



**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] 6 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] 10 marks**

**Question 2.1 [maximum 3 marks] 3 marks**

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

Answer: The key distinctions between MLCBI and EU regulations are:

- a) MLCBI is a global framework developed by UNCITRAL to promote the recognition and enforcement of foreign insolvency proceedings and provide for cooperation with foreign courts and foreign representatives. The EU Regulations apply to EU member states. It provides for a harmonised set of rules that is applicable only to EU member States (except Denmark).
- b) While MLCBI is dependent on voluntary adoption by States, the EU Regulations are binding on all EU States (except Denmark) and provide automatic recognition of insolvency proceedings across EU member states. However, it applies to proceedings where the COMI of the debtor is in the EU.

The key advantage of MLCBI is that it is flexible and can be adopted by states into their domestic laws by fitting it accordingly into their legal systems. However, the disadvantage is that it is not binding and lacks uniformity (since different legal systems adopt it differently).

The key advantage of EU Regulations is that it is binding on all member States and provides for automatic recognition and coordinated proceedings. The disadvantage is that it has limited applicability.

**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.

Answer: The court has been endowed with discretionary powers under Article 21 of the MLCBI to grant any appropriate post-recognition relief, wherever necessary, to protect the assets of the debtor or the interest of creditors. The question of what constitutes appropriate relief is for the courts to decide. In case of a foreign main proceeding recognized under para 1 of article 21, the court must ensure that 1) it is necessary to protect the interests of creditors, 2) to protect the assets of the debtor, 3) also subjected to the exception of public policy under article 6.

In granting these reliefs, the court must also regard the provisions of article 22, which mandates that the court to ensure that interests of the creditors and other person, including debtor is adequately protected. This means that there is need to achieve balance between different interests without unduly favouring one group of creditors over another.<sup>1</sup> It is in the nature of discretionary relief that the court may tailor such relief to the case at hand.<sup>2</sup>

In case of relief granted in foreign non-main proceedings, the court is required to be satisfied that relief relates to assets that, under the law of enacting State, should be administered in the foreign non-main proceeding or that it concerns information required in that proceeding.<sup>3</sup>

Cases in point: Kapila, Re Edelstan [2014] FCA 1112 [Australia]; Vitro SAB de CV 701 F.3d 1031 (USA)

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

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

Answer: Article 13 of the MLCBI embodies the anti-discrimination principle that establishes principle of equality of treatment between foreign and local creditors. Paragraph 1 provides foreign creditors with the same rights as local creditors regarding the commencement of and participation in insolvency proceedings.<sup>4</sup> This right is subject to the proviso contained in paragraph 2 which maintains that the provision contained in para 1 do not affect the ranking of claims in insolvency proceedings (including any provisions that might assign a special ranking to claims of foreign creditors).<sup>5</sup> It provides that foreign creditors shall not be ranked lower than the class of general, non-preferential (unsecured) claims according to local law.<sup>6</sup> An alternative provision in the footnote of paragraph 2 permits states that deny recognition to foreign tax and social security claims to continue to discriminate against those claims.<sup>7</sup>

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

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<sup>1</sup> Digest of Case Laws on UNCITRAL Model Law on Cross-border insolvency, available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293\\_uncitral\\_mlcbi\\_digest\\_e.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf)

<sup>2</sup> Model Law on Cross-Border Insolvency: The Judicial Perspective, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/judicial-perspective-2013-e.pdf>

<sup>3</sup> I Fletcher, *Insolvency in Private International Law* (OUP, 2<sup>nd</sup> ed, 2005), 476

<sup>4</sup> I Fletcher, *Insolvency in Private International Law* (OUP, 2<sup>nd</sup> ed, 2005), 476

<sup>5</sup> Digest of Case Laws on UNCITRAL Model Law on Cross-border insolvency, available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293\\_uncitral\\_mlcbi\\_digest\\_e.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf)

<sup>6</sup> Fletcher, n1

<sup>7</sup> Digest of Case Laws on UNCITRAL Model Law on Cross-border insolvency, available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293\\_uncitral\\_mlcbi\\_digest\\_e.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf)



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

There are three kinds of reliefs available under the MLCBI:

- a) Interim Relief (urgent) that can be sought at any time after application to recognize a foreign proceeding has been made (Art. 19)
- b) Mandatory automatic relief upon recognition of foreign proceedings as a 'foreign main proceeding' (Art. 20)
- c) Discretionary post-recognition relief available to the main or non-main proceedings. (Art. 21)

In the case of **foreign main proceedings**, the relief granted under Article 20 is automatic mandatory relief. The effects of article 20 flow automatically and allow time for steps to be taken to organize an orderly and fair cross-border insolvency proceeding. However, the scope of these effects is dependent on the exceptions and limitations that may exist in the law of the enacting State.<sup>8</sup>

In case of a **foreign non-main proceeding**, the relief granted under Article 21 is discretionary in nature. It is considered that the interests and authorities of foreign representatives of a non-main proceeding are much narrower than the interests and authority of foreign representatives of main proceedings. The MLCBI, under para 3 of article 21, clarifies that relief granted to foreign non-main proceedings should be limited to assets that are to be administered in non-main proceedings. Only such information must be provided to the representative concerning debtor's assets and affairs, as is necessary for the non-main proceeding. The court must avoid giving broad powers to foreign representatives that interferes with the administration of another insolvency proceedings, specifically main proceedings.<sup>9</sup>

### **QUESTION 3 (essay-type questions) [15 marks in total] 10 marks**

#### **Question 3.1 [maximum 4 marks] 1 mark**

A debtor has its COMI in Germany and an establishment in Bermuda, and both foreign main and foreign non-main proceedings as well as the recognition proceedings in the US have been opened. In this scenario, explain where the foreign proceedings must have been filed, and the likely result.

Given that the COMI is in Germany, the foreign main proceedings must start in Germany. USA will recognize the proceedings in Germany as primary insolvency proceedings. Since the debtor has an 'establishment' in Bermuda, the proceedings therein shall be recognized as secondary insolvency proceedings or foreign non-main proceedings. For this purpose, a Chapter 15 application must be made to seek recognition under the US Bankruptcy Code.

Once recognized in USA, it would foster coordination and cooperation between US and foreign proceedings. The relief provided by the courts hereunder might impose an automatic stay on the actions of other debtors' creditors.

**Answer should contain the definitions (Art.2,17 MLCBI), and also references to Art.15 and 6 related to recognition.**

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<sup>8</sup> Model Law on Cross-Border Insolvency: The Judicial Perspective, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/judicial-perspective-2013-e.pdf>

<sup>9</sup> Ibid

**Question 3.2 [maximum 3 marks] 2 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.

Answer: The commencement of recognition proceedings under Chapter 15 of the US Bankruptcy Code does not, in any way, prevent the filing of any other legal action against the joint provisional liquidators. The relief of automatic stay available under US law (relating to article 19/20/21 of MLCBI) is only applicable to the extent that it affects the assets, properties, or estate of the debtor. Therefore, a suit for tortious interference against the joint provisional liquidators can run parallelly to the recognition proceedings as the provisions of automatic stay shall not apply to the tort committed by the foreign representative.

Further, as per *CSL Australia v Britannia Bulkers A/S* (2009) – US Bankruptcy Code Section 1509(e) provides that subject to article 10, a foreign representative is subject to applicable non-bankruptcy law and must comply with court orders.

Although reference is made to Art.10, the answer does not mention the JPL immunity (within the limits of their roles as JPL) pursuant to Art.10 MLCBI.

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

A foreign representative who administers assets in a debtor-in-possession-like restructuring proceeding in the UK commences a recognition proceeding in the US, setting the recognition hearing 35 days after the petition date due to the availability of the court. There is no litigation pending or threatened against the foreign debtor, but US-governed leases and intellectual property licenses have *ipso facto* clauses (that is, bankruptcy-triggered terminations) that are not enforceable under the US Bankruptcy Code. Based on these facts, explain what steps, if any, should the foreign representative take to protect the assets and why?

Answer: It is clear in US bankruptcy jurisprudence that *ipso facto* clauses are not enforceable under US law. The facts of this case are somewhat similar to the *Pan Ocean* case (2014) wherein the Korean insolvency regime, where proceedings were started, declared *ipso facto* clauses null and void. The contract between Brazilian and Korean companies contained an *ipso facto* clause that allows termination of the contract upon one party entering into an insolvency proceeding. The Korean liquidator approached the UK courts as a foreign representative and requested relief of preventing the Brazilian party from exercising the *ipso-facto* clause. English High Court decided it would not intervene to prevent the termination of an English law contract for insolvency even though such termination was inoperative or invalid under the foreign law governing insolvency.<sup>10</sup>

In the given case, the facts mention that leases and IP licenses are governed by US law, and therefore, application of *ipso facto* clauses is a matter of policy, and US courts have every right to apply their policies to the lease and license governed under their law. The foreign representative may seek appropriate relief before the courts (vide article 21, MLCBI). However, since the parties had made a choice of law governing their contracts as US law, the court cannot be expected to apply UK law (where *ipso facto* clauses are valid).

**Question 3.4 [maximum 4 marks] 3 marks**

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<sup>10</sup> <https://www.lexology.com/library/detail.aspx?g=19307f77-9cd3-433f-a394-05bb894577aa>

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

Answer: The foreign debtor only has a registered office in Country A. Under the MLCBI presumptions under Article 16, in the absence of the contrary, a registered office can be counted to evaluate the debtor's COMI. There is a chance that the court has rejected the foreign representative's recognition application on the ground that it fails to establish the debtor's COMI in country A. In such cases, where it is difficult to determine the debtor's comi based on primary factors, a) where central administration of debtor takes place, b) which is readily ascertainable by creditors, the court also looks at factors like location of banks, employees, debtor's books and records, location from which reorganization of debtor was being conducted, etc.

If the court has rejected the application, the foreign representative should make an application to identify the proceedings as a foreign non-main proceeding.

At the outset, the foreign representative should have considered the provisions of article 2 of the MLCBI to confirm where the debtors COMI is because if a foreign proceeding that is not opened in the jurisdiction of the Debtor's COMI and also does not have an establishment, cannot be recognized as foreign proceeding under model law. Now, the FR must ensure that it has an establishment in Country A – a place of operation where the debtor carries out non-transitory economic activity with human means and goods or services. Further, the FR must also ensure that the application for recognition is not violative of the public policy of the state where recognition is being sought. (article 6, public policy exception).

Good discussion. However, complete answer requires reference to procedures per Art.15 MLCBI, as well as reference and discussion on Art.17 and 21.

#### **QUESTION 4 (fact-based application-type question) [15 marks in total] 6 marks**

**Assume you received a file for a new client of the firm. The file contains the facts described below. Based on these facts, analyse key filing strategy to ensure a successful restructuring – specifically, whether to apply for recognition of main or nonmain proceeding or both (in light of COMI / establishment analysis), what papers need to be submitted, and what relief should be requested on day one of the filing.**

The client is a Cayman Islands incorporated and registered entity. It is a financial service holding company for a number of direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States. Globe Holdings was initially formed as a Canadian company in 2009, under the laws of Ontario, Canada. A year later, following certain reverse merger transactions, it filed a Certificate of Registration by Way of Continuation in the Cayman Islands to re-domesticate as a Cayman Islands company and changed its name to Globe Financial Holdings Inc. When it re-incorporated in the Cayman Islands in 2010 (from Canada), Globe Holdings provided various notices of its re-incorporation, including in the public filings with the Securities and Exchange Commission (SEC). Around that time, Globe Holdings retained its Cayman Islands counsel Cedar and Woods, which has regularly represented Globe Holdings for over a decade. Globe Holdings has a bank account (opened just a few days ago) in the Cayman Islands from which it pays certain of its operating expenses. Globe Holdings often holds its board meetings virtually, and not physically in the Cayman

Islands, and, having obtained support for a bond restructuring, all its regular and special board meetings have been organized by its local Cayman counsel virtually. The client also maintains its books and records in the Cayman Islands. Its public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes disclosed that Globe Holdings is a Cayman Islands company and explained the related indemnification and tax consequences resulting from Globe Holdings' place of reformation.

Globe Holdings has no business operations of its own. The business is carried out through its non-insurance company non-debtor subsidiaries that are all incorporated under the US laws and operating in the US. All employees are in the US. The headquarters are also in the US.

In April 2017, Globe Holdings offered and issued USD 25,000,000 in aggregate nominal principal amount of 6.625% senior unsecured notes due in 2023 (referenced above as the Notes) governed by New York law.

In 2019, Globe Holdings recorded on its consolidated balance sheet a significant increase in liabilities. As a result, Globe Holdings worked with external professional advisors to undertake a formal strategic evaluation of its subsidiaries' businesses. In September 2020, Globe Holdings announced that it was informed its shares would be suspended from the NASDAQ Stock Market due to delinquencies in filing its 10-K. Thereafter, on November 6, 2020, its shares were delisted from the NASDAQ stock market.

An independent third party is actively marketing the sale of the corporate headquarters located in New York including the land, building, building improvements and contents including furniture and fixtures.

Despite these efforts to ease the financial stress, the culmination of incremental challenges consequently resulted in Globe Holdings being both cash flow and balance sheet insolvent.

Globe Holdings retained Cedar and Woods, its long-standing Cayman Islands counsel, to advise on restructuring alternatives. Upon consultations with Cayman counsel and its other professionals, Globe Holdings ultimately determined that the most value accretive path for the Noteholders was to commence a scheme under Cayman Islands law, followed by a chapter 15 recognition proceeding in the United States, most notably to extend the maturity of the Notes and obtain the flexibility to pay the quarterly interest "in kind".

Globe Holdings expeditiously secured the support of the majority of the Noteholders of its decision to delay interest payments and restructure the Notes through a formal proceeding. Thereafter, on August 31, 2021, about 57% of the Noteholders acceded to the Restructuring Support Agreement (RSA) governed by the New York law. The RSA memorialized the agreed-upon terms of the Note Restructuring. When Globe Holdings approached its largest Noteholders regarding the contemplated restructuring, their expectations were that any such restructuring would take place in the Cayman Islands, which is reflected in the RSA.

On July 4, 2023, the client, in accordance with the terms of the RSA, applied to the Cayman Court for permission to convene a single scheme meeting on the basis that the Noteholders, as the only Scheme Creditors, should constitute a single class of creditors for the purpose of voting on the Scheme.

On July 26, 2023 the Cayman Court entered a convening order (the Convening Order) on the papers, among other things, authorizing the client to convene a single Scheme Meeting for the purpose of considering and, through a majority vote, approving, with or without modification, the Scheme. The Scheme Meeting was held in the Cayman Islands at the offices of Cedar and Woods. Given the Covid-

19 pandemic, Scheme Creditors were also afforded the convenience of observing the Scheme Meeting via Zoom and in person via a satellite location in New York. Following the Scheme Meeting, the chairman of the Scheme Meeting (presiding over the meeting in person) reported to the Cayman Court that the Scheme was overwhelmingly supported by the Noteholders, with 91.83% in number and 99.34% in value voting in favor of the Scheme. The Sanction Hearing was held, and an order sanctioning the Scheme (the Sanction Order), which was filed with the Cayman Islands Registrar of Companies the same day.

During all of this time, a class action litigation was in the US was brewing but has been filed yet.

Answer: The key filing strategy are following:

**Introduction:** The debtor is incorporated and registered in the Cayman Islands and operates through several direct and direct subsidiaries incorporated under US laws and operating in the US, including all employees and headquarters. It issues USD 25,000,000 in aggregate nominal principal amount of 6.625% senior unsecured notes, governed by New York law, due in 2023. In 2020, the company, owing to incremental challenges became insolvent. The legal advisors suggested that the most beneficial path for the company was to commence scheme under Cayman Islands law and apply for chapter 15 recognition proceedings in the US. The majority noteholders have agreed to this and agreed to delay interest payments and restructure notes through formal proceedings. In 2021, 57% of noteholders acceded to the 'Restructuring Support Agreement' (RSA) governed by New York law. The proceeding will take place in the Cayman Islands.

The Cayman Islands court authorised the client to convene a single scheme meeting, which resulted in support from noteholders, with 91.83% in number and 99.34% in value voting in favour of the scheme. The scheme was sanctioned. It must also be established that the Cayman Islands has not adopted the UNCITRAL MLCBI. Chapter 15 of US Bankruptcy Code is the domestic adoption of MLCBI.

**Main/Non-main proceedings and COMI:** COMI is interpreted as a place where the debtor conducts administration of interests on a regular basis and is therefore ascertainable by a third party. In this case, the COMI is in the US. The fact sheet establishes that 'Globe Holdings has no business operations of its own. The business is carried out through its non-insurance company and non-debtor subsidiaries, which are all incorporated under US laws and operating in the US. All employees are in the US. The headquarters are also in the US.'

'Interest' includes not only commercial, industrial, or professional activities but also general economic activities (Virgos Schmitt Report 1996). Therefore, the Centre of Debtors' Main Interest is in the US. The main proceedings shall be opened in a US bankruptcy court, and the foreign representative, appointed in accordance with the laws of the Cayman Islands (since the company is registered there), could seek recognition of the foreign insolvency proceeding under Chapter 15 of the US Bankruptcy Code.

For this case, the proceedings started in the Cayman Islands constitute a non-main insolvency proceeding since the debtor's COMI is in the US. The debtor only has an 'establishment'<sup>11</sup> in the Cayman Islands. It carries non-transitory economic activities in the Cayman Islands, as is evident through its place of establishment, bank account, retention of counsels as well as starting the restructuring process in the Cayman Islands under the scheme. Thus, the reliefs are not automatic but discretionary post-recognition reliefs.

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<sup>11</sup> An establishment is a place of operations where the debtor carries out a long-term economic activity. 11 U.S.C. § 1502(2).

**Papers to be submitted** - Chapter 15 gives the foreign representative the right of direct access to US courts for this purpose - 11 U.S.C. § 1509. The petition must be accompanied by documents showing the existence of the foreign proceedings and the appointment and authority of the foreign representative.

1 U.S. Code § 1515 - Application for recognition

“(b) A petition for recognition shall be accompanied by—

- (1) a certified copy of the decision commencing such foreign proceedings and appointing the foreign representative;
- (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
- (3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.

(c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.”

**What relief should be requested** – Once the proceeding has been recognized (as non-main proceeding), the courts can grant relief that is necessary to protect the assets of the debtor or interest of creditors, which could be –

- a) Moratorium/automatic stay on individual actions or individual proceedings concerning debtor’s assets, rights, obligations or liabilities.
- b) Staying execution against debtors assets
- c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor, etc., including any additional relief that may be available to the local insolvency representative.

The court must keep in mind that the relief relates to assets in the administration of non-main proceeding. Once the court grants automatic stay after recognizing the foreign non - main proceeding, any class action litigation may also get barred. (however, since the question is unclear, it cannot be said for certain whether the class-action suit has been filed.)

Requires definitions with reference to Art.2 MLCBI. The answer should contain an overview of location of the COMI ie defense for both options (Caymans and USA), as well as a discussion on the rebuttable presumption (Art.16) applied to the facts of the case. Conclusion should refer to MLCBI Art 19, (20 and/or 21), 22 etc. as well as art 15 MLCBI for procedural matters.

**\* End of Assessment \***

**Marks awarded: 32 out of 50**