



**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] 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] 9 marks

#### Question 2.1 [maximum 3 marks] 2 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 key distinction between the application of the MLCBI and the EU Regulation on Insolvency Proceedings (the “EIR”) is that the EIR is a treaty [careful!] whereas the MLCBI is not. The MLCBI is only a recommendation for countries to adopt into their domestic legislations (i.e. a form of “soft-law”), whereas a treaty is binding on countries who chose to ratify it.

The benefit of using a treaty-approach is that countries who ratify it must adopt the provisions of the treaty, which creates greater consistency in the laws of the member countries. However, the disadvantage of using a treaty-approach is that it is difficult to persuade countries to ratify treaties because it generally does not accord them the flexibility of tailoring / modifying the obligations under the treaty to suit their domestic situation.

The benefit of using a “soft-law” approach like the MLCBI, is that it is more flexible and allows states to adopt them with / without modifications as they see fit which in turn leads to a greater uptake. In this regard, the success of the MLCBI can be seen from how legislation based on or influenced by the MLCBI has been adopted in 59 states. However, the disadvantage of this approach is the lack of consistency across the countries who choose to adopt the MLCBI.

**An EU Regulation (secondary law) is not a Treaty (primary law). Regulations are not chosen for ratification by member states, but agreed by the EU Parliament and Council...**

#### Question 2.2 [maximum 2 marks] 2 marks

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

The court should primarily consider the following matters when deciding whether to use its discretionary powers to grant post-recognition relief under Article 21 of the MLCBI:

- The court should consider whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. If dealing with a foreign main proceeding, the court should be aware that the automatic mandatory reliefs provided under Article 20(1) of the MLCBI would apply and that its discretion in that regard might be limited to the extent as provided for under Article 20(2) of the MLCBI by each enacting state.
- According to Article 22(1) of the MLCBI, the Court must also be satisfied that “*the interests of the creditors and other interested persons, including the debtor, are adequately protected*”. The Court must therefore aim to balance the effect of the reliefs applied for as against the interests of the persons that may be affected by the relief.
- According to Article 21(3) of the MLCBI, the Court must also be satisfied if granting reliefs in respect of a foreign non-main proceeding that “*the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding*”. The consideration here is for the Court to try and ensure that any relief granted does not interfere with the administration of other foreign proceedings, especially the foreign main proceeding.

**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(1) of the MLCBI states that: “Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [identify laws of the enacting State relating to insolvency] as creditors in this State.”

Article 13(2) of the MLCBI states that: “Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred payment claim) has a rank lower than the general non-preference claims].”

Article 13(1) of the MLCBI provides for foreign creditors to have the same rights as local creditors in the enacting state with regard to the commencement of and the participation in local proceedings relating to the debtor under the insolvency law of the enacting state.

Article 13(2) of the MLCBI provides that Article 13(1) of the MLCBI does not affect the ranking of claims in the enacting State, and that the claims of the foreign creditors shall not be given a lower priority than the claims of general unsecured creditors solely because of their status as “*foreign creditors*”.



It should, however, be noted that the footnote to Article 13(2) of the MLCBI provides for an alternative wording for Article 13(2), which allows enacting states to discriminate against foreign tax and social security claims.

**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 key distinction is that the recognition of a foreign main proceeding provides for automatic mandatory reliefs upon recognition pursuant to Article 20 of the MLCBI, namely:

- *“Commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed”;*
- *“Execution against the debtor’s assets is stayed”;* and
- *“The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.”*

Although the above reliefs can be granted in respect of foreign non-main proceedings, they are not automatic. The foreign representative applying for them will have to convince the Court to exercise its discretion to grant them (see response to Question 2.2).

**QUESTION 3 (essay-type questions) [15 marks in total] 12 marks**

**Question 3.1 [maximum 4 marks] 3 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.

Based on the description above, insolvency proceedings must have been filed in Germany and in Bermuda. The description above also suggests that the insolvency practitioners in appointed in the insolvency proceedings in Germany and/or Bermuda had also applied to recognise these proceedings in the US.

The insolvency proceedings filed in Germany would likely be recognised as foreign main proceedings in the US because the debtor has its Centre of Main Interests (“COMI”) in Germany. This is in accordance with Article 2(b) of the MLCBI which defines “foreign main proceeding” as “a foreign proceeding taking place in the State where the debtor has the centre of its main interests”.

The insolvency proceedings filed in Bermuda would likely be recognised as foreign non-main proceedings in the US because the debtor has an establishment in Bermuda. This is in accordance with Article 2(c) of the MLCBI which defines “foreign non-main proceeding” as “a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment ...”. An “establishment” is defined under Article 2(f) of the MLCBI as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.”

**Requires references to procedural provisions of MLCBI eg. Art. 15, 17, 6..**

**Question 3.2 [maximum 3 marks] 2 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.

The likely outcome is that the joint provisional liquidators will not be found liable for the claim brought by US-based vendors of the foreign debtor for tortious interference with contract rights.

The US Courts are unlikely to find that applying for the recognition of foreign insolvency proceedings in the US could subject a foreign representative, who was merely acting in accordance with his duties, to personal liability for tortious interference with the contract rights of the debtor's US-based creditors.

**Requires reference to 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?

The foreign representative should immediately apply for interim relief under the equivalent of Article 19 MLCBI under US Law.

The interim relief that the foreign representative should apply for is an order preventing the enforcement of the *ipso facto* clauses under the US-governed leases and intellectual property licenses. This will ensure that these assets are protected from termination pending recognition. In this regard:

- such interim relief can be applied for pursuant to the US equivalent of Article 19(1)(c) MLCBI read with Article 21(1)(g) MLCBI, which state that the foreign representative can apply for any additional relief that may be available to a US insolvency officeholder;
- as a US insolvency officeholder can rely on the US Bankruptcy Code to render *ipso facto* clauses unenforceable, a foreign representative should similarly be able to apply for such reliefs pursuant to the US equivalent of Article 19(1)(c) MLCBI read with Article 21(1)(g) MLCBI; and
- this situation can be distinguished from *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch) where the UK Court did not grant the relief sought by the foreign representatives to prevent the enforcement of *ipso facto* clauses. In *Fibria*, the UK Court denied relief because *ipso facto* clauses were valid and enforceable in a UK

insolvency at the time. This can be distinguished from the present case where *ipso facto* clauses are not enforceable under the US Bankruptcy Code.

**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?

Apart from appealing the decision of the Court in country B, the foreign representative could also consider applying for recognition of the foreign proceeding as a “*foreign non-main proceeding*” if he can show that the debtor has an “*establishment*” in Country B. In this regard:

- a “*foreign non-main proceeding*” is defined under Article 2(c) MLCBI as “*a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article*”; and
- an “*establishment*” is defined under Article 2(f) MLCBI as “*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.*”

As the debtor has assets within the territorial jurisdiction of Country B, the foreign representative might be able to establish that the debtor has an establishment in Country B. However, it is important to note that the mere presence of assets in a jurisdiction does not mean that a debtor has an establishment there (*The Judicial Perspective* at paragraph [140]). The debtor must also adduce evidence that the debtor has a place of operations in Country B, and that non-transitory economic activity with human means and goods or services is being carried out in Country B.

If the foreign representative is unable to show that the debtor has an establishment in Country B, then the foreign representative will need to consider where the COMI of the debtor truly is and facilitate the commencement of insolvency proceedings there. The appointed foreign representative in the COMI jurisdiction can thereafter apply for recognition in Country B of the insolvency proceedings in the COMI jurisdiction as a foreign main proceeding, and apply for reliefs that empower him/her to sell the assets 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] 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.

Whether to apply for recognition of main proceedings, non-main proceedings, or both

I would recommend that we apply for the recognition of the Cayman insolvency proceedings in the US as a foreign main proceeding, but also apply for the recognition of it as a foreign non-main proceeding in the alternative.

The US Court might be willing to recognise the Cayman insolvency proceedings as foreign main proceeding as the Cayman Islands might be the COMI of the Globe Holdings (Article 2(b) MLCBI) for the following reasons:

- there is a presumption that Globe Holdings' COMI is in the Cayman Islands pursuant to Article 16(3) of the MLCBI because Globe Holdings' registered office is located in the Cayman Islands. Although Globe Holdings was previously incorporated in Canada, the presumption of COMI is made on the date that the application for recognition is filed;
- when Globe Holdings re-incorporated in the Cayman Islands in 2010 from Canada, it provided various notices of its re-incorporation, including in the public filings with the Securities and Exchange Commission;
- Globe Holdings has a bank account in the Cayman Islands from which it pays its operating expenses. Though this factor might not be that persuasive given that the bank account was only opened a few days ago;

- Cayman Islands may also be the jurisdiction whose law would apply to most disputes especially since Globe Holdings have engaged Cayman Islands counsel for over a decade; and
- Cayman Islands is also the location where Globe Holdings maintains its books and records.

However, there is a risk that the US Court would not recognise the Cayman Insolvency Proceedings as a foreign main proceeding. This is because Globe Holdings does not actually have any business operations of its own and therefore no business operations in the Cayman Islands. It should also be noted that business activities of Globe Holdings were conducted through its subsidiaries who are all incorporated under US laws and operating in the US. Globe Holdings' employees and headquarters are also all in the US.

In the circumstances, I would recommend that Globe Holdings also apply in the alternative for the Cayman insolvency proceedings to be recognized as a foreign non-main proceeding. The US Court might be willing to recognise the Cayman insolvency proceedings as a foreign non-main proceeding because there is some evidence that Globe Holdings has an “*establishment*” in the Cayman Islands (see Article 2(c) read with Article 2(f) of the MLCBI). To this end:

- Globe Holdings has engaged Cayman Island counsel to “*regularly [represent]*” Globe Holdings for over a decade. This could be evidence of Globe Holdings having non-transitory economic activity with human means in the Cayman Islands;
- Globe Holdings also seem to have recently opened a bank account in the Cayman Islands from which it pays its operating expenses. This could also indicate that Globe Holdings has non-transitory economic activity with human means in the Cayman Islands; and

It should, however, be noted that more facts will be needed before a determination can be made as to whether Globe Holdings has an establishment in the Cayman Islands as the above facts, on their own, might not be sufficient to show the existence of an establishment. If, for example, it is discovered that Globe Holdings does not have non-transitory economic activity with human means and goods or services in the Cayman Islands, then there would be no point in applying for recognition as a non-main proceeding as an alternative as it would not be granted.

#### What papers need to be submitted

The following papers need to be submitted:

- A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or in the absence of the above-mentioned evidence, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. (Article 15(2) MLCBI)
- A statement identifying all foreign proceedings in respect of Globe Holdings that are known to the foreign representative of Globe Holdings. (Article 15(3) MLCBI)
- Evidence of the above-mentioned factors pointing to Cayman Islands being the COMI of Globe Holdings.

- Evidence of Globe Holdings having an establishment in the Cayman Islands (if also applying in the alternative for recognition of the Cayman insolvency proceedings in the US as a foreign non-main proceeding).
- Evidence in support of the reliefs sought by the foreign representative of Globe Holdings, in particular, evidence of how the interests of the creditors, other interested persons, and Globe Holdings are adequately protected (Article 22(1) MLCBI). In this case, evidence in relation to the scheme that was sanctioned in the Cayman Islands should be adduced.

Reference should also be made to the US equivalent of Article 15 of the MLCBI, as well as the US law surrounding the MLCBI to check if there are any other papers that need to be filed.

### What reliefs should be requested on day one of the filing

The reliefs that should be requested on day one of the filing is as follows.

First, the foreign representative should apply for the Cayman Insolvency Proceedings to be recognized in the US as a foreign main proceeding or a foreign non-main proceeding.

Second, the foreign representative should also apply for himself / herself to be recognized as the foreign representative of the Cayman Insolvency Proceedings.

Third, the foreign representative should also apply for the stay of the commencement or continuation of individual actions or individual proceedings concerning the Globe Holdings' assets, rights, obligations or liabilities (Article 21(1)(a) MLCBI). This is to prevent the class action litigation in the US from being filed against Globe Holdings. Although this relief is automatic and need not be applied for if the Cayman insolvency proceedings is recognized as a foreign main proceeding, the foreign representative should still request for it in the application just in case the US Court is only willing to recognise the Cayman insolvency proceedings as a foreign non-main proceeding.

Fourth, the foreign representative should also consider applying for relief under Article 21(1)(g) of the MLCBI for the sanctioned scheme in the Cayman Islands to be given effect in the US. Given that such relief would be ordinarily available to a debtor in the US, such relief should also be available to the foreign representative. Alternatively, the foreign representative could also take reference from the *Re BTA Bank JSC* [2012] EWHC 4457 (Ch) case and apply for the stay of the commencement or continuation of individual actions or individual proceedings concerning Globe Holdings' assets, rights, obligations or liabilities to be made permanent.

**Good, well-outlined essay.**

**References to Art.19, 22, 6 MLCBI and COMI definition from different sources are required.**

**\* End of Assessment \***

**Marks awarded: 40 out of 50. Good work!**