



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] 8 marks

Question 2.1 [maximum 3 marks] 3 marks

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

The MLCBI may be applied in any State that has adopted it, in relation to insolvency proceedings commenced in any State. In contrast, the European Union (EU) Regulation applies only to insolvency proceedings commenced in an EU Member State.

One key benefit of the MLCBI is that an enacting State is free to decide the extent to which the MLCBI is incorporated in its domestic laws, e.g., whether to adopt with modifications. This flexibility is also a disadvantage as there are States that have enacted the MLCBI in their domestic laws with the requirement for reciprocity, which limits the effectiveness of the MLCBI as originally adopted by UNCITRAL.

Conversely, a key benefit of the European Union (EU) Regulation on insolvency proceedings is that it requires insolvency proceedings commenced in any EU Member State to be recognised in the manner provided in the Regulation, which allows insolvency proceedings in any EU Member State to be recognised and enforced throughout the rest of the EU. One disadvantage, however, is that the Regulation applies only within the EU and does not provide a framework for whether and how insolvency proceedings commenced outside the EU should be recognised in an EU Member State.

Question 2.2 [maximum 2 marks] 0 mark

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

As Article 21 of the MLCBI applies to a foreign proceeding regardless of whether it is main or non-main, the court, upon recognition of the foreign proceeding, should consider whether

and how the post-recognition relief sought may affect the another foreign proceeding, particularly a foreign main proceeding.

The court primarily considers the creditors' interests

Question 2.3 [2 marks] 2 marks

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

Article 13 of the MLCBI enshrines the principle that there should not be discrimination against foreign creditors by providing that foreign creditors should also be allowed to commence and participate in local insolvency proceedings involving the debtor just as local creditors are able to, save that such equal access rights should not affect the ranking of claims in the local insolvency proceeding (provided that the claims of foreign creditors are not ranked lower than that of general unsecured creditors).

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 recognition of foreign main proceedings triggers the automatic reliefs under Article 20 of the MLCBI, which is an effect that the recognition of a foreign non-main proceeding does not automatically give rise to. If the foreign proceedings are recognised as foreign main proceedings, the following consequences will automatically arise by virtue of Article 20: (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. Any of such reliefs may still be available upon the recognition of a foreign non-main proceeding, but they are subject to the discretion of the court.

QUESTION 3 (essay-type questions) [15 marks in total] 11 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 the recognition proceedings are commenced in the US, the foreign proceedings refer to the insolvency proceedings commenced in Germany and Bermuda. Assuming that the likely result requested is that of the recognition proceedings in the US, the insolvency proceedings in Germany are likely to be recognised as foreign main proceedings since they were commenced in a jurisdiction in which the debtor has its centre of main interests (COMI), while the insolvency proceedings commenced in Bermuda are likely to be recognised as foreign non-main proceedings as the debtor has only an establishment in Bermuda.

Full answer requires a discussion and references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 17, 6.. to substantiate answer.

Question 3.2 [maximum 3 marks] 3 marks

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

Just because the joint provisional liquidators commenced a recognition proceeding in the US does not mean that they become subject to the jurisdiction of the US courts by virtue of their application for recognition. This is the protection clarified in Article 10 of the MLCBI. However, the protection is not absolute. The alleged cause of action in tortious interference with the contract rights of US-based vendors of the foreign debtor may provide separate occasion / ground for the US courts to exercise jurisdiction over the joint provisional liquidators, but the conditions for the exercise of that jurisdiction should be found in the laws / rules of civil procedure in the US relating to such causes of action. The joint provisional liquidators' commencement of the recognition proceedings in the US does not mean that they have submitted to the jurisdiction of the US courts in any and all matters such as for the alleged tort.

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?

That the foreign debtor has commenced debtor-in-possession-like restructuring proceeding in the UK indicates that there is a risk that the foreign debtor's US-governed leases and intellectual property licences may be terminated because of the foreign debtor's insolvency. The foreign representative has commenced a recognition proceeding in the US, but that does not in itself give rise to any relief until the date of the recognition hearing, at the earliest. In the meantime, if it is necessary to maintain the US-governed leases and intellectual property licences to support the debtor-in-possession-like restructuring proceeding in the UK, the foreign representative may consider applying under Article 19 of the MLCBI adopted under Chapter 15 of the US Bankruptcy Code for an interim relief that declares that the *ipso facto* clauses in the leases and intellectual property licences have no effect. However, it is doubtful on the facts whether the foreign representative will be able to secure a hearing date for the interim relief application sooner than the 35 days for the hearing of the recognition petition/application. A more effective option is for the foreign representative to apply to commence an insolvency proceeding under the US Bankruptcy Code (e.g., under Chapter 11 of the US Bankruptcy Code). The foreign representative is able to do so as Article 11 of the MLCBI adopted in Chapter 15 of the US Bankruptcy Code entitles a foreign representative to apply to commence an insolvency proceeding in the US without prior recognition of the UK debtor-in-possession-like restructuring proceeding. The commencement of insolvency proceeding under the US Bankruptcy Code has the effect of rendering unenforceable the *ipso facto* clauses in the leases and intellectual property licences.

Question 3.4 [maximum 4 marks] 2 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?

The foreign representative should make an application to the insolvency court in Country B for the recognition of the insolvency proceeding pending in Country A as a foreign non-main proceeding and seek the insolvency court's grant of appropriate reliefs under Article 21 of the MLCBI as adopted in Country B. The appropriate reliefs sought should include the relief that will entrust the administration or realisation of the debtor's assets within the territorial jurisdiction of Country B to the foreign representative.

The foreign representative should have applied for the recognition of the insolvency proceeding pending in Country A as a foreign non-main proceeding at the outset. Recognition of the insolvency proceeding pending in Country A as a foreign main proceeding, even if granted by the insolvency court in Country B, only gives rise to the following automatic reliefs, which are insufficient for the foreign representative to sell the debtor's assets within the territorial jurisdiction of Country B: (a) stay of commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; (b) stay of execution against the debtor's assets; and (c) suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor. If the foreign representative needs to be able to sell the debtor's assets within the territorial jurisdiction of Country B urgently (e.g., because of risk of quick dissipation in the value of the assets), the foreign representative may consider making a concurrent application for interim relief under Article 19 of the MLCBI as adopted in Country B to be entrusted with the administration or realisation of the debtor's assets located in Country B.

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

QUESTION 4 (fact-based application-type question) [15 marks in total] 6 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.

I would enquire with Globe Holdings' Cayman counsel (Cedar and Woods) on whether the Cayman Court has - in its Sanction Order, Convening Order or any earlier order (depending on when I was instructed to advise Globe Holdings in relation to how it should protect its position in the US to support its restructuring in the Cayman Islands through the scheme) - already appointed a foreign representative for the purpose of making an application to a US Bankruptcy Court for the recognition of the scheme proceedings in the Cayman Islands in the US, pursuant to Chapter 15 of the US Bankruptcy Code.

If I were instructed prior to Globe Holdings' commencement of the scheme proceeding by its application to the Cayman Court for permission to convene the Scheme Meeting, I would advise Globe Holdings to obtain, as soon as possible, an order acknowledging the commencement of the scheme proceeding (such as by an order granting permission to convene the Scheme Meeting) and recording the Cayman Court's appointment of a foreign representative for the purpose of commencing Chapter 15 recognition proceedings in the US.

I would also check with the Cayman counsel whether there are other insolvency proceedings commenced in respect of Globe Holdings, apart from the scheme proceeding commenced in the Cayman Court, as an application for recognition will have to include a statement identifying all foreign proceedings in respect of Globe Holdings that are known to the foreign representative.

The above are relevant as the documents that have to be submitted for filing a Chapter 15 application must include: (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) any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

While there are concerns that a class action litigation would be commenced in the US, it is unclear whether the class action litigation will be against Globe Holdings itself or any of the US subsidiaries of Globe Holdings instead, or what the subject matter of the class action litigation could be. In this regard, it is noted that Globe Holdings has no business operations of its own, an overwhelming majority of the Noteholders (both in terms of number and value) supported the Scheme, and it is unclear if Globe Holdings has other creditors beyond the Noteholders who may be affected by Globe Holdings' insolvency. More information on the potential class action litigation and Globe Holdings' possible exposure to the class action litigation is required.

In any case, if the potential class action litigation could distract the restructuring efforts in the Cayman Islands and dissipate the value of Globe Holdings, I would advise Globe Holdings to commence Chapter 15 recognition proceedings in the US for recognition of the scheme proceeding before the Cayman Court as a foreign main proceeding. Recognition of the scheme proceeding before the Cayman Court as a foreign main proceeding will automatically give rise to the effects provided under Article 20 of the MLCBI as adopted in Chapter 15 of the US Bankruptcy Code, particularly a stay of commencement or continuation of individual actions or individual proceedings concerning Globe Holdings' assets, rights, obligations or liabilities.

Globe Holdings should have a more than even chance of obtaining an order for recognition of the scheme proceeding before the Cayman Court as a foreign main proceeding. The scheme proceeding before the Cayman Court should qualify as a "foreign proceeding" as the scheme proceeding is a collective judicial proceeding in a foreign State (the Cayman Islands), pursuant to a law relating to insolvency in which proceeding the assets and affairs of Globe Holdings are subject to control or supervision by the Cayman Court, for the purpose of reorganization. The scheme proceeding before the Cayman Court is also a "foreign main proceeding" as the scheme proceeding was commenced in the Cayman Islands, which could reasonably be demonstrated to be the State in which Globe Holdings has its centre of main interests ("COMI").

- (a) First, in the absence of proof to the contrary, Globe Holdings' registered office in the Cayman Islands is presumed to be the COMI. In this regard, while Globe Holdings was originally incorporated in Canada in 2009, it was re-incorporated in the Cayman Islands just a year later (in 2010). Globe Holdings also provided various notices of its re-incorporation, including in the public filings with the SEC.
- (b) Globe Holdings also maintains its books and records in the Cayman Islands.
- (c) As a financial service holding company, Globe Holdings does not have business operations of its own. However, it is significant that the restructuring that Globe Holdings seeks is an extension of the maturity of the Notes and flexibility to pay quarterly interest "in kind", and that the creditors with whom Globe Holdings seeks to be bound to the scheme comprise only the Noteholders. In this regard, it is noted that Globe Holdings' public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes show that Globe Holdings is a Cayman Islands company.
- (d) The above shows that Globe Holdings' COMI in the Cayman Islands is readily ascertainable by its creditors. In this regard, it is also relevant that the expectations of the largest Noteholders were that any restructuring of Globe Holdings would take place in the Cayman Islands.

As for whether any relief should be requested "on day one of the filing", I would advise Globe Holdings to consider seeking, pursuant to Article 19 of the MLCBI as adopted in the US, an interim stay of commencement or continuation of individual actions or individual proceedings against Globe Holdings when the Chapter 15 application is made. While not expressly included in Article 19, such an interim relief should be available as it does not appear that the reliefs enumerated in Article 19 are intended to be exhaustive.

Further and/or in the alternative, Globe Holdings may also consider the option of having the foreign representative appointed by the Cayman Court commence proceedings under Chapter 11 of the US Bankruptcy Code, which has the automatic effect of giving rise to a moratorium against the commencement of proceedings against Globe Holdings from the point of filing of the Chapter 11 application. The foreign representative is able to do so because of Article 11 of the MLCBI as adopted in the US. The foreign representative should

be able to point to the New York law governed Restructuring Support Agreement (RSA) underpinning the scheme in the Cayman Islands as a connecting factor for a US court to be seized of jurisdiction over the Chapter 11 proceedings. This strategy works to provide Globe Holdings an interim measure of staving off any potential litigation in the US, pending determination of the Chapter 15 application, including any application for interim relief under Article 19 of the MLCBI as adopted in the US.

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 to the minimum, definitions eg (COMI, establishment, foreign main proceedings etc) with respective articles, a discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI, the necessary papers to be submitted to the US Court per Article 15 MLCBI, conclusive remarks with reference to Articles 20 through 22 MLCBI(in addition to Art.19) and 6 MLCBI.

*** End of Assessment ***

Marks awarded: 34 out of 50