



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.**
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- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2024** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).

ANSWER ALL THE QUESTIONS

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

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

Question 2.1 [maximum 3 marks] 1 mark

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

The key distinction between the application of the MLCBI and the EU Regulation on insolvency proceedings (“EIR”) is the mechanism in which they are adopted into a country’s laws. The EIR was adopted by the European Council as an EU Regulation. This means that following its adoption by the European Council, it directly becomes part of each EU Member State’s domestic law. It then functions as a framework through which insolvency proceedings happening in any of the EU Member State could be recognised and is enforceable throughout the EU.

In contrast, for the MLCBI to be adopted, each enacting State would need to individually adopt and accept it as part of the national laws. For example, Singapore adopted the MLCBI by way of amendments into its national law in 2017 (when the amendments came into force). The MLCBI is now found in Singapore’s Insolvency, Dissolution and Restructuring Act 2018 (2020 rev ed), in the Third Schedule. Foreign representatives seeking to utilise the provisions of the MLCBI can only do so in jurisdictions which have adopted the MLCBI into domestic law.

The response should include statements on benefits and drawbacks of each.

Question 2.2 [maximum 2 marks] 2 marks

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

The court should be satisfied that the interests of the creditors as well as other interested parties are adequately protected. It is for this purpose that the court is given the power to provide relief subject to conditions which it considers appropriate under Article 22. The court also has the option of modifying or terminating such relief upon application of the foreign representative or a person affected by such relief under Article 21.

For instance, in granting such post-recognition relief under Article 21 of the MLCBI, the court needs to be satisfied that the relief relates to property or assets, that under the law of the country, should be administered in a foreign non-main proceeding, or concerns information for that proceeding. In other words, any relief that is granted by the court should not interfere with the administration of other insolvency proceedings, especially the main proceeding.

Moreover, with respect to the handing over of all or part of the debtor's assets in-country to the foreign representative (pursuant to paragraph 2 of Art 21), the court needs to be satisfied that the interests of local creditors are adequately protected.

Question 2.3 [2 marks] 2 marks

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

Article 13 provides foreign creditors with the same rights as local creditors in the enacting State in connection with their commencement of and participation in local proceedings pursuant to the enacting State's insolvency laws. Article 13 further provides that this access does not affect the ranking of claims in a proceeding under the enacting State's insolvency laws, except that the claims of a foreign creditor are not to be given a lower priority than that of the claims of generally unsecured creditors on the sole basis of the holder of such a claim being 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 main distinction with respect to the relief available in foreign main versus foreign non-main proceedings is that there is automatic relief granted when a foreign main proceeding is recognised, pursuant to Article 20. Article 20, which only applies to foreign main proceedings, provides that upon recognition of a foreign main proceeding, three automatic effects take place. (1) The commencement or continuation of individual proceedings or individual actions concerning the debtor's property rights, obligations or liabilities is stayed. (2) Execution against the debtor's property is stayed. (3) The right to transfer, encumber or otherwise dispose of any property of the debtor is suspended.

In contrast, there is no automatic relief for foreign non-main proceedings, and an application would have to be made to the court for the appropriate relief pursuant to Article 21. Foreign representatives may also make an application for relief under Article 21. Such relief under Article 21 includes the relief found in Article 20 (as previously mentioned), and other reliefs like the provision for the examination of witnesses, the extension of any interim relief granted

pursuant to Article 19, and additional reliefs that may be available to a domestic liquidator or office holder under the enacting State's laws.

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

Question 3.1 [maximum 4 marks] 2 marks

A debtor has its COMI in Germany and an establishment in Bermuda, and both foreign main and foreign non-main proceedings as well as the recognition proceedings in the US have been opened. In this scenario, explain where the foreign proceedings must have been filed, and the likely result.

Since both foreign main and non-main proceedings have been opened, in this scenario, given that the debtor's COMI is in Germany, the foreign main proceeding must have been filed in Germany. Since the debtor has an establishment in Bermuda, a foreign non-main proceeding must have been filed in Bermuda.

Assuming the MLCBI has been adopted in the US state where recognition proceedings have been opened (since the MLCBI does not appear to form part of federal law in the US and remains applicable in only some states), it is likely that primacy will be given to the foreign main proceeding in Germany. Both foreign main and non-main proceedings are likely to be recognised. Since there would be concurrent foreign main and non-main proceedings, the guiding principle would then be that any relief granted to a representative of the foreign non-main proceeding must be consistent with the foreign main proceeding. This is pursuant to Article 30, and would apply whether the foreign main proceeding was recognised before or after the foreign non-main proceeding.

For a full mark, reference should be made to definitional and procedural Articles (eg. Art.2, 15, 17, as well as 6) to substantiate the likely result.

Question 3.2 [maximum 3 marks] 0 mark

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

As a starting point, the US case of *United States: Massa Falida Do Ban Cruzeiro Do Sul S.A., 567 B.R. 212* that relates to Article 9 suggests that following recognition under Article 17, the foreign representative would have the capacity to sue or be sued under Article 9. This means that whilst it is unclear whether the Joint provisional liquidators would have the capacity to be sued under US law initially, once the courts have granted recognition, it is likely that they can be sued.

Moreover, it is my view that in the interim, while recognition proceedings are ongoing, the joint provisional liquidators can rely on Article 19 to make an application to the court for interim relief from the lawsuit (by the US-based vendors of the foreign debtor) on the grounds that it would be in the interests of the creditors for such relief to be granted. Article 19(1)(c) read with Article 21(1)(g) would be applicable, assuming that US law provides for such reliefs.

After recognition has been granted by the US courts, the joint provisional liquidators should note that unless extended, such interim relief would terminate when the application for recognition is

decided on, per Article 19(2). They would then have to make another application for relief under Article 21(1)(g), assuming that US law provides for such reliefs.

The answer should have been based on Art.10 MLCBI

Question 3.3 [maximum 4 marks] 4 marks

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

Given the fact that there is currently no litigation pending or threatened against the foreign debtor, and given that the *ipso facto* clauses for the US-governed leases and intellectual property licenses are not enforceable under the US Bankruptcy Code, the foreign representative does not need to take any steps during this 35 day period to protect and assets. In particular, there is no need for the foreign representative to apply for interim relief after having commenced the recognition proceedings in the US, pursuant to Article 19 of the MLCBI. This is because Article 19 provides that for the court to grant interim relief to a foreign representative upon application for recognition of a foreign proceeding, the relief must be urgently needed to protect the property of the debtor or the interests of the creditors. On the facts, since there does not appear to be any urgent need to protect the property of the debtor or the interests of the creditors, there is thus no reason for the court to grant interim relief.

However, the foreign representative should continue to be alive to threats against such property of the company. If a material threat or risk eventuates against the US-governed leases and intellectual property licenses, e.g. litigation is commenced against these assets, the foreign representative would then have an option to apply for interim relief under Article 19.

For completeness, if the foreign proceedings are recognised as a foreign main proceeding, the automatic relief under Article 20 will apply to stay execution against the debtor's property. In this sense, the assets of the debtor would be protected. In the event that the foreign proceedings are recognised as a foreign non-main proceeding, the foreign representative has the option of applying for relief (such as the staying to execution against the debtor's property) under Article 21. This can be done if any threat towards the debtor's assets arises.

Question 3.4 [maximum 4 marks] 3 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?

Since the insolvency court has already denied the petition for recognition of the foreign proceeding as a foreign main proceeding, it is important for the foreign representative to bring an

application for recognition as a foreign non-main proceeding. This is because it is only if the foreign proceeding in Country A is recognised (whether as a main or non-main proceeding), will the courts in Country B be able to grant relief to the foreign representative (assuming the national laws of Country B do not provide for this). In this case, it is likely that the foreign representative will want the court to order relief in the form of entrusting the administration or realisation of the certain assets located within the territorial jurisdiction of Country B. The foreign representative will be able to do so only if the proceedings in Country A are now recognised as a foreign non-main proceeding.

The foreign representative should have applied for recognition of Country A's proceedings as a foreign non-main proceeding from the start. This is because the COMI does not appear to be in Country A. Although Country A is where the foreign debtor has its registered office, there is not much more going on in Country A. This suggests that the COMI of the foreign debtor is instead in another country. Therefore, it would have been much more appropriate for an application to have been brought to recognise the debtor's Country A proceedings as a foreign non-main proceeding. In any event, the foreign representative, in the original failed application, could have also applied for recognition of Country A's proceedings as a foreign non-main proceeding in the alternative.

The full answer should refer to COMI presumption Art. 16 and procedural articles of MLCBI.

QUESTION 4 (fact-based application-type question) [15 marks in total] 12 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.

Given that the Scheme was sanctioned by the Cayman Court, and the Sanction Order made, the next step is to get this proceeding recognition in the US in order to make available to Globe Holdings the various reliefs. The reliefs which could be obtained include the staying of the commencement or continuation of individual actions or individual proceedings against Globe Holding's property, rights, obligations or liabilities (on the assumption that this would translate to the stay of any potential class-action lawsuits in the US). This would be important to ensure the success of the Scheme, in light of the class action litigation in the US which is brewing, but has not been filed yet.

To begin with, the Chapter 15 recognition proceedings in the US which Cayman counsel has recommended is essentially similar to recognition proceedings under the MLCBI. Chapter 15 is the US's codification and adoption of the MLCBI.

The first step is to decide whether to apply for recognition of main or non-main proceedings or both in the US. This pertains to the COMI of Globe Holdings. I am of the view that it would be most prudent to apply for recognition of the Scheme both as a main proceeding, or in the alternative, as a non-main proceeding in the US. This is because from the facts, although there are favorable facts which point towards the Cayman Islands Scheme being a foreign main proceeding, there are other unfavorable facts which suggest that the Cayman Islands Scheme is not a foreign main proceeding, but rather a foreign non-main proceeding.

With respect to the former, the facts which are favorable to the Cayman Islands being Globe Holding's COMI include: (1) that Globe Holdings is registered and incorporated in the Cayman Islands; (2) it retains Cayman Island counsel Cedar and Woods; (3) it has a Cayman Island bank account from which it pays certain of its operating expenses – although this is most likely to be given minimal weight because the bank account is newly opened; (4) all regular and special board meetings have been organized by Cayman counsel virtually; (5) Globe Holdings maintains its books and records in the Cayman Islands; (6) its public prospectus disclosed that it is a Cayman Islands company, with the explanation of the related indemnity and tax consequences; and (7) the Scheme being conducted in the Cayman Islands.

There are many unfavorable facts to the Cayman Islands being Globe Holding's COMI as well, which include: (1) Globe Holdings having no business operations of its own, with its business being carried out through its non-insurance company non-debtor subsidiaries that are all incorporated under US law and operating in the US; (2) all the employees are in the US; (3) the headquarters are in the US; (4) the Notes are governed by New York law; and (5) its shares were listed on the NASDAQ stock market before being delisted for delinquencies in its filings.

In the circumstances, it appears that there is an equally strong case to be mounted that the US, and not the Cayman Islands, is the COMI of Globe Holdings. If the court finds that the COMI of Globe Holdings is not in the Cayman Islands, any application for the Scheme to be recognised as a foreign main proceeding would fail. Therefore, in the interests of expediency, and to reduce the risks associated with a failed recognition application, it would be best for an application to be brought in the alternative for Globe Holdings to be recognised as a foreign non-main proceeding, if the court finds its COMI to be outside the Cayman Islands. Based on the favorable factors mentioned above, it is likely that Globe Holdings will be found to have an "establishment" within the context of the MLCBI, as per Articles 2 and 17. The factors listed above make it clear that at the very least, Globe Holdings has a place of operation where it carries out non-transitory economic activity.

If the Scheme is successfully recognised as a foreign main proceeding by the US courts, this means that there will be automatic relief pursuant to Article 20. Otherwise, if the Scheme is successfully recognised as a foreign non-main proceeding, this means that the foreign representative can then

apply for relief under Article 21. As mentioned previously, for the purposes of the present case, the relevant relief would be the staying of the commencement or continuation of individual actions or individual proceedings containing Globe Holding's property, rights, obligations or liabilities (on the assumption that this applies to the brewing class-action lawsuit in the US). This is in light of the class action litigation in the US that is brewing, but is not yet filed.

For completeness, and if Globe Holdings needs to deal with other situations which may arise in the US, the automatic relief under Article 20 also includes the staying of execution against Globe Holding's property, as well as the suspension of right to transfer, encumber or otherwise dispose of any of its property. An application can be made for these reliefs under Article 21 as well. Additionally, as long as the Scheme is recognised as a foreign proceeding (either main or non-main), the foreign representative can apply for other reliefs such as:

- (1) Providing for the examination of witnesses;
- (2) Entrusting the administration or realization of all or part of Globe Holding's property located in the US to the foreign representative; and
- (3) The granting of any additional relief that may be available in US insolvency law.

Globe Holdings can thus apply for the relevant reliefs it needs, based on further threats to the Scheme which might emerge in the US.

As for what papers need to be submitted, Article 15 provides that an application for recognition shall be accompanied by:

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

The recognition application needs to be accompanied by a statement identifying all foreign proceedings in respect of Globe Holdings that are known to the foreign representative.

On day one of the filing, the foreign representative should apply for interim relief pursuant to Article 19, on the basis that the relief is urgently needed to protect the interests of the creditors, vis-à-vis ensuring the success of the Scheme. This is in the light of the class action litigation in the US which is brewing but which has not been filed yet. Specifically, the foreign representative should apply for interim relief in the form of the grant of any additional relief that may be available to a domestic liquidator or officeholder under the laws of the enacting State – which is one of the post-recognition reliefs provided for in Article 21. Such additional relief should be for a stay of any class-action lawsuit against Globe Holdings or any of its direct or indirect US subsidiaries.

The full answer should contain specific references to definitions and respective articles/subs, and importantly, the rebuttable presumption of COMI (Art.16 MLCBI). Also reference is needed for procedural aspects eg. Public Policy. Otherwise, good application on the facts of the case.

*** End of Assessment ***

Marks awarded: 36 out of 50