



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 key distinction between the application of the MLCBI and the European Union (EU) Regulation on insolvency proceedings is in the applicability scope of each: MLCBI is a legislative text that is recommended to be applied by countries and provides procedural frameworks for cooperation and coordination among states when dealing with cross-border insolvency matters. However, the EU Regulation is directly embedded into member states' national laws when adopted, and is directly focused on the harmonization of national laws through prescriptive rules on recognition and enforcement of insolvency proceedings within the confines of the European Union.

In terms of key benefits and disadvantages of each:

- For MLCBI:
 - One key benefit is that, by virtue of being a “soft law”, it has a universal and flexible approach and promotes global cooperation on international insolvency issues without interfering in enacting states’ sovereign matters, and, as such, promotes the principles of modified universalism;
 - However, one drawback of MLCBI, is that, given its non-substantive form, it leaves to the discretion of the sovereign states the decision to incorporate and adopt or not certain procedures and provisions, as stipulated by Article 6 which allows states to exclude or limit certain actions related to foreign proceedings on grounds of public policy. Therefore, the disadvantage of the MLCBI is that it remains subject to domestic laws and practices and sovereign decisions as to the level of adoption. As a result, the Model Law is not able to fully harmonize domestic insolvency laws.
- For the EU Regulation:

- One key benefit is that, by virtue of being specific to the EU and meant to be incorporated in national laws, it achieves a more harmonious unification of national laws in the EU both in terms of approach and coordination in the efficient recognition and enforcement of insolvency proceedings with member states of the EU
- However, it is only limited to insolvency proceedings taking place within the EU countries and does not therefore address cases where there is a non-EU component, involving other regions, where cross-border recognition is required and forms of bilateral agreements or treaties shall be in place to facilitate the administration of these cases. By being regional in nature, it does not address the international nature of cross-border insolvency proceedings involving non-European foreign proceedings, for instance.

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.

Under Article 21 of the MLCBI, using its discretionary power to grant post-recognition relief, the court should consider the following aspects and issues:

- It must ascertain that the post-recognition relief is consistent with the Model Law and the local insolvency law of the enacting state
- It must ascertain whether the post-recognition relief is a matter of insolvency law or general policy outside the scope of insolvency legislation
- Consider whether the relief is consistent with the scope of relief the local court can provide based on the local jurisdiction, such as restrictions and limitations on the level of protections and relief the court can provide
- Consider whether the relief is consistent with any earlier recognition order
- Consider whether any post-recognition relief related to a foreign non-main proceeding is consistent with the foreign main proceeding, as any inconsistency or interference with the main proceeding shall be modified or terminated
- Consider coordination and cooperation between the foreign proceeding and the local insolvency proceeding to ensure a harmonious outcome of the international insolvency case
- Consider public policy considerations in the enacting state
- Consider whether the relief enhances and expedites the overall treatment of the insolvency case without incurring significantly more costs and delays, while ensuring fair treatment of all creditors
- According to article 22, ensure the balance of interests between local creditors and foreign creditors, in particular in cases where the relief requires the handing over of the debtor's assets to the foreign representative, in which case the court shall ensure the interests of the local creditors are adequately safeguarded
- Be clear that the relief relates to assets that according to the law of the enacting state should be handled in the foreign proceedings or pertain to information thereof

Question 2.3 [2 marks] 2 marks

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

Under Article 13 of the MLCBI, creditors in a foreign proceeding can avail of various protections:

- The claim of creditors in a foreign proceeding can be recognized by submitting proof of their claims in accordance with the rules of the foreign proceeding. Indeed, creditors in a foreign proceeding are able to access and attend foreign proceedings where the main insolvency proceeding is taking place, and have the right to receive information and notice about foreign insolvency proceedings and their key developments and decisions
- Starting from the principle that every creditor has the right to present their claims irrespective of the location or origin of their claims, creditors in a foreign proceeding have the right to protect their interests and enforce their rights in the foreign proceeding, including seeking relief and remedies to protect their security/assets and claims. Accordingly, the foreign creditors carry the same rights as creditors domiciled in the local state without impacting the ranking of the claims. Indeed, creditors have the right to participate in the distribution of the assets in the foreign proceeding according to the priorities defined by the foreign insolvency law
- Last but not least, creditors in a foreign proceeding are allowed to challenge transactions (bring avoidance actions) that could be considered fraudulent under the foreign insolvency regime that could negatively impact their rights and recoveries

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?

According to article 20, the relief in a foreign main proceeding is comprehensive and broad and deals with the entire insolvency process, including automatic stay of legal proceedings, and approval of reorganization and liquidation plans if the COMI is in the jurisdiction where the foreign main proceeding has been opened. However, according to article 21, in a foreign non-main proceeding, since it is generally a secondary proceeding to the main proceeding, where typically the debtor has only an establishment, the relief is not automatic but is rather a discretionary post-recognition relief granted by the court. As such, it focuses on such items as the administration of assets within that specific jurisdiction, the stay of local proceedings and the protection of assets based in that jurisdiction, and is therefore limited in scope. Additionally, based on paragraph 4 of article 21, in case of a foreign non-main proceeding, the court has discretion to grant relief on the basis of satisfaction of the requirement that the relief pertains to assets that, under the law of the enacting state, should be administered in the foreign non-main proceeding or relate to information necessary for that proceeding, provided that the foreign non-main proceeding does not meddle with the processes of the foreign main proceeding.

QUESTION 3 (essay-type questions) [15 marks in total] 5 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.

Using the principles of the MLCBI for the coordination, the recognition and enforcement of insolvency proceedings in multiple jurisdictions, we can sketch out the following analyses:

- Since the debtor's COMI is located in Germany, the foreign main proceeding must have been filed in that jurisdiction. As a result, in Germany will take place the primary insolvency proceeding to administer the debtor's assets in globality

- Since the debtor has an establishment in Bermuda, a foreign non-main proceeding can be filed in Bermuda. The result of this filing is that this foreign non-main proceeding will focus only on assets placed in Bermuda and will be secondary to the foreign main proceeding in Germany
- It is presumed that the debtor has de minimis assets or has an establishment in the US and therefore justifies the search for recognition in US courts of the foreign main and non-main proceeding in US courts is focused on recognizing the proceedings in Germany (main) and Bermuda (non-main)
- The likely result is that the US courts, through Chapter 15, which reflects the principles of the Model Law, will recognize Germany as foreign main proceeding and Bermuda as foreign non-main proceeding. The recognition proceedings in the US will enable an effective coordination and cooperation across all jurisdictions in accordance within the principles of MLCBI to achieve a fair and efficient resolution of the cross-border insolvency case, bearing in consideration the primary and hierarch of the concurrent proceedings in Germany and Bermuda.

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

Question 3.2 [maximum 3 marks] 0 mark

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

The recognition by the US court of the foreign proceeding will result in the respect of the outcomes of foreign proceeding by the US court. Indeed, according to the principles of MLCBI, the US court could trigger an automatic stay (if the foreign proceeding is main) on any proceedings against the debtor's assets in the US and its foreign representatives. This stay by the US court is in line with the principles of international cooperation and coordinated process embedded in the MLCBI. On this basis, the US court could reject the lawsuit against the joint provisional liquidators.

However, Article 14 of MLCBI covers situations of interference that could give rise to a refusal of the recognition proceeding or suspension of automatic stay for a foreign main proceeding. If the alleged tortious interference is deemed correct, with the onus of the evidence on the plaintiffs, then the claims of the plaintiffs are appropriate and the claims pertaining the alleged tortious interference with contract rights of the US-based vendors of the foreign debtors are excluded from the automatic stay.

The likely outcome is that the US court is likely to protect the joint provisional liquidators from undue interference as the objective of the court is to achieve a fair and efficient process and the principle of international cooperation underlying MLCBI will prevail, resulting in the pursuit of the recognition proceeding (assuming all other requirements are met).

Requires discussion based on Art.10 MLCBI

Question 3.3 [maximum 4 marks] 2 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?

To protect the assets, the foreign representative should follow these steps:

- The foreign representative should seek recognition of the case in the US as both countries, both the US and UK are signatories to the MLCBI, which should establish a framework of cooperation between the UK proceeding and the US court
- The foreign representative can negotiate with the landlords and licensors of the IP to obtain moratoriums or relief on the *ipso facto* clauses and could use the help of the US court. By informing the stakeholders of the UK insolvency proceedings there could be a window of cooperation with the landlords and licensors to reach a settlement to prevent individual actions and proceedings while the foreign representative awaits the US recognition
- In light of article 19 of MLCBI, the foreign representative could file a motion for provisional relief to avoid a negative action during the 35-day period until the court hearing happens; this way the foreign representative could gain a temporary stay or injunction that would protect the assets and the value of the estate during the restructuring process

Requires substantive discussion upon Art.19 MLCBI and its definitions, as well as references to the provisions of Art 20 and/or 21 MLCBI as applicable.

Question 3.4 [maximum 4 marks] 1 mark

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?

In light of the insolvency court denying the petition for recognition of the foreign proceeding as main proceeding, the foreign representative should do the following next:

- Appeal the decision by working with a local legal counsel who is knowledgeable in the local jurisdiction domestic law. It is worth noting that the representative will not be able to apply article 31 of the Model law with regards to the rebuttable presumption of insolvency as it is likely that country A would be a foreign non-main proceeding on the basis of the case facts
- It is possible that the criteria for foreign main proceeding are not present due to absence of COMI but that country B could well be recognized as foreign non-main proceeding, benefiting from a certain level of recognition within the confines of country B, allowing the representative from certain post-recognition relief and accordingly certain stays on local assets

- Start negotiations with local stakeholders in Country B to reach an agreement that does not depend on formal recognition to be able to sell the assets without the need for recognition
- Find alternative reorganisation options by working with restructuring advisors and lawyers. The ability to dispose of assets without formal recognition of foreign proceeding depends on the local law jurisdiction which goes back to the point above on the importance for the foreign representative to appoint a local counsel

At the outset of the case, the foreign representative should have carried the following actions:

- Using articles 28 to 32 of the Model Law on concurrent proceedings, conduct a thorough legal analysis to determine the most appropriate jurisdiction for recognition including the criteria for a recognition of a foreign main proceeding in accordance with the principles of MLCBI. Accordingly, the foreign representative should have checked if both countries A and B have adopted MLCBI principles and do a thorough analysis of COMI
- Carefully analyse the local laws of Country B to determine the restrictive tests the local court may apply in recognizing foreign proceedings

Art.16 MLCBI is the main reference for “rebuttable COMI presumption” to highlight the weak COMI and substantiate as to why application for recognition of FNMP is an alternative. References to Art.17, 21, 6 are also required for full marks

QUESTION 4 (fact-based application-type question) [15 marks in total] 5 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.

In terms of application for recognition of main or non-main proceeding or both, it is important to first analyze the COMI of Global Holdings. Indeed, Global Holdings does not have its primary bank in the Cayman Islands and the location where the financing was arranged is governed by US law. However, in the same time, it could be argued that the location that is “readily ascertainable by creditors” is Cayman Islands because the prospectus of the Notes mentions that location and additionally the books and records are in the Cayman Islands. Therefore, it is likely that the COMI is in the Cayman Islands where it is incorporated and where it holds board meetings and where it maintains its books, and therefore Globe Holdings should file first for recognition in the Cayman Islands as foreign main proceeding. However, there is a risk that the US courts, based on a holistic assessment, would consider Cayman Islands as non-main and therefore I suggest that the company files for both types of recognitions.

In terms of the papers that need to be submitted to file a recognition under Chapter 15, Global Holdings needs to file, with the support of Cedar and Woods, the proposed RSA, the sanction Order and details of the Scheme Meeting to recognize Cayman Islands as the foreign main proceeding for the restructuring. Upon recognition, Global Holdings should be able to prevail an automatic stay as per article 20 of the Model Law, and start the restructuring process of the Notes to request the conversion of the payment to an “in-kind” structure.

In terms of the relief that should be requested on day one of the filing, Globe Holdings should request the recognition in the US of the main proceeding in Cayman Islands to enable an implementation of the sanctioned restructuring scheme in the US, and accordingly request the automatic stay on creditors’ actions and recognition of the restructuring plan to facilitate the sale of US assets (subsidiaries and the sale of the corporate headquarters in New York) and the cooperation with US creditors. This automatic stay is even more critical as Globe Holdings should anticipate challenges due to pending class action litigation in the US and therefore the automatic stay on these litigations would protect the estate and facilitate an orderly restructuring at the Cayman Islands.

While the restructuring plan should take place in the Cayman Islands where presumably the COMI is (rebuttable presumption), in order to ensure a seamless implementation of the plan while protecting the interests of creditors and all parties, Global Holdings should also request a recognition for a Chapter 15 proceeding and file for a recognition in the US as foreign non-main proceeding in case the COMI analysis is not conclusive in light of the analysis above. The recognition as foreign non-main proceeding will enable the company to obtain post-recognition relief granted by the US courts and importantly possible interim relief to protect the estate from the class action litigation pending in the US that could harm the restructuring process.

As this question is a fact-based application-type question, it requires the MLCBI provisions to be applied to the facts of the case and substantiated with references and a discussion. The answer should contain as a minimum:

- 1. Definitions (COMI, establishment, foreign main/non-main proceedings etc.) with respective references to (if any) MLCBI provisions**
- 2. A substantive discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI, different scenarios and corresponding courses of action**
- 3. The necessary papers to be submitted to the US Court per Article 15 MLCBI**
- 4. Conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI**

*** End of Assessment ***

Marks awarded: 26 out of 50