



**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] 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] 8 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.

	MLCBI	EU Regulation on insolvency proceedings (“EIR”)
Key distinction	The MLCBI is a <b>“template” legislative text</b> which is recommended for nation states to incorporate as part of their domestic laws. The MLCBI is focussed on <b>procedural matters</b> such as access, recognition, relief and co-ordination rather than on substantive issues.	The EIR, when adopted by member EU states, <b>directly becomes part of the domestic law of the EU state.</b>
Benefit	The key benefit of the model law approach is its <b>flexibility</b> i.e. it enables the enacting state to incorporate in whole or part of the recommended legislative text as part of the domestic law, and does not require reciprocity.	The key benefit of the EIR approach is the <b>uniformity in its application in the EU member states.</b>
Disadvantage	The key disadvantage of the model law approach is that there <b>may not be uniformity in an enacting state’s adoption of the MLCBI.</b> This is because the enacting state may incorporate only some provisions of the MLCBI and/or require reciprocity, thereby derogating from the aims of the MLCBI.	The key disadvantage of the EIR approach is its <b>rigidity/inflexibility.</b> Member states may not opt out/choose to apply certain provisions of the EIR only.

**Question 2.2 [maximum 2 marks] 0 mark**

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

Under Article 21 of the MLCBI, the court should take into account whether the post-recognition relief granted is for a **foreign main or non-main proceeding**. In general, relief granted to the foreign representative of a **foreign non-main proceeding should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.**

The above principle is reflected in **Article 21(3) of the MLCBI**, which provides that (a) relief provided to a foreign non-main proceeding should be limited to assets that are to be administered that proceeding only; and (b) if the foreign representative seeks information relating to the debtor’s assets or affairs, the relief must concern information required in that non-main proceeding only.

**The court primarily considers the creditors’ interests**

**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(1) of the MLCBI provides that foreign creditors have the same rights as the local creditors in the enacting state regarding the commencement of insolvency proceedings or the filing of claims in such proceedings.

Article 13(2) of the MLCBI provides that a foreign creditor’s claim shall not be given a lower priority than that of a general unsecured claim on the basis of the foreign creditor’s nationality or location.

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

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

	Foreign main proceeding (“FMP”)	Foreign non-main proceeding (“FNMP”)
	Recognition of a FMP has the following <u>automatic effects</u> :	Upon recognition of a foreign proceeding (whether main or non-main), Article 21(1) of the MLCBI provides that the court of the enacting state with <u>discretionary power</u> to grant the following appropriate relief:
(a)	An automatic stay of the commencement or continuation of individual actions or proceedings relating to the debtor’s assets, rights, obligations, or liabilities.	A stay of the commencement or continuation of individual actions or proceedings relating to the debtor’s assets, rights, obligations, or liabilities
(b)	An automatic stay of execution against the debtor’s assets.	A stay of execution against the debtor’s assets.
(c)	An automatic suspension of the right to transfer, encumber or dispose the debtor’s assets.	A suspension of the right to transfer, encumber or dispose the debtor’s assets.
(d)	N.A.	Providing for the examination of witnesses, taking of evidence or providing information on the debtor’s assets, affairs, rights, obligations.
(e)	N.A.	Entrusting the administration of realisation of all or part of the debtor’s assets in the enacting state to the foreign representative/authority.
(f)	N.A.	Extending interim relief granted under Article 19(1) of the MLCBI.
(g)	N.A.	Granting any additional relief that may be available to a domestic liquidator/

		office-holder under the laws of the enacting State.
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**QUESTION 3 (essay-type questions) [15 marks in total] 10 marks**

**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.

- The proceeding in Germany is likely to be recognised by the US courts under Chapter 15 of the US Bankruptcy Code as a foreign main proceedings (“FMP”). This is because Article 17(2)(a) of the MLCBI provides that a foreign proceeding shall be recognised as a FMP if it is taking place in a state where the debtor has the centre of its main interest (“COMI”). It is stated that the debtor has its COMI in Germany.
- The proceeding in Bermuda is likely to be recognised by the US courts under Chapter 15 of the Bankruptcy Code as a foreign non-main proceedings (“FNMP”). This is because Article 17(2)(b) of the MLCBI provides that a foreign proceeding shall be recognised as a FNMP if it is taking place in a state where the debtor has an establishment. It is stated that Bermuda has an establishment.

**Question 3.2 [maximum 3 marks] 0 mark**

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

- The joint provisional liquidators would be advised to seek the US court:
  - for an expedited hearing of the recognition proceeding;
  - to seek relief under Article 21(1) for a stay on the US-based vendor’s action against the debtor.
- In the case of *Halo Creative & Design Limited v Comptoir des Indes Inc.*, Case No. 14C 896 (N.D. Ill Oct. 2 2018), the Court decided that where urgent relief is sought on a stay on litigation, prior recognition of the foreign proceeding was required, and the form of relief sought was not one ordered under Article 19 but under Article 21(1) instead.

**Requires discussion based on Art.10 MLCBI**

**Question 3.3 [maximum 4 marks] 4 marks**

A foreign representative who administers assets in a debtor-in-possession-like restructuring proceeding in the UK commences a recognition proceeding in the US, setting the recognition hearing 35 days after the petition date due to the availability of the court. There is no litigation pending or threatened against the foreign debtor, but US-governed leases and intellectual property licenses have *ipso facto* clauses (that is, bankruptcy-triggered

terminations) that are not enforceable under the US Bankruptcy Code. Based on these facts, explain what steps, if any, should the foreign representative take to protect the assets and why?

- The foreign representative would be advised to seek relief under Article 21(1)(g) of the MLCI/Chapter 15 of the US Bankruptcy Code to grant relief that would have been available to a debtor under US laws. This is because ipso facto clauses are generally unenforceable under US law.
- The foreign representative would be advised not to seek relief under Article 21(1)(a) of the MLCI/Chapter 15 of the US Bankruptcy Code for a stay on the commencement or continuation or individual action or proceeding, on the basis that the termination of the contract on the ipso facto clauses constitutes the commencement of an individual action which attracts the application of the stay under Article 21(1)(a). This is because the English court in Fibria Celulose S/A v Pan Ocean Co Ltd [2014] EWJC 2124 (Ch) has held that the service of a notice to terminate a contract does not constitute the commencement or continuation of an individual action or proceeding.

**Question 3.4 [maximum 4 marks] 2 marks**

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

- The foreign representative is advised to review the seek relief under Article 17(4) of the MLCBI for the recognition decision to be modified (“Modification Application”) that the foreign proceeding ought to be a foreign main proceeding.
- It has been suggested that the court evaluating the evidence for modification of the recognition decision could consider evidence that was or ought to have to been available at the time the court granted the recognition but may also consider new or fresh evidence.
- The court may revisit a recognition order under Article 17(4) of the MLCBI in a case where the court initially applied the COMI in Article 16(3) in its recognition order, and if the evidence shows that the actual COMI is elsewhere upon evidence provided before the court in the modification application.
- The foreign representative would be advised to act fast in reviewing the case and making the Modification Application and to give full and frank disclosure of all relevant factors in determining the debtor’s COMI. The court would be slow/hesitant to disturb a recognition order where there is a significant passing of time (e.g. 2 years) even if the statements regarding the debtor’s COMI is not entirely accurate in light of subsequent developments.

**Full marks require discussion on what the representative should have done at the outset. Moreover, discussion on Art.21 MLCBI/ relief as a next step is missing.**

**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.

## RECOGNITION

### A Locus standi

- There is an issue whether the client is a “foreign representative” under Article 15(1) of the MLCBI, i.e. whether the client has locus standi to apply for recognition of the Sanction Order of Globe Holding.
- Article 15(1) of the MLCBI provides that a foreign representative may apply to the court for recognition of a foreign proceeding in which the foreign representative has been appointed.
- Article 2(d) of the MLCBI defines “foreign representative” *inter alia*, as a person or body authorized in a foreign proceeding to administer the reorganisation or liquidation in the debtor’s assets or affairs or act as a representative of the foreign proceeding.
- The client had the authority to convene the Scheme Meeting under the Convening Order. However, it is unclear from the facts of the case, whether the client is empowered to be the representative of the Scheme either under the Convening Order and/or the Sanction Order. However, see discussion below on Re BTA Bank JSC at “D”.

## B Application for recognition of Cayman Islands Sanction Order of Globe Holdings as a Foreign Main Proceeding

- Assuming the client is empowered to act as the foreign representative either under the Convening Order and/or Sanction Order, the client would apply to the US court for recognition of Sanction Order of Globe Holdings as a Foreign Main Proceeding (“FMP”) under Chapter 15 of the Bankruptcy Code in the US (“**Recognition Application**”).
- **Articles 15(2) and 15(3)** of the MLCBI provide that the application for recognition must be accompanied by the following documents:
  - A certificate of the decision commencing the foreign proceeding and appointing the foreign representative; or
  - A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
  - Any other evidence acceptable to the court of the existence of the foreign proceeding and appointment of the foreign representative; and
  - A statement identifying all foreign proceedings in relation to the debtor known to the foreign representative.
- **Article 16(3)** of the MLCBI provides that in the absence of evidence to the contrary., the debtor’s registered office is presumed to be the debtor’s centre of main interests (“COMI”), and which COMI is readily ascertainable objectively by third parties. The date for determining the COMI is the date of the commencement of the foreign proceedings. Some of the factors relevant for determining COMI include:
  - the location of the debtor’s books and records;
  - location in which the debtor’s main assets or operations are found;
  - the location of the debtor’s main bank ;
  - the location of employees.
- In light of the Articles 15(2), 15(3) and 16(3), the client would be advised to enclose a copy of the following papers in its Recognition Application:
  - a copy of the Convening Order and the Sanction Order;
  - in order to show that Globe Holdings has its COMI in the Cayman Islands, to enclose a copy of:
    - Certificate of Registration by Way of Continuation in the Cayman Islands;
    - Notices of its re-incorporation in the Cayman Islands, e.g. its public filings with the Securities and Exchange Commission.
    - Its bank account statement (appropriately redacted) in the Cayman Islands;
    - Books and records maintained in the Cayman Islands;
    - SEC filings and prospectus provided in connection with the issuance of notes that disclosed that Globe Holdings is a Cayman Islands entity.
- In order to avoid perceived abuse of process, the client is advised to give full and frank disclosure to the court that Globe Holding’s employees and headquarters are in the US.

## RELIEF

## C Discharge of New York governed notes valid under Cayman Islands arrangement - Gibbs Rule would not apply in US

- Globe Holdings had issued notes governed by New York Law and the maturity and payment of the notes were compromised in a foreign insolvency/reorganization proceeding i.e. the Cayman Islands scheme of arrangement.
- There is an issue whether the *English Gibbs* rule would apply in the current fact scenario. The Gibbs Rules states that a debt governed by English law cannot be discharged or compromised by non-English insolvency/foreign proceeding(s).
- The US decision of *In re Modern Land (China) Co., Ltd*, Case No 22-10707 (MG), 641 B.R.768 (Bankr. S.D.N.Y. July 18, 2022) (“MCL”) is instructive. In this case:
  - The debtor was a Chinese property developer incorporated in the Cayman Islands that has issue US governed notes. The debtor had proposed a Cayman Island scheme of arrangement to discharge its existing notes and to substitute them with new issued notes. The debtor made an application before the US Bankruptcy Court for recognition of the scheme under Chapter 15 of the US Bankruptcy Code and relief that the notes were discharged as matter of US law.
  - The US Bankruptcy Court held that a Chapter 15 order constitutes a valid discharge of the New York Law governed debt.
- The client is advised to highlight the decision of MCL before the US bankruptcy court in its recognition application as authority for that the Gibbs Rule does not apply and the recognition of Globe Holding’s Cayman Island Scheme of Arrangement as main proceedings would constitute a valid compromise/discharge of New York law governed notes.

**D Automatic stay of proceedings be made permanent under Article 20 of MLCBI - Re BTA Bank JSC**

- There is a potential class action litigation against Globe Holding but no formal action has been filed.
- The client is advised to seek relief that the automatic stay under Article 20(1) of the MLCBI would be permanent and to highlight the case of Re BTA Bank JSC [2012] EWHC 4457 (CH) (“BTA case”). However, there is the issue that the client may not be the foreign representative as defined in the MLCBI.
- The English case of BTA case may be of persuasive authority. In this case:
  - The debt had undergone restructuring process in Kazakhtan. A restructuring plan was approved by 93.8% of the affected creditors and the plan was subsequently approved by the Kazakh court. Before the debtor’s restructuring process was terminated, the foreign representative applied to the English court for an order that the automatic stay under Article 20 of the MLCBI would be made permanent.
  - The English court granted the permanent stay as there were no opposing creditors and on condition so long as the stay remains unopposed. If there were any opposing creditors, then complete submissions from parties would be required.

**E Sale of Globe Holdings headquarters**

- In the event that there is a proposed sale pending of Globe Holdings' headquarters, the client would be advised to seek the US court's approval of the sale under Article 21(1)(g) of the MLCBI.
- Article 21(1)(g) of the MLCBI provides that the court in the enacting state may grant any additional relief that may be available to the person/body administering a reorganization under the laws of the enacting State.
- The client may wish to seek approval of such a sale under s 363(f) of the US Bankruptcy Code i.e. a "363 sale" of Globe Holdings' assets.

The answer should contain as a minimum (with respective references to -if any- MLCBI provisions) definitions (COMI, establishment, foreign main/non-mail proceedings etc.), a discussion on the rebuttable presumption of the COMI and alternative courses of action in case of a weak COMI, reference to the public policy clause.

**\* End of Assessment \***

**Marks awarded: 36 out of 50**