



**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] 6 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 Regulation (EIR) is directly applicable within the Member States of the European Union, as per established principles of EU law. Conversely, the MLCBI is soft law which states *may* choose to adopt and/or modify.

In terms of the reference to the difference of “*application*”, I understand that, in the light of the course Guidance Text, to be a reference to the COMI, in that although the concept of COMI across the MLCBI and EIR are similar, different purposes are served. Under the Regulation, the Member State in which the debtor’s COMI is located is the state that has exclusive jurisdiction to open main proceedings - proceedings which the other Member States are obliged to recognise automatically; whereas, conversely, under the MLCBI the COMI concerns the effects of recognition, namely the relief that can be available to assist the foreign proceeding.<sup>1</sup>

A benefit of the EU approach is that legal certainty and predictability are enhanced, given that the EIR is an instrument of maximum harmonisation, in respect of deciding the jurisdiction of the main proceedings, across the Member States. There is no ‘*soft law*’, optional approach. The relevant law binds the relevant Member States, which must all apply the same test and automatically recognise and accept the state in which main proceedings are opened.

A disadvantage in contrast to the MLCBI is a loss of flexibility in that states implementing the MLCBI can vary its terms and can choose whether to grant certain types of relief on the basis of whether the Court recognises there to be foreign proceedings.

---

<sup>1</sup> Course Guidance Text, p 27, fn 90.

**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.

- Whether a foreign proceeding has been recognised;
- Whether the exercise of the power is necessary to protect the assets of the debtor or the interests of creditors;
- Whether the foreign representative has requested the use of the power;
- The balancing exercise set out in Article 22, *i.e.* whether the interests of the debtor, creditor and other interested persons are adequately protected; and
- Whether the relief granted under Article 21 should be subject to conditions (Article 22(2)).

**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 provides a right of access for foreign creditors in respect of commencing, and participating in, insolvency proceedings in the state which has implemented the MLCBI. Moreover, this provision does not affect the ranking of claims in a proceeding in the MLCBI state, *“except that the claims of foreign creditors shall not be ranked lower than... 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(2)).

The provision encapsulates, therefore, an anti-discrimination principle,<sup>2</sup> in respect of enabling foreign creditors to commence and participate in actions on comparable terms to domestic creditors. That being said, the principle is not necessarily an absolute one - as footnote *b* to the MLCBI, Article 13 recognises,<sup>3</sup> given the suggested wording of *“other than those [claims by foreign creditors] concerning tax and social security obligations”*.

**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?

If a foreign main proceeding is recognised automatic relief arises under the MLCBI, Article 20(1), *i.e.* the general stay under Article 20(1)(a)-(c) is triggered. Conversely, if foreign non-main proceedings are recognised, there is no automatic stay, but such relief *may* be granted, upon a request by the foreign representative, under Article 21. To obtain such relief (*i.e.* after recognition of a foreign non-main proceeding) the applicant would need to establish that the Court should grant the relief, after taking into account the Article 22 criteria, *i.e.* adequate protection of interests etc.

**QUESTION 3 (essay-type questions) [15 marks in total] 13 marks**

---

<sup>2</sup> Module 2A Guidance Text, p 22.

<sup>3</sup> *Ibid.*



**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.

The foreign main proceeding must have been filed in Germany, given that that is the location of the debtor's COMI (MLCBI, Article 17(2)(a)), and foreign non-main proceedings must have been filed in Bermuda, given that the debtor has an establishment in Bermuda (MLCBI, Article 17(2)(b)), but not its COMI.

The likely result, in the abstract, is that the US recognition application will be granted, and the US Court will apply an automatic stay, pursuant to Article 20(1), on the basis that the proceedings in Germany are recognised as foreign main proceedings.

**Answer should be substantiated with a discussion on and with references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 6..**

**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.

I understand the position to be that the tort action is a US action that has been brought in the US. So, the starting point is that the JPLs have not submitted to the jurisdiction of the US Court in respect of the tort action, given that as per Article 10, the Chapter 15 proceedings only involved the JPLs submitting themselves to the US Court's jurisdiction for the purpose of the petition, and not any other purpose. Depending on the circumstances though, the JPLs may wish to seek relief in staying / resisting the US litigation / entering a defence to that litigation and/or seeking relief within the US litigation.

However, from the insolvency / UNCITRAL law perspective, the JPLs would presumably seek to stay (or defeat) the US litigation, so as to avoid it interfering with their work and/or the foreign proceedings. The JPLs would thus likely seek urgent preliminary relief under Article 19, arguing that this is necessary to protect the debtor's assets and that the interests of the parties are adequately protected (Article 22) etc. Purely in the abstract, such relief would presumably be given, in that the urgency test (Article 19(1)) is satisfied, due to existing tort litigation that is targeted *directly at the insolvency process or, more accurately, the foreign representatives themselves*. At the very least, such relief would appear to make sense on an interim basis until the US Bankruptcy Court has determined the recognition application.

**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 apply for preliminary relief under Article 19 given that, until the US Court considers the recognition proceeding, there is no stay on any general action by the US creditors and/or any other legal block in the US on the creditors taking steps in respect of the assets, *i.e.* the assets are exposed, notwithstanding the comfort that would be given by the fact that US Bankruptcy Law would not treat the *ipso facto* clauses as enforceable. If anything, however, the *ipso facto* clauses add to the incentive for the JPLs to seek urgent relief, given that the creditors may / will likely know that the *ipso facto* clauses are unenforceable and seek to take *other* steps (outside of litigation) in the next 35 days. In other words, between now and the hearing, the creditors may attempt to extract value from the assets / dissipate the assets / assign the assets / exercise any contractual rights (including and/or short of termination) to the benefit of the creditors and detriment of the debtor. The relief sought could, for example, include as per Article 21(1)(c) (accessed via Article 19(1)(c)), suspending any right of transfer of the leases and/or IP rights etc. The debtor would, however, need to argue that the test of urgency (Article 19(1)) satisfied, notwithstanding the absence of any threat of litigation, and that the interests of the creditors, and other interest parties (which may be parties to the leases and IP licences) are adequately protected.

Such relief would also be prudent given that there may be obvious limits to any assistance to be had from the English Court, including on the basis that, as per the rule in *Gibbs*, “discharge of a debt under the insolvency law of a foreign country is only treated as a discharge therefrom in England if it is a discharge under the law applicable to the contract” ([2018] EWHC 59, para 44).

#### 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?

The foreign representative should have applied, in Country B, for recognition of the insolvency proceeding in country A as a foreign non-main insolvency proceeding, under Article 17(2)(b), *in the alternative* (in the event that Country B declined to recognise the Country A proceeding as a *main* foreign proceeding).

Having failed in the application for recognition as a foreign main proceeding (and without prejudice to any rights of appeal / review in that respect), the foreign representative should apply for recognition of the proceeding as a foreign non-main proceeding, provided that there is no bar to doing so on the basis of estoppel and/or a *Henderson v Henderson* point etc and, if granted, seek appropriate relief under Article 21.

**Missing reference and discussion Art.16 MLCBI on “rebuttable COMI presumption” to indicate weak COMI.**

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

#### Answer

For the sake of convenience: references in this answer to “Articles” are to the MLCBI and reference to “§§” are to US Title 11, Chapter 15 (unless indicated otherwise).

The first course of action would be to file in the US, under Title 11, Chapter 15, for recognition of the proceedings in Cayman as foreign proceedings. My view would be to file for recognition of the Cayman proceedings as foreign *main* proceedings (‘FMP’) and, *in the alternative* (in case the US Bankruptcy Court rejects that filing), as foreign *non-main* proceedings (‘FNMP’).

Taking this approach systematically, the first point is obviously that the Cayman Scheme is a “*foreign proceeding*” for the purpose of Article 2(a) / §101(23), such that an application for recognition can be made accordingly (Article 17(a)). In that regard, recognition does not appear to be manifestly contrary to public policy (Article 6), but I also note that the client has direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States, and §1501(d) provides that: “*The court may not grant relief under this chapter with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law or regulation for the benefit of claim holders in the United States*”. I have not considered this point further, however, given that this is a paper on the UNCITRAL Model Law, and not US bankruptcy law.

Moreover, there is also a “foreign representative” (Article 2(d) / §101(24)):

“Chapter 15 proceedings may be commenced if a debtor is engaged in non-US insolvency proceedings and a duly authorised representative seeks recognition of those proceedings in a US Bankruptcy Court. The “foreign representative” who seeks recognition is typically a receiver, liquidator, administrator or similar officeholder including, in the context of a scheme/RP, a designated member of the board of directors of the scheme/RP company” (Pilkington on Creditor Schemes of Arrangement and Restructuring Plans, 3rd Ed, para 11-026).

The foreign representative has a right of direct access (Article 9 / §1509), and is entitled to file the Chapter 15 petition, pursuant to Article 11 / §§1504, 1509(a).

The application would be filed pursuant to Article 15 / §1515(a), and would include a copy of, *inter alia*:

- a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative (so, here the Cayman Court’s Convening Order);
- a certificate from the Court affirming the existence of such foreign proceeding and of the appointment of the foreign representative a certificate and the Cayman Court’s Sanction Order); and/or
- any other evidence acceptable to the US court of the existence of such foreign proceeding and of the appointment of the foreign representative (Article 15(2) / §1515(b)), e.g. the Cayman Court’s Sanction Order, in the event that (for whatever reason) this is not a ‘certificate’, as above.

The provision of the above (*i.e.* the Sanction Order and/or the Certificate) would also enable the US Court to apply the presumptions in Article 16(1) / § 1516(a), *i.e.* presume the Cayman proceedings are foreign proceedings and that the foreign representative is a foreign representative under Article 2(d).

The application would also be filed with a statement identifying all foreign proceedings with respect to Globe Holdings that are known to the foreign representative (Article 15(3) / §1515(c)).

The US petition would argue, as stated above, by way of primary contention, that the Cayman proceedings are FMP in order to afford the client the greatest degree of protection possible, in terms of safeguarding the Cayman Scheme. The petition would, therefore, contend that the COMI in respect of the client is in Cayman (Article 2(b) / §§1502(4); and Article 17(2)(a) / §1517(b)(1)). It would do this by asserting, *inter alia*, that:

- The presumption in Article 16(3) / §1516(c) applies, given that the client’s registered office is in Cayman, *i.e.* where Globe Holdings has been incorporated;
- Globe Holdings maintains its books and records in the Cayman Islands (*i.e.* administrative functions take place there etc);
- Board meetings, although held remotely, have been organised by Cayman counsel; and
- The Scheme Meeting was held in the Offices of Cedar and Woods etc.

Furthermore, the petition would contend that this is in line with the location of the COMI as at the date of filing the Chapter 15 petition, *and* also as at date of the commencement of the foreign proceedings - in other words, that there has been no manipulation of the COMI in bad faith (*Morning Mist Holdings Ltd v Kryss (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals Apr. 16, 2013)). That does, however, raise the issue of the bank account being opened a few days ago, to pay certain operating expenses. I would need to discuss that with the client to consider why, exactly, that has happened, so as to present this information in

the best possible light, due to the risk of any opposing party asserting that it is an attempt to manipulate the COMI (prior to filing the Chapter 15 petition). The petition would also assert that client was re-incorporated in Cayman in 2010, well before the senior unsecured notes were issued (in 2017), and that various notices of its re-incorporation (in 2010), were included in public filings with the Securities and Exchange Commission (SEC). Likewise, counsel Cedar and Woods were instructed in 2010 etc and the Prospectus disclosed that the client is a Cayman Islands company etc.

All of the above being said, there are also factors which point to the COMI potentially being elsewhere (most obviously the HQ and employees being in the US, and the RSA being governed by New York law etc - albeit that the filing could also point to the fact that even the RSA envisaged that the restructuring is taking place *in Cayman*, despite being governed by NY law). Consequently, and in any event, the petition would argue, in the alternative, that the Cayman proceedings are FNMP. It would do this by pointing to the fact that the client has an establishment in Cayman (Article 17(2)(b) / §1517(b)(2)) due to the presence of operations there, where non-transitory economic activity takes place (Article 2(f) / §1502(2)), *i.e.* maintaining books and records etc. Appropriate evidence could be included, to that effect.

The relief sought in the filing would be designed, of course, to protect the Cayman Scheme, and try to shield it against any class action in the US.

Upon filing the petition there is the issue of how long the Court would take to list the recognition hearing etc. Accordingly, if a class action is brewing it may be prudent to seek preliminary relief right on day one of the filing (at the time of filing the Chapter 15 petition), under Article 19 / §1519, including: staying any claims / execution against the client's assets; entrusting realization of the client's US assets to the client as part of the Cayman Scheme; suspending any rights that the prospective litigants may have against the client, in respect of its assets, etc. The client would have to argue that this is necessary to protect the debtor's assets, that it would also be in the interests of creditors for the Scheme to proceed without disruption by way of US litigation, and that the urgency test (Article 19(1)), is satisfied, although this might be difficult if the US litigation is merely "*brewing*" and has not been filed or threatened yet. Factors which the client could point to are the impending sale of the US HQ and the fact that a majority of note holders approved the Cayman Scheme and that it is in the interests of the note holders as a whole for the Cayman Scheme to proceed, with the extension of maturity of the Notes and client's flexibility to pay the quarterly interest "*in kind*".

In that regard, should such relief be granted, it will be terminated upon recognition of a foreign proceeding, unless extended under §1521, as per §1519(b): "*Unless extended under section 1521(a)(6), the relief granted under this section terminates when the petition for recognition is granted.*" In the event that this concerned distribution of US assets (*e.g.* the HQ etc), the client would need to establish that the interests of US creditors are sufficiently protected (Article 21(2) / §1521(b)).

In the event that preliminary relief is not obtained, for whatever reason (including in the event that the US Court deems the relief not to be "*urgently needed*" (§1519(a))), but the petition for recognition is successful, and the Cayman Scheme is recognised as a FMP, the automatic stay would then apply, as per Article 20(1) / §1520. If the Cayman Scheme is recognised as a FNMP, however, then the automatic stay would not apply, and the client would have to apply for relief (Article 21(1) / §1521(a)), contending that such relief is necessary to protect the assets of the debtor or the interests of the creditors (and that there is adequate protection of the parties' interests, as per Article 22 etc). Moreover, the client would have to establish that the relief relates to assets that, under US law, should be

administered by the Cayman foreign representative, or concerns information required in Cayman (Article 21(3) / §1521(c)).

Excellent essay. !

\* End of Assessment \*

Marks awarded: 44 out of 50 (Well done!)