



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

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 7 marks

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

Question 1.1

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

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

Question 1.2

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

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

Choose the correct answer:

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

Question 1.3

Which of the following statements incorrectly describe the MLCBI?

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

Choose the correct answer:

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

Question 1.4

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

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

Choose the correct answer:

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

Question 1.5

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

- (i) An insolvency proceeding is commenced in jurisdiction A, but a significant asset is located outside of jurisdiction A.
- (ii) An insolvency proceeding is commenced in jurisdiction A and immediately transferred to a foreign jurisdiction B.

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

Choose the correct answer:

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

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

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

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

Question 1.6

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

- (a) Binding within jurisdiction B.
- (b) Binding within jurisdiction B, but certain actions need to be taken.
- (c) No effect within jurisdiction B.
- (d) Likely no effect within jurisdiction B.

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

Question 1.7

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

- (i) The increased risk of fraud by concealing assets in foreign jurisdictions.
- (ii) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (iii) To eradicate the use of comity.
- (iv) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

Choose the correct answer:

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

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

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

(d) All of the above.

Question 1.8

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

(i) COMI is a well-defined term in the MLCBI.

(ii) COMI stands for comity.

(iii) The debtor's registered office is irrelevant for purposes of determining COMI.

(iv) COMI is being tested as of the date of the petition for recognition.

Choose the correct answer:

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

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

(c) All of the above.

(d) None of the above.

Question 1.9

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

(i) Foreign main proceeding.

(ii) Foreign non-main proceeding.

(iii) Plenary domestic insolvency proceeding.

Choose the correct answer:

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

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

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

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

Question 1.10

Which of the statements below are correct under the MLCBI?

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

(b) The hotchpot rule prioritises local creditors.

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

(d) None of the above are correct.

QUESTION 2 (direct questions) [10 marks in total] 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 MLCBI and EU Insolvency Regulation (EIR) differ in a principal way in how they interact with domestic law. The MLCBI is not an attempt to unify insolvency law but is in the form of recommended soft law, whereas the EIR is implemented automatically in Member States' domestic laws. Once a state becomes signatory to the MLCBI, the enacting state incorporates the MLCBI into its domestic law by operation of a further statute, whereas the EIR became directly part of EU Member States' domestic laws once adopted by the EU.

The benefit to the EIR is that there is greater consistency across Member States' obligations because the EIR is the same in each domestic jurisdiction, as opposed to the MLCBI, where states parties may choose not to implement some parts of the MLCBI in their domestic law and wordings/implementations may vary. No two MLCBI enacting statutes are exactly the same, which may be beneficial for a state, but not as helpful for certainty for debtors and creditors in the same way as the EIR. The EIR allocates jurisdictional competence to the courts of a Member State within which the COMI is located, and it allows for subsidiary proceedings where a debtor has an "establishment", which definition is the same in the MLCBI. Under the EIR, the subsidiary proceeding may be independent if opened before the main proceeding, or secondary when opened after the proceeding in the COMI state; this prevents undesirable forum shopping. However, the EIR is stricter about the conditions for opening proceedings, their conduct and their closure, including as subject to specific provisions dealing with rights *in rem*, set-off, immovable property, employment and detrimental acts. The EIR (and EIR Recast) offer greater certainty on many of these rights and definitions than the MLCBI, but its strictness and topic focus may also be a disadvantage in cross-border matters that require greater agility to change with circumstances as they arise.

But this shows a benefit of operating within the MLCBI, because the MLCBI allows for a broader or more flexible interpretation of COMI (as there is no set definition of COMI) and prescribes more general terms about how foreign courts should interact and provide assistance and cooperation. It leaves open the form of cooperation between courts, which is helpful in adapting to the needs of novel restructuring tools and methods globally, including the use of other ADR for resolving party disputes along the way. The EIR's test for COMI is important for determining the jurisdiction in which main proceedings should be commenced, whereas the MLCBI COMI test relates to the effects of recognition and automatic or supplementary relief available to assist a foreign insolvency proceeding. Despite the similarities in the MLCBI and EIR, only a handful of EU countries have implemented the MLCBI separately, which means that parties will have to be mindful of working with EU parties in global restructuring matters.

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.

In the MLCBI, the court's discretionary power to grant post-recognition relief is found in Article 21. It envisions that the party applying for recognition has already been granted recognition of a foreign main or non-main proceeding. The court must consider granting such relief as is appropriate where it is necessary to protect the assets of the debtor or interests of the creditors (to the extent not otherwise (automatically) stayed under Art. 20), including:

- Staying the commencement or continuation of individual actions or proceedings about the debtor's assets, rights, obligations or liabilities;
- Staying execution against the debtor's assets;
- Suspending rights to transfer, encumber or otherwise dispose of the debtor's assets;
- Providing for evidence and witness examination orders;
- Entrusting the foreign representative or another person with the administration or realization of the debtor's assets located in the recognizing state; and,
- Granting relief that is otherwise available in the recognizing state.

Upon recognition, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the recognizing State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in the recognizing State are adequately protected. The same is true for any relief granted to a foreign representative of a non-main proceeding: the court must be satisfied that the relief relates to assets that are appropriately administered in the non-main proceeding.

There are circumstances where a court may have access to discretionary power under Article 21 before it begins considering recognition. An enacting state's court is entitled to grant urgently-needed interim relief to protect assets at the time of the recognition application (Article 19), including the discretion to grant access to the relief mentioned in Article 21, paragraphs 1(c), (d) and (g). This is an exercise of discretionary power that may be extended upon the determination of recognition as per Article 19, paragraph 3 and Article 21, paragraph 1(f).

Question 2.3 [2 marks] 2 marks

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

Article 13 embodies the anti-discrimination principle, which allows foreign creditors to have the same rights as creditors domiciled in the same state as the debtor, from the perspective of commencing and participating in local insolvency proceedings. The right does not affect how claims are ranked, but ensures that a foreign creditor will not be given lower priority than general unsecured claims (or the equivalent lowest local creditor claim) just by virtue of its foreign status. There are, of course, exceptions to this for states that will not recognize foreign tax and social security claims, such that they may continue to discriminate against such claims.

Notice must also be given under Article 14, which requires that creditors outside of the subject State are made aware of the steps being taken in the proceeding. This ensures that no party is operating at an unfair or prejudicial informational deficit as matters progress. In combination with protections and rights granted under Chapter II for foreign representatives, foreign debtors may be satisfied that the MLCBI gives the power of local tools to foreign representatives that save the time and costs of pursuing relief in the foreign proceeding first. Because foreign representatives are given standing before local

courts, they can address any breaches locally, which is an added benefit of cross-border recognition and cooperation. It dispenses with burdensome protections like legalization and letters rogatory as well, which helps parties streamline efforts and leads to optimal results.

Consistency in treatment is one of the goals that the MLCBI aims to achieve because it reduces cross-border disputes about fairness and preference. To the extent possible, local domestic proceedings have primacy under Article 29, but also international treaties will supersede the MLCBI. Each of these clauses creates the conditions for a proper balance of preserving a state's sovereignty and getting parties to work together in a spirit of comity to achieve the best outcome in a global insolvency proceeding.

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?

Foreign main and non-main proceedings have grounds for different relief because of the underlying nature of those proceedings. A key distinction is whether relief is automatic and mandatory or whether it is discretionary.

During an application for recognition, a court will review the requirements set out in Article 17 to determine whether to recognize a foreign proceeding, and if so, how to categorize it. A foreign proceeding will be recognized as a foreign main proceeding under Article 2(a) if it is taking place in the debtor's COMI. There is a rebuttable presumption that the COMI is the jurisdiction of the debtor's registered office. The debtor's COMI will need to be carefully analysed to ensure that the debtor did not simply move its registered office address shortly before or during the foreign proceedings and to ensure that it has more than "certain assets" or merely transitory activity there.

Where the COMI is determined to be in the jurisdiction where the foreign proceedings have begun, then those proceedings are "main" insolvency proceedings that attract automatic, mandatory relief under Article 20. The commencement or continuation of actions against the debtor's assets are stayed (except where necessary to preserve a creditor's claim), execution is stayed and the right to transfer, encumber or otherwise dispose of any of the debtor's assets is suspended. These allow the parties to take time to organize an orderly and fair cross-border insolvency proceeding. These are powerful provisions as they can even stay arbitration agreements, but which may be modified or terminated by local laws. There are still provisions that allow for court discretion over relief as well under Article 21 (as set out in the answer above to Question 2.2), regardless of whether a proceeding is main or not.

If during the recognition stage, the court determines that the debtor only has an "establishment" of non-transitory economic activity or operations per Article 2(f) in the foreign jurisdiction, then it is considered a non-main proceeding without access to automatic relief. Only discretionary post-recognition relief from the court can be granted according to Article 21 (as set out in the answer above to Question 2.2). If all that exists in the jurisdiction of the foreign proceeding is certain assets, then it is unlikely that the court will grant recognition at all.

As indicated above, there are limits to the court's ability to grant relief, including under local law and precedent, like the UK's Gibbs Rule. The Gibbs Rule means that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding unless it is discharged under the applicable contract's law. This rule does not apply if the creditor submits to a foreign insolvency proceeding, as that way the creditor has elected to have the foreign proceeding determine the applicable rights. In jurisdictions

where the Model Law on the Recognition and Enforcement of Insolvency-Related judgments is in force, this is not a concern.

Moreover, in foreign non-main proceedings, the foreign representative is required under Article 18 to keep the court apprised of any substantial changes in the status of a recognized foreign proceeding or any other foreign proceeding that becomes known to the foreign representative regarding that same debtor. The court is required by Article 22 to review any relief granted under Articles 19 and 21 when other foreign non-main proceedings are recognized, with a view to ensuring that the creditors' (and other parties') interests are adequately protected. A foreign representative or an affected person may also request to modify or terminate relief, which the court must consider.

It is important to note that, despite the different types of relief described above, there is interim relief available to either foreign main or non-main proceedings pre-recognition on an urgent basis under Article 19. An enacting state's court is entitled to grant urgently-needed interim and provisional relief to protect the debtor's assets or creditors' interests at the time of the recognition application. This includes staying execution against the debtor's assets, entrusting the foreign representative with administering or realizing some or all of the debtor's assets located in the subject state so as to protect or preserve the value of perishable, devaluable or otherwise jeopardized assets, and certain rights under Article 21, paragraph 1(c), (d) or (g), among other things.

QUESTION 3 (essay-type questions) [15 marks in total] 8 marks

Question 3.1 [maximum 4 marks] 3 marks

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

To determine where foreign proceedings are filed requires a review of COMI and of recognition principles because the COMI of the debtor determines the consequences of the recognition. If the COMI is in Germany, then the relevant law for the country's insolvency is the EIR (and EIR Recast). It seems likely that the foreign main proceeding was opened in Germany, which would have the debtor's COMI determined under the EIR's test, which is more prescriptive than under the MLCBI. The EIR's concept of COMI relates to the jurisdiction in which the main proceedings *should be* commenced, whereas the MLCBI's COMI concept relates to the location where the central administration of the debtor takes place, as is readily ascertainable by its creditors. The MLCBI's concept also relates to the relief available to a main proceeding by way of recognition of COMI.

The determination of whether a foreign proceeding is main or non-main will affect the nature of relief accorded to the foreign representative under Articles 20-21 of the MLCBI, coordination of foreign and local proceedings, and any concurrent proceedings under Chapter V. Of course, if there are any bilateral or international treaties in force between these countries, they take supremacy over the MLCBI.

The recognition test will consider whether each is a foreign proceeding under Article 2:

- It must be a proceeding or interim proceeding;
- Either judicial or administrative;
- Collective in nature;
- Located in a foreign state;
- Authorised or conducted under an insolvency law (which may require expert evidence as per the US Chapter 15 *Agrokor* decision);
- Where the debtor's assets and affairs are subject to control or supervision by the foreign court; and
- Where the proceeding is for the purpose of either reorganization or liquidation.

Both Germany and Bermuda appear to fit these definitions of foreign proceeding for the purposes of US recognition, based on the limited facts available and understanding of the proceedings.

Where the COMI is determined to be in the jurisdiction where the foreign proceedings have begun, then those proceedings are "main" insolvency proceedings that attract automatic, mandatory relief under Article 20. The commencement or continuation of actions against the debtor's assets are stayed (except where necessary to preserve a creditor's claim), execution is stayed and the right to transfer, encumber or otherwise dispose of any of the debtor's assets is suspended. These allow the parties to take time to organize an orderly and fair cross-border insolvency proceeding. These are powerful provisions as they can even stay arbitration agreements, but which may be modified or terminated by local laws. There are still provisions that allow for court discretion over appropriate relief as well under Article 21(1), regardless of whether a proceeding is main or not.

From the US recognition perspective, Germany would be recognized as the foreign main proceeding and Bermuda as the location with an establishment would be recognized as the foreign non-main proceeding. It means that the foreign representative from Germany obtains standing before the court in the US regarding matters related to the insolvency

proceedings. If recognition for both foreign proceedings is being filed at the same time in the US, then the likely outcome is that the above will be recognized and any relief granted in Germany must be consistent with relief granted in Bermuda. It seems likely that the first proceeding was commenced in Germany, as the EIR is more definitive about determining the COMI and thus setting Germany as the main proceeding for the purposes of recognition elsewhere.

If for some reason the recognition proceeding for Bermuda goes ahead first in the US, then any relief granted to it as the non-main proceeding must be reviewed once Germany is recognized as the foreign main proceeding. If the proceedings continue

US Chapter 15 contains the US MLCBI codification, so the opening of recognition process in the US may be required during the cross-border insolvency to ensure that additional assistance can be provided in the US as related to any creditors or assets in that jurisdiction. It also helps the foreign representative to ensure just treatment and protection against prejudice for all creditors who may be located in the US. It may be that the debtor has major assets or liabilities in the US, and so Chapter 15 recognition will help facilitate the organization of those things, including all other additional appropriate relief in section 1507(b). The court in the US will consider just treatment of all holders of claims against the debtor's property; protection of claims holders in the US against prejudice and inconvenience in the insolvency; prevention of preferential or fraudulent dispositions of the debtor's property; appropriate distribution of proceeds from the debtor's property; and if appropriate, the provision of a fresh start opportunity in the foreign proceedings.

Recognition also triggers important anti-discrimination principles under Article 13 and the safe conduct rule under Article 10, which are important protections that ensure all creditors are treated the same as much as possible, and given immunity from the US simply taking over the entire conduct or asserting sole jurisdiction over the debtor's assets within its jurisdiction simply on the grounds of the application.

For full marks, references to procedural provisions of MLCBI eg. Art. 15, 17, 6.. are required to substantiate the likely result.

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.

It sounds as though the US creditors are concerned about an abuse of process flowing from the JPLs' seeking recognition for a foreign proceeding, which if recognized would deprive them of rights in the US as against the debtor. It may be that the JPLs failed to make full and frank disclosure to the US court on the foreign proceeding's COMI and its determination date. They may have failed to ensure that there were no inappropriate motives for the recognition application that are not disclosed to the court. These failures can result in the public policy exception in Article 6 being exercised and the application for recognition being denied based on the public policy exception.

The US Bankruptcy Code, Chapter 15, section 1507(b) provides that the court has discretion to provide any additional appropriate relief is necessary in the circumstances. The court will do this, consistent with the principles of comity, to reasonably assure that all parties with interests in or claims against a debtor's property are treated justly. Under the US Chapter 15 recognition regime, the court is permitted to consider all additional appropriate

relief in section 1507(b). When considering whether to provide such assistance, the court in the US will consider:

- The just treatment of all holders of claims against the debtor's property;
- Protection of claims holders in the US against prejudice and inconvenience in the insolvency;
- Prevention of preferential or fraudulent dispositions of the debtor's property;
- Appropriate distribution of proceeds from the debtor's property; and
- If appropriate, the provision of a fresh start opportunity in the foreign proceedings.

MLCBI Article 22 requires the US court to also strike an appropriate balance of interests between the relief granted to the JPLs and the interests of persons locally that may be affected by the recognition of a foreign proceeding. For example, in reviewing how the parties with claims for tortious interference or discovery in connection to other litigation may need to understand that those claims are now stayed under the mandatory relief provisions, or whether the court must exercise its discretion under Arts 19-22 to modify or terminate relief that has been granted. The main principles of cooperation and coordination must always be respected between the states involved in the insolvency to the greatest extent possible, because it facilitates the best outcome and most expedient resolution for creditors.

Requires discussion based on Art.10 MLCBI (mark granted for mention of Art 6 and other explanations)

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?

There are several salient points from the *Fibria Celulose S/A v Pan Ocean* UK case to guide the foreign representative of a UK debtor-in-possession (DIP) proceeding like a moratorium or restructuring in how to handle this situation. In that case, the contract between the Korean and Brazilian company contained an *ipso facto* clause, which purport to allow a termination or action by one party to a contract when the other party enters bankruptcy or insolvency proceedings. The Korean insolvent company applied to the UK court for recognition and for relief under Article 21(1) of the MLCBI to attempt to have Korean law enforced in the UK to prevent the clause from operation. The court found that it was beyond its jurisdiction to apply foreign (Korean) law to the UK law contract as part of the relief granted (i.e., recognizing a foreign insolvency proceeding does not create a gateway to apply foreign insolvency law), and that the MLCBI could not enable the court to change the substantive rights conferred under the UK law chosen in the contract. This meant that the Brazilian counterparty could still serve a termination notice because in the UK the *ipso facto* clauses were still valid.

Under US law, these contract clauses are not enforceable because it would affect the automatic stay and other protections granted to a debtor during bankruptcy, especially those that would prevent the estate from receiving the benefit of the contract. In a US recognition proceeding, there should be no expectation that the foreign UK law will apply within that jurisdiction or to those contracts, much like the Korean law not applying to

nullify the *ipso facto* clause in *Pan Ocean*. This includes the Gibbs Rule, which does not have application over US-based debts but may still require some analysis in the UK context to ensure that any UK-based debts can be disposed of for the benefit of international/US creditors. Otherwise it would be challenging to satisfy the debts created under the US-governed leases and IP licenses in the main proceeding of the insolvency.

Further, with changes in UK legislation in the introduction of the Corporate Insolvency and Governance Act 2020, the *ipso facto* clauses may not have effect once a debtor is subject to certain UK insolvency proceedings. There is also the possibility that a UK DIP proceeding does not give way to the rights granted under the CIGA, and so the UK representative should consider whether those clauses could still be operative and operational within the UK. This also includes a consideration of the timing involved in the period after the petition date to ensure the COMI is settled in the UK and not in the US.

Overall, the foreign representative should ensure that the relief sought in the US enables it to handle any possible termination of contracts in a way that brings them under the stay that will happen after recognition among other relief in Article 21(1), applying the suggestions of the Practice Guide on procedural coordination, and ensure that the in the UK creditors get the maximum benefit of any relief granted in the interim per Articles 25-27 on cooperation and communication.

Question 3.4 [maximum 4 marks] 0 mark

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

To have greater success from the outset of the recognition proceeding and not have it rejected under MLCBI Article 14(h), the Country A representative should have ensured the following matters were sorted out beforehand:

- 1) The requirements of Art. 15(2) must have been met regarding the form of showing the Country A insolvency existed, and so Country B would be obliged (if it was an MLCBI state) to recognize the insolvency as a matter of course under Art. 4.
- 2) The COMI should be argued as persuasively as possible, to show that Country A is the place where the COMI belongs even if it has different operations elsewhere, or in the alternative, that there is at least an establishment in Country A, or in the further alternative that there is merely an insolvency proceeding commenced that should be recognised as a non-main proceeding per Art. 4.
- 3) The insolvency proceeding in Country A should meet all the criteria that make it easier to recognize, including that it is a collective action pursuant to insolvency laws with the purpose of reorganisation or liquidation, and that the foreign representative should have standing.
- 4) Ensuring that the Country A application avoids any public policy grounds in Country B that could lead to the refusal of recognition, including any potential violation of domestic law (as per Article 7).
- 5) Bringing in an insolvency representative from Country B to engage the exception in Article 14(h).

- 6) Ensuring the assets within Country B's territorial jurisdiction are not potentially able to be brought under the foreign insolvency proceeding (e.g., unlike the EIR provisions on very specific rights that must be governed by local law).
- 7) Explaining that the judgment related solely to assets located in Country A at the time that it commenced (another exception to 14(h)).
- 8) Apply for interim relief under Article 19 as required that relates to the assets in Country B.

But it is not the end of the world if recognition is unsuccessful as there is still the capacity for Country A's representative to have its recognition and enforcement of its Country A insolvency related judgments in Country B on several grounds under the Model Law on Recognition and Enforcement of Insolvency-related Judgments (although there are no state parties to this as yet). For example, the IRJ Model law Article X says that States may specify whether MLCBI Article 21 allows for the recognition and enforcement of insolvency-related judgments as discretionary relief, notwithstanding any prior interpretation to the contrary.

There is also the possibility of carrying out concurrent proceedings under Chapter V if an insolvency proceeding is commenced in Country B per Article 28 which does not prevent a domestic insolvency proceeding for the debtor's assets there. Article 28 also allows for the extension of the Country A proceeding if a) necessary to implement cooperation and coordination under Arts 25-27 of the MLCBI, and if b) the foreign assets in Country B to be included in the extension must be administered under domestic law of the enacting state. In the case of two concurrent foreign non-main proceedings, the court must act under Article 30(c) to amend the relief to facilitate coordination but no rule of preference between the creditors applies. Article 31 assists with opening a domestic insolvency proceeding for the debtor in the other state as well.

This answer should discuss and refer to Art.16 MLCBI is the main reference for “rebuttable COMI presumption”. Furthermore, references to Art.17, 21, 6 are also required for full marks.

QUESTION 4 (fact-based application-type question) [15 marks in total] 5 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 in the US was brewing but has [not] been filed yet.

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.

It sounds like, similar to the *In re Modern Land (China) Co* US case ("*Modern Land*"), the restructuring will be largely carried out in the Cayman Islands and that there are already agreements in place like the Restructuring Support Agreement (RSA) that support the Scheme being recognized as a main proceeding. A restructuring scheme is not the same as a liquidation and winding up proceedings, as a scheme is planned and sanctioned with a view to keeping the company solvent as a going concern and restructuring debt for equity. Given that the parties have already had the Cayman court's sanction of the scheme of arrangement, it would make sense to proceed with a US Chapter 15 recognition of the Cayman Islands as the main proceeding.

The analysis of the US court would include a flexible COMI analysis of the rebuttable presumption that it was located at the Company's registered office. It would still be important to have the Cayman proceeding recognized as a foreign main proceeding so that it could benefit from the automatic relief in MLCBI Art. 20. This would not be immediately clear because so much of the Company's business, including all its employees and headquarters, are in the US and not Cayman. The US court would need to consider (per the *Modern Land* analysis):

- the rebuttable presumption that a debtor's COMI is in its jurisdiction of incorporation as at the date of the commencement of the foreign proceeding (Arts. 2 and 17);
- the goals of the MLCBI and Chapter 15 to maximize the value of the debtor's assets, facilitate rescue and promote co-operation with foreign courts;
- the expectations of the creditors that the debtor's debts would be restructured pursuant to Cayman Islands law if a restructuring became necessary (given the overwhelming creditor support for the scheme);
- the competence of the Cayman judiciary and its role in the Cayman scheme and carrying it out;
- the lack of objections to recognition as a foreign main proceeding;

Another interesting point raised in *Modern Land* is the absence of any COMI shift that would raise the court's suspicions about the scheme. The Company must show that it made its request for recognition in good faith petition by retaining its COMI and not trying to shift it to a more beneficial location. However, it would be prudent for the applicant to give an alternative argument that the Cayman Islands proceeding could be considered as a non-main proceeding because it has an establishment where it carries on non-transitory activity. This could be challenging because it has no employees in the jurisdiction (employing outside counsel does not count), no or few assets, and per *Modern Land*, bookkeeping and record keeping in the Cayman Islands is not sufficient "non-transitory" economic activity requisite for finding an establishment.

Under Chapter 15, section 1507(b), to avoid a public policy issue arising on which the court could reject the recognition, the foreign representative would have to make full and frank disclosure of any other proceedings of which it may be aware. This could include the class action proceeding not yet filed, but this depends on what evidence it could provide to the court, for example, whether the Company has formal notice like a demand letter or other public notice that shows there are parties who intend to make a claim against the debtor.

In *Modern Land*, the court held that the recognition would constitute a substantive discharge of NY-law governed debt, meaning that in the above fact pattern, the RSA governed by NY law would be discharged. The proposal to delay interest payments and restructure the Notes could be administered as expected by the creditors.

Even if there is a single class of creditors to agree on the Scheme, there will likely still be other classes of creditors if the Company was subject to a full winding-up proceeding, and which would touch on other jurisdictions and not just the areas where principal creditors holding senior notes are involved. However, given the passage of time and apparent lack of ongoing connection to Ontario, it would not be advisable to commence a recognition and enforcement proceeding there for the present Scheme.

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

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

*** End of Assessment ***

Marks awarded: 30 out of 50