



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] 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.
- (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] 9 marks

Question 2.1 [maximum 3 marks] 2 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 EU Regulation applies to all EU Member States and forms part of their domestic legal framework governing insolvency proceedings. In contrast, the MLCBI has a potential worldwide application as it can be enacted by any nation State across the world.

The key benefit of the approach under the EU Regulations is uniformity and certainty in application of insolvency legislation across the EU Member States. The disadvantage includes potential disregard to national policies and priorities, thus, undermining the sovereignty of Member States [but EU Parliament and Council need to discuss and agree regulations].

The key benefit of the MLCBI is flexibility, given that the States can choose to adopt the Model Law, entirely or in part, depending on its suitability to local requirements/conditions. The disadvantage is that being a soft law, the MLCBI can only influence and not bind the enacting States, thereby leading to uncertainty in its application to cross border insolvencies.

Disadvantage on Regulation is questionable. The EU Parliament and Council need to discuss and agree on the regulations - a linked disadvantage is that it can take 40 years to get everyone on board. Requires mention of procedural issues. While this process largely addresses national concerns, it causes longer development/approval times as opposed to a "soft" guidance document like the MLCBI.

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.

While exercising its discretionary power to grant post-recognition relief under Article 21 of the MLCBI, the court must primarily ensure that the interests of the creditors, the debtor and other interested parties are adequately protected. This requirement is specified under Article 22(1) of the MLCBI. The court is expected to balance the interests of all concerned stakeholders. The court may achieve this by specifying certain conditions for grant of the relief (Article 22(2)). The court can also modify or terminate the relief granted, either on its own or at the request of an affected party or the foreign representative (Article 22(3)).

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 MLCBI deals with access rights of foreign creditors in insolvency proceedings of an enacting State. Article 13(1) allows foreign creditors to have the same rights as domestic creditors of the enacting State, to commence and participate in insolvency proceedings in the enacting State. However, such access right is subject to the condition under Article 13(2), which provides that the ranking of claims of creditors in the domestic insolvency proceedings shall not be affected, except that the claims of foreign creditors shall not rank lower than general unsecured/ non-preference claims only on the ground that the claim is of a foreign creditor. The enacting States that do not wish to recognise foreign tax and social security claims can consider using the language specified in the footnote to Article 13, and, accordingly, such foreign tax and social security claims can be treated on a separate footing.

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?

The recognition of a foreign main proceeding (i.e., where the COMI of the debtor is located in the jurisdiction of the foreign proceeding), leads to the following three **automatic** effects (Article 20(1)) -

- a) Stay on commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
- b) Stay on execution against the debtor's assets; and
- c) Suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

Article 20(2) of MLCBI provides that the scope, and the modification or termination, of the stay and suspension referred to in Article 20(1) is subject to applicable domestic laws of the enacting State in this regard. Further, Article 20(1) does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor (Article 20(3)). Article 20(4) also clarifies that Article 20(1) does not affect the right to request the commencement of a proceeding under insolvency proceedings in the enacting State or the right to file claims in such domestic insolvency proceedings.

On the other hand, in case of a foreign non-main proceeding, **discretion** is vested in the court to grant certain post recognition reliefs. This flows from Article 21 of MLCBI which provides that upon recognition of a foreign proceeding, as main or non-main, the court may, at the request of the foreign representative, grant any appropriate relief, including as follows -

- a) Stay on 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 stayed under Article 20(1)(a);
- b) Stay on execution against the debtor's assets to the extent it has not been stayed under Article 20(1)(b);
- c) Suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under Article 20(1)(c);
- d) 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;
- e) Entrusting the administration or realization 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;
- f) Extending relief granted under Article 19(1);
- g) Granting any additional relief that may be available to a person or body administering a reorganization or liquidation under the law of the enacting State.

Thus, the reliefs which may be granted under Article 21(1) of MLCBI are broader than those under Article 20(1). However, while the reliefs under Article 20(1) automatically follow the recognition of a foreign main proceeding, the reliefs that may be granted to a foreign proceeding (whether main or non-main) under Article 21(1) of MLCBI fall within the discretion of the court. Notably, even though Article 21(1) appears to be broader in scope, the power of the court is not unfettered. Particularly, while exercising its discretion to grant relief under Article 21(1), the court must bear in mind that the relief must be necessary to protect the rights of the creditor and the debtor. Further, as per Article 21(3) of MLCBI, while granting relief under Article 21 to a representative of a foreign non-main proceeding, the court is required to be satisfied that 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, the underlying idea being to avoid interference with the conduct of another insolvency proceedings.

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

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.

Article 2(b) of the Model Law defines a "foreign main proceeding" as "*a foreign proceeding taking place in the State where the debtor has the centre of its main interests*". Thus, a foreign main proceeding is where the debtor had its centre of main interests (COMI).

Article 2(c) of the Model Law defines a "foreign non-main proceeding" as "*a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article*". For a foreign proceeding to qualify as foreign non-main proceeding, the debtor must have an "establishment" in the jurisdiction of the foreign proceeding. The term "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 relevant date for the determination of COMI or the existence of establishment is the date of commencement of the foreign proceeding.

In the above fact scenario, since the debtor has its COMI in Germany, the German proceedings would qualify as foreign main proceeding. Further, since the debtor has an establishment in Bermuda, the proceedings in Bermuda would be foreign non-main proceeding.

Under the Model Law, the recognition of a foreign proceeding as main or non-main has a bearing on the nature of reliefs that can be granted. Two kinds of reliefs are available on recognition of a foreign proceeding (*the reliefs have been elaborated in the answer to question 2.4 above*):

- a) mandatory reliefs - these reliefs, which are specified in Article 20(1), follow automatically on recognition as a foreign main proceeding; and
- b) discretionary reliefs - these reliefs are not automatic; rather, once a proceeding is recognised as foreign main or non-main proceeding, the court has the discretion to grant certain reliefs, as specified in Article 21(1).

Apart from the above, once the recognition application is filed, the court can also grant urgent interim/ provisional reliefs at the request of the foreign representative in certain circumstances. The interim relief may be refused if such relief would interfere with the administration of foreign main proceeding. Unless extended, the interim relief terminates when the recognition application is decided.

Coming to the present facts, in the recognition proceedings opened in the US, the German proceedings is likely to be recognised as the foreign main proceeding, automatically leading to grant of mandatory reliefs in terms of Article 20(1), with respect to the debtor's property situated in the US. The foreign representative of the German proceedings may also apply for discretionary reliefs under Article 21(1). The Bermudan proceedings is likely to be classified as foreign proceeding, following which the foreign representative of the Bermudan proceedings can seek discretionary reliefs under Article 21(1).

Since there are concurrent foreign proceedings regarding the same debtor in this case, it is also relevant to refer to Article 30 of the Model Law which provides that any relief granted under Article 19 or Article 21 to the representative of the foreign proceeding in Bermuda after recognition of the German foreign main proceeding must be consistent with the German proceeding. If the German proceeding is recognized after recognition, or after the filing of an application for recognition, of the proceeding in Bermuda, any relief granted under Article 19 or Article 21 is required to be reviewed by the court and modified or terminated if inconsistent with the foreign main proceeding. In case of concurrent foreign proceedings, the court can also seek cooperation and coordination under Articles 25, 26 and 27 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.

The discovery proceedings are likely to be dismissed as pre-mature. This is because mere filing of a recognition application, does not lead to an automatic stay on individual actions/ legal proceedings or enforcement actions against the foreign debtor. The stay will come into force only once the foreign proceeding is recognised as a foreign main proceeding, in which case, stay will follow as an automatic mandatory relief under Article 20 of MLCBI. If

the foreign proceeding is recognised as a foreign non-main proceeding, then the court can grant discretionary reliefs under Article 21 of MLCBI.

In any event, mere commencement of proceedings in the US for recognition of a foreign proceeding cannot be alleged as a tortious interference with contract rights of US based vendors, given that the liquidators, being “foreign representatives” within the meaning of Article 2(d) of the MLCBI are legally entitled to seek reliefs under Article 20/ Article 21 or Article 19 of the MLCBI, as the case may be.

The foreign representative can plead the “safe conduct” rule under Article 10 of the MLCBI which provides that the sole fact that an application pursuant to the MLCBI is made to a court in the enacting State by a foreign representative does not subject, inter alia, the foreign representative to the jurisdiction of the courts of the State for any purpose other than the application. However, this immunity is not unlimited or absolute - the object underlying the “safe conduct” rule is to provide necessary protection so that the foreign representative can access the court in the enacting State in a meaningful manner. However, if the US court comes to a finding that the foreign representative has in fact committed a tort or indulged in some misconduct, then these could be dealt with by the US court.

Further, if the US court finds that a recognition application has been filed as an abuse of process, for instance, where full and frank disclosure has not been made by the joint provisional liquidators, then the recognition application may be refused. The recognition may also be declined if the US-based vendors are able to establish the applicability of the public policy exception under Article 6 of the MLCBI, for which the vendors must show that grant of recognition is manifestly contrary to the US public policy.

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?

In the given scenario, it appears that while the US-governed leases and intellectual property licenses have *ipso facto* clauses, there is no threatened termination of these contracts on account of the bankruptcy of the foreign debtor. Hence, in the absence of a threatened termination (for instance, issuance of notice of termination of the lease or revocation of the license), any steps taken by the foreign representative is likely to be considered as premature.

However, if there is a strong likelihood of termination of the lease/ revocation of the license by the counterparty, the foreign representative can make application for urgent interim relief under Article 19 of the Model Law, during the period when the recognition application is pending adjudication in the US Court. Such relief can be sought if it is urgently needed to protect the assets of the debtor, which would cover leasehold rights and intellectual property licenses of the debtor in this case.

Under Article 19 read with Article 21 (g) of the Model Law, the US court can grant any additional relief that may be available to the foreign representative under the laws of US. The foreign representative may consider filing an application in the US court seeking

restraint orders in respect of termination of the US-governed leases/ revocation of the licenses as an additional relief that may be granted to the foreign representative under US laws. The ground that may be taken by the foreign representative is that *ipso facto* clauses are not enforceable under the US laws and thus, such a provision in the lease/ license was *void ab initio*. The foreign representative will have to establish that it has a likelihood of success on merits, that irreparable harm will be caused to the interests of the debtor if the relief is not granted and that equity favours grant of the relief sought by the foreign representative.

Under Article 7 of the Model Law, the foreign representative may also consider seeking additional assistance of the US court, as may be deemed appropriate in the facts and circumstances of the case.

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?

The foreign representative may challenge the denial of recognition in the appellate court and contend that under Article 16 of the Model Law, there is a rebuttable presumption that the place of registered office of the debtor is the COMI and thus, in the absence of any proof to the contrary, Country A where the foreign debtor has its registered office should have been considered as the COMI and the insolvency proceedings in Country A should have been recognised as a foreign main proceeding. However, in the given fact scenario, since the foreign debtor only has certain assets and registered office in Country A, without anything more, it may be difficult for a court to hold that the COMI is in Country A.

Alternatively, the foreign representative may seek recognition of the insolvency proceeding in Country A as a foreign proceeding. However, once again, only the presence of certain assets and registered office in Country A without any other facts which may show that the debtor carries out non-transitory economic activity with human means and goods or services in Country A, it is unlikely that the court will be convinced that an “establishment” within the meaning of Article 2(f) of the Model Law exists in Country B, in which case recognition of the foreign proceeding is likely to be denied.

At the very outset, while filing the application for recognition, the foreign representative could have filed an application for interim relief under Article 19(1)(b) of the Model Law for entrusting the administration or realization of all or part of the debtor’s assets located in the enacting State to the foreign representative, in order to protect and preserve the value of assets if they, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy. However, it is to be noted that the Model Law provides for various safeguards to ensure that the local interests are adequately protected before the assets in the enacting State are turned over to the foreign representative. Article 22 of the Model Law clearly provides, inter alia, that while granting or denying any relief under Article 19, the court is required to be satisfied that the interests of creditors and other interested persons, including the debtor, are adequately protected. Further, such relief may be subject to appropriate conditions, and the court may, on its own or at the request of a person affected by such relief modify or terminate such relief.

As per Article 11 of the MLCBI, the foreign representative may also apply to commence insolvency proceedings of the debtor in Country B, if the conditions for commencing such insolvency proceedings are otherwise met. This kind of access does not require prior recognition of the foreign proceeding and may be relevant in the given fact scenario.

QUESTION 4 (fact-based application-type question) [15 marks in total] 10 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.

Application for Recognition:

A foreign proceeding is recognized as a main proceeding if it is in a State where the debtor’s COMI is situated. The term COMI is not defined in the Model Law. Rather, the determination of COMI is a holistic exercise in which various factors may need to be considered and weighed. The two key factors for determination of COMI under the Model Law are -

- a) the location from where the debtor is centrally administered; and
- b) readily ascertainable by creditors of the debtor.

The following factors may weigh with the US court in holding that the Cayman Islands is readily ascertainable as the COMI of the client by its creditors -

- incorporation and registration in Cayman Islands
- public filings (including SEC filings) regarding re-incorporation in Cayman Islands
- location of its counsel, Cedar and Woods, in Cayman Islands
- bank account in the Cayman Islands from which it pays certain operating expenses
- maintenance of books and records in the Cayman Islands.

- disclosures in public filings with the SEC and the Notes prospectus that Globe Holdings is a Cayman Islands company along with explanation regarding related indemnification and tax consequences resulting from Globe Holdings' place of reformation.

On the contrary, the following factors may weigh with the US court in holding that the debtor is centrally administered from the US and it only has an establishment in the Cayman Islands -

- Globe Holdings having no business operations of its own and instead, the business being carried out through its subsidiaries incorporated and operating in US.
- all employees being located in the US.
- headquarters being in the US.
- board meetings being held virtually (and not physically in the Cayman Islands).

In the given fact scenario, it may be advisable for the client to apply for recognition of both, main and non-main, foreign proceeding under Chapter 15 of the US Bankruptcy Code.

Papers To Be Submitted

Article 15 of the Model Law specifies the requirements for making an application for recognition of a foreign proceeding. As per Article 15(2), an application for recognition must 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 (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.

Article 15(3) provides that an application for recognition must also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. Article 15(4) enables the court to require a translation of the documents supplied in support of the recognition application into an official language of the enacting State (being US, in this case).

It may be added here that while considering a recognition application, the US court is not required to examine whether the foreign proceeding in the Cayman Islands was correctly commenced under the applicable law.

Reliefs

The following reliefs should be requested on day one of the filing (Article 19 of the Model Law) -

- (i) Suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor - this is necessary since 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 (which constitute assets of the debtor).
- (ii) Stay on commencement of class action litigation in the US.

As this question is a fact-based application-type question, it requires the MLCBI provisions to be applied to the facts of the case and substantiated with references and a discussion. The answer should contain as a minimum: definitions (COMI, establishment, foreign main/non-main proceedings etc.) with respective references to (if any) MLCBI provisions and/or other sources; reference to Article 16(3) MLCBI and alternative courses of action;

conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI (*noted mention of Art.19*)...

*** End of Assessment ***

Marks awarded: 42 out of 50. Well done!