INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
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] 5 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: **NONE**

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

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

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

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

ANSWER **The correct answer will be (i) and (iv)**

As per Model Law, the cross border insolvency is one where the insolvent debtor has assets in more than one state or where some of the creditors are not from the state where the insolvency proceedings is taking place.

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] 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.

ANSWER

The key distinction in application between MLCBI and EUIR (EIR) exists in the point that while the former attempts unification of insolvency law of different States keeping the original law of the concerned States intact, EIR is a legal act which need to be adopted in total by each member state of EU.

The distinction could be more clearly understood that MLCBI concentrates on the procedure to be followed by the States in formulating their insolvency law which would be applicable to cross border insolvency cases involving the concerned States as either the insolvency proceedings commenced there or the assets or liabilities of the entity under insolvency are in the territory of the State.

The difference could also be found in the method how the states are connected if involved in a cross border transactions. Under MLCBI after the case is initiated in one State, the involvement of the other State or States can be only by way of application for recognition of the case instituted in the former or by allowing an authorized representative to take part in the original proceedings.

On the other hand, under EUIR if a case is filed in any one of the member states, the courts in the all the other States recognize the same.

Key benefit and disadvantage under MLCBI

The foreign representatives and creditors are put in the same platform with equal rights and the foreign courts would find it easier to navigate through the proceedings as total transparency would be maintained which will result in value maximization.

In case if the relief provided as a judgement under MLCBI is either not available or not clear to the receiving state, then the courts in the receiving state can issue a parallel judgement which also results in time and cost over run in handling the proceedings.

Key benefit and disadvantage under EIR

As all the member states of the EU operate under similar law, a lot of time and cost savings are enjoyed by the parties involved in insolvency proceedings resulting in recovery of assets wherever they are inside the EU which also result in predictable closure of the proceedings.

The recast EIR puts too much of emphasis on restructuring rather than on liquidation on the basis that while restructuring enhances the value of the estate, liquidation is destructive. But this is not the case on all times. In case the corporate debtor is involved a zombie business, it would be always better to liquidate and redirect the investment into a better business.

Question 2.2 [maximum 2 marks] 1 mark

Explain what the court should primarily consider using its discretionary power to grant post-recognition relief under Article 21 of the MLCBI.

ANSWER

It is very important to understand and appreciate the relief available prior to recognition of a foreign proceedings under Article 19, automatic relief available under Article 20 post recognition of the foreign main proceedings, eligibility for appropriate relief under Article 21 through the court of the state where MLCBI is enacted which will give those reliefs in such a way under Article 22 after balancing the interests of all the involved parties. Better understanding of the provisions of all these inter-connected articles of MLCBI will bring out the points that would be considered by the courts while granting the relief using its discretionary powers . Some of them are:

1. The courts in the enacting state will take into account whether judgement debtor was present or not in the foreign court when the proceedings in the case commenced, participated by submitting claims or counter claims and agreed to subject himself to the foreign court and its proceedings. (Re Rubin vs Euro Finance)
2. The appropriate relief should be in line with what the court in the enacting state would have granted in a similar circumstance taking into account the ipso-facto clause put in the agreement specifying that the contract is voidable upon one of the parties to the agreement entering into insolvency (Pan Ocean Case).
3. The parties should also understand that necessarily the court would take into account legal provisions as per the enacting state only.

4. A relief granted to a foreign representative can at no point of time be at the cost of the loss of any right by a local debtor, creditor or any third party.

Court primarily considers creditors' interests. Art 21(1): "....to protect the assets of the debtor or the interests of the creditors,..."

Question 2.3 [2 marks] **2 marks**

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

ANSWER

Section 13 of MLCBI which deals exclusively regarding foreign creditors in a cross border insolvency case makes it very clear that the position of such creditors should not fall below the level of that of a domiciled creditor in the enacting state. They should be placed equally with the domiciled creditor in every aspect – whether it is right to initiate a proceedings or participation in a proceedings initiated already under the laws of the enacting State. However the provisions is also very clear that the equality will not be allowed to improve the ranking of the foreign creditors' claims vis-à-vis the domiciled creditors but at the same time care is also to be taken that the foreign creditors should not be given a lower priority, worse than that of a general unsecured claims.

Question 2.4 [maximum 3 marks] **3 marks**

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

ANSWER

The main distinction between in respect of relief available in foreign main proceedings is that when the same is recognized then all the relief under Article 20 of MLCBI will follow automatically. They are as follows:

1. A stay of the commencement or continuing proceedings if any filed on individual basis against the debtor (meaning his assets and liabilities and rights and obligation.
2. Stay on execution against debtor's assets and
3. Suspension of the right to transfer or other alienate any assets of the debtor.

In the case of non-main proceedings no such automatic relief would be available.

Also, in the case of non-main proceedings, the reliefs which are made available on discretionary basis such as reliefs related to assets or information about them can also be granted by the courts only if they do not affect the main proceedings or any other proceedings against the same debtor.

It is to be noted that both main and non-main proceedings are eligible for interim reliefs prior to the recognition of the proceedings.

If a main proceedings is recognized subsequent to the non main proceedings, the reliefs already granted should be reviewed and suitably modified or removed on the basis of the main proceedings.

Over all, the relief in non-main proceedings would be more restrictive than in a main proceedings.

Reference to Art.22 MLCBI is not made (however no points are deducted)

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

Question 3.1 [maximum 4 marks] 1 mark

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.

ANSWER

The debtor has its COMI in Germany and hence as per Article 2 (a) of MLCBI the proceedings which are commenced thereat would become a foreign main proceedings. The debtor also has an establishment in Bermuda (British colony situated close to USA where British judicial laws are followed) and hence any proceedings commenced thereat would be eligible for attaining the status of a foreign non-main proceedings. Actually, the foreign proceedings if had been filed as stated above, would have been beneficial.

However, we are not having further details as to why foreign proceedings as well as recognition proceedings were filed in USA. Since the proceedings have not only been filed as such but a recognition petition has also been filed, it is safe to assume that the creditor who filed them had records to prove that the debtor has both COMI and establishment in USA. (?)

[COMI is in Germany !]

Such case of concurrent proceedings and the matters arise thereof are covered under chapter V of the MLCBI in articles 28 to 32. In such situations, a set hierarchy as laid down is followed :

1. In case there is a domestic insolvency proceeding is filed against the debtor it gains the first position.
2. In case both main and non-main proceedings are filed and both are recognised, then the main proceedings will get the primary position.
3. In case more than one foreign non-main proceedings is filed, amongst them none will be given any preferential treatment.

Domestic vs foreign insolvency proceedings (Article 28)

As already mentioned, recognition of a foreign proceedings will not be a block for filing a domestic insolvency petition for which an establishment in the local place will be the minimum criteria. This petition will be limited to assets of the debtor in the same country. But in some cases, the assets situated abroad are also included in the petition on the condition that such assets are already administered under the law of the enacting state.

Domestic and foreign proceedings can exist simultaneously but if it is a foreign main proceedings then it will not be eligible for automatic relief under Article 20. Of MLCBI and will be eligible for the same relief if the foreign proceedings is a non-main proceedings.

According to the decision in the domestic insolvency case, suitable alteration should be made in the relief already provided.

Concurrent foreign main and non-main proceedings

If recognition of foreign main proceedings precedes that of a non-main proceedings, when the latter is recognised, reliefs granted under Article 19 or 21 of MLCBI to a non-main proceedings will be revisited and modified accordingly. Similarly, in a reverse case also , such a modification will be carried while extending the relief under main foreign proceedings.

Concurrent foreign non-main proceedings

As per MLCBI both the proceedings will be treated on par and it will be ensured by the court that in both the proceedings the reliefs granted are similar.

Hotchpot rule

In simple terms, whatever is the number of proceedings were brought in by the creditor, the treatment meted out to the creditor should not result in a favourable treatment resulting in more outflow of any benefit when measured with the benefit that a domestic creditor is found eligible. If at all a scenario arises where the creditor has secured better returns than what is secured by a creditor in a domestic insolvency proceedings, then the excess relief taken by the foreign representative should arrange to make refunds.

The answer requires a clear statement that FMP must have been in Germany and FNMP in Bermuda, with appropriate references to MLCBI definitional and procedural provisions (including Art. 17, 15, 6…).

Question 3.2 [maximum 3 marks] **0 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.

ANSWER

For every recognition proceedings under Chapter 15 there should be a plenary insolvency proceeding in another jurisdiction. Also Chapter 15 allows the foreign debtor to benefit from some of the provisions of Chapter 11.

Availing the discovery provision under US Federal and Bankruptcy Rules of Civil Procedure is also one of the aims of filing a recognition petition by the foreign representatives. As per this provision, pending the recognition by the US courts, a foreign representative can look for a provisional relief including an order from the US court authorising the examination of witnesses, the taking of evidence or delivery of information concerning the debtors assets and liabilities to the extent that such relief is urgently needed to protect the assets of the debtor.

However, such relief if granted is likely to be against the public policy, then the court would not sanction the same. For example, in Re Toft, where the plenary proceedings had been

commenced in Germany the request by the foreign representative was to allow access to the e mails which were stored in the servers of the internet service providers in USA. If it had been granted, the foreign debtor would have had access to tap the e mails of the vendors to the debtor without the permission of the debtor which would have been treated as against the public policy of United States. Obviously in such matters, the vendors would succeed in their litigation against the foreign debtor.

The answer is 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?

ANSWER

First of all, the reason for the gap of 35 days between filing petition under Chapter 15 of US Code and the recognition hearing date has been well explained that it was due to availability of the court. Otherwise a situation might have arisen as mentioned in the US judgement of Morning Mist Holdings Ltd vs Krys (Matter of Fairfield Sentry Limited) that a debtor's COMI should be determined based on its activities at or around the time te Chapter 15 is filed. Subsequently in UK this matter has been explained in an article on a case referred as Re Toisa Limited captioned "Clarity on cross border conundrum. Based upon the above judgements, two approaches called "Commencement Approach" and "Filing approach" came into discussion. In some cases like Toisa Ltd the filing approach was followed and the commencement approach in matters like Re Videology was followed.

Now coming to the ipso facto clauses in the contract such as "bankruptcy will trigger terminations" under UK laws, as mentioned in Belmond Park vs BNY Corporate trustee services are enforceable. But this policy has been revisited under Corporate Insolvency Governance Act 2020 that such ipso facto clauses cannot have its run on all contracts. For example, such a clause in a contract of supply cannot be allowed to take effect if the debtor has become a subject matter of an insolvency case in UK.

But under US Bankruptcy Code, such ipso facto clauses are not enforceable. In the question, it is also mentioned that no litigation is pending or threatened against the debtor under US Code.

In these circumstances, to protect the assets of the foreign debtor, the foreign representative should ask for interim relief as per Article 19 of the MLCBI which has been implemented in full form as Chapter 15 under US Code but of course with certain exceptions allowing the courts in US to decide on a case-by case basis in consistent with earlier Sec 304 of US code.

Under Article 19 the foreign representative can seek
a) stay of any execution against the assets of the debtor and
b) administration of the debtor's assets in order to protect and preserve them.

The foreign representative can also seek any of the following reliefs for which he is eligible under Article 21 of MLCBI post recognition:
a) right to take delivery of information on debtors assets and liabilities, rights and obligations etc
b) suspension of right to transfer, encumber or otherwise dispose of any assets
c) any other relief which a domestic liquidator would be entitled to

However, the foreign representative should be aware that any of the above reliefs can be denied under balancing interests under Article 22 of MLCBI if in the court's purview it is likely to affect the interests of other connected persons such as the domestic creditors, other parties and day to day administration of the debtor themselves. Granting such reliefs are purely at the discretion of the US courts.

Question 3.4 [maximum 4 marks] 3 marks

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

ANSWER

The exact reason for denying the recognition of the proceedings in Country A as foreign main proceeding by court in Country B is not given. Hence we will first analyse the conditions necessary to be fulfilled for a proceedings to be declared as a foreign main proceedings.

The term COMI (Centre Of Main Interest) which is very vital for the operation of Model Law has not been defined therein and it is leaning towards the concept under European Insolvency Regulations. Taking that we can conclude that the following two factors are necessary:

1. The location where the central administration of the debtor takes place and
2. That place should be readily ascertainable as connected to the debtor by the creditors of the debtor.

Of course, apart from the above, the UNCITRAL Guide to Enactment of MLCBI talks about very many circumstantial factors such as location from where contracts are entered into, location of employees, location of debtor's primary bank, location where the principal assets of the debtor are found, whose legal jurisdiction would be applied for the deals with the debtor etc

In the question above it is stated that Country A is the place where the debtors registered office is situated. Normally a registered office is the place wherefrom the central administration of an entity takes place and as it will be mentioned in most of its documents of the debtor, it could be concluded that the place can be located by the creditors.

Article 16 of MLCBI also states that the debtor's registered office, unless proved otherwise, is presumed to be the COMI of the debtor.

Before getting into the question of what the foreign representative should do next, we should find out what he should have done at the outset to confirm that he followed all the requirements before filing the proceedings in country B as per Article 15 which are:

1. An appropriate application enclosing
   a) a certified copy of the decision to commence the foreign proceedings and appointing foreign representative or
   b) a certificate from the court Country A confirming the proceedings and appointment of the foreign representative or
   c) any other evidence acceptable to court in Country B to prove the proceedings in Country A and appointment of the foreign representative
2. A statement by the foreign representative identifying all the foreign proceedings of the debtor his knowledge.

It should be noted that all the above documents should be translated into the official language of country B .

The foreign representative should also ensure that the debtor has an establishment in Country B so that the proceedings therein can be non-main foreign proceedings.

MLCBI does not insist on reciprocity as a requirement for a country to recognise the proceedings in the other country. But some of the countries while enacting Model Law include such a condition. The foreign representative should confirm that there is no such requirement laid down by Country B.

The foreign representative should ensure that a full and frank disclosure obligation has been complied with towards Court in country B.

Till the time the the court in Country B decides on the revised application filed, if any, (he should file) the foreign representative should seek an interim collective relief prior to recognition of the foreign proceedings in Country A detailed as under.

Under Article 19 the foreign representative can seek
a) stay of any execution against the assets of the debtor and
b) administration of the debtor's assets in order to protect and preserve them.

The foreign representative can also seek any of the following reliefs for which he is eligible under Article 21 of MLCBI post recognition:
a) right to take delivery of information on debtors assets and liabilities, rights and obligations etc
b) suspension of right to transfer, encumber or otherwise dispose of any assets
c) any other relief which a domestic liquidator would be entitled to

However, the foreign representative should be aware that any of the above reliefs can be denied under balancing interests under Article 22 of MLCBI if in the court's purview it is likely to affect the interests of other connected persons such as the domestic creditors, other parties and day to day administration of the debtor themselves. Granting such reliefs are purely at the discretion of the US courts.

For full marks, answer should also refer to and discuss Art. 17, 15, 6 MLCBI

QUESTION 4 (fact-based application-type question) [15 marks in total] 7 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.

ANSWER

The case under reference is requires application of provisions of Cayman Islands Companies Act and of Chapter 15 of US Insolvency Code which is nothing but total incorporation of MLCBI. In this process Global Holdings will get the required “ automatic stay” under MLCBI which is nothing but a moratorium against action, if any, by any creditor. The scheme is a process initiated by filing an application to the courts Cayman Islands and at the same time preparing to file a scheme of compromise with creditors towards restructuring.

The given case is similar to the case law of Ocean Rig, an oil services group which was originally operating from Marshall Islands, which follows US legal systems and shifted its COMI to Cayman Islands to make use of the scheme of arrangement process and for successful application for recognition under Chapter 15.

After registering and floating the company in Canada in 2009, Globe Holdings was probably advised to shift its operations to Cayman Islands for strategic reasons as many of its direct and indirect subsidiaries were operating in USA.

PROCEEDINGS IN CAYMAN ISLANDS

The scheme of arrangement in Cayman Islands is a court supervised process. It helps the corporate which has availed a debt to have it restructured with proper participation of all the members and creditors but at the same time use the process of cramming down if is necessary to achieve the consensus required for a proper restructuring.

However, the scheme is not a formal insolvency process and the debtors continue to be in control of the affairs while preparing and negotiating the terms of the restructuring proposal. Both formats are available, that is, with or without the formal insolvency process initiated. In the latter model, the scheme of arrangement put in to use would not be eligible for the automatic stay of actions against the company from unsecured creditors. In the given case, Globe Financial Holdings, like many Cayman Islan registered entities, while commencing a scheme under Cayman Islands law will simultaneously file a Chapter 15 proceedings in US through their subsidiaries and can make benefit out of the filing as stated herein.

Track history in Cayman Islands cases show that interference from the judiciary is very minimum and if the entity manages to secure required level of voting support the approval for the scheme is almost certain.

After the amendment to the Companies Act which came into effect on 31st August 2022 there is a change in the model of voluntary filing for reorganization by the corporate debtor themselves. A reorganization can be achieved via the same scheme of arrangement and this can be used by a solvent company to destress itself.

As per the amended legislation, the company can apply to the court for appointment of a restructuring officer on whose appointment provides for a moratorium and gives the necessary breathing time to promote a restructuring plan. The scheme is presented to the relevant stakeholders and then an application is made to the court for an order for a meeting of the stakeholders to vote on the same. In the first hearing the court will scrutinize the proposal and confirm the correctness of the classification of the voting class and also the details provided to them for them to vote upon.

If in the constituted meeting the scheme is approved by the statutorily required majority, the court will sanction the scheme in the subsequent hearing and the scheme then becomes binding on all the stakeholders whether they are part of the group who consented or not.

The documents required :

1. A special or ordinary resolution depending upon the relevant mentioning in the articles of association of the company.
2. The detailed proposal for restructuring with require enclosures of financial details required by the stake holders to understand the scheme.
3. Request for appointment of a Restructuring Officer.
4. List of Creditors / class of creditors who would be voting on the scheme.

Reliefs to be sought on day one of filing:

1. Appointment of Restructuring officer
2. Date for convening the meeting of the stakeholders who would be voting on the proposal for restructuring.

PROCEEDINGS IN USA

Since Globe Holdings does not have a business operations of its own, though they had their COMI in Cayman Islands, they wanted to cover themselves under additional factors also that could be considered by a court to determine the debtor's COMI detailed as below:

- Books and records are maintained in Cayman Islands;
- In public filings with SEC as well as prospectus for the notes issue the place was shown as Cayman Islands;
- Bank account is maintained at Cayman islands;
- Special board meetings are organized over VC but from the office at Cayman Islands of the local counsel means that the commercial decisions are taken out from Cayman Islands;
- The public filing with SEC and the prospectus shared with the public disclosed that Globe Holdings is a Cayman islands company;
- Location from where re-organisation was being conducted;

Thus more than the required proof is available to finalise Cayman Islands as the COMI of the debtor.

Globe Holdings has the following advantages to have their subsidiaries in USA declared as their" establishments" as it fits into the definition of of establishment which is " place from where the debtor carries out operations of economic activity of goods and services with human means "

- Entire business is carried out in USA under US laws;
- Financing raised under US Law:
- Employees are based out in US;

Thus the insolvency proceedings initiated in Cayman Islands and through their subsidiaries in USA then for declaring the same as a main proceedings and hence will also be eligible for automatic relief under article 20 of MLCBI.

Recognition proceedings:

Cedar and Woods, the long term standing counsel for Global Holdings are fit enough to be announced as a ' foreign representative' to participate in the matters of insolvency in USA. On filing of recognition proceedings under Chapter 15 of the US Code, the proceedings under Cayman Islands laws towards voluntary reorganization possessed the necessary ingredients to get declared as "foreign proceedings" in the matter of Chapter 15.

Immediately upon filing of the proceedings in US courts and even before recognition, Global Holdings would be eligible for interim reliefs under Article 19 of MLCBI such as

- Stay of any execution against debtor's assets;
- Power to administer and realise any assets;

And also the following reliefs under Article 21 of MLCBI

- Rights to deal with debtor's assets suspended;
- Right to Take delivery of information reg debtor's assets,etc and examination of witnesses
- Right to be granted equivalent reliefs available under domestic insolvency case.

Post filing of petition for recognition, through the foreign representative get the proceedings in Cayman Islands as "foreign main proceedings', the COMI of Global Financial Holdings could be ascertained as it fell into the definition as such. Likewise, to declare the proceedings in USA under Chapter 15 as "foreign non-main proceedings' as the subsidiaries are meeting the criteria of " establishment".

In the order of preference, it would be better to get the recognition of US courts through the " foreign representative" for the foreign proceedings (Cayman Islands) which would entail reliefs under Article 21 of MLCBI which are mentioned in nutshell below. For this purpose, it is immaterial whether the recognition obtained is foreign main or non-main

- Stay commencement or continuation of any proceedings against Global Holdings;
- Stay any execution activities against the assets of the debtor;
- Suspend activities of disposal of the assets of the debtor;

Once when the foreign proceedings is recognized as foreign main proceedings, in our case the proceedings in Cayman Islands is recognized, then reliefs under Article 20 of MLCBI, if they had not been already secured under Article 19 and 21. But this is subject to the provisions under Article 22 of MLCBI called " balancing interests". This means that the reliefs sanctioned to the foreign representative should not be detrimental to the interests of the creditors and other interested parties. Accordingly all reliefs sanctioned can be evaluated and if necessary toned down or up. (Article 22)

SCENE OF ACTION IN RESTRUCTURING SHIFTING BACK TO CAYMAN ISLANDS

In 2021 post their debacle in the stock market, it became clear that at the earliest the corporate debtor should put the plans of reorganization in place. When the company pushed up the decision to delay interest payment as well as postponing the repayment and approached the Note holders, they understood that the investors wanted to have the restructuring to take place Cayman Islands as stated in the Restructuring Support Agreement.

At this point of time, the Companies Act of Cayman Islands was amended with effect from 31st August 22 and this facilitated Global Holdings to file the application for voluntary reorganization and also seek appointment of Restructuring Officer. Accordingly on 4th July 2023 Global Holdings filed the application for voluntary restructuring and got it cleared as per the provisions of Companies Act of Cayman Islands.

Even if the class action litigation had been pressed in US either prior to the filing of the application for reorganization or during the process, by virtue of interim moratorium it would have been stalled.

The essay requires definitions with reference to Art.2 MLCBI, a clear comparison of alternative of COMI considerations making reference to Art.16 MLCBI ie. "rebuttable presumption", Art.15 processes and Art.6 public policy considerations.

*** End of Assessment ***

Marks awarded: 29 out of 50