



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A**

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

## **ANSWER ALL THE QUESTIONS**

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

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

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

#### **Question 1.1**

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

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

#### **Question 1.2**

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

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

Choose the correct answer:

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

(d) All of the above.

### Question 1.3

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

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

Choose the correct answer:

- (a) Options (ii), (iii) and (iv).
- (b) Options (i), (ii) and (iv).
- (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 UNCITRAL Model Law on Cross- Border Insolvency (MLCBI) and the European Union (EU) Regulation on insolvency proceedings primarily lies in their scope and approach to handling cross-border insolvency cases.

According to Article 1 of the UNCITRAL Model Law on Cross- Border Insolvency, the model laws apply where assistance is sought in one State by a foreign court or a foreign representative in connection with a foreign proceeding. The model law provides a framework for cooperation between courts in different states and facilitate the recognition of cross border insolvency proceedings.

According to paragraph 8 of the preamble of the European Regulation on Insolvency Proceedings [EIR], the Regulations were enacted to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Union measure which is binding and directly applicable in the EU Member States.

The UNCITRAL Model Law on Cross-Border Insolvency is designed to support international collaboration in managing insolvency cases, providing a framework that is adaptable across different legal systems. This approach, however, does not include direct protocols for the immediate acknowledgment and execution of insolvency decisions, potentially resulting in variable outcomes and uncertainty in legal proceedings.

On the other hand, the European Union's Regulation on insolvency proceedings facilitates the seamless recognition of insolvency cases among the EU member states, promoting efficiency and legal clarity within the Union. The key disadvantage is that this system's scope is restricted to the EU, not extending its solutions to insolvency issues globally.

**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 on the Relief that may be granted upon recognition of a foreign proceeding provides that upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, which may include: -

- a) Staying execution against the debtor's assets.
- b) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities.

Article 22 [1] of the MLCBI provides the considerations that the Courts ought to consider when exercising such jurisdiction and states that in granting or denying relief under 21, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

Additionally, the court has the flexibility to modify or terminate the relief based on requests from the foreign representative or any affected person, allowing for adjustments in response to new developments or better protection of the parties' interests. This is provided for under Article 22 [3] of the MLCBI provides that Courts may also, at the request of the foreign representative or a person affected by relief granted under article 21, or at its own motion, modify or terminate such relief.

**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 on the access of foreign creditors to a proceeding provides that subject to paragraph 2 of the Article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding as creditors domiciled in the enacting state without affecting the ranking of claims in the enacting state.

**Article 13 of the MLCBI** provides safeguards to ensure that the rights of creditors and other interested parties, including the debtor, are protected in the recognition and enforcement of foreign insolvency proceedings, and include the following: -

- a) **Right of direct access of the Insolvency Court** – based on Article 9 of the Model laws, a foreign representative is entitled to apply directly to the Courts of the enacting state.
- b) **Limited jurisdiction in the enacting state** – Article 10 provides that the sole fact that an application pursuant to the Model Law is made to a court in the enacting State by a foreign representative, that does not subject the foreign representative or the foreign assets and



affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

- c) **Non-discrimination of foreign creditors** – Article 13 embodies the principle that when foreign creditors apply to commence an insolvency proceeding in the enacting State or file claims in such a proceeding, the foreign creditors should not be treated worse than local creditors.

**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 key distinction between relief available in foreign main versus foreign non-main proceedings under the UNCITRAL Model Law on Cross-Border Insolvency primarily relates to the automatic effects and scope of relief granted upon recognition.

In a foreign main proceeding, which is a proceeding in the state where the debtor has its centre of main interests (COMI), the recognition comes with automatic effects such as a stay of execution against the debtor's assets under **Article 20 of the Model Laws** which states that: -

*“Upon recognition of a foreign proceeding that is a foreign main proceeding, commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed; execution against the debtor’s assets is stayed; and the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.”*

In contrast, for a foreign non-main proceeding, which occurs in a state where the debtor has an establishment, the relief granted is discretionary and requires a specific court order upon recognition as provided for under **Article 21 of the Model Laws** which states that: -

*“Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including; staying the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20.”*

**Article 21 [3]** further states that in granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

This distinction highlights the critical role of the primary insolvency process, ensuring main proceedings are prioritized, while also permitting targeted relief in locales where the debtor maintains a secondary footprint. This is facilitated through non-main proceedings, evaluated individually.

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

In the scenario where a debtor has its Centre of Main Interests (COMI) in Germany, an establishment in Bermuda, and both foreign main and foreign non-main proceedings, as well as recognition proceedings in the US have been opened, the foreign proceedings should have been filed in the jurisdictions where the debtor has a significant presence or business operations, based on the UNCITRAL Model Law on Cross-Border Insolvency principles.

Generally, and from Article 2 of the model laws on definitions, foreign main proceedings would be filed in the jurisdiction where the debtor's COMI is located, in this case, Germany. This is because the COMI is presumed to be the primary location of the debtor's financial dealings, ascertainable by third parties.

Foreign non-main proceedings could be filed in jurisdictions where the debtor has an establishment, in this case Bermuda, reflecting the presence of non-transitory economic activities there.

The likely result of the foreign proceedings being filed in Germany is that: -

- a. The proceedings in Germany shall gain recognition as provided from under Article 17 of the model laws which states that foreign proceedings shall be recognised as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests.
- b. The proceedings have automatic mandatory relief under Article 20 of the model laws which provides that upon recognition of a foreign proceeding that is a foreign main proceeding commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; execution against the debtor's assets is stayed; and the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

Foreign non-main proceedings would be filed in Bermuda which is the jurisdiction where the debtor has an establishment. The recognition of foreign non-main proceedings under the UNCITRAL Model Law on Cross-Border Insolvency has specific effects as outlined in Articles 17 and 21 of the Model Laws.

The likely result of the foreign non-main proceedings being instituted in Bermuda is that the Foreign Representative may seek for reliefs under Article 21 which include but are not limited to: -

- a) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;
- b) 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;
- c) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

These reliefs are granted in the Court's discretion. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to

assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

**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.

Based on Article 1 of the Model Laws on the scope of its application, the UNCITRAL Model Law on Cross-Border Insolvency aims to assist in the fair and efficient administration of cross-border insolvencies, promoting legal certainty for trade and investment, ensuring the protection of assets and the maximization of their value, and facilitating the rescue of financially troubled businesses. It provides for the recognition of foreign insolvency proceedings and cooperation between courts and insolvency practitioners in different countries.

When joint provisional liquidators are recognized in the US under the Model Law, they are generally afforded certain protections and powers, including a stay of actions against the debtor's assets and possibly against themselves in their capacity as foreign representatives. However, the specific protection against lawsuits such as those for tortious interference would depend on the court's interpretation of the Model Law's provisions and the applicability of any relief measures under **11 U.S. Code § 1521** on Relief that may be granted upon recognition. The chapter implements Article 21 of the Model laws.

One of the reliefs that the Court may grant upon relief of the foreign proceedings under **11 U.S. Code § 1521** include entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court.

Code § 1516 recognizes the validity of foreign proceedings and representatives and provides that: -

*"If the decision or certificate referred to in section 1515(b) indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative, the court is entitled to so presume."*

Given the protective measures and the principle of comity inherent in Chapter 15, the US court may grant a stay or relief to the joint provisional liquidators from such lawsuits to allow them to perform their duties effectively. The court may recognize the foreign proceeding as either a foreign main or non-main proceeding, which can provide certain protections to the foreign debtor's assets and representatives in the US. This could potentially include a stay of proceedings against the debtor's assets or representatives, including defense from suits such as alleged tortious interference.

However, if the actions of the joint provisional liquidators are found to exceed their authority or to interfere unjustly with the rights of US-based creditors or contract parties, the US court may limit their protections or modify the relief granted. In summary, while the Model Law and the US Bankruptcy Code may protect the foreign representatives to facilitate cross-border insolvency proceedings, the outcome of this scenario also depends on the specific facts of the case, the nature of the tortious interference, and the Court's balancing the need to respect the foreign insolvency proceedings with the protection of local creditors' and contract parties' rights.

Further, it is important to note that the Supremacy Clause under **Article VI, Clause 2 of the U.S. Constitution** dictates that federal law is the "supreme law of the land" and establishes that federal law overrides state law when there is a conflict between the two. This clause ensures that federal insolvency laws, such as those under the U.S. Bankruptcy Code, have supremacy over state tort laws in instances where the two may conflict.

The response should be based on Art.10 MLCBI. However, noted the (unsubstantiated) hint of a reference - as underlined.

**Question 3.3 [maximum 4 marks] 2 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?

A debtor-in-possession-like restructuring proceeding in the UK refers to a restructuring process where the existing management or owners of a company maintain control of the business and its assets while undergoing a financial restructuring.

In the UK, **Part 26A of the Companies Act 2006** introduced this procedure. It allows companies in financial distress to enter into a binding agreement with creditors and members to restructure debts and obligations. It features a "cross-class cram-down" mechanism in Section 901G that can bind dissenting classes of creditors to the plan, provided that certain conditions are met. This process is closer to the DIP model as it allows the company to continue operations under its current management while restructuring.

Given the scenario above, the foreign representative should take the following steps to protect the assets in the US: -

- a) **File for Recognition under 11 U.S. Code Chapter 15** - Since they have already commenced a recognition proceeding, ensuring that the US court recognizes the UK restructuring proceeding as either a foreign main or non-main proceeding is crucial. This recognition can provide automatic stay protections under the US Bankruptcy Code, preventing the enforcement of *ipso facto* clauses in US-governed leases and intellectual property licenses.
- b) **Seek Interim Relief under Code § 1519 of the US Bankruptcy Code** – pending the Ruling on the petition where the stay is not automatic, 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 suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under Code § 1520(a).
- c) **Seek Relief under Code § 1521 and § 1520 (a)(3) of the US Bankruptcy Code** - After obtaining recognition, the foreign representative should request specific relief to protect the debtor's assets and operations in the US. This can include seeking an order from the US court expressly prohibiting the enforcement of *ipso facto* clauses, leveraging Code § 1521 and 1520(a)(3),

which provide additional relief measures and automatic stay respectively, for recognized foreign proceedings.

- d) **Initiate discussions and negotiate with the US Creditors and Contract Parties** – Apart from the legal reliefs, it would be important for the Foreign representative to take steps that are commercially aware. Initiating early discussions with creditors and entities involved in lease and license agreements within the US can help to avoid potential disputes or confusion, and may lead to negotiated terms that are supportive of the UK restructuring efforts.

**Needs discussion based on Art.19 MLCBI, as well as procedures in Art.20 and 21, rather than national laws.**

**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?

Even though the Model Laws do not define what the centre of main interests [COMI] is, the 2 main factors for determining the COMI are similar to those in the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast). The factors are: -

- a. The COMI shall be the place where the debtor conducts the administration of its interests on a regular basis; and
- b. which is ascertainable by third parties.

From the definition of what foreign main proceedings and foreign non-main proceedings are under Article 2 of the Model Laws, Country A is the COMI while Country B is an establishment. There is a rebuttable presumption that the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

After the denial of recognition as a foreign main proceeding in Country B, the foreign representative could consider the following steps: -

- a) **Review the basis of the Court's decision in failing to recognize the proceedings as a foreign main proceeding.** - It's crucial to understand the reasons behind the court's decision to deny recognition as a foreign main proceeding. This may involve analyzing the court's interpretation of the Center of Main Interests (COMI) and whether it was not sufficiently demonstrated to be in Country A. Understanding the court's rationale can guide the following next steps.
- b) **Appeal the decision by the Insolvency Court** – if the laws of Country B allow for the foreign representative to appeal to a higher Court, the foreign representative can consider filing an appeal. In Kenya, for instance, Section 699 of the Insolvency Act, 2015 allows any person dissatisfied with a decision of the Court under the Act to appeal to the Court of Appeal against the decision.

- c) **Seek Recognition as a Foreign Non-Main Proceeding:** If the insolvency case in Country A cannot be classified as a foreign main proceeding due to the debtor's COMI not being located there, yet there are still assets or legal matters to address in Country B, the appointed representative has the option to seek its acknowledgment as a foreign non-main proceeding. This approach could still offer a measure of assistance and the capacity to manage affairs within Country B's jurisdiction. For instance, **Re Sphinx, 351 B.R. at 121.**, the Court in the United States rejected a finding of COMI supporting recognition of a foreign main proceeding, and instead proceeded to consider the existence of a foreign non-main proceeding not subject to the debtor's bad faith. This recognition is not automatic, it would have to meet the requirements of the definition in subparagraphs (c) and (f) of Article 2 of the Model Laws.
- d) **Seek Alternative Legal Remedies in Country B** - Depending on the specific legal environment in Country B, there may be alternative legal mechanisms or proceedings that the foreign representative could utilize to manage or sell the assets within Country B. These alternatives may include voluntary arrangements with creditors.

At the outset, the Foreign Representative should have considered the following: -

- a) **Assessed whether Country B is a COMI or an Establishment** – the foreign representative ought to have taken all factors into account before seeking recognition as a foreign main proceeding. From the definition of what foreign main proceedings and foreign non-main proceedings are under Article 2 of the Model Laws, there is a rebuttable presumption that Country A is the COMI while Country B is an establishment.
- b) **Presented evidence to prove that Country B was a COMI** – Article 16 [3] of the Model Laws provide that in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interest. This connotes that the presumption is rebuttable.

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

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

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

and records in the Cayman Islands. Its public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes disclosed that Globe Holdings is a Cayman Islands company and explained the related indemnification and tax consequences resulting from Globe Holdings' place of reformation.

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

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

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

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

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

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

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

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

On July 26, 2023 the Cayman Court entered a convening order (the Convening Order) on the papers, among other things, authorizing the client to convene a single Scheme Meeting for the purpose of considering and, through a majority vote, approving, with or without modification, the Scheme. The Scheme Meeting was held in the Cayman Islands at the offices of Cedar and Woods. Given the Covid-19 pandemic, Scheme Creditors were also afforded the convenience of observing the Scheme Meeting via Zoom and in person via a satellite location in New York. Following the Scheme Meeting, the

chairman of the Scheme Meeting (presiding over the meeting in person) reported to the Cayman Court that the Scheme was overwhelmingly supported by the Noteholders, with 91.83% in number and 99.34% in value voting in favor of the Scheme. The Sanction Hearing was held, and an order sanctioning the Scheme (the Sanction Order), which was filed with the Cayman Islands Registrar of Companies the same day.

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

Based on the foregoing, the issues for determination in this case are as follows: -

**A. Whether to apply for recognition of main or nonmain proceeding or both (in light of COMI /establishment analysis).**

The first issue for determination is whether the Foreign Representative should apply for recognition of main proceedings or non-main proceedings.

Based on **Article 2 of the Model Laws**, “Foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the Centre of its main interests. In **Article 16** on the presumptions on recognition, in the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual is presumed to be the Centre of the debtor’s main interests.

Even though the Model Laws do not define what the Centre of main interests [COMI] is, the 2 main factors for determining the COMI are like those in the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast). The factors are: -

- a) The COMI shall be the place where the debtor conducts the administration of its interests regularly; and
- b) which is ascertainable by third parties.

In the present case, the client is a Cayman Islands incorporated and registered entity. When the Company 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). These factors are enough to presume that the COMI is in the Cayman Islands and therefore, the Foreign Representative ought to apply for foreign main proceedings.

In a similar case **in re Modern Land (China) Co., Ltd., Case No. 22-10707 (MG)** from the United States Bankruptcy Court for the Southern District of New York, the Court in determining whether the proceedings in the Cayman Islands were foreign main proceedings or foreign non – main proceedings held as follows: -

*“The Court recognizes the Debtor’s COMI in the Cayman Islands. Section 1516(c) provides 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 interest.” 11 U.S.C. § 1516(c). Given the evidence in this case, the Court considers the totality of the circumstances before it, including the goals of Chapter 15, the Scheme Creditors’ expectations and intentions, the judicial role in the Cayman Scheme, the function of the Cayman Scheme Chairperson, the insolvency activities in the Caymans, Cayman choice of law principles and the Debtor’s good-faith petition for recognition of the Cayman Proceeding. Each of these factors function together to support a finding of COMI in the Cayman Islands.”*



Based on the above case, recognition would be warranted as a foreign main proceeding as it is also consistent with the goals of Chapter 15 of the US Bankruptcy Code. Based on **re Modern Land (China) Co., Ltd** *Supra*, Chapter 15 contemplates cooperation between American and foreign bankruptcy courts, as well as facilitating protection for the Debtor in this case before the Court. Considering that restructuring proceedings have commenced in the Cayman Islands and most of the noteholders are agreeable to the process being commenced in the Cayman Islands, recognition of the Cayman Proceeding would promote cooperation between the American and Cayman courts, by helping facilitate the Cayman Proceeding and maximizing the chances of a successful reorganization.

Recognition of the subject proceedings as Foreign main proceedings would also be consistent with creditors' expectations as they have acquiesced to the COMI. In the case of **re Sphinx, Ltd., 351 B.R. at 117**, the Court explained that: -

*"Various factors, singly or combined, could be relevant" to a COMI determination. The factors are not meant to be applied "mechanically," but rather, "viewed considering chapter 15's emphasis on protecting the reasonable interests of parties in interest according to fair procedures and the maximization of the debtor's value. ...because their money is ultimately at stake, one generally should defer, therefore, to the creditors' acquiescence in or support of a proposed COMI."*

In the present case, the Creditors held a Scheme Meeting, and 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. At all times, the Creditors were aware that the arrangement 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.

Based on the foregoing, it would be in the interests of justice and all creditors to uphold their expectations concerning the location of a debtor's COMI.

Another contributing factor to the Cayman Islands being considered the main operational base is the presence of restructuring proceedings occurring within the Cayman Islands. When determining the issue of whether to apply for recognition of main proceedings in **re Modern Land (China) Co., Ltd** *Supra*, the Court considered the following factors which would be relevant in the present case: -

- a) The Scheme Creditors had overwhelmingly approved the Scheme.
- b) The debtor identified itself as a Cayman-incorporated company in press releases and in official memoranda.
- c) The Debtor maintained its registered office in the Cayman Islands.
- d) The Debtor's historical corporate counsel, who additionally advised the Debtor on the issuance of the Existing Notes, was a law firm located in the Cayman Islands and the offering memoranda for the Existing Notes indicated in several places that, if needed, the Debtor would initiate an insolvency proceeding in the Cayman Islands.

The initiation of restructuring proceedings by the Debtor itself signifies an act of good faith. This action aligns with the principles of common law, which uphold the importance of good faith in legal and

business transactions, suggesting a commitment to fairness and transparency in the restructuring process.

In *re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007), the court refused to acknowledge a Cayman restructuring effort for an investment firm due to the firm's operational nexus to the United States, focusing on the locations of its workforce, management, records, and assets, leading to a rejection of the Cayman Islands as the center of main interests (COMI) in favor of the United States. The Court in this case held that: -

*“The Petitioners’ own pleadings provide the evidence to establish that the Funds’ COMI is in the United States, not the Cayman Islands. The only adhesive connection with the Cayman Islands that the Funds have is the fact that they are registered there. Section 1516(c) presumes that the COMI is the place of the debtor’s registered office but only in the absence of evidence to the contrary. The Verified Petitions have demonstrated such evidence to the contrary: there are no employees or managers in the Cayman Islands...”*

In another case, *Morning Mist* 2013 (In re *Fairfield Sentry Ltd.*), 714 F.3d 127 (2d Cir. 2013) (25 BBLR 564, 4/25/13), the Court held as follows on the use of bad faith on choosing the locus of its restructuring: -

*“a debtor’s COMI is determined as of the time of the filing of the Chapter 15 petition. However, to offset a debtor’s ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition.”*

In the present case, immediately after recording on its consolidated balance sheet a significant increase in liabilities, Globe Holdings worked with external professional advisors to undertake a formal strategic evaluation of its subsidiaries’ businesses. In September 2020, it announced that it was informed its shares would be suspended from the NASDAQ Stock Market due to delinquencies in filing its 10-K. At all times, the Client has acted in good faith and included all Noteholders in the restructuring process.

Based on the foregoing, the Foreign Representative so appointed should apply for the recognition of the proceedings as foreign main proceedings.

**B. Why it would not be reasonable to apply for foreign non-main proceedings.**

Based on the foregoing, it would not be reasonable to apply for foreign non-main proceedings under the US Bankruptcy Code for the following reasons: -

- a) Jurisdiction of Incorporation – since Globe Holdings is incorporated and registered in the Cayman Islands, it would be in the best interests to have the restructuring governed by the Country whose laws would govern the corporate affairs.
- b) Noteholder’s expectations – the expectations and preferences of the Noteholders and other is that the restructuring is to take place in the Cayman Islands, as reflected in the RSA. This preference influences the COMI.

**C. What papers need to be submitted?**

Based on **11 U.S. Code § 1515**, a Petition for recognition as a foreign main proceeding shall be accompanied by the following documents: -

- a) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;
- b) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative;
- c) In the absence of [a] and [b] above, any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative;
- d) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.
- e) If the documents in [a] and [b] above are not in English, then, translated copies of the same shall be filed in the Court.

In the present case, the foreign representative shall ensure that he files the subject documents which shall also include; the convening order issued by the Court on 26<sup>th</sup> July 2023 and the Restructuring Support Agreement, minutes of the scheme meeting and the Sanction Order issued by the Court.

**D. What relief should be requested on day one of the filing.**

According to **11 U.S. Code § 1519 and Code § 1521 [a]**, pending the Ruling of the petition for the recognition as a foreign main proceeding, the Court may grant the following reliefs in the interim: -

- a) An Order staying the execution against the debtor's assets;
- b) An Order 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.
- c) An Order suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
- d) An order for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.

For a complete response, the provisions of the MLCBI should have been applied to the case. The potential reasons for rebuttal of COMI should have been outlined, which would trigger application for recognition as both FMP and FNMP. Reference could have been made to Art.15 MLCBI for the procedures. Art.17 MLCBI is among other key missing references.

**\* End of Assessment \***

**Marks awarded: 37 out of 50**