



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).
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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.

[One key distinction between the MLCBI and the European Union Regulation on insolvency proceedings (the “EIR”) is the format of each legal instrument. The EIR is a treaty, which upon adoption directly becomes part of the domestic law of each EU Member State. On the other hand, the MLCBI is not a treaty but a model law, such that it is simply a recommendation and a form of “soft law” that each State can decide whether or not to adopt in whole or in part into its domestic legislation.

One key benefit of the format of a “model law” is its flexibility. By allowing States to each decide the extent to which they wish to adopt the model law into their domestic legislation based on the policy considerations unique to each State, it encourages States to be more willing to incorporate the broad procedural framework into their domestic legislation by being less intrusive on each State’s sovereignty and not forcing new foreign substantive insolvency laws on States. One key disadvantage of the format of a “model law” is that it achieves a lesser degree of harmonisation in respect of rules on international aspects of insolvency, given that it is only a recommendation and States can modify the procedural framework based on their respective considerations.

One key benefit of the using the format of a treaty is that it would achieve a greater degree of harmonisation and consistency between contracting states given that upon adoption it directly becomes part of the domestic law of each State. One key disadvantage with the format of a treaty is that it is quite difficult for states to agree on given its substantive legal implications on domestic law.]

Note, an EU Regulation (secondary law) is not a Treaty (primary law).

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.

[In exercising its discretionary power to grant post-recognition relief under Article 21 of the MLCBI, the Court in the enacting state should primarily consider whether the interests of the creditors and other interested persons, including the debtor, are adequately protected pursuant to Article 22 of the MLCBI.]

In the context of determining whether to grant relief to a foreign representative of a foreign non-main proceeding, pursuant Article 21(3) of the MLCBI, the Court should also consider whether the relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding, or concerns information required in that proceeding, such that any relief granted does not interfere with the administration of another insolvency proceeding, such as the main proceeding.]

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 is in respect of the anti-discrimination principle. Foreign creditors have the same rights as creditors domiciled in the enacting State regarding the commencement of and participation in local proceedings regarding the debtor under the insolvency law of the enacting state. Article 13 further provides that such access does not affect the ranking of claims in the enacting State, save that the claim of a foreign creditor shall not be ranked lower in priority than that of general unsecured claims by virtue of the fact that the holder of such a claim is a foreign creditor. However, even under Article 13, States may refuse to recognise foreign tax and social security claims, thereby allowing the enacting States to continue to discriminate against such claims.]

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?

[A key distinction between the relief that is available in a foreign main as opposed to foreign non-main proceeding is upon recognition of a foreign main proceeding pursuant to Article 20 of the MLCBI, 3 types of relief are automatically granted, namely:

1. a stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
2. a stay of execution against the debtor's assets; and
3. a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

On the other hand, if the recognition concerns a foreign non-main proceeding, no automatic relief is granted, and the Court retains a discretion (at the request of the foreign representative) as to the type of relief that may be granted pursuant to Article 21 of the MLCBI. In this regard, Article 21(3) of the MLCBI also provides that in granting relief to a representative of a foreign non-main proceeding, the court must be satisfied that the relief

relates to assets that under the law of the enacting State, should be administered in the foreign non-main proceeding.]

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

[In this scenario, foreign main proceedings must have been filed in Germany given that this is where the debtor's COMI is.

Foreign non-main proceedings must have been filed in Bermuda given that this is where the debtor has an establishment.

The foreign representatives of the debtor in the German proceedings and the Bermuda proceedings would then have brought recognition proceedings in the US. In this case, there would be concurrent foreign proceedings in existence in respect of the same debtor.

Pursuant to Article 30(a) of the MLCBI, if the German insolvency proceedings was recognised first in the US Court, then any relief granted to the German foreign representative under Article 19 or Article 21 must be consistent with the foreign main proceeding.

Pursuant to Article 30(b) of the MLCBI, if the recognition of the Bermuda insolvency proceedings came first, after the German proceedings are recognised in the US, the US Courts would need to review any relief that had previously been granted under Article 19 or 21 in the recognition of the Bermuda insolvency proceedings and modify or terminate any such relief if inconsistent with the German insolvency proceedings.]

Requires references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 17, 6..

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 US-based vendors of the foreign debtor likely sued the joint provisional liquidations (the "PLs") for tortious interference as the relief requested by the PLs from the US Court in seeking recognition was likely to the effect of preventing the US-based vendors from enforcing the contractual debts against the foreign debtor on the purported basis that these contractual debts are deemed to be discharged under the foreign insolvency law.

Under the rule in Anthony Gibbs (the "Gibbs Rule"), a debt governed by the law of a particular state cannot be discharged or compromised by foreign insolvency proceedings. The discharge of a debt under the insolvency law of a foreign country is only treated as a discharge in the law of the particular state if it is a discharge under the law applicable to the contract.

In the present case, the US Court would likely only grant the relief sought by the PLs if the discharge of the debt under the foreign insolvency law is also discharge under the law applicable to the contract. If this is not the case, the US Court would unlikely grant the relief sought, unless the US-based vendors have submitted to the foreign insolvency proceeding such that they would be taken to have accepted that the law governing the foreign insolvency proceeding should determine the contractual rights that the US-based vendors have elected to vindicate in that proceeding.

If neither of the above scenarios are satisfied, the US Court is unlikely to grant the relief sought, and the contractual debt owed to the US-based vendors would not be treated as discharged in US.

This analysis assumes that the US-based vendors were not taking steps to enforce their contract rights by way of the commencement of legal proceedings / litigation against the foreign debtor in the US Courts. If such domestic legal proceedings were commenced by the US-based vendors against the foreign debtor, the US Court would grant relief to the extent that provides for the staying of the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities. Depending on whether the PLs were appointed under a foreign main or non-main proceeding, the US Court could grant such relief under Article 20(1)(a) or Article 21(1)(a).]

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?

[Given that there is a relatively significant period of time between the application for recognition and the hearing date, the foreign representative should consider taking out an urgent application for interim pre-recognition relief to protect the foreign debtor's assets in US to grant appropriate relief to restrain the counterparties to the contracts with the foreign debtor from exercising the *ipso facto* clauses which are unenforceable under the US Bankruptcy Code pursuant to Article 19(1)(c) read with Article 21(1)(g) of the MLCBI.

This would be a similar approach taken by the Korean Liquidator in *Fibria cellulose S/A v Pan Ocean Co Ltd* ("*Fibria*") to prevent the Brazilian party from exercising the *ipso facto* clause, although the facts of the present case can be distinguished from *Fibria*. The US Court will likely find that it has the power under Article 21(1)(g) to grant relief to restrain the enforcement of the *ipso facto* clauses, given that such relief would likely be available to a bankruptcy trustee in the US who is likely to have the power under the US Bankruptcy Code to restrain the enforcement of *ipso facto* clauses by virtue of their unenforceability.]

Question 3.4 [maximum 4 marks] 4 marks

A foreign representative, who administers the assets of an insolvent debtor in an insolvency proceeding pending in Country A (where the foreign debtor has its registered office and not

much more), commenced a proceeding in Country B to recognise the foreign proceeding as the foreign main proceeding in order to sell certain assets within the territorial jurisdiction of Country B, but unfortunately the insolvency court considering the petition for recognition denied the recognition of the foreign proceeding as a foreign main proceeding. Explain what may or should the foreign representative do next? What should the foreign representative have done at the outset?

[The foreign representative may consider applying for the foreign proceeding in Country A to be recognised as a foreign non-main proceeding instead and seek relief under Article 21(1)(e) of the MLCBI to allow the administration or realisation of all the foreign debtor's assets located in Country B to be entrusted to the foreign debtor, such that the foreign representative would still be able to sell the debtor's assets within the territorial jurisdiction of Country B.

In this regard, foreign representative would instead have to show that Country A is a place where the debtor has an establishment, which is defined under Article 2(f) as "any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services". In this regard, the foreign representative should still take note that some evidence should still be adduced to show that the debtor did carry out some degree of business activities in Country A prior to applying for recognition again.

Recognition as a foreign main proceeding was likely denied on the basis that Country A was not the foreign debtor's COMI. This is likely because the foreign representative had only sought to rely on the fact that the foreign debtor has its registered office in Country A, without much more, which would only suffice to invoke a presumption that Country A was the debtor's COMI under Article 16(3) of the MLCBI. There was likely insufficient evidence to show that Country A was the principal location as at the date of the application for recognition where the central administration of the debtor was taking place. At the outset, the foreign representative should have sought to gather more evidence in support of the relevant factors that would lend further weight to the proposition that the debtor's COMI was Country A, for instance, the location in which the debtor's principal assets or operations are found, the locations of the employees and the jurisdiction whose law would apply to most disputes.]

QUESTION 4 (fact-based application-type question) [15 marks in total] 14 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.

[Whether to apply for recognition of main or non-main proceeding or both]

The client should apply for recognition of the Sanction Order as a foreign main proceeding, and in the alternative, as a foreign non-main proceeding. This is because, as will be explained further below, while there are certain factors leaning in favour of the COMI being the Cayman Islands, there are also a number of significant factors that suggest that the COMI is the US instead.

Based on the above facts, there would be a presumption under Art 16(3) of the MLCBI that the client's COMI is that Cayman Islands given that at as at the date of the envisaged recognition application to be brought, the client is a Cayman Islands incorporated and registered entity.

The client can rely on the following fact in support of its assertion that its COMI is Cayman Islands,

- Globe Holdings has a bank account in the Cayman Islands from which it pays certain operating expenses - although the fact that this account was only opened just a few days ago would tend to militate against a finding that the COMI was Cayman Islands if the client had a long history of making payments from other offshore accounts instead.
- The client have also retained its Cayman Islands counsel (Cedar and Woods) for over a decade, which suggests that its main contracts would have been subject to Cayman Islands' counsel and the law that would apply to most disputes was also Cayman Islands, thereby requiring it to have Cayman Island's counsel on retainer for an extended period.
- The client maintains its books and records in the Cayman Islands.
- The fact that its public filings with the SEC and its prospectus provided in connection with the Notes which disclosed that the client is a Cayman Islands company would also suggests that third parties and creditors of the client would have perceived the client's COMI to be Cayman Islands.

However, there are certain facts which may militate against a finding that that the client's COMI is Cayman Islands. For instance:

- The fact that all board meetings were held virtually (and not in the Cayman Islands) is a neutral factor, since it does not point to a single location where the company's management is located and where commercial policy was determined.
- the fact that the client has no business operations of its own, and that its main business operations are carried out through its subsidiaries that are incorporated under US laws suggests that the COMI is US instead, given that this is the location where the debtor's principal assets (being its subsidiaries) and operations are found.

- The fact that the client's headquarters is in the US also suggests that the location in which commercial policy was determined was in the US.

As such, given that there is some ambiguity in relation to the client's COMI, the client should consider applying for recognition of the Sanction Order as a foreign non-main proceeding, which requires the client to show that it has an "establishment" in the Cayman Islands by adducing evidence that it carries out non-transitory economic activity with human means and good or services (Article 2(c) and 2(f) of the MLCBI). In this regard, the factors referred to above that were relevant to a finding that the client's COMI is the Cayman Islands would similarly be relevant to this analysis. For instance, the fact that the client was making payments out of a Cayman Islands bank account suggests that it was carrying out economic activity in the Cayman Islands, coupled with the fact that it had retained Cayman counsel for the last 10 years.

What papers need to be submitted:

In this application, the foreign representative in the Cayman Islands proceedings would have to submit the following papers as required under Article 15 of the MLCBI:

- A certificated copy of the decisions commencing the foreign proceeding and appointing the foreign representative; or
- A certificate from the Cayman Islands Court affirming the existence of the proceedings and of the appointment of the foreign representative; or
- any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative;
- a statement identifying all proceedings in respect of which the debtor that are known to the foreign representative;
- translation of documents supplied in support of the application for recognition into English

Additionally, the client should also adduce the relevant documentary evidence in support of the aforesaid facts that demonstrate that Cayman Islands is its COMI, or in the alternative that the client has an establishment in the US.

What relief should be requested in the filing

- If recognition is being sought on the basis of a foreign main proceeding, to request for all automatic relief that would be granted upon recognition of the Sanction Order under Art 20 of the MLCBI. In particular, for for a stay of commencement or continuation of individual actions or individual proceedings concerning against the client in the US, to prevent the commencement of the class action lawsuit that is brewing. This
- Further and in the event recognition is being sought on the basis of a foreign non-main proceeding, pursuant to Article 21(1)(g) of the MLCBI, for an order that the automatic stay of article 20 of the MLCBI be made permanent, so as to give effect to the terms of the Sanction Order to prevent the Noteholders who may be located in US from seeking enforcement of their outstanding debts under the Notes against the client in the US and thereby bind them to the compromise of the debt in respect of the Notes pursuant to the Sanction Order.]

Very good, well-structured essay. The definition of COMI - from various sources would have been beneficial. Conclusive remarks could also make reference to Art. 22 and 6 MLCBI

*** End of Assessment * Marks awarded: 44 out of 50. Well done!**