



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
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- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2024** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).

ANSWER ALL THE QUESTIONS

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 9 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 European Union (EU) Regulation on insolvency proceedings (EIR), whilst not a treaty, is a regulation which, once adopted by the relevant (EU) state, becomes part of the domestic law of that state in its native form. The EIR is designed to harmonize the rules of the EU states. Distinct from that approach, the MLCBI is a recommendation which can be adopted (by any state, globally) in whole or in part and/or in an amended form. Once adopted, the MLCBI forms part of the domestic law of the state. The MLCBI is designed to provide a framework for cooperation between member states. Accordingly, the key distinction is one of scope and applicability. A key benefit of the EIR approach to application is consistency within the EU in terms of harmonisation, which serves to simplify proceedings between EU states. However, this is also disadvantage where it causes complexities in dealing with states outside of the EU, as EU member states have not adopted the MLCBI. A key benefit of the MLCBI is that the framework is flexible in how states may adopt it, e.g. modified. However, again, this is also a disadvantage where lack of consistency / uniformity can create inconsistencies in application between member states.

Question 2.2 [maximum 2 marks] 2 marks

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

When exercising its discretion to grant relief sought under Article 21 of the MLCBI, the court should primarily consider whether such relief interferes with the administration of another insolvency proceeding and in particular, the foreign main proceeding. In making such assessment, the court should consider whether, and be satisfied that, the relief sought relates to assets to be properly administered / information required in the foreign non-main proceeding or concerns information required in that proceeding. When considering whether

to grant discretionary relief, a court will generally take into account matters such as the interests of justice and in a MLCBI context, debtor and creditor rights.

Note, a nuance difference: the court primarily considers the creditors' interests - not "take into account"

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 seeks to ensure that foreign creditors have the same access rights as domestic creditors (i.e. creditors in the enacting state) in terms of foreign proceedings, including rights regarding the commencement of, and participation in, a foreign proceeding. That said, pursuant to Article 13(2) and footnote (b) to Article 13(2) (respectively), such rights shall not affect the ranking of claims (except that foreign creditor claims shall not rank lower than unsecured creditors) / any relevant exclusions (such as tax / social security claims).

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?

A key distinction with respect to the relief available in foreign main versus foreign non-main proceedings is whether the foreign proceeding has the benefit of automatic relief or not. If the proceeding does not have the benefit of automatic relief, such relief is discretionary (and must be sought). For example, upon recognition of a foreign main proceeding, Article 20(1)(b) imposes an automatic stay of execution over the debtor's assets, whereas in a foreign non-main proceeding, the foreign representative will need to apply to the court for such relief (Article 21(1)(b)) and show that the relief sought is necessary to protect the assets of the debtor or the interests of the creditors.

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

Question 3.1 [maximum 4 marks] 2 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.

If I understand the question correctly, recognition (of foreign main and non-main proceedings) proceedings have been opened in the USA. The foreign proceedings in question must have been filed in Germany and Bermuda. Pursuant to Article 2, the MLCBI determines that: (i) the German proceedings are the foreign main proceedings (with automatic relief) given that the debtor's COMI is in Germany; and (ii) the Bermudan proceedings are the foreign non-main proceedings (without automatic relief) given that the debtor has an establishment in Bermuda. The abovementioned categorisation will have various implications, including those identified in answer to question 2.4 above, and the breadth of authority of the foreign representative (which is narrower if categorised as a foreign non-main proceeding).

Requires references to definitional and procedural provisions of MLCBI eg. Art. 2 (mentioned), 15, 17, 6..

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.

An action for alleged tortious interference with contract rights of US-based vendors may cause issues in the recognition application, although the facts indicate that the action has been filed as separate proceedings, as opposed to a challenge to the recognition proceedings (within those proceedings). There is a risk that discovery is ordered, however in my view, the likely outcome is that the court will ultimately dispense with the matter on the basis that the provisional liquidators are at liberty to seek recognition under the MLCBI in the USA, and that doing so does not constitute tortious interference. Depending on whether recognition is of a main or non-main proceeding, and on the basis that the contracts at issue are between the claimant(s) the debtor, the proceedings would be automatically stayed (main proceedings) under Article 20(1)(a) or further to a successful request by the provisional liquidators, under Article 21(1)(a), respectively.

Requires discussion based on Art.10 MLCBI

Question 3.3 [maximum 4 marks] 4 marks

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

As leases and intellectual property (IP) rights are important assets of the company, and notwithstanding that the *ipso facto* clauses are not enforceable under the US Bankruptcy Code, the foreign representative should take steps to mitigate the risk that the counterparties seek to terminate the leases or the IP contracts by, at the time of filing the recognition application, also requesting that the court grants interim relief pursuant to Article 19 of the MLCBI, including requesting orders: (i) staying execution against the company's assets; (ii) prescribing that the administration or realization of all or part of the debtor's assets located in the USA be entrusted to the foreign representative in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are susceptible to devaluation or otherwise in jeopardy; and (iii) suspending the right to transfer, encumber or otherwise dispose of any assets of the company. This is particularly so given the 35-day period between filing and the hearing date, during which, issues may arise. It may be that the foreign representative wishes to surrender the leases in due course but s/he will wish to do so at the appropriate time.

Question 3.4 [maximum 4 marks] 3 marks

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

In order to be recognised as a foreign main proceeding, the foreign proceeding must have been opened in the jurisdiction where the debtor has its COMI. Whilst Article 16(3) of the MLCBI presumes that the place of the debtor's registered office is its COMI, that presumption can be displaced by proof to the contrary. Accordingly, the fact that the debtor has its registered office in Country A does not necessarily establish that Country A is the debtor's COMI.

In the event that the foreign representative considers that the debtor's COMI is in Country A, in order to mitigate the risk of the court disagreeing with that position, s/he may have asserted (and evidenced) that position in the application for recognition of a foreign main proceeding. That said, it appears from the limited facts that the debtor's COMI is unlikely to be in Country A. It should be noted that a false claim regarding the location of a COMI is likely to detrimentally affect a recognition application if deemed to be an abuse of process by the foreign representative.

If the foreign representative does not consider that the debtor's COMI is in Country A (or indeed, it is not (factually) in Country A) but that it can be reasonably asserted that the debtor has an establishment in Country A (within the meaning ascribed in the MLCBI), s/he may have sought recognition of the foreign proceeding as a foreign non-main proceeding. On the basis that the debtor "*carries out a non-transitory economic activity with human means and goods or services*" in Country A, such application may have had greater chances of success.

References to Art.17, 21, 6 are also required

QUESTION 4 (fact-based application-type question) [15 marks in total] 14 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.

Summary

In summary, my view is that the client would be best advised to apply for recognition of foreign non-main proceedings for the reasons set out below. I also set out below a list of required filings and relief should be requested on day one of the filing.

Analysis

First, in terms of analysing the position, ‘re-domestication / re-domiciliation’ or ‘transfer by continuation’ from another jurisdiction to the Cayman Islands is not unusual. For transfer by continuation, the company being redomiciled has to be solvent, which appears to have been the case in 2009 when Globe Holdings (GH) was transferred by continuation from Canada to Cayman.

As regards companies being transferred by continuation for the purposes of restructuring, the Americas Restructuring Review 2022 comments: “[t]he Cayman Islands has proved to be an attractive restructuring jurisdiction, not least because the Cayman courts have considerable experience with efficient management of large debt restructurings. ...Debt restructurings in the Cayman Islands often involve cross-border issues, and there is a wealth of precedent for successful applications for recognition under Chapter 15 of the United States Bankruptcy Code, as well as recognition in other key jurisdictions.”¹ Chapter 15 of the US Bankruptcy Code is the provision which incorporates the MLCBI into domestic law. Indeed, some entities will re-domicile their COMI into jurisdictions such as Cayman in order to obtain Chapter 15 protection. In principle, the Cayman Scheme could be granted recognition under Chapter 15 as a foreign main or non-main proceeding. For the Scheme to be recognised as a foreign main proceeding, the US court must consider that GH’s COMI is in Cayman.

The facts denote that whilst GH was transferred by continuation from Canada to Cayman in 2009, it is unclear to me (based on the facts) that its COMI is in fact in Cayman. As above, in order to assess whether to apply for recognition of main or non-main proceeding or both (in light of COMI / establishment analysis) in the USA, it is necessary to ascertain where GH’s COMI is.

¹ Americas Restructuring Review 2022, Edited by Richard J Cooper and Lisa M Schweitzer
<https://www.campbellslegal.com/wp-content/uploads/2021/12/Cayman-Islands-chapter-Americas-Restructuring-Review-2022.pdf> (accessed on 19 February 2024)

The MLCBI does not contain a definition of COMI, however Article 16(3) presumes that the place of the debtor's registered office is its COMI, that presumption can be displaced by proof to the contrary.

'COMI' is not a concept familiar to US law, which considers domicile, principal place of business, and location of assets in determining jurisdiction and venue. However, when determining a debtor's COMI for the purposes of foreign main/non-main proceeding classification, the presumption is that the debtor's COMI is presumed to be its place of incorporation. This presumption is rebuttable.

In respect of determination of COMI, I note the following:

USA:

GH 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 US laws and operating in the US;

GH's headquarters are in the USA;

All employees (of GH's subsidiaries) are in the USA;

GH's shares were historically listed on NASDAQ (New York Stock Exchange);

the Notes offered by GH were offered in USD and are governed by US law;

the RSA states that the restructuring will take place in Cayman, but is governed by US law.

Cayman:

GH is incorporated and registered in Cayman;

GH has no business operations in Cayman;

GH keeps its books and records in Cayman;

GH's board meetings are held virtually (not in Cayman);

GH recently opened a bank account in Cayman from which it pays certain of its operating expenses;

Filings made with SEC and the prospectus provided in connection with the issuance of the Notes disclosed that GH is a Cayman Islands company

The Scheme (recorded in the terms of the RSA) was sanctioned by the Cayman Court (on application of GH);

The Cayman Court authorised GH to convene a single Scheme Meeting which was held in Cayman and virtually, via Zoom.

When considering an application for recognition of foreign proceedings under Charter 15, a US court will determine a relevant entity's COMI at the time of determining the recognition application.

On the basis that GH is domiciled in Cayman and presumably its registered office is there (as opposed to its headquarters), it is arguable that GH's COMI is Cayman. However, GH carries on no business in Cayman. According to an article by Norton Rose Fulbright, "*courts will consider, among other things, the debtor's nerve center, location of operations and assets, and creditor expectations*".² Also to be considered is: (i) the location of the books and records (Cayman); (ii) location from where the cash management system was run / primary bank account (Cayman); (iii) the location of GH's assets / operations (USA); (iv) location of employees (of the subsidiaries: USA); (v) law governing contracts / jurisdiction governing disputes (USA); (vi) location from which the reorganisation is being conducted (Cayman); (vii) the location of the central administration of the debtor (operating expenses

² Overview of the key Chapter 15 decisions in 2019, James A. Copeland and Francisco Vazquez
<https://www.nortonrosefulbright.com/en/knowledge/publications/8020ddf9/irnw-us> (accessed 19 February 2024)

paid from Cayman, Cayman counsel instructed, Notes issued in USD (USA), HQ is USA, Scheme Meeting in Cayman); (viii) where is readily ascertainable as the COMI by creditors (Cayman (prospectus, SEC filings) or USA (HQ, assets, operations)). This list is non exhaustive. Accordingly, there are many factors which could count for or against Cayman as the COMI in the circumstances. However, in my view, the stronger argument on the facts is that GH's COMI is in the USA, not Cayman, and I consider it likely that a US court would take the same view based on the fact that GH's principle place of business, its HQ, primary assets, majority of affected creditors is/are in the USA, and the applicable law in its contracts is US law.

Recognition (foreign main / non-main proceeding)

If GH's COMI is in Cayman (which for the reasons discussed above, I do not think that it is), GH would be advised to seek to have the Scheme recognised in the USA as a foreign main proceeding, which pursuant to Article 20(1)(a) / Chapter 15 of the US Bankruptcy Code, would attract an automatic stay of proceedings against GH and thus should mitigate any effect of a class action in the USA, should one be filed. Recognition of foreign main proceedings would also attract automatic relief in the form of a stay of execution over GH's assets, suspension of the right to transfer, encumber or otherwise dispose of any assets and other relief set out in Article 20.

If GH's COMI is not in Cayman, GH may seek to establish that GH has an "*establishment*" (within the meaning ascribed to it in the MLCBI (noting that 'establishment' is not defined in the US Bankruptcy Code)) in Cayman in order to seek recognition of foreign non-main proceedings in the USA. Pursuant to Article 2 of the MLCBI, an "*establishment*" means "*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services*".

On the basis of a Cayman registered office and economic activity (i.e. payments of operating expenses / the implantation of the Scheme / the RSA (if that can be considered "*economic activity*")) being carried out from Cayman, GH may be able to have the Scheme recognised as foreign non-main proceedings. The scope of relief offered in a foreign non-main proceeding is not quite as wide as for a foreign main proceeding, and there would not be an automatic stay of proceedings (i.e. any class action filed), rather, a stay would need to be sought from the court as discretionary relief, which the court may or may not sanction. Importantly, in order to grant any such discretionary relief sought, the US court must be satisfied that it is appropriate for the relevant assets (of GH) to be administered by way of the Scheme. This may be questionable on these facts, i.e. given that business operations, assets and majority of creditors are in the USA rather than Cayman, however I note the comments made in the Americas Restructuring Review 2022 as quoted above.

In *Re Bear Sterns High-Grade Structured Credit Master Fund*, the US court held that a process in Cayman could not be recognised as either foreign main or non-main proceedings due to lack of COMI or establishment in Cayman. Whilst this is a risk for GH, *Re Bear Sterns* is distinguishable on the facts, as although neither GH nor the hedge fund in *Re Bear Sterns* each had/has operations in Cayman, the hedge fund had no establishment in Cayman prior to its insolvency, whereas arguably, GH has. As an aside, based on the facts, it may have been advisable for GH to have reorganised under Chapter 11, as that is an option that would have been available to it.

Relief to be sought

In the context of seeking recognition of a foreign non-main proceeding, GH would be advised to apply to the US court (under Article 21(1) of the MLCBI) (on day one of the recognition

application filing) for a stay of proceedings against it to mitigate any effect of a class action in the USA (should one be filed), a stay of execution over GH's assets, suspension of the right to transfer, encumber or otherwise dispose of any assets, and any other necessary relief GH deems necessary or desirable pursuant to Article 21.

Documents to be filed

In terms of the documents to be filed with a US recognition application, Section 1515 requires as follows:

“(b) A petition for recognition shall be accompanied by–

(1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;

(2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or

(3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.

(c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

(d) The documents referred to in paragraphs (1) and (2) of subsection (b) shall be translated into English. The court may require a translation into English of additional documents.”

Further discussion

The following may be beyond what this question is looking for in terms of a response, however I note that the facts contain a lot of detail about the terms of the Scheme, including voting / class of creditors, i.e. *“to extend the maturity of the Notes and obtain the flexibility to pay the quarterly interest “in kind””; “57% of the Noteholders acceded to the... RSA”*; the largest Noteholders expected that the restructuring would take place in Cayman and this was recorded in the RSA; *“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 Cayman Court entered a convening order (the Convening Order) on the papers”*.

These facts raise a few questions, which I would advise GH are considered further (as follows):

1. A simple majority (57%) of Noteholders acceded to the terms of the RSA (which was implemented by way of the Sanction Order). It is not clear whether the 91% / 99% of Noteholders who supported the Scheme is 91/99% of the 57% or of 100% of the Noteholders. Accordingly, it may be the case that 43% of the Noteholders were effectively crammed down into the RSA / the Scheme.
2. The terms of the RSA affect the Noteholders' rights (extension of maturity and payment *“in kind”*).
3. The Convening Order was issued on the papers, i.e. without a hearing.

Although I note that the Notes are US law governed and according to an article by Baker & Partners, *“Since the amendments [to Part V of the Companies Act (2022 Revision)] enhance the current restructuring regime, we do not expect that the new regime will alter the ability to compromise U.S. law-governed debt through a Cayman Islands scheme of arrangement and chapter 15 recognition, which Bankruptcy Judge Martin Glenn recently*

*reaffirmed in In re Modern Land (China) Co. Ltd*³ which indicates that the Notes are capable of compromise through the Scheme and Chapter 15 recognition.

Very good application! The essay should also contain references to Art. 15, 19, and 6 MLCBI for full marks.

*** End of Assessment ***

Marks awarded: 42 out of 50. Well done!

³ Introduction of a New Restructuring Regime in the Cayman Islands, 12 September 2022, Adam Crane and Nicosia Lawson <https://www.bakerandpartners.com/briefings-articles/introduction-of-a-new-restructuring-regime-in-the-cayman-islands/> (accessed 19 February 2024)