



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

QUESTION 1 (multiple-choice questions) [10 marks in total] **8 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.vbv
- (b) **The United Nations Commission on International Trade Law.**
- (c) The United Nations Conference on Trade and Development.

Question 1.2

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

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

Choose the correct answer:

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

Question 1.3

Which of the following statements incorrectly describe the MLCBI?

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

Choose the correct answer:

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

Question 1.4

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

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

Choose the correct answer:

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

Question 1.5

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

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

Choose the correct answer:

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

Question 1.6

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

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

Question 1.7

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

- (i) The increased risk of fraud by concealing assets in foreign jurisdictions.
- (ii) The difficulty of agreeing multilateral treaties dealing with insolvency law.

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

Choose the correct answer:

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

Question 1.8

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

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

Choose the correct answer:

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

Question 1.9

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

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

Choose the correct answer:

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

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

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

Question 1.10

Which of the statements below are correct under the MLCBI?

- (a) The foreign representative always has the powers to bring avoidance actions.
- (b) The hotchpot rule prioritises local creditors.
- (c) The recognition of a foreign main proceeding is an absolute proof that the debtor is insolvent.

(d) None of the above are correct.

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

Question 2.1 [maximum 3 marks] 3 marks

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

The key distinction between the application is well defined by Bork and Veder, that “the EIR, being a **regulation**, directly becomes part of the domestic law of each EU Member State”, whereas, the Model Law, is only a **recommendation**, and “does not attempt to substantively unify the insolvency laws of States.” According to the UNCITRAL Guide to Enactment, the Model Law “is not a convention, and can therefore be considered an example of ‘soft’ law”.

A **benefit of the MLCBI** is its flexibility, in that, by virtue of its ‘format’, each member State has the discretion to “decide on its own where or not to adopt the Model Law in whole or in part in its domestic legislation, rather than forcing new (foreign) substantive laws on States”. Further, the “Model Law aims to provide each State with the necessary procedural framework to allow cross-border insolvencies to be dealt with in a more cost and time efficient matter”.

To that end, a **disadvantage of the MLCBI** is that “flexibility” results in varying adoption of the MLCBI into the respective domestic laws of member States which, in turn, creates inconsistency.

On the contrary, a **benefit of the EIR** is that it is more predictable in its application, in that, the concepts contained within that regulation directly become part of the domestic law of each EU Member State.

That being said, a **disadvantage of the EIR** is its inefficiency to achieve harmonisation, noting that, according to Bork and Veder, “harmonisation of insolvency law efforts are still ongoing in Europe”.

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.

Pursuant to Article 21(1) of the Model Law, “upon recognition of a foreign proceeding...the court may, at the request of a foreign representative, grant any appropriate relief, including:

- Staying the commencement or continuation of individual proceedings concerning the debtor’s assets, rights, obligations or liabilities to the extent they have not been (automatically) stayed under Article 20(1)(a) of the Model Law;
- Staying execution against the debtor’s assets to the extent it has not been stayed (automatically) under Article 20(1)(b) of the Model Law;
- Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been (automatically) suspended under Article 20(1)(c) of the Model Law;
- Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;
- Entrusting the administration or realization of all or part of the debtor’s assets located in enacting State to the foreign representative or another person designated by the court;
- Extending any interim relief granted pursuant to Article 19(1) of the Model Law; and
- Granting any additional relief that may be available to a domestic liquidator/office holder under the laws of the enacting State.”

In granting relief under Article 21 of the Model Law, **the Court should primarily consider the following:**

- The interest of creditors in the enacting State are adequately protected; and
- The relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Put simply, the relief available under Article 21 of the Model Law “should not interfere with the administration of another insolvency proceeding, in particular, the main proceeding”.

Question 2.3 [2 marks] 2 marks

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

Pursuant to Article 13 of the Model Law, **foreign creditors have the same rights** regarding the commencement of, and participation in, a proceeding under the insolvency law of the enacting State.

Otherwise referred to as the “anti-discrimination principle”, Idem stated that “this access right for foreign creditors is expressed in Article 13, in which it is further clarified that this access does not affect the ranking of claims in the enacting State, except that the claim of a foreign creditor shall not be given lower priority than that of general unsecured claims solely because the holding of such claim is a foreign creditor.”

However, as stated in the Digest of Case Law, the footnote of Article 13 of the “differs from the provision in the text only to the extent that it provides wording that permits States that deny recognition to foreign tax and social security claims to continue to discriminate against those claims.”

Question 2.4 [maximum 3 marks] 3 marks

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

Articles 19 to 24 of the Model law deal with the relief available in foreign main and foreign non-main proceedings.

The key distinction with respect to the relief available in foreign main versus foreign non-main proceedings is as follows:

- under the Model Law, the COMI of the debtor determines the consequences of recognition. If the COMI is in the jurisdiction where the foreign proceedings have been opened, the proceedings are the **main proceedings** with **automatic mandatory relief**;
- on the contrary, if the debtor **only has an establishment** in the jurisdiction where the foreign proceedings are opened, the proceedings are the **non-main proceedings** **without automatic relief**, but only discretionary post-recognition relief granted by the court.

Whilst there is no definition of COMI in the Model Law itself, the UNCITRAL Guide to Enactment does provide some guidance on that term, particularly as it relates to whether (or not) proceedings are the ‘main’ proceedings. Pursuant to the Model Law, the two key factors for determining COMI are as follows:

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

I set out below the relief available in foreign main versus foreign non-main proceedings.

Foreign main proceedings - automatic relief

Pursuant to Article 20 of the Model Law, “the recognition of a foreign main proceeding (that is, where the COMI of the debtor is in the jurisdiction where the foreign proceeding was opened) has the following three automatic effects:

- A stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities;
- A stay of the execution against the debtor’s assets; and
- A suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor”.

Additional relief available at the request of foreign representative in a foreign main proceeding is set out under Article 21 below.

Foreign non-main proceedings - appropriate relief

Pursuant to Article 21 of the Model Law, “upon recognition of a foreign proceeding (whether main or non-main), the court in the enacting State with the discretionary power - where

necessary to protect the assets of the debt or the interest of creditors and at the request of the foreign representative - to grant appropriate relief including:

- Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligation or liabilities, to the extent they have not been (automatically) stayed under Article 20(1)(a) of the Model Law;
- Staying execution against the debtor's assets to the extent it has not been stayed (automatically) under Article 20(1)(b) of the Model Law;
- Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been (automatically) suspended under Article 20(1)(c) of the Model Law;
- Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- Entrusting the administration or realisation of all or part of the debtor's assets in the enacting State to the foreign representative or another person designated by the court;
- Extending any interim relief granted pursuant to Article 19(1) of the Model Law; and
- Granting any additional relief that may be available to a domestic liquidator/office holder under the laws of the enacting State.

QUESTION 3 (essay-type questions) [15 marks in total] 15 marks - excellent essays !

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.

Foreign main proceedings - Germany

Pursuant to Article 2(b) of the Model Law, the foreign main proceeding means a foreign proceeding taking place in the State where the debtor has the centre of main interests (COMI).

Whilst there is no definition of 'COMI' under the Model Law, the UNICTRAL Guide to Enactment provides some guidance on the two key factors for determining COMI as follows:

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

In the current scenario, I note that the debtor has its COMI in Germany, therefore the foreign main proceedings must have been filed in that jurisdiction, having regard to Article 2(b) of the Model Law.

Pursuant to Article 20 of the Model Law, upon recognition of a foreign main proceeding has the following the following three automatic effects:

- A stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
- A stay of the execution against the debtor's assets; and

- A suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor”.

Foreign non-main proceeding - Bermuda

On the contrary, pursuant to Article 2(c) of the Model Law, if a debtor only has an establishment (in this case, that establishment is in Bermuda) where the foreign proceedings are filed, those proceedings will be recognised as foreign non-main proceedings.

Pursuant to Article 21 of the Model Law, upon recognition of a foreign non-main proceeding, the court has the discretionary power to grant appropriate relief as follows:

- Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligation or liabilities, to the extent they have not been (automatically) stayed under Article 20(1)(a) of the Model Law;
- Staying execution against the debtor’s assets to the extent it has not been stayed (automatically) under Article 20(1)(b) of the Model Law;
- Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been (automatically) suspended under Article 20(1)(c) of the Model Law;
- Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;
- Entrusting the administration or realisation of all or part of the debtor’s assets in the enacting State to the foreign representative or another person designated by the court;
- Extending any interim relief granted pursuant to Article 19(1) of the Model Law; and
- Granting any additional relief that may be available to a domestic liquidator/office holder under the laws of the enacting State.

Recognition proceedings - US

Pursuant to Article 15 of the Model Law, “a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.” Such an application, “shall be accompanied by:

- A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- A certificate from the foreign court (Germany) affirming the existence of the foreign proceeding and the appointment of a foreign representative; or
- In the absence of evidence referred to above, any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative.

Further, the application filed pursuant to Article 15 of the Model Law shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. In this case, there are other foreign proceedings in Germany and Bermuda, assuming that the US foreign representative is aware of both of those proceedings.

The Court is also entitled to make presumption regarding the US application for recognition pursuant to Article 16 of the Model Law.

Article 17 of the Model Law “makes it clear that an application for recognition of a foreign proceeding must be decided upon at the earliest possible time and recognition can be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist”.

Therefore, insofar as the US recognition proceeding is concerned, provided that there are no public policy grounds for denying a request for recognition,” such request made before a competent court of the enacting State, pursuant to Article 4 of the Model Law, **shall be granted** as a matter of course if the requirements of Article 15(2) of the Model Law are met, the foreign proceeding qualifies as such in accordance with the definition of Article 2(a) of the Model Law and the foreign representative qualifies as such in accordance Article 2(d) of the Model Law.

For completeness, “even prior to a decision on the recognition application, the court in the enact State is entitled to grant urgently need interim relief upon application for the recognition of a foreign proceeding pursuant to Article 19 of the Model Law”. Further consequences of a recognition (once the application is decided) are set out under Articles 23 and 24 of the Model Law.

Question 3.2 [maximum 3 marks] **3 marks**

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.

Pursuant to Article 10 of the Model Law, the “safe conduct” rule ensures that “the court in the enacting State (being, the US, in the scenario) does not assume jurisdiction over all of the assets of the debtor on the sole ground of the fact that the foreign representative has made an application for the recognition of a foreign proceeding”.

Further, paragraph 109-111 of the GEI provides that “Article 10... however, absolutely and is only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. Other possible grounds for jurisdiction over the foreign representative or the assets and affairs of the debtor under the laws of the enacting State are not affect; a tort committed by, or misconduct on the part of, the foreign representative may provide grounds for dealing with the consequences of that tort or misconduct”.

Put simply, the foreign representative will need to respond to and appropriately deal with litigation and discovery served on them in connection with their alleged tortious interference with contract rights of the US-based vendors of the foreign debtors as was held in *SNP Boat Service SA*, 453 B.R. 446.

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?

I note that the recognition hearing date is set for 35 days after the petition date due to the availability of the court. Whilst there is no litigation pending or threatened against the foreign the debtor, there are assets in the form of US-governed leases and intellectual property licences that should be protected in the meantime. I set out below interim relief that the court may grant, at the request of foreign representative, in the meantime.

Interim collective relief prior to recognition

Pursuant to Article 19 of the Model Law, where relief is urgently needed to protect assets of the debtor (or the interests of the creditors), as is the case in this scenario, the US court may, at the request of the foreign representative, grant relief of a provisional nature from the time of filing the recognition application under the application is decided upon as follows:

- A stay of execution against the debtor's assets;
- Entrusting the administration or realisation of all or part of the debtor's assets located in the enacting State to the foreign representative or another person designated by the court, in order to protect and preserve the value of the assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- Any of the following post-recognition relief provided for in Article 21 of the Model Law, namely:
 - Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
 - Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligation or liabilities; and
 - Granting any additional relief that may be available to a domestic liquidator/office holder under the laws of the enacting State.

Question 3.4 [maximum 4 marks] 4 marks

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

In the first instance, the court in the enacting State will consider the provisions under Article 17(1)(a) and (b) of the Model law and assess whether the foreign proceeding has met the required characteristics set out under Article 2.

Further, I note that the foreign representative administers the assets of an insolvency debtor in an insolvency proceeding pending in **Country A where the foreign debtor has its registered office and not much more**. Pursuant to Article 16, otherwise referred to as recognition "presumption", "in the absence of proof to the contrary, the debtor's registered office (or habitual residence in the case of an individual, is presumed to be the centre of debtor's main interests (COMI)".

On that basis, pursuant to Article (2)(b) of the Model Law, the "foreign main proceeding means a foreign proceeding taking place in the State where the debtor has its **centre of main interests**". Therefore, the commencement of a proceeding in Country B to recognise that jurisdiction as the foreign main proceeding for the purpose of selling certain assets, was misguided. The court's decision to deny the recognition of the foreign proceeding insofar as Country B was concerned is correct.

That being said, "additional factors that could be considered by a court to determine the debtor's COMI include, but are not limited to... the location in which the debtor's principal assets or operations are found." If it was the case that the assets referred to in the scenario were, in fact, principal assets then the foreign representative needed to bring that (and any other relevant evidence) to the attention of the court in order to have the proceeding in Country B recognized as the foreign main proceeding.

However, if the debtor only has "certain assets" within the territorial jurisdiction of Country B, which appears to be the case here based on the facts provided, then it is unlikely that the court in the enacting state will conclude that the COMI of the debtor is in the foreign state.

For completeness, "establishment" is defined under Article 2(f) of the Model Law as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services".

The existence of "certain assets" on their own, without anything else, is unlikely to convince the court in the enacting State that there is an establishment. Put simply, the foreign representative will need show that an establishment exists (as that term is defined under the Model Law) in order to have the foreign proceedings recognized.

Paragraph 90 of the GEI notes that "under the MLCBI, the inquiry as to whether the debtor has an establishment is purely a factual one and will thus turn on specific evidence adduced; there is no presumption to assist with that inquiry".

For completeness, in making the application for recognition, the foreign representative can also bring it to the courts attention that there was another proceeding pending in Country A, noting that pursuant to Article 15(3) of the Model Law, "an application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative".

QUESTION 4 (fact-based application-type question) [15 marks in total] 13 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.

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.

I act for a Cayman Islands incorporated and registered entity (**Globe Holdings**).

I note that despite efforts to ease the financial stress, the culmination of incremental challenges consequently resulted in Globe Holdings being both cash flow and balance sheet **insolvent**.

I have been asked to advise on strategy regarding restructuring, particularly with respect to:

- Whether to apply for recognition of main or non-main proceedings (or both);
- What papers need to be submitted; and
- What relief should be requested on the day of filing.

I set out my advice below.

Applications for foreign proceedings

In the first instance, it is necessary to determine whether to apply for recognition of main or non-main proceedings or both.

To this end, under Article 2(b) the Model Law, the definition of a foreign main proceeding means the "foreign proceeding taking place in the State where the debtor has its centre of main interests (COMI)".

Further, under Article 2(c) of the Model Law, the definition of foreign non-main proceeding means the "foreign proceeding, other than a foreign main proceeding, taking place in the State where the debtor has an establishment within the meaning of Article 2(f) of the Model Law.

In which location is the COMI of Globe Holdings?

Whilst there is no definition of COMI under the Model Law, the UNCITRAL Guide to Enactment does provide some guidance on the two key factors for determining the COMI under the Model Law as follows:

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

"Depending on the circumstances, the court may need to give greater or less weight to a given factor, but in all cases the determination of the COMI is a holistic endeavour designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's COMI, as readily ascertainable by its creditors. Additional factors that could be considered by a court to determine the debtor's COMI include, but are not limited to, the following (in no particular order):

- the location of the debtor's books and records. The client also maintains its books and records in the Cayman Islands;
- the location where financing was organised or authorised;
- the location from where the cash management system was run;
- the location in which the debtor's principal assets or operations are found. I note that 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;
- the location of the debtor's primary bank. I note that 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.
- the location of employees. All employees are in the US. The headquarters are also in the US;
- the location in which commercial policy was determined;
- the site of the controlling law or the law governing the main contracts of the debtor;
- the location from which purchasing and sales policy, staff, accounts payable and computer systems are managed;
- the location from which contracts (for supply) were organised;
- the location from which reorganisation of the debtor was being conducted. 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.;
- the jurisdiction whose law would apply to most disputes;
- the location in which the debtor was the subject to supervision or regulation; and
- the location whose law governed the preparation and audit of accounts and in which they were prepared and audited."

Based on the facts provided, the COMI for Globe Holdings is in the **Cayman Islands**, therefore an application for recognition of the foreign main proceeding shall be filed by the foreign representative in the Cayman Islands court pursuant to Article 15 of the Model Law.

Further, we can then turn our minds to whether a foreign non-main proceeding is required, and if so, where is the appropriate location for an "establishment" having regard to the definition under the Model Law.

Pursuant to Article 2(f) of the Model Law, establishment means "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services".

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. Based on the facts provided, Globe Holdings is carrying out its services using human resources (employees) in the US, meets the requirements for an establishment under the Model Law.

Thus, an application for recognition of the foreign non-main proceeding shall be filed by the foreign representative in the US court pursuant to Article 15 of the Model Law.

Documents to be submitted to the relevant court

Pursuant to Article 15 of the Model Law, the following documents are required to be submitted to the court, by the foreign representative, in the application for recognition of the foreign proceeding:

1. A foreign representative of Globe Holdings may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.
2. An application for recognition shall be accompanied by:
 - (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
 - (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
 - (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.
3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Relief

Articles 19 to 24 of the Model law deal with the relief available in foreign main and foreign non-main proceedings.

Article 19 of the Model Law provides the relief that may be granted upon application for recognition of a foreign proceeding (interim relief).

Article 20 of the Model Law provides the effects of recognition of a foreign main proceeding. Relevantly, the commencement of any action concerning the debtor is stayed. Assuming that recognition is granted in the abovementioned applications, then the class action litigation was in the US would be stayed.

Article 21 of the Model Law provides the relief that is available in the foreign main (Cayman Islands) and non-main (US) proceedings.

On the day of filing, the foreign representative should request urgent relief to protect the assets of Globe Holdings pursuant to Article 19 of the Model Law.

Co-operation with foreign courts and foreign representatives

I note that 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.

Further, following a Scheme Meeting, 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.

Article 25(1) of the Model Law provides that "in cross-border insolvencies covered by Article 1 of the Model Law, the court must co-operate to the maximum extent possible with foreign courts and foreign representatives".

Article 25 is relevant in the current scenario in that, orders have been filed in the Cayman Court, therefore the Cayman Court ought to co-operate with the US court insofar as any foreign non-main proceedings are concerned.

Articles 25 to 27 of the Model Law deals with other aspects of cross-border co-operation, which, in the current scenario, provides guidance as to the co-ordination between judges in the Cayman Islands and the US in respect of Globe Holdings.

The essay should also contain: A discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI and alternative courses of action in case of a rebuttal. Conclusive remarks with reference to Art.6 MLCB... Otherwise, a very good essay.!

*** End of Assessment ***

Marks granted: 46 out of 50 (Congratulations!)