



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] **2 marks**

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

MLCBI is an example of an international 'soft' law instrument that provides for recommendations on procedural framework to deal with insolvency cross-border cases that reflects the provisions of modern and efficient insolvency systems worldwide. MLCBI can be incorporated to domestic law in full or in part, at State's discretion, and requires no consideration. MLCBI is grounded in four key premisses: providing access of foreign representatives and creditors to courts; recognition of foreign proceedings; providing appropriate relief and facilitating cooperation between courts and foreign representatives. One benefit of this approach is that it is more appealing to States, that can incorporate the provisions, accordingly to the according to the particulars of the legal system in effect. One downside of this approach is that one cannot enforce the incorporation of the provisions therein to domestic law, what can impair harmonization of procedural framework for cross-border cases.

On the other hand, the European Union Regulation (EIR) is an example of an international 'hard' law instrument that is incorporated to domestic law and binds all signatory parties. Therefore, a benefit of this approach is that as mentioned before, it binds all signatory parties and is enforceable. A downside to this approach is that EIR applies only to the signatory States within a certain geographic region and requires consideration (?).

The stated disadvantage of the EIR could be the difficulty in the development and adoption process.

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.

Relief may be granted, at court's discretion under article 21 of the MLCBI, in case an insolvency proceeding is recognized as a 'non-main' insolvency proceeding, including, but not limited to the following measures: (i) stay the commencement or continuation of individual actions or proceedings concerning debtor's assets, rights, obligations, and liabilities; (ii) stay the execution against debtor's assets; (iii) suspend the right to transfer, encumber or otherwise dispose of any assets of the debtor; provide for examination of witnesses, the taking of evidence or the delivery of information concerning debtor's assets, affairs, rights, obligations or liabilities; and (iv) hand over all or part of debtor's assets located in the enacting State to the foreign representative.

In this event, court should primarily be satisfied that the relief requested by the foreign representative of a foreign 'non-main' proceeding relates to assets that, under the law of the enacting State, should be administered in the foreign 'non-main' proceeding or concerns information required in that proceeding, using its discretionary power.

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 of the MLCBI is aimed at the protection of foreign creditor's rights as it provides for equal treatment among domestic and foreign creditors. This, however, does not imply in non-compliance with the priority provided for in domestic law, but rather assures that the foreign creditor will not be treated as a holder of a claim that is inferior to regular unsecured claims under domestic law only because the claim is held by a foreign creditor.

Question 2.4 [maximum 3 marks] 3 marks

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

The key distinction between the relief available in regard to foreign main and non-main insolvency proceedings is that the recognition of a foreign main proceedings causes automatic and mandatory effects while in the recognition of a foreign non-main proceedings, courts can grant certain measures aimed at the protection of debtor and creditors and third parties' interests at its discretion.

According to Uncitral Model Law art. 20, the relief granted following the recognition of a foreign main proceeding implies in the following automatic effects: (i) stay of the commencement or continuation of individual actions or individual proceedings concerning debtor's assets, rights, obligations, and liabilities; (ii) stay of execution against debtor's assets; and (iii) suspension of transfer and encumbrance rights or disposal of assets by debtor. It is worth to highlight that these 'automatic stay' effects also apply to arbitration proceedings in place. However, the enacting State can include exceptions and limitations, modifications, or termination provisions in regard to such effects as: (i) in a scenario in which the suspension of the arbitral proceeding would be contrary to the interest of a party. Including the debtor itself; (ii) enforcement of claims by secured parties; (iii) initiation of court action for claims that have arisen after the commencement of the insolvency proceeding or recognition; and (iv) the completion of open financial market transactions.

While the recognition of a foreign main insolvency proceeding triggers the abovementioned automatic stay effects, if an insolvency proceeding is recognized as a non-main proceeding,

foreign court can, at its discretion, if proven to be necessary to protect debtor's assets or creditors interests, following the foreign representative request: (i) stay the commencement or continuation of individual actions or proceedings concerning debtor's assets, rights, obligations, and liabilities; (ii) stay the execution against debtor's assets; (iii) suspend the right to transfer, encumber or otherwise dispose of any assets of the debtor; provide for examination of witnesses, the taking of evidence or the delivery of information concerning debtor's assets, affairs, rights, obligations or liabilities; (iv) hand over all or part of debtor's assets located in the enacting State to the foreign representative; and (v) any other measure available under enacting State law deemed necessary to secure debtor and creditor and third-parties' interests.

Missing reference also to Art. 21 MLCBI (no marks deducted)

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.

According to the definitions provided for in MLCBI article 2, main proceeding means an insolvency proceeding taking place where debtor's centre of main interest is located. Also, MLCBI art. 17 (2) provides that the foreign main proceeding shall be recognized as such if taking place where debtor has its centre of main interest. Therefore, considering that debtor's COMI is located in Germany, the main proceeding ought to be filed therein. If the foreign representative is to seek recognition of the foreign main proceeding before a US court, in case the proceeding is in fact recognized as such, the recognition would trigger the following automatic effects: (i) stay of the commencement or continuation of individual actions or individual proceedings concerning debtor's assets, rights, obligations, and liabilities; (ii) stay of execution against debtor's assets; and (iii) suspension of transfer and encumbrance rights or disposal of assets by debtor. One should also notice that the enacting State can also provide for exception, limitations, and termination provisions to the 'automatic stay' effects arising from MLCBI article 20. US has incorporated MLCBI provisions to its domestic Law under Chapter 15 of the US Bankruptcy Code, therefore, it is expected that the 'automatic stay' measures described above would be granted by the US court in which the recognition request for the Germany insolvency proceeding request was filed.

Further, definitions provided for in MLCBI article 2 clarifies that a non-main proceeding means any place of operations where debtor carries out a non-transitory economic activity with human means and goods or services. Therefore, the foreign non-main insolvency proceeding ought to have been filed within Bermuda jurisdiction. Moreover, MLCBI art 17 (2) provides that the foreign non-main proceeding shall be recognized as such if commenced where debtor holds an establishment. According to MLCBI art. 21, under the recognition of a foreign non-main proceeding, the court of the enacting State can, at its discretion, if proven to be necessary to protect debtor's assets or creditors interests, following the foreign representative request: (i) stay the commencement or continuation of individual actions or proceedings concerning debtor's assets, rights, obligations, and liabilities; (ii) stay the execution against debtor's assets; (iii) suspend the right to transfer, encumber or otherwise dispose of any assets of the debtor; provide for examination of witnesses, the taking of evidence or the delivery of information concerning debtor's assets, affairs, rights, obligations or liabilities; (iv) hand over all or part of debtor's assets located in the enacting State to the foreign representative; and (v) any other measure available under enacting

State law deemed necessary to secure debtor and creditor and third-parties' interests. US has incorporated MLCBI provisions to its domestic Law under Chapter 15 of the US Bankruptcy Code, therefore, it is expected that after the request of the foreign representative, and in accordance with US court's understanding, the measures described above could be granted following the recognition request of the Bermuda insolvency proceeding.

In both scenarios, an interim relief could also be requested by foreign representative and granted at courts' discretion, until a decision on the matter of the recognition is rendered, among such measures one can mention: the stay of execution against debtor, entrusting administration or realisation of all or part of debtor's assets located in the enacting State to the foreign representative or another person designated by court, suspend the right to transfer, encumber or dispose of any assets, provide for examination of witnesses, taking of evidence, or delivery of information, and grant any other measure available under the domestic law.

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.

MLCBI does not provide for abuse of process outcomes, but domestic law of the enacting State shall apply. However, the foreign representative is obliged to full and frankly disclose information to the court of the enacting State. Therefore, there are no barriers to the commencement of a discovery against foreign liquidators, under the allegations of tortious interference with contract rights if the US-based vendors of the foreign debtor.

MLCBI article 6 allows court of the enacting State to refuse the recognition request in case the act is manifestly against enacting State public policy. This is an ultimate measure to safeguard State's sovereignty. The application of such article of the MLCBI shall be restrictively interpreted and is intended to be invoked only under exceptional circumstances in regard to matters of fundamental importance for the enacting State.

However, recognition request is not often denied but rather the relief sought by the foreign representative of the foreign proceeding is limited in case of violation of public policy. Therefore, the commencement of such discovery proceeding is not likely to cause the refusal of the recognition request but might be a basis for limiting the nature of the relief sought.

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?

Foreign representative could, under MLCBI article 19, request the US court to grant an interim relief aimed at staying the maturity and termination clauses regarding the leases and intellectual property licenses governed by US law until a decision on the merits of the recognition request is rendered.

This measure would be necessary since such leases and licenses are governed by a bankruptcy-triggered termination clauses, that would allow creditors to pursue these assets, commence proceedings and adopt enforcement and constraint measures against debtor. The enforcement of bankruptcy-triggered termination clauses (even if not before US courts) that would follow the termination of the leases and intellectual property licenses could cause unequal treatment among creditors (as lease holders might receive their claims disregarded the payment order provided for in the UK proceeding with undue preference over the remaining creditors) and, ultimately, jeopardize the insolvency proceeding filed before the UK court.

However, if the interim relief requested by the foreign representative is denied, since the termination clauses relating to leases and intellectual property licenses are not enforceable within US territory, the foreign representative should also seek protection and the stay of the enforcement of these assets before the competent court.

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?

Foreign representative can file an appeal against the decision that rejected the recognition of the foreign insolvency proceeding as a main proceeding, if any available. Nonetheless, even if the proceeding is recognized as a non-main proceeding court can grant, at its discretion, and following the foreign representative request, the measures deemed necessary to secure debtor, creditors and third-parties interests if satisfied that the relief requested by the foreign representative of a foreign non-main proceeding relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding, using its discretionary power.

Thus, the foreign representative can request the court of the enacting State to grant the necessary measures and submit pertinent proof that such request relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

The foreign representative should have had, at the outset of the recognition request, submitted factual proof of (i) that the foreign proceeding can be understood as such under art. 2 subparagraph; (ii) the foreign representative is entitled to do so; (iv) the application has been submitted to court with jurisdiction over debtor's main establishment in the enacting State; and in case the foreign representative is seeking for the recognition of a foreign main proceeding, proof that such proceedings was filed before debtor's centre of main interest.

Submission of the following documents is also deemed necessary under MLCBI article 15: (i) certified decision commencing the proceeding and appointing the foreign representative; (ii) certificate from foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative; (iii) any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative in case the abovementioned documents are not available; (iv) statement identifying all foreign proceedings in regard to the debtor that are known to the foreign representative; (v) potentially, the translation and ratification (i.e. apostilled documents) by the respective entities of all documents, according to enacting State domestic law.

Art.16 MLCBI is the main reference for “rebuttable COMI presumption”. References to Art.17, 21, 6 are also required for obtaining full marks.

QUESTION 4 (fact-based application-type question) [15 marks in total] 11 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.

Considering that the above, the Scheme Meeting was approved by noteholders, ratified by Cayman Courts and duly registered before the competent authority, the foreign representative of the insolvency proceeding undergone in Cayman Islands could seek the recognition of such proceeding before foreign courts, especially the US court, to secure debtor, creditors and third-parties interests as the enforcement of the provisions arising

from the Scheme and to avoid acts from creditors against Globe Holdings assets located therein.

According to the definitions provided for in MLCBI article 2, main proceeding means an insolvency proceeding taking place where debtor's centre of main interest is located. Also, MLCBI art. 17 (2) provides that the foreign main proceeding shall be recognized as such if taking place where debtor has its centre of main interest.

MLCBI does not provide for a definition of COMI, but the Guide to Enactment and case-law on the matter provide for some guidance regarding where debtor's COMI is located being considered the place where the central administration of the debtor takes place, or the place that is ascertainable as such by creditors of the debtor. According to the piece of information provided above: Globe Holdings is a company registered and incorporated in the Cayman Islands; (ii) Globe Holdings provided various notices of its re-incorporation in the Cayman Islands in 2010, including in the public filings with the Securities and Exchange Commission (SEC); (iii) Globe Holdings opened in the Cayman Islands, through which it pays certain of its operating expenses; (iv) despite being held virtually, the special board meetings are organized by its local Cayman counsel; (v) noteholders' expectations were that any such restructuring would take place in the Cayman Islands, which is reflected in the RSA; (vi) despite RSA being US governed, the Scheme meeting was held in Cayman (but creditors were allowed to join the meeting virtually due to exceptional pandemic circumstances), ratified by the Cayman Island court and registered before the Cayman Islands offices. All things considered, there are grounds to support that the Cayman Scheme is a main insolvency proceeding. The foreign representative appointed by court should then request before US courts for the recognition of the Cayman Scheme as a main insolvency proceeding.

To do so, the foreign representative shall, along with the recognition request, submit factual proof of (i) that the foreign proceeding can be understood as such under art. 2 subparagraph; (ii) the foreign representative is entitled to do so; (iv) the application has been submitted to court with jurisdiction over debtor's main establishment in the enacting State; and in case the foreign representative is seeking for the recognition of a foreign main proceeding, proof that such proceedings was filed before debtor's centre of main interest.

Submission of the following documents is also deemed necessary under MLCBI article 15: (i) certified decision commencing the proceeding and appointing the foreign representative; (ii) certificate from foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative; (iii) any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative in case the abovementioned documents are not available; (iv) statement identifying all foreign proceedings in regard to the debtor that are known to the foreign representative; (v) potentially, the translation and ratification (i.e. apostilled documents) by the respective entities of all documents, according to enacting State domestic law.

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Even though there are no actions in course, foreign representative could, under MLCBI article 19, request the US court to grant an interim relief to prevent any potential actions from creditors against debtor's assets that could jeopardize the Scheme sanctioned by the Cayman Islands court, until a decision on the merits of the recognition request is rendered by US court.

If the Scheme is later recognized as a main proceeding the following would occur automatically: (i) stay of the commencement or continuation of individual actions or individual proceedings concerning debtor's assets, rights, obligations, and liabilities; (ii) stay of execution against debtor's assets; and (iii) suspension of transfer and encumbrance rights or disposal of assets by debtor. It is worth to highlight that these 'automatic stay' effects also apply to arbitration proceedings in place. However, the enacting State can include exceptions and limitations, modifications, or termination provisions in regard to such effects as: (i) in a scenario in which the suspension of the arbitral proceeding would be contrary to the interest of a party. Including the debtor itself; (ii) enforcement of claims by secured parties; (iii) initiation of court action for claims that have arisen after the commencement of the insolvency proceeding or recognition; and (iv) the completion of open financial market transactions.

In case the proceeding is not recognized as a main insolvency proceeding, but rather a non-main insolvency proceeding by US court, the foreign representative could also request court to stay actions from creditors against debtor's assets and submit pertinent proof that such request relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Very good essay. For full marks, the essay should also contain

- 1. A discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI**
- 2. Additional to Art.19, conclusive remarks should refer to Articles 20 through 22 MLCBI and 6 MLCBI**

*** End of Assessment ***

Marks awarded: 37 out of 50.