



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A**

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

This is the **summative (formal) assessment** for **Module 2A** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

**The mark awarded for this assessment will determine your final mark for Module 2A.** In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student ID.assessment2A]**. An example would be something along the following lines: 202223-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2024** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).

## **ANSWER ALL THE QUESTIONS**

**Please note that all references to the “MLCBI” or “Model Law” in this assessment are references to the Model Law on Cross-Border Insolvency.**

### **QUESTION 1 (multiple-choice questions) [10 marks in total] 8 marks**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

#### **Question 1.1**

Which one of the following international organisations’ mandate is to further the **progressive harmonization of the law of international trade**?

- (a) World Trade Organization.
- (b) The United Nations Commission on International Trade Law.**
- (c) The United Nations Conference on Trade and Development.

#### **Question 1.2**

Which trend(s) and process(es) served as a **proximate cause** for the development MLCBI?

- (i) Rise of corporations.
- (ii) Internationalisation.
- (iii) Globalization.
- (iv) Universalism.
- (v) Territorialism.
- (vi) Technological advances.

Choose the correct answer:

- (a) Options (i), (ii), (iii), (iv) and (vi).**
- (b) Options (i), (ii), (iii) and (iv).
- (c) Options (ii), (iii), (iv) and (vi).**

(d) All of the above.

**Question 1.3**

Which of the following statements **incorrectly** describe the MLCBI?

- (i) It is legislation that imposes a mandatory reciprocity on the participating members.
- (ii) It is a legislative text that serves as a recommendation for incorporation in national laws.
- (iii) It is intended to substantively unify the insolvency laws of the foreign nations.
- (iv) It is a treaty that is binding on the participating members.

Choose the correct answer:

- (a) Options (ii), (iii) and (iv).
- (b) Options (i), (ii) and (iv).
- (c) Options (i), (iii) and (iv).**
- (d) All of the above are incorrect.

**Question 1.4**

Which of the below options reflect the **objectives** of the MLCBI?

- (i) To provide greater legal certainty for trade and investment.
- (ii) To provide protection and maximization of value of the debtor's assets.
- (iii) To provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtors.
- (iv) To facilitate the rescue of financial troubled businesses.
- (v) To ensure substantive unification of insolvency laws of member-states.

Choose the correct answer:

- (a) Options (i), (ii), (iii) and (iv).**
- (b) Options (ii), (iii) and (v).
- (c) Options (ii), (iv) and (v).
- (d) None of the above.

**Question 1.5**

Which **two** of the below hypotheticals demonstrate a more likely **precursor to a “cross-border insolvency”**?

- (i) An insolvency proceeding is commenced in jurisdiction A, but a significant asset is located outside of jurisdiction A.
- (ii) An insolvency proceeding is commenced in jurisdiction A and immediately transferred to a foreign jurisdiction B.
- (iii) An insolvency proceeding is commenced in jurisdiction A, in which a group of affiliated debtors has its COMI as well as all assets and liabilities.
- (iv) An insolvency proceeding is commenced in jurisdiction A, but certain liabilities are governed by laws of a foreign jurisdiction B.
- (v) An insolvency proceeding is commenced in jurisdiction A, but all *de minimis* assets are located in foreign jurisdictions.

Choose the correct answer:

- (a) Options (i) and (ii).
- (b) Options (ii) and (iii).
- (c) Options (iii) and (v).
- (d) Options (i) and (v).**

#### Question 1.6

A restructuring proceeding is commenced in jurisdiction A by a corporation with COMI in jurisdiction A and an overleveraged balance sheet. The court in jurisdiction A, overseeing the restructuring, entered a final and non-appealable order, approving the compromise and restructuring of the debt. The entered order, by its express terms, has a universal effect. Based on these facts alone, what is the **effect** of such order's terms in jurisdiction B if jurisdictions A and B do **not** have a bilateral agreement?

- (a) Binding within jurisdiction B.
- (b) Binding within jurisdiction B, but certain actions need to be taken.
- (c) No effect within jurisdiction B.**
- (d) Likely no effect within jurisdiction B.**
- (e) Not enough facts provided to arrive at a conclusion.

#### Question 1.7

Which of the following statements set out the reasons for the development of the Model Law?

- (i) The increased risk of fraud by concealing assets in foreign jurisdictions.

- (ii) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (iii) To eradicate the use of comity.
- (iv) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

Choose the correct answer:

- (a) Options (i), (ii) and (iii).
- (b) Options (i), (ii) and (iv).**
- (c) Options (ii), (iii) and (iv).
- (d) All of the above.

#### **Question 1.8**

Which of the statements below are incorrect regarding COMI under the MLCBI?

- (i) COMI is a well-defined term in the MLCBI.
- (ii) COMI stands for comity.
- (iii) The debtor's registered office is irrelevant for purposes of determining COMI.
- (iv) COMI is being tested as of the date of the petition for recognition.

Choose the correct answer:

- (a) Options (i), (ii) and (iii).**
- (b) Options (ii), (iii) and (iv).
- (c) All of the above.
- (d) None of the above.

#### **Question 1.9**

In the event of the following concurrent proceedings, indicate the order of the proceedings in terms of their hierarchy / primacy:

- (i) Foreign main proceeding.
- (ii) Foreign non-main proceeding.
- (iii) Plenary domestic insolvency proceeding.

Choose the correct answer:

- (a) Options (ii), (i) and then (iii).
- (b) Options (i), (ii) and then (iii).
- (c) Options (iii), (i) and then (ii).
- (d) Options (iii), (ii) and then (i).

**Question 1.10**

Which of the statements below are correct under the MLCBI?

- (a) The foreign representative always has the powers to bring avoidance actions.
- (b) The hotchpot rule prioritises local creditors.
- (c) The recognition of a foreign main proceeding is an absolute proof that the debtor is insolvent.
- (d) None of the above are correct.

**QUESTION 2 (direct questions) [10 marks in total] 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 EU Regulation on insolvency proceedings is that the MLCBI is a model law that can be adopted by any State, with or without modifications, while the EU Regulation is a binding instrument that applies directly and uniformly to all EU Member States.

The key benefit of the MLCBI approach is that it allows for flexibility and adaptation to the specific legal and economic context of each State, and can facilitate cross-border insolvency cooperation with States outside the EU. However, a key disadvantage of the MLCBI approach is that it may create inconsistency in the application of the model law, and may not provide sufficient protection for creditors and debtors in some cases.

On the other hand, the key benefit of the EU Regulation approach is that it creates legal certainty and predictability for cross-border insolvency cases within the EU, and enhances the efficiency and effectiveness of insolvency proceedings by reducing conflicts of laws and jurisdiction. One key disadvantage of the EU Regulation approach is that it is limited to the EU Members and may not adequately reflect the diversity and complexity of insolvency situations.

**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.

The court should primarily consider the necessity and appropriateness of the post-recognition relief under Article 21 of the MLCBI, taking into account the interests of the creditors, the debtor and other interested parties in the enacting state and the foreign state where the foreign proceeding is taking place. The court should also respect the principle of modified universalism, which aims to facilitate cooperation and coordination among different jurisdictions in cross-border insolvency cases, while respecting the differences in national laws and policies.

The court should grant post-recognition relief only if it is necessary to protect the assets of the debtor or the interests of the creditors, and if it is appropriate in the circumstances of the case. For example, the court should not grant relief that would interfere with the administration of another insolvency proceeding, especially the foreign main proceeding, or that would be contrary to the public policy of the enacting state. The court should also avoid granting relief that would override or modify the substantive rights of the parties under the applicable law, unless they have consented or submitted to the foreign proceeding.

The court should also consider the possibility of imposing conditions, limitations or safeguards on the relief, or modifying or terminating the relief, if the situation changes or if the interests of the parties are not adequately protected.

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

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

Article 13 of the MLCBI provides that foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under the insolvency law of the enacting State as creditors in the enacting State. This means that foreign creditors can file claims, vote on proposals, request information, and exercise any other rights that local creditors have in the domestic insolvency proceeding. Article 13 also ensures that foreign creditors are not discriminated against solely because of their foreign status, and that they are not given a lower priority than general unsecured creditors, except for certain tax and social security claims that some States may exclude from equal treatment.

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

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

The key distinction with respect to the relief available in foreign main versus foreign non-main proceedings is that the recognition of a foreign main proceeding triggers automatic and mandatory relief, while the recognition of a foreign non-main proceeding does not.

According to Article 20 of the Model Law, the recognition of a foreign main proceeding has the following three automatic effects:

- a stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
- a stay of execution against the debtor's assets; and
- a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.



On the other hand, according to Article 21 of the Model Law, the recognition of a foreign non-main proceeding does not entail any automatic relief, but only discretionary relief that may be granted by the court upon request of the foreign representative. The discretionary relief granted in a foreign non-main proceeding must be necessary to protect the assets of the debtor or the interests of the creditors, and must relate to assets that should be administered in the foreign non-main proceeding or concern information required in that proceeding.

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

**Question 3.1 [maximum 4 marks] 3 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, where the debtor has its COMI, and the foreign non-main proceedings must have been filed in Bermuda, where the debtor has an establishment. The recognition proceedings must have been filed in the US, where the debtor has assets, and where the foreign representative seeks assistance from the US court under Chapter 15 of the US Bankruptcy Code, which is the US adoption of the Model Law).

The likely result of the recognition proceedings in the US is that the US court will recognize the foreign main proceedings in Germany as such, and grant automatic relief, which would include a stay of actions and execution against the debtor's assets in the US. The US court will also recognize the foreign non-main proceedings in Bermuda as such, but will not grant automatic relief. Instead, the US court will have discretion to grant appropriate relief, upon request of the foreign representative of the Bermuda proceedings, and subject to the conditions that the relief is necessary to protect the assets of the debtor or the interests of the creditors, and that the relief is consistent with the foreign main proceedings in Germany.

**A full answer requires references to the MLCBI eg definitions per Art.2 MLCBI, and procedures per Art.17, 6, 15....**

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

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

The joint provisional liquidators may seek to invoke the protection of Article 10 of the MLCBI, which provides that the filing of a recognition application does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the US court for any purpose other than the recognition application. This means that the joint provisional liquidators may argue that the US court does not have jurisdiction over the tort claims brought by the US-based vendors, and that the discovery requests are not appropriate for the recognition proceeding. Alternatively, the joint provisional liquidators may seek to obtain a stay of the tort claims and the discovery requests under Article 19 of the Model Law. Article 19 allows the US court to grant urgent interim relief to the foreign representative upon filing the recognition application, such as a stay of execution against the debtor's assets or a suspension of the right to transfer or dispose of any assets of the debtor. The joint provisional liquidators may argue that such relief is necessary to protect the assets of the debtor or

the interests of the creditors, and that the interests of the US-based vendors and other interested parties are adequately protected.

**Question 3.3 [maximum 4 marks] 3 marks**

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

The foreign representative should seek interim relief under Article 19 of the MLCBI to prevent the US-governed leases and intellectual property licenses from being terminated by the ipso facto clauses. Article 19 allows the court to grant relief of a provisional nature from the time of filing the recognition application until the application is decided upon, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors. The foreign representative could argue that the ipso facto clauses would jeopardize the value and viability of the debtor's business and assets, and that the relief sought is consistent with the relief that would be available under the US Bankruptcy Code if the debtor were subject to a domestic insolvency proceeding.

The foreign representative should file a motion for interim relief as soon as possible after filing the recognition application, and serve notice on the affected parties, including the lessors and licensors. The motion should include evidence of the existence and status of the foreign proceeding and the appointment of the foreign representative, as well as the nature and location of the debtor's assets and the potential harm that would result from the enforcement of the ipso facto clauses. The motion should also specify the type and duration of the relief sought, which could include a stay of execution against the debtor's assets, a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor, or any other relief that may be available to a domestic debtor-in-possession under the US Bankruptcy Code.

The court has discretion to grant or deny interim relief under Article 19, and may subject the relief to conditions or modifications as it considers appropriate. The court may also refuse to grant interim relief. The court should decide on the motion for interim relief expeditiously, taking into account the urgency of the situation and the need to preserve the status quo until the recognition hearing. The interim relief granted under Article 19 will cease to have effect if the court denies the recognition application or if the court modifies or terminates the relief in light of the recognition decision.

**Needs conclusion based on Art.20 and/or 21 MLCBI**

**Question 3.4 [maximum 4 marks] 0 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?

The foreign representative may or should do one or more of the following actions after the denial of recognition of the foreign proceeding as a foreign main proceeding in Country B:

- a) Appeal the decision of the insolvency court in Country B, if there are grounds to challenge the court's determination of the debtor's COMI or the application of the public policy exception under Article 6 of the MLCBI.
- b) Seek recognition of the foreign proceeding as a foreign non-main proceeding in Country B, if the debtor has an establishment in Country B, that is, any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. This would require the foreign representative to file a new application for recognition under Article 15 of the Model Law and to satisfy the evidentiary requirements and the definition of a foreign proceeding under the Model Law.
- c) Seek co-operation and communication with the insolvency court or the insolvency representative in Country B, if there is a domestic insolvency proceeding regarding the debtor in Country B, or if there is a possibility of commencing such a proceeding. The foreign representative could invoke Articles 25 to 27 of the Model Law, which provide for the court's and the insolvency representative's duty and power to co-operate and communicate with foreign courts and foreign representatives, and to approve or implement agreements concerning the co-ordination of proceedings.
- d) Seek alternative methods of assistance or relief in Country B, if the Model Law has not been adopted or implemented in Country B, or if the Model Law does not provide adequate or sufficient relief for the foreign representative's purposes. The foreign representative could explore the possibility of relying on other sources of law or practice in Country B, such as domestic insolvency law, private international law, common law principles, bilateral or multilateral treaties, or judicial co-operation agreements.

What the foreign representative should have done at the outset, before commencing the proceeding in Country B, is to conduct a thorough analysis of the debtor's situation and the legal framework in Country B, in order to determine the most appropriate and effective strategy for seeking assistance or relief in Country B. The foreign representative should have considered the following factors, among others:

- a) The location and nature of the debtor's assets, operations, creditors, and other stakeholders in Country B, and the extent to which they are affected by or involved in the foreign proceeding in Country A.
- b) The existence and status of any domestic insolvency proceeding or other legal proceeding regarding the debtor in Country B, and the potential conflicts or co-operation with such proceeding.
- c) The adoption and implementation of the Model Law in Country B, and the interpretation and application of its provisions by the courts and authorities in Country B, especially with regard to the recognition of foreign proceedings, the determination of the debtor's COMI, the public policy exception, and the relief available to foreign representatives.

**Answer requires a discussion on the rebuttable COMI presumption (Art 16 MLCBI), and on the procedural provisions per Art. 17, 15, as well as 6.**

**QUESTION 4 (fact-based application-type question) [15 marks in total] 2 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.

Based on the facts provided, the client's key filing strategy to ensure a successful restructuring should include the following steps:

- a) Apply for recognition of the Cayman Islands scheme of arrangement as a foreign main proceeding under Chapter 15 of the US Bankruptcy Code, since the client's COMI is likely to be in the Cayman Islands, where it is incorporated, registered, has its books and records, bank account, counsel, and board meetings, and where it has publicly disclosed its re-domiciliation and its restructuring plan. The client should submit the following papers to the US bankruptcy court:
  - a. a petition for recognition of the foreign proceeding, accompanied by a certified copy of the Sanction Order and a certificate from the Cayman Islands court affirming the existence of the scheme and the appointment of the foreign representative;
  - b. a statement identifying all foreign proceedings in respect of the client that are known to the foreign representative;
  - c. a declaration by the foreign representative in support of the petition, providing information on the client's business, assets, liabilities, creditors, and the scheme; and
  - d. a request for relief under Chapter 15, including the automatic stay of actions against the client and its assets in the US, the enforcement of the scheme in the US, and any other appropriate relief that may be available under US law or the Model Law.
- b) Request urgent interim relief pending the recognition of the foreign proceeding, to protect the client's assets and interests in the US from any actions by creditors or other parties that may jeopardize the implementation of the scheme. Such relief may include a temporary stay of execution, litigation, or enforcement against the client or its assets in the US.

- c) Co-operate and communicate with the US bankruptcy court and any US insolvency representative, if appointed, to facilitate the recognition and enforcement of the scheme and the co-ordination of the proceedings.
- d) Intervene in any local proceedings in the US in which the client is a party, if necessary, to assert its rights and interests under the scheme and Chapter 15, and to seek the application of the hotchpot rule to avoid any preferential treatment of creditors who may have received partial payment in the Cayman Islands or elsewhere.
- e) Respond to any challenges or objections to the recognition or enforcement of the scheme in the US, such as public policy, lack of due process, or inadequate protection of creditors' interests. The client should also be prepared to rebut any arguments that its COMI is not in the Cayman Islands, or that the scheme is not a foreign proceeding within the meaning of Chapter 15, or that the foreign representative is not a person or body authorized to administer the scheme or act as a representative of the scheme.

This is a **fact-based application-type question**, meaning that the MLCBI provisions need to be applied to the facts of the case to answer the questions. Moreover, the answer needs (1) definitions per Art.2 MLCBI as they apply in this situation; (2) discussions over the alternatives (what if?) regarding presumptions/rebuttal concerning COMI per Art.16 and their application to the case; (3) necessary procedures per Art 15, 17....; finally, (4) a conclusion based upon Art.19, 20, 21... - also taken into account Art.22, 6... MLCBI.

**\* End of Assessment \***

**Marks awarded: 29 out of 50.**