



**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] 9 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 EU Regulation (EIR) and UNCITRAL Model Law both aim to provide a framework for dealing with international insolvency scenarios, but they differ in their application and scope.

The EIR applies specifically to insolvency proceedings involving entities with ties to EU member states. It focuses on co-ordination and co-operation between different EU jurisdictions in cases where a company or individual has assets or creditors in multiple EU countries.

MLCBI has a broader scope and is designed to provide a framework for the recognition and cooperation of insolvency proceedings that involve multiple countries, regardless of whether they are within the EU or not.

Key benefits of the EIR:

1. Insolvency proceedings initiated in one EU member state are generally recognised in other EU member states automatically
2. The EIR aims to harmonise the rules on cross-border insolvency within the EU

Key disadvantages of the EIR:

1. Limited scope, it may not be suitable for addressing cross-border insolvencies involving non-EU countries.

Advantages of MLCBI

1. Global application. It is designed to facilitate cooperation and coordination in cross-border insolvency proceedings on a global scale, making it suitable for cases involving non-EU countries.
2. MLCBI allows for adaption for different legal systems and can be implemented in various jurisdictions with diverse legal tradition

#### Disadvantages of MLCBI

1. Varied implementation. While many countries adopted MLCBI, the specifics of its implementation may vary from one jurisdiction to another, even to the extent of rendering it dormant. For example, in South Africa the 2000 Cross-Border Insolvency Act introduced the Model law, however, it continues to be dormant due to the reciprocity requirement adopted in South Africa.

#### 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.

- 1) The court must consider what is an appropriate balance between the relief that may be granted to the foreign representative and the interest of the persons that may be affected by the relief. Article 22 mentions the interest of creditors, the debtor and other interested parties.
- 2) The court must ensure that any relief granted under Article 21 is consistent with the domestic insolvency proceedings
- 3) The court, when granting relief to foreign representatives of a foreign non-main proceedings, must be satisfied that the relief relates to assets that (under the law of enacting State) should be administered in the foreign non-main proceedings, or concern information required in that proceedings, i.e. such relief should not interfere with the administration of another insolvency proceedings, in particular the main proceedings.

**The required answer: the court primarily considers the creditors' interests... (still, full mark is awarded)**

#### 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 does include provisions for the recognising court to assess the merits of the foreign court's decision to issue insolvency-related judgments or to consider issued related to the commencement of the insolvency proceedings to which the judgment is related. Article 13 therefore establish clear and predictable criteria for recognition of insolvency judgment, thereby protecting creditor's interest in the relevant proceedings.

Article 13 of the MLCBI gives foreign creditors the same rights as creditors domiciled in the enacting state without affecting the ranking of claims in the enacting state.

#### 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?

[Article 20 of the Model Law provides for automatic mandatory relief in case the recognised foreign proceeding qualifies as a foreign main proceeding. The recognition of a foreign main proceeding has the following three automatic effects: (i) a stay of the commencement or continuation of individual action or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; (ii) a stay of execution against the debtor's assets; and (iii) a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor. These automatic consequences are intended to allow time for steps to be taken to organise an orderly and fair cross-border insolvency proceedings. Additionally, the stay under Article 20 covers actions before an arbitral tribunal, Article 20 in effect establishes a mandatory limitation to the effectiveness of an arbitration agreement.

If the proceedings recognised are non-main proceedings there is no automatic stay and the foreign representative would have to apply for appropriate relief under Article 21.

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

**Question 3.1 [maximum 4 marks] 4 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.

[With the proceedings opened in Germany and Bermuda, the foreign proceedings must have been filed in the US to recognise the Germany and Bermuda proceedings respectively (the Proceedings).

The recognition proceedings in the US have been opened, which means that the US Court had completed its assessment pursuant to Article 17 (1) (a) and (b) of the Model Law to confirm whether the Proceedings meet all the required characteristics; and there were no grounds to confirm to invoke the public policy exception under Article 6 of the Model Law.

The US court will then need to confirm, in accordance with Article 17 (2) of the Model Law, whether the debtor's COMI is indeed in Germany where the proceedings were opened, in which case the German Proceedings can be recognised as foreign main proceedings.

The proceedings in Bermuda, where the debtor has an establishment, can be recognised as foreign non-main proceedings.

The recognition of the German proceedings as main proceedings in the US unlocks automatic mandatory relief which entails the following:

- a) A stay of commencement or continuation of proceedings concerning the debtor's assets, rights, liabilities and obligations;
- b) A stay of execution against the debtor's assets; and
- c) A suspension of the right to transfer or otherwise dispose of any assets of the debtor.

Automatic mandatory relief will not be available in respect of the Bermuda proceedings.

The US court, according to Article 22 of the Model Law, must be satisfied that the interest of the debtor's creditors and other interested parties are adequately protected. Accordingly, the US court has the power to subject relief to conditions it considers appropriate and at the request of the foreign representative or an affected person the court may further modify or terminate the relief.

Once the proceedings are recognised, significant cost and time can be saved and complication avoided as the foreign representative - through the recognition process - is able to request tailor -made relief without the need to commence local insolvency proceedings. For example, German/Bermudian representative will be able to seek powers allowing the examination of witnesses, taking evidence, or the delivery of information concerning the debtor's assets, liabilities and affairs more generally. ]

**Good discussion. Full marks awarded despite the lack of references to definitional and procedural provisions of MLCBI eg. Art. 2, 15.**

**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.

*Default Position*

Article 10 of the Model Law provides that *“the sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.”* UNCITRAL Case Digest states that article 10 constitutes a “safe conduct” rule aimed at ensuring that the court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground that the foreign representative has made an application for recognition of a foreign proceeding. The limitation is not, however, absolute and is only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition.

*Potential Abuse of Process*

The Model Law does not explicitly prevent a court in the enacting State from responding to a perceived abuse of process. A foreign representative has an obligation of full and frank disclosure to the Court in the enacting State. As confirmed in *CSL Australia v Britannia Bulkers A/S*, case No. 08-15187 (S.D.N.Y. Sept. 8, 2009) - United States Bankruptcy Code, 11 U.S.C. sect. 1509 (e), provides that subject to Article 10, a foreign representative is subject to applicable non-bankruptcy law and must therefore comply with court orders. In *SNP Boat Service SA*, 453 B.R. 446 (Bankr. S.D. Fla. 2011), court threatened to revoke recognition of a foreign main proceeding because the foreign representative was not complying with the discovery process.

**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?

- [ 1. The foreign representatives should consider if it is necessary to apply for urgent interim under Article 19 of the Model Law. Urgent interim relief can be granted prior to the recognition decision after the recognition application has been filed, provided the interest of the debtor's creditors and other interested parties are adequately protected. As there is no information about proceedings in other jurisdiction, the assumption is that the proceedings in the UK will be regarded as main foreign proceedings in the US. Interim relief (which applies to both foreign main and foreign non-main proceedings) can include certain types of post-recognition relief provided for in Article 21, which include, in particular, granting *any additional relief that may be available to a domestic office-holder under the laws of enacting State*.

In the current scenario, as the recognition hearing is scheduled in 35 days after the filing and there is no litigation pending or threatened against the foreign debtor, and therefore it seems unnecessary to apply for interim relief which would include a stay of execution against the debtor's assets etc.

However, the foreign representatives might seek to protect the debtor position in relation to US-governed leases and intellectual property licenses from bankruptcy-triggered terminations. *Belmond Park v BNY Corporate Trustee Services* confirms that *ipso facto* clauses are in principle valid and impossible in a UK insolvency. Since *ipso facto* clauses are not enforceable under the US law, applying to the US court to protect the position in relation to the US-governed leases and licenses may not be an option under Article 19, the foreign representatives may consider applying post-recognition to the US Court for the relief that would have been available under the UK law.

In *Fibra Celulose S/A v Pan Ocean Co lts*, the insolvency practitioner tried to prevent other party from exercising the *ipso facto* clause which under Korean Law was deemed null and void by applying for relief under Article 21 (1) (a) of the Model Law (stay on "the commencement or continuation of individual actions or individual proceedings" and Article 21 (1) (g) (to make available the relief that would have been applicable under UK insolvency law. The application was unsuccessful, as the Court found, in summary, that applying foreign law to an English law governed contract is outside the appropriate relief court can grant.

Accordingly, there is a high degree of possibility that the US court will not necessarily grant the relief sought due to policy reasons and that the sought form of relief is not available under the US Insolvency Law. |

**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?

[ At the outset the foreign representatives should have ascertained the possibility of applying for recognition of the Country A proceedings as both main foreign proceedings and non-main foreign proceedings.  
The foreign representative should have considered whether they covered all relevant factors to demonstrate that the debtor has its COMI In Country A in their application for recognition as foreign main proceedings.

The COMI is not a defined term under the Model Law. However, the UNCITRAL Guide to Enactment provides some guidance. The two key factors for determining COMI under the Model Law are: (i) the location where the central administration of the debtor takes place; and (ii) which is readily ascertainable as such by creditors. Additional factors that could be considered by a court to determine the debtor's COMI include, for example, (i) the location of the debtor's books and records; (ii) the location where financing was organised or authorised ; (ii) the location from where the cash management system was run etc.

However, in the current scenario it is stated that in Country A “the foreign debtor has its registered office and not much more”. Accordingly, the most sensible course would be to apply for recognition of foreign non-main proceedings as it appears that the foreign debtor may have an “establishment” in Country A within the meaning of Article 2 (f) of the Model law. Under Article 2 (F) of the Model Law, the establishment is “*any place of operations where the debtor carries out a non-transitory activity with human means and goods or services*”

Accordingly, the foreign representative should apply for recognition of the Country A proceedings as foreign non-main proceedings and then seek appropriate relief under Article 21 of the Model Law

Full answer requires discussion on Art.16 MLCBI as the main reference for “rebuttable COMI presumption”. References to Art.17, 6... are also required

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

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

The client is a Cayman Islands incorporated and registered entity. It is a financial service holding company for a number of direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States. Globe Holdings was initially formed as a Canadian company in 2009, under the laws of Ontario, Canada. A year later, following certain reverse merger transactions, it filed a Certificate of Registration by Way of Continuation in the Cayman Islands to re-domesticate as a Cayman Islands company and

changed its name to Globe Financial Holdings Inc. When it re-incorporated in the Cayman Islands in 2010 (from Canada), Globe Holdings provided various notices of its re-incorporation, including in the public filings with the Securities and Exchange Commission (SEC). Around that time, Globe Holdings retained its Cayman Islands counsel Cedar and Woods, which has regularly represented Globe Holdings for over a decade. Globe Holdings has a bank account (opened just a few days ago) in the Cayman Islands from which it pays certain of its operating expenses. Globe Holdings often holds its board meetings virtually, and not physically in the Cayman Islands, and, having obtained support for a bond restructuring, all its regular and special board meetings have been organized by its local Cayman counsel virtually. The client also maintains its books and records in the Cayman Islands. Its public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes disclosed that Globe Holdings is a Cayman Islands company and explained the related indemnification and tax consequences resulting from Globe Holdings' place of reformation.

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

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

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

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

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

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

Globe Holdings expeditiously secured the support of the majority of the Noteholders of its decision to delay interest payments and restructure the Notes through a formal proceeding. Thereafter, on August 31, 2021, about 57% of the Noteholders acceded to the Restructuring Support Agreement (RSA) governed by the New York law. The RSA memorialized the agreed-upon terms of the Note Restructuring. When Globe Holdings approached its largest Noteholders regarding the contemplated restructuring, their expectations were that any such restructuring would take place in the Cayman Islands, which is reflected in the RSA.

On July 4, 2023, the client, in accordance with the terms of the RSA, applied to the Cayman Court for permission to convene a single scheme meeting on the basis that the Noteholders,

as the only Scheme Creditors, should constitute a single class of creditors for the purpose of voting on the Scheme.

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

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

#### *A. COMI/Establishment Analysis*

Globe Financial Holdings Inc (the Company) (Canada -> the Cayman Islands (from 2010))

##### *Applicable Principles*

##### *COMI*

The COMI is not a defined term under the Model Law. However, The UNCITRAL Guide to Enactment provides some guidance. The two key factors for determining COMI under the Model Law are: (i) the location where the central administration of the debtor takes place; and (ii) which is readily ascertainable as such by creditors. Additional factors that could be considered by a court to determine the debtor's COMI include, for example, (i) the location of the debtor's books and records; (ii) the location where financing was organised or authorised; (iii) the location from where the cash management system was run; (iv) the location of employees; (v) the jurisdiction whose law would apply to most dispute; (vi) the location from which reorganisation of the debtor being conducted; (vii) the location of the debtor's primary bank; (viii) the location in which the debtor's principal assets and operations are found.

In the US judgment *Morning Mist Holdings Ltd v Krys* (Matter of *Fairfield Sentry Ltd* (2<sup>nd</sup> Cir Appeals Apr 16, 2013), the Court held that: "(...) a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition is filed, as the statutory text suggests. (...), a court may consider the period between the commencement of the foreign insolvency proceedings and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith.(...)" As far as COMI factors are concerned, the US court noted that: "(...) any relevant activities and administrative functions, may be considered in the COMI analyses."

##### *Establishment*

Article 2 (F) of the Model Law defines "the establishment" as "any place of operations where the debtor carries out a non-transitory activity with human means and goods or services"

### Factors relevant for the COMI/Establishment Analysis

#### 1. Re-domiciliation to Cayman.

- There appears to be no indication that this had been done in bad faith. Additionally, it was done in 2010, i.e. well before the Company became both cash flow and balance sheet insolvent.

#### 2. Is the central administration of the company takes place in the Cayman Islands? Is it readily ascertainable by creditors?

##### 2.1 Factors Indicating that the Company has its COMI in the Cayman Islands:

- The Company has a bank account (opened just a few days ago) in the Cayman Islands from which it pays certain of its operating expenses. This however does not demonstrate that the bank is Cayman is the Company's primary bank.
- The Company maintains its books and records in the Cayman Islands.
- The Company's public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes disclosed that the Company is a Cayman Islands company and explained the related indemnification and tax consequences resulting from Globe Holdings' place of reformation.
- The Company has an established relationship with a local Cayman law firm.
- The Company's restructuring takes places in the Cayman Islands.
- Virtual meetings are organised by the Cayman Counsel.
- The Restructuring Support Agreement is governed by the New York Law, however the document states that any restructuring would take place in the Cayman Islands.
- The Company's shares were delisted from Nasdaq

##### 2.1 Factors Indicating that the Company has an establishment in the Cayman Island, rather than the COMI:

- The Company 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.
- The Notes are governed by New York Law.
- The Company holds its board meeting virtually, and not physically in the Cayman Islands.

On the balance, it might be advisable to apply for recognition of both main and non-main proceedings. However, it appears to be more likely, based on the factors outlined above, that the US will recognise the proceedings as foreign non-main proceedings.

### B. What papers need to be submitted

Pursuant to Article 15 of the Model Law, a foreign representative may apply to the court for recognition of the foreign proceedings to which the foreign representative has been appointed.

An application for recognition shall be accompanied by:

- A certified copy of the Court's Sanction Order
- Documents confirming the authority and identity of the foreign representative
- A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative

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

In the scenario it is stated that a class action litigation in the US was brewing but has been filed yet. Additionally, third parties started marketing the sale of the corporate headquarters located in New York including the land, building, building improvements and contents including furniture and fixtures.

If the proceedings are recognised as foreign main proceedings that automatic relief under Article 20 of the Model law will be available upon recognition. The automatic stay has the following three automatic effects:

- a) A stay of the commencement or continuation of individual actions or individual proceedings
- b) A stay of execution against the debtor's assets; and
- c) A suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

If the proceedings are recognised as foreign non-main proceedings, it is advisable to apply for relief on day one of the filing under Article 21 (1) (a) - that is, a stay on "the commencement or continuation of individual actions or individual proceedings"..

Very good and well-structured essay.

Missing:

1. A discussion on the rebuttable presumption of the COMI and reference to Article 16(3) MLCBI
2. Conclusive remarks with reference (also) to Articles 19, 22, and 6 MLCBI.

**\* End of Assessment \***

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