



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] 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.

A key distinction between the application of the Model Law on Cross-Border Insolvency (the "Model Law" or "MLCBI") and the European Union (EU) Regulation on insolvency proceedings ("EIR") is the approach (i.e. hard vs soft law) and subsequent recognition of each system.

Traditional examples of hard law are international instruments such as treaties and conventions. When States become a signatory to a treaty or convention, they are entering into a binding agreement in which the terms of the treaty or convention will be domestically incorporated into the State's legal system. This, in turn, may result in the State's hard laws on insolvency. While not a convention (**nor a treaty**), the EIR, which acted as the European Union's response to international insolvency, has seen significant success as hard law response to international insolvency. Once adopted via EU Regulation, the EIR becomes part of the domestic legislation of each EU member State.

In contrast, the Model Law can be considered as an example of "soft law" due to the fact that it operates as a recommendation for adoption by States, rather than a convention.¹ The Model Law is not attempting to substantially homogenise the insolvency legislation of various States and does not require reciprocity for its enactment.

In comparing the above approaches, there are many advantages and disadvantages to each system. The Model Law has the advantage of being flexible and capable of worldwide application. In contrast, the EIR is disadvantaged by its isolated application to EU member States and rigidity. On the other hand, the EIR is advantaged by its capability of providing certainty in its application whereas the Model Law is disadvantaged by levels of uncertainty due to its non-binding nature and the fact that it is subject to amendments and changes by the States that choose to adopt it.

¹ According to the UNCITRAL Guide to Enactment, p 24 at para 19.

Question 2.2 [maximum 2 marks] 2 marks

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

Pursuant to Article 21(1) of the Model Law, following the recognition of foreign proceedings (either main or non-main) and where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of a foreign representative, grant any appropriate relief, such as:

"(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of Article 20;

(b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of Article 20;

(c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of Article 20;

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration or realisation of all or part of the debtor's assets located in [the enacting] State to the foreign representative or another person designed by the court;

(f) extending relief granted under paragraph 1 of Article 19;

(g) granting any additional relief that may be available to...a person or body administering a reorganisation or liquidation under the law of the enacting State."

Pursuant to Article 21(2) of the Model Law, following the recognition of foreign proceedings (either main or non-main) a court may (at the request of a foreign representative) entrust the distribution of all or part of the assets of the debtor located in the enacting State to the foreign representative (or any other person) identified by the court. When considering the use of this discretionary power, the court must be satisfied that the interests of the creditors of the enacting State are sufficiently protected. (emphasis added)

Pursuant to Article 21(3) of the Model Law, and when granting relief to a representative of a foreign non-main proceeding, the court must be satisfied that the relief is in relation to assets that, under the law of the enacting State, should be managed in the foreign non-main proceeding. Alternatively, the relief should concern information required in the foreign non-main proceeding. (emphasis added)

Question 2.3 [2 marks] 2 marks

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

Under Article 13(1) of the Model Law, foreign creditors are given the same rights as creditors within the enacting State in regards to the commencement of, and the participation in, a proceeding under the enacting State. While the foregoing does not *prima facie* affect the ranking of creditor claims in an enacting State, Article 13(2) of the Model Law carves out a particular protection in regard to foreign creditors. Claims of foreign creditors may not be ranked lower than a general unsecured claim purely on the basis of the claim-holder being a foreign creditor.

Due to the above, foreign creditors may be assured that treatment of their claims will not be any worse than those of local creditors solely on the basis of the foreign creditor's domicile.

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 with respect to available relief in foreign main versus foreign non-main proceedings is the amount (?) of relief available to each proceeding.

Prior to recognition, whether the proceedings are foreign main or foreign non-main, interim relief under Article 19 of the Model Law may be pursued by a foreign representative.

While relief at the discretion of the court is available for both foreign main and foreign non-main proceedings following recognition (Article 21 of the Model Law), foreign main proceedings enjoy such discretionary relief in addition to automatic relief that becomes available upon recognition (i.e. Article 20 of the Model Law).

Following the recognition of foreign main proceedings, the following automatic relief is available:

"(a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) execution against the debtor's assets is stayed; and

(c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended."

The above stays and suspensions are considered mandatory or automatic due to the recognition of the foreign main proceedings. In contrast, foreign non-main proceedings do not enjoy any mandatory or automatic relief; any relief accorded to foreign non-main proceedings is only at the discretion of the court under Article 21. Further, and when considering the granting of discretionary relief under Article 21, a court must consider additional factors in regards to foreign non-main proceedings (see Article 21(3)).

QUESTION 3 (essay-type questions) [15 marks in total] 11 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.

Under the Model Law, a foreign main proceeding is defined in reference to a debtor's centre of main interests ("COMI"). Although 'COMI' is not defined under the Model Law, foreign main proceedings are proceedings opened in the jurisdiction of the debtor's COMI.

Foreign non-main proceedings mean *"a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has 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."*

In view of the particular facts above, foreign main proceedings have been filed in Germany. Further, foreign non-main proceedings have been filed in Bermuda.

Whether the German foreign main proceedings or the Bermuda foreign non-main proceedings will be recognised in the U.S. depends on whether the relevant foreign representatives make an application for recognition in adherence to Article 15 of the Model Law. Under Article 15, a foreign representative may apply for recognition of foreign proceedings in which they have been appointed, where such application includes the following:

1. a certified copy of the decision commencing the foreign proceedings and appointing the foreign representative; or
2. a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
3. in absence of evidence referred to a (1.) and (2.) above, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

In circumstances where the foreign proceeding is:

- within the meaning of subparagraph (a) of Article 2 (Article 17(1)(a));
- the foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of Article 2 (Article 17(1)(b));
- the application for recognition meets the requirements of paragraph 2 of Article 15 (as listed above and pursuant to Article 17(1)(c)); and
- the recognition application has been submitted to the relevant court referred to in Article 2 (Article 17(1)(d)),

the recognition application will be granted.

If the recognition applications of the German foreign main proceedings and the Bermuda foreign non-main proceedings are in adherence to the above requirements (namely, Article 15 and 17 of the Model Law), it is likely that such applications will be granted.

Requires reference to MLCBI Art.6.. (no marks deducted)

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.

Given that the joint provisional liquidators' (the "JPLs") application for recognition has not been determined, any application by the JPLs for relief from the US-based vendors' suit would be limited to interim relief (i.e. relief capable of remaining in effect from the time the recognition application is filed until a decision of the recognition application is handed down) pursuant to Article 19 of the Model Law.

Although Article 19 does not specifically note that a foreign representative may apply for interim relief in the form of an injunction against the suit issued by the US-based vendors, Article 19 can be interpreted as having a non-exhaustive list of available relief due to the use of the word "*including*" before the listing of specific relief therein.²

In view of the above and in accordance with the UNCITRAL guidance texts, the US-based vendors' suit against the JPLs is likely to amount to a detrimental business action intended to undermine the JPLs' efforts to achieve an equitable result for the benefit of all the debtor's creditors, causing immediate and irreparable injury.³ In those circumstances, it is plainly arguable that assets of the debtor are in jeopardy. Therefore, an application by the JPLs for interim relief in the form of an injunction on the US-based vendors' suit should be attempted and would likely have a chance of success.

Requires discussion based on Art.10 MLCBI

Question 3.3 [maximum 4 marks] 4 marks

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

Although the US-governed leases and intellectual property licenses contain termination clauses which would not be enforceable under the US Bankruptcy Code, the foreign representative may nevertheless consider obtaining interim collective relief under Article 19 of the Model Law prior to recognition of the foreign proceeding.

Where relief is urgently required in order to protect the assets of a debtor or the interests of creditors, the court of an enacting State (i.e. the US Court in this scenario) may, at the request of the foreign representative, grant provisional relief. Such provisional relief would remain in effect from the time the recognition application is filed until a decision of the recognition application is handed down. This interim relief may include:

1. a stay of execution against the debtor's assets; and
2. entrusting the administration or realisation of all or part of a debtor's assets within the enacting State to a foreign representative (or any other person) designated by the court, for the purpose of protecting and preserving the value of the assets in circumstances where those very assets are perishable, susceptible to devaluation or otherwise in jeopardy prior to the hearing of the recognition application.

² *New Zealand*: Williams v Simpson (No. 1) [2011] NZHC 1631 (17 September 2010) [para 44].

³ *United States*: Japan Airlines Corp. (Bankr. S.D.N.Y. Jan 28, 2010), pp 1-2.

It can be said that assets are in "jeopardy" in circumstances where creditors attempt to control or take possession of assets, terminate unfavourable contracts, require new security, renegotiate credit terms on a stricter basis or take any other unfavourable commercial action that would otherwise obstruct a court's jurisdictional directive under the Model Law. Additionally, any steps taken by creditors to interfere with and/or cause difficulties to the debtor's attempts in administering its assets pursuant to foreign proceedings and/or undercut a foreign representative's efforts to equitably deal with the debtor's creditors as a collective whole may give rise to interim relief under Article 19.⁴

Despite the above, the foreign representative may experience difficulties in establishing an urgent basis for the granting of interim relief as it does not appear that the assets under the US-governed leases and licenses are in any obvious jeopardy. No litigation is currently contemplated against the debtor and the US counterparties are not able to terminate the agreements based on a bankruptcy-triggering event. Be that as it may, the assets of the debtor under the US-governed agreements may still be threatened by any requests for additional security or tightened credit terms prior to the recognition hearing.

Further and separately, interim relief under Article 19 can be pursued for the purpose of ensuring certainty of Article 20 relief following recognition of the foreign proceedings.⁵ As such, the foreign representative may view it necessary to proceed with an application for interim relief under Article 19.

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?

Ordinarily, a foreign main proceeding is recognised in circumstances where the proceeding takes place in the State where the debtor's centre of main interests is established ("COMI"). While the Model Law presumes that a debtor's COMI is ordinarily in the location of the debtor's registered office (i.e. Country A in these circumstances), further considerations of determining a debtor's COMI are sometimes required under the Model Law.

Two essential factors in establishing a debtor's COMI under the Model Law are:

1. the location where the central administration of the debtor takes place; and
2. which is readily ascertainable as such by the creditors of the debtor.

Additionally, it can be said that the determination of a debtor's COMI under the Model Law is approached in a more holistic manner. In circumstances where a debtor's COMI is not

⁴ Ibid.

⁵ *Australia*: Trucker (2009) FCA 1354 [para 22], CLOUT 922 – court referred to relief available under art. 20, subpara 1 (c).

readily ascertainable following the consideration of the above two factors, the Model Law allows for further factors to be considered, such as⁶:

1. the location of the debtor's books and records;
2. the location where financing was organised or authorised;
3. the location from where the cash management system was run;
4. the location in which the debtor's principal assets or operations are found;
5. the location of the debtor's primary bank;
6. the location of employees;
7. the location in which commercial policy was determined;
8. the site of the controlling law or the law governing the main contracts of the debtor;
9. the location from which purchasing and sales policy, staff, accounts payable and computer systems are managed;
10. the location from which contracts (for supply) were organised;
11. the location from which reorganisation of the debtor was being conducted;
12. the jurisdiction whose law would apply to most disputes;
13. the location in which the debtor was subject to supervision or regulation; and
14. the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

Where the debtor's registered office (but not much else) was located in Country A and in view of the above factors, it is likely that foreign proceedings initiated in Country A would not amount to foreign main proceedings.

Consequently, the foreign representative of the foreign proceedings in Country A should not have assessed the debtor's COMI as Country A (and thus sought Country A as foreign main proceedings) at the outset. Further, and in circumstances where the foreign proceedings in Country A are able to satisfy Article 2(c) and (f) of the Model Law, the foreign representative should seek to have the foreign proceedings in Country A recognised as foreign non-main proceedings. This may be attempted even in circumstances where no other foreign proceedings are on-foot, as it would be contrary to logic for a court to recognise a foreign proceedings as foreign main proceedings merely because those proceedings are the only proceedings in existence.⁷

Art.16 MLCBI is the main reference for “rebuttable COMI presumption”. References to Art.17, 21, 6 are also required

⁶ UNCITRAL Guide to Enactment, p 44, para 82.

⁷ *Untied States: SPhinX, Ltd.* 351 B.R. 103, 122 (Bankr. S.D.N.Y. 2006).

QUESTION 4 (fact-based application-type question) [15 marks in total] 7 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.

Upon review of the above file, the Cayman proceedings of Globe Financial Holdings Inc (“GH”) are unlikely to be capable of recognition as foreign proceedings in the US Bankruptcy Court under Chapter 15 of the Bankruptcy Code.

The Cayman proceedings are unlikely to be determined as foreign main or non-main proceedings in circumstances where GH does not have an establishment in Cayman, and also does not maintain its COMI in Cayman. The COMI of GH is likely to be the United States of America due to the following factors:

1. the headquarters of GH are located in the U.S.;
2. the location of GH's management is in the U.S.;
3. the location of GH's primary assets are in the U.S.;
4. the location of the majority of GH's creditors are in the U.S.; and
5. disputes concerning the Notes would be determined in the U.S. as the relevant documentation is New York law-governed.

Further and more importantly, creditors of GH are likely to ascertain the U.S. as GH's COMI when all publically available documentation (e.g. the SEC filings) are available in the U.S.

It is also unlikely that GH would be viewed as maintaining an establishment in the Cayman Islands. 'Establishment' means "*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.*"

GH's presence in the Cayman Islands does not amount to economic activities that are exercised on the market externally. Further, GH does not maintain human means within the Cayman Islands (there are no employees or offices and business meetings of GH are held virtually) or any goods and services within Cayman.

As such, it is likely that concurrent Chapter 11 proceedings in the U.S. would be required to be filed in addition to the Cayman proceedings in order to protect GH from a commencement of the US class action litigation.

In circumstances where the above analysis is incorrect and GH is determined to have an establishment in the Cayman Islands, a foreign representative appointed to GH under the Cayman proceedings should file for recognition of foreign non-main proceedings under Chapter 15 of the US Bankruptcy Code. This would involve the foreign representative making an application under Article 15 of the MLCBI and obtaining the following evidence in support:

1. a certified copy of the decision commencing the Cayman proceedings and appointing the foreign representative; or
2. a certificate from the Cayman court affirming the existence of the Cayman proceedings and the appointment of the foreign representative; or
3. in the absence of evidence referred to in (1.) and (2.) above, any other evidence acceptable to the court of the existence of the Cayman proceedings and the appointment of foreign representatives.

Following any recognition of the Cayman proceedings, the foreign representatives should proceed to obtain relief under Article 20 for a stay of commencement in respect to the U.S. class action litigation.

As this question is a fact-based application-type question, it requires the MLCBI provisions to be applied to the facts of the case and substantiated with references and a discussion. The answer should contain as a minimum: definitions of terms used, with respective references to MLCBI provisions or appropriate sources; a discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI and alternative courses of action; conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI (noted reference to Art.20)...

*** End of Assessment ***

Marks awarded: 35 out of 50