



**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] 5 marks

#### Question 2.1 [maximum 3 marks] 0 mark

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.

One key difference is with how the concept of COMI is applied under the MLCBI and under the EU Regulation on insolvency proceedings (EIR). In the EIR, COMI determines the jurisdiction in which the main proceedings should be commenced. In the MLCBI, COMI regulates the effects of recognition and the relief available to assist the foreign proceedings.

The EIR formulation of COMI helps to harmonise insolvency proceedings which take place across various jurisdictions, since the jurisdiction where the debtor has its COMI is given exclusive jurisdiction to open main insolvency proceedings in respect of the debtor, and the law of the forum state is the law applicable to all insolvency proceedings opened in other states. A disadvantage is that this notion of COMI is difficult to apply in practice, particularly where a debtor has its business operations spread over several states with central control and management functions performed in a number of states, and can provide opportunities for the debtor to abusively shift its COMI to make use of favourable insolvency laws in certain jurisdictions [this is only so in the EU?]. Furthermore, it is difficult for other jurisdictions not of the same customs union to agree to give up its sovereignty and allow the insolvency laws of another state to govern insolvency issues within its home jurisdiction [?].

The MLCBI formulation of COMI avoids difficult issues of jurisdictional limits, and grants courts of local jurisdictions the flexibility to consider and determine the level and extent of relief granted to foreign insolvency proceedings based on whether they are main or non-main. This helps to achieve a more uniform approach to cross-border insolvencies without having to harmonise insolvency rules across jurisdictions. However, such approach does not deal with differences in law among local insolvency proceedings, which can create unfairness or unintended outcomes for creditors if the debtor's insolvency is conducted differently in different jurisdictions, notwithstanding attempts to harmonise the level and extent of relief offered to foreign insolvency proceedings.

The answer provided is very contradictory and includes some arguable statements. Requires higher-level discussions regarding the geographical limitations (or lack of), adoption processes, implementation, and effect of MLCBI and EIR (e.g. MLCBI is soft law, whereas EIR is substantive law with direct effect)

**Question 2.2 [maximum 2 marks] 0 mark**

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

The court should consider whether the relief is for a foreign main or non-main proceeding. If it is for a non-main foreign proceeding, the court should be aware that the interests and authority of such representative are usually narrower, as such, the relief granted should be limited to assets that are to be administered and/or information required in that non-main proceeding (see paragraphs 193 to 195 of the Guide to Enactment and Interpretation of the MLCBI). This avoids the court giving too broad powers to the representative of a foreign non-main proceeding, which could interfere with the administration of another insolvency proceeding (particularly the main proceeding).

The court primarily considers the creditors' interests

**Question 2.3 [2 marks] 2 marks**

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

Article 13(1) of the MLCBI embodies the principle that foreign creditors should not be discriminated against and treated worse than local creditors when instituting insolvency proceeding in the enacting state.

Article 13(2) provides that the claims of foreign creditors shall not rank lower than general non-preference claims in the law of enacting state, save for exceptional circumstances (e.g. where even a domestic creditor would rank lower than general non-preference claims given special relationships).

**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?

Recognition of foreign main proceedings brings about the following automatic effects under Article 20 of the MLCBI (which could be modified or terminated under certain circumstances): (a) stay of commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; (b) stay of execution against the debtor's assets; and (c) suspension of right to transfer, encumber or otherwise dispose of any assets of the debtor. Such automatic relief is not available for foreign non-main proceedings.

While representatives of both foreign main and non-main proceedings may apply for discretionary relief under Article 21 of the MLCBI, in the case of foreign non-main proceedings, the court of the enacting state needs to consider whether the relief relates to assets that (under the law of the enacting state) should be administered in the foreign non-main proceeding or



concerns information required in that proceeding. Such considerations do not feature for discretionary relief granted to main proceedings.

Under Article 23 of the MLCBI, representatives of both foreign main and non-main proceedings should have standing to initiate actions under the law of the enacting state to avoid or otherwise render ineffective legal acts detrimental to creditors, but in the context of foreign non-main proceedings, the court needs to consider whether such actions relate to assets that should be administered in the foreign non-main proceedings.

**QUESTION 3 (essay-type questions) [15 marks in total] 10 marks**

**Question 3.1 [maximum 4 marks] 2 marks**

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

Since the debtor's COMI is in Germany, the foreign main proceedings would most likely have been filed in Germany, while the foreign non-main proceedings in Bermuda where the debtor only has an establishment. It appears from the facts that representatives from both sets of foreign proceedings have applied for recognition in the US. The US has largely adopted the MLCBI under Chapter 15 of the US Bankruptcy Code, which allows recognition applications to be made for both foreign main and non-main proceedings.

The representatives of both the German insolvency proceeding and the Bermuda insolvency proceeding may apply for relief from the US Court following filing of a petition for recognition under 11 U.S. Code § 1519 (incorporating Article 19 of the MLCBI) and/or following grant of recognition by the US Court under 11 U.S. Code § 1521 (incorporating Article 21 of the MLCBI). Assuming both sets of insolvency proceedings qualify as "foreign proceedings" for purposes of the US Bankruptcy Code, and that the US Court recognises the German insolvency proceeding as the foreign main proceeding while the Bermuda insolvency proceeding as the foreign non-main proceeding, the US Court will be more restricted in terms of the relief it can grant for the Bermuda insolvency proceeding, and such relief must relate to assets that under US law should be administered in the Bermuda insolvency proceeding or concerns information required in that proceeding (11 U.S. Code § 1521(c)).

As a general principle, under 11 U.S. Code § 1530 (incorporating Article 30 of the MLCBI), preference should be given to the foreign main proceeding if there is one, in that any relief granted in favour of a foreign non-main proceeding must be consistent with the foreign main proceeding. As such, it seems likely that relief will be granted in priority to the representatives of the German insolvency proceeding, and if there is any conflict with relief requested by the Bermuda representatives, the German representatives' requests should prevail.

**Requires references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 17, 6.. to substantiate answer on likely outcome.**

**Question 3.2 [maximum 3 marks] 0 mark**

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

Under 11 U.S. Code § 1510 (incorporating Article 10 of the MLCBI), the sole fact that a foreign representative applied for recognition does not subject it to the jurisdiction of the courts of the enacting state to matters unrelated to insolvency. As such, the joint provisional liquidators could argue that the US Court should not have jurisdiction over them just because they commenced recognition proceedings, accordingly the US Court should not have jurisdiction to hear the discovery application for the alleged tortious interference claim commenced by the US-based vendors (which *prima facie* is not a matter related to insolvency).

However, if under US law, the US Court can exert jurisdiction over the joint provisional liquidators as a result of their alleged tortious interference with contract rights of the US-based vendors, then notwithstanding 11 U.S. Code § 1510, the US Court could potentially hear such application against the joint provisional liquidators (see also paragraph 110 of the Guide to Enactment and Interpretation of the MLCBI).

Requires discussion based on 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 UK foreign representative could make an application for (a) urgent interim relief against exercise of the *ipso facto* clauses, and (b) extending such interim relief (and/or provide additional relief) if the US Court recognises the UK proceedings.

Under 11 U.S. Code § 1519 (incorporating Article 19 of the MLCBI), from the time of filing the recognition petition up until the US Court rules on the petition, the US Court may at the request of the foreign representative grant urgent interim relief to protect the assets of the debtor or the interests of the creditors. In this context, the UK foreign representative could seek relief to: (a) entrust the administration of the US-governed leases and intellectual property licences to it to protect and preserve the value of such assets which are in jeopardy, (b) suspending the relevant counterparties' right to transfer, encumber or otherwise dispose of such assets (including the right to exercise the *ipso facto* clauses), and/or (c) potentially injunctions against relevant counterparties from exercising the *ipso facto* clauses in the US-governed documents.

The UK foreign representative may need to persuade the US Court that the relief sought is “collective” in nature, and not “individual” in nature covering specific assets identified by a creditor only. If the rights under the US-governed leases and intellectual property licences are valuable and available for realisation for the benefit of the general class of creditors, then an argument could be made that relief sought is collective in nature. Moreover, the UK foreign representative will need to establish urgency to the relief sought – if the relief sought is merely preventive to pre-empt the counterparties of the US-governed documents from exercising their *ipso facto* clauses without a real risk of this occurring, then it may be difficult for the UK foreign representative to succeed on obtaining such interim relief.

Even if the US Court grants such interim relief, such relief generally terminates when the recognition application is decided (see 11 U.S. Code § 1519(b), incorporating Article 19(3) of

the MLCBI). Assuming the US Court grants a recognition order for the UK foreign proceedings, the UK foreign representative will need to make a separate application to the US Court for extending the relief previously granted, and this is at the discretion of the US Court (see 11 U.S. Code § 1521(a)(6), incorporating Article 21(1)(f) of the MLCBI).

**Question 3.4 [maximum 4 marks] 4 marks**

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

Assuming that Country B has adopted the MLCBI into its domestic laws without amendment, the foreign representative could consider the following:

**1. (If available under the laws of Country B) appeal against the decision of the Country B Court.**

The MLCBI does not expressly provide that the recognition decision made by the local court can be appealed against. However, in the *Guide to Enactment and Interpretation of the MLCBI* (the “**Guide**”), it was stated that some jurisdictions could provide for full merits review of the case, or at least review of whether the requirements of Articles 15 and 16 of the MLCBI were observed in deciding whether or not to recognise the foreign proceeding.

**2. Apply for recognition of the Country A insolvency proceeding as a foreign non-main proceeding.**

Article 17(2) of the MLCBI permits foreign insolvency proceedings to be recognised as foreign non-main proceeding, if the debtor has an “establishment” within that foreign jurisdiction (meaning any place of operations where the debtor carries out non-transitory economic activity with human means and goods or services). Arguably, the debtor has an establishment in Country A since it maintains its registered office there, so the Country A foreign representatives may succeed on getting recognised this way.

Under Article 21 of the MLCBI, representatives of foreign non-main proceedings can also apply for relief as against the assets of the debtor in the local jurisdiction in the same way as representatives of foreign main proceedings, though the local courts (Country B in this case) have discretion to consider whether such assets should be administered in the foreign non-main proceeding.

**3. Failing that, if permitted under and following the requirements under the laws of Country B, apply for winding-up of the insolvent debtor with a view that it (or other friendly parties) be appointed as Country B insolvency representatives.**

If the prospects of getting recognised as foreign non-main insolvency proceeding is low, the Country A foreign representatives could attempt to apply for winding-up of the debtor in Country B (if it has standing to do so and there are proper grounds to do so under the laws of Country B), alternatively Country A foreign representatives could attempt to ask friendly creditors to apply for winding-up of the debtor in Country B. After the debtor is put into liquidation in Country B, the Country A foreign representatives

could attempt to secure their office as Country B insolvency practitioners, alternatively to try and secure appointment of friendly parties as Country B insolvency practitioners.

Article 29 of the MLCBI provides that concurrent local and foreign insolvency proceedings can take place, and the local court should cooperate and coordinate the relief that may be granted to foreign representatives. Appropriate relief can be granted to each of the Country A foreign representatives and Country B insolvency practitioners to achieve the sale and realisation of assets in Country B for distribution to the debtor's worldwide creditors.

The foreign representative could have at the start made an application to Country B Court for recognition as foreign main proceeding or alternatively as foreign non-main proceeding, so that the Country B Court could decide in the same hearing whether and how to recognise the Country A insolvency proceedings. This may have saved time and costs for the Country A foreign representative in commencing another set of proceedings for recognition as foreign non-main proceedings.

**QUESTION 4 (fact-based application-type question) [15 marks in total] 14 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.

It should be noted at the outset that Chapter 15 of the US Bankruptcy Code largely incorporates the provisions of the MLCBI, therefore the guidance provided in the *UNCITRAL Guide to Enactment and Interpretation of the MLCBI* (the "Guide") should apply with persuasive force.

### Commencement of the US Chapter 15 recognition proceeding

Globe Holdings' Cayman "foreign representative" may petition the US Court for recognition of a Cayman "foreign proceeding" (i.e. the Cayman scheme of arrangement).

Under 11 U.S. Code § 1502 (incorporating Article 2 of the MLCBI):

- (a) "Foreign representative" is defined as a person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding. Globe Holdings, as part of its application to convene the Cayman scheme of arrangement, may have sought and obtained the Cayman Court's approval to appoint a foreign representative. If the Cayman Court did not rule on this, a senior management representative of Globe Holdings likely has standing as a "foreign representative", given that the Cayman scheme of arrangement is likely to be company-led and hence the company should be able to select who acts as its foreign representative.
- (b) "Foreign proceeding" is defined as collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. A Cayman scheme of arrangement likely qualifies as a "foreign proceeding", considering the US case of *In re Modern Land (China) Co.* 641 B.R. 768 (Bankr. S.D.N.Y. 2022).

Under 11 U.S. Code § 1509 (incorporating Article 9 of the MLCBI), a foreign representative of Globe Holdings is entitled to apply directly to the US Court for recognition of the Cayman foreign proceeding.

Under 11 U.S. Code § 1515 (incorporating Article 15 of the MLCBI), when making an application for recognition of the Cayman scheme of arrangement, Globe Holdings' foreign representative will need to file a petition for recognition with the US Court, accompanied by the following materials:

- (a) A certified copy of the decision commencing such foreign proceeding and appointing the foreign representative – in this case, this should be the Sanction Order issued by the Cayman Court. To the extent the Sanction Order is not in English, an official translation into English will be required (unlikely applicable here since English should be the official language for the Cayman Court).
- (b) A certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative – in this case, a certificate from the Cayman Court should be sought affirming the Cayman scheme of arrangement commenced by Globe Holdings, the Sanction Order issued, and the person who will act as the foreign representative of Globe Holdings. To the extent the certificate is not in English, an official translation into English will be required (unlikely applicable here since English should be the official language for the Cayman Court).
- (c) A statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

### Whether to apply for recognition as foreign main proceeding or foreign non-main proceeding

For efficiency and to avoid duplicate court applications, a petition for recognition as foreign main proceeding, or alternatively as foreign non-main proceeding, should be made with the

US Court. For reasons explained below, it is more likely than not that Globe Holdings' Cayman scheme will be recognized as a foreign main proceeding.

Under 11 U.S. Code § 1502 (incorporating Article 2 of the MLCBI), a "foreign main proceeding" is a foreign proceeding pending in a jurisdiction where the debtor has the center of its main interest (COMI), while a "foreign non-main proceeding" is a foreign proceeding in a jurisdiction where the debtor only has an establishment (i.e. a place where the debtor carries out a non-transitory economic activity).

- Under 11 U.S. Code § 1516(c) (incorporating Article 16(3) of the MLCBI), in the absence of evidence to the contrary, the debtor's registered office is presumed to be its COMI. Considering that Globe Holdings re-domesticated as a Cayman company with its books and records kept in the Cayman Islands, its registered office is likely in the Cayman Islands as well. This lends support to the Cayman Islands being the foreign main proceeding.
- In the Guide, it was suggested that a number of factors should be considered to determine the debtor's COMI, principally the location (a) where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors, each to be determined at the date of commencement of the foreign proceeding (paras. 145 and 160 of the Guide). Since Globe Holdings often holds its board meetings virtually instead of physically in the Cayman Islands, this tends to go against the central administration of the Globe Holdings taking place in the Cayman Islands. Moreover, Globe Holdings is a NASDAQ-listed company, with significant liabilities (e.g. the Notes) governed by New York law, and its corporate headquarters are located in New York. These factors all seem to point to the Globe Holdings' COMI being in the US.
- Additional factors which may be considered as suggested in the Guide include (para.147):
  - the location of the debtor's books and records [*points to Cayman Islands*];
  - the location where financing was organized or authorized, or from where the cash management system was run [*points to Cayman Islands, since the Notes restructuring appears to have been organized out of Cayman Islands by Globe Holdings' Cayman lawyers*];
  - the location in which the debtor's principal assets or operations are found [*points to the US*];
  - the location of the debtor's primary bank [*may point to the US, since Globe Holdings' Cayman account was only "recently opened"*];
  - the location of employees [*points to the US*];
  - the location in which commercial policy was determined [*indeterminate*];
  - the site of the controlling law or the law governing the main contracts of the company [*points to the US, since the Notes constituting its significant liabilities are governed by New York law*];
  - the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed [*likely points to the US, since most of the business is in the US*];
  - the location from which contracts (for supply) were organized [*indeterminate*];
  - the location from which reorganization of the debtor was being conducted [*points to the Cayman Islands given a Cayman scheme was proposed, though the RSA being governed by New York law could point to the US*];
  - the jurisdiction whose law would apply to most disputes [*likely points to the Cayman Islands*];

- the location in which the debtor was subject to supervision or regulation [*points to both Cayman Islands (being its jurisdiction of incorporation) and US (given it is NASDAQ-listed and is subject to the exchange's supervision and regulation)*]; and
- the location whose law governed the preparation and audit of accounts and in which they were prepared and audited [*likely points to US, since the audit of accounts should be prepared in accordance with NASDAQ rules*].

*In re Modern Land (China) Co.* 641 B.R. 768 (Bankr. S.D.N.Y. 2022) suggests that in the case of a Cayman scheme of arrangement, in the absence of court-supervised fiduciaries, the Cayman Court's supervision of the debtor's scheme of arrangement, in the light of other relevant factors, are sufficient for the US Court to conclude that the debtor's COMI for a proceeding involving a single class of noteholders was in Cayman Islands. The facts of that case are quite similar to the facts of this case (as will be considered below). Therefore, it is arguable that Globe Holdings' Cayman scheme of arrangement could be recognized as a foreign main proceeding.

- Both involve debtors that were incorporated in the Cayman Islands, with the actual underlying business operations outside of the Cayman Islands (the debtor of *In re Modern Land (China) Co* operated its business in the PRC and was listed on the Hong Kong Stock Exchange, while Globe Holdings operated its business in the US and is listed on NASDAQ), but have their registered offices in the Cayman Islands where it kept its books and records.
- Both involve a Cayman scheme of arrangement to restructure / compromise the debts of a single-class of existing notes governed by New York law which were issued by the Cayman-incorporated debtor.
- Both involve a restructuring that obtained overwhelming amount of creditor support (91.83% in number and 99.34% in value voting in favor of the relevant scheme).

*What relief should be requested on day one of the filing*

Urgent interim relief could be sought from the US Court, however it is unlikely possible to obtain a "pre-emptive" stay against any class action litigation which may be filed against the debtor upon petitioning the US Court for recognition. However, to the extent that such class action litigation has been commenced and has the effect of executing against or encumbering or otherwise adversely affecting the assets of Globe Holdings, the foreign representative could seek appropriate interim relief.

Under 11 U.S. Code § 1519 (incorporating Article 19 of the MLCBI), after filing a recognition application and before the application is decided by the US Court, the foreign representative may request for urgent interim relief to protect the assets of the debtor in the US (there appears to be valuable land, building, building improvement and contents held by Globe Holdings in New York), including staying execution against the debtor's assets in the US, suspending the right to encumber or dispose of the debtor's assets in the US, etc.. However, urgency should generally be demonstrated – where the class action litigation has yet to be commenced (it is only "brewing"), and it is uncertain whether immediate execution or encumbrance of the debtor's assets is proposed as part of the class action litigation, it may be difficult to persuade the US Court to provide such "pre-emptive" interim relief.

Under 11 U.S. Code § 1520(a) (incorporating Article 20(1) of the MLCBI), if the Cayman scheme is recognised as a foreign main proceeding, then Globe Holdings benefit from an automatic stay, which enjoins all acts of third parties to enforce rights in or against Globe



Holdings and its property located within the US jurisdiction. If the Cayman scheme is recognised as a foreign non-main proceeding, such relief could be applied for by the foreign representative (see 11 U.S. Code § 1521, incorporating Article 21 of the MLCBI). In such cases, the US class action litigation, no matter if commenced or still in contemplation, should be stayed or barred.

Very good essay!  
Requires mention of Art 22 and 6 MLCBI for full mark.

**\* End of Assessment \***

**Marks awarded: 35 out of 50**