



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] 9 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 Model Law on Cross-Border Insolvency (MLCBI), adopted by UNCITRAL on 30 May 1997, was developed to standardize legal principles/rules on international aspects of insolvency law in multiple jurisdictions. The MLCBI solutions for practical issues arising from instituting insolvency proceedings in more than one jurisdiction by way of a set of recommendations, referred to as “soft law”. The **benefit** is that it doesn’t constitute a convention or a treaty but mere suggestions on how to approach and resolve insolvency law issues across various jurisdictions. The adoption of the MLCBI was a swift 2-year process (work commenced in 1995 and adopted in 1997). The MLCBI is flexible and allows for partial or complete adoption into the domestic (national) laws of a State which could be the only **disadvantage** as its adoption is not compulsory/mandatory and misalignment on application where some States have not adopted the MLCBI. A State incorporating the MLCBI into its national law need not notify the United Nations or any of the States that may have enacted.

The European Council battled for a prolonged period to agree and adopt the Regulation on Insolvency Proceedings (the European Insolvency Regulation or EIR) which is a proposed convention aimed at addressing the discrepancies in the manner different jurisdictions dealt cross-border insolvency matters. In 1995 the proposal on the European Convention on Insolvency Proceedings were unsuccessfully received and attempts to complement the insolvency laws are ongoing as at today. The challenge and **disadvantage** remain the search for a universal principle of insolvency proceedings which is not feasible.

The only **benefit** is that the EIR is not a treaty but the European Union Regulation and immediately (automatically) becomes part of the domestic law of each EU Member States once adopted by a Member State. The concept of the EIR was developed over a period of 40 years. As there were no statutory authorisation, there was great uncertainty amongst the judiciary. Unlike the adoption of the MLCBI, the adoption of an international convention requires the State to notify the United Nations or other States who decreed / authorised the international convention.

Question 2.2 [maximum 2 marks] 2 marks

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

The court in the State where the insolvency proceedings are instituted need to consider and must grant an order for relief on the request of the foreign representative to protect the assets of the debtor or the interest of creditors. This could entail handing over to the foreign representative, all or part of the debtor's assets which is located in the enacting State (State that decreed/authorized the MLCBI) to the extent that the court is content that the local creditors' interest and rights and properly protected and no prejudiced to local creditors. This relief can only of the following:

- (i) A stay on the commencement of individual actions concerning the debtor's assets, rights, obligations or liabilities;
- (ii) A stay on the execution against the assets of the debtor where there was no automatic stay;
- (iii) Suspension of the right to transfer, encumber or dispose of any of the debtor's assets where not suspended already;
- (iv) Allowing for the examination of witnesses, taking of evidence or delivery of information relating to the debtor's assets, rights, affairs, obligations and liabilities.
- (v) Allowing the foreign representative to administer all or part of the debtor's assets in the enacting State
- (vi) Extending any interim relief granted under Article 19(1) of the MLCBI; and
- (vii) Granting additional relief which may be available to a local/domestic liquidator of the enacting State.

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 of the MLCBI (Model Law on Cross-Border Insolvency) outlines specific criteria also referred to as the anti-discrimination principle, for the recognition and enforcement of an insolvency-related judgement. It grants creditors in foreign jurisdictions the same rights as creditors domiciled in the enacting State (State that decreed/authorized the MLCBI) but without altering the ranking of claims in the enacting State. A foreign creditor will therefore not enjoy a lower property claim than that of general unsecured claims on the basis of it being a foreign creditor and they don't have to be concerned about its rights prejudiced. The foreign representative accordingly has access to the same rights and remedies that the local creditors. There is also no need to institute/commence separate proceedings in the enacting State to gain access to the open domestic insolvency proceedings in the enacting State provided that all requirements under Article 11 have been met by the foreign representative.

Question 2.4 [maximum 3 marks] 2 mark

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

A **foreign main proceeding** will be recognised in the jurisdiction where the “centre of main interest” (COMI) of the debtor (insolvent) is. There is however there is no definition for COMI under the MLCBI. In contrast thereto **foreign non-main proceeding** requires a debtor’s “establishment” which is similarly defined in the MLCBI and the ERI as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Once it is found that a foreign proceeding is a “main” proceeding the nature of the relief granted under Article 20 and 21 of the MLCBI where Chapter 4 governs the co-ordination of foreign proceedings instituted in the enacting State and concurrent court proceedings governed by Chapter 5 of the MLCBI.

If a foreign proceeding is not instituted in the debtor’s COMI jurisdiction and if the debtor has no enterprise/business operation in the enacting State, it cannot be recognised as a foreign proceeding under the MLCBI and won’t enjoy the relief applicable.

Only Art. 20 MLCBI concerns foreign main proceedings. To receive full marks, you should also mention the consequences in case the foreign proceeding is recognized as foreign non-main proceedings.

QUESTION 3 (essay-type questions) [15 marks in total] 6 marks

Question 3.1 [maximum 4 marks] 3 marks

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

In terms of Chapter 3 of the MLCBI, the centre of main interest (COMI) of the debtor dictates the jurisdiction where the foreign proceedings will be opened, these are the main proceedings and enjoys automatic relief. The foreign main proceedings in this scenario must be opened in Germany. Should the debtor only have a business enterprise in the jurisdiction where the foreign proceedings commenced, those are the non-main proceedings and enjoys no automatic relief but discretionary post-recognition relief from the court. The foreign non-main proceedings should have commenced in Bermuda under Article 21 of the MLCBI.

The recognition decision process under Article 17 of the MLCBI states that the recognition application must be actioned as soon as possible. If the foreign proceedings take place in Germany (COMI), the foreign proceedings will be recognised as foreign main proceedings. If the debtor only has a business enterprise [establishment?] in the foreign State where the foreign proceedings opened, the foreign proceedings will be recognised in the enacting State as foreign non-main proceedings. The recognition proceedings were filed in the US, the application requires simple conditions for recognition in the enacting State of a foreign proceeding. The benefit of recognition in the enacting State of a foreign proceeding, opened in another foreign State is that there is then no need to open separate insolvency proceedings in the enacting State. The US is not an enacting States and separate insolvency proceedings will have to be opened in each foreign jurisdiction. This comes down to foreign proceedings in a foreign State being treated in the US like they are local insolvency proceedings, opened in the US. This achieves the primary objective of the recognition process, to save time and money and simplify the foreign representatives’ to request appropriate relief without commencing local insolvency proceedings.

The enacting State must be convinced that the interest of the debtors, creditors and other interest parties are protected. The foreign representative obtains the position initiate legal actions under the

law of the enacting State to avoid ineffective legal actions prejudicing the creditors. A further result of the recognition is that the foreign representative can participate in any local proceedings in the enacting State to which the debtor is a party, subject to the foreign representative meeting the local requirements.

Once the foreign main proceedings in Germany have been recognised (Article 20), the following 3 automatic effects:

- (i) Stay on any actions relating to the debtor's assets, rights, obligations and liabilities;
- (ii) Stay of execution against the debtor's assets; and
- (iii) Suspension of the right to transfer or dispose of the debtor's assets.

The automatic consequences allow time to consider next steps for a structured and fair cross-border insolvency proceeding.

Definitional articles should be addressed, eg Art. 2 MLCBI as well as procedural provisions, to include Art. 6, 15 MLCBI. (As a sidenote, please be careful with MLCBI terminology eg business enterprise ≠ establishment - but no points were deducted for that).

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.

The purposes of Article 7 which deals with Additional Assistance under Domestic Laws, of the Model Law on Cross-Border Insolvency (MLCBI) is not to replace the existing cross-border assistance provisions in the legislation of the enacting State. The common law principle of "comity" have been adopted in the United States of America (US) and which focuses on "the recognition which one nation allows within its territory to the legislative, executive or judicial act of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its (US) laws."

To the extent that the foreign representative stand accused of meddling with the rights of US-based vendors of the foreign debtors, whose proceedings have been recognized in the US, the principle of comity comes into play the rights of "its own citizens" must be protected under its (US) laws."

In terms of the US Chapter 15 of the Bankruptcy Code under which the Model Law was enacted it outlines that any "additional appropriate relief" is provided for in section 1507(b) which states that a court, in determining whether to provide additional assistance, it shall consider (i) the protection of claim holders in the US against prejudice and inconvenience in the processing of claims in such foreign proceeding; (ii) prevention of preferential or fraudulent dispositions of property of the debtor and (iii) the distribution of proceeds of the debtor's property in accordance with the order prescribed by this title.

Whereas US based vendors with claims in the insolvent estates and liquidation proceedings stand to be prejudiced in the liquidation proceedings of the foreign debtors, it is anticipated that the court will (i) no longer recognize the standing of the two foreign representatives (liquidators) and (ii) not recognized the foreign non-main proceeding and (iii) this will ultimately leave the foreign debtor without recourse to assets and potential recovery in the US.

This answer should be based on Art. 10 MLCBI.

Question 3.3 [maximum 4 marks] 2 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?

A foreign proceeding by its definition entails elements of:

- A proceeding (can be interim);
- in a foreign State;
- being collective in nature
- judicial or administrative;
- formally authorised or conducted under a form of insolvency law;
- where a foreign court will control and adjudicate the assets and affairs of a debtor; and
- where proceedings are for a reorganisation or a liquidation;

In the matter of *Agrokor*¹ the English court found that “the Lex Agrokor aimed to protect the strength of the economic system against systemic shocks by enabling the restructuring of companies of systemic importance that get into financial difficulty and, if a restructuring failed, by transforming it into a bankruptcy proceeding.” In summary this is referred to as legislation for the purposes of reorganisation or liquidation within the meaning of the Model Law in Great Britain: Cross-Border Insolvency Regulations 2006 (CBIR).

Prior to the recognition of a foreign proceedings in an instance where relief is required as a matter of urgency, to protect the assets of the debtor or the interests of the creditors, the foreign representation may request an order of provisional nature from the time of filing the recognition application until the court has heard and decided on the application. This interim relief applies to both foreign main and foreign non-main proceedings and may include:

- a stay of execution against the debtor’s assets;
- entrusting the administration or realisation, of all or part of the debtor’s assets located in the enacting State to the foreign representative to protect and preserve the value of assets;
- any of the post-recognition relief provided for in Article 21 of the Model Law:
 - (a) suspending the right to transfer, encumber or dispose of any assets;
 - (b) providing for the examination of witnesses, the taking of evidence, information on debtor’s assets, affairs, rights, obligations or liabilities; and
 - (c) granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting State.

Should the interim relief interfere with the administration of a foreign main proceeding, the court may refuse to grant such interim relief.

For full marks, reference should be made to the relevant articles regarding (interim) relief as well as discuss the subsequent steps to be taken by the foreign representative eg Art 20, and in the alternative, art. 21 MLCBI.

¹ DD [2017] EWHC 2791 (Ch)

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?

Whereas the insolvent debtor has “certain assets” in the territorial jurisdiction of Country B, one would think that it constitutes an “establishment” as defined in Article 2(f) of the Model Law as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.” However, it is unlikely to persuade the court in the enacting State of the concept of an establishment.

The golden rule is, a foreign proceeding not opened in the jurisdiction of the debtor’s centre of main interest (COMI) and which does not at least have an establishment in the enacting State, cannot be recognised as a foreign proceeding for purposes of the MLCBI.

The COMI of the insolvent debtor determines the consequences of the recognition. If the COMI (which is not a defined term) is in the jurisdiction where the foreign proceedings have been instituted, the proceedings are main insolvency proceedings with automatic mandatory relief. The proceedings are non-main proceedings if instituted in a jurisdiction where the debtor representatives and creditors to courts in this State, only has an establishment. The non-main proceedings have without automatic relief and only discretionary post recognition relief is granted by the courts.

With the dilemma of the COMI and the establishment in this scenario, the foreign representative should have applied for urgent interim relief which can be granted before the recognition decision but after the recognition application has been filed. This is on the basis that the interests of the debtor’s creditors and other interested parties are sufficiently protected.

The foreign representative must take steps to exercise local avoidance powers and the right to participate (intervene) in local insolvency proceedings. There are limits to the relief deemed to be appropriate in terms of the MLCBI. The *Rubin v Eurofinance*² case in the English Supreme Court ruled on whether a US judgment dealing with insolvency avoidance powers could be recognised and enforced in the UK and the foreign representative should be guided by the court’s findings and intervene in the local insolvency proceedings in [?].

This answer should have discussed the rebuttable COMI presumption in art. 16 MLCBI, the provisions regarding foreign non-main proceedings (eg 17 MLCBI) as well as procedural rules eg art 6 and 15 MLCBI.

QUESTION 4 (fact-based application-type question) [15 marks in total] 3 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.

² [2012] UKSC 46.

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.

Recognition

The centre of main interest (COMI) of the debtor determines the consequences of the recognition. If the COMI is in the jurisdiction where the foreign proceedings have been instituted, the proceedings are foreign main insolvency proceedings with automatic mandatory relief. The proceedings are non-main proceedings if instituted in a jurisdiction where the debtor only has an establishment. The non-main proceedings have without automatic relief and only discretionary post recognition relief is granted by the courts. An “establishment” is defined in Article 2(f) of the 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.”

Globe Holdings being a holding company with no assets, no human capital or business operations in the Cayman Islands with all of its operations via its subsidiaries in the US, moveable assets in the US, employees in the US, head office in the US - would therefore have to apply under the construct of its establishment to US courts for recognition of its restructuring application (scheme of arrangement) as a foreign non-main proceedings. There are two interesting decisions in respect of the *Antigua incorporated Standard International Bank Limited (“SIB”)*³ and in appeal the Court of Appeal (CA) decision⁴ dealing two rival applications for recognition in the UK by separate foreign officeholders appointed over SIB. These judgments deal with the determination of COMI and in particular the different approaches of the UK and the US. The Court of Appeal referred to the *Eurofood IFCS Ltd* matter⁵ which was clear that COMI had to be identified by reference to factors which are both “objective and ascertainable” by third parties and one cannot only rely on the “head office function” test.

In Globe Holdings it is not only the Head Office that is in the US but its business operations per se which is the definition to determine the establishment. There are two specific cases that deal with the

³ in the first instance the 3 July 2009 judgment by Lewison J [2009] EWHC 1441 (Ch)

⁴ [2010] EWCA 137 (CA)

⁵ (Case C-341/04) [2006] Ch 508

issue of recognition under Chapter 15 of the US Bankruptcy Code (which is the US adoption of the MLCBI).

Application and court papers

Initiating the restructuring solution, a compromise of creditors debt per class under a formal scheme of arrangement in Cayman Island, Cedar and Wood via formal process in 2021 had the noteholders approve the Restructuring Support Agreement (RSA) governed by New York (US) law. Noteholders insisted that scheme would be governed and recognized in Cayman Island which is what the RSA contemplated. The RSA was approved by the required class being the noteholders and sanction by court. At the same time a foreign non-main recognition application was prepared, to request relief under Chapter 15 of the US Bankruptcy Code, for relief in the US. In 2023, per the RSA, Globe Holdings applied to the Cayman Court to convene a meeting under the scheme sanction in 2021 under a main proceeding. The Cayman Court issued the Convening Order and 99% of the creditors approved the scheme without any amendments, outlining the terms on the interest moratorium and other issues to the restructure of Globe Holdings' affairs.

Given the period from 2021 to 2023 there is an ongoing obligation on the foreign representative to keep the court in the enacting State (Cayman Island) informed of any changes to the status of the matter under the foreign proceedings (Chapter 15 recognition) and if there is any other foreign proceeding with regard to the same debtor that the foreign representative becomes aware of.

Relief and the compromise of debt

In *Rare Earth Magnesium Technology Holdings Limited*⁶ the Hong Kong court contemplated that recognition under Chapter 15 of the US Bankruptcy Code is limited in territorial effect and would therefore not constitute a compromise of debt governed by US law (so as to satisfy the Gibbs Rule). The Gibbs rule originates from 1890 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux*⁷ and deals the general intention that a debt governed by English law cannot be compromised or discharged by a foreign insolvency proceedings. The discharge of a debt under the insolvency law of a foreign country can only be treated as a proper discharge in England if it is a discharge under the law applicable to the contract. The exception to the Gibbs Rule is where creditors submits or agrees to the foreign insolvency proceeding. The reasoning being that the creditor would have accepted the law governing the foreign insolvency and the contractual rights the creditors will prove correct in that proceeding.

In the *Shimmin matter*⁸ the debtor applied for recognition under Chapter 15 of the US Bankruptcy Code of proceedings which were pending in Isle of Man.

Furthermore, in *Modern Land (China) Co., Ltd*⁹ a US decision where the US Bankruptcy Court held that a Cayman Islands scheme of arrangement recognised as a main proceeding under Chapter 15 of the US Bankruptcy Code would constitute a substantive discharge of New York law governed debt. Based on the findings of the court, the representatives for Globe Holdings, Cedar and Woods could have instituted at the same time, a scheme of arrangement in the Caymans since in terms of the new "Restructuring Plan" principle also referred to as a "super schemes" of arrangement. Fortunately, in the Globe Holdings scenario all the creditors (noteholders) adopted the scheme and although a Restructuring Plan or "super scheme" may have been an attractive option.

⁶ [2022] HKCFI 1686 (Harris J)

⁷ (1890) LR 25 QBD 399

⁸ Case No 22-10039, 2022 LEXIS 2932

⁹ Case No 22-10707 (MG), 641

Your answer does not reflect the MLCBI provisions, apart from some basic definitions. Your efforts in linking to national caselaw is appreciated, but unfortunately the main requisites are missing.

As this is a **fact-based application-type question**, this answer should have – as minimum - included the steps to be undertaken by the foreign representative as well as definitional provisions (eg 2 and 17 MLCBI), procedural formalities (eg 15 MLCBI), and relief scenarios (under 19-22 MLCBI). You should apply the rebuttable presumption regarding COMI under art. 16 MLCBI to the facts of the case to substantiate if this concerns foreign non main or main proceedings.

*** End of Assessment ***

Marks awarded: 25 out of 50