



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

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

## **ANSWER ALL THE QUESTIONS**

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

### **QUESTION 1 (multiple-choice questions) [10 marks in total] 7 marks**

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

#### **Question 1.1**

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

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

#### **Question 1.2**

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

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

Choose the correct answer:

- (a) **Options (i), (ii), (iii), (iv) and (vi).**
- (b) Options (i), (ii), (iii) and (iv).
- (c) Options (ii), (iii), (iv) and (vi).

- (d) All of the above.

**Question 1.3**

Which of the following statements incorrectly describe the MLCBI?

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

Choose the correct answer:

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

**Question 1.4**

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

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

Choose the correct answer:

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

**Question 1.5**

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

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

Choose the correct answer:

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

#### Question 1.6

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

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

#### Question 1.7

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

- (i) The increased risk of fraud by concealing assets in foreign jurisdictions.

- (ii) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (iii) To eradicate the use of comity.
- (iv) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

Choose the correct answer:

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

#### Question 1.8

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

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

Choose the correct answer:

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

#### Question 1.9

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

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

Choose the correct answer:

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

#### Question 1.10

Which of the statements below are correct under the MLCBI?

- (a) The foreign representative always has the powers to bring avoidance actions.
- (b) The hotchpot rule prioritises local creditors.
- (c) The recognition of a foreign main proceeding is an absolute proof that the debtor is insolvent.
- (d) None of the above are correct.

#### QUESTION 2 (direct questions) [10 marks in total] 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 MLCBI and the European Union Insolvency Regulation (the "EIR") is its legal status and application to States.

The European Union Insolvency Regulation (the "EIR") is a form of secondary EU law. Article 288 of the Treaty on the Functioning of the European Union provides that Regulations are "*binding in their entirety and are directly applicable in all European Union (EU) Member States*".<sup>1</sup> Therefore, Member States of the EU, such as France, would not need to pass local legislation to give effect to the EIR in France, because the EIR is binding upon all EU institutions, Member States and the individuals to which it applies automatically and immediately upon the EIR entering into force.

By contrast, the MLCBI is a form of "soft law", i.e. a mere recommendation to States to incorporate the Model Law into its national law.<sup>2</sup> For example, should France wish to adopt the MLCBI, it would need to pass local legislation to incorporate all or part of the MLCBI into French law.

Advantages of adopting Regulations, such as the EIR include:

1. time and cost savings in not having to legislate locally;

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<sup>1</sup> <https://eur-lex.europa.eu/EN/legal-content/glossary/regulation.html>

<sup>2</sup> INSOL Guidance, Module 2A, page 7, footnote 21.

2. achieving some degree of harmonisation of laws across various jurisdictions simultaneously; and
3. the Regulation in question may provide individuals with rights and obligations that can be enforced before national courts.<sup>3</sup>

Disadvantages of adopting Regulations / the EIR include:

1. a purported reduction in State sovereignty (since the States' legislative process is not involved in nor required to give effect to the Regulation / EIR); and
2. the difficulty in achieving harmony across all Member States due to:
  - a. differences in legal regimes to which the Regulation / EIR would apply;
  - b. the possibility that local courts could interpret and apply the Regulation / EIR differently; and
  - c. the ability of Member States to pass legislation regarding the same subject matter as the Regulation / the EIR.

Advantages of adopting Model Laws, such as the MLCBI include:

1. safeguarding State sovereignty (since local law will be required to adopt the Model Law / MLCBI in whole or in part);
2. States adopting the Model Law / MLCBI will benefit from the research and approval of various institutions and bodies involved in developing the Model Law / MLCBI (such as INSOL, the ABA and UNCITRAL Working Group V);
3. the ability to adopt the Model Law in whole or part and/or to supplement the Model Law / MLCBI with national laws; and
4. the MLCBI in particular contains public policy safeguards and considerations, meaning local nuances will be taken into account in applying the MLCBI in a foreign jurisdiction.

Disadvantages of adopting Model Laws include:

1. the fact that there is no requirement for States to adopt the Model Law / MLCBI means it is not binding and is only of persuasive effect;
2. as the MLCBI does not deal with substantive insolvency law, significant differences in the treatment of cross border insolvencies may continue to exist; and
3. because adopting States do not need to notify the UN or another State that it has adopted the MLCBI, there may be some uncertainty as to the applicable regime in a given jurisdiction.

### **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.

Article 21 MLCBI provides the Court with a discretion to grant "any appropriate" post-recognition relief upon an application by a foreign representative (as defined in Article 2 MLCBI) supported by evidence. The foreign representative must satisfy the Court that such relief is "necessary to protect the assets of the debtor or the interests of creditors" – this is primarily what the Court will consider in determining whether to exercise its discretion and to grant the requested (or other) relief, or to decline to exercise its discretion and grant no discretionary relief to the requesting party. This is

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<sup>3</sup> <https://eur-lex.europa.eu/EN/legal-content/glossary/regulation.html>



sometimes referred to as a 'balancing of interests' exercise, having regard to the interests of the creditors, the debtor and other interested parties (Article 22 MLCBI).<sup>4</sup>

The tests of necessity and appropriateness must be satisfied by applicants (see the IBA Court of Appeal case) seeking to obtain discretionary relief.<sup>5</sup>

Justice Morgan in the English decision of Fibria Celulose S/A v Pan Ocean Co Ltd and another<sup>6</sup> cautioned against giving the phrase "any appropriate relief" in Article 21 MLCBI too broad a meaning, noting that the purpose of Article 21 of the MLCBI was not intended to allow the recognising court to venture beyond the relief it would grant in relation to a domestic insolvency. Therefore, the relief available under domestic law is a factor the Court will consider when dealing with applications under Article 21 MLCBI. For example, the ability of the IBA to have promoted a parallel scheme of arrangement in the UK (but their decision not to) under the UK CIGA 2020 was a factor considered by the English Court of Appeal in the IBA decision.

Specifically, the enacting State has broad discretionary powers under Article 21(1)(a)-(g) (which is non-exhaustive in nature) to:

1. stay the commencement or continuation of individual actions or proceedings regarding the debtor's assets, rights, obligations or liabilities;
2. stay the execution against the debtor's assets;
3. suspend the right to transfer, encumber or otherwise dispose of any assets of the debtor; and/or
4. permit the examination of witnesses, taking of evidence or the provision of information regarding the debtor's assets, affairs, rights, obligations or liabilities;
5. placing the administration or realisation of all or part of the debtor's assets in the enacting State to the foreign representative or other authorised person;
6. continuing the application of any interim relief already granted; and/or
7. granting any additional relief available under the law of the enacting State.<sup>7</sup>

The Court will have regard to the applicable safeguards in Article 21(2) (applicable to both foreign main and foreign non-main proceedings) and Article 21(3) (applicable only to foreign non-main proceedings).

When considering an application under Article 21 MLCBI, the Court / parties will first need to identify which asset(s) of the Company and/or interest(s) of creditors are in issue. Overall, any relief granted must adequately protect the asset(s) or interest(s) in question.

In order to achieve this, the enacting State may condition the grant of any discretionary relief, as deemed appropriate in the circumstances.<sup>8</sup> In addition, any discretionary relief granted can be modified or terminated upon the request of the foreign representative or other affected person under Articles 22(2) and 22(3) MLCBI, although it should be noted that any relief granted is assumed to terminate upon the end of the foreign proceeding (at least, this is the approach in England).<sup>9</sup>

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

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<sup>4</sup> INSOL Guidance, Module 2A, page 42.

<sup>5</sup> [2018] EWCA Civ 2802.

<sup>6</sup> [2014] EWHC 2124.

<sup>7</sup> INSOL Guidance, Module 2A, pages 31-32.

<sup>8</sup> UNCITRAL Digest on Case Law, page 65.

<sup>9</sup> UNCITRAL Digest on Case Law, page 42; IBA Court of Appeal decision Ibid.

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

Article 13 MLCBI provides foreign creditors with access to a local proceeding regarding a debtor under the insolvency law of the enacting State. Specifically, the anti-discrimination provision in Article 13 means:

1. foreign creditors have the same rights as domestic creditors to commence and to participate in the local proceedings; and
2. the ranking of foreign creditor's claims is unaffected, save for the fact that Article 13 sets a minimum ranking for foreign creditors claims as general unsecured claims (with certain exceptions, such as certain claims for financial penalties or fines).<sup>10</sup>

Article 13(1) states: "Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [the laws of State A] as creditors in this State."<sup>11</sup>

Article 13(2) states: "Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [State A], except that the claims of foreign creditors shall not be ranked lower than [the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim.]<sup>12</sup>

It should be noted that an enabling State may deny the recognition of foreign tax and social security claims and not fall foul of Article 13 (i.e. by adopting the text in the footnote to Article 13 when transposing the MLCBI into national law).<sup>13</sup>

Affording foreign representatives and creditors with access to the Courts is one of 4 key concepts of MLCBI.

#### **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 distinction is whether automatic relief will be available to a creditor or representative under Article 20 MLCBI upon recognition of a foreign proceeding by an enacting State.

Assuming that the foreign proceeding and foreign representative in question fulfill the requirements of Articles 2 and 17(2), and there are no grounds to invoke the public policy exception in Article 6 MLCBI, the Court in the enacting State will need to assess if the foreign proceeding in question is a foreign main or foreign non-main proceeding under Article 17(2), as the relief available differs.

#### **Foreign Main Proceedings and Automatic Relief**

- A foreign main proceeding means: a foreign proceeding occurring in the State where the debtor has its COMI (MLCBI, Article 2(a)).
- COMI is not defined in the MLCBI, however, the UNCITRAL Guide to Enactment, pages 70 to 72 identifies the following factors to consider:
  - the location where the central administration of the debtor takes place; and

<sup>10</sup> INSOL Guidance, Module 2A, page 22; UNCITRAL Digest on Case Law, page 33.

<sup>11</sup> UNCITRAL Digest on Case Law, page 33.

<sup>12</sup> Ibid.

<sup>13</sup> Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 46, 48], CLOUT 1332.

- which is readily ascertainable by the creditors of the debtor.

If having considered all relevant factors holistically, a debtor's COMI is the State in which the foreign proceeding commenced, then that proceeding is a "foreign main proceeding" for the purposes of Article 2(a) MLCBI. As a result, a creditor or representative will enjoy the benefits of automatic relief under Article 20 MLCBI upon recognition of the foreign main proceeding and may also be granted discretionary post-recognition relief by the Court under Article 21 MLCBI, if the pre-conditions are satisfied and the Court deems such relief to be appropriate and necessary.

Article 20 provides:

- (1) "Upon recognition of a foreign proceeding that is a foreign main proceeding:
  - a. Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights 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.
- (2) The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to [the law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or terminations in respect of the stay and suspension referred to in paragraph 1 of this article.]<sup>14</sup>

In practice, the relief granted to foreign representatives under Article 20 means:

- (1) The automatic stay under Article 20(1) has been interpreted by the Australian and US courts as lasting until the foreign proceeding is closed.<sup>15</sup>
- (2) Article 20(2) does not preclude a foreign representative from taking steps to preserve a right to enforce security over the debtor's property and/or to repossess goods.
- (3) Article 20(3) enables a foreign representative to commence individual actions or proceedings to preserve a claim(s) against a debtor, however, the stay operates so as to preclude any further action being taken against the debtor.<sup>16</sup>
- (4) Under Article 20(2), the enacting State has the ability to modify or terminate any automatic stay or suspension, if it would be contrary to the legitimate interests of a party in interest.

Unlike Articles 19 and 21, there is no pre-condition that the Court is satisfied that any automatic relief adequately protects the interests of the debtor's creditors or other interested parties. Instead, the relief / state of affairs outlined in Article 20(1) applies automatically by operation of law upon recognition of the foreign main proceeding and that relief cannot be modified or terminated under Article 22(3).<sup>17</sup>

### **Discretionary Relief in both Foreign Main and Foreign Non-Main Proceedings**

Regarding discretionary, post-recognition relief, Article 21 provides:

"1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

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<sup>14</sup> UNCITRAL Digest on Case Law, page 60.

<sup>15</sup> Yakushiji (No. 2) [2016] FCA 1277 [paras. 21–22]; Daewoo Logistics Corp., 461 B.R. 175, 179 (Bankr. S.D.N.Y. 2011), CLOUT 1315.

<sup>16</sup> UNCITRAL Digest on Case Law, page 61.

<sup>17</sup> UNCITRAL Digest on Case Law, page 60.

- (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;
  - (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;
  - (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;
  - (d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
  - (e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
  - (f) Extending relief granted under paragraph 1 of article 19;
  - (g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State [i.e. the enacting State].
2. 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.
  3. 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. (emphasis added)

As outlined above (as well as in my answer to question 2.2 above), the enacting State has broad discretionary powers at Article 21(1)(a)-(g) (which is non-exhaustive in nature), having regard to the applicable safeguards in Article 21(2) (applicable to both foreign main and foreign non-main proceedings) and Article 21(3) (applicable only to foreign non-main proceedings). Moreover, the enacting State may condition the grant of any discretionary relief, as deemed appropriate in the circumstances.<sup>18</sup>

Any discretionary relief granted can be modified or terminated upon the request of the foreign representative or other affected person.

#### **Foreign Non-Main Proceedings and Discretionary Relief**

By contrast, a foreign non-main proceeding means: a foreign proceeding occurring in a State where the debtor does not have its COMI, but instead has an "establishment" (Article 2(b) MLCBI). "Establishment" is defined at Article 2(f) MLCBI as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."<sup>19</sup>

When determining the type of proceeding, the COMI and establishment of a debtor should be reviewed as of the date of commencement of the foreign proceeding (though certain US and UK courts

<sup>18</sup> UNCITRAL Digest on Case Law, page 65.

<sup>19</sup> Note that this definition is similar to that in the EIR, Article 2(10): [REGULATION \(EU\) 2015/ 848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL - of 20 May 2015 - on insolvency proceedings \(europa.eu\)](#)

have recently adopted an alternative approach, namely the date of filing the petition for recognition).<sup>20</sup>

If the proceeding is a foreign non-main proceeding, no automatic relief is available under Article 20 MLCBI, however, a creditor or representative may be granted discretionary post-recognition relief by the court under Article 21 MLCBI, as outlined above.

Factors considered by the Court in determining whether to exercise its discretion and grant post-recognition relief include:

- i. Whether the interests of local creditors are adequately protected (Article 21(2)); and
- ii. Ensuring that any relief granted in foreign non-main proceedings would not interfere with the administration of another insolvency proceedings, such as the main proceeding (Article 21(4)).<sup>21</sup>

### **Rights available to all Foreign Representatives**

For completeness, it should be noted that upon a foreign main or foreign non-main proceeding being recognised by the enacting State, foreign representatives have the following rights:

- (1) Standing to commence action(s) to protect the interests of creditors of the debtor, i.e. claw back actions or actions regarding antecedent transactions (Article 23 MLCBI); and
- (2) The ability to intervene in local proceedings in the enacting State to which the debtor is a party, provided the foreign representative satisfies the requirements of the enacting State (Article 24 MLCBI).

In certain circumstances, interim relief may be available to creditors or representatives in either a foreign main or foreign non-main proceeding, where there is an urgent need for relief where an application for recognition of the foreign proceeding has been made but is pending determination. Examples of interim relief include: the grant of a search warrant, the termination of unfavourable contracts, the restriction of taking steps detrimental to a creditor, etc.<sup>22</sup>

In the event an insolvency proceeding is neither a foreign main proceeding, nor a foreign non-main proceeding, that proceeding cannot be recognised pursuant to the provisions of the MLCBI. Therefore, a creditor or representative must commence local insolvency proceedings in order to seek a form of relief or must rely upon other forms of co-operation with foreign courts and foreign representatives.

## **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.

Article 2(b) MLCBI defines a "foreign main proceeding" as: "a foreign proceeding taking place in the State where the debtor has the centre of its main interests" (i.e. "COMI").

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<sup>20</sup> Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd (2nd Cir Appeals Apr. 16, 2013); Re Toisa Limited (unreported, 29 March 2019); INSOL Guidance, Module 2A, page 29.

<sup>21</sup> INSOL Guidance, Module 2A, page 32.

<sup>22</sup> UNCITRAL Digest on Case Law, page 59.

COMI is not defined in the MLCBI, however, the UNCITRAL Guide to Enactment, pages 70 to 72 identifies the following factors to consider:

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

As the debtor's COMI is in Germany, the foreign main proceedings must have been filed in Germany. It is assumed for the purpose of this answer that the opening of the foreign main proceeding in Germany was successful.

Article 2(c) MLCBI defines a "foreign non-main proceeding" 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 sub-paragraph (f) of this article."

Article 2(f) MLCBI defines "Establishment" as: "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services." The determination of a debtor's establishment is a purely factual question, depending on the evidence before the Court.<sup>23</sup>

We are instructed that the debtor's establishment is in Bermuda and therefore the foreign non-main proceedings must have been filed in Bermuda. It is assumed for the purpose of this answer that the opening of the foreign non-main proceeding in Bermuda was successful.

Regarding the recognition proceedings in the US, it is assumed that two applications were issued to the relevant US court to recognise: (i) the German foreign main proceedings; and (ii) the Bermudan foreign non-main proceedings, under Article 17 MLCBI.

Article 17(3) MLCBI states that an application to recognise foreign proceedings must be determined as early as possible. Provided that:

1. the foreign proceedings satisfy the definitions in Article 2(a) (which we are told they do);
2. the requirements of Article 15(2) MLCBI and Article 16 MLCBI are satisfied for each application; and
3. there is no public policy reason not to recognise the foreign proceedings in the US,

then both the foreign main and foreign non-main proceedings will be recognised in the US.

Article 15(2) MLCBI requires each application for recognition to contain:

- (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;
- (b) a certificate from the foreign court confirming 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.

In this case, it is assumed that: (i) separate applications were filed with the relevant US court for each foreign proceeding,<sup>24</sup> (ii) the requirements of Article 15(2) were satisfied for each application; and (iii) no reason against US public policy precludes the US court's recognition of both foreign proceedings,

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<sup>23</sup> UNCITRAL Digest on Case Law, page 9, paragraph 25.

<sup>24</sup> In accordance with *British-American Insurance Co., Ltd.*, 425 B.R. 884, 889 (Bankr. S.D. Fla. 2010), CLOUT 1005.

the result being that recognition of the foreign proceedings would follow in accordance with Article 17 MLCBI.

That said, any decision of the US court to recognise a foreign proceeding can be modified or terminated later on, under Article 17(4) MLCBI, and therefore it does not have indefinite effect.

In terms of hierarchy of the concurrent foreign proceedings, primacy is given to the German foreign main proceeding over the Bermudan foreign non-main proceeding under Article 30(a) and (b) MLCBI.

The consequences of the US court recognising the foreign proceedings is as follows:

1. Recognition will not preclude the opening of a domestic insolvency proceeding, if the debtor has assets in the US State in question;
2. The US court may have to review and modify or terminate the relief in effect in the Bermudan foreign non-main proceeding, if inconsistent with any relief granted under Articles 19 or 21 MLCBI in the German foreign main proceeding.

Overall, the recognition of these proceedings aims to achieve, among other things, the fair and efficient administration of cross border insolvencies, protecting the interests of all creditors and other interested persons, including the debtor.<sup>25</sup>

Very good response. Would have been perfect with the mention of Art.6 MLCBI public policy exception. However, full marks are awarded.

### Question 3.2 [maximum 3 marks] 1 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.

The joint provisional liquidators ("JOLS") fall within the definition of "foreign representatives" in Article 2(d) MLCBI, which states: "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." Therefore, the JOLs have standing to commence the recognition proceedings in the US.

First, it is presumed that the foreign proceeding for which recognition is sought in the US is current or pending at the time of the relevant US Court's recognition decision, in order for those proceedings to be capable of recognition under the MLCBI (Article 17(2) MLCBI).

As the claim against the JOLs was issued after the recognition application was filed but before a determination has been made by the relevant US court, they may, as a "foreign representative" apply for urgent, interim relief from the court under Article 19 MLCBI.

Depending on the facts of the case and the evidence provided in support of the application for relief, the "foreign representative" could be the foreign debtor that is the counterparty to the contract(s) in question,<sup>26</sup> or the JOLs.

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<sup>25</sup> MLCBI Preamble paragraph (c); INSOL Guidance, Module 2A, page 12.

<sup>26</sup> cf. Daymonex Limited (Bankr. S.D. Ind, Feb. 7, 2007), CLOUT 757

The need for interim relief arguably arises because the dispute regarding the contract between US-based vendors and the foreign debtor impacts the rights and obligations (i.e. the legal interests) of the foreign debtor, which could impact the administration of the estate or liquidation in question.

Whether any interim relief will be granted by a court under Article 19 MLCBI is entirely at the discretion of the court. If the relief sought is deemed: (i) to be necessary and (ii) to adequately protect the interests of the creditors and other interested persons, including the debtor, the court may order any of the following types of interim relief in this case:

1. Staying execution against the debtor's assets (Article 19(1) MLCBI);
2. Any relief available under Article 21(d) MLCBI regarding the provision of information concerning the debtor's assets rights, obligations or liabilities; and
3. Any additional relief that may be available to the court under Article 21(g) MLCBI.

Here, the JOLs ought to request that the court grant "any additional relief" in the form of staying the proceedings issued against the JOLs for tortious interference with contract rights of the US-based vendors of the foreign debtor.

It should be noted that the Court may decline to grant interim relief to the foreign representative if to do so would interfere with a foreign main proceeding pursuant to Article 19(4) MLCBI (note, based on the facts provided, it is not known if the foreign proceeding is a foreign main proceeding or foreign non-main proceeding).

If any interim relief were granted by the court under Article 19, that relief would automatically terminate upon the recognition of the foreign proceedings. However, it would be open to the court to extend the relief under Article 21(1)(f) MLCBI.

In the circumstances, and based on the limited facts available, it appears that the JOLs would be able to satisfy the requirements of urgent interim relief. If the recognition application filed by the JOLs itself is the purported tortious interference with the debtors' / third parties' contract, this is unlikely to satisfy the elements of that tort, i.e. if this action proceeded to trial against the JOLs, it is (without more / standing alone) unlikely to succeed.

In addition, it would be prudent for the foreign representative to inform the US court of: (i) the issuance of the claim against the JOLs and (ii) the discovery received regarding the same, to ensure that the court is appraised of all relevant factors when determining the recognition application.

**The answer relates to Art. 10 MLCBI (not (interim) relief).**

**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 issue is how the recognising court (i.e. the US court) would treat ipso facto clauses in certain leases and intellectual property licences to which the debtor is a party or a license holder, when those clauses are unenforceable under its laws (i.e. pursuant to the US Bankruptcy Code), but are enforceable under the law of the foreign State (i.e. the UK).<sup>27</sup>

The risk to the foreign representative / the debtor is that counterparties to the US law governed leases and/or the grantors of the intellectual property licenses may seek to trigger the ipso facto clauses by virtue of the on-going debtor-in-possession-like restructuring proceeding in the UK, with the effect that those leases and licences may terminate, possibly causing loss to the debtor's estate or otherwise frustrating the restructuring process itself. Therefore, it is assumed that it is in the foreign representative's interest for the ipso facto clauses to be found to be unenforceable, so that the debtor's estate can continue to enjoy the benefit(s) of the leases and licenses in question.

To achieve this, the foreign representative may apply to the US Bankruptcy Court in the relevant State to seek a Declaration that the ipso facto clauses in the US law governed leases and licenses are unenforceable, because those clauses seek to terminate or modify the contractual relationship due to the filing of a bankruptcy / similar petition in violation of section 365(e) of the US Bankruptcy Code 1978. Further, section 541(c) US Bankruptcy Code provides that any interest of the debtor in property (i.e. the leases and licences) "becomes the property of the estate...notwithstanding any provision in an agreement...that is conditioned...on the commencement of a case under this title...and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property."

Even if a foreign representative or other interested party were to apply to the US court for relief under Articles 21(1)(a) and 21(1)(g) MLCBI, following the approach of the UK court in the Pan Ocean decision (which is persuasive only / not binding), the foreign representative can take comfort from the fact that the US court is likely to find that the ipso facto clauses are unenforceable. This is because:

1. Article 21(1)(a) relief, i.e. a stay on "the commencement or continuation of individual actions or individual proceedings": the US court would not have the power to restrain the counterparty to the leases or the holders of the licenses from serving termination notices. However, serving a termination notice does not amount to the commencement or continuation of an action or proceeding (i.e. it is not the service of a claim form, for example).
2. An application for 'appropriate relief' under Article 21(1)(a), i.e. to make available the relief that would have been available under UK insolvency law (i.e. to recognise and give effect to the ipso facto clauses / termination of the leases and licenses). Adopting the approach of Pan Ocean, the US court is likely to find that "appropriate relief" does not extend to enable it as the recognising court to go beyond the relief it would grant in a domestic insolvency (i.e. applying the US Bankruptcy Code and finding the ipso facto clauses to be unenforceable).
3. The parties to the leases and license US-law governed agreements would not expect the US court to apply UK insolvency law (i.e. to find that the ipso facto clauses are enforceable).
4. The validity of ipso facto clauses is a policy decision. As the UK Supreme Court found in the Belmond Park decision at paragraph 174, "*any rule invalidating ipso facto termination clauses ought to be a matter for legislative attention, rather than novel common law development.*" On the facts provided, there is no good reason for the US court to prefer the UK policy

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<sup>27</sup> In Belmond Park v BNY Corporate Trustee Services Ltd [2011] UKSC 38 the UK Supreme Court held ipso facto clauses are, in principle, valid and enforceable in a UK insolvency (see UNCITRAL Guidance, page 36).

decision (i.e. ipso facto clauses are enforceable) over the policy decision of its own legislature (i.e. ipso facto clauses are unenforceable).

That said, the foreign representative may also apply to the US court for interim relief while its US recognition application is pending under Article 19, for provisional relief:

1. (1)(a) staying execution against the debtor's assets; and/or
2. 1(c) for any relief mentioned in Article 21(g), namely the "granting of any additional relief under the foreign representative under the laws of the US.

Whether interim relief would be granted lies at the discretion of the US court and any such relief must "not interfere with the administration of a foreign main proceeding" (i.e. this is assumed to be the UK restructuring proceeding), Article 19(4) MLCBI; or

As the recognition application will not be heard until 35 days after the petition, the foreign representative is strongly encouraged to apply for interim relief during this period.

### **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?

We are informed that the purpose of the foreign representative's recognition application in country B is to enable them to sell certain assets located in country B.

It is assumed that the application for the insolvency proceeding that is pending (i.e. is 'taking place' for the purposes of Article 17(2)(a) MLCBI) in country A to be recognised in country B as a 'foreign main proceeding' failed because the foreign debtor only has its registered office there and "not much more", i.e. the debtor was found not to have its centre of main interests in country A as of the date of commencing the foreign insolvency proceeding,<sup>28</sup> as is required under Article 17(2)(a).

Although Article 16(3) MLCBI contains a presumption that the location of a debtor's registered office is the place of its COMI, this presumption may be rebutted by evidence and it is assumed that this was the case here.

In order for the pending insolvency proceeding to be recognised as a 'foreign main proceeding' it would require:

1. The definitions of 'foreign proceeding' and 'foreign representative' in Article 2(a), (d) MLCBI to be satisfied;
2. Article 6 MLCBI, public policy exception not to be engaged on the facts of the case;
3. The recognition application must satisfy the procedural requirements set out in Article 15 MLCBI; and
4. The foreign proceeding is taking place in the State where the debtor has the centre of its main interests under Article 17(2)(a).

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<sup>28</sup> UNCITRAL Digest on Case Law, page 48, paragraph 3.

The application in question could have fallen foul of either of the above requirements.

#### Alternative Options

Unfortunately, the facts provided are not sufficient to reach a conclusion as to where the debtor's COMI is or whether it has an "establishment" (i.e. any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services" under Article 2(f) MLCBI) in either country A or B. We are told that "certain assets" are located in country B.

**Option 1:** The foreign representative could seek the co-operation of the courts in country B under Articles 25 and 27 of the MLCBI. Helpfully, recognition of the insolvency proceedings in country A is not a precondition to the foreign representative exercising their rights under these Articles. Moreover, the cooperation available under Article 25 extends to foreign proceedings that would not be capable of recognition as either foreign main or foreign non-main proceedings (as is the case here (see above and below commentary). In addition, and as discussed below, Article 28 enables the foreign representative to extend the proceedings in country A to reach the assets in country B.

Article 25(1) MLCBI provides: "In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives..." As such, the foreign representative or courts in country A may communicate directly with or request information and assistance from the courts in country B.

Article 27 MLCBI provides a non-exhaustive list of types of cooperation that may be open to the foreign representative including: (i) the co-ordination of the administration and supervision of the debtor's assets and affairs, (ii) the appointment of a person in country B to act at the direction of the court and (iii) any additional form of cooperation that the courts in country B may wish to provide.

Moreover, Article 28 MLCBI enables the domestic proceedings in country A to be extended to include the foreign assets in country B, on condition that (i) this extension is necessary to implement the cooperation and co-ordination under Article 25 MLCBI outlined above and (ii) the assets in country B are administered in accordance with the local law of country B.

Therefore, Articles 25, 27 and 28 MLCBI may provide an alternative avenue for the foreign representative in either gaining more information regarding the assets in country B or selling those assets in country B. The foreign representative is encouraged to consider this option.

**Option 2:** As the foreign representative has been appointed in country A, it has standing under Article 11 of MLCBI to open domestic insolvency proceedings in country B, provided that the local law requirements for commencing such a proceeding are met. The terms of Article 11 MLCBI and UNCITRAL Digest on case law is clear that the insolvency proceedings in country A need not be recognised in country B to exercise this right.<sup>29</sup> Assuming that the foreign representative satisfies the local law requirements, they may be able to sell the assets in country B as part of that insolvency proceeding / the administration of the debtor's estate.

**Option 3:** Although the foreign representative may consider filing a recognition application for the insolvency proceedings in country A to be recognised in country B as a foreign non-main proceeding, based on the facts provided, this would not be advisable. The presence of a "registered office" alone in country A is unlikely to satisfy the definition of an 'establishment', which is a precursor for recognizing the foreign proceedings in this manner (see Article 17(2)(b)). Under Article 17 MLCBI, if neither the COMI nor an establishment of the debtor exists in country A, then the courts in country B must deny the recognition application. Therefore, it is unlikely that any such

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<sup>29</sup> UNCITRAL Digest on Case Law, page 31.

application would be successful, meaning the foreign representative would not be able to use this avenue to sell the assets based in country B.

What the foreign representative should done from the outset

The foreign representative could have considered first opening the insolvency proceedings in country B (where certain assets of the debtor are present) prior to (or as an alternative to) commencing the proceedings / pursuing their appointment in country A. The foreign representative would need to satisfy any local laws of country B in order to do so. Assuming that they were able to do so, the facts provided do not indicate a need for such an insolvency proceeding in country B to be recognised in country A, since the foreign representative wishes to be able to sell certain assets in country B. The viability of this option depends on the local law constraints / requirements.

As mentioned above, the foreign representative could have sought cooperation of the courts in country B under Articles 25, 27 and 28 MLCBI and/or commenced domestic insolvency proceedings in country B under Article 11 MLCBI.

**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.

We are informed that the client wishes to safeguard the successful restructuring of Globe Financial Holdings Inc (a Cayman Islands incorporated entity, whose shares were listed the NASDAQ stock market prior to 6 November 2020; the "Company")), which has been found to be both cash flow and balance sheet insolvent. Based on the facts provided, no Winding Up Petition appears to have been filed against the Company. As part of the Company's restructuring efforts:

1. a Restructuring Support Agreement was entered into by the Company and c. 57% of the Noteholders on 31 August 2021 (the "RSA") (agreeing certain terms to delay the payment of interest to Noteholders and to restructure the US-law governed 6.625% senior unsecured notes due in 2023);
2. in accordance with the RSA, a Cayman Islands Scheme was put into place, which has been sanctioned by the Cayman Islands Registrar of Companies; and
3. Chapter 15 recognition proceedings in the US are planned to be commenced, in order for the Scheme to be recognized and enforced in the US, as the Company's operations are ran out of its direct and indirect subsidiaries in the US.

For the purposes of this answer, it is assumed that the various meetings held and approvals obtained are valid effective to implement the Scheme. A filing of a prospective class action in the US is a current risk to the Company and may frustrate the implementation of the Scheme. For example, defending litigation would divert the Company's time and financial resources away from the Company's operations in the US irrespective of the outcome of that litigation. Depending on the type of legal action, the litigation may result in negative publicity for the Company, which could be damaging to the Company's goodwill, as well. The below analysis considers the filing strategy of the Company, the documentation required to be prepared and the relief that the Company ought to seek immediately.

#### Recognition of the Cayman Proceedings in the US

Article 2(a) MLCBI defines "foreign proceeding" as "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 reorganisation or liquidation."

The Cayman insolvency related proceedings that resulted in the issuance of the Sanction Order satisfies this definition because the Sanction Order restrains the Company's actions and regulates the distribution of the Company's assets (for e.g. payments of interest to Noteholders "in kind").

Before filing an application before the US court requesting it recognize the Cayman proceedings, the Company must carefully consider the type of foreign proceeding the Cayman proceedings is.

#### a. Foreign Main Proceeding?

In order to be considered a "foreign main proceeding" it must satisfy the definition in Article 2(b) MLCBI, which defines this as "a foreign proceeding taking place in the State where the debtor has the centre of its main interests" (i.e. "COMI"). Although COMI is not defined in the MLCBI, the following factors are key to determining COMI:

1. The location where the central administration of the debtor takes place; and
2. Which is readily ascertainable as such by creditors of the debtor.

The Company's COMI will be determined as of the date of the commencement of the foreign proceedings (i.e. the Cayman proceedings).

The facts indicate that the Company and its various subsidiaries have both Cayman Islands and US touch points, as outlined in the table below:

Cayman Islands	US	Other
<ol style="list-style-type: none"> <li>1. Company re-incorporated in the US in 2010.</li> <li>2. Cayman legal advisors, Cedar and Woods instructed.</li> <li>3. Bank account recently opened in order to pay certain operating expenses.</li> <li>4. Company's books and records maintained.</li> <li>5. RSA and restructuring Scheme as sanctioned by the Cayman Islands court.</li> </ol>	<ol style="list-style-type: none"> <li>1. Company's shares listed on NASDAQ stock exchange until 6 November 2020.</li> <li>2. Direct subsidiary's operations.</li> <li>3. Indirect subsidiary's operations.</li> <li>4. Company's headquarter is in New York, including land, building improvements, furniture, fixtures, etc.</li> <li>5. 6.625% senior unsecured notes issued on SEC stock exchange in April 2017, which are New York law governed.</li> <li>6. All employees based in the US.</li> <li>7. RSA is New York law governed.</li> <li>8. Company's SEC filings (including 10-k form), which are publicly available.</li> </ol>	<ol style="list-style-type: none"> <li>1. All regular and special Board meetings occur virtually. It is not known which location is specified in the notes of those meetings.</li> <li>2. Company initially incorporated in Canada, for c. 1 year.</li> </ol>

Although the Company is incorporated in the Cayman Islands, we do not know where its registered office is. The location of its registered office is, under Article 16 MLCBI, presumed to be its COMI in absence of any proof to the contrary.

We are instructed that the Company is a holding company with "no business operations of its own" and that it operates via its direct and indirect subsidiaries in the US. Although the Company has a bank account in the Cayman Islands for limited purposes and maintains its books and records there, the overwhelming factors point to the US being the Company's location of its central administration – for example, all direct and indirect subsidiaries are US based, the headquarters are in New York, all employees are US based and key contracts, including the RSA, are New York / US law governed.

In addition, the location of the bank account and the books and records is not 'readily ascertainable' by creditors or debtors. Conversely, the Company's (prior) listing of its shares and notes on the SEC and NASDAQ exchanges, the public filings in respect of those with US bodies and the operations of the business in the US would be easy for debtors and creditors to identify and to understand as being in the US. Therefore, the Company's COMI is not the Cayman Islands (but rather, the US (perhaps, more

specifically New York, though the location of the various subsidiaries is not known)). As a result, the Cayman proceedings would not satisfy the definition of a 'foreign main proceeding' under Article 2 MLCBI.

b. Foreign Non-Main Proceeding?

Article 2(c) MLCBI defines 'foreign non-main proceeding' as "a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment".

"Establishment" is defined in Article 2(f) MLCBI as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."

As mentioned above, the Company does not have any Cayman Islands based operations. No employees based in the Cayman Islands, thus no "economic activity with human means" is conducted there. Moreover, no goods or services are supplied by the Company in the Cayman Islands. Therefore, the Company is likely not to have an establishment in the Cayman Islands. Under Article 17 MLCBI, only foreign proceedings that are either foreign main or foreign non-main proceedings are capable of recognition.

Documentation Required

Notwithstanding the above analysis, if the Company were to proceed to file an application to recognise the Cayman insolvency proceedings in the US, any application for recognition must:

- (1) satisfy the definitions in Article 2 (as discussed above);
- (2) Article 15(2) MLCBI requires each application for recognition to contain:
  - (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;
  - (b) a certificate from the foreign court confirming 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; and
- (3) there must be no public policy reason not to recognise the foreign proceedings in the US. No such policy reasons come to mind, though this is ultimately a determination for the US court.

Relief

The Company could:

- (1) Issue an application for recognition of the Cayman proceedings (irrespective of the difficulties identified above) and seek interim relief under Article 19 MLCBI, while that recognition proceeding is pending.

The need for interim relief arguably arises because of the possibility of a class action being brought against the Company in the US, which may frustrate the implementation of the Scheme.

Whether any interim relief will be granted by a court under Article 19 MLCBI is entirely at the discretion of the court. If the relief sought is deemed: (i) to be necessary and (ii) to adequately protect the interests of the creditors and other interested persons (i.e. the Noteholders), including the debtor Company, the court may order any of the following types of interim relief in this case:

- a. Staying execution against the debtor's assets (Article 19(1) MLCBI);



- b. Any relief available under Article 21(d) MLCBI regarding the provision of information concerning the debtor's assets rights, obligations or liabilities; and
- c. Any additional relief that may be available to the court under Article 21(g) MLCBI.

Here, the Company ought to request that the court grant "any additional relief" in the form of precluding the commencement of the class action against the Company in the US.

If any interim relief were granted by the court under Article 19, that relief would automatically terminate upon the finalisation of the recognition of the foreign proceedings. However, it would be open to the court to extend the relief under Article 21(1)(f) MLCBI if the Cayman proceedings were in fact recognised by the US court. As it is unlikely that the Cayman proceedings will be recognised as either a foreign main or foreign non-main proceeding, the Company should consider the below alternative forms of relief.

(2) Seek cooperation of the US courts under Articles 25 and 27 of the MLCBI.

A foreign representative of the Company could seek the co-operation of the courts in the US under Articles 25 and 27 of the MLCBI. Helpfully, recognition of the Cayman insolvency proceedings in the US is not a precondition to the foreign representative exercising their rights under these Articles. Moreover, the cooperation available under Article 25 extends to foreign proceedings that would not be capable of recognition as either foreign main or foreign non-main proceedings (as is the case here (see above commentary).

Article 25(1) MLCBI provides: "In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives..." As such, the foreign representative or courts in the Cayman Islands may communicate directly with or request information and assistance from the courts in the US.

Article 27 MLCBI provides a non-exhaustive list of types of cooperation that may be open to the foreign representative including:

- a. Appointment of a person or body to act the direction of the court;
- b. Communication of information by any means considered appropriate by the court;
- c. Coordination of the administration and supervision of the debtor's assets and affairs;
- d. Approval or implementation by courts of agreements concerning the coordination of proceedings; and
- f. any additional form of cooperation that the courts in the US may wish to provide.

Using a combination of the above mentioned forms of relief ((a)-(d), (f)) the Company is advised to prepare an agreement regarding how the Scheme would be implemented in the US via a person or body in the US acting at the direction of the US court. The terms of that agreement could also set out the envisaged coordination of implementing the Scheme and thus the restructuring of the Company in the US. This could provide for an efficient mechanism to engage the assistance of the US courts and an authorised representative(s)' in giving effect to the Scheme.

(3) Seek to extend the Cayman proceedings to cover its US based assets, under Article 28 MLCBI. For example, the Company has assets such as land, the headquarter building and certain furniture and fixtures in its headquarters, and possibly in other sites, too, where its subsidiaries actively operate from, that it may wish to safeguard.

Overall, the relief discussed at (2) and (3) above are most likely to be of assistance to the Company.

c. Recognition of the Sanction Order

The IRJ Model Law provides a mechanism for recognising and enforcing insolvency related judgments issued in a foreign State (i.e. the Cayman Islands Sanction Order).

To date, no State has implemented the IRJ Model Law, however, the following points are mentioned for completeness. First, the Sanction Order is likely to satisfy the definition of an "insolvency related judgment" as it arises as a consequence of or is materially associated with the insolvency proceeding in the Cayman Islands, and the Sanction Order was issued on or after the commencement of that proceeding. Moreover, the Guide to the Enactment of the IRJ specifically lists judgments confirming or varying a plan of reorganisation or liquidation, such as this, as a type of judgment that could be considered to be an 'insolvency related judgment'.<sup>30</sup>

Second, in order for the Sanction Order to be recognised and enforced in the US via IRJ Model Law: (i) the US State in question must have implemented the IRJ Model Law into its own law and (ii) the exception to Article 14(h) must apply (i.e. because the Cayman proceedings are unlikely to satisfy the definition of either a foreign main or foreign non-main proceeding under MLCBI).

Third, if the exception to Article 14(h) is engaged, the US court may recognise and enforce the Sanction Order if:

- a. The judgment is found to be an insolvency related judgment under Article 2(d);
- b. The Sanction Order is effective and enforceable in the Cayman Islands under Article 9;
- c. Recognition is sought by either an insolvency representative or other authorised person in the Cayman proceedings, in accordance with Article 11;
- d. The documentation and evidence specified in Article 11(2) has been provided to the US court;
- e. It would not be contrary to US public policy for the Sanction Order to be recognised (Article 7); and
- f. The Sanction Order is not subject to any grounds for refusal as set out in Article 14, such as fraud, inconsistency with another judgment or interference with insolvency proceedings.

Based on the facts provided, and assuming that (i) the US court would adopt the IRJ Model Law and/or be guided by this system, and (ii) the exception to Article 14(h) applies, there does not appear to be any reason for the US court not to recognise and give effect to the Sanction Order in the US.

d. Commencing Domestic Insolvency Proceedings in the US

It should be noted that, depending on local US State law requirements, it is potentially open to the Company to commence an insolvency proceeding in the US (and in doing so, seek to give effect to the New York law governed RSA and Sanction Order). Concurrent domestic and foreign insolvency proceedings are possible, though the former would be afforded primacy. However, the thrust of the MLCBI is to prevent the need to open multiple insolvency proceedings in countries, and to avoid the associated time and cost in doing so.

Therefore, it would be advisable for the Company to proceed with the avenues to obtain relief available to it (outlined above) to have the Cayman Sanction Order recognised and/or implemented in the US to ensure that the restructuring is a success.

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<sup>30</sup> INSOL Guidance, Module 2A, page 63.

Excellent response, a very good application to the scenario.

**\* End of Assessment \***

**Marks awarded: 45 out of 50 (congratulations!)**