



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] 8 marks

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

Question 1.1

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

- (a) World Trade Organization.
- (b) **The United Nations Commission on International Trade Law.**
- (c) The United Nations Conference on Trade and Development.

Question 1.2

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

- (i) Rise of corporations.
- (ii) Internationalisation.
- (iii) Globalization.
- (iv) Universalism.
- (v) Territorialism.
- (vi) Technological advances.

Choose the correct answer:

- (a) **Options (i), (ii), (iii), (iv) and (vi).**
- (b) Options (i), (ii), (iii) and (iv).
- (c) Options (ii), (iii), (iv) and (vi).

- (d) All of the above.

Question 1.3

Which of the following statements incorrectly describe the MLCBI?

- (i) It is legislation that imposes a mandatory reciprocity on the participating members.
- (ii) It is a legislative text that serves as a recommendation for incorporation in national laws.
- (iii) It is intended to substantively unify the insolvency laws of the foreign nations.
- (iv) It is a treaty that is binding on the participating members.

Choose the correct answer:

- (a) Options (ii), (iii) and (iv).
- (b) Options (i), (ii) and (iv).
- (c) Options (i), (iii) and (iv).
- (d) All of the above are incorrect.

Question 1.4

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

- (i) To provide greater legal certainty for trade and investment.
- (ii) To provide protection and maximization of value of the debtor's assets.
- (iii) To provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtors.
- (iv) To facilitate the rescue of financial troubled businesses.
- (v) To ensure substantive unification of insolvency laws of member-states.

Choose the correct answer:

- (a) Options (i), (ii), (iii) and (iv).
- (b) Options (ii), (iii) and (v).
- (c) Options (ii), (iv) and (v).
- (d) None of the above.

Question 1.5

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

- (i) An insolvency proceeding is commenced in jurisdiction A, but a significant asset is located outside of jurisdiction A.
- (ii) An insolvency proceeding is commenced in jurisdiction A and immediately transferred to a foreign jurisdiction B.
- (iii) An insolvency proceeding is commenced in jurisdiction A, in which a group of affiliated debtors has its COMI as well as all assets and liabilities.
- (iv) An insolvency proceeding is commenced in jurisdiction A, but certain liabilities are governed by laws of a foreign jurisdiction B.
- (v) An insolvency proceeding is commenced in jurisdiction A, but all *de minimis* assets are located in foreign jurisdictions.

Choose the correct answer:

- (a) Options (i) and (ii).
- (b) Options (ii) and (iii).
- (c) Options (iii) and (v).
- (d) Options (i) and (v).**

Question 1.6

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

- (a) Binding within jurisdiction B.
- (b) Binding within jurisdiction B, but certain actions need to be taken.
- (c) No effect within jurisdiction B.**
- (d) Likely no effect within jurisdiction B.
- (e) Not enough facts provided to arrive at a conclusion.

Question 1.7

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

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

- (ii) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (iii) To eradicate the use of comity.
- (iv) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

Choose the correct answer:

- (a) Options (i), (ii) and (iii).
- (b) Options (i), (ii) and (iv).**
- (c) Options (ii), (iii) and (iv).
- (d) All of the above.

Question 1.8

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

- (i) COMI is a well-defined term in the MLCBI.
- (ii) COMI stands for comity.
- (iii) The debtor's registered office is irrelevant for purposes of determining COMI.
- (iv) COMI is being tested as of the date of the petition for recognition.

Choose the correct answer:

- (a) Options (i), (ii) and (iii).**
- (b) Options (ii), (iii) and (iv).
- (c) All of the above.**
- (d) None of the above.

Question 1.9

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

- (i) Foreign main proceeding.
- (ii) Foreign non-main proceeding.
- (iii) Plenary domestic insolvency proceeding.

Choose the correct answer:

- (a) Options (ii), (i) and then (iii).
- (b) Options (i), (ii) and then (iii).
- (c) Options (iii), (i) and then (ii).
- (d) Options (iii), (ii) and then (i).

Question 1.10

Which of the statements below are correct under the MLCBI?

- (a) The foreign representative always has the powers to bring avoidance actions.
- (b) The hotchpot rule prioritises local creditors.
- (c) The recognition of a foreign main proceeding is an absolute proof that the debtor is insolvent.
- (d) None of the above are correct.

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

Question 2.1 [maximum 3 marks] 3 marks

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

The European Union Regulation on Insolvency Proceedings (EIR) is not a treaty, rather it is a European Union Regulation.

The benefit of this approach is that once adopted by a Member State, the EIR directly becomes part of the domestic law of the relevant Member State. The EIR has created a framework for the recognition and enforcement of insolvency proceedings taking place in one Member State throughout the rest of the European Union.

However, the disadvantage of this approach is the difficulties and delays in establishing the framework which took almost forty years to be drafted and adopted. The proposal from the European Community for a convention on Insolvency Proceedings was unsuccessful in 1995 and studies show that efforts are still ongoing in Europe to harmonise insolvency law, notwithstanding the introduction of the EIR.

On the other hand, the MLCBI is not a treaty or convention and is only a recommendation and can be considered as an example of 'soft law'.

The benefit of this approach is that the MLCBI provides a State with a procedural framework that can be adopted in whole or in part into the domestic legislation of the State. The MLCBI is therefore a lot less intrusive and more flexible when compared with a requirement for States to adopt a treaty or substantive rules.

However, a disadvantage of this approach is that the MLCBI allows States to amend the procedural framework when adopting the MLCBI into their domestic legislation. Some States have included reciprocity provisions when enacting the MLCBI which can significantly reduce the effectiveness of the MLCBI. For example, in South Africa, the cross border legislation which adopts the MLCBI has had very limited effect as South Africa requires countries to meet reciprocity requirements and so far no State has met these requirements.

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 MLCBI contains safeguards designed to protect local interests before assets are turned over to the foreign representative pursuant to post-recognition relief under Article 21 MLCBI.

Article 22 paragraph 1 MLCBI requires the court to be satisfied that the interests of creditors in the State where the assets are located are adequately protected before granting relief under Article 21 MLCBI.

The court should also consider whether the proceedings that have been recognised are foreign main proceedings or foreign non-main proceedings. In the case of the recognition of a foreign non-main proceeding, Article 21 paragraph 3 MLCBI requires the court to be satisfied that the relief relates to the assets to be administered in the foreign non-main proceeding or information required in the foreign non-main proceeding.

Finally, any relief granted must be consistent with the domestic insolvency proceedings in the State where the relief is to be granted. For example, in the Pan Ocean case¹, the English court was not able to grant relief in relation to the termination of a contract as a result of an ipso facto clause in a contract, given that ipso facto clauses are in principle valid and enforceable in English insolvency law², and such relief would therefore not be consistent with English insolvency law.

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 MLCBI reflects the anti-discrimination principle which provides that foreign creditors should have the same rights as creditors who are domiciled in the enacting State in relation to the commencement of, and participation in, local proceedings regarding the debtor under the insolvency law of the enacting State.

Few states have provisions which apply special ranking to foreign creditors, however Article 13 paragraph 2 MLCBI states that Article 13 paragraph 1 MLCBI does not affect the ranking of claims in a proceeding, save that the claim of a foreign creditor will not be given a lower priority than a general unsecured claim solely due to the reason that the holder of such claim is a foreign creditor.

¹ *Fibra Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch)

² *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC38

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?

A foreign main proceeding is a proceeding taking place where the debtor had its centre of main interests (COMI) at the date of commencement of the foreign proceeding. A foreign non-main proceeding is a proceeding taking place where the debtor has an establishment (i.e. any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services).

Relief under Article 19 MLCBI (pre-recognition relief) and Article 21 MLCBI (post-recognition relief) is discretionary whereas the relief under Article 20 MLCBI is automatic on the recognition of the foreign main proceeding. However, relief is not available under Article 20 MLCBI in relation to foreign non-main proceedings.

Another distinction is in relation to the discretion of the courts to tailor the relief to be granted under Article 21 MLCBI. The interests and authority of a representative of a foreign non-main proceeding are usually narrower than the interests and authority of a representative of a foreign main proceeding. As a result, in the case of the recognition of a foreign non-main proceeding, Article 21 paragraph 3 MLCBI requires the court to be satisfied that the relief relates to the assets to be administered in the non-main proceeding or information required in the non-main proceeding. The objective of this requirement is that the relief granted for a foreign non-main proceeding should not give unnecessarily wide powers to the foreign representative that would interfere with the administration of another insolvency proceeding, in particular the foreign main proceeding.

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

Question 3.1 [maximum 4 marks] 2 marks

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

The foreign main proceedings will have been opened in Germany as this is where the debtor has its COMI. It is assumed that the debtor also had its COMI in Germany as at the date of the commencement of the proceedings.

The foreign non-main proceedings will have been opened in Bermuda as this is where the debtor has an establishment. It is assumed that the debtor also had an establishment in Bermuda as at the date of the commencement of the proceedings.

In the event that the foreign main proceeding was recognised first in the US, under Article 30(a) MLCBI any relief granted by the US under Article 19 MLCBI or Article 21 MLCBI to a representative of the foreign non-main proceeding in Bermuda must be consistent with the relief granted in respect of the foreign main proceeding in Germany.

In the event that the application for recognition (or the recognition) of the foreign non-main proceeding in Bermuda comes first, under Article 30(b) MLCBI once the foreign main proceeding in Germany is recognised in the US, any relief in effect under Article 19 MLCBI or Article 21 MLCBI in relation to the foreign non-main proceeding must be reviewed by the court in the US and must be

modified or terminated if this is not consistent with the relief granted in relation to the foreign main proceeding in Germany.

Full response requires reference to definitions in Art.2 MLCBI, as well as a discussion on the process per Art.15, 17, 6.... rather than relief.

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.

It is assumed that recognition has not yet been granted in the US. As a result, the liquidators should apply for pre-recognition relief under Article 19 MLCBI in order to protect the assets of the debtor.

This relief would be granted at the discretion of the court and is similar to the relief granted under Article 21 MLCBI. As the recognition has not yet been granted, the relief is restricted to urgent and provisional measures.

Any relief granted under Article 19 MLCBI would terminate when the application for recognition is granted (however, in the event recognition is granted, the relief can be extended pursuant to Article 21 MLCBI).

The court in the US can also refuse to grant relief under Article 19 MLCBI where this would interfere with the administration of the foreign main proceeding.

Subject relates to Art.10 MLCBI (not relief).

Question 3.3 [maximum 4 marks] 3 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 the recognition has not yet been granted in the US, the foreign representative may consider applying for pre-recognition relief under Article 19 MLCBI.

However, the court in the US may refuse to grant relief under Article 19 where such relief would interfere with the administration of a foreign main proceeding, i.e. the proceedings in the UK.

Ipso facto clause are in principle valid and enforceable under English law. The US court may therefore adopt the approach taken by the English court in the Pan Ocean case where the court refused to grant relief which would go beyond the relief that a court would grant in a domestic insolvency (i.e. the US court as the recognising court may not grant relief in relation to *ipso facto* clauses as such relief would not be granted in a domestic insolvency in England).

The recent developments under English insolvency law in relation to ipso facto clauses under CIGA 2020 are not relevant on these facts given that the ipso facto clauses in question relate to leases and IP licences rather than supply contracts (ipso facto clauses in supply contracts are no longer enforceable under English insolvency law).

Full response includes a conclusion per Art. 20 and/or 21 MLCBI

Question 3.4 [maximum 4 marks] 4 marks

A foreign representative, who administers the assets of an insolvent debtor in an insolvency proceeding pending in Country A (where the foreign debtor has its registered office and not much more), commenced a proceeding in Country B to recognise the foreign proceeding as the foreign main proceeding in order to sell certain assets within the territorial jurisdiction of Country B, but unfortunately the insolvency court considering the petition for recognition denied the recognition of the foreign proceeding as a foreign main proceeding. Explain what may or should the foreign representative do next? What should the foreign representative have done at the outset?

Article 15 MLCBI provides that the application for recognition in Country B should be accompanied with a certificate of the decision commencing the proceeding and appointing the foreign representative in Country A (or a certificate from the court in Country A affirming the existence of the proceeding and the appointment of the foreign representative).

From the statement 'insolvency proceeding pending in Country A' it is assumed that the proceedings have not yet been formally commenced in Country A. The foreign representative should therefore wait until the proceedings have been formally commenced in Country A and then submit evidence of these proceedings and their appointment to the court in Country B.

Provided that the requirements set out in Article 17(1) MLCBI are met by the proceedings in Country A are met, the court in Country B then needs to determine whether the debtor's COMI is in Country A in order for the proceedings to be recognised as foreign main proceedings.

Under Article 16(3) MLCBI there is a rebuttable presumption that the place of the registered office of the debtor is the place of its COMI, however the fact that the debtor's registered office is in Country A may not be sufficient information for the Court in Country B to conclude that the debtor's COMI is in Country A. The foreign representative should provide as many details as possible to the court in Country B (i.e. details of any assets, employees or bank accounts located in Country A) in order to ensure that the presumption is not rebutted.

The foreign representative also has the option to appeal the refusal by the court in Country B to recognise the proceedings as foreign main proceedings. Article 17 paragraph 4 MLCBI clarifies that the decision on recognition may be revisited if the grounds for the decision were fully or partially lacking or have ceased to exist.

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

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

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

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

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

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

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

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

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

Globe Holdings expeditiously secured the support of the majority of the Noteholders of its decision to delay interest payments and restructure the Notes through a formal proceeding. Thereafter, on August 31, 2021, about 57% of the Noteholders acceded to the Restructuring Support Agreement (RSA) governed by the New York law. The RSA memorialized the agreed-upon terms of the Note

Restructuring. When Globe Holdings approached its largest Noteholders regarding the contemplated restructuring, their expectations were that any such restructuring would take place in the Cayman Islands, which is reflected in the RSA.

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

On July 26, 2023 the Cayman Court entered a convening order (the Convening Order) on the papers, among other things, authorizing the client to convene a single Scheme Meeting for the purpose of considering and, through a majority vote, approving, with or without modification, the Scheme. The Scheme Meeting was held in the Cayman Islands at the offices of Cedar and Woods. Given the Covid-19 pandemic, Scheme Creditors were also afforded the convenience of observing the Scheme Meeting via Zoom and in person via a satellite location in New York. Following the Scheme Meeting, the chairman of the Scheme Meeting (presiding over the meeting in person) reported to the Cayman Court that the Scheme was overwhelmingly supported by the Noteholders, with 91.83% in number and 99.34% in value voting in favor of the Scheme. The Sanction Hearing was held, and an order sanctioning the Scheme (the Sanction Order), which was filed with the Cayman Islands Registrar of Companies the same day.

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

The foreign representative should apply for recognition of the Scheme in the US pursuant to Article 15 MLCBI (as adopted in the US).

The foreign representative should provide a copy of the Sanction Order as evidence of the Scheme as a foreign proceeding. The foreign representative should also file a statement identifying all foreign proceedings in relation to Globe Financial Holdings Inc (the "Company") that are known to the foreign representative pursuant to Article 15(3) MLCBI. The court may require a translation of documents supplied in support of the application under Article 15(4) MLCBI however this is not expected to be relevant on the facts set out above.

Given the pending class action in the US, the foreign representative should apply for interim relief under Article 19 MLCBI. This applies to both foreign main and foreign non-main proceedings and can include a stay of execution against the assets of the Company or any additional relief that would be available to the foreign representative under the laws of the Cayman Islands. According to Article 19(3) MLCBI, unless extended, this relief would cover the period from the time the recognition application is filed in the US until the application is decided upon in the US and would therefore provide discretionary relief in relation to the class action prior to the recognition decision.

The recognition of the Scheme as a foreign main proceeding or a foreign non-main proceeding requires an analysis as to the COMI of the Company as at the time the Scheme was sanctioned, being the date of commencement of the foreign proceeding.

COMI is not defined in the MLCBI, however there is a rebuttable presumption that the COMI of the Company is the place of its registered office. There are 2 principal factors which will indicate whether the location in which the foreign proceeding has been commenced is the COMI of the Company. These are: (i) the location where the central administration of the Company takes place and (ii) the location which is readily ascertainable by creditors of the Company.

The determination of COMI should be a holistic exercise which considers a range of factors such as: (i) the location of the books and records of the Company, (ii) the location of the principal assets and operations of the Company, (iii) the location of the employees of the Company and (iv) the location of the main bank of the Company.

Whilst the facts above state that the headquarters of the Company are in the US, it is assumed that the registered office of the Company is in the Cayman Islands as this is where the Company is incorporated. The books and records of the Company are maintained in the Cayman Islands and the Company holds a bank account in the Cayman Islands (although this was only opened a few days ago). The employees of the Company are based in the US and the headquarters of the Company are in the US. All of the business of the Company is carried out through subsidiaries incorporated in the US. The board meetings of the Company are held virtually and not physically in the Cayman Islands.

Applying a holistic approach to the facts set out above (and considering the 2 principal factors set out in the UNCITRAL Legislative Guide) the court deciding on the recognition application may rebut the presumption that the COMI of the Company is in the Cayman Islands and instead decide that the COMI is in the US given that:

- (i) the headquarters of the Company, the employees of the Company and the business of the Company are located in/carried out in the US, thereby indicating that the central administration of the Company takes place in the US; and
- (ii) the creditors of the Company who deal with the Company through its subsidiaries in the US may not be in a position to readily ascertain that the Company is actually registered in the Cayman Islands.

However as noted above the court will consider a range of factors in determining the COMI of the Company and the court may well decide that the COMI of the Company is in the Cayman Islands given the presumption arising from the fact the Company has its registered office in the Caymans Islands, given that the books and records of the Company are maintained in the Cayman Islands and given that the Company holds bank accounts in the Cayman Islands.

If the COMI of the Company is deemed to be the US, the court must also deem that the Company has an establishment in the Cayman Islands (or vice versa), otherwise the Scheme will not be recognised as a foreign proceeding and the court would have to deny the recognition application (Article 17(2) MLCBI). An establishment is defined in the MLCBI as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Paragraph 90 of the UNCITRAL Legislative Guide states that as 'establishment' is a defined term, the inquiry to be made by the court as to whether the debtor has an establishment is purely factual in nature. There is no presumption with respect to the determination of establishment, unlike with COMI for foreign main proceedings. The existence of debts and the presence alone of goods in isolation, or bank accounts or of property would not in principle satisfy the definition of establishment.

Based on the facts above, it is likely that the court deciding on the recognition application would conclude that the Company has at least an establishment in the US and/or the Cayman Islands.

In the event the court decided that (i) the COMI of the Company is in the US and (ii) the Company has an establishment in the Cayman Islands, the Scheme in the Cayman Islands would be recognised as a foreign non-main proceeding. In the event that the court decided that (i) the COMI of the Company

is in the Cayman Islands and (ii) the Company has an establishment in the US, the Scheme in the Cayman Islands would be recognised as a foreign main proceeding.

As to the specific question of whether to apply for recognition of (i) foreign main proceedings; or (ii) foreign non-main proceedings or (iii) both, this distinction is not relevant in relation to an application for interim relief under Article 19 MLCBI as this is available in the case of both foreign main proceedings and foreign non-main proceedings, albeit this relief is discretionary.

In relation to post-recognition relief, in the case of foreign main proceedings this is both automatic under Article 20 MLCBI and discretionary under Article 21 MLCBI, whereas in the case of foreign non-main proceedings, post-recognition relief will only be discretionary under Article 21 MLCBI. The relief granted in foreign non-main proceedings is usually narrower as the relief should not give unnecessarily wide powers to the foreign representative that would interfere with the administration of another insolvency proceeding, in particular the foreign main proceeding.

The application for recognition of the Scheme should therefore be for recognition of the Scheme as a foreign main proceeding (i.e. the COMI of the Company is in the Cayman Islands with an establishment in the US) in order to obtain both automatic and discretionary relief upon the recognition of the Scheme. The foreign representative should therefore provide as much evidence as possible to persuade the court that the COMI of the Company is in the Cayman Islands.

It may also be desirable to apply for option (iii) above, i.e. submitting applications for recognition for both a foreign main proceeding and a foreign non-main proceeding in order to increase the chances of a successful recognition.

As discussed above, an application should also be made for discretionary pre-recognition relief under Article 19 MLCBI in any event given the pending class action in the US.

Very good essay with substantive arguments concerning the two options. Missing are the definitions (per Art.2 MLCBI), and a reference to Art.16 in the discussion.

*** End of Assessment ***

Marks awarded: 39 out of 50