INSOL INTERNATIONAL
FOUNDATION
CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

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] 8 marks

Question 2.1 [maximum 3 marks] 3 marks

What is the key distinction between the application of the MLCBI and the European Union (EU) Regulation on insolvency proceedings? Also describe one key benefit and disadvantage of each approach.

The European Union Insolvency Regulation (2015) ("EUIR") is binding on all member countries of the European Union (apart from Denmark) and has becomes part of the domestic laws of each EU member country on a mandatory basis. This is contrast to the MLCBI which is "soft law" as it merely recommends adoption of certain insolvency legislation - and does not try to substantively unify the insolvency laws of participants.

The advantage of the MLCBI is its flexibility: it allows the enacting state to tweak their adoption of the legislative text depending on their appetite to cooperate and coordinate with other countries and foreign representatives on insolvency matters. The MLCBI being "soft law" means it can mould itself to the existing (insolvency) national laws of the enacting state, thereby limiting the potential impact on the adopting state's sovereignty. The MLCBI does this by:

- Limiting new terminology added to the existing insolvency laws of the enacting state;
- Aligning the relief available resulting from recognition of foreign proceedings with that of national law;
- Not preventing local creditors to pursue domestic insolvency proceedings following recognition of foreign proceedings (in the enacting state);
- Allowing relief available to foreign representatives to be reliant on compliance with notice requirements and local procedural requirements of the enacting state; and

- Ensuring action in favour of the foreign proceeding is limited if it overrides public policy considerations.

Adoption of the model law can be done relatively rapidly and incrementally by country, in contrast to EUIR – which took 40 years to adopt, or treaties – which require reciprocity.

A draw-back of the MLCBI is also its flexibility – in that it can be too easy for adopters of the MLCBI to pick and choose which legislation is applied, and at the extreme end, this can be disadvantageous in that it can render the model law ineffective. Consider South Africa who have opted for reciprocity provisions in relation to recognition in their 2000 Cross-Border Insolvency Act (the Act) that adopts the Model Law. The Act is currently dormant, because no other country has been designated as meeting the reciprocity requirement – meaning there is no practical effect to South Africa's adoption of the model law.

Question 2.2 [maximum 2 marks] 0 mark

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

The Court should consider the following questions when granting relief:

- Whether the foreign representative is attempting to recognise main or non-main proceedings.
- Whether the granting of relief in the non-main proceedings interferes with the administration of the main proceedings.
- Whether the relief sought relates to assets or information that should be administered in the foreign non-main proceedings, and not that of domestic proceedings.

Article 21 is drafted broadly, and it might not be suitable for all types of relief listed under Article 21 to be granted. Instead, limitations to the relief being sought should be considered carefully by the Court in question. Consideration of the relevant case law could be considered by the Court in arriving at a decision in granting appropriate relief, including but not limited to the below:

1. *Igor Vitalievich Protasov and Khadzhi-Murat Derev;*
2. *Rubin v Eurofinance; and*
3. *Fibria Celulose S/A v Pan Ocean Co Ltd*

In respect to 1., where a worldwide freezing order ("WFO") was granted as provisional relief, the continuation of the recognition of the WFO was sought following recognition in the UK of a Russian bankruptcy as a foreign main proceeding. The effect of the recognition of the foreign main proceeding was thought to be equivalent to that of the WFO in the enacting country – rendering that relief sought redundant. In this context, careful consideration should be given to as to the additional effect the relief sought would bring.

In respect to 2., a foreign representative sought to enforce an insolvency-related *in personam* default judgment which was not covered by the Model Law. In arriving at a decision as to whether to grant the relief sought, the UK Supreme Court considered whether accepting the *in personam* default judgment would have amounted to creating a new rule that did not exist, in that it would create a difference between insolvency-related judgments and non-insolvency judgments. This relief was beyond that of the Model Law.

In respect to 3., The applicant sought relief by applying (Korean) foreign insolvency law to an English law governed contract, which was denied by the English Court. Korean insolvency law declares *ipso facto* clauses null and void. In this case, the English Court had to consider whether it would grant relief beyond that offered in a domestic insolvency.

The answer is the protection of 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.

Article 13 clarifies that a foreign creditor's access rights [to local proceedings under the insolvency law of the enacting state] do not affect the ranking of claims in the enacting state, however that a claim submitted by the foreign creditor shall not be ranked in lower priority than that of a general unsecured claimant solely on the basis that the claimant is a foreign creditor.

This ensures that foreign creditors have the same rights as local creditors, with the exception of foreign tax and social security claims. A footnote to Article 13, allow enacting states to not recognise and therefore discriminate against these.

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?

Whether a proceeding is a foreign "main" or "non-main" proceeding may affect the nature of the relief granted in accordance with Articles 20 and 21 of the Model Law, and whether mandatory relief is automatically granted or not.

In main proceedings:

- automatic mandatory relief is granted following recognition; and
- in addition, discretionary post- recognition relief could be granted by the court.

In non-main proceedings:

- no automatic relief is granted following recognition; and
- only discretionary post- recognition relief is granted by the court as appropriate.

Automatic mandatory relief comprises of the following (as exactly drafted in Article 20, "Effects of recognition of a foreign main proceeding" in the UNCITRAL Guide to Enactment, p82):

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
(b) Execution against the debtor's assets is stayed; and
(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

According to Article 21, UNCITRAL Guide to Enactment, pp 87-89, discretionary post-recognition relief could include the following:

(a) 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;

(b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;
(c) 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;
(d) 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;
(e) 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;
(f) Extending relief granted under paragraph 1 of article 19;
(g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State

In respect to (g), note that there are limits to the relief that is appropriate to grant under the Model Law.

Note it is technically possible to obtain the same type of relief in non-main proceedings as in main proceedings in due course, but not on an automatic basis. This would be at the discretion of the Court in question.

Appreciate the details in your answer

QUESTION 3 (essay-type questions) [15 marks in total] 13 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.

The main foreign proceedings must have been filed in Germany, the COMI being located there. The foreign non-main proceedings were most likely filed in Bermuda, the debtor only having an establishment there. It is noted that Bermuda has not adopted the model law, which is possibly why it was necessary to start separate non-main proceeding there (as opposed to the German proceeding simply being recognised in Bermuda).

If the foreign representative from either the main or non-main proceedings sought recognition in the US, recognition would have been granted pursuant to the proceedings qualifying as a "foreign proceeding" and the Chapter 15 application being brought by a "foreign representative" – pursuant to Article 17 of the Model Law which relies on definitions taken from Article 2 of the Model Law:

Pursuant to Article 2 of the Model Law – "Foreign Proceeding" means "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.

Article 2 of the Model Law defines "Foreign Representative" as meaning "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".

The relief accorded to the German proceeding once recognised in the US may be different to that accorded to the Bermudian proceeding, pursuant to Articles 20 and 21 of the Model Law. The determination that a foreign proceeding is a "main" proceeding may affect the nature of the relief accorded to the foreign representative under Articles 20 and 21 of the Model Law.

If the foreign representative of the "main" proceeding and the foreign "non-main" proceeding both file for chapter 15, then this would be a case of concurrent proceedings. According to Chapter V, article 30 (a) and (b) – primacy would be given to the foreign main proceeding. The "non-main" proceeding in Bermuda can file for chapter 15, but if and when chapter 15 is granted to the main proceedings in Germany, then any relief granted to the Bermudian estate pursuant to Articles 19 or 20 must be revised to be consistent with that of the main proceeding.

In the case were both proceedings are recognised - it is noted that the "hotchpot" rule will likely apply where creditors have filed claims in both main and non-main proceedings, and to facilitate this and the coordination of asset realisation efforts in the US – some sort of cross-border protocol would be enacted between the foreign representatives of the main and non-main proceedings, as seen between the Antiguan liquidators of Stanford International Bank and its US Receivers – for example.

The full answer should also contain other relevant definitions eg. FMP, FNMP, COMI; and procedural issues in Art.15 MLCBI

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.

It appears that the Joint Provisional Liquidators begun Chapter 15 proceedings in the US, and the success of this application would be to the alleged detriment of the local US-based vendors. What is interesting is that they haven't opposed the Chapter 15 proceedings but begun separate proceedings against the JPLs for *inter alia* discovery. Either way, if the JPLs are able to satisfy the tests that the JPLs have begun "foreign proceeding" and these are being brought by a "foreign representative", then they should be able to secure Chapter 15 recognition pursuant to Article 17 of the Model law.

It should be noted that recent case law in the case of Global Cord Blood Corporation (2022) saw JPLs apply for Chapter 15 and this was denied on the basis that there were few creditors, the debtor was solvent, and there were no insolvency or restructuring proceedings at play in the Cayman main provisional liquidation (PL). The Cayman PL did not the meet the criteria of a "collective proceeding". Therefore, the above application should be pursued with this recent case law in mind.

It is likely that the US-based vendors are creditors of the debtor. The preamble of the Model Law provides that local creditor's rights be protected (pages 25-26). And Article 28 of the Model Law sees that "the recognition of foreign proceedings does not prevent local creditors from initiating or continuing collective insolvency proceedings commenced in the enacting state". In this scenario though, the US-based vendors are suing the JPLs – and not necessarily seeking to start collective insolvency proceedings in the US (from what we know from the question).

The JPLs could apply for appropriate interim relief under Article 19 pending the outcome of the Chapter 15 application and this relief could include "Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State." Whether that additional relief could

include protection from being sued and discovery is matter of the Court's discretion. It should be noted that pursuant to Article 22 of the Model Law: "In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected". The guidance notes details that in many cases "affected creditors" will be "local creditors".

Pursuant to Article 10 of the Model Law: "The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative 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." This is also known as the safe conduct rule, and means that the recognition application alone is not sufficient for the US court to assert jurisdiction over the JPLs in matters unrelated to insolvency. However, this protection is not all encompassing, and section 110 of the UNCITRAL Model law guide enactment stipulates that "a tort or misconduct committed by the foreign representative may provide grounds for jurisdiction to deal with the consequences of such an action by the foreign representative". This is particularly relevant in the US where the following took place according to page 30 of the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency:

"CSL Australia v Britannia Bulkers A/S, case No. 08-15187 (S.D.N.Y. Sept. 8, 2009) – United States Bankruptcy Code, 11 U.S.C. sect. 1509 (e), provides that subject to art. 10, a foreign representative is subject to applicable non-bankruptcy law and must therefore comply with court orders;

SNP Boat Service SA, 453 B.R. 446 (Bankr. S.D. Fla. 2011), CLOUT 1314 – court threatened to revoke recognition of a foreign main proceeding because the foreign representative was not complying with the discovery process"

Therefore, to conclude – while they may gain recognition, it is highly unlikely that the JPLs would be provided relief from the discovery process or from being sued pursuant to Article 10 of the Model Law. They will have to comply with the discovery process so as to not have their chapter 15 application revoked. The JPLs are unlikely to be able to modify or terminate their chapter 15 application as pursuant to Article 17 of the Model Law, the grounds for granting it would still supposedly exist and nothing (aside from the JPLs potentially being sued) would have changed.

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?

Section 365(e) of the US Bankruptcy Code doesn't allow for *ipso facto* clauses which means that once the UK debtor-in-possession restructuring is recognised in the US, the US-governed leases and intellectual property licenses will not automatically be terminated. It is assumed from the question that the debtor is the lessor and holds the intellectual property licenses. Following recognition, and according to US bankruptcy law, the debtor should be in a position to carry on receiving those benefits (rent and the licenses), which should promote its rehabilitation.

However, the UK allows for *ipso facto* clauses (as seen in the UK Supreme Court ruling regarding *Belmond Park v BNY Corporate Trustee Services*. Although there is no litigation pending, it would not be too far-fetched to imagine that the other party to the US-governed leases and intellectual property licenses could try and exercise the *ipso facto* clause in the UK restructuring proceedings (where they could arguably be allowed). Consider for example, the case of *Fibria Celulose SA/ v Pan Ocean Ltd,* where the English Court ruled that there was no relief they could provide to prevent the Brazilian counter-party from serving notice to terminate a contract pursuant to *ipso facto* clauses. In Pan Ocean Ltd, the Korean liquidator applied for appropriate relief under Article 21(1)(g) i.e. and asked that the UK Court consider the *ipso facto* clauses null and void. However, the English Court did not consider the application of "appropriate relief" to extend to that relief which would be granted under Korean Insolvency Law, as it would not grant this (to recognise *ipso facto* clauses) relief domestically. Based on this case alone and its application of the model law, it is unlikely that the UK foreign representative could apply to the US court for interim relief and for the ipso facto clause to be recognised – as this would not be the case domestically in the US.

Given that the recognition hearing is 35 days following the foreign representative's petition – the foreign representative should apply for other forms of interim relief available under Article 19 of the Model Law including: " Staying execution against the debtor's assets", "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". This would prevent asset dissipation i.e. the leases and licenses being transferred to a third party before the foreign representative can be recognised.

Question 3.4 [maximum 4 marks] 3 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?

Under the European Insolvency Regulation – the COMI would be the place of registration of the Company – and in this case, Country A. However, COMI is not defined in the Model Law. Article 16, paragraph 3 of the Model Law does presume, in the absence of proof of the contrary, that the debtor's registered office in the COMI. Evidence to the contrary must have been considered evidencing that another country was better suited as the COMI of the debtor.

The foreign representative should have analysed the establishment characteristics of the debtor from the outset and arrived at the conclusion that Country B would have recognised the foreign proceedings as non-main proceedings, as they have now wasted time and resources in making the wrong application. Pursuant to the UNCITRAL Guide to Enactment, paragraph 145 - Consideration should have been given (by the foreign representative of Country A) to the following principal factors "to indicate whether the location in which the foreign proceeding has commenced is the debtor's centre of main interests":

(a) where the central administration of the debtor takes place, and
(b) which is readily ascertainable by creditors

Pursuant to paragraph 146 of the UNCITRAL Guide to Enactment, "When these principal factors do not yield a ready answer regarding the debtor's centre of main interests, a number of additional factors concerning the debtor's business may be considered". These include the following pursuant to paragraph 147 of the UNCITRAL Guide to Enactment:

"the location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited"

The above should be analysed as of the date that the foreign proceedings begun. It is careful that the foreign representative makes this consideration carefully. This is because pursuant to section 162 of the UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation: "If the applicant falsely claims the centre of main interests to be in a particular State, the receiving court may determine that there has been a deliberate abuse of the process. The Model Law does not prevent receiving courts from applying domestic law or procedural rules in response to such an abuse of process."

It is important to discern between main and non-main proceedings as there are differences to the relief available upon recognition depending on which is recognised – i.e. relief under article 20 (a) (b) (c)[1] would not be automatically granted in the case of non-main proceedings recognition – where only discretionary post- recognition relief is granted by the court of Country B as appropriate under Article 21. This would include the same type of relief sought under 20 (a) (b) (c) as well as 21 (d) (e) (f). Having wasted time, when re-applying for recognition, the foreign representative should apply for urgent interim relief pursuant to Article 19 of the Model Law – which is available for both non-main and main proceedings and request to prevent asset dissipation.

In granting relief, the Court of Country B will want to pay special attention that the foreign representative of Country A is not interfering with the administration of the main proceedings (if they exist). The foreign representative should have verified from the outset if a foreign representative of the main proceedings have already sought recognition in Country B as those assets could have already been handed over for administration and realisation to the foreign representative of the main-proceeding. Pursuant to Article 30 of the Model Law – priority is given to main-proceedings over non-main proceedings. According to Article 29 (c), the Court of Country B must be satisfied that "In granting, extending or modifying relief granted 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." Even if foreign main proceedings are not already recognised, should they be recognised in the future in Country B, then any relief provided under Article 19 or 21 to the foreign representative of Country will need to be reviewed, modified and possibly terminated if inconsistent with relief granted to the foreign representative of the main proceeding.

[1] Article 20, "Effects of recognition of a foreign main proceeding" in the UNCITRAL Guide to Enactment, p82

So to conclude, if foreign main proceedings already exist and have been recognised in Country A – the foreign representative should inform themselves of the relief that was granted already and consider whether to pursue their recognition application of non-main proceedings. If no main proceedings have been recognised, the foreign representative of the non-main proceedings should act quickly in their application for recognition, as there is a risk that the relief granted will be modified.

If concurrent foreign main and non-main proceedings are recognised in Country B - it is also anticipated that the "hotchpot" rule will likely apply where creditors have filed claims in both main and non-main proceedings, and to facilitate this and the coordination and cooperation efforts in the Country B – some sort of cross-border protocol would be enacted between the foreign representatives of the main and non-main proceedings, as seen between the Antiguan liquidators of Stanford International Bank and its US Receivers – for example.

Good effort..! The complete answer also includes Art. 15 and 6 MLCBI as well as the reference to FNMP provisions Art. 17.

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

Applying for Chapter 15 pursuant to Article 17 of the Model Law

The foreign representative is eligible to apply for chapter 15 recognition, because the Cayman restructuring qualifies as a "foreign proceeding" brought by a "foreign representative", in accordance with Article 17(1)(a) and (b) of the Model Law.

Pursuant to Article 2 of the Model Law – "Foreign Proceeding" means "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."

As the scheme was passed a majority vote and the Noteholders were the only Scheme creditors, the scheme is considered "collective". Restructurings take place pursuant to the Cayman Islands Winding-up Rules – which qualify as "law relating to insolvency" and furthermore, Globe Holdings was balance sheet insolvent. The assets and affairs of Globe Holdings were subject to the control and supervision of the Cayman Court. The restructuring was for the purpose of "re-organisation" in that it would extend the maturity of the Notes and obtain the flexibility to pay the quarterly interest.

Article 2 of the Model Law defines "Foreign Representative" as meaning "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". A Cayman islands i) restructuring officer or ii) provisional liquidator would qualify as such an individual.

Main or Non-Main Proceedings

The foreign representative should analyse the establishment characteristics of Globe Financial Holdings Inc ("Globe Holdings") to determine whether they are making an application for recognition of "main proceedings" or "non-main proceedings".

Under the European Insolvency Regulation – the COMI would be the place of registration of Globe Holdings i.e. the Cayman Islands – where the Globe Holdings is registered by way of continuation. However, COMI is not precisely defined in the Model Law. There is a rebuttable presemption pursuant to Article 16, paragraph 3 of the Model Law that, in the absence of proof of the contrary, the debtor's registered office in the COMI. Pursuant to the UNCITRAL Guide to Enactment, paragraph 145 - Consideration should be given to the following principal factors "to indicate whether the location in which the foreign proceeding has commenced is the debtor's centre of main interests":

(a) where the central administration of the debtor takes place, and
(b) which is readily ascertainable by creditors

The answer to (a) is not definitive. While (a) could arguably be the US given that is where the headquarters are located however this is not clear as Globe Holdings has "no business operation of its own" and the headquarters are being actively marketed for sale by a third party. Meetings to authorise decisions are held by Cayman Counsel virtually which could arguably mean that central administration takes place in Cayman. It is likely that the address of the meetings is stipulated as the Cayman Islands and the meetings are held virtually out of convenience. So long as these are held according to the articles of Globe Holdings then the meetings can be deemed as being held in Cayman.

(b) could be identified as the Cayman Islands by creditors– as "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". Notice of the re-incorporation from Canada to Cayman would have also been organised and provided on the SEC website of Globe Holdings – therefore creditors should be aware of the change of location of incorporation and qualify (b) as Cayman. The answer to (b) is not definitive either however because if you are a creditor, you might assume the Company's COMI is its headquarters in the US.

Therefore, the above test is not conclusive of the Globe Holdings' COMI. Pursuant to paragraph 146 of the UNCITRAL Guide to Enactment, "When these principal factors do not yield a ready answer regarding the debtor's centre of main interests, a number of additional factors concerning the debtor's business may be considered". These include the following pursuant to paragraph 147 of the UNCITRAL Guide to Enactment:

"the location of the debtor's books and records"; this would be the Cayman Islands according to the above scenario.

"the location where financing was organized or authorized", Although governed by New York law, it can be argued that the notes were authorised from the Cayman Islands as the meetings would have been organised by Cayman counsel and held virtually – and not physically in the US. Additionally, "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".

"from where the cash management system was run"; It is possible that these systems are run from the US HQ, however there is insufficient information to determine this. Additionally, it is noted that the HQs are being actively marketed for sale.

the location in which the debtor's principal assets or operations are found; Globe Holdings does not have any business operations of its own. However, its subsidiaries are incorporated in the US and could be considered as "principal assets".

"the location of the debtor's primary bank"; we are told that 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". The phrasing of this alludes to the primary bank account being in a different location to the Cayman Islands – and possibly opened merely to establish COMI. It is likely that a principal bank account is located in the US.

the location of employees; we are told that Global Holdings has no operating business of its own and that employees are hired through its US subsidiaries and located in the US.

the location in which commercial policy was determined; Meetings to authorise decisions are often held by Cayman Counsel virtually. It is likely that the address of the meetings is the Cayman Islands however the meetings are held virtually to provide convenience to make it convenient to participant's to attend and so long as these are held according to the articles of Globe Holdings then the meetings can be deemed as being held in Cayman.

the site of the controlling law or the law governing the main contracts of the company; in the scenario we are told that the Restructuring Support Agreement (RSA) is governed by New York law, and its senior unsecured notes due in 2023 are also governed by New York law.

the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; we are told that Global Holdings has no operating business of its own

the location from which contracts (for supply) were organized; we are told that Global Holdings has no operating business of its own.

the location from which reorganization of the debtor was being conducted; we are told that a scheme of arrangement was organised from the Cayman Islands and that sanction of same was granted by the Cayman Court. That participants were also given the option to attend virtually would not necessarily

mean that the meeting approving the scheme did not take place in the Cayman Islands – as the meeting would have been convened at the Cayman offices of Cedar and Woods who are Cayman Legal counsel to Global Holdings.

the jurisdiction whose law would apply to most disputes; in the scenario we are told that the Restructuring Support Agreement (RSA) is governed by New York law, and its senior unsecured notes due in 2023 are also governed by New York law.

the location in which the debtor was subject to supervision or regulation; we were told that shares were traded on the NASDAQ however, on November 6, 2020, shares were delisted from the NASDAQ stock market. Global Holdings still appears to be regulated by the SEC however that provides supervision and regulation.

and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited" It is not necessary to prepare and audit accounts of a Cayman Islands company however, if the Global Holdings was trading on the NASDAQ then they would have to file accounts in order to carry on being listed. Because they are no longer listed it is not clear whether they would still be preparing audit of accounts according to US law.

These are summarised in the below table:

Additional Factor	**Location**	**When**
books and records	Cayman Islands	Now
where financing was organized or authorized	Cayman Islands	April 2017
where the cash management system was run	Inconclusive	Unknown
debtor's principal assets or operations are found	US	Now
debtor's primary bank	(likely) US	Now
location of employees	US	Now
location in which commercial policy was determined	Cayman Islands	Now
the site of the controlling law or the law governing the main contracts of the company	US	Now
location from which purchasing and sales policy, staff, accounts payable and computer systems were managed	Inconclusive	Unknown
location from which contracts (for supply) were organized	Inconclusive	Unknown
location from which reorganization of the debtor was being conducted	Cayman Islands	July 2023
jurisdiction whose law would apply to most disputes;	US	Now
location in which the debtor was subject to supervision or regulation	US	Now

location whose law governed the preparation and audit of accounts and in which they were prepared and audited	Inconclusive	Unknown
Total Cayman	**4**	
Total US	**6**	

Paragraph 146 of the UNCITRAL Guide to Enactment indicates that "additional factors are set out below is not intended to indicate the priority or weight to be accorded to them, nor is it intended to be an exhaustive list of relevant factors; other factors might be considered by the court as applicable in a given case." The wording of this shows that the determination of COMI is considered on a case-by-case basis by the relevant court. Therefore, the US having 6 additional factors and Cayman having 4 is not conclusive that the US would be the COMI of Global Holdings.

In Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), 714 F.3d 127, 137 (2d Cir. 2013) – the Second Circuit ruled that the relevant time for assessing COMI is the chapter 15 petition date. According to a publication by Jones Day on Morning Mist: "The impact of the ruling is that, in cases where a foreign representative engages in significant pre-U.S. chapter 15 filing activities—such as operating or liquidating the debtor—in the jurisdiction where the foreign proceeding was commenced, COMI "can be found to have shifted from the foreign debtor's original principal place of business to the new locale."[2]

Similarly, in *Modern Land (China) Co. Limited (2022)* – Judge Glenn granted Chapter 15 recognition of the Cayman proceedings as a foreign main proceeding. Judge Glenn deemed that the COMI was located in Cayman Islands as that was the location of the registered office. Other factors considered include: "recognition was consistent with creditors' expectations; the prevalence of the judicial role in the Cayman scheme; the insolvency activities in the Cayman Islands; Cayman choice of law principles; and the debtor's good-faith petition for recognition"[3]

Because the scheme would have been approved by the Cayman Court (July 2023) – it is reasonable to anticipate that the US court will place substantial weight on the location of where the restructuring of Global Holdings are being controlled from (Cayman) in establishing COMI. A US judge will also consider that the New York HQs are actively being marked by a third party for sale and the shares of Global Holdings have been delisted – indicating it may have slowed or halted trading activity – and the "nerve centre" of activities has shifted to Cayman. Therefore, in light of the automatic relief that would be available should the recognition for main proceedings be successful, the Cayman representative should apply for chapter 15 and include in their filing that the Cayman restructuring is the main proceeding.

It should be noted that it would be unwise for the representative to "hedge their bets" and to apply for recognition of the Cayman Islands proceedings as both main and non-main proceedings. Pursuant to paragraph 162 of the UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation - if the applicant falsely claims the COMI to be in a particular State, the receiving court may determine that there has been a deliberate abuse of the process. This could have an impact on Chapter 15 being granted in the main proceeding and also be a waste of resources.

Relief sought on day 1 of filing

[2] https://www.jonesday.com/en/insights/2016/04/chapter-15-recognition-denied-due-to-comi-manipulation-scheme-to-evade-uk-judgment

[3] https://www.mayerbrown.com/en/perspectives-events/publications/2022/09/rare-earth-and-modern-land-chapter-15-recognition-and-the-discharge-of-new-york-law-governed-debt

There is some risk of asset dissipation is the HQs are sold and the proceeds are transferred away. Therefore, when applying for Chapter 15, the Cayman representative should apply for interim relief available under Article 19 of the Model Law including 19(a) "Staying execution against the debtor's assets" and Article 19(b): "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, 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". It should be noted that pursuant to Article 20 (3) "Paragraph 1 (a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor." Therefore there is unlikely that relief will be granted to the Cayman representative in the form of a moratorium over the progress of the class action. These are to be allowed to continue as necessary to allow creditors to form a claim against Global Holdings. The resulting claim will not be executed against the debtor's assets – but can form a claim in the liquidation of the Cayman estate or can be submitted in domestic insolvency proceedings, which are allowed to exist concurrently.

What papers need to be submitted

Pursuant to Article 15 (2-5) of the model law, the following should be submitted with the recognition application:

- A certified copy of the Convening Order and the Sanction Order;
- A certified copy of the order of appointment of either i) the provisional liquidator(s) or ii) restructuring officer(s) as made by the Cayman Court; and
- "a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative".

No letters rogatory should be necessary and the above documents do not need to be legalised.

Brilliant essay!

*** End of Assessment ***

Marks awarded: 43 out of 50 (Well done!)