



**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.

The MLCBI takes the form of a “soft law”. The MLCBI contains a recommended framework on procedural aspects of cross-border insolvency. Countries are free to adopt the MLCBI in whole or in part, with or without amendments. The MLCBI is available for adoption by any country across the world.

On the other hand, the European Union (EU) Regulation on insolvency proceedings is a “hard law” which, once adopted, becomes part of the domestic law of the adopting member states. There is no scope for the adopting member states to customize the Regulation - it is either adopted in whole or not adopted. The application of the European Union (EU) Regulation on insolvency proceedings is limited only to EU Member States (except Denmark).

“Hard Laws”, such as the European Union (EU) Regulation on insolvency proceedings, have the disadvantage of being quite difficult to agree on between different states and, as a result, take extended periods of times to develop and adopt. They, however, have the advantage of being more detailed and precise, making applicability and enforcement more certain. For example, the European Union (EU) Regulation on insolvency proceedings took close to 40 years to develop.

Conversely, “Soft Laws”, such as the MLCBI, have the advantage of being (relatively) easier to develop and adopt. They also are more flexible, allowing adopting countries to customize them as appropriate for their circumstances. However, as a disadvantage, this flexibility creates uncertainty in terms of both adoption (what kind of customization will each nation pass?) and application. For example, in the case of the MLCBI, while it was developed within a relatively shorter period of time (compared to, say, the European Union (EU) Regulation on insolvency proceedings), it has, in some cases, been adopted with amendments that appear to go against the spirit of the model law (e.g., countries like South Africa that have introduced requirements for reciprocity).

**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.

In considering applications for relief under Article 21 of the MLCBI, the court should consider whether interests of the debtor's creditors and other interested parties (including the debtor themselves) are adequately protected within the context of the relief that is being considered.

The relief envisaged under Article 21 should be relief that necessary to protect the assets and the interests of the creditors of the insolvent debtor. Similarly, the court is expected to balance the relief granted under Article 21 and the interests of those affected by such relief. (*Page 66, Paragraph 2 under the heading "Case Law Under Article 21", Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency*).

Under Article 22, the court granting the discretionary relief under Article 21 retains the power to attach any conditions it deems appropriate to the relief it grants, as well as the power to vary or terminate the relief granted. (<https://www.elibrary.imf.org/display/book/9781557758200/back-1.xml>, Paragraph Numbered 24 and Titled "Protection of creditors and other interested persons", Accessed on 10<sup>th</sup> February 2024 at 14.48PM)

**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 details the MLCBI's "Anti-discrimination"/"Equal treatment of creditors" principle which provides for equal/similar rights to both local creditors domiciled in the enacting state and foreign creditors of an insolvent debtor in relation to commencing and participating in local proceedings under the insolvency laws of the enacting state. This protection does not affect the ranking of claims in the enacting state and ensures, for example, that claims by foreign creditors are not accorded lower priority under the distribution waterfall than the ranking accorded to general unsecured claims simply because the claims are lodged by foreign creditors.

The protection accorded to foreign creditors is subject to them meeting other requirements under the laws of the enacting state (e.g., lodging claims in the prescribed manner) (<https://www.elibrary.imf.org/display/book/9781557758200/back-1.xml>, Paragraph Numbered 18 and Titled "Foreign Representative's Access to Courts of the Enacting State", Accessed on 10<sup>th</sup> February 2024 at 14.55PM)

**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?

Under MLCBI, foreign main proceedings enjoy automatic mandatory relief upon recognition in the enacting state. This automatic mandatory relief: (a) stays the commencement or continuation of individual actions or proceedings relating to the debtor and their affairs/assets/liabilities; (b) stays execution against the debtor's assets; and (c) suspends the right to transfer/encumber or dispose of the debtor's assets. The automatic stay is aimed at providing "breathing space" to allow the formulation and implementation of measures aimed at achieving an orderly restructure or liquidation of the debtor.



On the other hand, relief under foreign non-main proceedings is only discretionary - i.e., the foreign representative has to make a request for specific relief and the court has to consider and decide whether that relief is appropriate in the circumstances of that debtor. Under Article 21, in granting relief to a foreign representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that should be administered in the foreign non-main proceedings or concerns information required in the foreign non-main proceeding.

**Requires reference also to Art. 20 (no mark is deducted)**

### **QUESTION 3 (essay-type questions) [15 marks in total] 9 marks**

#### **Question 3.1 [maximum 4 marks] 2 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 foreign main proceedings must have been filed in Germany, which is the debtors COMI. The foreign non-main proceedings must have been filed in Bermuda, where the debtor has an establishment.

Under applicable laws, the two applications for recognition (i.e., in relation to the foreign main and foreign non-main proceedings) will be moved to the same court for purposes of coordination of matters relating to the same debtor.

In relation to the Chapter 15 recognition sought in respect of the foreign main proceedings (German Proceedings), to the extent the application for recognition was accompanied by sufficient evidence of the existence of the foreign main proceedings and the appointment and authority of the foreign representative, after hearing and notice, the Court is likely to grant orders recognizing the German Proceedings as a foreign main proceeding. Upon grant of recognition, the foreign main proceedings will get the full benefit of an automatic stay/automatic relief, and the foreign representative will have the right to manage the assets and affairs of the debtor located in the US.

In relation to the Chapter 15 recognition sought in respect of the foreign non-main proceedings (Bermuda Proceedings), to the extent the application for recognition was accompanied by sufficient evidence of the existence of the foreign non-main proceedings and the appointment and authority of the foreign representative, after hearing and notice, the Court is likely to grant orders recognizing the Bermuda Proceedings as a foreign nonmain proceeding. This recognition will not accord any automatic relief to the foreign non-main proceedings. The foreign representative acting in the foreign non-main proceedings will have to apply to the court for any specific relief they want, and the court will consider such application and decide as to whether or not to grant the relief sought. In considering the request for discretionary relief, the court will consider whether the relief sought in any way interferes with or undermines the foreign main proceedings. Any relief that interferes with the foreign main proceedings will not be granted.

Pending the determination of the applications proceedings, the foreign representatives in both the foreign main and foreign non-main proceedings may apply to the court, and the court may consider and grant if it deems appropriate, interim relief that they deem appropriate in the circumstances of their respective proceedings.

**Requires references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 17, 6.. to substantiate answer.**

**Question 3.2 [maximum 3 marks] 1 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.

Under Chapter 15 of the US Bankruptcy Code (and the MLCBI in general), a provisional liquidation and provisional liquidators qualify as foreign proceedings and foreign representatives, respectively (<https://www.govinfo.gov/content/pkg/USCODE-2015-title11/html/USCODE-2015-title11-chap1-sec101.htm>, Paragraphs Numbered 23 and 24, accessed on 10<sup>th</sup> February 2024 at 18:53PM). The application for recognition is, therefore, properly before the bankruptcy court.

US Bankruptcy Law is a Federal Law that is administered by the Federal Bankruptcy Courts. On the other hand, tort claims are claims under State Law and are administered by State Courts. The two matters raise considerations under the Doctrine of Preemption which invalidates state laws that interfere with the operation of federal laws (Supremacy Clause). (<https://www.govinfo.gov/content/pkg/USCODE-2015-title11/html/USCODE-2015-title11-chap1-sec101.htm>, Page 2, Paragraph 1).

Given the exclusive jurisdiction of Bankruptcy Courts in handling bankruptcy-related matters (including considering whether bankruptcy-related filings are proper) and, further, considering the pre-emption of claims for tortious interference with contracts by federal bankruptcy law, the proceedings for tortious interference with contract brought by the US-base vendors are likely to fail. The vendors are likely to be guided to make submissions regarding their interests and rights to the bankruptcy court handling application for recognition.

The bankruptcy court is likely to grant/allow the application for recognition provided the application for recognition was accompanied by sufficient evidence of the existence of the foreign main proceedings and the appointment and authority of the foreign representative. The provisional liquidators are also likely to apply for interim relief barring the US-based vendors from continuing any action against them pending determination of the application for recognition. The court, in considering the request for relief may consider and balance the relief granted with the rights of the creditors.

**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?

*Ipso Facto* clauses are invalidated in the context of insolvency proceedings in both the UK (Section 233B of the Insolvency Act of 1986) and US (Section 365 (e)(1) of the Bankruptcy Code). The protection accorded through this invalidation of *ipso facto* clauses can only be enjoyed once insolvency proceedings have commenced under the respective insolvency

laws. (<https://www.legislation.gov.uk/ukpga/1986/45/section/233B>, accessed on 10 February 22:30PM, <https://codes.findlaw.com/us/title-11-bankruptcy/11-usc-sect-365> accessed on 10 February 22:35PM)

The invalidation of the ipso facto clauses under Section 233B of the Insolvency Act of 1986 should have universal effect. However, since these contracts sit in the US and under US laws, the protection accorded by the UK proceedings may not be effective - there is a risk that counterparties domiciled in the US will terminate the contracts underlying these assets. This is, especially, a risk where the US-based counterparties do not like the terms of the UK restructuring.

To protect the US-based assets in the period before the hearing and determination of the application for recognition, the foreign representative for the UK proceedings should apply for interim/provision relief under Section 1519 of the Bankruptcy Code. The interim relief that the foreign representative should ask for should be in the form of orders barring the counterparties to the contracts underlying the US assets from taking any action that would vary, terminate or jeopardize the debtor's interests in the US assets.

(<https://www.jonesday.com/en/insights/2023/06/chapter-15-recognition-order-and-relief-could-be-modified-after-conversion-of-foreign-debtors-reorganization-to-liquidat>, paragraph 13, accessed on 10<sup>th</sup> February 2024 at 22:40PM)

Considering the UK proceedings are restructuring, not liquidation proceedings, the support of the US based creditors/stakeholders will be critical to the success of the restructure. The foreign representative should engage the US based creditors/stakeholders to elicit their support and cooperation.

### **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?

Presumably, the court in Country B found that the debtor's COMI is not in Country A based on existing evidence rebutting the presumption of COMI based on the place of incorporation. An application for review or an appeal against the court's decision may, therefore, not succeed.

Furthermore, considering the debtor company only has "its registered office and not much more" in Country A, it is unlikely that, in the alternative, an application for recognition of a foreign non-main proceeding will succeed. The activities of the debtor in Country A cannot support a claim for existence of an establishment in Country A.

The foreign representative should, therefore, consider making an application for commencement of local insolvency proceedings in Country B. Under Article 11 of the MLCBI, the foreign representative has standing to make such applications provided the conditions for commencing such proceedings are otherwise met in line with the insolvency laws of Country B. Under the MLCBI, recognition of the foreign proceedings is not a precondition for the commencement of local insolvency proceedings. The application for commencement of local insolvency proceedings should be accompanied by an application for interim relief aimed at preserving the assets of the insolvent debtor in Country B, pending commencement of the local insolvency proceedings. Presumably, upon commencement of the local

insolvency proceedings in Country B, automatic relief would be available to the local insolvency proceedings (and the interim relief will no longer be needed). Once the local insolvency proceedings have commenced, the foreign representatives should seek the cooperation of the local (Country B) representative and the local (Country B) court in ensuring the concurrent (Country A and Country B) proceedings of the debtor are run in a manner that optimizes the outcome to the creditors of the debtor across both Country A and Country B.

From the onset, the foreign representative should have undertaken a robust analysis of “COMI” and “Establishment” to inform the right type of application in Country B. In the event both COMI and Establishment were found not to exist in Country A, the foreign representative should have gone straight to applying for commencement of local insolvency proceedings in Country B, instead of applying for recognition of the Country A proceedings.

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

**QUESTION 4 (fact-based application-type question) [15 marks in total] 9 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.

#### a. COMI and Establishment Analysis

Globe Holdings is a Cayman Islands incorporated Company. This position is easily verifiable by third parties since transacting with the Company since this is included in the Company's

public filings with the Securities and Exchange Commission (SEC). The Company's books and records are maintained in the Cayman Islands. Globe Holdings has also retained Cedar and Woods, Cayman Islands counsel, as its main representative for many years. The prospectus of the notes being restructured also identified Globe Holdings as a Caymans incorporated company and the accompanying indemnification and tax impacts. The Company's main creditors, the largest note holders, expected that the Company's restructuring would happen in the Cayman Islands, a position that is reflected in the Restructuring Support Agreement the creditors acceded to. This is evidence that Globe Holdings has its COMI in the Cayman Islands. While there is some evidence that can be called upon to rebut the assumption/conclusion that Cayman Islands is Globe Holdings' COMI (e.g., the Headquarters, Management, Operations and Creditors being in the United States), there exists established precedent - In re Sphinx, Ltd (2006) (<https://casetext.com/case/in-re-sphinx-1>, accessed on 18<sup>th</sup> February 2024 at 20:11PM) - that the determination of COMI should also follow the creditor's expectations since they are, ultimately, most affected by the insolvency proceedings. In the case of Globe Holdings, the creditors expected the restructuring to happen in the Cayman Islands. It is, therefore, in the creditors interest that COMI be determined to be in the Cayman Islands. The Bankruptcy Court is likely to be persuaded to recognize Cayman Islands as Globe Holdings COMI.

On the other hand, Globe Holdings does not have outward (to the market) non-transitory operations in the Cayman Islands. There are no employees of the Company domiciled in the Cayman Islands. Instead, the Company has all its operations in the United States through its subsidiary operations. Its headquarters are also in the United States (i.e., no base of operations in Cayman Islands). The Company has only recently opened a bank account in the Cayman Islands. This evidence is unlikely to be adequate to support a claim of Globe Holdings having an establishment in the Cayman Islands. Instead, Globe Holdings has its establishment in the United States.

**b. Application(s) to be made**

Considering Globe Holdings COMI is in the Cayman Islands as analysed above, the foreign representative should make an application for recognition of Foreign Main Proceedings only, under Sections 1515 and Section 1517 of the Bankruptcy Code.

Considering Globe Holdings does not have an establishment in the Cayman Islands, the foreign representative should not make an application for recognition of foreign non-main proceedings.

**c. Papers to be filed**

The documents that Globe Holdings' foreign representative should submit in making the application for recognition should include:

- i. The document containing the petition/motion for recognition of the foreign main proceedings, recognition of the foreign representative and the relief desired;
- ii. A document containing the proposed recognition order that the Company's foreign representative wants the court to adopt;
- iii. A certified copy of the Sanction Order granted by the Cayman's court effecting the scheme and (certified) evidence of filing of the order with the Cayman Islands Registrar of Companies.
- iv. A copy of the Restructuring Support Agreement, or any other document that sets out the terms of the restructure (e.g., the Chairman's Report on the Scheme Meeting); and
- v. A statement by the foreign representative identifying all the foreign proceedings relating to the debtor that the foreign representative is aware of (if any)

(<https://casetext.com/statute/united-states-code/title-11-bankruptcy/chapter-15-ancillary-and-other-cross-border-cases/subchapter-iii-recognition-of-a-foreign-proceeding-and-relief/section-1515-application-for-recognition>, accessed on 18<sup>th</sup> February 2024 at 18:50PM AND <https://casetext.com/case/in-re-modern-land-china-co-1>, under Subsection A titled “The Motion for Recognition and Enforcement, accessed on 18<sup>th</sup> February 2024 at 19:03PM)

**d. Relief to be sought**

Globe Holdings’ foreign representative should apply for relief under Section 1521 of the Bankruptcy Code, specifically, requesting the Court to stay the commencement of the class action litigation that is threatened against Globe Holdings to the extent this class action litigation suit has any linkage to the restructured notes and the restructuring scheme (<https://casetext.com/statute/united-states-code/title-11-bankruptcy/chapter-15-ancillary-and-other-cross-border-cases/subchapter-iii-recognition-of-a-foreign-proceeding-and-relief/section-1521-relief-that-may-be-granted-upon-recognition>, accessed on 18<sup>th</sup> February 2024 at 20:44PM).

Considering this is a consensual restructure between the Company and its creditors and, further, the bankruptcy proceedings only impact the notes being restructured, it is not necessary for the foreign representative to apply for relief relating to administration of the Company and its assets since these are expected to remain the hands of the Management Team in charge of Globe Holdings.

Good essay. It was expected to also contain:

1. Definitions (COMI, establishment, foreign main/non-mail proceedings etc.) with respective references to (if any) MLCBI provisions
2. A discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI and alternative courses of action
3. Procedures per Article 15 MLCBI
4. Conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI

**\* End of Assessment \***

**Marks awarded 34 out of 50**