



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).
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- 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 European Union Regulation on insolvency proceedings (“EIR”) concerns their applicability and scope. The MLCBI facilitates the recognition and enforcement of international foreign insolvency proceedings. In its model form, it is non-binding but allows countries to adopt and integrate its guidelines into their domestic legislative frameworks. The EIR on the other hand is binding and governs the recognition and enforcement of insolvency proceedings among member states of the European Union. Its jurisdiction is limited to the European Union. Under the EIR, COMI dictates international insolvency jurisdiction, that is, the jurisdiction in which primary insolvency proceedings can be commenced. COMI under the MLCBI relates to the effects of recognition, chief among those being the nature of the relief available in aid of the foreign proceeding.

A key benefit of the MLCBI is the fact that any country may adopt and integrate its provisions into its legal system. The process provides a simplified, expedited and a clear framework for obtaining recognition. This facilitates a more universal approach to cross-border insolvency across different jurisdictions with different legal systems. One disadvantage however is that because the MLCBI depends on individual States to enact legislation to implement its provisions, there is a lack of universal and direct enforcement. Consequently, there may be inconsistent interpretation and application of its provisions across different jurisdictions.

Given the fact that the EIR is binding and directly applicable within the EU, it provides the benefit of predictability and legal certainty in cross-border insolvency proceedings by establishing the rules on jurisdiction to commence insolvency proceedings and the law which applies to such proceedings. However, its advantage also serves as a disadvantage in some instances as its limited scope excludes non-EU cross border cases and may cause issues in circumstances involving debtors whose COMI are outside of the European Union.

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.

When using its discretion to grant post recognition relief under Article 21 of the MLCBI, the Court's primary consideration must be that the relief is necessary to protect the interests of the creditors and other interested parties or to protect the assets of the debtor. This is one of the reasons why the court is empowered to grant relief on such conditions as it considers appropriate (para. 2) and the court may modify/terminate the relief at the request of the foreign representative or an affected person (para. 3).

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 which embodies the principle of non-discrimination seeks to ensure that when foreign creditors apply to start insolvency proceedings in the enacting State or file claims in such a proceeding, they have the same rights as and are not treated worse than local creditors. While paragraph 1 preserves the provisions concerning the ranking of claims in insolvency proceedings, including provisions that may assign special ranking to foreign creditors' claims, to preserve the non-discrimination principle and bolster creditor protection, paragraph 2 sets out the minimum ranking for foreign creditor claims - the rank of general unsecured claims, except in circumstances where an equivalent domestic claim would be ranked lower under the law of the enacting State than general unsecured claims. Critically however, a foreign creditor's claim cannot be ranked lower in priority than general unsecured claims simply on the basis that such claim is held by a foreign creditor.

Question 2.4 [maximum 3 marks] 3 marks

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

A key distinction with respect to the relief available in foreign main versus foreign non-main proceedings is that once a foreign proceeding is recognized as a "main" proceeding, the MLCBI provides for automatic mandatory relief in stays of various enforcement actions that could otherwise be taken in the receiving court's jurisdiction (art. 20). To qualify as a foreign main proceeding, the COMI of the debtor must be in the jurisdiction where the foreign proceedings have been commenced. There are three automatic effects of the recognition of a foreign main proceeding: (i) a stay of the commencement/continuation of individual actions or proceedings relating to the debtor's assets, rights, obligations, or liabilities; (ii) a stay of executions against the debtor's assets; and (iii) a suspension of the right to transfer, encumber or otherwise dispose of any of the debtor's assets.

If the debtor only has an establishment in the jurisdiction where the foreign proceedings have been commenced, the proceedings are considered non-main proceedings and do not have the benefit of automatic relief. Instead, the debtor may only seek to obtain discretionary post-recognition relief from the court (art. 21). It should be noted that interim relief applies to both foreign main and foreign non-main proceedings and may include: (i) a stay of execution against the debtor's assets; suspending the right to transfer, encumber or otherwise dispose of any of the debtor's assets; and any additional relief that may be available to a domestic liquidator/office holder under the laws of the enacting State.

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.

In this scenario, foreign proceedings must have been filed in Germany as that is where the debtor has its Centre of Main Interests (COMI). Filing foreign proceedings in Germany relates to the effects of recognition, i.e., - it impacts the nature of relief available to assist the foreign proceeding and the coordination of the German proceedings with the recognition proceedings in the US and the concurrent non-main proceedings in Bermuda.

The recognition of the German proceedings would have three automatic effects: (i) a stay of the commencement/continuation of individual actions/proceedings in respect of the debtor's assets, rights, obligations, or liabilities; a stay of execution against the debtor's assets and suspension of the right to transfer, encumber or otherwise dispose of the debtor's assets. Note that relief in respect of the Bermudan proceedings the debtor would not be automatic but rather would be discretionary in nature.

If the German proceeding was recognised first in the US, then any relief granted thereafter under either art. 19 or art. 21 to the Bermudan proceeding representative must be consistent with the German proceeding (art. 30(a)). If the application for recognition of Bermudan proceedings came first, the once the German proceeding is recognised in the US, any relief in effect under art 19 or art 21 must be reviewed by the court and modified or terminated if inconsistent with the German proceeding (art. 30(b)).

For full marks, references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 17, 6..

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 US court is empowered by art. 17 to recognise a foreign insolvency proceeding. If the US court concludes that the foreign proceeding commenced by the joint provisional liquidators ("JPLs") satisfies the criteria laid down for example in articles 2(a) and (d), article 15(2) and article 4, the MLCBI it shall grant recognition. If the US court grants recognition, this does not necessarily immunise the JLPs from a tortious interference liability under US law. At the same time, the MLCBI's non-discrimination principle dictates that the JPLs should not undergo unfair treatment solely based on them being foreign representatives. Foreign creditors possess the same rights as creditors domiciled in the enacting State regarding the commencement of, and participation in, local proceedings regarding the debtor under the insolvency law of the enacting State (art. 13).

The likely outcome in circumstances where the Court grants recognition would involve the court also granting relief under art. 22 to protect the assets of debtor and the interest of creditors - such relief could include temporarily staying or limiting litigation against the

JPLs so (including suspending discovery proceedings) as to facilitate the efficient and orderly administration of the foreign insolvency proceeding. This outcome would be geared towards promoting fair and equitable treatment of the foreign representatives while facilitating the efficient resolution of the proceedings.

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?

To foster transparency and cooperation, upon commencing recognition proceedings in the US the foreign representative should promptly alert creditors and other interested parties of the proceedings.

While there is no litigation pending or threatened against the foreign debtor, given the existence of the *ipso facto* clauses, as a precautionary measure, the foreign representative may also petition the US court for relief under art. 21 of the MLCBI. The Court is empowered to grant the relief it would give in a domestic insolvency context. Given the fact that the licences and leases are governed by US law and *ipso facto* clauses are unenforceable under the US Bankruptcy Code as part of US policy, the Court's relief could include orders staying termination/enforcement actions triggered by the *ipso facto* clauses contained in the US-governed leases and IP licences (see *Pan Ocean* case).

The foreign representative should also take pre-emptive steps to prevent the dissipation or diminution in value of the debtor's assets pending the recognition hearing by seeking interim relief under art. 19. This may include petitioning the court for interim orders to prevent the termination of leases or licenses that are vital to the debtor's business concerns.

In view of protecting the debtor's US assets and efficiently administering the debtor's assets, the foreign representative should also seek to cooperate and communicate with the US Court, US creditors and other stakeholders (art. 25).

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?

The Foreign Representative ("FR") should first engage in a close review of the reasons provided by the insolvency court for denying the recognition petition. The reasons for the

denial will dictate the FR's next steps. If after reviewing the judge's reasons it appears that the decision on the recognition application was wrong or premised misconceptions regarding the foreign proceeding, if there is an appeal or other challenge mechanism in place in Country B, the FR could consider appealing/challenging the insolvency court's decision. The FR would have to ensure to provide cogent evidence to demonstrate the validity of the foreign proceedings and its compliance with Country B's legislative requirements and which addresses any defects in the application which were alluded to by the court.

The FR could consider alternative methods of recognition if recognition of the proceedings in Country A as a foreign main proceeding is not feasible. For instance, the FR could make an application for recognition of the Country A proceeding as a foreign non-main proceeding. Additionally, if Country B's laws permit, the FR could consider initiating fresh and separate insolvency proceedings in Country B to administer the debtor's assets located within Country B's jurisdiction or liaise with Country B's authorities to sell or distribute the debtor's assets.

Given that the foreign debtor has its registered office and not much more in Country A, at the outset, the FR should have ensured that the COMI was made out in Country A and should have provided supporting evidence of same in his recognition application to minimise rebutting the presumption. This could include providing detailed information about the foreign proceeding, the status of the debtor's insolvency, and details regarding the assets located within Country B's jurisdiction.

Before starting the recognition proceeding in Country B, it would have been prudent for the foreign representative to have engaged in a thorough analysis of the domestic legal framework, jurisdictional requirements, and criteria for recognition under the MLCBI in Country B. This would have assisted in detecting any possible challenges or obstacles to recognition of the foreign proceeding. Particularly, the FR should have assessed whether the recognition application fell outside of the public policy exception [Good!]. Engaging and obtaining advice from experienced local counsel who are versed in the insolvency laws of Countries A and B and the MLCBI would have also provided critical insight into each country's recognition process and assisted with wading through complexities of their legal frameworks.

For full marks, answer should provide a discussion on the "weak COMI" per Art.16 MLCBI as the main reference for "rebuttable COMI presumption".
Definitional references to Art.17, 21 are also required to substantiate answer.

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

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

The client is a Cayman Islands incorporated and registered entity. It is a financial service holding company for a number of direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States. Globe Holdings was initially formed as a Canadian company in 2009, under the laws of Ontario, Canada. A year later, following certain reverse merger transactions, it filed a Certificate of Registration by Way of Continuation in the Cayman Islands to re-domesticate as a Cayman Islands company and changed its name to Globe Financial Holdings Inc. When it re-incorporated in the Cayman

Islands in 2010 (from Canada), Globe Holdings provided various notices of its re-incorporation, including in the public filings with the Securities and Exchange Commission (SEC). Around that time, Globe Holdings retained its Cayman Islands counsel Cedar and Woods, which has regularly represented Globe Holdings for over a decade. Globe Holdings has a bank account (opened just a few days ago) in the Cayman Islands from which it pays certain of its operating expenses. Globe Holdings often holds its board meetings virtually, and not physically in the Cayman Islands, and, having obtained support for a bond restructuring, all its regular and special board meetings have been organized by its local Cayman counsel virtually. The client also maintains its books and records in the Cayman Islands. Its public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes disclosed that Globe Holdings is a Cayman Islands company and explained the related indemnification and tax consequences resulting from Globe Holdings' place of reformation.

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

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

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

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

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

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

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

On July 4, 2023, the client, in accordance with the terms of the RSA, applied to the Cayman Court for permission to convene a single scheme meeting on the basis that the Noteholders,

as the only Scheme Creditors, should constitute a single class of creditors for the purpose of voting on the Scheme.

On July 26, 2023, the Cayman Court entered a convening order (the Convening Order) on the papers, among other things, authorizing the client to convene a single Scheme Meeting for the purpose of considering and, through a majority vote, approving, with or without modification, the Scheme. The Scheme Meeting was held in the Cayman Islands at the offices of Cedar and Woods. Given the Covid-19 pandemic, Scheme Creditors were also afforded the convenience of observing the Scheme Meeting via Zoom and in person via a satellite location in New York. Following the Scheme Meeting, the chairman of the Scheme Meeting (presiding over the meeting in person) reported to the Cayman Court that the Scheme was overwhelmingly supported by the Noteholders, with 91.83% in number and 99.34% in value voting in favor of the Scheme. The Sanction Hearing was held, and an order sanctioning the Scheme (the Sanction Order), which was filed with the Cayman Islands Registrar of Companies the same day.

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

Whether to apply for recognition of main or nonmain proceeding or both (in light of COMI/ establishment analysis)

Based on the information provided, the client should apply for recognition of both and non-main proceedings.

(i) Main proceedings

There are several factors that support that Globe Holdings' application for recognition of main proceedings in the Cayman Islands.

The UNCITRAL Guide to Enactment provides two key factors for determining center of main interests ("COMI") under the Model law: (a) the location where the central administration of the debtor occurs; and (b) which is readily ascertainable as such by the debtor's creditors.

Globe Holdings has its place of incorporation and registration in the Cayman Islands. Its continuation into the Cayman Islands from Canada in 2010 signifies a deliberate decision to make Cayman its primary jurisdiction for legal purposes (thus satisfying the article 16 Model law recognition presumptions). Cayman is thus presumed to be Globe Holdings' COMI where it has maintained its status as a corporate entity since 2010.

Globe Holdings provided various notices of its re-domiciliation from Canada to the Cayman Islands, including SEC public filings which disclosed Globe Holdings as a Cayman Islands company and explained the legal and tax consequences of its re-domiciliation. It also maintains its books and records in Cayman.

Globe Holdings' retention of Cedar and Woods as its long-standing Cayman Islands counsel for over a decade demonstrates a significant ongoing connection to the Cayman Islands legal system and corporate governance framework. This Caymanian firm plays a critical role in organizing both special and regular board meetings as well as providing advice on restructuring alternatives.

While Globe Holdings conducts its business operations through its US law incorporated subsidiaries in the United States, has US employees and a US headquarters, the evidence makes it clear that key decisions regarding its operations and restructuring are made in the Cayman Islands. Globe Holdings is seeking to restructure its debt

through a scheme of arrangement under Cayman Islands law. The scheme meeting and subsequent court proceedings were conducted in the Cayman Islands and the orders concerning same emanating from a Cayman Court.

Based on foregoing, Globe Holdings should apply for recognition of main proceedings in the Cayman Islands. This recognition would formalise the restructuring process and provide legal protection for Globe Holdings and its stakeholders, including its creditors and shareholders, under Cayman Islands law and provide the benefit of automatic reliefs provided by article 20 of the Model law.

(ii) Non-Main Proceedings

An establishment as defined in article 2(f) of the Model Law, as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods and services”. There are several factors that support that the argument that the United States qualifies as an establishment which would support Globe Holdings’ application for recognition of non-main proceedings in that jurisdiction:

Global Holdings’ operational presence in the United States is a significant factor. Although Globe Holdings is incorporated and registered in the Cayman Islands, its primary business operations are conducted through its subsidiaries in the United States. All its employees are US-based, and the headquarters of its subsidiaries are also in the US.

Globe Holdings' shares were initially listed on the NASDAQ Stock Market, a US-based exchange demonstrating the company’s connection to the US economic system. Furthermore, in April 2017, Globe Holdings issued senior unsecured notes governed by New York law. This indicates a significant connection to the US legal system and financial markets.

Critically, Globe Holdings is contemplating issuing a Chapter 15 recognition proceeding in the United States following the restructuring scheme under Cayman Islands law. This shows an intention to seek legal protection and aid from US courts with respect to the restructuring process. Further, Globe Holdings approached its largest noteholders regarding the contemplated restructuring, and their expectations were that any restructuring would take place in the Cayman Islands and be recognised in the US. This implies an acknowledgment of the necessity for legal proceedings in both jurisdictions to address the complex interests of its stakeholders.

Finally, although the class action litigation brewing in the US has not yet been filed, it is indicative of potential legal disputes or liabilities within the US.

Therefore, Globe Holdings’ s ties to the US through its substantial business operations and assets enables it to apply for non-main proceedings recognition in the United States under Chapter 15 of the US Bankruptcy Code. This recognition would facilitate cooperation between the Cayman proceedings and any potential US litigation, such as the brewing class action lawsuit and afford the foreign representative maximum flexibility and the ability to devise bespoke solutions tailored to the Globe Holdings’ circumstances and those of other interested parties.

Papers that need to be filed

As a starting point, article 15 of the MLCBI requires an application for recognition to be accompanied by:

- a. A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- b. A certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative; or
- c. In the absence of the above, any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the representative.

It is also necessary that the application be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

To further proceed with the restructuring in both the Cayman foreign main proceedings and the US non-main proceedings, the following papers need to be submitted:

1. Cayman Foreign Main Proceedings:
 - a. Scheme Meeting Report which details the proceedings and outcomes of the Scheme Meeting held in keeping with the Convening Order. It should indicate the number and percentage of Noteholders present, voting results, any discussions or modifications made during the meeting, and the overall decision made by the Noteholders regarding the Scheme.
 - b. The order sanctioning the Scheme, obtained after the Scheme Meeting and Sanction Hearing, should be filed with the Cayman Islands Registrar of Companies. This order formally approves the restructuring scheme as agreed upon by the Noteholders.
 - c. After obtaining the Sanction Order, Globe Holdings needs to implement the approved scheme of arrangement. This involves taking actions as outlined in the scheme documentation to restructure the debt, extend the maturity of the notes, and provide for the payment of interest "in kind" as per the agreed-upon terms.
 - d. A report detailing the implementation of the scheme, including any actions taken to restructure the debt and fulfil other obligations, should be filed with the Cayman Islands Court.
 - e. Globe Holdings should provide a certificate of compliance with the terms of the sanctioned scheme, affirming that all necessary actions have been taken in accordance with the scheme's provisions.
 - f. A Notice should be sent to Creditors, including Noteholders, about the implementation of the scheme and any changes to the terms of the notes resulting from the restructuring process. Any notices sent to Creditors regarding the Scheme Meeting, including the Convening Order and details of the meeting's time, location, and agenda, should be documented, and filed as part of the proceedings.
2. US Non-Main Proceedings (Chapter 15 Recognition):
 - a. A detailed petition for recognition of the Cayman foreign main proceeding under Chapter 15 of the US Bankruptcy Code needs to be filed with the US bankruptcy court. This petition should outline the nature of the Cayman proceedings, including the restructuring scheme, and request recognition and enforcement of the Caymanian court orders in the US.
 - b. A certified copy of the Sanction Order issued by the Cayman Islands Court sanctioning the Scheme should be provided as evidence of the approval of the restructuring plan in the Cayman jurisdiction.
 - c. Any notices sent to US creditors, including potential litigants involved in the pending class action litigation, regarding the Cayman Scheme Meeting and Sanction Order, along with evidence of delivery or publication, should be

- submitted to the US bankruptcy court to safeguard transparency and compliance with procedural requirements.
- d. Documents detailing the Cayman Scheme Meeting, including the agenda, attendance records, voting results, and any discussions or modifications made during the meeting, should be submitted to the US court to facilitate understanding of the Cayman restructuring process.
 - e. A request for a stay of proceedings in the US should be filed as part of the Chapter 15 recognition proceedings in an effort to protect Globe Holdings' assets and interests during the restructuring process.

Relief that should be requested on day one of the filing the recognition application

In order to protect Globe Holdings' assets and the interests of its creditors, in both the foreign main (Cayman) and foreign non main (US) proceedings, article 19 of the MLCBI empowers the foreign representative to request provisional relief from the first day of the filing. The relief to be requested should include:

- a. A stay of proceedings, i.e., any pending or imminent legal against Globe Holdings. This would prevent creditors from taking individual actions that may undermine restructuring efforts.
- b. A stay of execution against Global Holding's assets
- c. Article 21 relief such as suspending the right to transfer, encumber or otherwise dispose of the Globe Holdings' assets; an order providing for the examination of witnesses, taking evidence or delivery of information concerning Globe Holding's assets, affairs, rights obligations and liabilities; and any further relief that would be available to a domestic liquidator under the laws of the enacting State.

The answer should contain all important definitions with MLCBI and other references, and conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI (noting the mentions of Art,19 and 21).
Very good essay.

*** End of Assessment ***

Marks awarded: 38 out of 50