



**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] 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 application of the MLCBI was a result of pressure exerted by two main bodies, INSOL and the International Bar Association. MLCBI is not a treaty and does not attempt to substantively unify laws of states. MLCBI can be seen as an example of “soft law” as it serves as a recommendation to insolvency proceedings within states and recognises the differences among substantive and procedural laws of states. Due to the inevitable issues that arise from differences in laws, legal systems and political interests that characterise each state, MLCBI has the advantage of allowing each state the opportunity to adopt the Model law in whole or in part to domestic legislation. In other words, it is flexible. A disadvantage can be seen in the uncertainty of the correct way of dealing with cross border insolvency issues as the interpretation of the MLCBI can differ significantly, which can create challenges for insolvency representatives.

On the other hand, European Union (EU) Regulations, which came about on 19 May 2000 as a result of the work done by the European Council and adopted the European Insolvency Regulations, otherwise known as EIRs, automatically became part of domestic laws in EU member states. The EU regulations provide a legal playbook which sets out clear rules when encountering cross border insolvency situations. The advantage of the EIRs is the uniformed approach for determining jurisdiction, communication and coordination, recognition and providing insolvency representatives and lawyers legal certainty. Unfortunately, the main disadvantage of this approach is that there is limited application outside of the EU which can create challenges for cross border insolvency cases involving non-EU member states.

##### 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.

When a court exercises its discretionary powers to grant post-recognition relief under Article 21, for example, entrusting the distribution of all or in part of the debtor's assets whether the be in foreign main or non-main proceedings, the court must be satisfied that the interests of the creditors in that state are adequately protected and analyse whether the relief being provided respects public policy or public interest.

While the interest of the creditors should remain the focus of a court when using its discretionary powers, it is also important to consider whether the proceedings are foreign main or non-main. This is due to the fact that the interests of a foreign representative in a foreign non-main proceeding are usually narrower than the interests of a foreign representative of foreign main proceedings, who ultimately are looking to seek control over all assets of the debtor.

For example, Paragraph 3 of Article 21 describes that relief in favour of foreign non-main proceedings should not give excessive broad powers to the foreign representative and that such relief should be limited to assets that are to be administrated in that non-main proceeding. Additionally, information being sought by the foreign representative concerning the debtor's assets, should only be concerned with information in that non-main proceeding. In conclusion, courts need to assess that the relief granted will not interfere with the administration of another insolvency proceeding, in particular the main proceeding and if for the overall benefit for creditors.

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

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

The main protections granted to creditors in a foreign proceeding as outlined in Article 13 can be seen as the fact that foreign creditors are afforded the same rights regarding the commencement of, and participation in, proceedings as creditors domiciled in the enacting state without interfering with the ranking of the claims in the enacting state.

Article 13 of MLCBI provides creditors the right to participate by way of having equal access to information and ongoing proceedings. They will also be provided the right to challenge the recognition of foreign proceedings.

Additionally, a claim of a foreign creditor, excluding those concerning tax and security obligations, shall not be given a lower rank of priority than that of unsecured claims merely based on the fact the holder of such claim is a foreign representative, this view is supported by Article 13, paragraph 1.

### **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?

While Article 19 on the MLCBI describes the Interim collective relief that is available prior to the recognition of a foreign insolvency proceeding whether main or non-main, the types of relief can differ. The relief granted in foreign main and non-main proceedings requested by a foreign representative can vary through the mechanisms and requirements for such relief. For example, relief available in foreign main proceedings, described as, where the debtor has its Centre of Main Interests (COMI)



can be automatic (Article 20 of the MLCBI) and discretionary (Article 21 of the MLCBI) whereas relief available in foreign non-main proceedings (one taking place where the debtor has an establishment) is only discretionary in nature.

Relief granted under foreign main proceedings may be broader in nature and can affect assets and debtors on a global scale. For example, the court can order the relinquishing of assets, stays on proceedings, suspension of transfers and additional forms of relief to maximise recoveries on a universal scale for the benefit of the wider creditor group. While the rights of Article 19 and 21 of the MLCBI are discretionary, the MLCBI Guide to Enactment and Interpretation section 176 states that relief is automatic from the recognition of foreign main proceedings.

In regard to foreign main proceedings, as noted in Article 21 of the MLCBI Paragraph 2, provided the court of the enacting state is satisfied that the interest of local creditors is adequately protected, the court has discretionary power to hand over all or part of the debtors' assets located in the enacting state to the foreign representative at their request.

On the other hand, when it comes to foreign non-main proceedings, relief is narrower in nature. While similar relief can be provided as mentioned in relation to foreign main proceedings, the relief is restricted to protect debtors' assets within the non-main jurisdiction as when granting relief to a foreign representative, the court must be satisfied that the relief relates to assets that, under the law of the enacting state, should be administered in the foreign main proceedings or concerns information required in that proceeding.

### **QUESTION 3 (essay-type questions) [15 marks in total] 11 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.

Article 2(a) of the MLCBI defines foreign proceedings as “a collective judicial or administrative proceeding in a foreign state, including interim proceeding, pursuant to a law relating to insolvency in which the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.”

Accordingly, in this scenario, the foreign main proceedings are identified as insolvency proceedings in Germany due to the debtor having its COMI there which is supported by the definition noted in Article 2(b) of MLCBI. Furthermore, Bermuda is identified as the foreign non-main proceedings as this is where the debtor has an establishment, also supported by the definition in Article 2(c) of the MLCBI.

As Germany and Bermuda are not in the 59 of 62 states that have adopted the MLCBI as per the current status of the MLCBI in part or in whole into their legislation, the foreign proceedings must have been filed in the US under Article 15 of the MLCBI “*Application for recognition of a foreign proceeding*”.

As a result, from the point of the filing for recognition until the application is decided upon, the court, under Article 19 of the MLCBI may provide interim collective relief prior to the recognition of a foreign proceeding in the form of:

- (a) Staying the execution against the debtor's assets

- (b) 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, in order 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

Upon the recognition of proceedings, further relief can be granted by order of the court on a discretionary basis by request of the foreign representative under Article 21 of the MLCBI.

**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.

Tortious interference can be defined as when one party intentionally interferes with contractual or business relationships with a third party. In terms of insolvency law, this can result in significant implications. For example, for tortious interference or intentional interference to be valid, it must result in economic harm to the affected party.

The likely outcome of the litigation in the scenario will depend largely on the legal arguments put forward by both parties, the strength of the presented evidence with connection to the relevant information uncovered during the discovery phase and the court's interpretation of the facts. The overall legal outcome could consist of settlement talks, dismissal of the case entirely, damages awarded and possible appeal actions in relation to the initial judgement.

The outcome of the legal situation will also depend on the conclusion of the recognition proceedings. For example, if the Joint Provisional Liquidators ("JPLs") have followed the correct procedures outlined under Article 15 of the MLCBI to be granted recognition of a foreign proceeding in the US under the US Bankruptcy Code, then the proceedings are likely to be recognised. Once recognised, the JPLs could argue that their proceedings were of the legitimate economic interest, and they were acting with the intention to preserve assets for the benefit of the creditor body and the overall administration of the debtor's estate in the foreign jurisdiction. However, if there are shortcomings with respect to the procedural documentation or requirements under Article 15, along with any reason for the court to doubt the authenticity of the JPLs, then the recognition may be denied.

Requires discussion based on Art.10 MLCBI

**Question 3.3 [maximum 4 marks] 2 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?

In this situation a UK foreign representative commences Chapter 15 recognition proceedings in the US under Article 15 of MLCBI "*Application for recognition of a foreign proceeding*". Referring to the information provided, the foreign representative can take the following steps to protect the assets in the foreign proceedings:

1. Obtain interim relief, the foreign representative may be granted relief under Article 19 of the MLCBI of a provisional nature from the time of the filing of the recognition application until the application is decided upon. Examples of interim relief can include "*Temporary Stays*" to prevent actions against the debtor's assets and as this specific scenario involves intellectual property, seeking "*Preservation orders*" to safeguard assets by way of pending the resolutions of the insolvency case.
2. Notify and communicate effectively with the relevant parties that there are ongoing recognition proceedings in the US Courts. A clear understanding of the insolvency proceeding may reduce the risk of adverse actions against the assets of the debtor.

As the information in the question provides, *Ipso facto* clauses are not enforceable in the US bankruptcy code under Section 365(e)(1) which states that "a provision in an executory contract or unexpired lease that purports to terminate or modify the contract or lease solely because of the debtor's financial condition, insolvency, or bankruptcy filing is unenforceable."

Requires substantive discussion based upon Art.19 MLCBI and its definitions (*noted the mention of Art.19*), as well as references to the provisions of Art 20 and/or 21 MLCBI as applicable.

#### 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?

In this situation the foreign representative has a few options to consider when moving forwards. Firstly, they should consider the judgement handed down and review the reasons for denial of recognition. Once the foreign representative has a firm understanding of the details for the rejection, including any legal grounds which have been noted by the court, they will be able to formulate a strategy.

Depending on the grounds for the rejection and based on the information provided in the question, the foreign representative may appeal the decision handed down by the court provided the foreign representative and the foreign proceedings meet all the requirements, the public policy exception of Article 6 does not apply and that the requirements put forward in Article 17(1)(c) of the MLCBI are adhered to. In addition, as we are provided limited information regarding Country A, the grounds for appeal should cite Article 16(3) of the MLCBI which states "*in the absence of proof to the contrary, the debtor's registered office, (in this case is stated as being in Country A) or habitual residence in the case of an individual, is presumed to be the centre*

*of the debtor's main interests.* As Article 16(3) of the MLCBI defines the centre of main interest, the proceedings should be recognised as a foreign main proceeding under Article 17(2) of the MLCBI and should be granted the relevant relief request by the foreign representation in accordance with Article 19 and 21 of the MLCBI.

Alternatively, another approach would be to abandon the initial application to be recognised as foreign main proceedings and refile under the recognition application as foreign non-main proceedings through demonstrating the presence of an establishment. However, as with the nature of the recognition of a foreign non-main proceeding, the foreign representative will have to demonstrate to the court, when requesting relief to sell certain assets within Country B, that the relief relates to assets that, under the law of the state, should be administered as in the foreign non-main proceedings.

In conclusion, as always, the foreign representative will be required to consult legal counsel in relation to both options mentioned above for the most efficient and effective cross-border strategy. Additionally, explore the further option of engaging with local creditors and interested parties to gain support of the sale of the assets located in Country B for the benefit of the foreign proceedings and the wider creditor body.

**QUESTION 4 (fact-based application-type question) [15 marks in total] 10 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.

Referring to the facts noted above I will lay out the steps that will need to be taken for the successful restructuring of Globe Financial Holdings Inc (the "Company"). Firstly, I would like to cite the two jurisdictions and the governing law in those jurisdictions which I will be referring to, namely the Cayman Islands, governed by the Cayman Islands Companies Act (as amended) and the Companies Winding Up Rules (2023 Consolidation) and the US, governed by the US Bankruptcy code.

Prior to required filings in relation to the company for the purpose of restructuring, according to the enacted law at the time (The Companies Law) today revised as the Companies Act (As Revised) of the Cayman Islands, the company would be required under Section 178(2)(c), to register the company by way of continuation as an exempted company.

Furthermore, to briefly recap the current situation, the company has successfully received a Sanction Order from the Grand Court of the Cayman Islands (the "Grand Court") who has granted the formal approval of a *Scheme of Arrangement*, which as defined by the American Bar Association is "a court-supervised tool for companies and creditors allowing for various restructuring solutions, including intra-group reorganizations, mergers and take-private transactions." These schemes are usually employed in the Cayman Islands to restructure financial liabilities of companies, when costs and timings are an issue, they are an alternative route for complicated cross-border restructurings. To further understand the process, I have included the relevant steps below which would have been required in order to receive the relevant order as briefly discussed above:

1. Application - the company petitions the court for approval of the scheme, in terms of documents to be provided, this would include a petition, a scheme document (the Scheme of Arrangement) as well as affidavits and witness statements. The company would have also applied by way of summons for the Grand Court to order a meeting of Noteholders, as the only Scheme Creditors (Convening Order).
2. Meeting - Noteholders are sent formal notice of the meeting, which sets out the details of the scheme. Under Cayman law approval requires a majority in number (minimum 50%) and 75% of the value voting, the scheme received a 91.83% in number and 99.34% in value voting in favor of the Scheme.
3. Sanction Hearing - The Sanction Hearing was held, and an order sanctioning the Scheme (the Sanction Order) was handed down and filed with the Registrar of Companies making it binding on all stakeholders, even those who did not vote for it.

In relation to the questions of whether to apply for recognition of main or non-main proceeding or both (in light of COMI / establishment analysis). There is only one viable option in this case as I have detailed below.

Since the company has received the Sanction Order from the Grand Court, it is now recognised in the Cayman Islands. It is important to note that the Cayman Islands does not adopt the UNCITRAL Model law on Cross Border Insolvency ("MLCBI") into their legislation and therefore does not recognise the concepts of the MLCBI. However, the US does adopt the MLCBI which is incorporated into their bankruptcy laws.

The next step in this scenario would be to file a petition for the recognition of a foreign proceeding under Chapter 15 of the US Bankruptcy Code, specifically (1) 11 U.S.C. § 1504 in the United States Bankruptcy Court for the Southern District of New York. As Chapter 15 gives the foreign representative the right of direct access to US courts for this purpose. The required documentation in order to file this petition would be the Sanction Order from the Grand Court in the Cayman Islands showing the existence of the foreign proceedings and the confirmation

of the foreign representative, defined under Article 2 of the MLCBI, this relates to 11 U.S.C. § 1515.

The foreign representative is seeking recognition of a foreign main proceeding under 11 U.S.C. § 1517, as the Cayman Islands is the country where the debtors Centre of Main Interests (“COMI”) are located, under the MLCBI, seeking recognition of a foreign main proceeding is applicable in this scenario. However to be recognized as a foreign main proceeding pursuant to the MLCBI, the foreign representative will have to justify the Cayman Islands being the COMI, therefore meeting the criteria of a foreign main proceeding as stated in Article 2. (b) of the MLCBI. The points below should be considered by the court when making this determination:

- A debtor’s COMI, as the statutory presumption outline in Article 16, Paragraph 3 of the MLCBI states, “In the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interests”.
- The ruling on the relevant case law similar to this situation, namely the MODERN LAND (CHINA) CO., LTD., restructuring which was successfully granted foreign main proceeding recognition based on the fact that the Debtor’s primary business activity at the time of the filing of the Chapter 15 application was the restructuring itself (and was significantly conducted in the Cayman Islands).

Furthermore, immediately upon filing of the Cayman Scheme as the foreign main proceeding, the US court will grant automatic relief under 11 U.S.C. § 1519. On day one of the filing, the foreign representative should request the following relief, as detailed under the MLCBI, and incorporated into the US bankruptcy code:

- (1) staying execution against the debtor’s assets;
- (2) entrusting the administration or realization of all or part of the debtor’s assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order 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; and
- (3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a).

In conclusion, upon recognition of the Cayman Scheme, the foreign representative can request further discretionary relief under 11 U.S.C. § 1520 which will enable the company to further safeguard the notes to continue the process of restructuring the company until process is completed.

**Good essay! However, it should also contain the necessary papers to be submitted to the US Court per Article 15 MLCBI; conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI...**

**\* End of Assessment \***

**Marks awarded: 38 out of 50.**