INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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] 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). NB iii) is correct

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

(c) All of the above.

(d) None of the above.

i) and ii) are incorrect. iii) and iv) is correct.

Correct answer is: Options (i), (ii) and (iii).

Question 1.9

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

(i) Foreign main proceeding.

(ii) Foreign non-main proceeding.

(iii) Plenary domestic insolvency proceeding.

Choose the correct answer:

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

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

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

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

Question 1.10

Which of the statements below are correct under the MLCBI?

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

(b) The hotchpot rule prioritises local creditors.

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

(d) None of the above are correct.

QUESTION 2 (direct questions) [10 marks in total] 10 marks

Question 2.1 [maximum 3 marks] 3 marks

What is the key distinction between the application of the MLCBI and the European Union (EU) Regulation on insolvency proceedings? Also describe one key benefit and disadvantage of each approach.

The key distinction between the application of the MLCBI and European Union (EU) Regulation on insolvency proceedings is the MLCBI is not binding. It is a matter for States to decide whether they adopt it and the States are entitled to modify it to suit own law. The MLCBI does not provide substantive law[1]. As such the EU Regulation has impacts on the sovereignty of nations whereas the MLCBI does not. The EU Regulation is binding upon member states (although there is an option to opt out – Denmark has done so).

Benefit

i) MLCBI

The foundational principle of the MLCBI is its attempt to find a solution to resolving the disparate nature of insolvency law worldwide and to bridge the gap between territorialism and universalism.

Its key benefit, therefore, is that "it is intended to expediate and simplify the process required to recognise foreign proceedings and to provide a clear framework for recognition[2]."

[1] A Kaey and P Walton, Insolvency Law Corporate and Personal (Lexi Nexis, 4th Edition, 2017), pg. 400

[2] Foundation Certificate in International Insolvency Law, "Module 2A Guidance Text UNCITRAL Model Laws Relating to Insolvency 2023/2024" (INSOL) pg. 24

This process is prescriptive and straightforward. The conditions for recognition are clearly stated and are not difficult to be met.

Adoption of the MLCBI by the enacting state has the benefit of limiting the number of proceedings that need to be opened (therefore reducing cost and complexity) – opening proceedings in the Enacting state are not needed if proceedings have been opened in a foreign state.

For the foreign representative the benefit is that the recognition makes available the protections and tools that would be afforded a local insolvency representative (e.g. examining witnesses to trace assets to potentially "claw back" for the benefit of the creditors) or to make claims against the directors.

It has a broader geographic effect than the EU Regulation. The MLCBI does not impose the requirement for reciprocity which allows for a foreign representative to seek recognition from a country that has not incorporated the model law may still seek recognition.

ii) EU Regulation

The key benefit of the EU Regulation is it does provide substantive law (for those states within the EU) unlike the MLCBI. As such it provides greater certainty not only to those affected by insolvency but also to investors, creditors etc who operate in the EU. It provides conflict of law rules (unlike the MLCBI which only provides for recognition of proceedings). It does provide more certainty as to the insolvency law that will apply to the proceedings. The EC Regulations provide for automatic recognition of insolvency proceedings that are opened in an EU country (under MLCBI this is not automatic). The law that applies to insolvency proceeding is the law of the State where the proceeding that take place (unless provided by regulation). Jurisdictional competence is were the centre of main interest (COMI) is.

One potential benefit that extends beyond Europe and to the Model Law itself is the influence of the notion of COMI on determining foreign main proceedings.

Disadvantage

i) MLCBI

The disadvantage of the MLCBI is that it relies on nations to adopt it and given that some large economies have not done so (for example Germany, France and China) means that it is still limited in scope and is only of partial effectiveness in its objective.

There is no certainty as to choice of law.

ii) EU Regulation

It does not extend beyond the EU (and those with their centre of main interest in the EU). The EU regulation has also failed to address the issue of group companies (the Model Law has developed this but it has yet to be adopted by any State). The regime that is in place is voluntary and does not enforce group co-operation.

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 should primarily consider when using its discretionary power to grant post recognition relief under Article 21 of the MLCB is whether the request for relief is made by

the foreign representative is necessary to protect the assts of the debtor or interests of the creditors. It does not need to consider whether the proceedings are main or non-main.

It needs to consider what is "appropriate" relief. Following the English court decision in Re *Pan Ocean Co Ltd (Pan Ocean))*[3] it may wish to consider if the relief sought would go beyond relief it would grant in a domestic insolvency. In Pan Ocean it was decided that appropriate relief did not extend to relief that would not be available in domestic insolvency.

The court may under Article 21 need to consider questions of both jurisdiction and discretion[4]. The court needs to determine if it is a matter that it is within its discretion and what issues it needs to take into account of domestic insolvency law as if the application had been bought by a local representative[5].

For a non-main proceeding the court must be satisfied that the relief relates to assets that under local law should be administered in the foreign non-main proceeding (Article 21(3)).

Question 2.3 [2 marks] 2 marks

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

The protections granted to creditors in a foreign proceeding under Article 13 of the MLCBI are that foreign creditors have the same rights as the domiciled creditors in the enacting State with respect to

- commencement of local proceedings and
- participation in local proceedings

as local creditors (Article 13.1).

Foreign creditors rights in terms of ranking of claims are not prejudiced in an insolvency proceeding in an Enacting State. The claim of a foreign creditor will be rank lower than a general unsecured claim i.e. the foreign creditor is not prejudiced because it is foreign[6].

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?

Recognition granted for a foreign main proceeding has the effect that a stay is automatic. As result for foreign main proceedings there is no need for a specific application as the relief is automatic. In terms of Articles 20(1) once the order is made

- the commencement or continuation of individual actions or proceedings is stayed
- execution against the company's assets is stayed
- right to transfer, encumber or otherwise dispose of any assets is suspended.

(This automatic stay is no sacrosanct and the automatic stay can be varied, suspended or terminated).

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[3] [2014] EWHC 2124 (Ch), [2014] Bus LR 1041

[4] Picard v FIM Advisers LLP ([2010] EWHC 1299 (Ch); [2011] 1 BCLC 129)

[5] A Kaey and P Walton, Insolvency Law Corporate and Personal (Lexi Nexis, 4th Edition, 2017), pg. 414

[6] Foundation Certificate in International Insolvency Law, "Module 2A Guidance Text UNCITRAL Model Laws Relating to Insolvency 2023/2024" (INSOL) pg. 22

However for a non-main proceeding that stay is not automatic and an application has to be made for a stay or other relief. For relief following an order of recognition (under Article 21) the court should consider whether the relief sought relates to assets, that under the laws of the Enacting State, should be administered in the non-main proceeding or relates to information required in that proceeding. Further, for a non-main proceeding if the relief sought is with respect to pre-insolvency transactions including timings of insolvency and notifications then the same consideration may apply (Article 23(5).

An application for provisional relief by a foreign representative in a main proceeding or non-main proceeding can be made under Article 19 for interim relief i.e. the time when a foreign representative files an application for a recognition and the time of the order, where relief it required urgently to protect the assts or the interests of the creditors and will be provisional in nature. There is no distinction with respect to the relief available.

QUESTION 3 (essay-type questions) [15 marks in total] **Good, substantive essays… 12 marks**

Question 3.1 [maximum 4 marks] **4 marks**

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

Neither Germany nor Bermuda have adopted the MLCBI but the US has.

The foreign main proceedings will be considered to be Germany as that is where the debtor has its COMI and the non-main proceedings will be in Bermuda (in terms of Article 17(2)). While there is no definition of COMI (centre of main interest) in MLBCI it is generally considered to have equivalence to the concept that has developed in the European Union with respect to the EU Regulations for identifying the main proceedings. While the US (Chapter 15) does not explicitly incorporate the concept of the COMI it is guided by it[7] and there is corresponding case law[8]. It generally presumed to be the place of incorporation in the US as these meet the criteria that determine the COMI under MLBCI which are it is the central place of administration and creditors can ascertain same.

Foreign non-main proceedings can only be opened where there is an establishment. Under Article 2(e) an establishment is "any place of operations where the debtor carries out non-transitory economic activity with human means and assets or services'.

Assuming that the foreign representative in Bermuda and the foreign representative in Germany have both made recognition applications to court the US Court is required to seek co-operation and co-ordination under Articles 25-27, what this co-operation and co-ordination will be influenced by the timing of the proceedings.

Depending on the timing of the recognition applications, under Article 30, if the relief sought by the representative from Bermuda (i.e. under the non-main proceedings) is after the relief sought by the representative from Germany (i.e. under the main proceedings) then the relief granted by the US court to the non-main proceeding must be consistent with that under the

[7] See LC Ho 'Proving COMI: Seeking Recognition Under Ch 15 of the US Bankruptcy Code' (2007) 22 JIBFL 636.
[8] *In re Sphinx* (SDNY Case No 06-11760)

main proceeding. However, if the non-main proceeding preceded the main proceeding then the relief granted to the non-main proceeding will need to reviewed and potentially modified to ensure consistency.

The recognition of the foreign main proceedings will impact and local proceedings in the US (in terms of Articles 28). Once there main proceedings are recognised an automatic stay will apply.

Question 3.2 [maximum 3 marks] 1 mark

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

The Joint provisional liquidators have only commenced recognition proceedings. They have not been granted recognition.

As such there will not be any stay in place if the Joint Provisional Liquidators are making a recognition application as foreign representatives of a foreign main proceeding. The Joint Provisional Liquidators are likely to want to make an urgent application for provisional relief under Article 19 (this can be applied for regardless of whether they are foreign main representatives of a foreign main proceeding or foreign non-main proceeding). The Joint provisional liquidators would need to demonstrate to the US Court that relief was urgently needs to protect the assets of the company and the interests of the company including inter alia suspending the right to transfer, encumber or otherwise dispose of any of the assets of the company.

Depending on whether the recognition proceedings are non-main proceedings or main proceedings it may be necessary for the joint provisional liquidators to apply for a stay. If they are main proceedings a stay would be automatic upon recognition and the US-based vendors would need to apply to the court for a variation of that stay.

If the proceedings are non-main proceedings then the joint provisional liquidators would need to apply for the stay as it is not an automatic relief granted on recognition. Again, the US-based vendors would need to apply to the court for a variation of that stay.

The joint provisional liquidators could bring an application for urgent relief and in terms of Article 12 this would have commenced as the date of the application of the proceedings.

The US Court would need to consider whether it is protecting the creditors under Chapter 15 in accordance with Article 7 (the protection of claim holders in the US and ensuring the US-based vendors were not prejudiced or inconvenienced if required to process claims in the foreign jurisdiction).

It is not considered likely that the US-based vendors would be able to vary the stay (in either instance) given that the proceedings are liquidation proceedings and as such there is a need to protect the interest of all creditors and such a stay would be granted under US law. The US-based vendors would have enforceable rights in the insolvency proceedings.

One caveat would be whether the US-based vendors held security over any of the assets or potentially were goods that were contractually excluded as being part of the estate (in terms of Article 2(k).

The US-based vendors are unlikely to be able to challenge the basis that the joint provisional liquidators do not meet the criteria of falling within in the definition of a foreign representative. In terms of Articles 2(j) a foreign representative is defined as:

> "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs to act as a representative or the foreign proceeding".

This includes liquidators and provisional liquidators (who are appointed on an interim basis and this is covered in the MLCBI). There would be no course of action to challenge it as a foreign proceeding as it meets the criteria as set out in Article 2 (It is a proceeding, it is judicial, it is collective in nature, in a foreign state, authorised and conducted under a law relating to insolvency, the assets and affairs of the debtor are subject to the control or supervision of a foreign court and the proceedings are for the purpose of liquidation[9]). Even if the liquidation was a provisional liquidation the definition of proceeding includes interim proceeding[10]

One alternative challenge would be for the US-based vendors to challenge whether the joint provisional liquidators made full and frank disclosure to the court as to the consequence that recognition may have in their application.[11] There is no evidence they have not. The US court will presume the orders, if properly presented in accordance with Article 15.

Given that the action is being bought US-based vendors with respect to contractual rights it is highly improbable that the relief sought by the Joint provisional liquidators would not be granted under public policy considerations (in terms of Articles 6) which would allow the US-based vendors to proceed with their actions.

Requires discussion based on Art.10 MLCBI. Mark is awarded to the extensive peripheral considerations.

Question 3.3 [maximum 4 marks] **4 marks**

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

The US Bankruptcy Code does not recognise *ipso facto* clauses, even if included contractually. This is unlike other jurisdictions, such as the UK. As such even if the parties exercise their rights under the contract these would not be enforceable under US insolvency law. The parties having chosen US law for these leases the US insolvency laws would likely apply[12].

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[9] As discussed *In the matter of Agrokor DD* [2017] EWHC 2791 (Ch).

[10] It is likely but not certain that as a provisional liquidator is appointed the company is in provisional liquidation however in certain jurisdictions a company can be in final liquidation and the provisional liquidator remains in place until the first meeting of creditors which only takes place after the final order.

[11] See case law OGX Petroleo e Gass SA [2016] EWHC 25 (Ch)

[12] Belmond Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd [2011] UKSC 38.

This is fortunate given that there is case law (see *Fibria Celulose S/A v Pan Ocean Co Ltd*[13]) whereby the courts have refused to make such clause null and void if the clauses are enforceable in the domestic law. This is regardless of what the insolvency law is of the foreign state.

However, the foreign representative would want to bring an application for interim relief (under Article 19) until the recognition hearing (which is 35 days away). While it is not known what the terms of the leases are the notice provisions may be 30 days so the leaseholders could issue notice on contractual terms, terminating the leases, before the recognition hearing is held. This would likely be to the detriment of the restructuring including notably the intellectual property licences which would possibly hold considerable value.

If the debtor-in possession restructuring is considered to be a foreign main-proceeding a stay would be granted automatically upon recognition. If it is a non-main foreign proceeding the foreign representative would want to bring an application for a stay.

However, if the intention is for the assignment of the intellectual property lease this may not be done without the licensor's consent.

The intellectual property leases may include leasing patents and copyrights and if owned by the debtor then they may be protected under the US Bankruptcy Code, which prevents the termination of licences should there be a reorganisation under chapter 11.

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?

The foreign representative should, in the short term, apply for interim relief under Article 19. (This relief is applicable to non-main and main proceedings so the fact that the recognition of the foreign proceedings was denied would not prevent any action being taken). The relief should include for:

i) a stay of execution against the debtor's assets in Country B
ii) the foreign representative to be entrusted with the administration/realisation of all or part of the debtor's assets in Country B in order to protect and preserve the value of the assets.

The foreign representative would need to demonstrate to the court in country B that the assets were *inter alia*

- in jeopardy
- susceptible to devaluation,
- perishable.

[13] [2014] EHWC 2124 (Ch)

The foreign representative has automatic access to courts even before the recognition application has been determined. Should there be a denial of any further application for recognition then order granted can be terminated.

Given that the debtor has in Country A "a registered office and not much more" and the recognition of foreign main proceeding has been denied the foreign representative may consider applying for recognition of a non-main proceeding (and in due course, if considered, necessary apply for a stay under Article 21 once recognition has been granted if considered necessary). However, the "registered office" does not meet the criteria of an establishment (being 'any place of activity where the debtor carries out a non-transitory economic activity with human means and good or services") and as such runs the risk that this recognition application would also be denied.

Another alternative would be to reapply for recognition as the foreign main proceedings and argue that the registered office is in fact the centre of main interest (COMI) and the court erred. The argument would be that there is no prescribed definition in terms of MLCBI as to what is considered the COMI aside from two factors.

- location of central administration of the debtor
- place that is readily discernible as such by the creditors of the debtor[14].

The foreign representative could argue that it does meet some of the criteria that are considered to demonstrate the existence of a COMI as that is where the principal assets are found (it would need to be confirmed the assets in country A are principle assets). However this is likely to be unsuccessful as the law relating to COMI is increasingly established[15].

A better way forward, and one that the foreign representative should have considered in the first instance is seek co-operation with the court in Country B given that it may not be possible for the foreign proceeding to be recognised as a main proceeding or non-main proceeding re *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund*[16].

Recognition is not required for co-operations as such if the foreign proceeding does not qualify for recognition as a foreign main proceeding or a foreign non-main proceeding (under Article 17) there is a still the option for the courts to co-operate under Article 25. (Article 25(1) requires the court in Country B to co-operate with the court in Country A and the foreign representative).

The course of action would be to apply to the court in Country B under Articles 27 to *inter alia*:

- appoint a person or body to act at the direction of Country B's court
- co-ordinate the administration and supervision of the debtor's assets and affairs in Country B, and
- co-ordinate the concurrent proceedings of the debtor.

Given the (limited) facts the debtor may be a "letter box company" (i.e. the company's management, administration and financial affairs are located in a different country and the company is registered in Company A because for avoidance purposes).

Art.16 MLCBI is the main reference for "rebuttable COMI presumption".

[14] Foundation Certificate in International Insolvency Law, "Module 2A Guidance Text UNCITRAL Model Laws Relating to Insolvency 2023/2024" (INSOL) pg. 28
[15] *Re Videology Limited* [2018] EWHC 2186 (Ch)
[16] 352 BR 103 (Bankr SDNY 2006).

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

Assume you received a file for a new client of the firm. The file contains the facts described below. Based on these facts, analyse key filing strategy to ensure a successful restructuring – specifically, whether to apply for recognition of main or nonmain proceeding or both (in light of COMI / establishment analysis), what papers need to be submitted, and what relief should be requested on day one of the filing.

The client is a Cayman Islands incorporated and registered entity. It is a financial service holding company for a number of direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States. Globe Holdings was initially formed as a Canadian company in 2009, under the laws of Ontario, Canada. A year later, following certain reverse merger transactions, it filed a Certificate of Registration by Way of Continuation in the Cayman Islands to re-domesticate as a Cayman Islands company and changed its name to Globe Financial Holdings Inc. When it re-incorporated in the Cayman Islands in 2010 (from Canada), Globe Holdings provided various notices of its re-incorporation, including in the public filings with the Securities and Exchange Commission (SEC). Around that time, Globe Holdings retained its Cayman Islands counsel Cedar and Woods, which has regularly represented Globe Holdings for over a decade. Globe Holdings has a bank account (opened just a few days ago) in the Cayman Islands from which it pays certain of its operating expenses. Globe Holdings often holds its board meetings virtually, and not physically in the Cayman Islands, and, having obtained support for a bond restructuring, all its regular and special board meetings have been organized by its local Cayman counsel virtually. The client also maintains its books and records in the Cayman Islands. Its public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes disclosed that Globe Holdings is a Cayman Islands company and explained the related indemnification and tax consequences resulting from Globe Holdings' place of reformation.

Globe Holdings has no business operations of its own. The business is carried out through its non-insurance company non-debtor subsidiaries that are all incorporated under the US laws and operating in the US. All employees are in the US. The headquarters are also in the US.

In April 2017, Globe Holdings offered and issued USD 25,000,000 in aggregate nominal principal amount of 6.625% senior unsecured notes due in 2023 (referenced above as the Notes) governed by New York law.

In 2019, Globe Holdings recorded on its consolidated balance sheet a significant increase in liabilities. As a result, Globe Holdings worked with external professional advisors to undertake a formal strategic evaluation of its subsidiaries' businesses. In September 2020, Globe Holdings announced that it was informed its shares would be suspended from the NASDAQ Stock Market due to delinquencies in filing its 10-K. Thereafter, on November 6, 2020, its shares were delisted from the NASDAQ stock market.

An independent third party is actively marketing the sale of the corporate headquarters located in New York including the land, building, building improvements and contents including furniture and fixtures.

Despite these efforts to ease the financial stress, the culmination of incremental challenges consequently resulted in Globe Holdings being both cash flow and balance sheet insolvent.

Globe Holdings retained Cedar and Woods, its long-standing Cayman Islands counsel, to advise on restructuring alternatives. Upon consultations with Cayman counsel and its other professionals, Globe Holdings ultimately determined that the most value accretive path for

the Noteholders was to commence a scheme under Cayman Islands law, followed by a chapter 15 recognition proceeding in the United States, most notably to extend the maturity of the Notes and obtain the flexibility to pay the quarterly interest "in kind".

Globe Holdings expeditiously secured the support of the majority of the Noteholders of its decision to delay interest payments and restructure the Notes through a formal proceeding. Thereafter, on August 31, 2021, about 57% of the Noteholders acceded to the Restructuring Support Agreement (RSA) governed by the New York law. The RSA memorialized the agreed-upon terms of the Note Restructuring. When Globe Holdings approached its largest Noteholders regarding the contemplated restructuring, their expectations were that any such restructuring would take place in the Cayman Islands, which is reflected in the RSA.

On July 4, 2023, the client, in accordance with the terms of the RSA, applied to the Cayman Court for permission to convene a single scheme meeting on the basis that the Noteholders, as the only Scheme Creditors, should constitute a single class of creditors for the purpose of voting on the Scheme.

On July 26, 2023 the Cayman Court entered a convening order (the Convening Order) on the papers, among other things, authorizing the client to convene a single Scheme Meeting for the purpose of considering and, through a majority vote, approving, with or without modification, the Scheme. The Scheme Meeting was held in the Cayman Islands at the offices of Cedar and Woods. Given the Covid-19 pandemic, Scheme Creditors were also afforded the convenience of observing the Scheme Meeting via Zoom and in person via a satellite location in New York. Following the Scheme Meeting, the chairman of the Scheme Meeting (presiding over the meeting in person) reported to the Cayman Court that the Scheme was overwhelmingly supported by the Noteholders, with 91.83% in number and 99.34% in value voting in favor of the Scheme. The Sanction Hearing was held, and an order sanctioning the Scheme (the Sanction Order), which was filed with the Cayman Islands Registrar of Companies the same day.

During all of this time, a class action litigation was in the US was brewing but has been filed yet.

Assumptions

The client is considered to by Globe Financial Holdings (formerly Globe Holdings). Globe Financial Holdings is referred to as GFH and Globe Holdings as GH.

It is assumed that the advice being given is to GH in the Cayman Islands in early 2024.

The global covid pandemic was declared in 2020 and prohibited travel for most of 2020 and 2021.

Note: Reference is made throughout the question to "Globe Holdings" notwithstanding the reference to a change of name. It is assumed that after the references to Globe Holdings after 2010 (mid-first paragraph) are to GFH.

The statement "during all this time" last paragraph it is not assumed that this refers to the time period from 2009 but rather from the time that restructuring was considered so from around mid to late 2021.

COMI/Establishment Analysis

Facts to consider:

- In 2009 GH was formed in Canada (under the laws of Ontario).
- In 2010

    - it re-domesticated in the Cayman Islands officially filing a Certificate of Registration by Way of Continuation
    - it changed its name to GFH
    - it issues notices of the re-incorporation including in the public filings with the Securities and Exchange Commission (SEC), in the United States.
- Circa 2010 is retained counsel in the Cayman Islands which it retains to present day.
- It did not have a bank account in the Cayman Islands until 2024. It is now paying expenses from this account.
- It is a financial services holding company for direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States (US)
- Books and records are maintained in the Cayman Islands
- Board meetings are held virtually.
- Public documents with the SEC and a prospectus for the issuance of notes disclose that GFH as being a "Cayman Islands company" and it is made clear that being a "Cayman Islands company" has indemnification and tax consequences
- GFH has no business operations. It is a holding company.
- Business is carried out through non-insurance non-debtor subsidiaries incorporated and operating in the US.
- The US based subsidiaries have employees
- GFH headquarters in the US.
- 2017 GFH offered and issues notes due in 2023 governed by New York (US) Law.
- November 2020 GFH shares delisted from NASDAQ.
- GFH owns a building and furniture and fitting in New York.
- Circa late 2020 /early 2021 GFH was potentially insolvent
- Circa 2021 GFH commenced planning for scheme with respect to note programme (Notes) under Cayman Island Law and recognition under chapter 15 in the US. The scheme is a formal proceeding.
- August 2021 Restructuring Support Agreement (RSA) signed in terms of Cayman Island Law by the noteholders in respect of the proposed scheme (Scheme Creditors).
- July 2023 Cayman Court issued a court order convening a single scheme meeting (there being only one class of creditors affected by the scheme)
- Scheme meeting was held in the Cayman Islands, with Scheme Creditors able to attend virtually.
- The Scheme was approved by the Scheme Creditors
- Cayman Court sanctioned the Scheme and issued a court order (Sanction Order) which was filed with the Registrar of Companies in the Cayman Islands.

COMI/Establishment Analysis
In order to determine whether to apply for recognition (either main or non-main) it is necessary to determine the center of main interest (COMI) and/or establishment.

Given GFH was initially incorporated in Canada it needs to be ruled out that Canada is not its COMI or an establishment. Given that the company changed its place of incorporation 13 years ago and formally registered in the Cayman Islands and issuing relevant notices. There can be not case to be made that the COMI is considered to be Canada, given the time lapse and the notifications issued. There is no evidence it has any continued contact with Canada following the change of incorporation so it is not considered probable there is an "establishment" in Canada (defined under Article 2(e) to be "any place of operations where the debtor carries out non-transitory economic activity with human means and assets or services'.) Therefore the COMI and establishment are not in Canada.

GFH moved its incorporation to the Cayman Islands in 2010. It needs to be determined if the COMI is in the Cayman Islands or if that is an establishment for purposes of the scheme. The

scheme being the insolvency proceeding to be recognized by a chapter 15 recognition proceeding.

There are two key factors in determining a COMI under the model law:

- location where the central administration of the debtor takes place,
- the location which is readily ascertainable as such by the creditors of the debtor[17].

There is some uncertainty as to whether the Cayman Islands fulfils both of those criteria. It likely fulfils the second but maybe not the first. Therefore other considerations should be taken into account including, but not limited to[18]:

(a) the location of the debtor's books and records
(b) location where financing was organized and authorized
(c) the location where the cash management system was run
(d) the location in which the debtor's principal assets or operations are found
(e) the location of the debtor's primary bank account
(f) the location of the employees
(g) the location in which commercial policy was determined
(h) the site of the controlling law or the law governing the main contracts of the debtor
(i) the location from which purchasing and sales policy, staff, accounts payable and computer systems are managed
(j) the location from which contracts (for supply) were organized
(k) the location from reorganization of the debtor was being conducted
(l) the jurisdiction whose law would apply in most disputes
(m) the location in which the debtor was subject to supervision or regulation; and
(n) the location whose law governed the preparation and audit of account and in which they were prepared and audited.

It is noted that generally, when determining the COMI or whether an establishment exists is the date of the commencement of proceedings[19]. However, in terms of US law this is more nuanced and "a debtor's COMI should be determined based on its activities around the timer the Chapter 15 petition is filed… a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure the debtor has not manipulated the COMI in bad faith"[20].

The facts here are that while the RSA was signed in 2021 which commenced the restructuring the formal proceeding only commenced in 2023. In terms of the Model Law it would be the issuance of the Convening Order that would meet the criteria of a foreign proceeding under Article2. Therefore what needs to be considered is what has happened between July 2023 and today.

The answers to (a) to (n) above are both the US and the Cayman Islands which does not give a clear answer.

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[17] Foundation Certificate in International Insolvency Law, "Module 2A Guidance Text UNCITRAL Model Laws Relating to Insolvency 2023/2024" (INSOL) pg. 28

[18] Foundation Certificate in International Insolvency Law, "Module 2A Guidance Text UNCITRAL Model Laws Relating to Insolvency 2023/2024" (INSOL) pg. 28

[19] Foundation Certificate in International Insolvency Law, "Module 2A Guidance Text UNCITRAL Model Laws Relating to Insolvency 2023/2024" (INSOL) pg. 29

[20] *Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd*) (2nd Cir Appeal Apr. 16, 2013)

GFH's books and records are in the Cayman Islands although the headquarters are in the US. Financing was historically at least organized and authorized in US (given the company was listed) as is the location where the cash management system was run (given that all the subsidiaries are based on the US). The GFH's principal assets or operations are also in the US. The subsidiaries are all incorporated there and the building (and furniture and fittings are based there).

It is also likely that GFH's primary bank account is there although this is not clear. It must have paid Cedar and Woods (and presumably company secretarial fees at the very least) during the time it has been registered in the Cayman Islands. This must have been settled from a non-Cayman Island account given it only recently opened one. The reasons for same are unclear but may run afoul of previous US rulings.

GFH does not in and of itself have employees, the subsidiaries do and they are based in the US. It is not known where the commercial policy was determined.

The controlling low governing the main contracts, which is primarily the Notes is the US (New York law), so too for the main contracts of the subsidiaries. Given the company was a holding company it is unlikely to have a purchasing and sales policy. It does not have staff. It is not known where the accounts payable and computer systems are managed on the facts provided. Supply contracts would be minimal but it has retained counsel in the Cayman Islands since 2010.

The reorganization of GFH is being conducted in the Cayman Islands. The law that would govern any dispute arising would be the law of Cayman Islands given the RSA. (Cayman Island law governs that). The scheme is under Cayman Law. The public filings including with respect to the Notes reflected company was a Cayman Islands Company (Although the Notes themselves were issued under US law). The scheme meeting was held in the Cayman Islands albeit parties attended virtually (but there were reasons for same i.e. the covid pandemic).

As a holding company is will be required to prepare and audit group accounts. These would need to be prepared, at group level, under Cayman accounting standards (likely in compliance with International Accounting Standards but this is not known). Given that the board meetings are held in the Cayman Islands (albeit virtually) but from a base in the Cayman Islands this may considered to fufil the "nerve center" text.

In reverse order, is the location readily ascertainable as such by the creditors of the debtor? The scheme governing the compromise on the Notes is under Cayman Law.

Application
Given the above the key filing strategy with respect to GFH is that an application should be made for a main foreign proceeding application in the US under Chapter 15 of the Bankruptcy Code.

It is a main proceeding not a non-main proceeding as there is sufficient justification that the Cayman Islands meet the criteria for a COMI given that it has been incorporated there for over a decade, the books and records are maintained there, meetings are held there (albeit on a virtual basis), the creditors are aware of the location (per public filings). The scheme is under Cayman law.

Given that the Note holders have signed the RSA and have approved the Scheme which has now been sanctioned in terms of the Sanction Order the scheme is now binding on the Scheme Creditors. However, the Scheme needs to be recognized under Chapter 15 given

that the Notes are issued under US law. (It is not known the location of the Scheme Creditors).

The so called Gibbs Rule arguments are unlikely to apply, in so far as an American court is likely to consider this case law given it is English Law). in part because the relevant creditors (Noteholders have submitted to the foreign proceeding – they signed the RSA under Cayman Law and approved the scheme issued out of the Cayman court) as well as the case law[21].

Papers to be submitted
The documents to be submitted in the recognition proceeding with include:

- Certified copy of the Complying Order
- Certified copy of the Sanction Order
- Certificate affirming the appointment of a foreign representative (e.g. a scheme administrator).
- Statement from the foreign representative of scheme of the known foreign proceedings (based on the facts this is none).

No translation of these documents will be required given that the Cayman Islands is English speaking.

Relief Requested
Given that there is a class action litigation brewing in the US but not filed. It will be necessary to file for interim relief under Article 19(1) while the recognition application is being filed. The application should include a request for relief:

- A moratorium
- a Stay of execution against GFH's assets in the US (which include the building but also the subsidiaries). The building is actively marketing the building it is not clear if this is a forced sale or not)
- Entrusting the administration of the subsidiaries and other assets to the foreign representative in order to preserve their value given they are in jeopardy given risk of the class action.

It is assumed that the scheme compromising the Notes will return GFH to solvency. It is not known whether or not some or all of the subsidiaries may be insolvent.

If the foreign proceeding is recognized as a non main proceeding then the foreign representative should apply for a stay under Article 21, for the period of the scheme of arrangement, once recognition has been granted.

It is not known as to what the payment will be in terms of the scheme to the Note holders (it is stated to be "in kind"). Depending on the terms of this and the duration there may be some challenge to a stay under Article 21 (along the lines of the IBA Case[22]).

Consideration could be given to commencing plenary proceedings under chapter 15 following recognition. The US subsidiaries would be coordinated with the foreign proceedings. The foreign representative could submit a chapter 11 petition against GFH (even with the recognition proceedings under Chapter 15). It would need to be decided and determined the appropriate venue for filing. This would apply an automatic stay and the development of a restructuring plan.

[21] In re Modern Ltd 642 BR 758 (Bankr SDNY 2022).
[22] *In the Matter of the OJSC International Bank of Azerbaijan and the CBIR 2006 – Bakshiyeva v Sberbank of Russia, et al* [2018] EWHC 59 (Ch).

Consideration needs to be given to the fact that in terms of US Bankruptcy Code insurance companies do not full under it and separate bankruptcy provisions apply[23]. As such there may be a public policy exception in terms of Articles 6. dealing with the subsidiaries that are in the insurance sector will need to be dealt with separately. It is not clear whether the subsidiaries are insurance companies are "operate in the sector".

Excellent!

*** End of Assessment ***

Marks awarded: 44 out of 50. Well done!

[23] Foundation Certificate in International Insolvency Law, "Module 2A Guidance Text UNCITRAL Model Laws Relating to Insolvency 2023/2024" (INSOL) pg. 4