



42.5/50 = 85%

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

RESIT ASSESSMENT: SEPTEMBER 2023

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the summative (formal) assessment for Module 2A of this course.

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. The final submission date for this assessment is 21 September 2023. Please provide the completed assessment back to Sanrie Lawrenson via email at Sanrie.Lawrenson@insol.org by no later than 23:00 (11 pm) GMT on 21 September 2023. No submissions can be made after this time, no matter the circumstances.**
- 6. When submitting your assessment you will be required to confirm / certify via email 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.**

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.

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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.

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(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]

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 EIR is a regulation, which is directly applicable to EU member states, meaning that the member states apply the EIR as it appears directly to their domestic laws. The MLCBI is a recommendation of 'soft law' which states can choose to adopt in its entirety or modify it accordingly. An advantage of the EIR is the uniform application of the rules of deciding the appropriate jurisdiction to commence insolvency within the EU, however the member states do not have an option to adopt those rules to suit their domestic laws. The MLCBI gives the adopting countries the choice to the countries on how to adopt it and what provisions within it to adopt. This can lead to different countries not having consistency in the manner of adoption of 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.

The interest of local creditors must be considered and protected when the courts are deciding to grant post-recognition relief.¹ Additionally, the relief must relate to assets in the enacting state not anything outside the jurisdiction.²

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

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

Foreign creditors are protected against discrimination if insolvency proceedings are opened in an enacting state per Article 2 para 1. This means that they should not be treated worse than the domestic creditors. The ranking of the foreign creditors will be dictated by enacting state's ranking of creditors in a similar

¹ UNCITRAL Model Law on Cross-Border Insolvency, Article 21 paragraph 2.

² UNCITRAL Model Law on Cross-Border Insolvency, Art 21 paragraph 4

position as those of the foreign creditor. The minimum position of foreign creditors is unsecured creditors in the enacting state per Article 2 para 2.

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?

Automatic mandatory relief is available for foreign main proceedings under art 20³ while foreign non-main proceedings have discretionary post-recognition relief which is granted by the court.⁴ Once a jurisdiction is recognized as having COMI automatic relief is granted for foreign main proceedings meaning that actions against the debtor by creditors against the debtor or against debtors assets are stayed, additionally assets cannot be dealt with by disposing them or granting or transferring rights.⁵ Local courts on application of foreign representatives can apply to acquire the post-recognition relief and the courts look at the interests of local creditors when deciding to grant the relief.⁶

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

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.

A multi-national company operating in more than one jurisdiction has options of where to commence insolvency proceedings. It is a possibility for the company to commence insolvency proceedings in the countries that it has links to. In the example provided above, the debtor has the option of commencing insolvency proceedings in Germany, Bermuda and US. However, the issue arises as to whether each of those countries can deal with the matters in the other jurisdictions. The MLCBI provides procedural rules where foreign main and foreign non-main proceedings can be commenced.⁷ This short essay will look at which jurisdiction ought to commence foreign main and foreign non-main proceedings for the debtor.

³ UNCITRAL Model Law on Cross-Border Insolvency, Article 20.

⁴ UNCITRAL Model Law on Cross-Border Insolvency, Art 21.

⁵ UNCITRAL Model Law on Cross-Border Insolvency, Art 20.

⁶ UNCITRAL Model Law on Cross-Border Insolvency, Art 21.

⁷ UNCITRAL Model Law on Cross-Border Insolvency.

The debtor's foreign main proceeding refers to an insolvency proceedings taking place where the debtor's COMI is located.⁸ (1) Therefore, foreign main proceedings should be commenced in Germany (1) rather than US as this is where the 'centre of main interest' is located. German laws will be applicable to dealing with the insolvency issues of the debtor, hence the relief will be under German law.⁹

The debtor's foreign non-main proceedings refers to proceedings commenced where the establishment is located. (1) Establishment refers to where the debtor carries non-transitory activities¹⁰ which is other than the location of the COMI. Therefore, the correct location to commence foreign non-main proceedings is Bermuda. (1)

The proceedings opened in the US will not be recognised as foreign proceedings under the MLCBI since COMI and establishment is not located in the jurisdiction.

All requirements of Article 15 and Article 17; relief requested must not violate the public policy of the US as noted under Article 6.

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.

To protect the assets of the foreign debtor the court may stay the commencement of proceedings against the foreign debtor by individual US-based creditors.¹¹ However, the US courts must ensure the relief granted to joint provisional liquidators also satisfies the interest of the US-based vendors.¹² The consequence of commencing recognition proceedings is determined by whether the enacting state has the COMI or the establishment.¹³

If the enacting state has COMI the proceedings will be recognised as foreign main proceedings.¹⁴ The effect of commencing foreign main proceeding for foreign debtor acquires automatic mandatory relief.¹⁵ The US-based vendors of the foreign debtor will automatically be prevented from commencing individual proceedings against the debtor¹⁶ but there are exemptions to this rule. The US-based vendors may provide evidence to show that their individual claims are

⁸ UNCITRAL Model Law on Cross-Border Insolvency, Article 2(b).

⁹ UNCITRAL Model Law on Cross-Border Insolvency, Articles 20 and 21.

¹⁰ UNCITRAL Model Law on Cross-Border Insolvency, Article 2(f).

¹¹ UNCITRAL Model Law on Cross-Border Insolvency, Article 21(1).

¹² UNCITRAL Model Law on Cross-Border Insolvency, Article 21(2).

¹³ UNCITRAL Model Law on Cross-Border Insolvency, Articles 19 to 24.

¹⁴ UNCITRAL Model Law on Cross-Border Insolvency, Article 2(b).

¹⁵ UNCITRAL Model Law on Cross-Border Insolvency, Art 20.

¹⁶ UNCITRAL Model Law on Cross-Border Insolvency, Article 20 (1)(a).

necessary to preserve a claim against the debtor, but this will not automatically remove the stay.¹⁷ Additionally, if the US has modified art 20 paragraphs 2 and 4 to include protection to the US-based creditors' type of interest then the automatic stay can be suspended allowing the claim proceeding by the US-based creditors to continue.

On the other hand, if the foreign debtor's establishment is located in the US, the stay on the proceedings by the US-based creditors is at the discretion of the US courts which is a post recognitional relief.¹⁸

Finally, if the recognition decision is obtained by the joint provisional liquidators are able to initiate actions under the US laws to avoid or render ineffective the commenced legal proceedings by the US based creditors.¹⁹ If the proceeding is non-main proceedings the courts will also take into account the interest of the US-based creditors.²⁰

Question 3.3 [maximum 4 marks] **2.5 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?

The foreign representatives may wish to apply to the UK courts for relief under Article 21(1)(a)²¹ which is a stay on the commencement or continuation of individual actions or individual proceedings or appropriate relief under Article 21(1)(g).²² As stated above in the US the *ipso facto* clauses are not enforceable hence the US creditors are not able to rely on Article 21(1)(g) as the US insolvency law does not offer that type of protection. The question for the foreign representatives then becomes can UK law offer any type of relief through the implementation of Article 21(1)(a) through the Cross-Border Insolvency Regulations 2006 (CBIR). The type of relief applied for by the foreign representatives is a stay to prevent the exercise of the *ipso facto* clause which ought to have a world wide effect thus including the US. The case of *Fibria Celulose S/A v Pan Ocean Ltd (Pan Ocean)*²³ the English court determined terminating a contract due to the *ipso facto* clause is not the same as

¹⁷ UNCITRAL Model Law on Cross-Border Insolvency, Article 20 (3).

¹⁸ UNCITRAL Model Law on Cross-Border Insolvency, Article 21

¹⁹ UNCITRAL Model Law on Cross-Border Insolvency, Article 23.

²⁰ UNCITRAL Model Law on Cross-Border Insolvency, Article 23(2).

²¹ UNCITRAL Model Law on Cross-Border Insolvency, Article 21(1)(a).

²² UNCITRAL Model Law on Cross-Border Insolvency.

²³ *Fibria Celulose S/A v Pan Ocean Ltd* [2014] EWHC 2124 (Ch).

commencement or continuation of individual actions or individual proceedings, hence the courts cannot provide a relief under Article 21(1)(a).²⁴ Therefore, the dealing of the US-governed leases and intellectual property licences will be dictated by the contracts.

Arts 17, 19 and 20

Question 3.4 [maximum 4 marks] **0 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 could apply for standing in Country B via direct access to Country B's courts under Article 9.²⁵ The foreign representative would be able to apply to the Country B's court without meeting any competency requirements such as licence and consular action. However, this does not mean that they will gain any other right and powers.

The other option the foreign representative could have utilised is seeing Country B's conditions for commencing an insolvency proceedings are met. If they are met the foreign representative would be entitled to commence domestic insolvency proceeding in Country B under Article 11.²⁶ The prior recognition is not required by the foreign representative in Country B.

The foreign representative should apply for recognition of the foreign proceeding as a foreign nonmain proceeding

Arts 15, 17, 16(3) presumption, 21(e)

The foreign representative should always seek recognition of foreign nonmain proceeding as an alternative to foreign main proceeding, especially in instances where the COMI analysis is weak

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

²⁴ UNCITRAL Model Law on Cross-Border Insolvency.

²⁵ UNCITRAL Model Law on Cross-Border Insolvency, Article 9

²⁶ UNCITRAL Model Law on Cross-Border Insolvency.

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.

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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.

The first thing to decide is the location of the main and non-main proceedings which are will be determined by the location of the COMI and establishment.²⁷

A recognition proceedings ought to be filled either in the Cayman Island or the US which will be treated as local proceedings rather than opening multiple insolvency proceedings dealing with Global Holdings. Once recognition is approved Global can utilize the insolvency tools in the either Cayman Island or US.

Foreign representative appointed on behalf of Globe Holding makes the application of a recognition. There are requirements that must be fulfilled in the application for recognition of foreign proceedings under Article 15:²⁸

The application ought to be accompanied by:

- ***A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative. The appointment of the Cedar and Woods and decision to starting the chapter 15 recognition proceeding dated August 31, 2021.²⁹ The filing of the Sanction Order with the Cayman Islands Registrar of Companies***

The application for recognition should be accompanied by a statement identifying all foreign proceedings in respect of Globe Holdings that is known to Cedar and Woods.³⁰ There is none currently even though there is a possibility of a class action in the future. The court should presume the submitted documents are authentic, whether or not they are been legalized.³¹

If the criteria are met the recognition proceeding will be approved based on Article 17. The type of proceedings will determine the type of relief. Therefore it is essential to determine whether COMI is in US or Cayman island. The presumption is that Globe Holding's COMI is located in the Cayman Island as it is where it is registered.³² The presumption can be rebutted by looking at where the central administration of Globe Holding takes place and whether that location is ascertainable by its creditors.³³ Globe Holding conducts its affairs in the US (its headquarters are located in the US) which is known by Noteholders. However, it conducts its board meetings from the Cayman island albeit virtually. Additionally other factors to consider to rebut the presumption that Cayman Island is COMI:

- ***The unsecured notes are governed by New York laws.***
- ***Its business mainly conducted by subsidiaries that are registered and operate in the US.***

On the other hand factors that support that Cayman Island is COMI:

- ***the books and records are kept in Cayman Island.***

²⁷ UNCITRAL Model Law on Cross-Border Insolvency, Articles 2(b) and 2(c).

²⁸ UNCITRAL Model Law on Cross-Border Insolvency, Article 15.

²⁹ UNCITRAL Model Law on Cross-Border Insolvency, Article 15 (2).

³⁰ UNCITRAL Model Law on Cross-Border Insolvency, Article 15 (3).

³¹ UNCITRAL Model Law on Cross-Border Insolvency, Article 16 (2).

³² UNCITRAL Model Law on Cross-Border Insolvency, Article 16 (3).

³³ UNCITRAL Guide to Enactment, pp 70-72.

- *Globe Holdings' bank account is located in the Cayman island (However, the account was only opened a few days ago and therefore may not be relevant).*
- *Counsel is located in Cayman Island.*
- *Noteholders have agreed for restructuring to be governed by Cayman island laws.*

Therefore, COMI is located in the Cayman Island. The proceedings to be commenced in Cayman Island are foreign main proceedings.³⁴ Since Globe Holdings operates non-transitory economic activities in the US via its subsidiaries (as seen above) it has an establishment in the US.³⁵ The proceedings in the US are foreign non-main proceedings.³⁶

On filling the recognition application, it should be requested relief under Article 19 be granted at the discretion of the court which applies to both foreign main and non-main proceedings.³⁷ The relief will be to protect the assets of the assets in NY (HQ which includes the land, building, building improvements and contents) and stay any execution against Globe Holding such as the possible class action litigation.

The effect of commencing foreign main insolvency proceedings in the Cayman Island is automatic relief under Article 20.³⁸ The effect would be the pending class action litigation would be stayed and the selling of the HQ assets in NY will also be stayed. This is to give the foreign representative a chance to restructure Globe Holdings. On recognition of the Cayman Island as the foreign main proceeding, the foreign representative can request the court to exercise its discretionary powers under Article 21.³⁹ The relief sort will have a world wide effect to include Cayman Island and US.⁴⁰ The relief would be to stay the potential class action litigation and prevent the sell of the assets in NY. It will be also be to extend any relief granted under Article 19.

The effect of recognition of US as the foreign non-main proceedings is the US courts may exercise their discretionary power under Article 21 which is a post-recognition relief.⁴¹ The relief sort after would be to turn over the NY assets stated above to the foreign representative, but the courts have to bare in mind the local creditors interests.⁴² The relief would be limited to the matters in US.⁴³

³⁴ UNCITRAL Model Law on Cross-Border Insolvency, Article 2(b)

³⁵ UNCITRAL Model Law on Cross-Border Insolvency, Article 2(f).

³⁶ UNCITRAL Model Law on Cross-Border Insolvency, Article 2(c).

³⁷ UNCITRAL Model Law on Cross-Border Insolvency, Article 19 (1).

³⁸ UNCITRAL Model Law on Cross-Border Insolvency, Article 20 (1).

³⁹ UNCITRAL Model Law on Cross-Border Insolvency, Article 21 (1).

⁴⁰ UNCITRAL Model Law on Cross-Border Insolvency, Article 21 (3).

⁴¹ UNCITRAL Model Law on Cross-Border Insolvency, Article 21 (1).

⁴² UNCITRAL Model Law on Cross-Border Insolvency, Article 21(2).

⁴³ UNCITRAL Model Law on Cross-Border Insolvency, Article 21 (3).

* End of Assessment *