



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

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

## ANSWER ALL THE QUESTIONS

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

### QUESTION 1 (multiple-choice questions) [10 marks in total] 6 marks

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

#### Question 1.1

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

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

#### Question 1.2

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

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

Choose the correct answer:

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

### Question 1.3

Which of the following statements incorrectly describe the MLCBI?

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

Choose the correct answer:

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

### Question 1.4

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

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

Choose the correct answer:

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

### Question 1.5

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

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

Choose the correct answer:

(a) Options (i) and (ii).

(b) Options (ii) and (iii).

(c) Options (iii) and (v).

(d) Options (i) and (v).

#### Question 1.6

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

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

#### Question 1.7

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

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

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

Choose the correct answer:

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

#### Question 1.8

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

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

Choose the correct answer:

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

#### Question 1.9

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

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

Choose the correct answer:

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

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

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

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

#### Question 1.10

Which of the statements below are correct under the MLCBI?

(a) The foreign representative always has the powers to bring avoidance actions.

(b) The hotchpot rule prioritises local creditors.

(c) The recognition of a foreign main proceeding is an absolute proof that the debtor is insolvent.

(d) None of the above are correct.

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

##### Question 2.1 [maximum 3 marks] 3 marks

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

The key distinction between the application of the Model Law on Cross-Border Insolvency (the MLCBI) and the European Union (EU) Regulation on Insolvency Proceedings (the EIR)<sup>1</sup> is that upon adoption the EIR directly becomes part of the domestic law of each EU Member State, whereas the MLCBI is only a recommendation and can be adopted and incorporated by States to the extent that they see fit.

To elaborate, unlike the EIR which unifies the insolvency law in EU Member States, the MLCBI does not and simply provides a suggested model and that can be adopted in an attempt to improve consistency in cross border insolvency laws.<sup>2</sup> The MLCBI is based on four key concepts including (i) access to foreign representatives and creditors to courts, (ii) recognition of foreign proceedings, (iii) providing appropriate relief, and (iv) facilitating co-operation between foreign courts and representatives.<sup>3</sup>

One key benefit of the EIR is that it provides complete certainty and consistency in insolvency proceedings involving EU Member States due to the fact that it is the law of all Member States. However, a disadvantage is the length of time and difficulty involved in actually agreeing and implementing a cross border law like this and that was the case in respect of the EIR.

On the other hand, an advantage of the MLCBI is that it provides a more flexible system which takes into account and facilitates the continuation of differing approaches in national insolvency laws whilst still offering opportunities for co-operation and co-ordination where

<sup>1</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings, as recast in Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May, 2015.

<sup>2</sup> Foundation Certificate: Module 2A Guidance Text (**Guidance Text**) at Section 4.2, page 6.

<sup>3</sup> Guidance Text at Section 4.2, page 8.

possible. It includes the characteristics of modern and efficient insolvency systems and offers useful solutions for dealing with complex cross border scenarios if states wish to utilise them. An obvious disadvantage is that there may still be gaps between the insolvency systems of states who have adopted the model law, so there is no guarantee that the key concepts such as access and recognition will be achieved, however, it is much more likely.

**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.

When using its discretionary power to grant post-recognition relief under Article 21 of the MLCBI, the Court's in the enacting state's primary consideration should be making sure that the interests of the debtor's creditors, the assets of the debtor and any other interested parties are adequately protected.<sup>4</sup>

In addition, because the automatic relief on recognition of a foreign main proceeding pursuant to Article 20 of the MLCBI do not apply to foreign non-main proceeding, the Court will need to have regard to whether the proceeding is the main or non-main proceeding and the Courts have emphasised this important distinction.<sup>5</sup> If the proceeding is the non-main proceeding MLCBI, Article 21(3) provides that, "*the court must be satisfied that the relief relates to assets that, under the law of [that] State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding*".<sup>6</sup> This article acknowledges that the "*interests and the authority of a representative of a foreign non-main proceeding are typically narrower than the interests and the authority of a representative of a foreign main proceeding*"<sup>7</sup> and is all about ensuring that representatives of foreign non-main proceedings are not given unnecessarily broad powers and that relief granted in foreign non-main proceedings is restricted to assets which are to be administered in that non-main proceeding and that any information sought by a foreign representative as to the debtor's assets or affairs, must be limited to information that is required in the non-main proceeding.<sup>8</sup>

**Question 2.3 [2 marks] 2 marks**

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

Pursuant to Article 13 of the MLCBI, foreign creditors have the same rights as creditors domiciled in the enacting State when it comes to the commencement of and participating in proceedings concerning the debtor under the insolvency laws of that State.

Article 13(2) of the MLCBI goes on to clarify that this does not affect the ranking of creditor claims in the enacting state, except that the claim of a foreign creditor shall not be given lower priority than that of general unsecured claim just because they are a foreign creditor.<sup>9</sup>

**Question 2.4 [maximum 3 marks] 3 marks**

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<sup>4</sup> Guidance Text at Section 8.3.1, page 31.

<sup>5</sup> Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (Case Law), page 66 at 4.

<sup>6</sup> MLCBI, Article 21(3).

<sup>7</sup> UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (Guide to Enactment), page 88, at 193.

<sup>8</sup> Ibid.

<sup>9</sup> Guidance Text, Section 7.4, page 22.



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

As touched on above in question 2.2 and I further refer to my answer there, a key distinction the relief available in foreign main versus foreign non-main proceedings is that Article 20 of the MLCBI provides automatic relief upon recognition of foreign main proceeding (i.e., where the centre of main interest (COMI) of the debtor is in the state where the foreign proceeding was initiated).<sup>10</sup>

The automatic relief includes: (a) a stay on commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; (b) a stay on execution against the debtor's; and (c) suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.<sup>11</sup> The intention of these automatic consequences is to allow for the organisation of an efficient and fair cross-border insolvency proceeding.

When dealing with a foreign non-main proceeding (i.e., COMI of the debtor is not in the state of the proceeding) the automatic relief under Article 20 of the MLCBI is not imposed. Instead, the Court will draw from Article 21 of the MLCBI and the range of discretionary relief that may be imposed under Article 21 (a) - (g) in order to protect creditors or, as an alternative, to protect the assets of the debtor.

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

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

A debtor has its COMI in Germany and an establishment in Bermuda, and both foreign main and foreign non-main proceedings as well as the recognition proceedings in the US have been opened. In this scenario, explain where the foreign proceedings must have been filed, and the likely result.

In circumstances where 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, the foreign main proceedings would have been filed in Germany. Guidance as to why this is the case can be drawn from the definitions of the MLCBI. In particular, under Article 2 of the MLCBI, "Foreign main proceeding" is defined as "*a foreign proceeding taking place in the State where the debtor has the centre of its main interests*"<sup>12</sup> and "Foreign non-main proceeding" is defined as "*a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article*".<sup>13</sup>

"Centre of main interest" is not defined in the MLCBI, however, some guidance is provided in the Guide to Enactment which provides that the two key factors for determining COMI are (a) the location where the central administration of the debtor takes place; and (b) which is readily ascertainable as such by creditors of the debtor.<sup>14</sup> "Establishment" means "*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services*".<sup>15</sup> A range of additional factors can also be weighed up by the Court, including the:

1. location of the debtor's books and records;

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<sup>10</sup> Guidance Test, page 32 at 8.3.2.

<sup>11</sup> MLCBI, Article 20.

<sup>12</sup> MLCBI, Article 2(b).

<sup>13</sup> MLCBI, Article 2(c).

<sup>14</sup> Guide to Enactment, pages 70 - 75

<sup>15</sup> MLCBI, Article 2(f).

2. location where financing was organised or authorised;
3. location from where the cash management system was run;
4. location in which the debtor's principal assets or operations are found;
5. location of the debtor's primary bank;
6. location of employees;
7. location in which commercial policy was determined;
8. site of the controlling law or the law governing the main contracts of the debtor;
9. location from which purchasing and sales policy, staff, accounts payable and computer systems are managed;
10. location from which contracts (for supply) were organised;
11. location from which reorganisation of the debtor was being conducted;
12. jurisdiction whose law would apply to most disputes;
13. location in which the debtor was subject to supervision or regulation; and
14. location whose law governed the preparation and audit of accounts and in which they were prepared and audited.<sup>16</sup>

In essence, where a foreign proceeding is opened in the jurisdiction where the debtor has its COMI (in this case Germany), the proceedings are the main insolvency proceedings for the purpose of the MLCBI and the with automatic mandatory relief will apply.

Two further reasons which demonstrate that the foreign main proceedings are in Germany based on the above scenario are that:

1. the US proceedings are recognition proceedings which will seek recognition of the foreign main proceedings; and
2. the Bermudan proceedings could not be the main proceedings because the debtor only has an establishment there which is secondary to COMI.

The likely result of the above scenario where the debtor's COMI is in the jurisdiction where the proceedings were opened is that the German proceedings will proceed as the foreign main proceedings and the automatic relief under Article 20 of the MLCBI will apply. This includes (a) a stay on commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; (b) a stay on execution against the debtor's; and (c) suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.<sup>17</sup>

As there are concurrent foreign non-main proceedings ongoing in Bermuda, primacy will be given to the foreign main proceedings in Germany pursuant to Article 30 of the MLCBI. The German Court shall seek co-operation and co-ordination under articles 25, 26 and 27 and any relief granted thereafter under either Article 19 or Article 21 to a representative of the Bermudan foreign non-main proceeding must be consistent with the German foreign main proceeding (Article 30(a)). If necessary, the relief will be reviewed and modified or terminated if inconsistent with the foreign main proceeding (Article 30(b)).

With respect to the recognition proceedings in the US, the success of the application would likely depend on the existence of any assets and or establishment of the Debtor in the US. In view of the automatic relief in the German proceedings, the US representatives wouldn't be able to transfer, encumber or otherwise dispose of any assets of the debtor.

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

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<sup>16</sup> Guidance Text, pages 28 - 28, at section 8.2.7.

<sup>17</sup> MLCBI, Article 20.

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 likely outcome of the above scenario will depend on whether or not the foreign proceedings in which the joint provisional liquidators (JPLs) have been appointed are foreign main proceedings or foreign non-main proceedings for the purpose of the MLCBI.

If the proceedings are foreign main proceedings on the basis that the foreign debtor has its COMI in the jurisdiction that those proceedings were commenced, and if those proceedings are recognised in the US, the automatic relief that is available under Article 20(1)(a) of the MLCBI will apply with the effect that the tort proceedings alleging interference with contractual rights of US-based vendors will be stayed and prevented from continuing.

However, if the foreign debtor only has an establishment in the jurisdiction of the foreign proceedings such that the JPLs have applied for recognition of non-main foreign proceedings, then in considering whether to grant a stay of the US tort proceedings pursuant to article 21(1)(a) of the MLCBI, the US court will need to consider whether the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.<sup>18</sup> In this scenario and in view of the fact that some of the parties to the contracts in question are US based, the Court may not be convinced that these assets should be dealt with and administered in the foreign proceeding. However, the outcome will depend on the relevant law that governs the contracts among other things.

**Requires discussion based on Art. 10 MLCBI.**

### **Question 3.3 [maximum 4 marks] 4 marks**

A foreign representative who administers assets in a debtor-in-possession-like restructuring proceeding in the UK commences a recognition proceeding in the US, setting the recognition hearing 35 days after the petition date due to the availability of the court. There is no litigation pending or threatened against the foreign debtor, but US-governed leases and intellectual property licenses have *ipso facto* clauses (that is, bankruptcy-triggered terminations) that are not enforceable under the US Bankruptcy Code. Based on these facts, explain what steps, if any, should the foreign representative take to protect the assets and why?

Firstly, the nature of the UK proceedings is a debtor-in-possession type restructuring meaning that the aim is for the debtor to continue operating whilst it implements its restructuring plan. In circumstances where the debtor has US-governed leases and intellectual property licenses, the representative has rightly applied for recognition in the US to allow the restructuring plan to continue.

However, those same US-governed leases and intellectual property licenses have *ipso facto* clauses which allow for termination of a contract upon one of the parties entering into insolvency proceedings. In the circumstances, a party to those contracts would be entitled to terminate those contracts in view of the UK insolvency proceedings.

In those circumstances the UK insolvency representative ought to take steps to ensure that the US leases and intellectual property licenses are protected and can continue in the intervening period until the hearing of recognition application that won't take place for 35

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<sup>18</sup> MLCBI, Art 21(3).

days due to limitations with the Court's availability. The *ipso facto* clauses are not enforceable under the US Bankruptcy code.

In the circumstances, the best thing that the foreign representative can do is to apply for interim relief pursuant to Article 19 of the MLCBI which is available regardless of whether the UK proceedings are foreign main or foreign non-main proceedings.

Article 19 provides for a number of different kinds of interim relief and the UK representative may wish to consider all of them. But based on the facts it appears that the relief available under Article 19(1)(c) which allows for any relief mentioned in paragraph 1 (c), (d) and (g) of Article 21, may be the most useful.

In particular, Article under 21(c) which suspends the right to transfer, encumber or otherwise dispose of any assets of the debtor could be useful to prevent any party from disposing of assets by terminating the contracts and leases. In addition, Article 21(1)(g) would allow the Court to grant any additional relief such as specifically preventing the termination of the contracts and leases whilst the recognition hearing is pending for example on the basis that the US Bankruptcy Code would specifically preclude these clauses from being enforced.

In applying for the interim relief, the UK representative should seek to demonstrate to the Court that maintaining the status quo will protect the assets of the debtor and in turn protect the US creditors who should benefit from the better outcome following the restructuring as opposed to a liquidation or termination of the contracts and leases.

#### **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?

At the outset, the foreign representative should have properly assessed where the debtor's COMI is. Based on the facts, it appears that the foreign representative has determined that the debtor's COMI is in Country A based on the fact that that is where the debtor's registered office is, but has not taken into consideration the fact that aside from that the debtor doesn't have any other connection to Country A and has its assets in Country B.

The foreign representative should have embarked on a fulsome and proper assessment of the debtor's COMI and then commenced proceedings in the proper state which may be Country B.

Alternatively, if the foreign representative had any doubt that the debtor's COMI was in Country A, they could have applied for recognition in Country B on the basis that the Country A proceedings were foreign non-main proceedings.

The foreign representative could seek to appeal; however, the prospects of success seem low given the assets in Country B and the other facts. However, in Article 16(3) of the MLCBI does presume, that in the absence of proof to the contrary, that the debtor's registered office, is the debtor's COMI. Therefore, an appeal does not seem totally hopeless.

Another option could be to commence new proceedings in the State where COMI is, that may be Country B, but a proper assessment should be completed.

The final option would be to assess whether the debtor has an establishment in Country A, and apply for recognition based on those proceedings being non-main proceedings, however, that also seems unlikely if all the debtor has in country A is a registered office.

**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.

From the outset, it is worth stating that the Cayman Islands (**Cayman**) hasn't adopted the MLCBI. This does not prevent the Cayman representatives from seeking recognition in the US, however, the relevance of the model laws will depend on the specific insolvency laws and regulations of the US and the extent to which it has adopted the model laws. The following response assumes they have been adopted in full.

In considering the key filing strategy to ensure a successful restructuring of Globe Holdings following the Sanction Order in the Cayman, the first step is to assess where Globe Holdings has its COMI.

## COMI analysis

The following factors support a conclusion that Global Holdings has its COMI in Cayman.

1. has been registered in Cayman since 2010;
2. has a bank account from which it pays certain operating expenses (although this account has only been open for a few days prior to these instructions);
3. has long standing Cayman counsel which organize its board meetings (although those meetings are held virtually as opposed to physically in Cayman);
4. maintains its books and records in Cayman;
5. has public filings with the SEC and the prospectus relating to the issuance of new notes which record that it is a Cayman company;
6. has no business operations of its own.

The final point is important because although Global Holdings has non-debtor subsidiaries that are all incorporated under the US laws and operate and carry out business in the US, when dealing with enterprise groups such as this and considering COMI for the purpose of determining whether a proceeding is main or non-main, the MLCBI each and every member of an enterprise group as a distinct legal entity.<sup>19</sup>

To assess COMI, it is necessary to take into account a) the location where the central administration of the debtor takes place; and (b) determine whether that is readily ascertainable by creditors of the debtor. In this case, Global Holdings central administration is in Cayman by virtue of all the above factors and that is readily ascertainable by the fact that a registered office search would show the same and it has made public filings with the SEC and issued a prospectus to its debtor noteholders which record that it is a Cayman company.

It is worth noting that there are some factors which could point towards Global Holdings potentially having its COMI in the US and this is based on the fact that five factors have been identified by courts as being among the most important with respect to corporate debtors and those are:

1. *"The location of the debtor's headquarters;*
2. *The location of those who actually manage the debtor (which could conceivably be the headquarters of a holding company);*
3. *The location of the debtor's primary assets;*
4. *The location of the majority of the debtor's creditors or of a majority of creditors who would be affected by the case;*
5. *The jurisdiction whose law would apply to most disputes."*<sup>20</sup>

Factors 1, 3, 4 and 5 are the most relevant to the current scenario. In particular, as to Global Holdings has its corporate headquarters in New York. As to assets, the USD 25,000,000 in aggregate nominal principal amount of 6.625% senior unsecured notes due in 2023 (the **Notes**) are governed by New York law and potentially held in the US on the basis that a satellite location in New York was offered to creditors who could not attend the scheme meeting in Cayman.

In addition, Global Holdings has a number of subsidiaries in the US which are also its assets.

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<sup>19</sup> The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective (2011, updated 2013) (The Judicial Perspective) at page 24, paragraph 68.

<sup>20</sup> Case Law, page 41 at paragraph 21.

It follows that the majority of Global Holdings' creditors are most likely not in Cayman and could well be in the US (we need more information to reach a final conclusion on this). Finally, and although we don't have enough information to conclusively determine which law would apply to most disputes, we know that the Notes are governed by New York law, but we also know that Cayman law would apply by virtue of the Global Holdings registration.

However, given that the recognition application will be made to the US Court, it will take into account the cases of *British-American Insurance Co., Ltd.* 425 B.R. 884, 909 (Bankr. S.D.Fla. 2010), CLOUT 1005 and *British American Isle of Venice, Ltd.*, 441 B.R. 713, 720 (Bankr. S.D. Fla. 2010) where the Court found that several of these important factors were not actually that helpful in determining the debtor's COMI.<sup>21</sup>

Based on the above assessment that COMI is in Cayman, an application for recognition of a foreign main proceeding should be made in the US for the purpose of recognising the Sanction Order there.

#### Establishment analysis

In view of the definition of "establishment" in the MLCBI as "*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services*" and based on the facts, it does not appear that Global Holdings has an establishment in Cayman. Global Holdings does have a Cayman bank account; however, The Judicial Perspective clarifies that: "*the presence alone of goods in isolation or bank accounts does not, in principle satisfy the requirements for classification as an "establishment"*".<sup>22</sup>

In order for the Cayman proceedings to qualify as a foreign non-main proceeding, the MLCBI would require the debtor to have an establishment in Cayman, in circumstances where there aren't sufficient facts to establish that it does, it doesn't seem that an application for recognition of the Cayman proceedings as foreign non-main proceedings would be worthwhile.

#### Papers

As to what papers need to be submitted, pursuant to Article 15 of MLCBI, the application for recognition should be accompanied by a certified copy of the scheme application in Cayman and certified copies of the Sanction Order and for completeness the Convening Order.

The US Court may also be assisted by the earlier Cayman filings such as the application to convene a single scheme meeting on the basis that the Noteholders, as the only Scheme Creditors (note that this is effectively an application for cross class cram down) and evidence in support which led to the Cayman Court making the Convening Order. There would be a range of other relevant papers but based on the facts we assume that it would have included evidence of the Noteholders decision to delay interest payments and restructure the Notes and the Restructuring Support Agreement (RSA) governed by New York law, evidence of the outcome of the scheme meeting.

Article 15(3) of the MLCBI also requires the application for recognition shall be accompanied by a "*statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.*"<sup>23</sup>

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<sup>21</sup> In that case it was ultimately found to be located at the foreign representative's offices.

<sup>22</sup> The Judicial Perspective, page 47 at paragraph 140.

<sup>23</sup> MLCBI, Art 15(3).



In view of the fact that there is a class action litigation brewing but not yet filed in the US, the Cayman representatives should also give consideration to whether this proceeding should be mentioned in the statement identifying all foreign proceedings in respect of the debtor. On the one hand, this class action proceeding hasn't been filed yet and we don't know for sure that Global Holdings will be named, however, to avoid misleading the Court it may be prudent to mention the existence of this potential proceeding.

### Relief

As to the relief that the Cayman representatives should seek on day one of filing the recognition application.

#### *Article 19*

In order to maintain the status quo and the effect of the Sanction Order, it would be prudent for the Cayman representatives to apply for urgent interim relief pursuant to Article 19 of the MLCBI, to protect the assets of Global Holdings and the interests of the creditors until the US Court determines the application for recognition of the Sanction Order.

Pursuant to Articles 19(1)(a) and (b) of the MLCBI, the Cayman representatives should seek a stay on execution against Global Holdings assets and possibly an order entrusting the administration or realisation of the debtor's assets located in the US 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.

The reasons that the Cayman representatives should apply for this relief are because a) Global Holdings is because it is both cash flow and balance sheet insolvent, there is a class action in the US brewing and its likely that Global Holdings shareholders are considering action. We know that Global Holdings shares were suspended from the NASDAQ Stock Market due to delinquencies in filing its 10-K annual report to security holders with the SEC and that one month later its shares were delisted from the NASDAQ stock market. In addition, an independent third party is actively marketing the sale of Global Holdings corporate headquarters in New York including the land, building, building improvements and contents including furniture and fixtures. In view of these facts, there is a serious risk of legal action by Globe Holdings' creditors and of the dissipation of its assets in the US.

Provisional relief pursuant to Article 19 would mean that no action could be taken in relation to Global Holdings assets until the recognition application is determined. Pursuant to Article 19(3), any interim relief will terminate upon determination.

#### *Article 20*

On the basis that the Cayman proceedings are foreign main proceedings, the Cayman representatives should also apply for the automatic relief that is available under Article 20 of the MLCBI in circumstances where Global Holdings COMI is in Cayman and in the jurisdiction where the main foreign proceedings was opened. If the US accedes to this application and recognises the Cayman proceedings as foreign main proceedings, then the automatic relief will apply including:

1. a stay of the commencement or continuation of individual actions or individual proceedings concerning Global Holdings' assets, rights, obligations or liabilities;
2. a stay of execution against Global Holdings assets; and
3. a suspension of the right to transfer, encumber or otherwise dispose of any assets of Global Holdings.

The above would be powerful on the basis that it would preclude the US class action proceedings, any other proceedings and prevent any action being taken in relation to Global Holdings assets which is currently threatened.

In making their application for recognition and in light of fact that is for recognition of a scheme sanction, the Cayman Representatives should rely on and inform the US court of the US decision in *In re Modern Land (China) Co., Ltd*, Case No 22-10707 (MG), 641 B.R 768 (Bankr. S.D.N.Y. July 18, 2022), in which the US Bankruptcy Court held that a Cayman Islands scheme of arrangement recognised as a main proceeding under Chapter 15 of the US Bankruptcy Code would constitute a substantive discharge of New York law governed debt.<sup>24</sup> The facts of this case are analogous to what the Cayman representatives are seeking to accomplish in the present circumstances.

#### *Article 21*

In addition to the automatic relief that the Cayman Representatives can apply for under Article 20 in the context of seeking to recognize the Sanction Order, the Cayman Representatives should apply for additional relief pursuant to Article 21 of the MLCBI. In particular, they should apply under section 21(1)(e) to entrust the administration and realization of Global Holdings assets located in the US to the foreign representatives.

The Cayman Representatives may also benefit from an order for the examination of witnesses, the taking of evidence or the delivery of information concerning the Global Holding' assets, affairs, rights, obligations or liabilities in order to obtain any relevant information that they need to implement the restructuring under the Scheme.

The Cayman Representatives should also apply under Article 21(f) to extend the relief granted under Article 19(1), if that interim relief to impose a stay on execution of assets is implemented, then it might be a quicker route to extend that relief than reapplying. However, if the US Court accepts the Cayman proceedings as foreign main, then that relief would be automatically applied anyway.

Finally, the Cayman Representatives should apply under Article 21(2) for the US Court to entrust the distribution of Global Holdings assets located in the US to them. In order to obtain this order, they will need to satisfy the Court that the interests of creditors in the US are adequately protected and by virtue of the Scheme will be better off. Dealing with the position of the disgruntled shareholders may be the most challenging aspect to satisfy the Court, especially given the fact that the Noteholders have been prioritised and sanctioned the scheme without reference to those shareholders whose interests have not yet been heard or determined.

**Very good essay, excellent structure. Only a reference to public policy (Art.6 MLCBI) is missing, but no mark is deducted.**

**\* End of Assessment \***

**Marks awarded: 44 out of 50. Well done!**

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<sup>24</sup> Guidance Text, pages 37 - 38, footnote 124.