



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] 7 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 difference between the format of the MLCBI and the EU Regulation provides a key distinction.

The MLCBI is a model law which provides a framework for cooperation of insolvency proceedings on a global scale and enables coordination between multiple different jurisdictions. Whereas the EU Regulation applies only to EU member states as a standardized framework and is automatically entered into law in member states of the EU. This uniformity makes cross-border insolvency proceedings within the EU much easier, promoting efficiency. The EU Regulation's downfall is that it is solely limited to EU member states and therefore cannot be applied globally, whereas the MLCBI can be, and the global reach of the MLCBI is its main strength.

However, as the MLCBI is not binding this can result in different jurisdictions applying the framework in ways they have interpreted, this can make cross-border insolvency proceedings inefficient, even among states which have adopted the MLCBI.

Question 2.2 [maximum 2 marks] 1 mark

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

Article 21 empowers the court to provide relief upon recognition of a foreign insolvency proceeding. When considering the granting of this power, the court should consider the need to implement the foreign insolvency proceeding to protect the assets of the debtor and weigh factors which contribute to the success of the foreign insolvency proceeding in the local jurisdiction.

The court should also ensure that they have considered whether granting this relief will not interfere with another insolvency proceeding, and align with the objectives of other proceedings, in particular the main insolvency proceeding, whilst remaining consistent.

The court primarily considers the creditors' interests

Question 2.3 [2 marks] 2 marks

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

Article 13 addresses the rights of foreign creditors, ensuring they're equal to those of creditors domiciled in the enacting State. The Article does not affect the ranking of claims in the local jurisdiction beyond ensuring that the claim of any foreign creditors is not given a lower priority than those claims of general unsecured creditors for reasons not related to the creditors status of being a foreign creditor, this is also known as the anti-discrimination principle.

Question 2.4 [maximum 3 marks] 1 mark

What is a key distinction with respect to the relief available in foreign main versus foreign non-main proceedings?

A foreign main proceeding in the principal insolvency proceeding which occurs where the debtor COMI is determined to be. Whereas a foreign non-main proceeding is a secondary proceeding which occurs in a State where the debtor's COMI isn't.

The foreign main proceeding has relief granted which is typically broader than relief granted to non-main processes. One of these is the automatic stay of legal proceedings, this halts legal proceedings and creditors against the debtor, which enables the insolvency process to continue unencumbered or threatened, this relief is not extended the non-main proceedings.

A further relief granted to the main insolvency process is the authority to sell assets or make significant steps to administer the state, which is typically granted to the main proceeding but not the non-main.

Requires reference to Art. 20 and 21 MLCBI. The relief in FNMP is discretionary

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 main proceeding is typically filed where the debtor has its COMI, which in this case would be Germany, and therefore take precedence. This is a fundamental principle of cross-border insolvency, ensuring that the primary proceedings are conducted in the jurisdiction most closely connected to the debtor's overall administration.

Foreign non-main proceedings could be filed in any State where a debtor holds an establishment, in this example that would likely be Bermuda. This recognition allows for

the efficient resolution of local issues and assets without disrupting the main proceedings. These non-main proceedings may operate independently within Bermuda but should align with the broader strategy of the main proceedings.

This means that the foreign recognition proceedings would be filed in the U.S., once the main proceeding in Germany is recognized in the U.S., the court will cooperate with the German proceedings, and providing relief in the U.S.

With the main proceeding in Germany, the German insolvency law would take precedence over the other jurisdictions, therefore the recognition in the U.S. would allow the U.S. proceeding to align with the German proceedings and continue as such.

The non-main proceeding in Bermuda would likely only focus on any matters within the State, including the assets. This dual-track approach, with allows for a comprehensive yet localized resolution where the administration of the process in all States is aligned.

The coordinated recognition and cooperation across the jurisdictions would allow for an effective and harmonized insolvency proceeding.

Requires references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 17, 6..

Question 3.2 [maximum 3 marks] 1 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.

In response to the immediate legal challenge, the joint provisional liquidators (“JPLs”) may seek relief under article 15 which provides the court with the authority to grant relief, potentially by staying or suspending the tort claim proceedings. This would protect and preserve the debtor’s assets during the insolvency process. By invoking this article, the JPLs would aim to maintain the integrity of the liquidation, safeguarding assets from the threatened disruption of the suit.

Simultaneously, the JPLs could turn to article 21 to seek relief from the U.S. court. This would coordinate and harmonize actions with the ongoing foreign main proceeding and recognizes the need for a cohesive approach to a global insolvency process. If this application was granted, an automatic stay could be issued which would halt the tort claim proceedings which would allow them to focus on the recognition proceedings and the overall management of the insolvency estate.

When evaluating the decision of whether to grant relief to the JPLs they would consider whether article 22 is relevant to the case and if cooperation and coordination with the foreign main proceedings will achieve a cohesive resolution for the Liquidation.

It’s also likely that to achieve a desirable outcome the JPLs would actively engage in communication with the U.S. court providing necessary information under article 27.

If the relief is granted, the U.S. court may coordinate with these proceedings in addressing the claims against the JPLs, this would allow the actions taken in the U.S. to align with the broader strategy of the main proceedings.

The JPLs would likely assert defences which include the protection of their actions under the recognition proceeding, principles of comity of the application of the foreign insolvency law and argue that their actions were within the scope of their authority in the insolvency process.

As the case progresses, the JPLs may cooperate with the U.S. court’s discovery process so long as it does not conflict with their obligations in the insolvency proceedings, by doing this they would also demonstrate to the U.S. court their transparency and collaboration.

The U.S. court would ultimately determine whether the tort claim against the JPLs holds merit and take into account the applicable laws, the scope of their actions and any available defences.

Requires discussion based on Art.10 MLCBI (noted the slightly relevant discussion in the last 3 paragraphs)

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?

Given that *ipso facto* clauses are not enforceable under US bankruptcy law, it's likely that the licenses and leases will remain intact during the 35 day period between the recognition hearing and petition date.

However, as previously demonstrated in *Belmond Park v BNY Corporate Trustee Services*, the English Supreme Court clarified that *ipso facto* clauses are in principle valid and enforceable in a UK insolvency. Although, the new Corporate Insolvency and Governance Act 2020 which was adopted in the UK in June 2020 in response to Covid-19 has reconsidered UK policy in regards to *ipso facto* clauses, and provides that certain clauses in contracts for the supply of goods or services will cease to have effect under certain UK insolvency proceedings.

Therefore, ahead of the U.S. recognition hearing the foreign representative should research which type of *ipso facto* clauses are held and whether they will cease to have effect upon recognition upon cooperation of the U.S. court. It's also essential that the foreign representative ensures they are fully prepared for the recognition hearing, if they don't have the appropriate experience they can engage U.S. legal counsel for this.

Ahead of the recognition hearing, the foreign representative could also seek protective measures from the U.S. court, which may involve requesting a stay or injunction to prevent any adverse actions by U.S. counterparties. This would protect the assets and the overall objective of the insolvency proceeding.

The foreign representative could also petition the U.S. court for interim relief and emergency orders to protect the assets ahead of the recognition hearing, which would provide immediate protection and stop counterparties triggering *ipso facto* clauses to protect the interests of the insolvency proceeding.

Alternatively, the foreign representative could implement asset preservation strategies which are consistent with the objectives of the UK restructuring, which could involve securing assets through legal means which are recognized in both the UK and the U.S., this could include filing for IP protections such as trademarks or patents to ensure that the property remains safeguarded and in the control of the insolvency practitioner to maintain the best outcome for the insolvency proceeding.

Question 3.4 [maximum 4 marks] 2 marks

A foreign representative, who administers the assets of an insolvent debtor in an insolvency proceeding pending in Country A (where the foreign debtor has its registered office and not

much more), commenced a proceeding in Country B to recognise the foreign proceeding as the foreign main proceeding in order to sell certain assets within the territorial jurisdiction of Country B, but unfortunately the insolvency court considering the petition for recognition denied the recognition of the foreign proceeding as a foreign main proceeding. Explain what may or should the foreign representative do next? What should the foreign representative have done at the outset?

After being handed the denial of recognition, the foreign representative could appeal the decision of the court, it would be advisable for the foreign representative to engage local legal counsel to navigate this process and establish whether there are legal grounds to do so.

If the appeal fails and the denial is upheld, the foreign representative could consider seeking recognition as a foreign non-main proceeding in Country B, this would allow the representative to administer and realize assets within the jurisdiction despite the recognition having a weaker status than that of a main proceeding. This is more likely to be approved and also works for the foreign representative of country A as they're seeking to sell assets within Country B. The foreign representative should have evaluated which status suited them better and potentially should've applied for recognition as a non-main proceeding in the first instance.

Part of this evaluation could have included a jurisdictional analysis which would have enabled the foreign representative to analyse the insolvency laws and recognition criteria in Country B, which would have informed the foreign representatives strategy.

If the foreign representative was still unsure of the optimum strategy to take, they could have engaged local legal counsel early to help inform their decision. By taking this step they could have tailored the recognition petition to meet the specific criteria outlined in Country B's insolvency laws.

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

QUESTION 4 (fact-based application-type question) [15 marks in total] 9 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.

Establishing the COMI for Globe Holdings will inform the decision of whether to file the scheme as a foreign main proceeding or non-main proceeding for recognition in the U.S. under chapter 15. It's important to note that the COMI is where the center of main operations is, not where the Company is incorporated.

Identifying the COMI for the Company relied on two main factors: where the central administration of the Company takes place and what is readily ascertainable as such by creditors of the debtor.

There are multiple factors which could play into this, and we can evaluate these in relation to Globe Holdings. The factors which would align with establishing the COMI as being the Cayman Islands are as follows:

- The books and records are held in the Cayman Islands.
- The reorganization of the debtor is being conducted in the Cayman Islands.
- As the subsidiaries are not debtors, and the holding company is, the creditors would perceive Global Holdings as being the COMI.
- The above is supported by the notices Globe Holdings filed upon it's re-incorporation to the Cayman Islands, including public filings and with the SEC, leading the public to believe that the COMI is in the U.S.
- Legal counsel retained by the Company is Cedar and Wood, therefore the conclusion could be drawn that most disputes are registered under Cayman Islands law, as this would be Cedar and Wood's specialty.

Whereas the factors which indicate that the COMI is in the U.S. are as follows:

- The business operates through its non-debtor subsidiaries which operate under U.S. law; therefore, it could be assumed that they are subject to U.S. commercial policy.
- Continuing the above point, as the operations of the business are carried out in the U.S., and the subsidiaries hold assets, this is the principal place where both these things are found, this is supported by the headquarters being located in the U.S.
- The employees of the Company are all located in the U.S.
- As the bank account the Company has in the Cayman Island was only opened a few days ago and only pays certain of its operating expenses it can be argued that the primary bank is held elsewhere and further that the majority of the operating expenses are paid from these alternate accounts.
- Due to the Company's accounts are filed with the SEC, it's fair to assume that U.S. laws govern the preparation and audit of accounts.

The above factors could be interpreted by the court in different weights in order to agree the COMI. However, Globe Holdings should be conscious that they hold an obligation to provide full disclosure to the court when establishing their reasoning for where they have indicated the COMI is. For example, by trying to claim that the primary bank is located in the Cayman Islands, it could be argued that the bank account was opened for the purpose of establishing the Cayman Islands as the COMI for a more favorable outcome and therein be perceived as abusing the process. If they're found to be doing so this could affect the granting of the recognition application.

The Cayman Islands could be argued to be only an establishment of the Company as it could be described as it is in the European Insolvency Regulation: “*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.*”

The decision to establish the Cayman Islands as an establishment or a COMI will affect whether the chapter 15 can be filed as main or non-main proceedings as main proceedings can only be defined as where the company has its COMI, whereas non-main is for establishment. Due to the above factors listed out which feeds into the COMI, it’s more likely that the COMI will be found to be the U.S., and therefore the Company should file for recognition in the US as a non-main foreign proceeding. If the Company wants further clarity on this point, they should engage local U.S. counsel to advise them on the matter.

To seek recognition of the non-main foreign proceeding in the U.S., Globe Holdings must submit the following documents:

- A certified copy of the decision initiating the foreign proceeding and designating a foreign representative; OR
- A certificate from the foreign court confirming the existence of the foreign proceeding and the appointment of the foreign representative; OR
- In the absence of the above evidence, any other admissible evidence demonstrating the existence of the foreign proceeding and the appointment of the foreign representative.

Additionally:

- A statement detailing all known foreign proceedings related to the debtor must accompany the recognition application.
- While the court may request translations of supporting documents into an official language of the enacting State, this is unlikely given that both the Cayman Islands and the U.S. predominantly use English as their main language.

Due to the proceeding being non-main, this means that the recognition, if granted, would not include automatic relief but only discretionary post-recognition relief granted by the court. Urgent interim relief can be granted before the recognition decision after the application has been filed provided that parties’ interests are aligned and protected under article 19.

It should be acknowledged that to grant this the court needs to be satisfied that the interests of the creditors and the parties are protected and can subject relief to conditions it considers appropriate and can also terminate the relief.

This relief can include:

- A stay of execution against the debtor’s assets.
- Suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor.
- Entrusting the administration or realization of all or part of the debtor’s assets located in the enacting State to the foreign representative or another person designated by the court. This is to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy.
- Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor’s assets, affairs, rights, obligations, and liabilities.
- Granting any additional relief that may be available to a domestic liquidator or office holder under the laws of the enacting State.

The stay of execution would enable the Company to stay the class action which is brewing against them, this would protecting the restructuring process and allow for the foreign representative to continue with the process without the risk of outside litigation.

Alternatively, the foreign representative could apply for a stay of actions which would provide the same protection against the potential class action.

The suspension of right to transfer under article 19 will also protect Globe Holdings against any changes which may affect the reorganization, particularly in relation to the sale of any assets which could alter the opinions of those who voted in favor of the reorganization and spur them to file a complaint against it which could affect the court's decision on relief and recognition granted.

Further cohesion of the insolvency proceeding could be gained by invoking article 25 which mandates co-operation from foreign courts and representatives, this would assist Globe Holdings with ensuring communication and assistance from the U.S. court.

The completion of all of these steps should ensure a successful outcome of the insolvency proceeding for Globe Holdings.

As this question is a fact-based application-type question, it requires the MLCBI provisions to be applied to the facts of the case and substantiated with references and a discussion. The answer should contain as a minimum: definitions (COMI, establishment, foreign main/non-main proceedings etc.) with respective references to (if any) MLCBI provisions and/or other sources (*noted the discussion for COMI definition*); reference to the rebuttable presumption of the COMI per Article 16(3) MLCBI (*noted the discussion*); reference to Article 15 MLCBI (*noted the information provided*); conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI (*noted the reference to Art. 19*)....

*** End of Assessment ***

Marks awarded: 32 out of 50