



**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] 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.

The MLCBI does not attempt to unify the insolvency laws of member (signatory) states substantively. Its goal is to provide recommendations, in the form of “soft law”, which member states can choose to adopt into their national insolvency laws, in whole or in part.<sup>1</sup> Reciprocity is not required between member states as it has been found that this requirement would negatively impact the effectiveness of the MLCBI.<sup>2</sup>

Conversely, the European Insolvency Regulation (“EIR”) on insolvency proceedings becomes part of the domestic law of the member state upon adoption. The Regulations provide a framework for insolvency proceedings that can be applied throughout the EU, and reciprocity is required between member states. The member states adopt the regulations in whole, providing a more unified application of the EIR between states.

A benefit of MLCBI’s approach is that it respects differences among national procedural laws. Because it is a type of soft law, it is more flexible in its application of the laws, allowing the member states to choose which parts of the law to adopt and therefore those that align with its domestic insolvency laws. The MLCBI also takes into consideration the differing attitudes of states to coordination and cooperation between states.

A disadvantage of this approach is that its effectiveness depends on the implementation and adoption of the MLCBI by different states, causing inconsistencies in the application

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<sup>1</sup> UNCITRAL Guide to Enactment, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>, accessed 30 January 2024

<sup>2</sup> S Chandra Mohan, “Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?” (2012) International Insolvency Review

of the laws. This can lead to complexities which have to be navigated by the respective courts. The inconsistency of the approach impacts the aim of the MLCBI to make the application of cross-border insolvency more predictable in nature.<sup>3</sup>

In respect of the EIR, the uniformity of the approach to jurisdiction of proceedings and recognition between member states makes the application of the regulations more predictable and in some cases easier to apply.

On the other hand, challenges may be faced when attempting to accommodate diverse legal practices and traditions among EU member states. As the rules are more unified and states cannot choose which are adopted, the adoption of the EIR into the domestic insolvency legislation can be complex.

### **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.

As Article 21 provides a discretionary power, consideration must be given as to the appropriateness of the relief to be granted. The primary consideration in assessing appropriateness should be whether the proceeding being considered in is the foreign main or non-main proceeding.

It is generally true that in the case of foreign non-main proceedings, the authority and interests of the insolvency representative are more limited and therefore, the relief granted should be less than the foreign main proceeding.<sup>4</sup> The relief granted to the foreign non-main proceedings should not interfere or impact other proceedings and the effects of the relief should be restricted to the assets administered in that proceeding. If seeking to obtain information in accordance with 1(d) or article 21, the information obtained should be limited to information that is required in that proceeding.

An interesting recent example of case law whereby the relief granted was inappropriate is Igor Vitalievich Protasov vs Khadzhi-Murat Derev. In this case, a worldwide freezing order had been applied in accordance with Article 19 of the MLCBI. Subsequently, the Russian bankruptcy was recognised as a foreign main proceeding. Following this, the relief that had been granted, i.e. the freezing order, was found to no longer be justified given that other more appropriate relief was available in accordance with domestic UK bankruptcy law.<sup>5</sup>

**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.

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<sup>3</sup> The Model Law on Cross-Border Insolvency turns 25 <https://www.nortonrosefulbright.com/en-us/knowledge/publications/87d4ce21/the-model-law-on-cross-border-insolvency-turns-25> Accessed 2 February 2024

<sup>4</sup> UNCITRAL Model Law Guide to Enactment <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> Accessed 3 February 2024

<sup>5</sup> Order of 24 February 2021 by Mr Justice Adam Johnson, [2021] EWHC 392 (Ch) (the Protasov v Derev Case).



The intention of article 13 is to ensure that foreign creditors should have the same rights as local creditors when seeking to commence proceedings or to file a claim. The article also clarifies that the protection of foreign creditors shouldn't impact the ranking of claims in the proceeding, and that the minimum ranking of foreign claims should be as unsecured non-preference claims unless certain types of claims apply, such as penalties or deferred payments which may rank lower.

The protection provided by this article should mean that the foreign creditors and local creditors are afforded the same rights when commencing and participating in proceedings, and at a minimum, are not treated worse.

#### **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?

Firstly, distinction must be made between foreign main vs foreign non-main proceedings. In the foreign main proceedings, there is a prerequisite that the insolvency process has been commenced in a State whereby the debtor's centre of main interests or "COMI" is located. The foreign non-main proceeding on the other hand would be commenced in a State whereby the debtor only has an establishment.<sup>6</sup>

The nature of the relief granted is largely dependent on the type of proceeding. As discussed, the 'appropriate relief' granted by Article 21 will differ for the foreign main and non-main proceedings, and it is given that the insolvency representative in the foreign main proceedings would have more authority than that of the representative of the foreign non-main proceedings.

Article 20 draws a clear distinction between the two types of proceeding. This Article has the following effects when a foreign main proceeding is recognised:

1. It commences a stay of individual actions against the debtor's assets, rights obligations and liabilities as well as a stay of a continuation of the same
2. There is a stay of execution against the assets of the debtor
3. There is an automatic suspension of encumbrance, transfer and disposal of the debtor's assets.

The above is not automatically applied upon recognition of a foreign non-main proceeding.

Article 19 also provides some relief which can be applied to both foreign main and non-main proceedings before recognition to provide some protection over the debtor's assets. The foreign representative must request this relief from court and the relief under this Article includes a stay of execution against the assets of the debtor, and in some circumstances, the court may entrust the foreign representative with realising or administering the debtor's assets that may be perishable or susceptible to devaluation in order to protect the value of the assets.

#### **QUESTION 3 (essay-type questions) [15 marks in total] 12 marks**

##### **Question 3.1 [maximum 4 marks] 3 marks**

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<sup>6</sup> Idem, Note 3

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.

The MLCBI defines the foreign main proceeding as “a foreign proceeding taking place in the State where the debtor has the centre of its main interests”<sup>7</sup> (COMI). Conversely, the foreign non-main proceeding is where the debtor only has an establishment. COMI is not a defined term in the MLCBI however it is defined in the European Union Insolvency Regulation as a place where the debtor regularly administers its interests, and which can be ascertained by third parties<sup>8</sup>.

It is worth noting that neither Germany nor Bermuda are member states of the MLCBI, however, the country in which recognition is being requested, being the US, is a member. Unlike treaties, the MLCBI is soft law and does not require full adoption by member states. It also therefore does not require reciprocity, and member states mostly do not reject recognition applications purely based on the State of the requesting party not providing the same relief, although some States have adopted this provision.<sup>9</sup> In this instance, the US does not have a reciprocity provision in place, therefore, whilst the proceedings seeking recognition are not based in MLCBI member states, the US would not reject the recognition of these proceedings purely based on Germany or Bermuda not offering the same relief.

It is given in the information provided that the COMI is located in Germany. Subject to the US Court agreeing on this conclusion and in consideration of a number of factors, including the location of the debtor’s books and records, the location of employees and location of the Debtor’s primary bank, Germany is the entity recognised as the foreign main proceeding. The outcome of this is an automatic and immediate (upon recognition) stay of individual actions and proceedings against the debtor and its assets in the US in accordance with article 20 of the MLCBI.<sup>10</sup>

An establishment is defined in the MLCBI as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”. As the debtor has an establishment in Bermuda, from the information provided it is concluded that this is where the foreign non-main proceedings are located. Given that this is the non-main proceeding, the relief granted will be at the discretion of the US Court and must be requested by the Bermuda insolvency representative. The relief granted would also be limited to the assets being administered in the Bermuda proceedings in accordance with article 21 of the MLCBI.<sup>11</sup>

**Requires to be substantiated with definitional provisions of MLCBI as well as a discussion on procedural matters to support the likely outcome eg. Art. 2, 15, 17, 6..**

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<sup>7</sup> UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> Accessed 6 February 2024

<sup>8</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848> Accessed 6 February 2024

<sup>9</sup> UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlcbi\\_judicial\\_perspective\\_en.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlcbi_judicial_perspective_en.pdf) Accessed 6 February 2024

<sup>10</sup> Idem note 7

<sup>11</sup> Idem note 7

**Question 3.2 [maximum 3 marks] 1 mark**

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 MLCBI was adopted by the United States of America in 2005<sup>12</sup>, and as discussed, the MLCBI does not require reciprocity. Therefore, regardless of the member status of the foreign proceeding, it should be recognised by the US Courts (in the absence of any other prohibiting factors) if it meets the definition of “foreign proceeding” as set out in Article 2 of the MLCBI,

and provides sufficient evidence as set out in Article 15. It is noteworthy that the definition of foreign proceeding includes interim proceedings, such as a joint provisional liquidation.

In a recent example of foreign joint provisional liquidators seeking Chapter 15 recognition in the US, *Global Cord Blood Corp, 2022*<sup>13</sup> it is noted that recognition was not granted due to the purpose of the liquidation being only for corporate governance and fraud remediation. The proceeding was not found to have met the definition of foreign proceeding as there was a question as to whether the provisional liquidation was a “collective judicial or administrative proceeding” as described in the definition on foreign proceeding in Article 2. Depending on the purpose of the appointment of joint provisional liquidators, there is a chance that the proceedings won’t be recognised.

The information provided suggests that the recognition proceeding has been commenced but that recognition has not yet been granted. Based on this assumption, the foreign proceeding has therefore not been recognised as either a foreign main or foreign non-main proceeding and does not automatically benefit from the relief afforded to foreign-main proceedings upon recognition as per Article 20. Therefore, there is currently no protection afforded to the joint provisional liquidators against any actions brought by the vendors of the foreign debtor in accordance with the MLCBI and, in the absence of any other relief, the actions brought by the vendors may be required to proceed. It is noteworthy that in accordance with section 1509 of the US code<sup>14</sup> the foreign representative has the capacity to sue and be sued upon recognition. This is not to say that the foreign representative can’t be sued prior to recognition if certain conditions are met.

Whilst automatic relief isn’t granted, the foreign insolvency representative may apply for urgent interim relief prior to recognition of the proceedings in accordance with Article 19.1. if it is to protect the assets of the debtor or if it is in the interests of creditors. Relief granted may include any relief mentioned in c, d, and g of Article 21. This includes granting of additional relief that may be available to a domestic insolvency representative under the law of the US. Whilst it appears that the actions brought by the vendors are brought against the liquidators and not necessarily the assets of the debtor, it may still be considered in the best interests of creditors that the liquidators are not sued by the US vendors as it may be

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<sup>12</sup> Status: UNCITRAL Model Law on Cross-Border Insolvency (1997) : [https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status) Accessed 6 February 2024

<sup>13</sup> Chapter 15 Recognition Limited to Foreign Insolvency, Liquidation, or Restructuring Proceedings, <https://www.jonesday.com/en/insights/2023/03/chapter-15-recognition-limited-to-foreign-insolvency-liquidation-or-restructuring-proceedings> Accessed 9 February 2024

<sup>14</sup> 11 USC § 1509 - Right of direct access

a hindrance to the proceedings. It is to the US courts discretion to consider what relief may be appropriate, however in this instance, given that none of the assets of the debtor are in jeopardy, relief may not be granted.

There is also a question whether the actions of a joint provisional liquidator could constitute a ‘tortious interference with contract rights’. Depending on the nature of the JPLs appointment, they may continue to operate the debtors business, and in such a case, the rights of vendors may not be impacted. In this scenario, the US court may find that the claims brought have no merit.

**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?

Based on the facts provided, the foreign representative has made a recognition application which has not yet been granted. Whilst a Chapter 11 proceeding commenced in the US triggers an automatic stay of proceedings, the UK proceedings have not yet been recognised in the US and therefore has not been granted any kind of relief if the US.

It is stated that the assets of the company, being US-governed leases and intellectual property licences have *ipso facto* clauses and that these clauses are not enforceable under the US Bankruptcy Code. This is a protection afforded to debtors in the US to allow time for their affairs to be resolved in an insolvency or restructuring process. The assets are therefore at risk until the UK proceedings are recognised by the US court, and so the UK representative should seek urgent relief to protect the value of these assets until the proceedings are recognised.

The foreign representative can in these circumstances seek urgent interim relief in accordance Article 19 of the MLCBI. The relief available under this Article, which is ordered at the discretion of the court, may include:

- a. A staying of execution against the debtor’s assets;
- b. The entrustment of the administration or realisation of the debtor’s assets located in the US to the UK appointed insolvency representative
- c. Any relief provided in c, d or g in Article 21.<sup>15</sup>

When the landlords and IP licensees become aware of the UK proceedings, they may seek to enforce the *ipso facto* clauses. In these circumstances, the UK insolvency representative may seek relief under section (a) of Article 19 in order to ensure that no actions can be taken in relation to enforcement of the *ipso facto* clauses.

They may also wish to seek the relief in accordance with section b of Article 19 above, which is for the purpose of preserving the value of and protecting assets that may be in jeopardy. Given that the assets in this situation are at risk of termination, it would appear that these assets are indeed in jeopardy. This would allow the UK insolvency representative

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<sup>15</sup> Idem note 7

to take control of the administration of the leases and licences, ensuring their continued operation and security until recognition is granted. It is to the court discretion whether relief granted under this Article is appropriate in the circumstances.

Part g of Article 21 would grant additional relief to the UK representative which may be available to a representative under the laws of the US. Given that under Chapter 11 of the US Bankruptcy Code, there is an automatic stay, which provides a 'worldwide' injunction against actions against the debtor. This would give broad protection to the assets of the debtor.

### **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?

Prior to making any recognition application, it is important for the foreign representative to carry out a thorough analysis to determine, firstly, that the foreign proceeding meets the definition as given in Article 2 of the MLCBI, and secondly, that the proceeding meets all the prerequisites to be recognised as the foreign-main proceeding.

The foreign main proceeding is defined at Article 2 of the MLCBI as 'a foreign proceeding taking place in the State where the debtor has the centre of its main interests'<sup>16</sup>. Therefore, care must be taken when considering where the entity's COMI is. Whilst the centre of main interests is not a defined term in the MLCBI, the concept of COMI is provided in the European Insolvency Regulation.

It is stated in Article 16 of the MLCBI that the debtor's COMI can be presumed to be the registered office in the absence of any proof to the contrary.<sup>17</sup> The facts provided state that the debtor's registered office was located in Country A, but 'not much more', suggesting that the debtor may have run its operations elsewhere. In determining the COMI an important factor is the location of the central administration of the debtor.

It is therefore important to consider other factors before determining that this is the location of the COMI, to include the location of the debtor's employees, books and records, the primary bank, and the location from which commercial policy was determined and where financing was organised and authorised. This analysis should be completed at the outset of the foreign proceeding and should be monitored throughout the course of the insolvency proceeding as the COMI may change.

If after carrying out the COMI analysis, the foreign representative still comes to the conclusion that the foreign proceedings should be foreign main proceedings, then the foreign representative may wish to appeal the decision of the Court in Country B, if the

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<sup>16</sup> Idem Note 7

<sup>17</sup> Idem Note 7

domestic procedural laws allow. The ability of the foreign representative to make an appeal will be determined by the domestic laws of Country A.

Alternatively, if the foreign representative instead finds that the insolvent debtor does not have a COMI in Country A, it may instead seek recognition as a foreign non-main proceeding. In accordance with the Article 2 of the MLCBI, the foreign non-main proceeding takes place in a State where the debtor has an establishment, which is defined as “any place of operations where the debtor carries out non-transitory economic activity with human means and goods or services”. The registered office may come under this definition and the foreign representative should conduct an analysis.

**QUESTION 4 (fact-based application-type question) [15 marks in total] 13 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.



Upon commencement of any foreign proceedings, it is important to carry out an analysis to determine the COMI of the debtor. This, amongst other things, is to ensure that, when applying for recognition in other States, the correct type of proceeding is requested and the appropriate relief granted.

The MLCBI assumes in Article 16 that the debtor's COMI is located in the State where it's registered office is located, in the absence of any evidence to the contrary.<sup>18</sup> As stated in the information provided, the entity has re-registered in Cayman. If no further information was available to the contrary, it may be determined that this would be the debtor's COMI, however the additional information provided paints a different story.

As previously mentioned, the MLCBI does not define the COMI, however Article 3 of the European Insolvency Regulation<sup>19</sup> defines it as "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties." There are a number of factors which may impact creditors ability to ascertain the COMI.

In consideration of the information provided, these factors include:

- The location of the entity's Registered Office which is located in Cayman;
- The entity made filings with the SEC, a regulatory authority in the US
- The entity recently opened a bank account in the US
- The entity is a holding company and has no operations of its own
- The books and records of the company are kept in Cayman
- Board meetings are usually held virtually rather than in person
- The company's business is carried out through its subsidiaries, which are all incorporated and operating in the US rather than Cayman
- All employees are located in the US
- The company's headquarters (and assets including land, building and its contents) are in the US
- The Notes issued by the company are governed by New York (US) law
- The company has retained Cayman Islands counsel
- Counsel advised the company to commence a scheme under Cayman Islands law
- The Restructuring Support Agreement is governed by New York law

It is also noted that the company's largest noteholders, being the creditors of the company, expected that the restructuring would be taking place in the Cayman Islands. Different weight may be given to the above factors by the Court in determining the COMI. The situation is not clear-cut and the Cayman appointed representative needs to consider whether the US or Cayman is a more appropriate COMI for the company.

On one hand, the company has its registered office, books and records, retained counsel and a (newly opened) bank account in the Cayman Islands. Given that the company has no operations or employees in the Cayman Islands, and no meetings are held physically there, it is a weak argument that the debtor could be considered as a place where 'the debtor conducts the administration of its interests on a regular basis'. A bank account in the Cayman Islands may be considered as 'administration of its interests', however given that

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<sup>18</sup> Idem Note 7

<sup>19</sup> Idem Note 8



it has only recently been opened, less weight may be given to this factor in consideration of the COMI.

On the other hand, it is noted that the business of the company is conducted entirely through its subsidiaries, which are all located and operate in the US. The company is also regulated and makes filings with the SEC, a US regulator, has its headquarters in New York (which includes assets of the company) and all employees are US based. From this information it can be deduced that the administration of the company is conducted in the US.

The situation is further complicated by the restructuring of the business. It is noted that the Restructuring Support Agreement is governed by New York law, however major creditors expect the restructuring to take place in the Cayman Islands, and the scheme is to be entered under Cayman law. It is not obvious whether the major creditors are of this opinion because their view is that the company's COMI is located here or whether it is for another reason. Finally, it is noted that the Scheme Meeting is conducted in the Cayman Islands, which may suggest that this is where the majority of creditors are located, although an option is given for creditors to attend virtually. Despite this, it is already stated that the company had no operations of its own and whilst there may be creditors located in Cayman, it is not reflective of the operations of the company.

Based on the information given, it would appear that more information is in favour of the US being designated as the company's COMI. In conclusion, the Cayman scheme representative should apply for recognition of the Scheme as a foreign non-main proceeding. Article 15 of the MLCBI<sup>20</sup> provides guidance on what needs to be submitted to the court for recognition. This would include the application for recognition itself, as well as the order sanctioning the scheme and identifying the insolvency representative. The application must also include a statement which identifies all known foreign proceedings in respect of the debtor. Based on the information provided, no other foreign proceedings have been commenced at this stage. A translation may be required where the language differs from that of the enacting state, however in this situation both would be in English so it is not required.

Prior to any recognition being granted, the Cayman representative may apply for urgent interim relief in accordance with Article 19 of the MLCBI.<sup>21</sup> The Cayman representative should obtain information regarding the imminent class action which has been brewing in the US and consider whether any urgent relief is required. Relief granted under Article 19 is only granted provided that the interests of the company's creditors are protected adequately.

Subject to the Scheme being recognised by the US Court as the non-main proceeding, in accordance with Article 21 of the MLCBI<sup>22</sup>, the Cayman representative may apply for discretionary relief. Any relief granted to the representative of the foreign non-main proceeding should be limited to assets that should be administered in the foreign non-main proceedings. Therefore, consideration must be given as to whether the relief granted relates to assets of the Cayman proceedings or whether these would be dealt with in proceedings commenced in the US, where the COMI has been determined to be located. There is no automatic moratorium for the foreign non-main proceedings and the relief granted is to the discretion of the court. In accordance with Article 21, it may therefore be considered that

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<sup>20</sup> Idem note 7

<sup>21</sup> Idem note 7

<sup>22</sup> Idem note 7

the only relief granted would be any relief relating to assets that should be administered in the foreign non-main proceedings, which would be the Notes.

Given that the COMI is located in the US, it may be more beneficial for the entity to commence Chapter 11 proceedings domestically in the US. This would give the insolvency representative more power and the assets located in the US would be better protected by the automatic stay of proceedings. In accordance with Chapter 11<sup>23</sup> the company would need to file a voluntary petition as well as its schedule of assets and liabilities, a schedule of income and expenditure, a schedule of executory contracts and unexpired leases and finally a statement of financial affairs. As discussed, this type of proceeding would provide the company with an automatic stay of all actions brought against the company which would therefore protect it from the class actions being brought. This would also enable the representative the power to deal with the sale of the company's headquarters which are located in the US.

The response lacks an analysis of the alternative COMI situation (Cayman Islands).  
Necessary MLCBI references are given (except for Art.6 and 17 MLCBI).  
Good essay and application of the law!.

**\* End of Assessment \***

**Marks awarded: 39 out of 50**

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<sup>23</sup> <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics>  
Chapter 11 Bankruptcy Basics, Accessed 15 February 2024