



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

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

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

Question 1.1

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

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

Question 1.2

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

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

Choose the correct answer:

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

Question 1.3

Which of the following statements incorrectly describe the MLCBI?

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

Choose the correct answer:

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

Question 1.4

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

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

Choose the correct answer:

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

Question 1.5

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

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

Choose the correct answer:

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

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

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

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

Question 1.6

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

(a) Binding within jurisdiction B.

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

(c) No effect within jurisdiction B.

(d) Likely no effect within jurisdiction B.

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

Question 1.7

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

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

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

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

Choose the correct answer:

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

Question 1.8

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

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

Choose the correct answer:

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

Question 1.9

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

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

Choose the correct answer:

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

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

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

Question 1.10

Which of the statements below are correct under the MLCBI?

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

(d) None of the above are correct.

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

Question 2.1 [maximum 3 marks] 3 marks

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

The key distinction between the MLCBI and the EU Regulation is that they are examples of “soft law” and “hard law” respectively.

The MLCBI does not attempt to substantively unify the insolvency laws of States, but is rather a recommendation. It is suitable for adoption, in whole or in part, into the domestic legislation of a State.

A benefit of the MLCBI is that it is less intrusive. It does not force insolvency laws on States, but rather provides each State with a necessary procedural framework that brings with it a level of transparency and predictability.

However, by virtue of it only being a recommendation, States are not required to adopt the MLCBI. If States do not adopt the MLCBI then it is not effective, which is a disadvantage.

Following adoption of the EU Regulation, it becomes part of the domestic law of the EU Member State. The EU Regulation establishes a framework within which insolvency proceedings taking place in any EU Member State can be recognised and enforced throughout the rest of the EU.

A benefit of this is that insolvency laws are unified and binding which allows for cross-border insolvencies to be dealt with in a cost and time efficient manner.

A disadvantage is that hard law approaches can be considered intrusive, forcing new (foreign) substantive insolvency laws on States which will each have different approaches in national insolvency laws.

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.

At the request of the foreign representative, in granting or denying discretionary post-recognition relief under Article 21 of the MLCBI, the court should primarily consider whether the relief is necessary to adequately protect the:

1. the assets of the debtor; and/or
2. the interests of creditors.

Question 2.3 [2 marks] 2 marks

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

Article 13 of the Model Law gives foreign creditors the same rights as creditors domiciled in the enacting State regarding the commencement of, and participation in, local proceedings regarding the debtor under the insolvency law of the enacting State.

This access does not affect the ranking of claims in the enacting State. However, a claim of a foreign creditor cannot be given a lower priority than that of general unsecured claims solely because the holder of such claim is a foreign creditor.

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?

When foreign proceedings are opened in the jurisdiction of a debtor's COMI, these are referred to as "foreign main proceedings".

When foreign proceedings are opened in the jurisdiction that is not the debtor's COMI but is a jurisdiction that the debtor has an establishment (a place where a debtor carries out a non-transitory economic activity) in, these are referred to as "foreign non-main proceeding".

For both types of proceedings, the Court has discretionary power to grant interim relief prior to recognition under Article 19 of the MLCBI to foreign representatives in both foreign main and non-main proceedings.

With regards to foreign main proceedings only, under Article 20 of the MLCBI certain automatic reliefs take effect when foreign main proceedings are recognised, intended to allow time for steps to be taken to organise an orderly and fair cross-border insolvency proceeding. The three automatic effects are:

1. a stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
2. a stay of execution against the debtor's assets; and
3. a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

The Court has discretionary power to grant post-recognition relief under Article 21 of the MLCBI to foreign representatives in both foreign main and non-main proceedings to protect the assets of the debtor or the interest of creditors at the request of the foreign representative (where deemed necessary). Therefore, in the absence of Article 20 being available in foreign non-main proceedings, the Court can look to this Article. The reliefs include:

1. staying the commencement or continuation of individual actions or 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;
2. 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;
3. 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;
4. 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;
5. 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;
6. extending any interim relief granted pursuant to Article 19(1) of the Model Law; and
7. granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting State.

With regards to granting relief to a foreign representative of a foreign non-main proceeding is concerned, the court must be satisfied that the relief relates to assets that - under the law of the enacting State:

1. should be administered in the foreign non-main proceeding; or
2. concerns information required in that proceeding.

I.e., the key distinction between the relief available in foreign main versus foreign non-main proceedings is that such relief granted to foreign representatives in foreign non-main proceedings under Article 21 should not interfere with the administration of another insolvency proceeding, in particular the foreign main proceeding.

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

Foreign main proceedings have been opened in Germany, where the debtor has COMI.

We can assume that the foreign non-main proceedings in this case have been opened in Bermuda, where the debtor has an establishment. It is possible that other foreign non-main proceedings have been opened if the debtor has establishments in other jurisdictions.

Recognition proceedings in the US must have been filed in the US.

The US has adopted the MLCBI and therefore assuming that (i) both the foreign (main and non-main) proceedings and the foreign representatives meet all required characteristics, (ii) there are no grounds to invoke the public policy exception of Article 6, (iii) the requirements set forth in Article 17(1)(c) and (d) of the Model Law are met, and (iv) the US Court is satisfied that COMI and establishment exists in the jurisdictions of the main and foreign non-main respectively, the recognition applications will be granted.

The German foreign main proceedings will benefit from automatic post recognition relief per Article 20 which includes, but is not limited to, a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor that are located in the US.

The Bermuda proceedings will not benefit from this automatic relief, as foreign non-main proceedings.

Further, the US Courts at its discretion can grant post recognition relief to the Bermuda proceedings under Article 21 should it deem that the proceedings will not interfere with the administration of another insolvency proceeding, in particular the foreign main proceeding. I.e., Such relief will only be available to the Bermuda non-main proceedings if it can prove that the proceedings will not interfere with the German foreign main proceedings. In my view, it is unlikely that the Bermuda non-main proceedings will be granted relief under Article 21 on this basis.

Answer should be substantiated with references to definitional and procedural provisions of MLCBI eg. Art. 2, 15,.. as well as public policy matters.

Question 3.2 [maximum 3 marks] 0 mark

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

We haven't been told of the proceedings have been opened in jurisdictions where the debtor has COMI or an establishment. If they do not, then recognition will not be granted by the US Courts. We therefore require further information.

If the joint provisional liquidators' proceedings have been opened in the jurisdiction where the debtor has COMI or an establishment, then these are foreign main and non-main proceedings respectively. Given that the US has adopted the MLCBI, subject to (i) both the foreign proceedings and the foreign representatives meet all required characteristics, (ii) there are no grounds to invoke the public policy exception of Article 6, (iii) the requirements set forth in Article 17(1)(c) and (d) of the Model Law are met, and (iv) the US Court is satisfied that these are foreign main and non-main proceedings, the recognition application will be granted.

With regards to point (ii) if there has been a of breach of the full and frank disclosure obligation a foreign representative has towards the court with regards to the contract rights of the US-based vendors, this may amount to an abuse of process and as such justify a denial of the requested recognition based on the public policy exception.

Another consideration is whether the foreign proceedings recognise ipso facto clauses - allowing termination of contracts upon one of the contracted parties entering into insolvency proceedings. The US Bankruptcy Code addresses ipso facto clauses and renders them unenforceable. However, if recognition is granted, it does not automatically apply the US Bankruptcy Code to the foreign proceedings.

If these are foreign main proceedings, automatic relief will be granted post recognition under Article 20. This includes a stay of the continuation of individual actions or proceedings concerning the debtors assets, rights, obligations or liabilities - I.e., The debtor will succeed over the US-based vendors.

If these are foreign non-main, such relief is not automatically available.

Requires discussion based on Art.10 MLCBI

Question 3.3 [maximum 4 marks] 4 marks

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

Debtor-in-possession proceedings allow the debtor to continue operations which it implements a restructuring.

Ipsa facto clauses allow for contracts to be terminated or altered upon one of the contracted parties entering into insolvency proceedings. For the debtor to continue operations, it will be important that it retains its key contracts and leases.

The foreign representative should apply for interim relief prior to recognition under Article 19 of the MLCBI - available to both foreign main and non-main proceedings. This is particularly important given that the application will not be heard for 35 days. In this time, contracted parties may become aware of the insolvency proceedings and enforce any ipso facto clauses in their contracts.

The foreign representative will need to demonstrate to the US Courts that the relief is urgently required to protect the debtor's operations, therefore the debtor's assets, and ultimately protecting the interests creditors who should benefit from a better outcome once the debtor's debt is restructured versus the alternative of liquidation.

Given that the ipso facto clauses are not enforceable per the US Bankruptcy Code, the US Court will likely provide this relief provided they are satisfied with the points set out above regarding the protection of assets and creditor interests.

Question 3.4 [maximum 4 marks] 2 marks

A foreign representative, who administers the assets of an insolvent debtor in an insolvency proceeding pending in Country A (where the foreign debtor has its registered office and not

much more), commenced a proceeding in Country B to recognise the foreign proceeding as the foreign main proceeding in order to sell certain assets within the territorial jurisdiction of Country B, but unfortunately the insolvency court considering the petition for recognition denied the recognition of the foreign proceeding as a foreign main proceeding. Explain what may or should the foreign representative do next? What should the foreign representative have done at the outset?

From the outset, the foreign representative should have properly and holistically assessed where the debtor's COMI is located. In doing so, it will have been able to demonstrate to the Court of Country B that Country A is the location of the debtor's COMI and the proceedings should therefore be considered foreign main proceedings - to the extent their assessment is correct.

If COMI is in a different jurisdiction to Country A, then the foreign representative should not commence proceedings in Country B as foreign main proceedings.

Following the denial of Country A's recognition application in Country B on the basis that Country B does not consider it to be foreign main proceedings, the Country A foreign representative has the following options:

1. If the debtor has an establishment in Country A (rather than COMI), proceedings can be commenced in Country B as foreign non-main proceedings.
2. If the foreign representative is comfortable, after proper assessment, that COMI is located in Country A, they can appeal the decision of Country B's Court. Given there are assets in another jurisdiction (potentially its principal assets), in my view it is unlikely that the debtor's COMI is in Country A. However, in the absence of any other proof/factors, the registered office is presumed to be a debtors COMI, so the foreign representative's assessment might be correct.
3. If COMI is determine to be in a jurisdiction other than Country A, insolvency proceedings could be commenced in that jurisdiction.

Answer should be substantiated with reference to art.16 MLCBI for the "rebuttable COMI presumption". References to Art.17, 21, 6 are also required.

QUESTION 4 (fact-based application-type question) [15 marks in total] 9 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.

COMI

We must properly assess the location of Global Holding's COMI. Factors I have considered in determining COMI include:

- The location of its books and records - the Cayman Islands.
- The location where financing was organized or authorized - Global Holding's unsecured notes issued in 2017 are governed by New York law.
- The location of the debtor's primary bank - Global Holdings has a bank account in the Cayman Islands however this was only opened a few days ago and only pays "certain" of its operating expenses. In my view it is unlikely that this is the entity's primary bank account.
- The location from where the cash management system was run - There are no employees in the Cayman Islands. Given this information, in my view its cash management system is not run out of the Cayman Islands and it is likely run out of the US. However, given it has no operations, and therefore I'd expect minimal cash management required, I'm of the view that this factor shouldn't hold much weight.
- The location in which the debtor's principal assets or operations are found - Global Holding's principal assets are its subsidiaries which are all based in the US. It does not have business operations of its own. Its headquarters (including land, building, improvements and contents) are in New York. However, the information does not specify that this is an asset of Global Holdings.
- The location of employees - All employees are in the US, albeit, given it has no operations, and therefore I'd expect minimal number of employees required, I'm of the view that this factor shouldn't hold much weight.
- The location in which commercial policy was determined - This was likely Canada, where the entity was first incorporated. The entity has no other link to Canada so in my view we can be comfortable that COMI is not in Canada.
- When Global Holdings was re-incorporated in the Cayman Islands, public filings were made to the SEC (US based) further implying that the entity has interests in the US, albeit I'm of the view that this is because on a consolidated basis interests are in the US.
- Shares in Global Holdings were listed on NASDAQ in the US, prior to being delisted.
- The location from which reorganisation of the debtor was being conducted - Global Holding's restructuring advisors, Cedar and Wood are based in the Cayman Islands. Cedar and Wood have been the entity's legal counsel for over a decade.

- The location of board meetings - The meetings regarding the restructuring of Global Holding's notes are organized by local Cayman Islands counsel. The reason these meetings are occurring virtually is due to the Covid-19 pandemic.

Considering the above on a holistic basis, I am of the view that COMI of Global Holdings is located in the Cayman Islands. Whilst there are factors that indicate that COMI is located in the US, these are more relevant when looking at the group on a consolidated basis. From a holding company only perspective, the key influencing factors - the notes and restructuring of the same - indicate that, on balance, COMI is most likely located in the Cayman Islands.

It is arguably clear that the COMI of the underlying subsidiaries of Global Holdings is located in the US.

Establishment

An Establishment is defined as “*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services*”. In this case, Global Holdings does not have operations of its own. Per case law, having a bank account in the jurisdiction is not enough to determine that the jurisdiction is an establishment.

Foreign main or non-main proceedings

Given that we have determined that Global Holdings has COMI located in the Cayman Islands, we should seek US recognition of the Sanction Order as foreign main proceedings - so that the scheme, compromising creditors, can be enforced in the US.

Papers to be submitted

Article 15 of the MLCBI requires that the recognition application made by the foreign representative is accompanied by:

1. a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
2. a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
3. 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.

Relief to be requested

The foreign representative should apply for interim relief prior to recognition under Article 19 of the MLCBI - available to both foreign main proceedings.

This is particularly important if there is a significant delay between the filing and hearing date.

The relief can include a stay of execution against the debtor's assets. If the New York head quarters are an asset of Global Holdings, the interim relief can halt the sale of this asset which is currently being actively marketed by an independent third party.

As the question is fact-based application-type question, the MLCBI provisions should be applied to the facts of the case. The answer should contain to the minimum definitions eg (COMI, establishment, foreign main proceedings etc) with respective articles, a discussion

and reference on the rebuttable presumption of the COMI per Article 16(3) MLCBI, conclusive remarks should also refer to post-recognition relief, Art. 20 through 22 MLCBI - as alternative scenarios - and 6 MLCBI.

*** End of Assessment ***

Marks awarded: 34 out of 50