INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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] 7 marks

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

Question 1.1

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

(a) World Trade Organization.

(b) The United Nations Commission on International Trade Law.

(c) The United Nations Conference on Trade and Development.

Question 1.2

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

(i) Rise of corporations.

(ii) Internationalisation.

(iii) Globalization.

(iv) Universalism.

(v) Territorialism.

(vi) Technological advances.

Choose the correct answer:

(a) Options (i), (ii), (iii), (iv) and (vi).

(b) Options (i), (ii), (iii) and (iv).

(c) Options (ii), (iii), (iv) and (vi).

(d) All of the above.

Question 1.3

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

(i) It is legislation that imposes a mandatory reciprocity on the participating members.

(ii) It is a legislative text that serves as a recommendation for incorporation in national laws.

(iii) It is intended to substantively unify the insolvency laws of the foreign nations.

(iv) It is a treaty that is binding on the participating members.

Choose the correct answer:

(a) Options (ii), (iii) and (iv).

(b) Options (i), (ii) and (iv).

(c) Options (i), (iii) and (iv).

(d) All of the above are incorrect.

Question 1.4

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

(i) To provide greater legal certainty for trade and investment.

(ii) To provide protection and maximization of value of the debtor's assets.

(iii) To provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtors.

(iv) To facilitate the rescue of financial troubled businesses.

(v) To ensure substantive unification of insolvency laws of member-states.

Choose the correct answer:

(a) Options (i), (ii), (iii) and (iv).

(b) Options (ii), (iii) and (v).

(c) Options (ii), (iv) and (v).

(d) None of the above.

Question 1.5

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

(i) An insolvency proceeding is commenced in jurisdiction A, but a significant asset is located outside of jurisdiction A.

(ii) An insolvency proceeding is commenced in jurisdiction A and immediately transferred to a foreign jurisdiction B.

(iii) An insolvency proceeding is commenced in jurisdiction A, in which a group of affiliated debtors has its COMI as well as all assets and liabilities.

(iv) An insolvency proceeding is commenced in jurisdiction A, but certain liabilities are governed by laws of a foreign jurisdiction B.

(v) An insolvency proceeding is commenced in jurisdiction A, but all *de minimis* assets are located in foreign jurisdictions.

Choose the correct answer:

(a) Options (i) and (ii).

(b) Options (ii) and (iii).

(c) Options (iii) and (v).

(d) Options (i) and (v).

Question 1.6

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

(a) Binding within jurisdiction B.

(b) Binding within jurisdiction B, but certain actions need to be taken.

(c) No effect within jurisdiction B.

(d) Likely no effect within jurisdiction B.

(e) Not enough facts provided to arrive at a conclusion.

Question 1.7

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

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

(ii) The difficulty of agreeing multilateral treaties dealing with insolvency law.

(iii) To eradicate the use of comity.

(iv) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

Choose the correct answer:

(a) Options (i), (ii) and (iii).

(b) Options (i), (ii) and (iv).

(c) Options (ii), (iii) and (iv).

(d) All of the above.

Question 1.8

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

(i) COMI is a well-defined term in the MLCBI.

(ii) COMI stands for comity.

(iii) The debtor's registered office is irrelevant for purposes of determining COMI.

(iv) COMI is being tested as of the date of the petition for recognition.

Choose the correct answer:

(a) Options (i), (ii) and (iii).

(b) Options (ii), (iii) and (iv).

(c) All of the above.

(d) None of the above.

Question 1.9

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

(i) Foreign main proceeding.

(ii) Foreign non-main proceeding.

(iii) Plenary domestic insolvency proceeding.

Choose the correct answer:

(a) Options (ii), (i) and then (iii).

(b) Options (i), (ii) and then (iii).

(c) Options (iii), (i) and then (ii).

(d) Options (iii), (ii) and then (i).

Question 1.10

Which of the statements below are correct under the MLCBI?

(a) The foreign representative always has the powers to bring avoidance actions.

(b) The hotchpot rule prioritises local creditors.

(c) The recognition of a foreign main proceeding is an absolute proof that the debtor is insolvent.

(d) None of the above are correct.

QUESTION 2 (direct questions) [10 marks in total] 10 marks

Question 2.1 [maximum 3 marks] 3 marks

What is the key distinction between the application of the MLCBI and the European Union (EU) Regulation on insolvency proceedings? Also describe one key benefit and disadvantage of each approach.

> The MLCBI is not a treaty, but is only a recommendation for states to incorporate into their domestic legislation voluntarily. The advantage of this approach is that the content of the MLCBI could be crafted relatively quickly by a working group of experts. The MLCBI was adopted in 1997, only 3 years after UNCITRAL and INSOL first held a colloquium expressing support for the project in 1994. The disadvantage is that the success of the MLCBI depends to a large extent on whether states ultimately choose to adopt it in their legislation.
>
> On the other hand, the EU Regulation is akin to a treaty binding on all EU member states – its provisions directly become the domestic law of each EU member state. The advantage of this approach is that it has binding effect on all member states and is therefore immediately effective, in this case across the EU. The disadvantage is that the regulation took a very long time to be adopted – the EU Regulation was only adopted in 2000 after almost 40 years of efforts to establish a similar framework for insolvency proceedings in Europe.

Question 2.2 [maximum 2 marks] 2 marks

Explain what the court should primarily consider using its discretionary power to grant post-recognition relief under Article 21 of the MLCBI.

> The court must strike a balance between the relief that may be granted to the foreign representative and the interests of persons who may be affected by such relief. Under Article 22 of the MLCBI, such persons include creditors and other interested persons, including the debtor.

Under Article 21(3), where the court is considering whether to grant relief to a representative of a foreign non-main proceeding, the court must also be satisfied that the relief relates to property that, under the law of the enacting state, should be administered in the foreign non-main proceeding

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 local 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. It also ensures that the claims of foreign creditors shall not be ranked lower than general unsecured claims solely because the holder of the claim is 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?

The key distinction is that under Article 20 of the MLCBI, the recognition of a foreign main proceeding will trigger the following *automatic* relief:

(a) A stay on commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities.
(b) A stay of execution against the debtor's assets.
(c) A suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

On the other hand, there is no automatic relief upon the recognition of a foreign non-main proceeding. The foreign representative will have to seek relief on a discretionary basis under Article 21 of the MLCBI. The court's relief may only relate to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding.

Futhermore, where there are concurrent foreign main and foreign non-main proceedings, primacy is accorded to the foreign main proceeding. Any relief granted to the foreign non-main proceeding must be consistent with that granted to the foreign 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.

The foreign main proceeding must have been filed in Germany. Under Article 2(*b*) of the MLCBI, a foreign main proceeding is one which takes place in the state where

the debtor has the centre of its main interests (COMI). Since the debtor's COMI is in Germany, the foreign main proceedings can only be in Germany.

Conversely, this means that the foreign non-main proceedings must have been filed in Bermuda. Under Article 2(*c*) of the MLCBI, a foreign non-main proceeding is a proceeding other than a foreign main proceeding which takes place in a state where the debtor has an establishment. In this case, the debtor has an establishment in Bermuda.

The US has adopted the MLCBI. Assuming that the German and Bermuda proceedings are foreign proceedings under within the meaning of Article 2(*a*) of the MLCBI, the foreign representative of each proceeding is a person or body within the meaning of Article 2(*d*), and the application satisfies the requirements in Article 17(*c*) and (*d*), it is likely that both proceedings will be recognised in the US pursuant to Article 17 of the MLCBI.

Question 3.2 [maximum 3 marks] 3 marks

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

The joint provisional liquidators may be able to avail themselves of the immunity granted under Art 10 of the MLCBI, which is also known as the safe conduct rule. Under Art 10, the sole fact that an application is made under the MLCBI to a court in the state by a foreign representative does not subject that foreign representative (or the debtor's foreign assets and affairs) to the jurisdiction of the state for any other purpose. This protection has been reiterated in the US case of *In re Lloyd (Les Mutuelles du Mans Assurances IARD, United Kingdom Branch)* case No. 05-60100 (Bankr. S.D.N.Y. Dec. 7, 2005), CLOUT 788. On this basis, the joint provisional liquidators will likely be able to claim immunity to the lawsuit on the basis that the US courts do not have jurisdiction over them for any purpose other than the recognition proceeding.

Alternatively, if the foreign proceeding is recognised in the US, the joint provisional liquidators may be able to seek a stay of the lawsuit against them as an appropriate relief under Art 21 of the MLCBI. Such a stay may be granted on the ground that the lawsuit will interfere with the administration of the proceedings by the liquidators, such that the stay is necessary to protect the interests of all creditors.

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?

In this case, the foreign representative will have to take steps to ensure that the counterparties to the US-governed leases and intellectual property licences do not

attempt to terminate those leases and licences. These are likely to constitute valuable assets of the debtor.

Since the proceedings are still at a pre-recognition stage, the foreign representative should apply for provisional relief under Art 19 of the MLCBI. Under Art 19, such relief may be granted where it is urgently needed to protect the assets of the debtor or the interests of the creditors.

Specifically, the foreign representative may apply to the US court for an injunction to restrain the counterparties from relying on the *ipso facto* clauses to terminate the leases and licences. This may be sought under Art 19(1)(c) read with Art 21(1)(g) of the MLCBI, which allows the foreign representative to seek any additional relief that may be available under the laws of the state. Since *ipso facto* clauses are unenforceable under the US Bankruptcy Code, it should be within the US court's powers to restrain parties from relying on such clauses.

Once the proceedings are recognised in the US, the provisional injunction will terminate pursuant to Art 19(3) of the MLCBI. The foreign representative should therefore also apply to extend this injunction against termination under Art 21(1)(f) of the MLCBI.

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?

Even if the foreign proceeding is not recognised as a foreign main proceeding, it may be recognised as a foreign non-main proceeding. The foreign representative should therefore immediately apply for the proceeding to be recognised as a foreign non-main proceeding. Once it is recognised, the foreign representative may apply for discretionary relief under Art 21 of the MLCBI, in particular an order that the foreign representative be entrusted with the administration or realization of the debtor's assets located in Country B pursuant to Art 21(1)(e).

At the outset of the recognition application, the foreign representative should have requested under Art 19(1)(b) of the MLCBI to be entrusted with the administration or realization of the debtor's assets in order to preserve and protect the value of those assets. In the course of its application, the foreign representative should also have raised the presumption in Art 16(3) that the debtor's registered office was presumed to be the centre of its main interests. If this was done, the court in Country B would likely have had to recognise the foreign proceedings as foreign main proceedings pursuant to Art 17(2)(a) of the MLCBI.

QUESTION 4 (fact-based application-type question) [15 marks in total] 13 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.

Since the Cayman Scheme has already been approved by the Noteholders and sanctioned by the Cayman Court, the primary goal should be for the Scheme to be recognized in the US so that Globe Holdings obtain reliefs to protect its position in the US.

Firstly, Globe Holdings will have to appoint a person or body to act as its foreign representative before the US courts. Pursuant to Art 2(d) of the MLCBI, this person or body will have to be authorized to administer the Cayman Scheme or to act as a representative of the scheme.

Globe Holdings' foreign representative must then commence recognition proceedings under Chapter 15 of the US Bankruptcy Code, which implements the MLCBI in the US. The foreign representative should apply for the Scheme to be recognized as a main proceeding, and alternatively as a non-main proceeding. Recognition as a main proceeding should be sought first because such recognition will trigger automatic reliefs under Art 20 of the MLCBI, specifically (a) a stay on commencement or continuation of individual actions or individual proceedings concerning Globe Holdings' assets, rights, obligations or liabilities; (b) a stay on execution against Globe Holdings' assets; and (c) a suspension of any right to transfer, encumber or otherwise dispose of any assets of Globe Holdings. In this case, relief (a) would apply to stay the commencement of the class action litigation in the US and relief (c) will suspend any disposal in relation to Globe Holdings' New York corporate headquarters.

In order for the Scheme to be recognized as a foreign main proceeding, the foreign representative will have to show that the Cayman Islands is where Globe Holdings has the centre of its main interests ("COMI") (Art 17(2)(a)). To persuade the US court that the COMI of Globe Holdings is in the Cayman Islands, the foreign representative should raise the

presumption in Art 16(3) of the MLCBI that Globe Holdings' COMI is in the jurisdiction of its registered office *ie* the Cayman Islands. Other factors which Globe Holdings can raise are as follows:

(1) Its books and records are in the Cayman Islands.
(2) Its public filings with the SEC and and the prospectus in the Notes expressly state that it is a Cayman Islands company, such that the Cayman Island would likely be readily ascertainable by creditors as its COMI.
(3) It has a bank account in the Cayman Islands which it uses to pay certain operating expenses.
(4) Its board meetings are organised by Cayman counsel.

However, there are significant factors which would weigh against a finding that Globe Holdings' COMI is in the Cayman Islands:

(1) Its corporate headquarters is located in New York.
(2) Its business is carried out through US-incorporated subsidiaries which operate in the US and all their employees are in the US.
(3) The Cayman Islands bank account was opened only shortly before the applications.
(4) Its board meetings cannot be said to be held in the Cayman Islands since they are held virtually.
(5) The Notes are governed by New York law.

Therefore, there is a possibility that the US court will refuse to recognize the Scheme as a foreign main proceeding. It is therefore advisable that the foreign representative apply in the alternative for recognition as a non-main proceeding. All that is required for this is that Globe Holdings has an establishment in the Cayman Islands (Art 15(2)(b)). Under Art 2(f) of the MLCBI, an establishment is defined as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. It is likely that Globe Holdings can show that it has an establishment in the Cayman Islands especially since it retains Cayman counsel to organize its board meetings and uses its Cayman bank account to pay operating expenses.

Even if Scheme is recognized only as a foreign non-main proceeding, the foreign representative can apply under Arts 21(1)(a), (b) and (c) of the MLCBI for the same relief which would otherwise be granted automatically under Art 20 of the MLCBI if it was a foreign main proceeding. Under Art 21, such relief may be granted by the court where it is necessary to protect the assets of Globe Holdings and the interests of creditors. The foreign representative can show that these reliefs are necessary by raising evidence of the efforts to market the sale of its corporate headquarters and the US class action litigation.

Under Art 15(2) and (3) of the MLCBI, the papers which will need to be submitted are as follows:

(1) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or, in the absence of the aforementioned evidence, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative (Art 15(2)).
(2) A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative (Art 15(3)).

While there will also be a need to provide an English translation of documents for the recognition application in the US under Art 15(4), this will not likely be required since the documents in the Cayman Scheme are likely to be in English as well.

On day one of the recognition application, the foreign representative should apply for all the reliefs discussed above on a provisional basis pursuant to Art 19 of the MLCBI. Under Art 19, the court may grant such relief where it is urgently needed to protect the assets of the debtor or the interests of the creditors. Such relief may be granted provisionally before the Scheme is recognized in the US.

Very good essay! Clear and concise. However requires mention of Art. 6 and 22 MLCBI and definitions of COMI, FNP, etc.. with respective references for full marks.

*** End of Assessment ***

Marks awarded: 45 out of 50 (Congratulations!)