



**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] 5 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] 9 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 MLCBI (upon adoption into the domestic legislation of the enacting State) has a comparatively light touch recognition approach as compared to the EU Regulation (the EIR). Under the MLCBI which only creates a procedure to apply for recognition to the court of the enacting State, recognition is not automatic, and recognition of the foreign proceedings will not extend the effects of the foreign proceedings to the affect the consequences envisaged by the laws of the enacting State. An advantage to this approach is that this respects the fundamental differences in the insolvency laws of the different States and would not import the consequences of the foreign law / displace the national law - this will encourage broader adoption of the MLCBI. However, the scope of recognition would be narrower under this approach which may increase the difficulty (and therefore the time and cost) for foreign insolvency office holders to seek the required reliefs in the enacting State.

On the other hand, the EIR automatically applies when a debtor has its COMI in an EU Member State and the main insolvency proceedings in the COMI state is automatically recognised across all Member States, and (subject to specific exceptions) the default rule is that the local law of the Member State will give way to the law of the COMI State. An advantage of this approach is that this would allow insolvency practitioners to more speedily and easily take control of and realise assets in another Member State. On the other hand, a disadvantage such arrangement is that this may encourage forum shopping and may encourage parties to open insolvency proceedings in states whose law are more favourable to them.

Note, forum shopping does not only manifest itself within the EU borders. In fact, if the laws are more “harmonized/ approximated” there would be less of a need to forum shop...

##### 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 will tailor the discretionary relief to the case at hand and one salient factor to be considered is whether the relief is granted to the representative of a foreign main or non-main proceedings (paragraphs 193-195 of the Enactment Guide).

The court has the authority to impose conditions, modify or terminate the relief granted under the Article 21, and shall consider the balancing of interests exercise pursuant to Article 22 of the MLCBI and strike an appropriate balance between the relief that may be granted to the foreign representative and interests of the persons that may be affected by the relief (including creditors, debtors and other interested parties).

**Note, 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.

The anti-discrimination principle under Article 13 ensures that foreign creditors are given the same access rights as the local creditors domiciled in the enacting State in terms of the commencement and participation in the local insolvency proceedings against the debtor.

Furthermore, although Article 13 does not affect the ranking of claims in the enacting State, Article 13 requires that a claim of a foreign creditor cannot be given a lower priority than that of general unsecured claims solely on the ground that the holder of such claim is a foreign creditor. For completeness, the enacting State has the option to include provisions in the legislation enacting the MLCBI to refuse to recognise foreign tax and social security claims and continue to discriminate against such claims.

**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 automatic mandatory relief under Article 20 of the MLCBI is only applicable for recognised foreign main proceedings, which has the effects of (i) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities (which also covers arbitration actions and thus effectively creates a mandatory limitation to the effectiveness of an arbitration agreement), (ii) staying execution against the debtor's assets, and (iii) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor.

Only discretionary relief granted by the court will be available in foreign non-main proceedings. The relief available in a non-main proceeding is also likely to be more restrictive than for a main proceeding - Article 21 paragraph 4 requires the Court to be satisfied that in granting relief in relation to a foreign non-main proceeding that the relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.

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



**Question 3.1 [maximum 4 marks] 3 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.

Foreign main proceedings: given the debtor's COMI is in Germany, the proceedings must have been opened in Germany and can be recognised as foreign main proceedings in the US if the foreign proceeding and the foreign representative are within the definition of those terms in Article 2 of the MLCBI. The US court can rely on the recognition presumptions under Article 16 of the MLCBI that (i) such foreign proceeding/representative fall within the meaning of the definitions in Article 2 of the MLCBI if so indicated in the decision commencing the foreign proceeding and appointing the foreign representative has been appointed or the certificate from the foreign court affirming the existence of such proceeding or appointment, and (ii) the documents submitted in support of the application are authentic.

Foreign non-main proceedings: given the debtor has an establishment in Bermuda, the proceedings opened in Bermuda can similarly be recognised as foreign non-main proceedings if the foreign proceeding and the foreign representative are within the Article 2 definition.

A "foreign proceeding" is a collective judicial or administrative proceeding in a foreign state (including an interim proceeding), pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

A "foreign representative" means a person or body (including one appointed on an interim basis) authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

In deciding whether to grant recognition of the foreign main/non-main proceedings, the US court will not embark on a consideration of whether the foreign proceeding was correctly commenced under the applicable law of Germany/Bermuda.

Any relief granted to a representative of the non-main Bermuda proceedings must also be consistent with the German main proceedings or will be modified or terminated if later found to be inconsistent once the German proceedings are recognised as the main proceedings. (Article 30(a)) of the MLCBI)

**Requires references to procedural provisions of MLCBI eg. Art. 15, 17, 6.. to substantiate your answer.**

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

Joint provisional liquidators commenced a recognition proceeding in the US and immediately were sued and served with discovery in connection with their alleged tortious interference with contract rights of the US-based vendors of the foreign debtor. Explain the likely outcome.

The "safe conduct" rule under Article 10 of the MLCBI provides that the court in the enacting State would not assume jurisdiction over all the assets of the debtor on the sole ground of

the foreign representative having made an application for recognition of a foreign proceeding (see paragraphs 109-111 of the Enactment Guide).

Based on the given facts, the discovery action in connection with the joint provisional liquidators' alleged tortious interference is not an insolvency proceeding. Therefore, the fact of the commencement of the recognition proceeding in the US alone is not sufficient ground for the US court to assert jurisdiction over the foreign representative as to matters unrelated to insolvency.

However, Article 10 does not affect other grounds for the US court to exert jurisdiction over the joint provisional liquidators, so depending on the facts of the alleged tortious interference and the position under US tort law, it may be possible for the US-based debtors to proceed with their tort action against the joint provisional liquidators.

Furthermore, if the joint provisional liquidators applies for discretionary relief from the court in the recognition proceedings, the US court may impose conditions when granting such relief to the joint provisional liquidators.

**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 may apply for interim pre-recognition relief available at the discretion of the court between the making of an application for recognition and the decision on that application (under the UK equivalent of Article 19 of the MLCBI).

Only relief in collective nature (as opposed to the individual nature) will be available and there must be an urgent need to protect the assets of the debtor and interests of the creditors. Whilst there is no litigation pending or threatened, the foreign representative may be able to demonstrate that there is a need to take control of the leases and intellectual property if there are signs that the counterparty may seek to terminate such arrangements based on the *ipso facto* clauses which would adversely affect the value of the debtors' assets.

As such, it is possible for the foreign representative to apply to the court for an order to entrust the relevant US-governed leases and intellectual property licenses to it to ensure that the counterparty of these leases/licenses are continuing to perform their obligations thereunder.

The court may require the foreign representative to give appropriate notice of the relief granted (in accordance with the UK equivalent of Article 19 paragraph 2 of the MLCBI).

If the foreign representative is successful in obtaining the pre-recognition relief, such relief is only provisional and terminates when the recognition application is decided upon (see the principle under Article 19 paragraph 3). However, the court may exercise its powers (under the UK equivalent of article 21 paragraph (f)) to extend the measure if it considers appropriate.

Another thing to note is that if the application is for the foreign proceeding to be recognised as a non-main proceeding, any relief granted must also be consistent and should not interfere with the main proceeding.

**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?

The foreign representative can seek to reapply to the court for recognition of the proceeding in Country A as a non-main proceeding.

Whilst the debtor's registered office is presumed to be its COMI, such presumption can be rebutted by proof to the contrary, and will be determined by the court on a case-by-case basis. Therefore, the question of COMI is not a straightforward one and turns on the facts of each case. As such the foreign representative should have applied for recognition of the Country A proceedings as a non-main proceeding in the alternative at the outset, to avoid having to resubmit an application in the event that the court refuses to recognise Country A as the COMI.

If the foreign representative is able to persuade the court that the debtor does have an establishment in Country B and is able to obtain recognition as non-main proceeding, whilst the automatic reliefs under Article 20 are not applicable for foreign non-main proceedings, the foreign representative will, among other things, have standing to request the commencement of an insolvency proceeding (Article 11 of the MLCBI), be able participate in any local insolvency proceedings regarding the debtor (Article 13 of the MLCBI) and may intervene in any proceeding in which the debtor is a party (Article 24 of the MLCBI).

However, to obtain recognition as a non-main proceeding, the foreign representative will need to demonstrate that the debtor conducted non-transitory economic activity, and therefore has an establishment in Country A. There is no presumption with respect to the determination of establishment, and so even though the foreign debtor only has its registered office in Country A, there may not be sufficient grounds to demonstrate that the debtor has an establishment in Country A without any other economic activity in Country A.

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

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

The client is a Cayman Islands incorporated and registered entity. It is a financial service holding company for a number of direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States. Globe Holdings was initially formed as a Canadian company in 2009, under the laws of Ontario, Canada. A year later,

following certain reverse merger transactions, it filed a Certificate of Registration by Way of Continuation in the Cayman Islands to re-domesticate as a Cayman Islands company and changed its name to Globe Financial Holdings Inc. When it re-incorporated in the Cayman Islands in 2010 (from Canada), Globe Holdings provided various notices of its re-incorporation, including in the public filings with the Securities and Exchange Commission (SEC). Around that time, Globe Holdings retained its Cayman Islands counsel Cedar and Woods, which has regularly represented Globe Holdings for over a decade. Globe Holdings has a bank account (opened just a few days ago) in the Cayman Islands from which it pays certain of its operating expenses. Globe Holdings often holds its board meetings virtually, and not physically in the Cayman Islands, and, having obtained support for a bond restructuring, all its regular and special board meetings have been organized by its local Cayman counsel virtually. The client also maintains its books and records in the Cayman Islands. Its public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes disclosed that Globe Holdings is a Cayman Islands company and explained the related indemnification and tax consequences resulting from Globe Holdings' place of reformation.

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

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

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

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

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

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

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

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

On July 26, 2023 the Cayman Court entered a convening order (the Convening Order) on the papers, among other things, authorizing the client to convene a single Scheme Meeting for the purpose of considering and, through a majority vote, approving, with or without modification, the Scheme. The Scheme Meeting was held in the Cayman Islands at the offices of Cedar and Woods. Given the Covid-19 pandemic, Scheme Creditors were also afforded the convenience of observing the Scheme Meeting via Zoom and in person via a satellite location in New York. Following the Scheme Meeting, the chairman of the Scheme Meeting (presiding over the meeting in person) reported to the Cayman Court that the Scheme was overwhelmingly supported by the Noteholders, with 91.83% in number and 99.34% in value voting in favor of the Scheme. The Sanction Hearing was held, and an order sanctioning the Scheme (the Sanction Order), which was filed with the Cayman Islands Registrar of Companies the same day.

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

Chapter 15 of the US Bankruptcy Code is its national legislation implementing the MLCBI under US law, which recognizes and gives effect to orders in a recognized foreign (main or non-main) proceeding.

There are cases where Cayman scheme of arrangements have been successfully recognized by the US court as the foreign main proceeding through the Chapter 15 process, such as *Re Modern Land (China) Co Ltd* in which the court took the view that Chapter 15 can discharge US law governed debt as a matter of US law. However, each recognition application should be considered on its own facts.

#### Evidential and filing requirements

The application for recognition will need to be accompanied by the evidence required by the US equivalent of MLCBI Article 15, i.e. (a) a certified copy of the decision commencing the Cayman scheme proceedings and appointing the Cayman representative; or (b) a certificate from the Cayman court affirming the existence of the Cayman scheme proceeding and the appointment of the Cayman representative; or (c) in the absence of (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the Cayman representative.

The US court should be able to rely on the recognition presumption (i.e. the US enacted version of MLCBI Article 16) and is entitled to presume that the documents submitted in support of the application are authentic.

#### COMI vs Establishment analysis

COMI is not defined in the MLCBI; whereas establishment is any place of operations where the debtor carries out a non-transitory economic activity. The two key factors for determining the COMI under MLCBI is (i) the location of where the central administration of the debtor takes place and (ii) which is readily ascertainable as such by creditors of the debtor.

Under Article 16(3) of the Model Law, there is a presumption that the place of the registered office of the debtor is the place of the COMI - however this is rebuttable by proof to the contrary.

Whilst the various given facts point to different jurisdictions as the possible COMI of Globe Holdings, the determination of the COMI requires a holistic analysis of the circumstances of the case, and the court may need to give different weights to the various facts. It is important, courts have suggested, to consider not just what the debtor was doing, but also what the objective observer perceived the debtor was doing (Digest of Case Law, para 18 on Article 16). The relevance of the various facts (which are relevant to the non-exhaustive list of factors discussed in paras 145 to 147 of the Enactment Guide) are considered in turn below:

- **Cayman Islands:**
  - Location of registered office: *It is likely to be in Cayman given it is a Cayman company.*
  - Location from which the reorganization of the debtor is being conducted: *The scheme proceedings were conducted in Cayman. Furthermore, although the RSA is governed by New York, the RSA also envisages that the restructuring will be carried out by the Cayman scheme of arrangements. The scheme of arrangements has received support from an overwhelming majority of scheme creditors, which shows the scheme creditors' expectation and intentions that the debts will be restructured pursuant to Cayman law (and from the facts there are no indication that there are any objections to recognition of the Cayman proceedings as the foreign main proceeding).*
  - Location in which the debtor was subject to supervision or regulation: *the company is incorporated in the Cayman.*
  - Location of books and records: *the books and records are maintained here.*
  - Location of bank account: *whilst Globe Holdings has a bank account used for paying certain of its operating expenses in Cayman, the account was only opened a few days ago (and whilst this is not mentioned in the given facts, it seems unlikely that this account holds the main assets of the company which is a commercial automobile insurance sector).*
  
- **US:**
  - Location of employees: *all employees of the operating companies are in the US.*
  - The location in whose law would apply to most disputes: *the senior notes and the RSA are governed by New York law.*
  - Location of principal assets and operations: *the headquarters are in the US; the land, building and contents of the corporate headquarters also remain to be the Globe Holdings' properties. However, it is unclear from the facts whether the company may have other assets in other jurisdiction.*
  - Location in which the debtor was subject to supervision or regulation: *whilst the company was previously listed on the NASDAQ, its shares has been delisted prior to the commencement of the Cayman insolvency proceedings.*
  
- **Canada:** *For completeness, although Globe Holdings was initially formed as a Canadian company in 2009, it has already been re-domesticated and re-incorporated in the Cayman Islands. Given this change in domicile took place more than 10 years ago (i.e. long before the commencement of the insolvency proceedings), and notices and public filings have been made at the time, it should be clear to the objective observer that Canada is unlikely to be the COMI of Globe Holdings.*

On balance, although there are some relevant factors pointing to the US, it seems more likely that the US court applying the MLCBI principle would consider the Cayman Islands to be the COMI of Globe Holdings based on the totality of the available facts - in particular, the place of incorporation (and hence the place of registered office) and the conduct of the reorganization process with overwhelming creditor support are likely to be given significant weight.

If, however, the court found that Cayman is not the COMI of Globe Holdings, it would also be doubtful whether the court would find that the company has an establishment in the Cayman as the goal of foreign non-main proceedings should relate to assets that should be administered in the foreign proceedings.

#### Main vs non-main proceedings

Chapter 15 contemplates recognition of both main and non-main proceedings. The significance of the COMI issue is that it determines whether the Cayman scheme of arrangement will be recognized as a foreign main proceeding or a foreign non-main proceeding, which in turn determines the effect of the recognition and the relief available.

In view of the above analysis, a recognition application of main proceedings seems to be more appropriate. However, if the US court allows application of main and non-main proceedings to be taken out in the alternative, perhaps it would be beneficial to also apply for recognition of non-main proceedings as a backup.

The US court can exercise its discretionary powers to grant appropriate relief to the foreign representative upon recognition of the foreign proceeding, whether it is recognized as a main or non-main proceeding. Relief available includes stay of individual actions concerning the debtor's assets, rights, obligations and liabilities and stay of execution against the debtors' assets.

Therefore, in recognizing and enforcing the Cayman scheme of arrangement would make the extension of the maturity of the Notes and the changes to the relevant terms effective under US law and would be binding on creditors who did not participate in the Cayman scheme process.

#### Brewing US class action

The foreign representative can try to seek urgent provision relief from the US court under the national provision implementing MLCBI Article 19. The relief may be granted from the filing of the recognition application until the decision of the application is made, and the relief may include stay of execution against the debtors' assets and entrusting the administration or realization of all or part of the debtor's assets in the jurisdiction to the foreign representative in order to protect and preserve their value.

While no conclusion can be drawn from the limited available facts, the court may exercise discretion to grant such relief if it is satisfied that the interests of the creditors and other interested parties are adequately protected.

In the present case, since the litigation is merely "brewing" but has not been filed it, it seems unlikely that the US court would go as far as to grant a pre-emptive protective stay before any actual action is taken by the applicant.

**For full mars, the answer should also contain:**

1. Definitions (establishment, foreign main/non-mail proceedings etc.) with respective references to Art.2 MLCBI
2. Conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI (Art.19 reference is noted)

Good, well-structured essay

**\* End of Assessment \***

**Marks awarded: 39 out of 50**