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).
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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] 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 EU Regulation on insolvency proceedings ("**EIR**"), becomes part of the domestic law of the Member State directly upon adoption and is therefore a form of "hard law". In contrast, the MLCBI merely provides recommendations as to legislative approaches and is therefore a form of "soft law".

The benefit of an approach such as the EIR is that it provides certainty, as those jurisdictions that are bound by it will automatically recognise proceedings commenced in the jurisdiction where the debtor has its COMI. The disadvantage of such an approach is that such "hard law" provisions can take a very long time to negotiate, and other cross-jurisdictional attempts have failed where the countries cannot agree a common approach.

The benefit of the MLCBI is that it affords greater flexibility and recognition of a jurisdiction's autonomy – in addition to providing safeguards such as the public policy exception. However, the disadvantage of this is that it can mean that principles of domestic law can undermine the goals of the MLCBI – for example, the fact that there is no bar on enacting States imposing reciprocity requirements in their domestic law (even though there are none under the MLCBI).

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 main concern for courts exercising their discretion under Article 21 MLCBI is that the relief granted should not interfere with insolvency proceedings in other jurisdictions – especially those that are foreign main proceedings. This is captured by Article 21(3), which provides that "*the court must be satisfied that the relief relates to assets that, under the law of this State [i.e. the enacting State], should be administered in the foreign non-main proceeding or concerns information required in that proceeding.*"

The main aim per Art.21 MLCBI is "*…to protect the assets of the debtor or the interests of the creditors…*"

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 is an anti-discrimination provision and ensures that foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding in the enacting State as local creditors in the enacting State. The Article makes it clear that this does not affect the ranking of creditors according to the laws of the enacting State. However, a foreign creditor is not to be disadvantaged purely because they are a foreign creditor. Furthermore, a footnote in the MLCBI suggests that enacting States may wish to include wording to give priority to certain tax and social security obligations in the enacting State.

Question 2.4 [maximum 3 marks] 3 marks

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

The key benefit to a foreign proceeding being designated as "main" is that there will be certain automatic mandatory relief under Article 20 of the MLCBI. In contrast, if the foreign proceeding is "non-main" then the foreign representative will need to apply to the local court of the enacting State, requesting that it use its discretionary powers to grant relief, pursuant to Article 21.

Under Article 20 there are three automatic effects where a foreign main proceeding is recognised in the enacting State:

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.

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

Question 3.1 [maximum 4 marks] 4 marks

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

"Foreign main proceeding" is defined at Article 2(b) of MLCBI as being, "*a foreign proceeding taking place in the State where the debtor has the centre of its main interests*". The foreign main proceeding must therefore have been filed in Germany.

"Foreign non-main proceeding" is defined at Article 2(c) as being, "*a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment*". The foreign non-main proceeding could, therefore, be in Bermuda, albeit it is possible there could be other foreign non-main proceedings in another jurisdiction where the debtor also has an "establishment" within the meaning of Article 2(f) MLCBI.

As the US has adopted the MLCBI, as per Article 17(1) MLCBI, the foreign proceedings shall be recognised in the US if the "foreign proceeding" is one meeting the definition under Article 2(a) MLCBI and the "foreign representative" is a person within the meaning of Article 2(d). There are also certain requirements as to the form the application for recognition should take. If these requirements are met, and there are no public policy grounds for refusing recognition, recognition will be granted as a matter of course.

For the reasons outlined above, the German proceedings would be recognised as foreign main proceedings and the Bermudan proceedings recognised as foreign non-main proceedings (as per Article 17 (2)(a) and (b).

Question 3.2 [maximum 3 marks] 0 mark

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

In the English courts, there is the so-called "Gibbs Rule," which provides that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. The US has, however, taken a significantly different approach. For example, *In re Modern Land (China) Co., Ltd.,* Case No. 22-10707 (MG) (Bankr. S.D.N.Y. July 18, 2022) *("**Re Modern Land**")* was a case where the US Bankruptcy Court recognised a Cayman Islands Scheme of Arrangement as being foreign main proceedings and found that a Scheme which modifies or discharges debts governed by New York law is enforceable. It is not clear where the tortious interference proceedings were commenced, but assuming they were commenced in the US, then, if the US Bankruptcy Court follows the *Re Modern Land* dicta, if the liquidation proceedings are recognised in the US then this is likely to be sufficient to affect whatever debts may have arisen under the vendor contracts and mean that the claims would fail.

The question relates to Art.10 MLCBI (not the Gibbs rule).

Question 3.3 [maximum 4 marks] 4 marks

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

The foreign representative should be conscious of the possibility that the counterparties to the leases and licences may seek to treat them as terminated under the *ipso facto* clauses (and take any consequent action against the debtor). The foreign representative can look to apply to the US court

for relief pre-recognition under Article 19 MLCBI "*where relief is urgently needed to protect the assets of the debtor or the interests of the creditors*".

Article 19 provides a non-exhaustive list of relief available and includes (pursuant to Article 19(1)(c) and Article 21(1)(g)) granting any additional relief that may be available to the foreign representative under the laws of the enacting State (in this case the US).

In the *Pan Ocean* case ([2014] EWHC 2124 (Ch)), a Korean liquidator made an application to the English court in respect of an English law shipping contract, seeking to restrain the counterparty from terminating the contract under an *ipso facto* clause. The application had argued that the English court should apply Korean insolvency law which declares *ipso facto* clauses null and void (whereas they are valid under English law). The English courts refused relief, finding that the parties should not have expected that under the chosen English law, the English court would apply Korean insolvency law.

However, the circumstances are different in this case, where the application would be to a US court, in respect of US-governed contracts, asking the court to restrain the exercise of the *ipso facto* clauses, which are invalid under US law. Thus there is a good chance of relief being granted under Article 19(1)(c)/ Article 21(1)(g).

Note that in *Pan Ocean*, the English courts also found that the mere serving of notice to terminate the contract does not constitute the commencement or continuation of an individual action (for the purposes of Article 21(1)(a)) and so, even after recognition, the US Bankruptcy Courts (if they follow the same approach as the English Courts) could not restrain a contractual counterparty from exercising the termination notice by virtue of the Article 21(1)(a) ground. In any event, the relief under Article 21(1)(a) is not available pre-recognition under the MLCBI.

Question 3.4 [maximum 4 marks] 1 mark

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

It is unclear whether the court of Country B refused recognition altogether or whether it only refused to recognise the proceedings in Country A as being "main" proceedings (but did recognise them as "non-main" proceedings in the alternative).

If proceedings in Country A have been (or were to be) recognised as foreign non-main proceedings, the foreign representative can apply to the court for discretionary relief under Article 21 to protect the assets of the debtor. This includes "*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*" (Article 21(e)).

Furthermore, Article 21(2) provides:

> *"Upon recognition of a foreign proceeding, whether main or non main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets*

located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected."

Note that this relief would still be discretionary even if the proceedings were main proceedings. Thus the fact that the proceedings are not recognised as "main" is not necessarily fatal to the foreign representative's goal of realising assets in Country B. However, Article 21(3) adds an additional hurdle to the representative in non-main proceedings which does not exist for the representative in main proceedings:

> *"In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding."*

If the assets in question are within the territorial jurisdiction of Country B it might be difficult to argue they should be administered in foreign non-main proceedings, but it is still possible the foreign representative might be able to obtain information about those assets.

As the D*igest of Case Law on the UNICTRAL Model Law on Cross-Border Insolvency* (the "**Digest**") makes clear, *"a proceeding that failed to qualify as a main proceeding would not automatically be a non-main proceeding; for recognition as a non-main proceeding, it would have to meet the requirements of the definition in subparagraphs (c) and (f)"* (p.8)

The mere fact that the debtor has its registered office in Country B is unlikely to be enough to meet the definition of "establishment" under the MLCBI by itself ("*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services"*).

The Digest (p.9-10) lists a number of activities that have been considered by some courts to be insufficient to establish conduct consisting of "non-transitory" activity. This includes *"the fact of incorporation and record-keeping*". On the facts, there may be little point in re-applying for recognition of the foreign proceedings as non-main proceedings as this could be refused too.

In this case, there are two potential options open to the foreign representative:

a) Even if the proceedings in Country A have not been recognised at all in Country B, the foreign representative can still use the standing provisions of MLCBIC. Under Article 11, this would allow the foreign representative to request commencement of a domestic insolvency proceeding in Country B. This may be the only way for the assets in Country B to be realised if the debtor's COMI is in Country B.
b) Alternatively, if the debtor has its COMI in a third country, the foreign representative may wish to commence proceedings there and subsequently apply again to Country B for those proceedings in the third country to be recognised as foreign main proceedings.

Either of the above two options could also have been done at the outset.

Please read the question carefully. Note that *in casu* the representative (only) filed for FMP, which was refused. This answer should be based on the FMNP, the rebuttable COMI presumption in art. 16(3) MLCBI, as well as procedural rules eg. Art. 17, 6, 15… MLCBI.

QUESTION 4 (fact-based application-type question) [15 marks in total] 13 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.

1. MAIN OR NON-MAIN PROCEEDINGS

1.1 In deciding whether to apply for recognition of the Cayman Islands Scheme as a "main" or "non-main" foreign proceeding, the foreign representative overseeing the Scheme will need to consider whether the Cayman Islands could be seen as Global Holdings' COMI (or, in the alternative, an "establishment").

1.2 Centre of Main Interests (COMI)

a) *Definition*

There is no definition of "centre of main interests" under the MLCBI. However, there is a presumption, under Article 16(3) that, "*In the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interests.*"

Under the presumption, therefore, Cayman Islands would be the COMI. However, there are a number of factors that may serve to rebut this.

The principle of COMI is based on the same wording in the EU Regulation on insolvency proceedings ("**EIR**"), which was itself based upon the formulation previously adopted in the European Union Convention on Insolvency Proceedings (the "**European Convention**"). Paragraph

141 of the Guide to Enactment and Interpretation of the MLCBI (the "**Guide**") notes that EIR jurisprudence in relation to COMI may be relevant to the interpretation of the MLCBI.

In the leading ECJ case of *In re Eurofoods IFSC Ltd.* [2006] Ch 508 (E.C.J. May 2, 2006), (in interpreting the equivalent provisions under the EIR) the ECJ suggested that the presumption as to the registered office being the COMI could be rebutted in the case of a “letterbox company” which does not carry out any business in the territory of the State in which its registered office is situated.

Paragraph 84 of the Guide cites M.Virgos and E. Schmit, *Report on the Convention on Insolvency Proceedings*, Brussels 3 May 1996 (the "**Virgos-Schmit Report**"), which was prepared with respect to the European Convention. In particular, the Guide quotes paragraph 75 of the Virgos-Schmit Report:

> *"The concept of ‘centre of main interests’ must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.*
>
> *The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction …be based on a place known to the debtor’s potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated."*

b) *The principal factors*

Paragraph 145 of the Guide sets out the following principal factors in determining the COMI as the location:

- where the central administration of the debtor takes place; and
- which is readily ascertainable by creditors.

We know that Globe Holdings does not conduct any business operations in Cayman and its business is mostly conducted in the US. This is also where its headquarters are. However, it should not be overlooked that because Globe Holdings is a holding company, the nature of its activities will, necessarily, be different from an operational company and it is not a "letterbox company" purely because most operations are conducted in the US.

Furthermore, we are told that upon re-incorporation to the Cayman Islands, Globe Holdings filed the necessary notices, including with the SEC. In its public filings with the SEC and the prospectus relating to the issue of the Notes, it also disclosed that Globe Holdings is a Cayman Islands company. The Cayman Islands was therefore "readily ascertainable" to creditors as a potential COMI and the finding of the Cayman Islands as the COMI would not offend the principle that the COMI should be readily ascertainable to creditors. However, against that is that fact that its operations, headquarters and location of employees all point to the US being the COMI and this may be a more "obvious" COMI to anyone unfamiliar with SEC filing notices.

In this case, it may still not be apparent whether the COMI is the Cayman Islands or the US based on these two principal factors.

c) *Additional factors*

The Guide states that where the factors under paragraph 145 do not provide a ready answer, there are additional factors the court can take account of. The balancing of these factors will be a holistic endeavour. Paragraph 147 of the Guide sets out certain (non-exhaustive) factors. Some that may be relevant to consider in this case include the following:

- The location of the debtor’s books and records (although, as already noted, this is not enough in itself): Globe Holdings keeps its books and records in the Cayman Islands. In addition, being registered as a Cayman Islands company means that Globe Holdings is subject to the supervision and jurisdiction of the Cayman Island Court and its place of incorporation will also dictate certain filing and accounting requirements.
- The location in which the debtor’s principal assets or operations are found: as noted above, this is the US (at least as far as the wider group is concerned).
- The location of the debtor’s primary bank: We are told that Globe Holdings only opened a Cayman Islands bank account a few days ago and it therefore must have had banking facilities elsewhere before this.
- The location of employees: this is the US.
- The location in which commercial policy was determined and the site of the controlling law or the law governing the main contracts of the company: we do not know for sure what this is but on the facts given, it may well be the US.

Another important factor set out in the Guide is the location from which reorganisation of the debtor is being conducted. Discussions concerning the restructuring of Globe Holdings took place as a result of advice taken from the company's Cayman Islands counsel. Furthermore, the Scheme Meeting approving the Scheme took place at the offices of Cedar and Woods in Cayman, and the Chairman was physically present on the Island. *Re Modern Land* was a case there, amongst other things, the US Bankruptcy Court placed significant emphasis on the restructuring proceedings in the Cayman Islands in finding that the Cayman Islands were the debtor's COMI. The Court considered it important that the Scheme Creditors' expectations as to where the restructuring would take place are met. Here we are told that when the Noteholders entered into the RSA they expected the restructuring to take place in the Cayman Islands.

1.3 <u>Establishment</u>

a) Definition

Given the benefits of the Scheme being recognised as a "main" foreign proceeding, and the fact it is at least arguable that the Cayman Islands is Globe Holdings' COMI, the foreign representative should seriously consider making an application that it be recognised as such. However, given the uncertainty as to how the US court will view the situation, if it is open to the foreign representative to also apply for recognition as a foreign non-main proceeding in the alternative, this would be wise.

To be recognised as a foreign non-main proceeding, it will still need to be shown that Globe Holdings has an "establishment" in the Cayman Islands. This is defined at Article 2(f) of the MLCBI as "*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."* There is no presumption in the MLBCI as to "establishment" as there is for COMI. It will be a matter of fact for the court to determine.

The definition of "establishment" under the MLCBI was inspired by the EIR. The Virgos-Schmit Report (paragraph 7.1) further explained this definition in the EIR (in the context of a report on the earlier European Convention) in the following terms:

"The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an 'establishment'. A certain stability is required. The negative formula ('non-transitory') aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor."

b) *The Case of Globe Holdings*

The Cayman Islands would appear to meet the "stability" requirement noted in the Virgos-Schmit Report, given that Globe Holdings has had its registered office there since 2010. The position would not be beyond challenge, though, given that most board activity has taken place virtually and it appears there was very little activity in the Cayman Islands prior to the commencement of the Scheme. Further, paragraph 90 of the Guide states that, *"The commencement of insolvency proceedings, the existence of debts, and the presence alone of goods in isolation, of bank accounts or of property would not in principle satisfy the definition of establishment."*

The Digest (p.9-10) lists a number of activities that have been considered by some courts to be insufficient to establish conduct consisting of "non-transitory" activity, including:

- The fact and incorporation and record-keeping;
- Retention of Counsel and accountants; and
- The conduct or pendency of insolvency and similar types of proceeding.

On this basis, it may be that a court would find there is no establishment in the Cayman Islands. However, it is also clear that the Cayman Islands is not merely a temporary arrangement, as the company has been incorporated in Cayman since 2010. There is also at least some degree of "human" activity, as is apparent from the fact that the Chairman of the Scheme Meeting was physically present on the island. The position may, therefore, be finely balanced.

c) *Guidance from Re Modern Land*

As was clear from the US Bankruptcy Court decision in *Re Modern Land*, it is possible for a jurisdiction to be a debtor's COMI but not an establishment. In the *Re Modern Land* case, whilst the US court recognised the Cayman Islands as the debtor's COMI, it found that there was not an "establishment" in the Cayman Islands. This was on the basis, amongst other things, that the Scheme proceedings and book-keeping activities in Cayman constituted "non-transitory" economic activity. Furthermore, the debtor did not engage in the Cayman Islands economy.

"Establishment" is therefore not merely a "fall-back" position in case a main proceeding recognition is refused. On the grounds of *Re Modern Land*, Globe Holdings' position may be such that it is more likely to have a COMI in the Cayman Islands than an establishment. This further supports that there should be applications for both types of recognition in the alternative.

2. PRACTICALITIES OF FILING A RECOGNITION APPLICATION AND PAPERWORK REQUIRED

2.1 Paperwork

Article 15(2) of the MLCBI sets out the paperwork that must accompany an application for recognition. This includes:

a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

Article 15(3) also requires that an application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. On the facts of this case, it does not appear that there are any other such proceedings other than the Cayman Scheme.

2.2 **Recognition**

If the required paperwork under Article 15(2) is filed with the appropriate US Bankruptcy Court (as per the competent court or authority rule under Article 4 MLCBI), then Article 17(1) MLCBI provides that (subject to the public policy exception) the US court shall recognise the Scheme as a foreign proceeding if:

- The foreign proceeding is a proceeding within the meaning of Article 2(a); and
- The foreign representative applying for recognition is a person or body within the meaning of Article 2(d).

Article 16(1) then provides a presumption that if the decision or certificate referred to in Article 15(2) indicates that this is the case, the US Bankruptcy Court is entitled to so presume.

Under the MLCBI, "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."*

There are extensive explanations in the Guide as to what each of these criterion mean. Schemes of Arrangement in the Cayman Islands have been recognised by the US Bankruptcy Courts under Chapter 15 Proceedings (which implements the MLCBI) as being "foreign proceedings" capable of recognition (see, for example, *Re Modern Land*).

Under the MLCBI, “foreign representative” means "*a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding."* It is not clear on the facts who the foreign representative in respect of the Scheme is, but they will need to meet these requirements.

Assuming the Scheme is recognised as a foreign proceeding, it will then be a matter for the US court, under Article 17(2) to determine if it is a foreign main proceeding or foreign non-main proceeding (depending on whether it considers that Globe Holdings has a COMI or establishment in the Cayman islands (or neither).

3. RELIEF

3.1 The foreign representative should consider whether there is any relief that should be applied for at the time of the application for recognition. The types of relief the court can grant under the MLCBI are at Article 19. Such relief must be urgently needed to protect the assets of the debtor or the interests of the creditors.

3.2 **Staying execution against the debtor's assets**

Under Article 19(1)(a), the foreign representative can apply for a stay of execution against the debtor's assets. In practice, the risk here may be small. We are told that the only Scheme Creditors are the Noteholders and that they have voted for the Scheme with an overwhelming majority (over 90%). Further, subject to the provisions of New York law which govern it, the Noteholders are presumably bound by the terms of the Restructuring Support Agreement.

Even, though the original Notes are governed by New York law, *Re Modern Land* was a case where the US Bankruptcy Court recognised a Cayman Islands Scheme of Arrangement as being foreign main proceedings and found that a Scheme which modifies or discharges debts governed by New York law is enforceable. It is likely that Scheme Creditors who dissented are therefore still bound by the Scheme.

Nonetheless, the foreign representative should do a thorough review of Globe Holdings overall liabilities to determine if there are any risks of attempted execution (it is not clear that there are any grounds on which any party could attempt to execute against the assets of Globe Holdings at this stage).

Article 19 does not provide for a stay of the commencement of proceedings, only a stay of execution (as confirmed in, for example, the US case of *Halo Creative & Design Limited v Comptoir des Indes Inc.*, case No. 14C 8196 (N.D. Ill Oct. 2, 2018). Therefore, to the extent an aggrieved Noteholder attempts proceedings in New York, the foreign representative may have to wait until recognition to deal with this.

3.3 **Sale of headquarters**

Under Article 19(1)(b) another types of relief the court can grant is: *"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."*

This could be relevant to the sale of the New York headquarters. If it were the case that the premises or land were at risk of devaluation (or it was otherwise in jeopardy) there may be grounds for this emergency relief, but absent these conditions, the foreign representative would not be able to take control of the sale process. This may not be an issue in a "friendly" restructuring where the party responsible for the sale can be trusted to obtain a fair price for the asset.

Note that the above assumes that the company owns the headquarters and that the "third party" selling the headquarters referred to above is a real estate agent, as we are told that the sale of the headquarters is intended to ease financial stress for the company (suggesting this is not a case of an independent landlord selling the property).

3.4 **Class action**

We do not know enough about the class action yet to be able to advise whether anything can be done at this stage. As noted above, Article 19 does not provide for a stay of the commencement of proceedings, only a stay of execution (although the Digest (p.59) emphasises that Article 19 uses the word "including" before listing possible types of relief, opening the door to wider relief.

Furthermore, Article 7 of the MLCBI states, *"Nothing in this Law limits the power of a court or […] to provide additional assistance to a foreign representative under other laws of this State."* It may be that there are New York State (or US federal) laws that can assist.

It is not even clear from the information that the class action is against Globe Holdings *per se.* Rather, given that Globe Holdings operates in the automobile insurance industry, these may well be claims where Globe Holdings will be a participant in proceedings in its capacity as insurer. The foreign representative may need to consider whether Globe Holdings (or other companies within the group) are subject to any specific regulatory regime, especially where there may be a large contingent liability as a result of a class action.

Excellent.. Very well-structured essay.. Missing discussion on Art. 20 and 21 MLCBI.

*** End of Assessment ***

Marks awarded: 36 out of 50