foreign main proceeding (Article 20), and post recognition relief (Article 21). Any relief available in foreign non-main proceedings is more restrictive than the relief available in foreign main proceedings. This is because it is not automatic, it is subject to the discretion of the court, and also it can't be granted if it were to interfere with the administration of a foreign main proceeding.

¹ UNCITRAL Model Law on Cross-Border Insolvency (1997)
<<<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>>>, accessed 4 February 2024

Under Article 20, automatic relief is granted upon recognition of a foreign main proceeding. The relief available here is staying of commencement or continuation of individual actions and individual proceedings concerning the debtor's assets, obligations or liabilities, staying execution against a debtor's assets and suspending any rights to transfer or dispose of any assets of the debtor. This automatic relief is intended to give some breathing space, allowing time to be taken in preparing and organising an orderly and fair cross border insolvency proceeding. It also prevents fraud and protects the interests of creditors by preventing the assets being moved. This automatic relief is not available in a foreign non-main proceeding, meaning they will need to rely on either discretionary relief upon recognition or post recognition relief.

Article 21 outlines the relief that may be granted upon recognition of a foreign proceeding. This relief applies to both foreign main and non-main proceedings. It includes the 3 forms of relief available in Article 20, as well as additional relief such as providing for the examination of witnesses and taking of evidence regarding the debtor's assets, affairs or obligations, and entrusting the administration of the estate or realisation of the assets in the enacting State to the foreign representative. The forms of relief under Article 21 are not automatic and will only be granted by the court at the request of the foreign representative. Although relief under Article 21 is available to both foreign main and non-main proceedings, the interests and authority of the foreign representative in foreign non-main proceedings are normally narrower, and this is reflected in paragraph 3. This paragraph states that the court must be satisfied that any relief granted is limited to only the assets that should be administered in the foreign non-main proceedings, and also that any information sought by the foreign representative regarding the debtor's assets or affairs should only be concerning information required in that non-main proceeding. The reason for this is to not unnecessarily broaden the powers of the foreign representative in the non-main proceeding, and also to ensure that the relief granted by the court does not interfere with any other insolvency proceedings, in particular the foreign main proceeding.

This further restriction and narrowing of powers available to the foreign representative in a foreign non-main proceeding is also seen in Article 19 pre-recognition relief that can be granted. This is again discretionary relief that can be granted in both foreign main and non-main proceedings, at the court's discretion. Article 19 relief is considered interim relief that can be granted before the recognition of a foreign proceeding, and includes the staying of execution against the debtor's assets and entrusting of the administration or realisation of the debtor's assets to a foreign representative or other person designated by the court, as well as other reliefs that can be sought under Article 21. The intention of this pre-recognition relief is to prevent the dissipation of assets whilst recognition proceedings are underway. Similarly, to Article 21 relief, this Article 19 relief is again narrower in foreign non-main proceeding, as the request for relief can be refused "if such relief would interfere with the administration of a foreign main proceeding".

QUESTION 3 (essay-type questions) [15 marks in total] 14 marks

Question 3.1 [maximum 4 marks] 4 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.

As we know recognition proceedings have been brought in the US (the "US proceedings"), we must look to Chapter 15 of the Bankruptcy Code (Chapter 15)², to determine where the foreign proceedings have been commenced.

As we know, the proceedings could be recognised as either foreign main or non-main proceedings. Section 1502 of Chapter 15 provides us with the following definitions:

"(4) "foreign main proceeding" means a foreign proceeding pending in the country where the debtor has the center of its main interests;

(5) "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."³

As we have been told the debtor's COMI is in Germany, this would be where the foreign main proceedings have been filed. Bermuda, where the debtor merely has an establishment, would be where the foreign non-main proceedings have been filed.

The US proceedings should have been commenced by a foreign representative filing a petition for recognition under section 1515 of Chapter 15. Section 1515 (b) states that:

"[a] petition for recognition shall be accompanied by—

(1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;

(2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or

(3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative."⁴

It shall also be accompanied by a "statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative."⁵

Under section 1517, following a notice and hearing, an Order recognising the foreign proceedings will be granted by the US court, so long as the foreign proceedings fall within the meaning of a foreign main or non-main proceeding under section 1502, the foreign representative applying for recognition is a person or body, and the petition meets the section 1515 outlined above. As we do not know more information about the recognition application, we will assume all requirements have been met, and an Order under section 1517 would be granted recognising the proceedings in Germany as foreign main proceedings, and the proceedings in Bermuda as foreign non-main proceedings.

For both sets of foreign proceedings, upon request by the foreign representatives, pre-recognition relief under section 1519 could have been granted by the court on commencement of the recognition proceedings in the US. The relief available here could

² United States Bankruptcy Code (title 11, United States Code) - Chapter 15, Ancillary And Other Cross-Border Cases << <https://uscode.house.gov/view.xhtml?path=/prelim@title11/chapter15&edition=prelim>>>, accessed 4 February 2024

³ *idem* section 1502

⁴ *idem* section 1515(b)

⁵ *idem* section 1515(c)

include a stay of execution against the debtor's assets, entrusting the administration or the realisation of the debtor's assets in the US to the foreign representatives and some additional relief available under section 1521(a) paragraph (3), (4), or (7)⁶. One of the reasons the court may not grant pre-recognition relief in the Bermuda proceedings (the foreign non-main proceedings) would be if such relief would interfere with the German proceedings (the foreign main proceeding)⁷.

If the court recognises the proceedings as foreign proceedings as anticipated above, the foreign representatives in both Germany and Bermuda would be entitled to request post-recognition relief under section 1521. This would include staying commencement or continuation of any individual actions against the debtor's assets, liabilities, or rights, staying execution against the debtor's assets, suspending the right to transfer or otherwise dispose of assets of the debtor and entrusting the administration and realisation of the debtor's assets in the US to the foreign representatives.

Also upon recognition, the foreign representative in Germany has the additional automatic relief made available in section 1520, which is only available to foreign main proceedings. It includes the same relief as in section 1521, however there is also the added relief of adequate protection, an automatic stay on actions and proceedings and avoidance of post-petition transactions. The appeal of this form of relief is that it is automatic, so does not require making a request to the court - it is effective from the date of recognition.

As we know, the court in the US is required to communicate and co-operate with the foreign courts and foreign representatives under Sections 1525⁸ and 1526⁹, and the appropriate forms of co-operation are included in a non-exhaustive list in Section 1527¹⁰. As we have more than one foreign proceeding underway, we need to consider how these would be coordinated. Section 1530 states that:

"In matters referred to in section 1501, with respect to more than 1 foreign proceeding regarding the debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527, and the following shall apply:

- (1) Any relief granted under section 1519 or 1521 to a representative of a foreign nonmain proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding.
- (2) If a foreign main proceeding is recognized after recognition, or after the filing of a petition for recognition, of a foreign nonmain proceeding, any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding.
- (3) If, after recognition of a foreign nonmain proceeding, another foreign nonmain proceeding is recognized, the court shall grant, modify, or terminate relief for the purpose of facilitating coordination of the proceedings."¹¹

From this, we can see that primacy would be given to the German proceedings as foreign main proceedings. It also makes it clear that any relief granted in the foreign non-main

⁶*idem* section 1521(a)

⁷*idem* section 1519(c)

⁸*idem* section 1525

⁹*idem* section 1526

¹⁰*idem* section 1527

¹¹*idem* section 1530

proceedings shall not interfere with the foreign main proceedings and should be consistent. We are not aware of any domestic insolvency proceedings in the US, however if there were any, we would look to section 1529¹² which covers the coordination of domestic proceedings with foreign proceedings. In this situation, primacy would be given to the domestic proceeding.

Although adopted in the US, it should be noted that neither Bermuda nor Germany have adopted the MLCBI into their domestic insolvency laws¹³. There is no requirement for reciprocity in the foreign jurisdictions, therefore there are no grounds for the US court to refuse recognition merely because the court in Bermuda or Germany would not grant the same relief.

Question 3.2 [maximum 3 marks] 2 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.

We know that the United States adopted the UNCITRAL Model Law on Cross Border Insolvency 1997 (MLCBI) by enactment of Chapter 15 of the Bankruptcy Code¹⁴. Although the MLCBI has been adopted in the US, we are not aware of the jurisdiction of the foreign proceedings or whether they have adopted the MLCBI. Regardless, there is no requirement for reciprocity in the foreign jurisdiction, therefore there are no grounds for the US court refusing recognition merely because the foreign jurisdiction would not grant the same relief.

Firstly, we should discuss any pre-recognition relief available to the foreign liquidators. Under section 1519, the foreign liquidators could have requested pre-recognition relief from the court, which could include:

"(1) staying execution against the debtor's assets;

(2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and

(3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a)."¹⁵

This is not an exhaustive list, therefore there is flexibility for the court to grant other relief sought if it deems it appropriate. This could potentially include a stay of any action or proceedings against the foreign liquidators.

¹²*idem* section 1529

¹³Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)

<<https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status>> accessed 24 February 2024

¹⁴United States Bankruptcy Code (title 11, United States Code) – Chapter 15, Ancillary And Other Cross-Border Cases <<<https://uscode.house.gov/view.xhtml?path=/prelim@title11/chapter15&edition=prelim>>> accessed 25 February 2024

¹⁵*idem* 1519

Post recognition relief is available under section 1521¹⁶, and also automatic relief available upon recognition of a foreign main proceeding under section 1520¹⁷, should the proceedings be recognised. Both of these forms of relief including staying the commencement or continuation of individual actions against the debtor's assets, right, obligations or liabilities.

One aspect to consider here is the potential for liability of foreign representatives in the US. According to section 1509(b) of the Bankruptcy Code, if the court grants recognition of the foreign proceedings under section 1517 'the foreign representative has the capacity to sue and **be sued in a court in the United States**'¹⁸ (emphasis added). This implies that, prior to recognition, the joint provisional liquidators are not subject to lawsuits in the US. While there might be a mechanism through which they could be sued, such as petitioning the court for service out of the jurisdiction, we have not been given any information to consider this.

Also, it is worth noting that the foreign liquidators are joint provisional liquidators. Provisional liquidation is an interim measure, where provisional liquidators are appointed by the court to safeguard the assets of the company, usually where there is a real concern that, between filing of the petition and any order being made by the court winding the company up, the company will not properly conduct its affairs, or the assets of the company will be dissipated. The provisional liquidator only has the powers that are granted on them by the court on their appointment. This normally includes taking control of the company from the directors, as well as controlling the company's assets. They may also be granted the power to investigate whether any of the company's assets have been misappropriated, and also if there has been any wrongful conducting of the company's affairs or business. The powers granted to provisional liquidators, however, do not generally include realising or distributing the assets of the company, or taking any steps to wind the company up.

We should then consider whether, as provisional liquidators applying for recognition of the foreign proceedings, the foreign representatives could be liable for tortious interference in this role. 'Tortious interference is a common law tort that most often arises... when one party damages another party's contractual or business relationship with others'¹⁹. The elements of tortious interference differ between the different States in the US, but one of the key elements required in most States is that the defendant has 'improperly or intentionally interfered with the contract without justification'²⁰. The standard for establishing intent to interfere again differs between States, but it generally requires the defendant's actions to be wilful, malicious or improper, and to be direct, not purely incidental. However generally, if the defendant has a legal right to interfere (i.e. in the conduct of insolvency proceedings), any claim for tortious interference would not be successful. A US case considered whether an attorney could be liable for inducing their client to breach a contract with a third party. It was found that 'an attorney is not liable for inducing his [or her] principal to breach a contract with a third person, at least where he [or she] is acting on behalf of his principal **within the scope of his [or her] authority**' (emphasis added)²¹.

Taking this into consideration, I think it would be unlikely the court would agree that the provisional liquidators are liable for tortious interference, given they are acting within their capacity at liquidators of the debtor, and assumedly within the authority granted to them.

¹⁶ *idem* section 1521

¹⁷ *idem* section 1520

¹⁸ *idem* section 1509(b)

¹⁹ Tortious Interference: Asserting a Claim - Practical Law Commercial Litigation

<<<https://us.practicallaw.thomsonreuters.com/w-022-3064>>> accessed 25 February 2024

²⁰ *ibid*

²¹ *Asamblea De Iglesias Christianas, Inc. v. DeVito* 2020-03517 Index No. 522506/18

Requires discussion based on Art.10 MLCBI

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?

We know that the UK foreign representative is undertaking a debtor-in-possession like restructuring. As part of this process, they have filed a petition under Chapter 15 of the US Bankruptcy Code to have the UK proceedings recognised in the US.

To ensure this is successful, they would need to make sure they meet all requirements for the UK proceedings to be recognised as a foreign proceeding. The US proceedings will have been commenced by a foreign representative filing a petition for recognition under section 1515 of Chapter 15. Section 1515 (b) states that:

"[a] petition for recognition shall be accompanied by—

- (1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;
- (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
- (3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative."²²

It shall also be accompanied by a "statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative"²³. So long as these requirements are met, and the petition is brought by a "foreign representative" applying for recognition of a "foreign proceeding" as within the meanings defined in Section 1502²⁴, the application would likely be successful and recognition of the UK proceedings would be granted by the US court. Unfortunately, we do not have enough information to say whether it would be granted as a foreign main or non-main proceeding.

On filing the petition for recognition, the foreign representative should request pre-recognition relief from the court under Section 1519, which could include:

"(1) staying execution against the debtor's assets;

²² United States Bankruptcy Code (title 11, United States Code) – Chapter 15, Ancillary And Other Cross-Border Cases section 1515

<<<https://uscode.house.gov/view.xhtml?path=/prelim@title11/chapter15&edition=prelim>>> accessed 25 February 2024

²³ *ibid*

²⁴ *idem* section 1502

(2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and

(3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a)".²⁵

The additional relief in subsection (3) includes "suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor", and "providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities"²⁶.

If the proceedings are recognised, post recognition relief is available under section 1521²⁷, and also automatic relief available upon recognition of a foreign main proceeding under section 1520²⁸, should the proceedings be recognised. Both of these forms of relief including staying the commencement or continuation of individual actions against the debtor's assets, right, obligations or liabilities.

Assuming the foreign proceedings are recognised, the foreign representative will need to consider any executory contracts in place. Executory contracts are not defined in the Bankruptcy Code, however we know these are contracts entered into by a debtor with a third party prior to the commencement of insolvency proceedings in which there are unperformed obligations on both sides. Executory contracts are dealt with in Section 365 of the Bankruptcy Code. Under section 365(a), it states that the foreign representative "may assume or reject any executory contract or unexpired lease of the debtor"²⁹. This means the foreign representative can decide whether they choose to abide by the contract or not. Normally, they will only continue or complete an executory contract if there is some benefit to the estate in doing so. The debtor, or their foreign representative, and the creditor are obligated to continue performing their duties until this decision is made, and afterwards if it is assumed. The only point where these obligations end for both sides is if the contract is rejected.

Regarding *ipso facto* clauses (bankruptcy triggered termination clauses), Section 365(e) states as follows:

"(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor **may not be terminated or modified**, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

²⁵ *idem* section 1519

²⁶ *idem* section 1521

²⁷ *idem* section 1521

²⁸ *idem* section 1520

²⁹ United States Bankruptcy Code (title 11, United States Code) section 365 <<

<https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title11&saved=L3ByZWxpUB0aXRszTExL2NoYXB0ZlXMQ%3D%3D%7CZ3JhbnVsZWlkOIVTQy1wcmVsaW0tdGlbGUxMS1jaGFwdGVyMTE%3D%7C%7C%7C0%7Cfalse%7Cprelim&edition=prelim>>> accessed 24 February 2024

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement."³⁰

This makes it clear, as we know, that *ipso facto* clauses within executory contracts are not enforceable under US law should the debtor become insolvent or their financial position changes, or if there is a commencement of insolvency or restructuring proceedings.

In regard to the Intellectual Property (IP) Licenses, under Section 365(n) notwithstanding an executory contract containing an IP Licence being rejected, the licensee can decide whether to treat the contract as terminated once it is rejected, or they can choose to retain their IP rights and continue using the IP for the remainder of the contract³¹. This is limited to certain IP as defined in Section 101(35A) of the Bankruptcy Code³², however we do not have enough information to know whether the IP licence here would fall within this definition.

Question 3.4 [maximum 4 marks] 4 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?

Firstly, we will assume both Country A and Country B have adopted the Model Law on Cross-Border Insolvency (MLCBI) into their domestic insolvency legislation for the purpose of answering this question.

To properly advise here, it would be helpful to know on what basis the petition for recognition was refused. It is unlikely to have been on a public policy basis under Article 6 of the MLCBI³³, as these public policy exceptions should be interpreted restrictively and are rarely used as a basis for refusing recognition, only for limiting the relief granted upon recognition. It could be that the recognition requirements were not met, i.e. the petitioner was not a foreign representative within the meaning of Article 2 (d)³⁴, the foreign proceedings didn't fall within the meaning of Article 2(a)³⁵, and/or the foreign representative didn't meet the requirements of Article 15(2) and (3)³⁶. However, as we do not know enough information to support this, we shall assume that the application for recognition of the foreign proceedings as foreign main proceedings was refused because the court found that the debtor's Centre of Main Interests (COMI) was not in Country A. This is something the foreign representative should have considered before commencing proceedings in Country B to recognise the proceedings as foreign main proceedings.

³⁰ *ibid*

³¹ *ibid*

³² *idem* section 101

³³ UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (1997) Article 6 <<<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>>>, accessed 4 February 2024

³⁴ *idem* Article 2

³⁵ *idem* Article 2

³⁶ *idem* Article 15

As we know under Article 17 of the MLCBI, paragraph 2(a) states that a foreign proceeding shall be recognised "[a]s a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests"³⁷. COMI is not defined with the MLCBI, however Article 16.3 states that "[i]n the absence of proof to the contrary, the debtor's registered office... is presumed to be the centre of the debtor's main interests"³⁸. However, as we know, the debtor's COMI may be more complicated to establish. We are aware that Country A is where 'the foreign debtor has its registered office and not much more'. The 'and not much more' is key here. We know from the Guide To Enactment And Interpretation Of The UNICTRAL Model Law On Cross-Border Insolvency ('Guide to Enactment') that when considering COMI, there are 2 principal factors the court will consider when establishing if the jurisdiction in which the foreign proceedings have commenced is the debtor's COMI, and these are "(a) where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors"³⁹. If these principal factors do not yield an answer on the debtor's COMI, the court may consider additional. These could include, but are not limited to, the location of where the debtor's principal assets are found, the location of its employees, the location of the books and records, where financing was organised and authorised or the location where the debtor is subject to supervision or regulation⁴⁰.

If it is the case that the court refused the application for recognition of the foreign proceedings as foreign main proceedings on the basis that they did not consider Country A to be the debtor's COMI, the foreign representative could apply for recognition of the foreign proceedings as foreign non-main proceedings. The difference here is that, to be considered foreign non-main proceedings, the court must consider whether the debtor has an 'establishment' in Country A. An Establishment is defined in Article 2(f) as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services"⁴¹. As we know the foreign debtor has its registered office in Country A, this could be considered an establishment for the purposes of being recognised as a foreign non-main proceeding.

On making this application, the foreign representative could request pre-recognition relief under Article 19 and, if the application for recognition is granted, could request further relief available under Article 21. There is one exception to this in Article 21(3) in that any relief granted to the foreign representative must only relate to assets that should be administered in the foreign non-main proceeding or concern information required in that proceeding i.e. it should not interfere with the administration of another proceeding⁴².

The foreign representative should have also considered whether they would be successful in commencing proceedings or participating in local proceedings in Country B. Firstly, under Article 11 of the MLCBI, a foreign representative is entitled to apply to commence proceedings in Country B. This means they can request the commencement of domestic insolvency proceedings in Country B, however as we know from the Guide to Enactment, "[m]any national laws, in enumerating persons who may request the commencement of an insolvency proceeding, do not mention a representative of a foreign insolvency proceeding; under such laws, it might be doubtful whether a foreign representative might make such a request"⁴³.

³⁷*idem* Article 17

³⁸*idem* Article 16

³⁹*idem* p71

⁴⁰*ibid*

⁴¹*idem* Article 2

⁴²*idem* p12

⁴³*idem* p57

Should there be local insolvency proceedings taking place in Country B, and the proceedings in Country A are recognised as foreign non-main proceedings, then the foreign representative could apply to participate in the local insolvency proceedings of Country B under Article 12 of the MLCBI. This would provide the foreign representative with standing to participate in the local insolvency proceedings to make petitions, requests or submissions concerning the protection, realisation or distribution of assets, however it will not vest the foreign representative with any specific powers or rights.

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.

To ensure the Restructuring Support Agreement (RSA) that has been implemented for Globe Holdings (GH) is successful, we need to consider all of the above facts, and also consider what relief might be available from the United States (US) courts.

COMI analysis

Before making submitting an Application for Recognition (the 'Application') under Chapter 15 of the US Bankruptcy Code ('Chapter 15'), we need to establish whether we are applying for recognition of the foreign proceedings as foreign main or foreign non-main proceedings. The definitions for each of these can be found in Section 1502 which are as follows:

"(4) "foreign main proceeding" means a foreign proceeding pending in the country where the debtor has the center of its main interests;

(5) "foreign nonmain proceeding" means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment'.⁴⁴

An establishment is defined as 'any place of operations where the debtor carries out a nontransitory economic activity'⁴⁵.

We therefore need to establish whether the Cayman Islands would be considered GH's COMI or an establishment to determine if the proceedings would be foreign main or non-main proceedings. Chapter 15 does not define COMI, but there is the presumption of the debtor's COMI in section 1516 (c) where it states that "[i]n the absence of evidence to the contrary, the debtor's registered office... is presumed to be the center of the debtor's main interests"⁴⁶. Given the vast amount of information we have been given about GH, we can't necessarily follow the presumption in section 1516(c), as there is 'evidence to the contrary'.

There are several factors about the company that we know could indicate their COMI, is in the Cayman Islands. These include:

- GH has been domesticated in the Cayman Islands since 2010, so for around 13 years;
- They have been represented by Cayman counsel for over 10 years;
- They have had a Cayman bank account since 2010, from which they pay their operating expenses;
- They maintain their books and records in in the Cayman Islands; and
- The restructuring proceedings have taken place in the Cayman Islands.

The factors that could suggest GH's COMI is in the US include the following:

- They have direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the US. These subsidiaries are incorporated under US law and operate in the US;
- Their headquarters are in the US;
- All of their employees are in the US;
- Notes issued by GH are governed by New York law;
- It previously had shares in the NASDAQ stock market, which is a US stock exchange; and
- The Restructuring Support Agreement is governed by New York law.

To further establish where COMI could be, we can consider the Guide To Enactment And Interpretation Of The UNICTRAL Model Law On Cross-Border Insolvency ('Guide to Enactment'). There are 2 principal factors the court will consider when establishing if the jurisdiction in which the foreign proceedings have commenced is the debtor's COMI. These are "(a) where the central administration of the debtor takes place, and (b) which is readily

⁴⁴ United States Bankruptcy Code (title 11, United States Code) – Chapter 15, Ancillary And Other Cross-Border Cases section 1502

<<<https://uscode.house.gov/view.xhtml?path=/prelim@title11/chapter15&edition=prelim>>> accessed 25 February 2024

⁴⁵ *ibid*

⁴⁶ *idem* section 1516

ascertainable by creditors"⁴⁷. If these principal factors do not yield an answer on the debtor's COMI, the court may consider additional factors. Each of the factors listed above for both the Cayman Island and the US are included in the additional factors listed in paragraph 147⁴⁸.

Taking this into consideration, I think it would be established that the US is GH's COMI. Although there are factors to support GH's COMI being in the Cayman Islands, including them being incorporated there, having a bank account there and maintaining their books and records there, we are also told that GH has no business operations of its own. The business is run through the subsidiaries that are incorporated under US law and operate in the US. As well as this, the headquarters are in the US, all the employees are in the US, and even the RSA is governed by New York Law. Given this information, I think the court in the US would establish US as GH's COMI. We would therefore be looking to file an Application in the US recognising the Cayman proceedings as foreign non-main proceedings.

Application for Recognition of the Cayman Islands Proceedings in the United States

In order to have the Cayman Island's proceedings (the Scheme Order) recognised in the US, we would need to file an Application for Recognition (the 'Application') under Chapter 15 of the US Bankruptcy Code.

To do this, the Application would be filed under section 1515. Under section 1515(a) "[a] foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition"⁴⁹. In this, we can see there are a few different elements here: the application must be made by a foreign representative, it must be in regard to a foreign proceeding over which they have been appointed. As well as this, under Section 1515(b), the petition should be accompanied by—

- "(1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;
- (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
- (3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative."⁵⁰

It shall also be accompanied by a "statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative"⁵¹.

The term foreign representative is defined in Section 101(24) as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to

⁴⁷ UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, p71 << <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>>> accessed 25 February 2024

⁴⁸ *idem* p71

⁴⁹ United States Bankruptcy Code (title 11, United States Code) – Chapter 15, Ancillary And Other Cross-Border Cases section 1515 <<<https://uscode.house.gov/view.xhtml?path=/prelim@title11/chapter15&edition=prelim>>> accessed 25 February 2024

⁵⁰ *idem* section 1515

⁵¹ *ibid*

administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding"⁵². Foreign proceeding is defined in Section 101(23) as "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"⁵³.

A Scheme is an agreement between a company and its members, creditors, or in this case, its noteholders. This method of restructuring can be used to facilitate a solvent reorganisation of a company, as well as to effect insolvent restructurings. We have been informed that, after discussing restructuring options, GH decided to commence a scheme under Cayman Islands law. The Sanction Hearing took place, and an order sanctioning the Scheme was granted and filed with the Cayman Islands Registrar of Companies on the same day.

Considering the definitions above, a Scheme would fall within the meaning of foreign proceedings. Cedar and Woods would be the foreign representative in these circumstances. As there is an Order sanctioning the Scheme in the Cayman Islands, this would satisfy Section 1515(b), so we would need to make sure to provide a statement identifying all foreign proceedings in respect to the debtor that we are aware of to ensure that all requirements for the Application to be successful are met.

Relief Available under section 1519

As we know there is a class action litigation in the US that has not been filed yet, the first thing we would need to do on filing the Application would be to request pre-recognition relief. Pursuant to section 1519, "[f]rom the time of filing a petition for recognition until the court rules on the petition, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including—

- (1) staying execution against the debtor's assets;
- (2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and
- (3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a)"⁵⁴.

The additional relief in subsection (3) includes "suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor", and "providing for the examination of

⁵² United States Bankruptcy Code (title 11, United States Code) section 101 << [>> accessed 24 February 2024](https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title11&saved=L3ByZWxpbUB0aXRsZTEuL2NoYXB0Zl9xMQ%3D%3D%7CZ3JhbnVsZWlkOIVTQy1wcmVsaW0tdG10bGUxMS1jaGFwdGVyMTE%3D%7C%7C%7C0%7Cfalse%7Cprelim&edition=prelim)

⁵³ *ibid*

⁵⁴ United States Bankruptcy Code (title 11, United States Code) – Chapter 15, Ancillary And Other Cross-Border Cases section 1519 <<[>> accessed 25 February 2024](https://uscode.house.gov/view.xhtml?path=/prelim@title11/chapter15&edition=prelim)

witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities"⁵⁵.

In these circumstances, we would be requesting the stay of execution against the debtor's assets to prevent any litigation against GH during the Scheme. It should be noted that there are rounds for denial of relief if "such relief would interfere with the administration of a foreign main proceeding"⁵⁶.

If the proceedings are recognised, post recognition relief is available under section 1521⁵⁷. This form of relief including staying the commencement or continuation of individual actions against the debtor's assets, right, obligations or liabilities. There is one exception to this in Article 1521(c) in that any relief granted to the foreign representative must only relate to assets that should be administered in the foreign non-main proceeding or concern information required in that proceeding i.e. it should not interfere with the administration of another proceeding⁵⁸.

Although adopted in the US, it should be noted that the Cayman Islands have not adopted the MLCBI into their domestic insolvency laws⁵⁹. There is no requirement for reciprocity in the foreign jurisdictions, therefore there are no grounds for the US court to refuse recognition merely because the court in the Cayman Islands would not grant the same relief.

Very well written.

For full marks, the answer should contain as a minimum:

- 1. Definitions (COMI, establishment, foreign main/non-main proceedings etc.) with respective references to (if any) MLCBI provisions**
- 2. A discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI and alternative courses of action (what if the COMI is considered in the Cayman Islands?)**
- 3. Procedures per Article 15 MLCBI**
- 4. Conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI**

*** End of Assessment ***

Marks awarded: 44 out of 50 (Well done!)

⁵⁵ *idem* section 1521

⁵⁶ *idem* section 1519

⁵⁷ *idem* section 1521

⁵⁸ *ibid*

⁵⁹Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)

<<https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status>> accessed 24 February 2024