



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.**
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- 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.

Whilst both being multinational instruments, the MLCBI and the European Union (EU) Regulation (the "EIR") differ significantly in terms of their scope and effect on insolvency proceedings. In terms of advantages/disadvantages of each of the MLCBI and the EIR, see below.

It is an advantage that the EIR forms part of the domestic law of the EU member states and, as such, is binding on those member states. By comparison, the MLCBI is not legally binding and is a recommendation on model legislation to be implemented for insolvency proceedings. This is a disadvantage. That said, it took approximately 40 years to implement the EIR which is a disadvantage. Whereas, by contrast, the MLCBI was created four years after UNCITRAL's WG V. This is an advantage.

Question 2.2 [maximum 2 marks] 2 mark

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

In order for the court to exercise its discretionary power to grant post-recognition relief under Article 21 of the MLCBI, it must be satisfied that the relief sought is necessary to protect the assets of the debtor or, alternatively, that it is necessary to protect the interests of the creditors as a whole. In the context of a foreign non-main proceeding, a further requirement is imposed; namely that the court must be satisfied that the relief sought relates to assets that should be administered in the foreign non-main proceeding or concerns information required in that proceeding. Those considerations are made by reference to the law of the domestic jurisdiction.

Question 2.3 [2 marks] 2 marks

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

The protections granted to creditors in a foreign proceeding under Article 13 of the MLCBI are, as part of the anti-discrimination principle, as follows:

- a. Foreign creditors have the same rights as creditors from the enacting state as to the commencement of and participation in local proceedings relating to the debtor under the insolvency law of the enacting state; and
- b. Foreign creditors are prohibited from being ranked lower in priority than other creditors based on the fact that they are foreign creditors.

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?

In short, the key distinction is that, under Article 20 of the MLCBI, if foreign proceedings are recognised as "foreign main proceedings", certain forms of relief are automatically granted. Such automatic relief is:

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

By comparison, in a foreign non-main proceeding, no automatic relief is granted following recognition. Albeit relief akin to that which is available automatically in a foreign main proceeding can be granted by the court on application by the foreign representative. See Article 21 - it is a matter for the court's discretion whether to grant relief and the foreign representative will have to show that such relief is necessary to protect the assets of the debtor. Alternatively, the foreign representative will need to show that it is in the interests of creditors to grant relief.

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

Question 3.1 [maximum 4 marks] 2 marks

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

When one considers both (a) the provisions Article 17 of the MLCBI and (b) that the debtor's COMI is Germany, the German proceedings would be recognised as the "foreign main proceedings" by the US bankruptcy court. The insolvency proceedings that have been commenced in Bermuda would likely be recognised as "foreign non-main proceedings" because we are told that the debtor has an establishment in Bermuda. Pursuant to Article 30 of the MLCBI, primacy would be given to the German insolvency proceedings (i.e., the "foreign main proceedings").

Full answer requires a discussion and references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 6.. (additional to Art.17). Although your answer is correct, it lacks substantiation.

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.

The starting position would be that the US-based vendors' (the "Plaintiffs") proceedings against the joint provisional liquidators (the "JPLs") would not be stayed pending the determination of the JPLs' recognition proceedings under chapter 15 of the US Bankruptcy Code. The caveat to this is that it is open to the JPLs to apply for urgent interlocutory relief. A point that is worth noting is that in *Global Cord Blood Corp. (Case No. 22-11347, (DSJ), 2022 WL 17478530 (Bankr SDNY Dec 5, 2022)*, which concerned chapter 15 proceedings for recognition brought by joint provisional liquidators (i.e., a foreign representative), the US Court refused to recognise the proceedings as a "foreign proceeding" because they were brought for the purposes of investigation and, further, because they were not a collective proceeding. It is not possible to advise as to the likelihood of the JPLs' proceedings being recognised as a foreign proceeding with the limited information that we are given. However, it is certainly possible that recognition would not be granted and in such circumstances the Plaintiffs' proceeding would proceed as against the company (under the control of the JPLs) or, alternatively, against the JPLs themselves.

If, however, the JPLs' chapter 15 proceedings were recognised as a "foreign main proceeding", the Plaintiffs' action would be automatically stayed upon recognition. Alternatively, if the JPLs' chapter 15 proceedings were recognised as a "foreign non-main proceeding", they would need to apply to the US Court for a stay of the Plaintiffs' proceedings. In order to succeed in that application, the JPLs would need to demonstrate to the US Court that such a stay is necessary to protect the assets of the debtor or that it is in the interests of the creditors as a whole.

Requires discussion based on Art.10 MLCBI

Question 3.3 [maximum 4 marks] 4 marks

A foreign representative who administers assets in a debtor-in-possession-like restructuring proceeding in the UK commences a recognition proceeding in the US, setting the recognition hearing 35 days after the petition date due to the availability of the court. There is no litigation pending or threatened against the foreign debtor, but US-governed leases and intellectual property licenses have *ipso facto* clauses (that is, bankruptcy-triggered terminations) that are not enforceable under the US Bankruptcy Code. Based on these facts, explain what steps, if any, should the foreign representative take to protect the assets and why?

Based on the facts that we have been given, the foreign representative should apply for urgent relief seeking a declaration that the *ipso facto* clauses are not enforceable. A declaration in those terms would likely fall within "any additional relief that may be available to the trustee" in chapter 15 of the US Bankruptcy Code (which is the equivalent to Article 21(1)(g) of the MLCBI) and, in that respect, can be distinguished from the facts of the *Pan Ocean* case. If the foreign representative did not make an application for relief in those terms then it would risk the counterparties to the intellectual property licences and

leases terminating the agreements which could prejudice the underlying company's ability to continue as an going concern and, therefore, prejudice its interests.

Question 3.4 [maximum 4 marks] 1 mark

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?

This answer assume that Country A and B have adopted legislation in their respective countries substantially in the form of the MLCBI.

The foreign representative should apply for recognition of the foreign proceedings as "foreign non-main proceeding." In making that application, it should seek relief from the court (at the least) in the form that it would have obtained if it had been successful in its application for recognition as a foreign main proceeding. The foreign representative should have applied at the outset for the foreign proceeding to be recognised as a "foreign main proceeding" or, in the alternative, as a "foreign non-main proceeding."

In making its application for recognition of the proceedings as "foreign non-main proceedings", the foreign representative should explain to the court why the relief is sought. In other words, it should explain why it (a) it is necessary to protect the assets of the debtor or the interests of the creditors or other interested parties; and (b) why assets that are under the law of Country B, should be administered in Country A.

Art.16 MLCBI is the main reference for "rebuttable COMI presumption" which should be discussed. References to Art.17, 21, 6 are also required to get full marks.

QUESTION 4 (fact-based application-type question) [15 marks in total] 9 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.

The starting point in the analysis of the facts that we have been given is to consider where the COMI of Globe Holdings (the "**Company**") would be. It is important to undertake this analysis because it is central to the determination of the question as to whether the recognition of the Cayman scheme proceedings (the "**Cayman Proceedings**") should be sought on the basis that they are "foreign main proceedings" or "foreign non-main proceedings".

The factors that indicate that the Company's COMI is in the Cayman Islands are as follows.

1. The Company is incorporated and registered in the Cayman Islands (the fact that it was first incorporated in Canada almost 15 years ago and for a short period only will likely be given little if any weight by the US court).
2. Public filings with the SEC disclose that the Company is a Cayman Islands company / that the Cayman Islands is the Company's place of incorporation.
3. The prospectus provided to the Noteholders similarly discloses that the Company is a Cayman Islands company and explained the resulting indemnification and tax consequences.
4. The RSA expressly provided for the restructuring to take place via formal proceedings in the Cayman Islands.
5. The Company has retained Cayman Islands Counsel (Cedar and Woods) for over a decade to advise and represent it and all the Company's regular and special board meetings are organized by Cedar and Woods (although the meetings are held virtually).
6. The Cayman Court made the Convening Order and the Sanctioning Order (thereby supervising the restructuring) and the Scheme Meeting was held at Cedar and Woods' offices (although again virtual attendance was permitted).
7. The Company's books and records are maintained in the Cayman Islands.

Taken together, those factors strongly indicate that that the Cayman Proceedings are likely to be recognised as foreign main proceedings under chapter 15 of the US Bankruptcy Code (which is the same as the MLCBI in all material respects. All the factors listed above indicate to persons dealing with the Company (specifically creditors including, but not limited to, the Noteholders) that the Company's COMI was in the Cayman Islands. That conclusion is strengthened by the fact that when the Company approached its largest Noteholders regarding

the proposed restructuring, they expected that any such restructuring would take place in the Cayman Islands. This analogous to the circumstances in *Modern Land* case heard by the US Bankruptcy Court where recognition as a foreign main proceeding was granted to a Cayman scheme.

Indeed, under chapter 15 of the US Bankruptcy Code the fact that the Company is incorporated in the Cayman Islands (and its registered office is domiciled in that jurisdiction) means that there is a presumption that the Company's COMI is in the Cayman Islands. Although that presumption is rebuttable.

The factors which point to the US (specifically New York) being the Company's COMI are as follows:

1. The Company's business is exclusively carried out through its subsidiaries which are all incorporated in the US. We are told that the Company operates in the commercial automobile insurance sector in the US.
2. The Company's headquarters are in New York.
3. All the Company's employees are in the US.
4. The Company regularly holds its board meetings virtually (i.e., they are not held in the Cayman Islands).
5. The Company's shares were listed on the American NASDAQ stock market until 2020 (and presumably during the time when the Notes were issued).
6. The Notes and the RSA were governed by New York law.

There are, therefore, factors that suggest that New York is the Company's COMI so there may be some judicial debate in any recognition proceedings which are commenced.

That said, because of the presumption that the Cayman Islands is the Company's COMI, the Company should seek recognition in the US on the basis that the Cayman Proceedings are "foreign main proceedings." It is important that the recognition proceedings make clear that:

1. The Company is not just a Cayman "letterbox" company (see *In re SPhinX*); and
2. That granting recognition on the basis that the Cayman Proceedings are foreign main proceedings would be appropriate because the purpose (or one of them) of chapter 15 is to maximise the value of the debtor's assets, facilitate rescue and promote co-operation between the US and foreign courts (such as the Cayman court).

It would be sensible, given that the facts indicate that there could be some genuine debate that New York is the Company's COMI, to apply for the Cayman Proceedings to be recognized as "foreign non-main proceedings" in the alternative if, having taken US law advice, an application of that nature is permissible. In such an application, it will be necessary to provide sufficient supporting information to explain why the necessary relief (e.g. the enforcement of the scheme and the moratorium on proceedings against the Company given the class action risk) should be granted on a discretionary basis. It would be necessary for the Company to provide evidence supporting that the relief is in the interests of creditors and necessary to protect the assets of the Company in the US (and that it would satisfy s 1521(c) of the Bankruptcy Code).

Ultimately, it does not matter practically whether the Cayman Proceedings are recognized as a foreign main or foreign non-main proceedings because the foreign representative will need to seek relief from the Court which is discretionary in nature anyway (see below). In such circumstances, it cannot rely only on the relief that would be automatically granted under chapter 15 if the Cayman Proceedings were recognized as foreign main proceedings.

In terms of the necessary papers, Article 15 of the MLCBI and section 1515 of the US Bankruptcy Code are instructive. They provide that the foreign representative would need to provide either:

1. A certified copy of the decision commencing such the Cayman proceeding and appointing the foreign representative; or
2. a certificate from the Cayman court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
3. in the absence of (a) and (b), any other evidence acceptable to the US court of the existence of the Cayman proceeding and of the appointment of the foreign representative.

The foreign representative should also prepare and file the recognition application an affidavit identifying all foreign proceedings to which the Company is a party that are known to the foreign representative as at the time of the application.

As to relief, in addition to seeking enforcement of the scheme in the US, the foreign representative could seek urgent relief from the date of filing the application for recognition (see both Article 19 MLCBI and section 1519 of the US Bankruptcy Code). In relation to relief for the enforcement of the scheme in the US *Modern Land* confirmed that a Cayman scheme recognised as a "foreign main proceeding" under chapter 15 amounts to a substantive discharge of New York law governed debt (in this case the Notes). In other words, it would be binding and effective in discharging the debt which is governed by New York law.

A stay is not available as a form of urgent interim relief. However, it may be sensible for the foreign representative to seek urgent relief staying execution against the Company's assets in the US and entrusting the administration or realization of the Company's assets located in the US to the foreign representative to protect and preserve the value of those assets for the benefit of the Company's creditors and other interested parties. If that application is pursued it will be necessary for the foreign representative to demonstrate that the Company's assets are at risk of devaluation or may otherwise be in jeopardy. The foreign representative will also need to demonstrate that the relief is urgently needed to protect the assets of the Company as to fail to do so would be contrary to the interests of the Company's creditors as a whole.

Well-structured essay and good application on the facts of the case. However, the full answer also contains: discussion and reference to definitions eg (COMI, establishment, foreign main proceedings etc) with respective articles in the MLCBI. A discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI. Conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI. (Noting the reference made to Art.19.)

*** End of Assessment ***

Marks awarded: 35 out of 50