



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 key distinction between the EU Regulation and the MLCBI is that the EU Regulation is binding in its entirety on all member States of the EU, while the MLCBI is a draft of legislation which States have the discretion to adopt the same in whole or in part. A key benefit of the binding effect of the EU Regulation is its reciprocity, which provides certainty and reliability regarding the effects of an insolvency proceeding in one EU State over another EU State. A disadvantage is that should there be a need to amend the EU Regulation this would require consensus and agreement by all EU States, something that has been proven difficult.

The MLCBI does not have reciprocity. Therefore, there is less certainty of the effect of an insolvency proceeding in one State over another State. This is a disadvantage. An advantage of the MLCBI is its flexible form which allows its adoption by States, considering their different insolvency laws and their sovereignty. This makes adoption of the MLCBI easier and faster.

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.

Pursuant to Article 21 and Article 22 of the MLCBI, the Court, in order to grant post-recognition relief, needs to balance and consider the adequate protection of interests of the Debtor, the protection of

the Debtor's assets, the interests of the Debtor's creditors and those of other parties in interest versus the relief requested by the foreign representative.

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 grants important anti-discriminatory protections to the creditors in a foreign proceeding. Foreign creditors and local creditors have the same access rights regarding the commencement and participation within the insolvency proceeding. Nevertheless, even though foreign creditors are granted the same access to the proceeding, the same does not affect the ranking of the claims. Therefore, all creditors, both foreign and local creditors are protected. Furthermore, foreign creditors' claims cannot be subordinated and given a lower rank than an unsecured creditor, solely on the fact that it is a foreign claim.

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 key distinction with respect to the nature of the relief available under Articles 20 and 21 of the MLCBI to a foreign representative is on the nature of same, the coordination of the foreign proceeding with the domestic proceedings and with any other concurrent proceeding under Chapter V of the MLCBI. If the proceeding is considered a "main foreign proceeding" because its COMI is located there, then the following automatic reliefs are granted:

1. The stay of the commencement or continuation of individual actions or proceedings;
2. The stay of execution against debtor's assets
3. The suspension of the right to transfer, encumber or otherwise dispose of assets of the Debtor.

If the case is considered a "non-main proceeding" because the Debtor only has an establishment there, then these reliefs are not automatic and the Court has to consider the same using its discretionary powers.

QUESTION 3 (essay-type questions) [15 marks in total] 7 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.

If the Debtor has its centre of main interest or "COMI" in Germany, then pursuant to the definition in Article 2(b) of the MLCBI the proceeding commenced in Germany is recognized as the "Main Foreign Proceeding". If the Debtor has merely an establishment in Bermuda, then the proceeding commenced in Bermuda is recognized as the "Non-Main Foreign Proceeding" pursuant to the definition in Article 2 (c) of the MLCBI. The Court in the US will grant automatic post-recognition relief to the foreign representative of the German proceeding and will then have to consider any post-recognition relief

requested by the Bermuda foreign proceeding within its discretionary powers and the parameters provided by Articles 21 and 22 of the MLCBI.

For full marks refer also to procedural articles of the MLCBI (including Art. 17, 6 and 15)

Question 3.2 [maximum 3 marks] 0 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.

If the joint provisional liquidators commenced recognition proceedings in the US and are immediately confronted by actions and discovery from the US based vendors, then the foreign liquidators can request the US bankruptcy court for interim collective relief prior to recognition under Article 19 of the MLCBI adopted under Chapter 15 of the Bankruptcy Code to have a breathing space and preserve the status quo until appropriate measures are taken in the case and recognition is resolved by the US Court.

This urgent relief is provisional in nature and granted under the Court's discretionary powers and balancing the interests of the US vendors, the Debtor, the other parties in interest and the foreign liquidators. The US Court may tailor such interim relief by imposing conditions to the same or by modifying or terminating relief already granted. See Articles 22(2) and 22 (3) of the MLCBI.

Answer should be 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 order for the UK representative to protect the US governed leases and intellectual property of the Debtor which are subject to ipso facto clauses, the UK representative needs to seek interim relief with the US Court to avoid any future application of such ipso facto clauses until recognition is granted. This could be done as a precautionary measure in order to stay the applicability of such clauses by the other contracting parties while the recognition of the proceeding is decided by the US Bankruptcy Court.

Since no prior recognition is required for the UK representative to have access to start a domestic Chapter 11 case. The UK representative can seek on urgent basis, according to Article 11 of the MLCBI, the commencement of a Chapter 11 case in the US for the UK Debtor if the Debtor has assets in the US and complies with all of the requirements imposed by the Bankruptcy Code to file a Chapter 11 bankruptcy petition. This Chapter 11 petition would then be a domestic insolvency (restructuring) case with supremacy over other foreign proceedings. Therefore, the UK Debtor in the Chapter 11 case would have, as a matter of right, all protections afforded by the Bankruptcy Code, including the automatic stay and those which reject the enforceability of ipso facto clauses. These protections

would pre-empt any future attack by the other contracting parties that seek to enforce the ipso facto clauses on the leases and licenses of the Debtor.

The Bankruptcy Code provides that ipso facto clauses are null and unenforceable in bankruptcy, this urgent relief can save time and resources should a counter party to the contracts seek termination of the lease of license while the recognition is pending. Distinguishable from the *Fibria Celulose S/A v Pan Ocean Co Ltd.* case discussed in the materials, since accepting or rejecting an ipso facto clause is a policy decision, the US Court can uphold the provisions of the Bankruptcy Court rejecting enforceability of the ipso facto clauses over a claim by the non-contracting party that such clauses should be upheld, since the choice of law is US law, not English (which can in certain instances apply ipso facto clauses).

The answer requires a discussion on interim relief and reference to art. 19 MLCBI. References should also be made to definitional and procedural articles of 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?

Since the Debtor only has its registered office and not much more in Country A, the Court correctly rejected recognition of the insolvency proceeding as a main foreign proceeding. In order to be considered a main foreign proceeding the foreign representative needed to prove that the Debtor's COMI was located at Country A, not merely rely on the presumption.

The foreign representative may try to seek recognition as a non-main foreign proceeding, since according to the facts the Debtor only has assets and the registered office in Country A. In order to prevail he would need to prove that the Debtor has an establishment in Country A in order to qualify as a non-main proceeding and then seek under Article 21 (2) to have access to the assets limited those that are to be administered in that non-main proceeding. Nevertheless, it does not appear that there are sufficient facts to establish that the Debtor had an establishment in Country A and most probably that request for recognition would also be denied.

The foreign representative may also file a domestic insolvency/restructuring proceeding in Country B and cooperate with the representative of the Debtor's estate under Articles 25 to 27 of the MLCBI which does not require recognition of the foreign proceeding as a condition for cooperation. This way both representatives can coordinate for the administration of the Debtor's assets in Country A, achieve the sale of the assets and have the proceeds distributed to both the creditors in Country B, as well as those of Country A, who have the right to participate and have access to the domestic proceeding under the MLCBI. For the above stated reasons, this should have been the initial course of action, since the foreign representative did not meet the requirements to have the foreign proceeding considered as a main or a non-main foreign proceeding.

The answer should be based on the COMI rebuttal (Art.16) and associated recognition procedures (Art. 15, 6 MLCBI).

QUESTION 4 (fact-based application-type question) [15 marks in total] 13 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 establish the key filing strategy to ensure a successful reorganization of the Client and the implementation of the RSA Note restructuring, sanctioned by the Cayman Islands’ Scheme and Sanction Order we need to consider the basic requirements for recognition of the Cayman Islands’ proceeding under a Chapter 15 case to be filed in the United States (US), as per the RSA covenants. The Cayman Islands Scheme is considered a “foreign proceeding” under Article 2 of the MLCBI since it is a judicial proceeding, which is collective in nature (seeks reorganization of the Client and approve the payment through the RSA for the Notes) in the Cayman Islands (a foreign state to the US) which was authorized through the insolvency laws of the Cayman Islands, where the assets and affairs of the Client were subject to the Court’s supervision and was undertaken for the reorganization of the Client.

In order to proceed with the recognition of the Cayman Islands’ Scheme under Chapter 15 of the United States, a petition for recognition of the foreign proceeding needs to be filed. See 11 USC 1515 which adopts Article 15 of the MLCBI. This provision requires that the petition for recognition needs to be accompanied by the following documents:

1. A certified copy of the Convening Order, the Sanction Order and any decision appointing the foreign representative;
2. A certificate from the Cayman Islands’ Court affirming the existence of the Scheme and of the appointment of the foreign representative; or
3. If applicable, a statement identifying all foreign proceedings with respect to the Client that are known to the foreign representative, if any. Pursuant to the above facts, there are no other foreign proceedings. Therefore, the statement would advise that there are none pending.

In order to file the recognition petition, we need to determine if the Cayman Islands' Scheme is considered a "main foreign proceeding" or a "non-main foreign proceeding". The key factor when evaluating this the location of the Debtor's Centre of Main Interest (COMI). If the Client has a COMI in the State where the foreign proceeding was filed, then the foreign proceeding is a "main foreign proceeding". If the foreign proceeding is filed in a State where the Debtor has an establishment, then the proceeding is a "non-main foreign proceeding". An establishment is defined as the place of operations where the Debtor has non-transitory commercial activities.

There is no established definition in the MLCBI of the term COMI. Nevertheless, 11 USC 5161, which makes applicable Article 16 of the MLCBI includes the presumption that Clients' registered office is presumed to be the center of the Clients' main interests or COMI. The COMI is, in most jurisdictions, determined at the time of the filing of the foreign proceeding. In the US there is case law that provides that the COMI is determined at the time of the filing of the Chapter 15 petition. See Matter of Fairfield Sentry Ltd, (2nd Cir. 2013). In this case if the Chapter 15 petition is filed promptly after the Convening Order is entered, then this distinction would be irrelevant.

Therefore, since the Client's registered office is located in the Cayman Islands, its COMI is presumed to be in the Cayman Islands. There are two key factors that need to be considered when further evaluating if the Client's COMI is in the Cayman Islands. These are (1) the location of the Client's central administration and (2) that such location is readily ascertainable as such by the Client's creditors. According to the file and the facts, the creditors of the Client can readily ascertain that its COMI is in the Cayman Islands. First of all, the Client is registered and incorporated in the Cayman Islands. This is sustained by the public records. The Cayman Islands is also where the following are located:

1. The Client's books and records
2. The Client's bank account which pays certain operating expenses

Also, the public filings of the SEC disclose that the Cayman Islands is the place of the Client's incorporation and the related tax consequences and indemnifications to investors. And even though the Board of Directors did not physically meet in the Cayman Islands, all of the Client's regular and special board meetings were virtual meetings organized by its counsel in the Cayman Islands. Finally, the RSA executed with the Noteholders provides that the restructuring would take place in the Cayman Islands and the Scheme Meeting was held at the Cayman Islands' offices of the Client's longstanding legal counsel, as well as virtually.

Nevertheless, it should be noted that the Client does not have business operations of its own and the same is done through its US based subsidiaries. It could be argued by any party opposing the recognition of the case as a main foreign proceeding that the Cayman Islands is not the Client's COMI based on the following facts:

1. The operating subsidiaries are all incorporated, located and operating under the laws of the US.
2. The employees of the operating subsidiaries are all in the US.
3. The Client's headquarters are located in the US.
4. The Client's main obligation are the \$25M Notes which are governed by New York law.

We would need to prepare to address these facts and bring evidence to prove those factors that support the Cayman Islands as the Client's COMI and that the case is a main foreign proceeding.

Under the specific facts and information contained in the file it can be argued in the alternative that the Cayman Islands Scheme was a non-main foreign proceeding, because the Client has an establishment in the Cayman Islands at the time of the commencement of the foreign

proceeding/date of the filing of the chapter 15 petition. As stated above, an establishment is defined as the place of operations where the Debtor has non-transitory commercial activities. In this case the Client does not have “operations” in the Cayman Islands, but it could be argued that it has non-transitory commercial activities related to its administration in such State.

It would be best to seek recognition under both scenarios in the event the Bankruptcy Court understands that the Client does not have its COMI in the Cayman Islands, but instead the same is located in the US. That way the Client can benefit from the provisions of Chapter 15 and be able to implement the RSA negotiated with the Noteholders and the Scheme Order entered by the Court of the Cayman Islands.

Upon the filing of the Chapter 15 petition for recognition of the Cayman Islands’ Scheme, we would need to seek urgent interim relief through first day motions in order to obtain interim relief while the US Bankruptcy Court determines if it will accept the request for recognition. This application for interim relief can be made under 11 USC 1519 which makes applicable Article 19 of the MLCBI. This interim relief can include an order from the Bankruptcy Court suspending any attempt to transfer, encumber or otherwise dispose of the assets of the client in the US and an order providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the Client’s assets, affairs, rights, obligations or liabilities that could assist in the implementation of the Scheme Order and the approved RSA. This interim relief is necessary in the event at the time of the filing of the Chapter 15 petition, the creditors that are planning to file the class action suit against the Client have done so and are seeking remedies in order to secure any judgment to be obtained in those proceedings. Interim relief would also allow for discovery on additional assets and liabilities of the Client in the US which can aid in the restructuring efforts and that are unknown at the time of the filing of the chapter 15 petition. The Bankruptcy Court will balance the interest of creditors, the Debtor and other parties in interest to see if the same are adequately protected when granting any interim relief.

Once the petition for recognition of the Cayman Island Scheme as a main foreign proceeding is granted by the Bankruptcy Court then the Client will receive all protections of the automatic stay and other relief provided by Article 20 of the MLCBI adopted by 11 USC 1520, which also include entrusting the administration and realization of the Client’s assets in the US. This will allow for the implementation of the Sanction Order and restructuring of the Client using the available assets in the US. Should the Bankruptcy Court grant recognition of the proceeding as a non-main foreign proceeding, then we would need to seek post recognition relief under Article 21 of the MLCBI adopted by 11 USC 1521, which the Court will consider using its discretion with the guidelines stated above. This request needs to be made, since in a non-main foreign procedure, certain post recognition relief is not automatic.

For full marks, full set of definitions (pertinent to Art.2 MLCBI) and Debtor/Creditor protection (Art.22 MLCBI) and public policy clause (Art.6) need to be mentioned. Otherwise, very good essay.

*** End of Assessment ***

Marks awarded: 39 out of 50