



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A
THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 8 marks

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

Question 1.1

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

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

Question 1.2

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

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

Choose the correct answer:

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

Question 1.3

Which of the following statements incorrectly describe the MLCBI?

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

Choose the correct answer:

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

Question 1.4

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

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

Choose the correct answer:

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

Question 1.5

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

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

Choose the correct answer:

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

Question 1.6

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

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

Question 1.7

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

- (i) The increased risk of fraud by concealing assets in foreign jurisdictions.
- (ii) The difficulty of agreeing multilateral treaties dealing with insolvency law.

- (iii) To eradicate the use of comity.
- (iv) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

Choose the correct answer:

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

Question 1.8

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

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

Choose the correct answer:

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

Question 1.9

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

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

Choose the correct answer:

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

(c) Options (iii), (i) and then (ii).

(d) Options (iii), (ii) and then (i).

Question 1.10

Which of the statements below are correct under the MLCBI?

- (a) The foreign representative always has the powers to bring avoidance actions.
- (b) The hotchpot rule prioritises local creditors.
- (c) The recognition of a foreign main proceeding is an absolute proof that the debtor is insolvent.

(d) None of the above are correct.

QUESTION 2 (direct questions) [10 marks in total] 8 marks

Question 2.1 [maximum 3 marks] 2 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 European Insolvency Regulation (“EIR”) is a treaty and directly becomes part of the domestic law of each member State of the European Union (“EU”) upon adoption and establishes a framework within which insolvency proceedings taking place in any EU member State can be recognised and enforced throughout the rest of the EU.

By comparison, the UNCITRAL Model Law on Cross-Border Insolvency (“Model Law”) is not a treaty. It is only a recommendation and can be adopted, in whole or in part, into the domestic legislation of a State. The Model Law does not attempt to substantively unify the insolvency laws of States.

The advantage of the EIR is that there is consistency in how cross-border insolvency issues are dealt with in the EU. However, the disadvantage with such an approach is the time it takes to agree on the terms of the treaty. For example, the EIR was the result of almost forty years of efforts.

The advantage of the Model Law is that it takes less time to develop, as it does not require agreement between States as to its terms. However, the disadvantage is that it does not have to be adopted into the domestic legislation of States and, even it is adopted, it can be adopted in an ad hoc manner.

EIR (Regulation) is “EU secondary law”, not a Treaty.

Question 2.2 [maximum 2 marks] 2 marks

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

The court in the enacting State must strike an appropriate balance between the relief that may be granted to the foreign representative and the interests of the persons that may be affected by the relief. Article 22 specifically mentions the interests of creditors, the debtor and other interested parties. These interests should guide the court in exercising its discretionary powers to grant post-recognition relief in Article 21.

Question 2.3 [2 marks] 2 marks

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

Article 13 of the Model Law gives foreign creditors the same rights as creditors domiciled in the enacting State regarding the commencement of, and participation in, local proceedings regarding the debtor under the insolvency law of the enacting State. This access right for foreign creditors does not affect the ranking of claims in the enacting State, except that the claim of a foreign creditor shall not be given a lower priority than that of general unsecured claims solely because the holder of such claim is a foreign creditor. The footnote to Article 13 does provide wording for States that refuse to recognise foreign tax and social security claims, allowing them to continue to discriminate against such claims.

Question 2.4 [maximum 3 marks] 2 mark

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

Article 20 of the Model Law provides for automatic mandatory relief where the recognised foreign proceeding qualifies as a foreign main proceeding (but not if it qualifies as a foreign non-main proceeding). Specifically:

- a) a stay of the commencement or continuation of individual actions of individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
- b) a stay of execution against the debtor's assets; and
- c) a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

Besides the automatic relief available for FMP's (Art. 20) it requires explanation of FNMP with reference to Art.21 MLCBI to highlight difference.

QUESTION 3 (essay-type questions) [15 marks in total] 9 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.

Recognition proceedings are proceedings in which an application is made, pursuant to Article 15 of the Model Law, for recognition of the foreign proceeding to which the foreign representative has been appointed. If the recognition proceedings are in the US, then the foreign proceedings cannot have been filed in the US.

The definition of “foreign main proceeding” in the Model Law uses the term “centre of main interest” (“COMI”) of the debtor, without defining what it means. The definition of “foreign non-main proceeding” in the Model Law requires the debtor to have an “establishment”, being “any place of operations where the debtor carries out a non-transitory economic activity with humans and goods or services”.

Accordingly, the foreign main proceedings must have been filed in Germany and the foreign non-main proceedings must have been filed in Bermuda.

As the debtor has a COMI in Germany, the foreign proceedings in Germany will be recognised in the US as foreign main proceedings (paragraph 2(a) of the Model Law).

Question 3.2 [maximum 3 marks] 0 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.

If the foreign proceedings are recognised as foreign main proceedings then there will be an automatic stay of the proceedings commenced by the US-based vendors pursuant to Article 20 of the Model Law. If the foreign proceedings are recognised as foreign non-main proceedings then the joint provisional liquidators can apply for such a stay pursuant to Article 21 of the Model Law. However, in the interim, the joint provisional liquidators can seek, as interim relief under Article 19 of the Model Law pending the hearing and determination of the recognition proceeding, a stay of the proceedings commenced by the US-based vendors.

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?

The foreign representative should take no steps in the recognition proceeding in the US because the *ipso facto* clauses are not enforceable under the US Bankruptcy Code.

This is not a situation, like in *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch), where the Korean liquidator, as foreign representative, sought prevent the Brazilian party from exercising the *ipso facto* clause, which under Korean law was deemed to be null and void but which, at the time, were valid and enforceable in a UK insolvency following the decision of the English Supreme Court in *Belmond Park v BNY Corporate Trustee Services* [2011] UKSC 38.

Insofar as the proceeding in the UK is concerned, the Corporate Insolvency and Governance Act 2020 provides that certain *ipso facto* clauses in contracts for the supply of goods and services will cease to have effect once the debtor has become subject to certain UK insolvency proceedings.

Question 3.4 [maximum 4 marks] 1 mark

A foreign representative, who administers the assets of an insolvent debtor in an insolvency proceeding pending in Country A (where the foreign debtor has its registered office and not much more), commenced a proceeding in Country B to recognise the foreign proceeding as the foreign main proceeding in order to sell certain assets within the territorial jurisdiction of Country B, but unfortunately the insolvency court considering the petition for recognition denied the recognition of the foreign proceeding as a foreign main proceeding. Explain what may or should the foreign representative do next? What should the foreign representative have done at the outset?

The foreign representative could seek the co-operation of the courts in Country B under Chapter IV of the Model Law, because co-operation is not dependent upon recognition.

At the outset, the foreign representative could have also sought to recognise the foreign proceedings as foreign non-main proceedings, but would need to be able to demonstrate that the debtor has an “establishment” in Country A, meaning “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods and services”.

Art.16 MLCBI is the main reference for “rebuttable COMI presumption” to point out the weak COMI and substantiate why FNMP would be an alternative. References to Art.17, 21, 6 are also required for full marks.

QUESTION 4 (fact-based application-type question) [15 marks in total] 8 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.

The key issue is whether the Scheme and the Sanction Order can be recognised and enforced in the US, under Chapter 15 of the US Bankruptcy Code (being the US adoption of the UNCITRAL Model Law on Cross-Border Insolvency). If the Scheme and Sanction Order are recognised and enforced in the US then any debts that will be potentially owed by Globe Holdings as a result of the class action litigation that is brewing in the US, but has not yet been filed, will be discharged.

As Judge Glenn said in *In re Modern Land (China) Co.*:

“This is a critically important issue. The Scheme in this case, and in many other scheme or restructuring plan cases, modifies or discharges existing debt and related guarantees governed by New York law, and provides for the issuance of new debt and guarantees governed by New York law. An indenture trustee will only take the actions authorized by the scheme or plan if enforceable orders have been entered by the foreign court and a Chapter 15 court.

With great respect for the Hong Kong court in Rare Earth, that court misinterprets this Court’s earlier decision in Agrokor, as was as many other decisions in the United States which have recognized and enforced foreign court sanctioned schemes or restructuring plans that have modified or discharged New York law governed debt. Provided that the foreign court properly exercises jurisdiction over the foreign debtor in an insolvency proceeding, and the foreign court’s procedures comply with broadly accepted due process principles, a decision of the foreign court approving a scheme or plan that modifies or discharges New York law governed debt is enforceable. Under U.S. law, that is an unremarkable proposition that has been firmly established in the U.S. at least since the Supreme Court decision in Canada Southern Ry. Co. v. Gebhard, 109 U.S. 527 (1883), which granted international comity and enforced a Canadian scheme that discharged New York law governed debt and provided for the issuance of new debt governed by New York law. As Chief Justice Wait said in Gebhard, “the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries.” Id. at 548. Chapter 15 limits a U.S. bankruptcy court’s authority to enjoin conduct outside the territorial jurisdiction of the United States, but it does not make a discharge of New York law any less controlling.

To be clear, in recognizing and enforcing the Scheme in this case, the Court concludes that the discharge of the Existing Notes and issuance of the replacement notes is binding and effective.”

The question is then whether Globe Holdings can have the Scheme and Sanction Order recognised and enforced in the US under Chapter 15 of the US Bankruptcy Code.

To obtain recognition of the Scheme and the Sanction Order in the US, the Cayman Court proceeding must be either a foreign main or foreign non-main proceeding.

Under section 1502(4) of the Bankruptcy Code, the term “foreign main proceeding” means “a foreign proceeding pending in the country where the debtor has the center of its main interests”. The term “center of its main interests” (“COMI”) is not defined.

In re Modern Land (China) Co., Judge Glenn said:

“The Bankruptcy Code establishes that “[i]n the absence of evidence to the contrary, the debtor’s registered office . . . is presumed to be the center of the debtor’s main interests.” 11 U.S.C. § 1516(c). However, this presumption can be overcome. See, e.g. ABC Learning, 445 B.R. 318, 328 (Bankr. D. Del. 2010); aff’d, 728 F.3d 301 (3d Cir. 2013) (stating that “the COMI presumption may be overcome particularly in the case of a ‘letterbox’ company not carrying out any business” in the country where its registered office is located); In re Basis-Yield Alpha Fund (Master), 381 B.R. 37, 51-54 (Bankr. S.D.N.Y. 2008) (concluding that the absence of objections to COMI were not binding; the court must make an independent determination of COMI).

Courts consider several additional factors to determine whether the COMI presumption has been overcome, including: “the location of the debtor’s headquarters; the location of those who actually manage the debtor . . . the location of the debtor’s primary assets; the location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.” In re SphinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006). In SphinX, this court explained that these factors should not be applied “mechanically”; rather, “they should be viewed in light of Chapter 15’s emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor’s value.” Id.; see also Fairfield Sentry, 714 F.3d at 137 (explaining that “consideration of these specific factors is neither required nor dispositive” and warning against mechanical application). The SphinX court also noted that “because their money is ultimately at stake, one generally should defer . . . to the creditors’ acquiescence in or support of a proposed COMI.” 351 B.R. at 117.

The Second Circuit and other courts often examine whether a Chapter 15 debtor’s COMI would have been ascertainable to interested third parties, finding “the relevant principle is that the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties. Among other factors that may be considered are the location of headquarters, decision-makers, assets, creditors, and the law applicable to most disputes.” Fairfield Sentry, 714 F.3d at 130. As the Second Circuit explained, by examining factors “in the public domain,” courts are readily able to determine whether a debtor’s COMI is in fact “regular and ascertainable [and] not easily subject to tactical removal.” Id. at 136-37; see also In re British Am. Ins. Co., 425 B.R. 884, 912 (Bankr. S.D. Fla. 2010) (“The location of a debtor’s COMI should be readily ascertainable by third parties.”); In re Betcorp Ltd., 400 B.R. 266, 289 (Bankr.D. Nev. 2009) (looking to ascertainability of COMI by creditors).”

The UNCITRAL Guide to Enactment also provides some guidance and, similar to the COMI concept under the European Insolvency Regulation, the two key factors for determining COMI under the Model Law are:

- a) the location where the central administration of the debtor takes place; and
- b) which is readily ascertainable as such by creditors of the debtor.

With respect to a “foreign non-main proceeding”, *In re Modern Land (China) Co.* Judge Glenn said:

*Courts recognize a foreign proceeding as a “foreign nonmain proceeding” if “the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.” 11 U.S.C. § 1517(b)(2). Section 1502(2) defines “[e]stablishment” as “any place of operations where the debtor carries out a nontransitory economic activity.” 11 U.S.C. § 1502(2); see also *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 70 (Bankr. S.D.N.Y. 2011), *aff’d* 474 B.R. 88 (S.D.N.Y. 2012) (“*Millennium Glob. I*”). Additionally, courts have required proof of more than a “mail-drop presence” to satisfy the establishment requirement. *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 277 (Bankr. S.D.N.Y. 2019) (“*Constellation I*”) (citation omitted). Due to the “paucity of U.S. authority” on this question, the court in *Millennium Glob. I* cited a “persuasive” English law holding that the presence of an asset and minimal management or organization can create a debtor establishment. 458 B.R. at 84-85 (citing *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005)).*

*... Several factors “contribute to identifying an establishment: the economic impact of the debtor’s operations on the market, the maintenance of a ‘minimum level of organization’ for a period of time, and the objective appearance to creditors whether the debtor has a local presence.” Millennium Glob. I, 458 B.R. at 32. See *In re Creative Fin., Ltd.*, 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016) (citing *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007)) (finding that an “establishment” requires a “showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property.”) This is evidenced by engagement of “local counsel and commitment of capital to local banks.” *Millennium Glob. I*, 458 B.R. at 86-67. See also *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1028 (5th Cir. 2010) (If a foreign “bankruptcy proceeding and associated debts [themselves] . . . demonstrate an establishment . . . [t]here would be no reason to define establishment as engaging in a nontransitory economic activity. The petition for recognition would simply require evidence of the existence of the foreign proceeding.”); *Rozhkov v. Pirogova (In re Pirogova)*, 612 B.R. 475, 484 (S.D.N.Y. 2020) (finding that a foreign insolvency proceeding on its own cannot suffice to count as nontransitory economic activity in support of recognition as a foreign nonmain proceeding.)*

The appropriate date for determining the COMI, or whether an establishment exists, is the date of commencement of the foreign proceeding.

In *In re Modern Land (China) Co.* Judge Glenn referred to the US decisions in *Fairfield Sentry* and *Suntech* where court-appointed fiduciaries assumed substantial control over the debtor’s liquidation and considered whether the absence of court-supervised fiduciaries required a different result in finding COMI in the Cayman Islands. His Honour said:

“While this would be an easier case if JPLs had been appointed, the Court concludes that the Cayman court’s supervision of the Debtor’s Scheme Proceeding, in light of the other factors present here, is enough for the Court to conclude that the Debtor’s COMI for the proceeding involving the single class of Existing Note holders was in the Cayman Islands.”

Many of the “other factors” referred to by Judge Glenn *In re Modern Land (China) Co.* are present here. In particular:

- the RSA referred to any restructuring taking place in the Cayman Islands;
- Cayman Islands law requires that liquidation proceedings of companies incorporated in the Cayman Islands take place in the Cayman Islands under the supervision of a Cayman Islands appointed liquidator;
- Globe Holdings maintains its registered office and books and records in the Cayman Islands;
- the restructuring activities have been centralised in the Cayman Islands and undertaken by Cayman Islands actors; and
- board meetings were held virtually and not physically located in the Cayman Islands.

Other factors pointing to the COMU being in the Cayman Islands include that 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 its long standing counsel are based in the Cayman Islands.

In re Modern Land (China) Co. Judge Glenn found that recognition of the Cayman Islands proceedings as a foreign non-main proceedings was not warranted because, inter alia, there was insufficient evidence to support a finding of non-transitory economic activity in the Cayman Islands. For similar reasons, it is unlikely that a US court would find there was non-transitory economic activity by Globe Holdings in the Cayman Islands. As the question states, “*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.*”

Accordingly, Globe Holdings should seek recognition and enforcement in the US of the Scheme and the Sanction Order a foreign main proceeding.

The type of papers that need to be submitted with the application are summarised by Judge Glenn in *In re Modern Land (China) Co* (i.e. a motion attaching a proposed recognition order and supporting declarations and the foreign representative’s statements required by section 1515(c) of the Bankruptcy Code and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure). Presumably, this mirrors what is required under Article 15 of the Model Law on an application for recognition.

On day one of filing, Globe Holdings should seek, as interim relief under Article 19 of the Model Law, a stay of execution against the assets of Globe Holdings in the US.

It is relevant to note that the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (“IRJ Model Law), which was adopted by UNCITRAL on 2 July 2018, has not yet been enacted by any States in their own national laws. This means that Globe Holdings cannot seek to have the Scheme and Sanction Order recognised and enforced in the United States under Article 11 of the IRJ Model Law, although whether the interests of all creditors were taken into account (as opposed to only the interests of the Noteholders) by the Scheme would be a ground for refusing to recognise the Scheme and the Sanction Order under Article 14(f) of the IRJ Model Law.

As this question is a fact-based application-type question, it requires the MLCBI provisions to be applied to the facts of the case and substantiated with references and a discussion.

The answer should contain as a minimum: definitions (COMI, establishment, foreign main/non-mail proceedings etc.) with respective references to (if any) MLCBI provisions; a discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI and alternative courses of action; The necessary papers to be submitted to the US Court per Article 15 MLCBI; Conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI (*noted the reference to Art.19*)

*** End of Assessment ***

Marks awarded: 33 out of 50