



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 MLCBI and the EU Regulation on Insolvency Proceedings, is that the EIR, whilst not a treaty, is an EU Regulation which, upon adoption, becomes part of the domestic law

of each EU Member State, and crucially, a key benefit of EIR is that thus insolvency proceedings opened in any EU Member State could be automatically recognised and enforced throughout the rest of all other EU Member States. A key disadvantage of EIR is that, because in the EIR (in difference to the MLCBI) the determination of the COMI relates to the jurisdiction in which main insolvency proceedings should be commenced and only the courts of the Member State in which a debtor has its COMI have jurisdiction to open main proceedings, recognition of insolvency proceedings will depend on the local law of each Member State, which can make the process more complex and potentially inefficient.

By contrast, the MLCBI, as an example of so-called 'soft law' and explicitly not a convention or a treaty binding on the participating members, imposes no mandatory reciprocity on the participating members. One key benefit of the MLCBI is that as a legislative text which serves as a recommendation for incorporation in national laws it aims to provide each enacting State with a necessary procedural framework that brings with it a level of predictability and transparency to allow cross-border insolvencies to be dealt with in a more cost and time efficient manner avoiding destruction of value and (where possible) allow for creation of value. It is also a flexible form of model legislation that takes into account differing approaches in national insolvency laws and varying propensities of States to cooperate and coordinate in insolvency matters. A key disadvantage is that recognition (of foreign proceedings) under the MLCBI is not automatic and requires an application to the courts, which may make the process more complex and time-consuming compared to the automatic recognition provided by EIR.

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.

Pursuant to article 21 of the MLCBI, paragraphs 2 and 3 of the MLCBI, (i) the court in the enacting state may exercise its discretionary power (at the request of the foreign representative) to hand over all or part of the debtor's assets located in the enacting State to the foreign representative (or another person designated by the court), provided that the court is satisfied the interests of creditors in the enacting State are adequately protected; and (ii) as far as granting relief to a foreign representative of a foreign non-main proceeding is concerned, the court in the enacting State must be satisfied that the relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 22 of the MLCBI clarifies at paragraphs 1 to 3 that in granting or denying relief under article 19 or 21 of the MLCBI, or in modifying or terminating relief under paragraph 3 of article 22 of the MLCBI, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. The court may (i) subject relief granted under article 19 or 21 of the MLCBI to conditions it considers appropriate; and (ii) at the request of the foreign representative or a person affected by relief granted under article 19 or 21 of the MLCBI, or at its own motion, modify or terminate such relief. (For an identification and application of the principles applicable to the exercise of discretion related to applications for, or to discharge, a stay under article 21 of the MLCBI, see for example, *In the matter of Armada Shipping SA* [2011] EWHC 216 (Ch) at paras 35, 38, 45, 46, and 49; *Re Pan Ocean Co Ltd* [2015] 1500 (Ch) at paras 23, 24, 28, 37, 49, 50, and 60.)

Thus, the court in the enacting State must strike a balance between the relief that may be granted to a foreign representative and specifically (under article 22 of the MLCBI) the interests of creditors, the debtor and other interested parties affected by the relief.

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 grants foreign creditors the same rights as creditors domiciled in the enacting State without affecting the ranking of claims in the enacting State. However, a claim of a foreign creditor cannot be given a lower priority than that of general unsecured claims solely because the holder of such claim is a foreign creditor.

Article 13 of the MLCBI expresses the access right for foreign creditors, by which such foreign creditors have the same rights as creditors in the enacting State regarding the commencement of, and participation in, local proceedings regarding the debtor under the insolvency law of the enacting State; and furthermore, this access does not affect the ranking of claims enacting State, except that the claim of a foreign creditor shall not be given a lower priority than that of general unsecured claims solely because the holder of such claim is a foreign creditor. The footnote to article 13 of the MLCBI provides wording for States that refuse to recognise foreign tax and social security claims, allowing them to continue to discriminate against such claims:

"Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency] 1. Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [identify laws of the enacting State relating to insolvency] as creditors in this State. 2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to Part one. UNCITRAL Model Law on Cross-Border Insolvency 7 insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g., claim for a penalty or deferred payment claim) has a rank lower than the general non-preference claims]."

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?

Articles 10 to 24 of the MLCBI deal with relief. Whether a foreign proceeding is determined to be a 'main' proceeding may affect the nature of the relief accorded to the foreign representative under articles 20 and 21 of the MLCBI. A key distinction is that recognition of a foreign main proceedings brings with it automatic relief which is not the case for foreign non-main proceedings:

- If the COMI of the debtor is in the jurisdiction where the foreign proceedings have been opened, the proceedings are the main insolvency proceedings with automatic mandatory relief (under article 20 of the MLCBI). The three automatic reliefs available (as per article 20 of the MLCBI, paragraph 1(a) to (c) are:
 - (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
 - (b) Execution against the debtor's assets is stayed; and
 - (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
- If the debtor only has an establishment in the jurisdiction where the foreign proceedings are opened, the proceedings are determined to be non-main proceedings without automatic relief, but only discretionary post-recognition relief granted by the court (pursuant to article 21 of the MLCBI).

The court in the enacting State is entitled to grant interim relief on an urgent basis upon application for the recognition of a foreign proceeding, pursuant to article 19 of the MLCBI. This interim relief applies to both foreign main and foreign non-main proceedings. If such interim relief would interfere with the administration of the foreign main proceedings, the court may, pursuant to article 19 of the MLCBI, paragraph 4, refuse to grant it.

Under article 21, paragraph 3 of the MLCBI as far as granting relief to a foreign representative of a foreign non-main proceeding is concerned, the court in the enacting State must be satisfied that the relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding. Although article 21, paragraph 1 is drafted broadly, the appropriate relief the court of the enacting State may grant is not unlimited, and has been limited in English judge-made jurisprudence:

- (1) the English Supreme Court in *Rubin v Eurofinance SA* [2012] UKSC 46, determined that the enforcement of an insolvency-related *in personam* default judgment is not covered by the Model Law;
- (2) in *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch), the English court of first instance, held that effectively applying foreign insolvency law to an English law governed contract is outside the scope of appropriate relief the English court can grant;
- (3) in *In the Matter of the OJSC International Bank of Azerbaijan and the CBIR 2006* [...] [2018] EWHC 59 (Ch) (the '**IBA Case**'), in which Mr Justice Hildyard extensively addressed the so-called *Gibbs Rule* (see at para 44), the English court concluded that it did not have jurisdiction to grant a foreign representative of a foreign main proceeding opened in that representative's jurisdiction an indefinite continuation of the automatic moratorium that resulted from an earlier recognition order; and
- (4) in the recent English case of *Igor Vitalievich Protasov and Khadi Murat Derev*, where the court was faced with the question whether under article 21 of the MLCBI a worldwide freezing order that was granted as provisional relief under article 19 of the MLCBI could continue after recognition in the UK of a foreign bankruptcy as a foreign main proceeding, the court held that while the English court had jurisdiction in the strict sense to grant such post-recognition discretionary relief, it concluded that relevant restrictions and limitations existed which served to inhibit the proper exercise of that jurisdiction

Conversely, the power to avoid antecedent transactions is contained in article 23 of the MLCBI, which is drafted narrowly. The standing afforded to foreign representatives in article 23 of the MLCBI extends only to actions that are available to the local insolvency representatives in the context of an insolvency proceeding. Article 23 of the MLCBI ensures only that foreign representatives are not prevented from initiating any action to avoid antecedent transactions by the sole fact that the foreign representative is not the insolvency representative in the enacting State. Thus, by making a distinction between foreign main and non-main proceedings in paragraph 2 of article 23 of the MLCBI, it is obvious that the relief in a non-main proceeding is likely to be more restrictive than for a main proceeding.

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

Question 3.1 [maximum 4 marks] 4 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 order to rule on a request for recognition of the German foreign main proceeding, the US court will first need to assess (pursuant to article 17(1)(a) and (b) of the MLCBI) whether the German proceeding (and the foreign representative) meet all the required characteristics defined in article 2 of the MLCBI – that is,

(a) "*Foreign proceeding*" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation";

(b) "*Foreign main proceeding*" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests"; and

...(d) "*Foreign representative*" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding".

The court is also entitled to rely on the presumptions in article 16(1) – (3) of the MLCBI:

- (1) If the decision or certificate referred to in paragraph 2 of article 15 of the MLCBI indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2

and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume.

(2) The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

(3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

On the assumptions that both the German foreign proceeding and foreign representative meet all the above required characteristics and that there are no grounds to invoke the public policy exception under article 6 (in the absence of public policy grounds to deny a request for recognition, such request made before the competent US court shall be granted as a matter of course (pursuant to article 4, if the requirement set out in article 15(2) of the MLCBI are met), and that also the application and court submission requirements set out in article 17(1)(c) and (d) of the MLCBI are met, the US court will need to determine, pursuant to article 17(2)(a) of the MLCBI, that the German foreign proceeding is to be recognized as a foreign main proceeding on the basis that it is taking place in the State where the debtor has the centre of its main interests.

In order to decide on a request for recognition of the Bermudian foreign proceeding, the US court will first need to assess (pursuant to article 17(1)(a), (c), and (f) of the MLCBI) whether the Bermudian proceeding (and the foreign representative) meet all the relevant required characteristics defined in article 2 – that is,

(a) "*Foreign proceeding*" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation";

(c) "*Foreign non-main proceeding*" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article";

(f) "*Establishment*" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."; and

... (d) "*Foreign representative*" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding".

The court is also entitled to rely on the presumptions in article 16(1) of the MLCBI. On the assumptions that both the Bermudian foreign proceeding and foreign representative meet all the above required characteristics and that there are no grounds to invoke the public policy exception under article 6, and that also the application and court submission requirements set out in article 17(1)(c) and (d) of the MLCBI are met, the US court will need to determine, pursuant to article 17(2)(a) of the MLCBI, that the Bermudian foreign proceeding is to be recognized as a foreign non-main proceeding on the basis that it is taking place in the State where the debtor has an establishment. Note in this context that *In the Matter of Sturgeon Central Asia Balanced Fund Ltd* [2019] EWHC 1215 (Ch), the English High Court had to decide whether the solvent winding up proceeding on just and equitable grounds of Sturgeon under the Bermudian Companies Act qualified as a "foreign proceeding" within the meaning of article 2(a) – while the court held it did, following a review of the application ([2020] EWHC 123 (Ch) at paragraph 5 overturned the earlier decision and held that "*it would be contrary to the stated purpose and object of the MLCBI to interpret "foreign proceedings" to include solvent debtors and more particularly include actions that are subject to a law relating to insolvency which have the purpose of producing a return to members not creditors*"; whether the US court would come to a similar judgment is arguable.

As the COMI of the debtor is in Germany, then if foreign insolvency proceedings have been filed/opened in that jurisdiction, the German proceedings are most likely determined to be the main foreign proceedings with automatic mandatory relief (under article 20 of the MLCBI). The three automatic reliefs available (as per article 20, paragraph 1(a) to (c) of the MLCBI) are:

- (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- (b) Execution against the debtor's assets is stayed; and
- (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

As the debtor has an establishment Bermuda, proceedings filed in that jurisdiction are most likely determined to be non-main proceedings without automatic relief, but only discretionary post-recognition relief granted by the court (pursuant to article 21 of the MLCBI). Upon recognition of the foreign proceedings (irrespective of whether these are main (i.e., German) or non-main (i.e., Bermudian), article 21(1) of the MLCBI provides the US court with the discretionary power where necessary to protect the assets of the debtor or the interest of the creditors and at the request of the foreign representative to grant appropriate relief, including the following at article 21 of the MLCBI:

- At paragraph 1,
 - (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20 of the MLCBI;
 - (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20 of the MLCBI;
 - (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20 of the MLCBI;
 - (d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
 - (e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
 - (f) Extending relief granted under paragraph 1 of article 19 of the MLCBI;
 - (g) Granting any additional relief that may be available to [...] under the laws of this State.
- At paragraph 2, upon recognition of a foreign proceeding, whether main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

Other consequences of recognition in the US court include also the following:

- pursuant to article 23 of the MLCBI, that the foreign representative obtains standing to initiate actions under the law of the enacting State to avoid or otherwise render ineffective the legal acts detrimental to the creditors of the debtor (i.e., claw-back rights and the power to avoid antecedent transactions); and
- pursuant to article 24 of the MLCBI, the right of the foreign representative to intervene in local proceedings in the enacting State in which the debtor is a party, provided the foreign representative meets the local requirements in the US.

Article 18 requires foreign representatives from the time of filing the recognition application in the US for the foreign proceeding, to promptly inform the court in the enacting State of (a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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.

Under US Bankruptcy Code Chapter 15 (i.e. the Chapter of the United States Bankruptcy Code under which the Model Law was enacted), Subchapter II, § 1509 (b)(1)), if the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter— (1) the foreign representative has the capacity to sue **and be sued in a court in the United States** (emphasis added). Therefore, the joint provisional liquidators could be sued in the US court and served with discovery in connection with their alleged tortious interference with contract rights of the US-based vendors of the foreign debtor, once they commenced a recognition proceeding in the US.

Pursuant to article 18 of the MLCBI, the Joint Provisional Liquidators, i.e. the foreign representatives, have an ongoing obligation from the time of filing the recognition application for the foreign proceeding in the US, to promptly inform the court in the enacting State of (a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative. The UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (Updated 2022) (the "**Judicial Perspective**") (at page 18, paragraph 45) also emphasizes that "*the foreign representative has a continuing duty of disclosure. They must inform the receiving court promptly of any substantial change in the status of the recognized foreign proceeding or of their appointment and any other foreign proceeding regarding the same debtor of which the foreign representative becomes aware.*"; and notes that more generally, the English court in *OGX Petroleo e Gas S.A.* [2016] EWHC 25 (Ch), CLOUT 1622, recognized that since many applications for recognition are made on an *ex parte* basis, there must be full and frank disclosure to the court in all respects.

While the MLCBI does not contain provisions on abuse of process and leaves it to the domestic law and the procedural rules of the enacting State to determine what constitutes an abuse of process, it also does not overtly prevent a court in the enacting State from responding to any perceived abuse of process. In this context, the foreign representatives/joint provisional liquidators have an obligation to full and frank disclosure to the US court and if they breach that obligation by, for example, not giving full and frank disclosure in relation to tortious interference with the contract rights (or where they have inappropriate motives for the recognition application under the Model Law which they did not disclose to the court), then the US court could consider this to be abuse of process based on its domestic law and procedural rules which could affect the recognition application (cf. *Nordic Trustee A.S.A. v OGX Petroleo e Gas SA* [2016] EWHC 25 (CH) and *Cherkasov & Ors v Olegovich* [2017] EWHC 3153 (Ch).)

According to the Digest of Case Law in relation to the so-called "safe conduct" rule provided for in article 10 of the MLCBI, "*a tort committed by, or misconduct on the part of, the foreign representative may provide grounds for dealing with the consequences of that tort or misconduct*" (page 30, paragraph 1); and that "*the immunity afforded by this article has been reiterated in the orders issued by some courts*" (paragraph 2). As noted above, US Bankruptcy Code, 11 U.S.C. sect. 1509 (e), provides that subject to art. 10, a foreign representative is subject to applicable non-bankruptcy law and must therefore comply with court orders. In *SNP Boat Service SA*, 453 B.R. 446 (Bankr. S.D. Fla. 2011), CLOUT 1314 the court threatened to revoke recognition of a foreign main proceeding because the foreign representative was not complying with the discovery process. Hence the joint provisional liquidators could face similar sanctions if they fail to comply with the service for discovery in connection with their alleged tortious interference with contract rights of the US-based vendors of the foreign debtor.

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?

Based on the above facts, pursuant to article 19(1) of the MLCBI, from the time of filing an application for recognition until the application is decided upon, the court may, at the request of the UK foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) Staying execution against the debtor's assets;

(b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and

(c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21 of the MLCBI – thus the UK foreign representative here could consider requesting relief from the English court under MLCBI article 21(1) (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20 of the MLCBI; (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and appropriate relief under article 21(1)(g) of the MLCBI to granting any additional relief that may be available to UK foreign representative under the laws of the US; or article 21(1)(a) of the MLCBI, i.e., a stay on "*the commencement or continuation of individual actions or individual proceedings*".

Moreover, article 19 of the MLCBI, paragraph 2 enables the enacting State to include an appropriate notice of interim relief granted and the court may refuse to grant such interim relief pursuant to article 19, paragraph 4 of the MLCBI, if such interim relief would interfere with the administration of a foreign main proceeding. In the UK Cross-Border Insolvency Regulations 2016 (**CBIR**), which enacts the MLCBI in the UK, article 19, paragraph 2 states that unless extended under paragraph 1(f) of article 21 of the MLCBI, the relief granted under this article terminates when the application for recognition is decided upon. Hence, any protective interim pre-recognition relief granted to the UK foreign representative under could lapse following recognition hearing set 35 days after the petition date (Cf. in this context the cases of *Igor Vitalievich Protasov*, *Pan Ocean*, and *IBA* noted above).

On our facts, the English court may follow *Pan Ocean* (as noted above), and in relation to relief sought under article 21(1)(a) of the MLCBI, hold that any notices to terminate the contract served pursuant to the *ipso facto* clauses (i.e., bankruptcy-triggered terminations) are not the commencement or continuation of an individual or individual proceeding; and that therefore the English court does not have the power under article 21(1)(a) of the MLCBI to restrain the US-based debtor to trigger the *ipso facto* clauses. The English court could also follow *Pan Ocean* and reject the appropriate relief requested on the basis of article 21(1)(a) of the MLCBI, as it may not be considered the intention of "appropriate relief" on our fact pattern to include allowing the recognising court to go beyond the relief it would grant in a domestic insolvency.

In *Belmond Park v BNY Corporate Trustee Services* [2011] UKSC 38, the UK Supreme Court clarified that *ipso facto* clauses are in principle valid and enforceable in a UK insolvency. On our facts, if the US-governed leases and intellectual property licenses are governed by another law than English law, that may impact the way the English court would apply a foreign e.g., US insolvency law. *Belmond* also held that accepting or rejecting *ipso facto* clauses in an insolvency is a policy decision and there is no good reason for the English court to prefer the policy decision in US over the policy decision made in the UK.

The decision in *Pan Ocean* must now be considered in the context of the Corporate Insolvency and Governance Act 2020 (**CIGA**) adopted in June 2020, in which the UK policy regarding *ipso facto* clauses has been reconsidered. The CIGA now also provides that certain *ipso facto* clauses in contracts for the supply of goods or services will cease to have effect once the debtor has become subject to certain UK Insolvency proceedings. As noted by US Bankruptcy Judge Martin Glenn at page 5 of the US Chapter

15 [Agrokor Opinion](#) (U.S. Bankruptcy Court, SDNY, Case No. 18-12104), "the difficulties here arise because the courts in England and Wales still apply the so-called "Gibbs" rule, based on an 1890 decision of the Court of Appeal in *Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399 (hereinafter, "Gibbs"). [...] the essence of the decision [in *Gibbs*] is that where a debtor, in that case domiciled in France, made a contract governed by English law and to be performed in England, was declared a bankrupt and its debts discharged under foreign law in a foreign proceeding (there, French law in a French proceeding), the plaintiff was not bound by the discharge and could maintain an action on the contract and recover damages in an English court."

Given that the foreign representative is said to administer assets in a debtor-in-possession-like restructuring proceeding in the UK, it may be useful to consider UNCITRAL Model Law on Enterprise Group Insolvency (the "**EGI Model Law**"), articles 17, 18, and 19 (which, however, falls outside the assessed materials).

Question 3.4 [maximum 4 marks] 4 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?

At the outset, the foreign representative could have filed expert evidence to assist Country B's court's determination that the insolvent debtor's COMI is Country A on the basis that the foreign debtor has its registered office (although not much more) there.

Article 16 of the MLCBI creates certain rebuttable presumptions concerning the authenticity of documents and the content of the order commencing the foreign proceedings and appointing the foreign representative, including at paragraph 3 that in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests (see the Judicial Perspective, pp. 18 – 19, paragraph 44).

Notwithstanding the presumption found in article 16, paragraph 1 of the MLCBI, expert evidence may be relevant to the assessment of whether the proceeding for which recognition has been sought is a "foreign proceeding" for the purposes of the MLCBI. Expert evidence may also be relevant to the assessment of COMI or establishment, which are primarily factual inquiries to be undertaken on the basis of evidence before the court. Depending upon applicable national law, the receiving court might be able to rely, in the absence of expert evidence, on reproduction of statutes and other aids to interpretation to determine the status of the particular form of insolvency proceeding at issue. (See the Judicial Perspective at page 26, paragraph 70 as well as footnote 105: An illustration of that approach can be found in *Betcorp* (case no. 5), in which the United States Bankruptcy Court used the explanatory memorandums that accompany draft legislation in Australia and are prepared to assist Parliament in understanding the purpose and structure of the legislation it is being asked to consider. Such memos may be used by a domestic court in Australia as an aid to resolving ambiguities, but the court is not bound to do so (pp. 282-283).)

The *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (GEI)* (at paragraphs 143–149 and the Judicial Perspective (at paragraphs 93–125) give considerable space to discussing the interpretation of paragraph 3 of article 16 of the MLCBI. They indicate that, as a general statement, when the debtor's COMI is at the same location as its place of registration, no issue concerning rebuttal of the presumption is likely to arise. However, when there appears to be a separation between the debtor's registered office and its alleged COMI, the party alleging the COMI is not located at the place of registration will be required to satisfy the court as to its location. In the latter situation, the GEI suggests, a debtor's COMI will be identified by factors that are both objective and ascertainable by third parties, i.e., factors indicating to those who deal with the debtor, especially creditors, where the COMI is located (see the Digest on Case Law, para 2 on article 16, page 38). According to the Case Digest at page 39, paragraph 11, the presumption in favour of the place of the

company's registered office was not a particularly strong one, just one of the factors to be taken into account with the whole of the evidence in reaching a conclusion as to the location of the COMI (see *Ci4net.com Inc.* [2005] B.C.C. 277). In most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the foreign proceeding has commenced is the debtor's centre of main interests. The factors are the location:

- (a) where the central administration of the debtor takes place, and
- (b) which is readily ascertainable by creditors. (See GEI, paragraph 145).

The foreign representative may next consider to:

- (i) commence a proceeding in Country B to recognise the foreign proceeding as the foreign non-main proceeding (pursuant to article 17(1)(a), (c), and (f) of the MLCBI);
- (ii) apply for collective interim relief prior to recognition in the courts of Country B of the foreign non-main proceeding in Country A (pursuant to article 19 of the MLCBI), e.g. under (a) staying execution against certain debtor assets within the territorial jurisdiction of Country B; (b) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of Country B to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and
- (iii) apply for any relief mentioned in paragraph 1 (c), (d) and (g) of article 21 of the MLCBI – thus the UK foreign representative here could consider requesting relief from the court in Country B under MLCBI article 21(1) (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20; (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and (g) any appropriate relief to grant any additional relief that may be available to the foreign representative under the domestic laws of Country B.

QUESTION 4 (fact-based application-type question) [15 marks in total] 15 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 above, the key filing strategy for Globe Holdings may involve the following steps:

- 1. Recognition of main or nonmain proceeding or both (in light of COMI / establishment analysis)**

1.1. **Main proceeding:** In light of the fact that Globe Holdings is incorporated and registered in the Cayman Islands, holds its board meetings (albeit) virtually (organised by its local Cayman counsel), maintains its books and records in the Cayman Islands, and has publicly disclosed its status as a Cayman Islands company in its SEC filings and prospectus, it appears that its COMI is in the Cayman Islands. Under article 16(3) of the MLCBI there is a rebuttable presumption that the place of the registered office of the debtor (here, presumably Cayman) is the place of its COMI. Globe Holdings has a bank account in the Cayman Islands from which it pays certain of its operating expenses, but opened that just a few days ago, we are told. At first blush, it would therefore appear to be appropriate to apply for recognition of a main proceeding in the Cayman Islands.

1.1.1. We further understand that Globe Holdings has decided to commence a scheme under Cayman Islands law (i.e., the "**Scheme**" or Restructuring Support Agreement, "**RSA**"), which is a formal procedure for restructuring its debts. This decision was made after consultations with its Cayman Islands counsel and other professionals and is supported by a simple majority of the Noteholders. The goal of the scheme is to extend the maturity of the Notes and obtain the flexibility to pay the quarterly interest "in kind". This approach is consistent with the expectations of its largest Noteholders, as reflected in the RSA.

1.1.2. In addition, on July 4, 2023, Globe Holdings applied to the Cayman Court for permission to convene a single scheme meeting, which was held on July 26, 2023. The purpose of the meeting was to consider and approve the Scheme. The Scheme was overwhelmingly supported by the Noteholders, with 91.83% in number and 99.34% in value voting in favour. This appears to be consistent with section 86(2) of the Companies Act (2022 Revision) (Cayman Islands) which requires the majority in number representing 75% in value of the creditors of each affected class of creditors to vote in favour of the scheme; and the scheme was sanctioned by the court. Following the Scheme Meeting, the Cayman Court entered a Sanction Order, which was filed with the Cayman Islands Registrar of Companies. This indicates that the Scheme has been formally approved and is now legally binding.

1.1.3. Conversely, in order to decide on a request for recognition of the US Chapter 15 foreign proceeding, the Cayman court will first need to assess (pursuant to article 17(1)(a), (c), and (f) of the MLCBI) whether the US proceeding (and the foreign representative) meet all the relevant required characteristics defined in article 2 of the MLCBI, and in particular, on our facts, consider (f) in relation to meaning of "*Establishment*" (i.e. *any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.*) in relation to Globe Holding's operations in the US.

1.1.4. The Cayman court is also entitled to rely on the presumptions in article 16(1). On the assumptions that both the US Chapter 15 foreign proceeding and foreign representative meet all the above required characteristics and that there are no grounds to invoke the public policy exception under article 6, and that also the application and court submission requirements set out in article 17(1)(c) and (d) of the MLCBI are met, the Cayman court will need to determine, pursuant to article 17(2)(a) of the MLCBI, that the US Chapter 15 foreign proceeding is to be recognized as a foreign non-main proceeding on the basis that it is taking place in the State where the debtor has an establishment.

1.2. **Non-main proceeding:** However, considering that all of Globe Holdings' business operations are carried out through its subsidiaries in the US that are all incorporated under the US laws and operating in the US; all employees are in the US; and that its headquarters (i.e., not its registered office) are also in New York in the US; it might also be beneficial to apply for recognition of a nonmain proceeding in the US. So, Globe Holdings could be afforded the additional protections and benefits under US law (with caveat that it may also expose it to the disadvantages that can come such recognition – more on this below).

- 1.2.1. On the facts, it would seem that Global Holdings' business operations in the US fulfil the requirement for the debtor to have an "establishment", defined in the Model Law in the same way as in the European Insolvency Regulation (EIR), namely "*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.*" The Judicial Perspective notes that "There is a legal issue as to whether the term "non-transitory" refers to duration of a relevant economic activity or to a specific location at which the activity is carried out" (at para 40), and on our facts we are only given an indication of location but not duration of US operations.
- 1.2.2. We also understand that following the commencement of the scheme in the Cayman Islands, Globe Holdings plans to initiate a Chapter 15 recognition proceeding in the US. This procedure under US bankruptcy law provides assistance to foreign insolvency proceedings as well as providing additional protections and benefits under US law and may impact on the success of the implementation of the restructuring plan.
- 1.2.3. In order to rule on a request for recognition of the Cayman foreign main proceeding, the US court will first need to assess (pursuant to article 17(1)(a) and (b) of the MLCBI) whether the Cayman Scheme proceeding (and the foreign representative) meet all the required characteristics defined in article 2.
- 1.2.4. The US court is also entitled to rely on the presumptions in article 16(1) – (3) of the MLCBI, especially that (3) in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.
- 1.2.5. On the assumptions that both the Cayman Scheme foreign proceeding and foreign representative meet all the above required characteristics and that there are no grounds to invoke the public policy exception under article 6 of the MLCBI (in the absence of public policy grounds to deny a request for recognition, such request made before the competent US court shall be granted as a matter of course (pursuant to article 4, if the requirement set out in article 15(2) of the MLCBI are met), and that also the application and court submission requirements set out in article 17(1)(c) and (d) of the MLCBI are met, the US court will need to determine, pursuant to article 17(2)(a) of the MLCBI, that the Cayman Scheme foreign proceeding is to be recognized as a foreign main proceeding on the basis that it is taking place in the State where the debtor has the centre of its main interests.
- 1.2.6. However, it must be noted, that as Global Holdings is financial service holding company for a number of direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States, it may fall under the article 1(2) of the MLCBI exclusions. Specifically, under that article, the US would be permitted to exclude certain proceedings from the application of the MLCBI, including insurance companies (and banks) which are noted as examples of entities that are subject to a special insolvency regime in the enacting State; on this, the UNCITRAL Guide to Enactment states at para 56:
- "... The reason for the exclusion would typically be that the insolvency of such entities gives rise to the particular need to protect vital interests of a large number of individuals or that the insolvency of those entities usually requires particularly prompt and circumspect action (for instance to avoid massive withdrawals of deposits). For those reasons, the insolvency of such types of entity is administered in many States under a special regulatory regime."*

2. What papers need to be submitted

- 2.1. The papers that need to be submitted on behalf of Globe Holdings in compliance with Article 15 of the MLCBI would include a petition or application for recognition of foreign (main or nonmain) proceeding.

- 2.2. Pursuant to article 15(2) of the MLCBI, such an application for recognition will need to be accompanied by:
- a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative [subject to the presumption in article 16 of the MLCBI) – For the US recognition, Global Holdings would include information about 57% of the Noteholders acceded to the RSA governed by the New York law and the agreed-upon terms of the Note Restructuring which the RSA memorialised; and also include the information that 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; or
 - b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative – Global Holdings could submit to the US court that a Sanction Hearing was held, and submit the order sanctioning the Scheme (the "**Sanction Order**") filed with the Cayman Islands Registrar of Companies; or
 - c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.
- 2.3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative evidence of the existence of the foreign proceeding (such as a certified copy of the decision commencing the foreign proceeding), and a statement identifying all foreign proceedings known to the petitioner. (Article 15(2) of the MLCBI).

3. **What relief should be requested on day one of the filing**

- 3.1. On day one of the filing, Globe Holdings could request relief that includes a stay of execution against its assets, suspension of the right to transfer or encumber its assets, and provision of notice to creditors. In light of the company's financial situation, it might also be beneficial to request additional relief such as authority to use cash collateral,¹ approval of post-petition financing, or authority to pay certain pre-petition claims.
- 3.2. It is noted that a class action litigation in the US is brewing but has not been filed yet. This could potentially impact the restructuring process, depending on the nature of the claims and the timing of the litigation. Globe Holdings would be best advised to monitor this situation closely and be prepared to address any legal challenges that may arise.
- 3.3. If the COMI of Global Holdings is in Cayman, then the foreign insolvency proceedings, i.e., Cayman the Scheme, which have been filed/opened in that jurisdiction, will likely determined to be the main foreign proceedings with automatic mandatory relief (under article 20 of the MLCBI). The three automatic reliefs available as per article 20, paragraph 1(a) to (c) are:
- (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
 - (b) Execution against the debtor's assets is stayed; and
 - (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
- 3.3.1. As Global Holdings has an establishment in the US, Chapter 15 proceedings filed in that jurisdiction are most likely determined to be non-main proceedings without automatic relief, but only discretionary post-recognition relief granted by the court (pursuant to article 21 of the MLCBI). Upon recognition of the foreign proceedings (irrespective of whether these are main (i.e., Cayman) or non-main, article 21(1) of the MLCBI provides the US court with the discretionary power where necessary to protect the assets of the debtor or the interest of the creditors and at the request of the foreign representative to grant appropriate relief.

¹ Cf. IRJ Guide to Enactment, Part 2, paras 57-62.

3.3.2. Other consequences of recognition in the US court include also the following:

- 3.3.2.1. pursuant to article 23 of the MLCBI, that the foreign representative obtains standing to initiate actions under the law of the enacting State to avoid or otherwise render ineffective the legal acts detrimental to the creditors of the debtor (i.e., claw-back rights and the power to avoid antecedent transactions); and
- 3.3.2.2. pursuant to article 24 of the MLCBI, the right of the foreign representative to intervene in local proceedings in the enacting State in which the debtor is a party, provided the foreign representative meets the local requirements in the US.

3.3.3. Article 18 of the MLCBI requires foreign representatives from the time of filing the recognition application in the US for the foreign proceeding, to promptly inform the court in the enacting State of (a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

4. Other consequences and risks recognition of insolvency proceedings

- 4.1. Under US Bankruptcy Code Chapter 15, para 1509 (b)(1)), if the US court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter— (1) the foreign representative has the capacity to sue and be sued in a court in the United States. Therefore, the Global Holdings' appointed insolvency practitioner could be sued in the US court and served with discovery in connection with, for example, its suspension from the NASDAQ Stock Market due to delinquencies in filing its 10-K and subsequent delisting delisted from the NASDAQ Stock Market, once they commence a recognition proceeding in the US.
- 4.2. US Bankruptcy Code, 11 U.S.C. para 1509 (e), provides that subject to article 10, a foreign representative is subject to applicable non-bankruptcy law and must therefore comply with court orders. Hence Global Holdings and/or its Cayman representatives could face similar non-bankruptcy sanctions from the US court in relation to any prospective class action litigation brewing in the US.
- 4.3. Pursuant to article 18 of the MLCBI, Global Holdings Cayman foreign representatives, have an ongoing obligation from the time of filing the recognition application for the foreign proceeding in the US, to promptly inform the court in the enacting State of (a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative. The UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (Updated 2022) (the "**Judicial Perspective**") (at page 18, paragraph 45) also emphasizes that "*the foreign representative has a continuing duty of disclosure. They must inform the receiving court promptly of any substantial change in the status of the recognized foreign proceeding or of their appointment and any other foreign proceeding regarding the same debtor of which the foreign representative becomes aware.*"; and notes that more generally, the English court in *OGX Petroleo e Gas S.A.* [2016] EWHC 25 (Ch), CLOUT 1622, recognized that since many applications for recognition are made on an *ex parte* basis, there must be full and frank disclosure to the court in all respects.

**Excellent! Very well-written essay, and very well structured.
(note: this comment is valid for the entirety of your submission)**

*** End of Assessment ***

Marks awarded: 48 out of 50. (Congratulations!)