



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A
THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

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

Question 1.1

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

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

Question 1.2

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

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

Choose the correct answer:

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

Question 1.3

Which of the following statements incorrectly describe the MLCBI?

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

Choose the correct answer:

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

Question 1.4

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

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

Choose the correct answer:

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

Question 1.5

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

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

Choose the correct answer:

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

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

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

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

Question 1.6

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

(a) Binding within jurisdiction B.

(b) Binding within jurisdiction B, but certain actions need to be taken.

(c) No effect within jurisdiction B.

(d) Likely no effect within jurisdiction B.

(e) Not enough facts provided to arrive at a conclusion.

Question 1.7

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

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

(ii) The difficulty of agreeing multilateral treaties dealing with insolvency law.

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

Choose the correct answer:

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

Question 1.8

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

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

Choose the correct answer:

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

Question 1.9

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

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

Choose the correct answer:

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

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

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

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

Question 1.10

Which of the statements below are correct under the MLCBI?

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

(b) The hotchpot rule prioritises local creditors.

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

(d) None of the above are correct.

QUESTION 2 (direct questions) [10 marks in total] 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 Model Law is global in scope and not limited to a single geographical area. It is also more flexible than the EIR in the sense that it reflects merely a recommended default legislative text governing some aspects of cross border insolvency and permits deviation by individual states owing to their individual circumstances.

The EIR, in contrast, is focused on the EU. The benefit of the EIR is that upon adoption, it directly becomes part of the domestic law of each EU member state and is therefore prescriptive, uniform, and consistent; whereas the Model Law requires each state to act to adopt and incorporate the model text into its domestic legislation - which takes a long time and will likely result in piecemeal global adoption rates.

Owing to these differences in the politics underlying the promulgation of each set of rules, there are also substantive differences in their approaches to resolving cross border insolvency. For instance, under the EIR, recognition of a foreign EU proceeding is automatic, whereas under the Model Law this requires an application to the court of the enacting state.

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 most obvious answer is that it depends on whether the foreign proceeding in relation to which relief is sought is a foreign main or non-main proceeding.

In terms of the text of Art 21, sub-provision (2) provides a statutory pre-condition that the “court is satisfied that the interests of creditors in this State are adequately protected”. If the recognized proceeding is a foreign non-main proceeding, then the court must ensure that the relief relates to property that should be administered by, or concerns information relating to, that foreign proceeding.

Case law suggests that the Court has different considerations depending on the type of the relief sought. For instance, if the relief sought is a moratorium, then what is important is creditor support (Re Im Skaugen SE [2019] 3 SLR 979). The court will frequently also require a minimum level of disclosure by the debtor of the foreign restructuring plan, and whether there is a realistic prospect of the plan working as intended.

In a more generic sense, the court’s primary consideration will always be with a balancing of policies - of according comity and due deference to the recognized foreign proceeding or representative on one hand, like the court would for a local proceeding or representative, in line with the ideals of modified universalism, as against the interests of the stakeholder (most often, creditor) or local public policy on the other hand.

Question 2.3 [2 marks] 2 marks

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

Firstly, foreign creditors and local creditors are generally accorded the same rights as regards the commencement of, and participation in, insolvency laws of the enacting State (see Art 13(1) Model Law).

Further, there are ranking protections accorded to the foreign creditors which the enacting State can prescribe as they wish - generally this states that, save for tax and social security claims, the foreign creditor’s claim shall not rank lower than a local general unsecured claim solely because the holder of the claim is foreign (see Art 13(2) Model Law).

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?

Whether the relief is automatic. Under Art 20, if the foreign main proceeding is recognised, 3 of the stated effects occur automatically, which are collectively intended to allow steps to be taken for the organisation of a foreign restructuring in the COMI jurisdiction. In contrast, under Art 21 for post-recognition relief for non-main proceedings, just like under Art 19, such relief are discretionary and there are also statutory preconditions (see, for instance, Art 21(3) Model Law).

Furthermore, in considering the kind of relief granted to the representative, the court can and will likely consider that the interests and authority of a representative of a foreign non-main proceeding are narrower than those of a representative of a foreign main proceeding.

Another point of distinction is that because Art 20 comes into effect automatically without reference to any application, it appears that any stakeholder with locus including a creditor can seek recognition of a foreign main proceeding. However, Art 21 specifies that the court may grant relief “at the request of the foreign representative” which suggests that the foreign representative is essential and irreplaceable in this process (see *Re Rooftop Group International Pte Ltd* [2019] SGHC 280).

Furthermore, Art 21(3) requires that for foreign non-main proceedings specifically, the court must be satisfied that the relief to be granted relates to the assets should be administered in the foreign non-main proceeding, or concerns information required in that foreign proceeding. This is not a requirement if foreign main proceedings are concerned.

QUESTION 3 (essay-type questions) [15 marks in total] 8 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 the COMI is indisputably in Germany, then the foreign main proceedings should rightly have been commenced in Germany. Upon recognition of these German proceedings in the US as the foreign main proceeding (or the German representative as the representative of the foreign main proceeding), the automatic relief under Art 20 Model Law comes immediately into effect.

Since there is an establishment in Bermuda, the Bermudan proceeding will be recognised as the foreign non-main proceeding in the US, with discretionary relief available for application by the Bermudan representative.

It is not known what the subject of the recognition proceedings in the US was. If both German and Bermudan proceedings were sought to be recognised in the US, then the court should ensure that the relief granted to the representative of the foreign non-main proceeding (Bermudan) be consistent with that granted vis-à-vis the foreign main proceeding (German) regardless of the order of application (Art 30 Model Law).

If the proceedings in the US are sought to be recognised overseas, it will likely be recognised as foreign non-main proceedings, given that it is not the locale of the COMI, but this requires that there must be an “establishment” in the US. Otherwise, the proceedings in the US will not be recognised as foreign proceedings at all, for the purposes of the Model Law.

Answer requires to be substantiated with a discussion and references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 17, 6..

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 question is unclear - was the alleged tortious interference the very act of commencing a recognition proceeding in the US, or was this interference sued upon some other prior conduct? Was this a suit against the debtor-company, or against the joint PLs personally?

Whether the claimant is suing the company or JPLs, it is unlikely that the mere filing of an application for recognition - which is indisputably a legal act in itself in the sense that it is sanctioned by the Model Law - would constitute a tortious act without more.

The claimant may wish to apply to set aside the recognition order on the basis that the filing was in abuse of process, but if so, the first issue is whether the relevant US circuit recognises abuse of process as a ground for setting aside a recognition order, and secondly, the evidential threshold for abuse of process is likely to be extremely high. This argument might work, for instance, if it is evident that the application for recognition could have been and should reasonably have been filed much earlier or in a different and clearly more convenient forum, but was timed or strategically located to thwart a legitimate claim that the representative knew was going to be filed by the claimant.

If the claimant is suing the company then he might not be able to do so given the automatic moratorium in place under Art 20 if the foreign proceeding sought to be recognised is a foreign main proceeding. In other words, if the JPLs are representatives of, and appointed by, the court of the COMI jurisdiction, then the claim may be subject of a moratorium (if it has not commenced) or stayed (if it has). While there are exceptions to this, contract rights do not generally qualify.

For completeness, it should be noted that liquidation has no issue qualifying as a “foreign proceeding”. The facts are insufficient but it seems there is no significant obstacle to the conclusion that the recognition proceedings commenced by the JPLs will be granted in the US.

Requires discussion based on Art.10 MLCBI

Question 3.3 [maximum 4 marks] 3 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 US Bankruptcy Code generally forbids the termination of executory contracts based solely on the counterparty’s insolvency. This protection for the debtor is critical to allow it to continue operations (with the tenanted land and the intellectual property licensed) and have time and breathing space to work out its affairs.

However, subject to further research about the US Bankruptcy Code, the mere filing of a recognition proceeding in the US may not trigger this protection, because that filing is not in itself proof that the debtor is insolvent. Under Art 31 Model Law, the

recognition of a foreign main proceeding is proof that the debtor is insolvent, but not the mere *filing* of an application for recognition.

Therefore, there is no Bankruptcy Code protection until and unless the recognition application is heard and granted in 35 days' time. Additionally, the automatic moratorium protection that would attach to the recognition of a foreign main proceeding (ie the UK scheme) would also not come into effect until the grant of the recognition application. Meanwhile, until such time the recognition application is granted, there are no protections in effect for the debtor-company.

If the above premises are correct, then the natural incentive is for the US counterparties in the leases and licenses to rush to protect their rights by exercising any pre-bankruptcy termination clause, or making any filing in court, once they become aware of the filing of the recognition application. Even though there is no action or threatened action now, much can change within 35 days to the prejudice of the debtor.

Thus, it will be prudent for the foreign representatives to immediately seek pre-recognition relief under Art 19 Model Law in the form of an immediate interim moratorium, pending determination of the recognition application, preventing not only the commencement of any action in court against the debtor but also the exercise of any adverse contractual right. The interim moratorium sought should be carefully tailored to be no broader than necessary to protect the essential interests of the debtor; it should also be calibrated to be no broader than what would eventually come into effect upon the grant of the recognition application (if it is granted). The hearing for the interim moratorium should also be sought on an urgent / expedited basis.

Indeed, the application for pre-recognition relief should be filed at the same time as the substantive recognition application, to reduce the risks that adverse action might be taken in the interim.

Also requires references to Art 20 and/or 21 MLCBI as applicable.

Question 3.4 [maximum 4 marks] 2 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?

Country A is not the COMI jurisdiction. Indeed, depending on what the registered office in that country does, it might not even constitute an "establishment" because it is unclear if it carries out a "non-transitory economic activity with human means and goods and services" at that registered office.

Even if Country A is an establishment, the representative can at best seek recognition as a foreign non-main proceeding. It ought to have done so at the start, and even though

it is late and misguided, it should do the same as soon as possible despite the rejection of its application for recognition as foreign main proceedings.

Being recognised as a foreign non-main proceeding will allow the representative to seek the court's discretionary powers, specifically, to empower the representative to sell that "certain asset" that it intended to sell in Country B. In most jurisdictions, it should seek this power as a prayer within the same application as the recognition.

In some jurisdictions such as the SDNY, the scope of relief that the courts are willing to grant for non-main proceedings is often almost as large as that for main proceedings; there may therefore be no significant disadvantage in seeking recognition of a non-main proceeding.

Art.16 MLCBI is the main reference for "rebuttable COMI presumption" which needs to be discussed and referred to for full marks. References to Art.17, 21, 6 are also required.

QUESTION 4 (fact-based application-type question) [15 marks in total] 7 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

Client should file a recognition application in NY under Chapter 15 with alternative prayers for the Cayman scheme to be recognized as a foreign main proceeding, or in the alternative, as a foreign non-main proceeding. The supporting affidavit / statement should assert that Cayman is the COMI jurisdiction, and in any event, constitutes an establishment within the meaning of the Model Law.

If local law does not permit alternative prayers, then the client should file for recognition as a non-main proceeding, and abandon its claim that Cayman is the COMI.

Together with the recognition application, the client should also seek pre-recognition relief (or provisional relief) in the form of a moratorium pending the hearing of the recognition application. Notice of these applications / prayers will likely have to be given to all persons affected by it (or parties-in-interest), which may include the class litigants. Relief in the form of court authorization should also be sought for the continuance of payments and use of cash collaterals for the operational needs of the company.

CAYMAN SCHEME INDUBITABLY A “FOREIGN PROCEEDING”

The Cayman scheme is indubitably a “foreign proceeding”. Under 11 USCS s 101(23), the Cayman scheme must be (1) a proceeding (2) that is either judicial or administrative (3) that is collective in nature (4) that is in a foreign country (5) that is authorized or conducted under a law related to the insolvency or the adjustment of debts (6) in which the debtor’s assets and affairs are subject to the control or supervision of a foreign court and (7) which proceeding is for the purpose of reorganization or liquidation.

All 7 requirements are highly likely to be satisfied vis-à-vis the Cayman scheme.

FOREIGN MAIN OR NON-MAIN - WHERE IS THE COMI?

In determining whether the Cayman scheme is a foreign main or non-main proceeding, the first sub-issue is when is COMI determined? In the US (and specifically NY) where the recognition application is to be filed, the preponderance of authorities suggest that COMI is determined at the time of the Chapter 15 filing (see, for instance, the 2nd Circuit decision in *Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd; In re Ascott Fund Ltd 603 BR 271, 282 (SDNY 2019); In re Ocean Rig UDW Inc 570 BR 687 (SDNY 2017))*).

On this basis, it is strongly arguable that the client’s COMI is located in Cayman. These main factors, among others, should be highlighted:

1. Client’s primary bank account was opened in Cayman in 2010, and operational payments have been from that account for more than a decade.
2. Client’s lawyer is based in Cayman and has been regularly representing and advising the client in relation to major corporate milestones for over a decade.
3. Board meetings, even if held virtually for necessity or convenience, are organized from and based in Cayman. The controlling mind of the company is thus located in Cayman and commercial policy is determined from here.
4. The restructuring exercise is almost entirely conducted from and based in Cayman, advised by Cayman counsel, and the creditors’ expectations are also as such.

While the client’s subsidiaries are incorporated in the US and operate in the US, it should be pointed out that the restructuring at hand is a liability of the client (holding company) and not its subsidiaries; the focus of the COMI inquiry should thus be on the client. This is unlike the cases in which it is the entire business (of both the holding and the subsidiaries) that is sought to be restructured.

Even if, in the unlikely situation, COMI is held to be determined as at the date of the foreign proceeding sought to be recognized, which in this case is the filing of the Cayman scheme application. The first 3 factors highlighted above nevertheless militate against recognition of the Cayman scheme as a foreign main proceeding.

For the foregoing reasons, it is likely that the Cayman scheme will be found to be the foreign main proceedings by the US court.

AUTOMATIC / MANDATORY RELIEF AS FOREIGN MAIN PROCEEDING

On the basis that the Cayman scheme is found to be the foreign main proceeding, the automatic reliefs under Art 20 will come into effect, which will (among other things) protect our client from the brewing class litigation and offer it breathing space.

Even if our client fails to show that the Cayman scheme is the COMI, it will likely have no difficulty establishing that the Cayman operations constitute an “establishment” such that the Cayman scheme may be considered a foreign non-main proceeding.

While theoretically, a wider scope of relief is available to main proceedings under the Model Law, in practice, SDNY bankruptcy court has been equally liberal with relief granted for non-main proceedings (see, for instance, Judge Glenn’s note in *In re Servicios de Petroleo Constellation SA* that relief available vis-à-vis non-main proceedings are “nearly identical” as that in relation to main proceedings). Thus, the question of where COMI is located is not likely to significant or irretrievably prejudice our client.

GIBBS PRINCIPLE?

The Gibbs principle is a protective principle that disallows a debt governed by English law from being discharged or compromised by a foreign insolvency proceeding. At present, the notes to be restructured are governed by NY law. The Gibbs principle therefore does not apply. In any event, it is arguable that the Gibbs principle does not operate because the creditors have submitted to the Cayman scheme, and therefore should be taken to have accepted that Cayman law should govern the restructuring.

PRE-RECOGNITION AND APPROPRIATE RELIEF

In anticipation of operational needs during the pendency of the recognition application, since the client will likely need to draw on funds and assets in NY and in US to main its business operations, the client should seek provisional relief to this end. It should make an assessment as to its cash and asset needs, and seek empowerment to liquidate or dispose of such assets (limited to an amount) as required.

Additionally, in anticipation of a potential rush to court litigation by the class litigants and any other vultures, the client should also seek an interim moratorium / stay on proceedings until the disposition of the recognition application.

In the US, some bankruptcy courts have suggested that threshold for pre-recognition provisional relief should be the same as that for preliminary injunctions. In that case, we will need to show, and will likely be able to show, reasonable probability of success on the merits of the recognition application, irreparably injury if there is a denial of relief, the preservation of status quo by granting of the provisional relief, and that such relief will be in the public interest by pointing to the purposes of Chapter 15.

In due course, at the recognition proceeding or thereafter in further hearings, an extension may be sought of the provisional relief in interim relief.

As this question is a **fact-based application-type question**, it requires the MLCBI provisions to be applied to the facts of the case and substantiated with references and a discussion. The answer should contain as a minimum:

1. Definitions eg (COMI, establishment, foreign main proceedings etc) with respective references to any MLCBI provisions
2. A discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI
3. The necessary papers to be submitted to the US Court per Article 15 MLCBI
4. Conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI. (*mention of Art.20 is noted*)

*** End of Assessment ***

Marks awarded: 31 out of 50