



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] 8 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 EIR, as a European Union regulation, once adopted becomes part of the domestic law of each EU Member State, such that insolvency proceedings taking place in any EU Member State could be recognised and enforced throughout the rest of the European Union.

The MLCBI is 'soft law', designed to be "*a legislative text that is recommended to States for incorporation into their national law*"¹ as a vehicle for harmonisation of laws focusing on procedural rules for access, recognition, relief and coordination (but leaving each jurisdiction to determine, via application of its own domestic laws and practices) how harmonisation is to be achieved.

The MLCBI is inherently more flexible than the EIR, as MLCBI Member States can modify / adapt / leave out some of its provisions. Under the EIR the possibility of changes being made to a uniform text to which EU Member States are parties is much more restricted. The downside of the MLCBI's flexibility is, however, the lesser degree of certainty and harmonisation achieved across Member States (typically lower than through 'hard law' like the EIR).

¹ UNICTRAL Guide to Enactment (1997, updated 2014)

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.

When tailoring the relief that can be granted under Article 21 of the MLCBI, the Court must take into account whether it is for a foreign main proceeding, or a foreign non main proceeding, given that "*the interests and the authority of a representative of a foreign non-main proceeding are typically narrower than the interests and the authority of a representative of a foreign main proceeding, who normally seeks to gain control over all assets of the insolvent debtor*"². The weight given to this idea is reflected in Article 21(3), which recognises that "*the court must be satisfied that the relief relates to asset that, under the law of this State [the enacting state], should be administered in the foreign non main proceeding or concerns information required in that proceeding*". However, the Courts of the enacting states are not unnecessarily restricted in their ability to grant any type of relief that is available under the law of the enacting State, and as needed in the circumstances of the case, and can tailor to the relief to the case at hand.

The correct answer is the protection of creditors' interests – as stipulated in Art.21 MLCBI

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 of the MLCBI relates to access of foreign creditors to an insolvency proceeding under the laws of an enacting state, providing them with the same rights regarding the commencement of, and participation in, an insolvency proceeding under the enacting state as domestic creditors. The underlying principle is that foreign creditors should not be treated any worse than local creditors (the "*non discrimination principle*")

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?

The determination that a foreign proceeding is a "foreign main proceeding" (versus a "foreign non-main proceeding") impacts the nature of the relief accorded to the foreign representative. Article 20 of the MLCBI provides for automatic mandatory relief, but this automatic relief is only available if the recognised foreign proceeding qualifies as a foreign main proceeding (whereas discretionary relief in Articles 19 and 21 may be issued in favour of both foreign main proceedings and foreign non-main proceedings).

QUESTION 3 (essay-type questions) [15 marks in total] 6 marks

Question 3.1 [maximum 4 marks] 3 marks

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

² UNCITRAL Guide to Enactment and Interpretation (1997, updated 2014) (Article 21)

Under Article 2(b) of the MLCBI "*foreign main proceeding*" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests". Under Article (c) "*foreign non main proceeding*" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment". Under Article 2(f), and establishment means "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services". Consequently, the foreign proceeding filed in Germany should be recognised as the foreign main proceeding (provided the centre of main interests was Germany at the date of the commencement of the foreign proceedings), and the foreign proceeding filed in Bermuda should be recognised as the foreign non main proceedings. The foreign man proceeding, in Germany, is expected to have "*principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors*"³.

Application of procedural and definitional MLCBI provisions ie Art.17 and 6 MLCBI, as well as Art 15 are missing.

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.

Whilst the Joint Provisional Liquidators have commenced a recognition proceeding in the US, it appears that the US Court has not (yet) granted the requested recognition. As such, the Joint Provisional Liquidators could, under Article 19 of the MLCBI request interim relief (which may be granted upon the application for recognition). This interim relief can be ordered at the discretion of the Court, pending a decision on recognition, provided it is "*urgently needed to protect the assets of the debtor or the interests of creditors*", and provided that such relief would not interfere with the administration of the foreign main proceeding. Such relief can include: (a) staying execution against the debtor's assets; (b) entrusting the administration or realisation of all or part of the debtor's assets located in the US to the foreign representative or another person designed 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 (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities. Whether such urgent interim relief is authorised would depend on whether that relief is availability in collective insolvency procedures in the US.

The answer relates to Art.10 MLCBI rather than interim relief.

Question 3.3 [maximum 4 marks] 1 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?

³ UNCITRAL Guide to Enactment and Interpretation (1997, updated 2014) page 28, paragraph 31

Ipso facto clauses allow the termination of contracts upon one of the parties entering into insolvency proceedings. In this scenario, if the clauses are held to be enforceable, the US leases and intellectual property licences could be terminated, which would negatively affect the value of the foreign debtor's assets. As these assets need to be safeguarded, for the benefit of all creditors in future distributions, the impact of these clauses therefore needs to be understood by the foreign representative as a priority (and local advice provided by US Counsel on their enforceability (or otherwise) under the US Bankruptcy Code). Provided that local law advice confirmed that these clauses would not be enforceable under the US Bankruptcy Code, there could be merit in the foreign representative communicating this to the foreign debtor's counterparties in the leases / licences, to clarify any future impact of the recognition application on these agreements. The foreign representative may also request the US Court's assistance in preserving the status quo pending the recognition hearing given the 35 day gap, including seeking court orders protecting the assets for the benefit of creditors.

The response concerns interim and post-recognition relief and requires references per Art 19, as well as 20 and 21 MLCBI.

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?

The foreign representative could look to have the recognition decision reviewed as "*a decision on recognition may also be subject to a review of whether, in the decision-making process, the requirements for recognition were observed. Some appeal procedures give the appeal court the authority to review the merits of the case in its entirety, including factual aspects*"⁴. However, such an appeal "*would be limited to the question of whether the requirements of Articles 15 and 16 were observed*"⁵. Such an appeal would therefore likely focus on the Court's consideration of the rebuttable presumption in Article 16(3) of the MLCBI that "*in the absence of proof to the contrary, the debtor's registered office [i.e. in Country A] ... is presumed to be the centre of the debtor's main interests*", such that the foreign proceedings should be recognised as foreign main proceedings. That being said, given that the registered office "but not much else" is located in Country A, on its own and without anything else, it is likely that the first instance Court felt this to be insufficient evidence for it to conclude that Country A is the debtor's COMI. Absent any additional information, an appellate Court is unlikely to reverse that decision.

At the outset, the foreign representative should have sought further information from the originating Court as "*recognition of a foreign proceeding would be assisted if the originating Court [i.e. Country A] mentioned in its orders any information that would facilitate the finding by a receiving Court [i.e. Country B] that the proceeding is a foreign proceeding ... this would be particularly helpful when the originating Court was aware of the international character of the debtor or its business, and of the likelihood that recognition of the proceeding would be sought under the Model Law*"⁶. The foreign representative could also have considered applying for recognition of the Country A proceedings as foreign non-main proceedings

⁴ UNCITRAL Guide to Enactment and Interpretation (1997, updated 2014) (Article 17)

⁵ Ibid

⁶ UNCITRAL Guide to Enactment and Interpretation (1997, updated 2014) (Article 17)

Underlined part is the needed answer to the question. Complete answer also refers to and discusses Art. 17, 6 as well as Art. 21 MLCBI.

QUESTION 4 (fact-based application-type question) [15 marks in total] 8 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.

In order to ensure a successful restructuring for Global Holdings, given the international nature of the business across both Cayman and the US (including the fact that the client's primary operations and significant assets are located in the US), the foreign representative should consider applying for recognition proceedings in the US under Chapter 15 of the US Bankruptcy Code. This filing strategy would allow for coordination of the Cayman-based restructuring efforts (the "**Cayman Restructuring**"), overwhelmingly supported by Noteholders, with protection and recognition of this process from the US.

The Cayman Restructuring would, under Article 2(a) qualify as a 'foreign proceeding', capable of recognition, as a "*collective judicial or administrative proceeding in a foreign state ... 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 reorganisation or liquidation*" (emphasis added), intended to "*refer broadly to proceedings involving debtors that are in severe financial distress or insolvent [Globe Holdings being both cash flow and balance sheet insolvent]*"⁷.

⁷ UNCITRAL Guide to Enactment and Interpretation (1997, updated 2014) (Article 2)

When applying to the US Court for recognition, the Cayman foreign representative should apply for recognition of the Cayman Restructuring as a foreign main proceeding, i.e. one taking place where the debtor had its centre of main interests ("COMI") at the date of commencement of the foreign proceedings (i.e. not in 2009, when the company was first incorporated). Determining a debtor's COMI requires consideration of the guidance in Recital 13 of the EC Insolvency Regulation (1346/2000) and Recitals 28-30 of the Recast EU Insolvency Regulation, in order to establish "*where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties*". The required analysis will require a holistic weighting of factors, given the change from Globe Holding's original country of incorporation (Canada) and its subsequent re-domestication in the Cayman Islands. However, factors that point to the debtor's COMI being the Cayman Islands, rather than Canada, would include: (a) the information contained in its notices of re-incorporation (b) the public filings at the SEC (c) its Cayman bank account (which, in isolation would be insufficient but is persuasive in the broader context of other Cayman connections), (d) the location of the debtor's books and records (e) the information included in the prospectus for the Notes and (f) the location from which the Cayman Restructuring was organised.

When applying to the US Courts for recognition, the Cayman foreign representative would need to provide copies of the Convening Order and the Sanction order, in accordance with the requirements of Article 15(2) of the MLCBI mandating the provision of:

- (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
- (c) in the absence of the evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.

The foreign representative will also have to include a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative (which, on the information above appears to be none). This process is designed to avoid "*cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications*"⁸, and – as such – these documents do not need to be authenticated in any special way, including by legalization.

Given the potential threat of the US class action, at the time of filing the recognition application, the foreign representative could apply for urgent interim relief (to protect the US assets of the debtor or the interests of the creditors), including a stay on any potential US litigation or enforcement actions in connection with Globe Holdings and its subsidiaries (whilst the recognition process is ongoing). Provided the US Court grants recognition of the Cayman Restructuring as a foreign main proceeding, upon recognition being granted, a stay of execution against the debtor's assets and a stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets would follow.

Good reasoning. However, lacking discussion based on Art.16 and 17, as well as a conclusive discussion based on Art.19, 20 (or 21, if applicable), as well as 22 and 6 MLCBI. In addition, definitions (per Art.2 MLCBI - as mentioned) would be more complete with discussions on FMN, FNMP, Establishment etc.

*** End of Assessment ***

⁸ UNCITRAL Guide to Enactment and Interpretation (1997, updated 2014) (Article 15)

Marks awarded 28 out of 50