



**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] 9 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.

MLCBI does not substantively unify the insolvency laws of states whereas the European Insolvency Regulation (EIR), when adopted, becomes part of the states domestic law and as such each EU Member state has the same unified insolvency laws. MLCBI is only a recommendation, not a convention, and can therefore be considered as an example of “soft law” whereas the EIR is enforceable when adopted and as such considered to be an example of “hard law”.

MLCBI and the European Union Regulation each have their own key benefits and disadvantages. MLCBI has been developed to be globally applicable as it has the benefit of being flexible to existing legal systems as the Model is a structure which can be adapted and tailored to suit each jurisdiction. In the same light, this leads to a potential lack of an enforcement mechanism as each jurisdiction, which may tailor the Model Law, could have different procedures/ viewpoints when it comes to liquidation proceedings. The European Union regulation on the other hand has the benefit of being a unified legal framework which can streamline liquidation proceedings between jurisdictions, as all jurisdictions which adopt this model would have the same guidelines to follow. The disadvantage of the European Union Regulation is that the model is only applicable within the European Union. Given the high level of globalization in the corporate environment, there may be limitation on liquidation proceedings which have jurisdiction in European Union as well as other jurisdictions internationally.

**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 relief available in Article 21(1) of the MLCBI is not an exhausted list of possible relief, as such the court has a level of discretionary power when granting relief. The court should ensure the interests of local creditors are adequately protected as well as the broader protection of article 22(1) which clarifies that the court in the enacting state should ensure the debtor's creditors and other interested parties are adequate protected when granting relief based on Article 21 of the MLCBI.

Given the discretionary nature of the post- recognition relief in Article 21 of the MLCBI, any foreign representative or affected person may request modification or termination of relief which has been provided under Article 21.

**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 is an anti-discrimination principle which clarifies that foreign creditors would have the same rights as local creditors within the enacting states jurisdiction when it comes to commencement and participation of insolvency proceedings. Article 13 further clarifies that access granted under this article does not affect the overall ranking of claims within the enacting state, except with the proviso that the claim of a foreign creditor can not have a lower priority than that of a general unsecured claim on the sole basis that the holder 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 distinction with respect to relief available in foreign main proceedings vs non-main proceedings, is clearly defined in Article 20, which states the automatic relief when a foreign main proceeding is recognised. There are three automatic effects when foreign main proceedings are recognised which are not automatically affected with foreign non-main proceedings:

1. A stay of the commencement or continuation of individual actions or proceedings concerning the debtors' assets, rights, obligations, or liabilities;
2. A stay of execution against the debtors' assets; and
3. A suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

It should be noted that Article 19 and 21 relating to interim pre-recognition relief and discretionary post-recognition relief respectively; are not impacted by whether the foreign proceeding is considered a main or non-main proceeding.



**QUESTION 3 (essay-type questions) [15 marks in total] 10 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.

As the recognition proceedings have been opened in the US, Chapter 15 of Bankruptcy Code (under which the Model Law was enacted) would be applicable and as such it would need to be considered whether the foreign proceedings relate to a COMI or an establishment before considering whether foreign main or foreign non-main proceedings would be recognised. If the jurisdiction where the foreign proceedings have been opened is noted as being the Centre of Main Interest ("COMI"), the proceedings are main insolvency proceedings and as such automatic mandatory relief is granted. If the debtor only has an establishment in the jurisdiction where the foreign proceedings are opened, the proceedings are non-main proceedings without automatic relief, but only post recognition relief can be granted by the court.

It should be noted that COMI has not been specifically defined by the Model Law, however the UNCITRAL Guide to Enactment has provided guidance which states that two key factors, being the location of central administration and which is readily ascertainable as such by creditors of the debtor, should be considered when determining where a debtors COMI lies.

Given the above example, the foreign main proceedings would be recognised by the enacting State (US) to have been filed in Germany as this is where the debtor has its COMI. Additionally, the recognition of foreign non-main proceedings by the enacting state (US) would have been filed in Bermuda as this is where the debtor has an establishment.

**Requires definitions (eg FMP, FNMP, establishment...) and references to the MLCBI eg Art.2 MLCBI, procedural references to Art. 16, 17, 6...**

**Question 3.2 [maximum 3 marks] 0 mark**

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

The foreign representative (the Joint Provisional Liquidators) could initially request the court to grant an interim relief of a provisional nature from the time of filing the recognition application until the application is decided upon. This relief could include a stay of execution against the debtor's assets which would protect the foreign debtors assets from contractual right of the US Based vendors.

The likely outcome of the above is dependent on whether the liquidation proceedings are recognised and if so whether these are recognised as foreign main or foreign non-main proceedings. Should these proceeding be recognised and qualified as a foreign main proceedings, Article 20 of the Model Law would provide automatic relief which provides a stay on the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities. As such the proceedings relating to the alleged tortious interference with the contract rights of the US- based vendors of the foreign debtor would be stayed.

Should these proceedings be recognised and qualified as a foreign non-main proceedings, the foreign representative would request that the court grant appropriate relief in terms of Article 21 of the Model Law, to stay the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities. As such the proceedings relating to the alleged tortious interference with the contract rights of the US-based vendors of the foreign debtor would be stayed.

Subject relates to Art.10 MLCBI, not relief.

**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?

As there is no litigation pending or threatened against the foreign debtor, and all US-governed leases and intellectual property licences have *ipso facto* clauses which are **NOT** enforceable under the US Bankruptcy Code, no further steps would be required by the foreign representative to protect the assets of the debtor.

Should the facts and circumstances change, and a threat arises against the debtor's assets, the foreign representative would be able to initially request the court to grant an interim relief of a provisional nature from the time of filing the recognition application until the application is decided upon. This relief could include a stay of execution against the debtors' assets should these occur. Interim relief could also be sought to entrust the administration or realisation of all, or part of the debtors' assets located in the US if such assets are perishable, in jeopardy or susceptible to devaluation. Additionally, the foreign representative would be able to apply for interim relief of any of the following post – recognition relief provided by Article 21 of the Model Law:

1. Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
2. Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligation, or liabilities; and
3. Granting any additional relief that may be available to a domestic liquidator/ office holder under the laws of the US.

**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?

One of the goals Model Law aims to achieve is co-operation. Co-operation is not dependent on recognition and the Model Law is not prescriptive in what appropriate co-operation is in any given situation. The Model Law does however provide a framework of procedures to allow for co-operation

to take place, which is a non-exhaustive list set out in Article 27. Given the insolvency court’s ruling, the foreign representative would be advised to seek some co-operation with the sale of certain assets within the territorial jurisdiction of Country B. This may include:

- The appointment of a person or body to act at the direction of the court within the jurisdiction of Country B.
- Setting up a communication platform which is considered appropriate for the court for any dealings relating to the certain assets include in jurisdiction of Country B.
- Co-ordination of the administration and supervision of the debtors’ assets and affairs,
- Approval or implementation by the courts of agreements concerning the co-ordination of proceedings.
- Co-ordination of concurrent proceedings regarding the same debtor.

When considering the recognition application, the foreign representative should have determined where the foreign debtors COMI would have been concluded to be. According to Article 16(3) of the Model Law – there is a rebuttable presumption that the place of the registered office of the debtor is the place of its COMI. It should however be noted that the place of the registered office or where the debtor has certain assets alone is not sufficient to conclude that the COMI is within Country A. Assuming the foreign proceeding and foreign representative has met all the required characteristics as set forth in the definition of those terms in Article 2 of the Model Law, the foreign representative would have needed to consider whether Country A would be considered to be the debtors COMI. Should this not be the case, the foreign representative should have determined whether an “establishment” as defined in Article 2 of the Model Law has been satisfied. If so, the foreign representative should have applied to the courts of Country B for recognition as a foreign non-main proceeding.

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

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

The client is a Cayman Islands incorporated and registered entity. It is a financial service holding company for a number of direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States. Globe Holdings was initially formed as a Canadian company in 2009, under the laws of Ontario, Canada. A year later, following certain reverse merger transactions, it filed a Certificate of Registration by Way of Continuation in the Cayman Islands to re-domesticate as a Cayman Islands company and changed its name to Globe Financial Holdings Inc. When it re-incorporated in the Cayman Islands in 2010 (from Canada), Globe Holdings provided various notices of its re-incorporation, including in the public filings with the Securities and Exchange Commission (SEC). Around that time, Globe Holdings retained its Cayman Islands counsel Cedar and Woods, which has regularly represented Globe Holdings for over a decade. Globe Holdings has a bank account (opened just a few days ago) in the Cayman Islands from which it pays certain of its operating expenses. Globe Holdings often holds its board meetings virtually, and not physically in the Cayman Islands, and, having obtained support for a bond restructuring, all its regular and special board meetings have been organized by its local Cayman counsel virtually. The client also maintains its books and records in the Cayman Islands. Its public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes disclosed that Globe Holdings is a Cayman Islands

company and explained the related indemnification and tax consequences resulting from Globe Holdings' place of reformation.

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

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

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

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

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

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

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

On July 4, 2023, the client, in accordance with the terms of the RSA, applied to the Cayman Court for permission to convene a single scheme meeting on the basis that the Noteholders, as the only Scheme Creditors, should constitute a single class of creditors for the purpose of voting on the Scheme.

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

99.34% in value voting in favor of the Scheme. The Sanction Hearing was held, and an order sanctioning the Scheme (the Sanction Order), which was filed with the Cayman Islands Registrar of Companies the same day.

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

At first instance it should be noted that the Global Holdings case falls within the scope of Model Law as outlined in Article 1, as it relates to an inward bound request for recognition of a foreign proceeding, being a Cayman Islands proceeding which is seeking recognition in the United States of America. As such it would be appropriate to apply the Model Law which aims to provide solutions to cross-border insolvency matters.

Before considering recognition proceedings it should be assessed whether the case meets the definition of a foreign proceeding as well as whether a foreign representative is involved.

A Foreign Proceeding is defined as proceeding (including an interim proceeding); that is either judicial or administrative; that is collective in nature; that is in a foreign state, that is authorized or conducted under a law relating to insolvency; in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and which proceeding is for the purpose of reorganization or liquidation. The Cayman Islands Courts entered into a convening order to convene a single Scheme Meeting to extend the maturity of the senior unsecured notes which are maturing in 2023 and to pay the quarterly interest in kind as a result of Global Holdings being both cash flow and balance sheet insolvent. As such the Cayman proceeding would meet the definition of a "Foreign Proceeding" in the enacting state (being United States of America)

A Foreign Representative is defined as being a person or body, including one appointed on an interim basis; authorized in a foreign proceeding; to administer the reorganization or liquidation of the debtors' assets or affairs or to act as representative of the foreign court. It should be noted that the Model Law does not specify that the foreign representative must be authorized by the foreign court. Given this, it would be appropriate that Cedar and Woods, being Global Holdings counsel who has been retained to advise on restructuring alternatives, meets the definition of a foreign representative.

When considering recognition, it needs to be determined whether the Cayman proceeding is classified as a "Foreign Main" or "Foreign Non-Main" proceedings. This is determined by whether or not the debtor has a Center of Main Interest ("COMI") or an Establishment. 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. Unlike Establishment, COMI has not been specifically defined in the Model Law. However, the UNCITRAL Guide to Enactment provides some guidance. Two key factors to consider is the location where the central administration of the debtor takes place as well as which is readily ascertainable as such by creditors of the debtor. The central administration of Global Holdings would be considered to be at the headquarters which is situated in the US. In addition to this Global Holdings has no business operations of its own. The business is carried through non-insurance non-debtor subsidiaries which are all incorporated under US laws and operate in the US. As such, we would expect that creditors of Global Holdings to be readily ascertainable in the US. The court would also consider the following additional factors to assist in concluding where the COMI is situated. These may include:

- All books and records are maintained in the Cayman Islands.
- Financing through the senior unsecured notes is governed by New York law within the US.
- The bank account of Global Holdings had only been opened recently in Cayman Islands to assist in paying certain operating expenses. This suggests that the cash management system was run out of the US prior to this.

- Principle assets and operations, through non- insurance non- debtor subsidiaries, are all incorporated under US laws and operate in the US.
- All employees are in the US.
- Global Holdings shares had been listed on the NASDAQ stock market.
- Independent third-party advisors have been appointed in the US to assist with the marketing of the corporate headquarters within New York, including the land, building, building improvements and contents including furniture and fixtures.

Given the overarching factors considered above, the courts would most likely view the US as the COMI. As such it needs to be determined whether Global Holdings in the Cayman Islands would be considered as an Establishment as defined in the Model Law. 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. Global Holdings was incorporated in the Cayman Islands in 2010 and has maintained its books and records within the country. Given that Cedar and Woods have been the long-standing Cayman Islands Counsel as well as the fact that books and records are maintained in the Cayman Islands, this would be evidence that human means have been utilized. As such Global Holdings in the Cayman Islands would meet the definition of an Establishment in terms of Model Law.

Considering the above COMI and Establishment assessment, the Cayman proceeding would be considered “Foreign Non- Main” by nature as it meets the definition of an Establishment. As such Counsel should commence a US Chapter 15 proceeding to recognize the Cayman proceeding as a Foreign Non- Main proceeding, which would assist with providing relief as detailed in line with Model Law.

The evidential requirements for recognition of a foreign proceeding are set forth in Article 15 of the Model Law. Article 15 prescribes that the application for recognition should be accompanied by the following:

1. A certified copy of the Cayman Court convening order to convene a single Scheme Meeting to extend the maturity of the senior unsecured notes which are maturing in 2023 and to pay the quarterly interest in kind; or
2. A certificate from the Cayman court affirming the existence of the foreign proceedings and the appointment of the foreign representative. As there is no court appointed foreign representative this may not be provided by the Cayman courts; or
3. Other evidence of the existence of the foreign proceeding and the appointment of the foreign representative. This should include the Restructuring Support Agreement as well as the engagement letter confirming the retention of Cedar and Woods as Cayman legal counsel to advise on restructuring alternatives; and
4. Statement identifying all foreign proceedings in respect of Global Holdings that are known to the foreign representation should this be applicable.

Relief from the recognition as a foreign non- main proceeding would be provided in terms of Article 21 of the Model Law. It should be noted that Article 20 relating to Automatic relief would not be accessible to Global Holdings as the proceedings would not be recognized as a foreign main proceeding as the Cayman Islands is not recognized as the COMI. The foreign representative, being Cedar and Woods, would need to request the enacting state to grant appropriate relief in terms of Article 21 which could include:

- Staying the commencement or continuation of individual actions or individual proceedings concerning Global Holdings’ assets, rights, obligations or liabilities.
- Staying the execution against the Global Holdings assets.
- Suspending the right to trade, encumber or otherwise dispose of any assets of Global Holdings.

- Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the Global Holding's assets, affairs, rights, obligation, or liabilities;
- Granting any additional relief that may be available to a domestic liquidator/ office holder under the laws of the US.

Given the impending class action litigation in the US, it may be prudent to apply to the courts in terms of Article 19 of the Model Law for interim collective relief prior to recognition of the foreign proceedings. The foreign representative would be able to seek interim relief of a provisional nature from the time of filing the recognition application until the application is decided upon. This relief could include a stay of execution against Global Holdings' assets should these occur. Interim relief could also be sought to entrust the administration or realisation of all, or part of Global Holdings' assets located in the US. Additionally, the foreign representative would be able to apply for interim relief of any of the following post – recognition relief provided by Article 21 of the Model Law:

1. Suspending the right to transfer, encumber or otherwise dispose of any assets of the Global Holdings;
2. Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the Global Holdings' assets, affairs, rights, obligation, or liabilities; and
3. Granting any additional relief that may be available to a domestic liquidator/ office holder under the laws of the US.

Further to the above, the following should be considered throughout the proceedings:

- Article 3 of the Model Law: expresses the principle of supremacy of international obligation of the enacting State (US) over internal law. If the enacted Model Law conflicts with a treaty or other form of multi- State agreement of the enacting State, then that treaty or international agreement prevails.
- Article 18 of the Model Law: requires the foreign representative, from the time of filing the recognition application for the foreign proceedings, to promptly inform the court in the enacting state (US) of and substantial change in the status of the recognized foreign proceeding or the status of the foreign representatives appointed as well as any other foreign proceeding regarding the same that becomes known to the foreign representative.

Good essay. However does not mention key references: Art.16 MLCBI (rebuttable presumption), procedural/public policy matters eg. Art. 22, 6.. as well as Art.2 for definitions.

**\* End of Assessment \***

**Marks awarded: 40 out of 50 (Good work!)**