



40/50 = 80%

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

RESIT ASSESSMENT: SEPTEMBER 2023

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the summative (formal) assessment for Module 2A of this course.

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. The final submission date for this assessment is 21 September 2023. Please provide the completed assessment back to Sanrie Lawrenson via email at Sanrie.Lawrenson@insol.org by no later than 23:00 (11 pm) GMT on 21 September 2023. No submissions can be made after this time, no matter the circumstances.**
- 6. When submitting your assessment you will be required to confirm / certify via email 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.**

ANSWER ALL THE QUESTIONS

Please note that all references to the "MLCBI" or "Model Law" in this assessment are references to the Model Law on Cross-Border Insolvency.

QUESTION 1 (multiple-choice questions) [10 marks in total] **7 marks**

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which one of the following international organisations' mandate is to further the progressive harmonization of the law of international trade?

(a) World Trade Organization.

(b) The United Nations Commission on International Trade Law.

(c) The United Nations Conference on Trade and Development.

Question 1.2

Which trend(s) and process(es) served as a proximate cause for the development MLCBI?

(i) Rise of corporations.

(ii) Internationalisation.

(iii) Globalization.

(iv) Universalism.

(v) Territorialism.

(vi) Technological advances.

Choose the correct answer:

(a) Options (i), (ii), (iii), (iv) and (vi).

(b) Options (i), (ii), (iii) and (iv).

(c) Options (ii), (iii), (iv) and (vi).

(d) All of the above.

Question 1.3

Which of the following statements incorrectly describe the MLCBI?

(i) ***It is legislation that imposes a mandatory reciprocity on the participating members.***

(ii) ***It is a legislative text that serves as a recommendation for incorporation in national laws.***

(iii) ***It is intended to substantively unify the insolvency laws of the foreign nations.***

(iv) ***It is a treaty that is binding on the participating members.***

Choose the correct answer:

(a) Options (ii), (iii) and (iv).

(b) Options (i), (ii) and (iv).

(c) Options (i), (iii) and (iv).

(d) All of the above are incorrect.

Question 1.4

Which of the below options reflect the objectives of the MLCBI?

(i) ***To provide greater legal certainty for trade and investment.***

(ii) ***To provide protection and maximization of value of the debtor's assets.***

(iii) ***To provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtors.***

(iv) ***To facilitate the rescue of financial troubled businesses.***

(v) *To ensure substantive unification of insolvency laws of member-states.*

Choose the correct answer:

(a) Options (i), (ii), (iii) and (iv).

(b) *Options (ii), (iii) and (v).*

(c) *Options (ii), (iv) and (v).*

(d) *None of the above.*

Question 1.5

Which two of the below hypotheticals demonstrate a more likely precursor to a "cross-border insolvency"?

(i) *An insolvency proceeding is commenced in jurisdiction A, but a significant asset is located outside of jurisdiction A.*

(ii) *An insolvency proceeding is commenced in jurisdiction A and immediately transferred to a foreign jurisdiction B.*

(iii) *An insolvency proceeding is commenced in jurisdiction A, in which a group of affiliated debtors has its COMI as well as all assets and liabilities.*

(iv) *An insolvency proceeding is commenced in jurisdiction A, but certain liabilities are governed by laws of a foreign jurisdiction B.*

(v) *An insolvency proceeding is commenced in jurisdiction A, but all *de minimis* assets are located in foreign jurisdictions.*

Choose the correct answer:

(a) Options (i) and (ii).

(b) *Options (ii) and (iii).*

(c) *Options (iii) and (v).*

(d) Options (i) and (v).

Question 1.6

A restructuring proceeding is commenced in jurisdiction A by a corporation with COMI in jurisdiction A and an overleveraged balance sheet. The court in jurisdiction A, overseeing the restructuring, entered a final and non-appealable order, approving the compromise and restructuring of the debt. The entered order, by its express terms, has a universal effect. Based on these facts alone, what is the effect of such order's terms in jurisdiction B if jurisdictions A and B do not have a bilateral agreement?

- (a) Binding within jurisdiction B.**
- (b) Binding within jurisdiction B, but certain actions need to be taken.**
- (c) No effect within jurisdiction B.**
- (d) Likely no effect within jurisdiction B.**
- (e) Not enough facts provided to arrive at a conclusion.**

Question 1.7

Which of the following statements set out the reasons for the development of the Model Law?

- (i) The increased risk of fraud by concealing assets in foreign jurisdictions.**
- (ii) The difficulty of agreeing multilateral treaties dealing with insolvency law.**
- (iii) To eradicate the use of comity.**
- (iv) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.**

Choose the correct answer:

- (a) Options (i), (ii) and (iii).**
- (b) Options (i), (ii) and (iv).**
- (c) Options (ii), (iii) and (iv).**
- (d) All of the above.**

Question 1.8

Which of the statements below are incorrect regarding COMI under the MLCBI?

- (i) COMI is a well-defined term in the MLCBI.**
- (ii) COMI stands for comity.**
- (iii) The debtor's registered office is irrelevant for purposes of determining COMI.**
- (iv) COMI is being tested as of the date of the petition for recognition.**

Choose the correct answer:

(a) Options (i), (ii) and (iii).

(b) Options (ii), (iii) and (iv).

(c) All of the above.

(d) None of the above.

Question 1.9

In the event of the following concurrent proceedings, indicate the order of the proceedings in terms of their hierarchy / primacy:

- (i) Foreign main proceeding.**
- (ii) Foreign non-main proceeding.**
- (iii) Plenary domestic insolvency proceeding.**

Choose the correct answer:

(a) Options (ii), (i) and then (iii).

(b) Options (i), (ii) and then (iii).

(c) Options (iii), (i) and then (ii).

(d) Options (iii), (ii) and then (i).

Question 1.10

Which of the statements below are correct under the MLCBI?

- (a) The foreign representative always has the powers to bring avoidance actions.**

(b) The hotchpot rule prioritises local creditors.

(c) The recognition of a foreign main proceeding is an absolute proof that the debtor is insolvent.

(d) None of the above are correct.

QUESTION 2 (direct questions) [10 marks in total]

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 European Union (EU) Regulation on insolvency proceedings (EIR) is a regulation and so it directly becomes part of the domestic law of the EU Member State following its adoption. The MLCBI on the other hand is a mere recommendation that can be adopted in whole or part into the legislation of the enacting State. A key benefit of the EIR is that it provides substantive unification of insolvency laws of member-states, however, this was as a result of 40 years of work. The MLCBI does not provide as much legal certainty as the EIR because the enacting States can choose to adopt the legislation in whole or in part. The MLCBI unlike the EIR was able to be established within a few years as a matter of urgency.

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.

The court at the request of the foreign representative, upon recognition of a foreign proceeding, main or non-main has the discretionary power to grant post-recognition relief under Article 21 of the MLCBI.

In deciding whether to use its discretionary power, the court should:

- 1. consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors; and*
- 2. strike an appropriate balance between the relief that may be granted and the persons that may be affected.*

This is a balancing act.

Question 2.3 [maximum 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 is the anti-discrimination principle. It provides a foreign creditor with the same rights regarding the commencement and participation in the proceeding as creditors in the State. This principle however, does not affect the ranking of claims in the in the enacting State except that the foreign creditor should not be ranked lower than the creditor of the enacting State solely on the ground that it is a foreign creditor.

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 with respect to the relief available in foreign main versus foreign non-main proceedings is the Article 20 reliefs. Upon recognition of a foreign proceeding as a foreign main proceeding the following have automatic effect:

- a. Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;*
- b. Execution against the debtor's assets is stayed; and*
- c. The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.*

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

Question 3.1 [maximum 4 marks] **4 marks**

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

Article 2 of the MLCBI provides the definition for both a foreign main proceedings and a foreign non-main proceedings. A foreign main proceeding is when the proceedings is in the State of the debtor's COMI while a foreign non-main is in the State of the debtor's establishment. In line with the above definitions the Germany proceeding should be filed as the foreign main proceedings and the Bermuda proceeding as the foreign non-main proceedings. Upon the Germany proceeding being recognised as the foreign main it will be granted the automatic mandatory relief of Article 20. The Bermuda proceeding recognition as a foreign non-main proceedings will be granted the court's discretionary post-recognition relief. However, Article 19 provides for the granting of urgent relief to protect the assets of the debtor or the interests of the creditors from the filing of the recognition application until it is decided.

Question 3.2 [maximum 3 marks] **2 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.

The Joint provisional liquidators (JOLs) under Article 18 have an ongoing obligation upon filing the application to promptly inform the court of any substantial change in the status of their appointment.

Upon the filing of the recognition application the JOLs can be granted interim reliefs as provided in Article 19. The JOLs can request a stay of execution against the debtors assets which will result in a stay of the proceedings brought against the JOLs.

The US court will likely have no jurisdiction over the JPLs or the suite commenced by the US-based vendors in the US

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?

*The ipso facto clauses are not enforceable in US which governs the leases and intellectual property. What this means is that even though the debtor is insolvent, the other parties can not enforce the ipso facto clauses. Even though the ipso facto clauses are enforceable in the UK where the restructuring proceedings have been commenced it is unlikely that the US courts will enforce the ipso facto clauses. In *Pan Ocean* case the Korean liquidator attempted to prevent the enforcement of the ipso facto clauses because they were not enforceable in Korea. The contract was however governed by UK law. The UK court refused to prevent the enforcement of the ipso facto clauses because:*

- 1. It would go beyond the relief available in the UK court;*
- 2. Parties shouldn't have expected that the English court would prefer Korean law; and*
- 3. Accepting or rejecting the ipso facto clauses is a policy decision and there was no good reason to prefer Korean law over English law.*

The foreign representative can apply under Article 19 for a stay of execution of the debtor's assets until the recognition application is decided if there is an urgency that the other parties might terminate the leases and intellectual property licenses. The

foreign representative can also apply for reliefs under Article 20 and 21 depending on whether the application is for a foreign main or foreign non-main proceedings.

Question 3.4 [maximum 4 marks] Domestic proceedings **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?

Given that only the debtor's registered office is located in Country A, the foreign representative should have applied for a foreign non-main recognition in Country B. A foreign proceeding will only be recognised as a foreign main proceedings if it is filed in the debtor's COMI. The foreign representative will need to make another application for recognition as a foreign non-main. Proceedings that failed to qualify as a main proceeding would not automatically be a foreign non-main proceeding. Recognition as a non-main proceeding would have to meet the requirements of the definition of Article 2 subparagraphs (c) and (f).

Articles 15 and 17; rebuttable presumption of Art 16(3)

QUESTION 4 (fact-based application-type question) [15 marks in total] **11 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.

Given a risk that the Cayman proceeding may be found to be a non-main proceeding, the petition for recognition should seek recognition of Cayman proceeding as a main proceeding and in the alternative non-main proceeding.

COMI Analysis

Whether Gable Holdings' proceedings in Cayman is recognized as the foreign main or foreign non-main proceedings will determine the relief that is provided by the US court. If the Cayman proceedings is recognized as the foreign main proceedings in the US then there is no need to open a separate insolvency case in the US. It will allow the Cayman representative to access certain tools and protections available to a US representative.

A foreign proceeding that is filed in the debtor's center of main interest (COMI) will be recognized as a foreign main proceedings. A foreign proceeding that is not in the debtor's COMI will not be granted recognition as the foreign main proceeding. A debtor can only have one COMI and as such there can only be one foreign main proceedings. Article 16(3) provides that in the absence of proof to the contrary, the

debtor's registered office is presumed to be the debtor's main interest. This is a rebuttable presumption that must be proved by the party alleging that the COMI is not the same as the registered office. The two key factors in determining COMI under the MLCBI are:

- 1. The location where the central administration of the debtor takes place; and*
- 2. Which is readily ascertainable as such by the creditors of the debtor.*

In determining the COMI of a debtor, the court gives consideration to a number of factors including to the location of the headquarters, employees, bank account, books & records. In my opinion Gable Holdings' Cayman proceedings could be recognized as the foreign main proceedings in the US for the below reasons:

- 1. Registered office is in Cayman*
- 2. Book & records in Cayman*
- 3. Central administration of the Gable Holdings is in Cayman which is ascertainable by the creditors as the noteholder had an expectation that the restructuring would take place in Cayman*
- 4. The RSA was organized in Cayman*

*The COMI is usually determined at the commencement date of the foreign proceedings, however, in the US judgment *Morning Mist Holdings*, it was determined to be the date of the filing of the Chapt 15 petition.*

Application papers

Before the recognition application can be made in the US, the Cayman proceedings and the appointed Cayman representative must meet the Article 2 definition of a foreign proceedings and a foreign representative. In my opinion the Cayman proceedings and the foreign representative will meet the requirements of Article 2.

An application for recognition will require the below as per Article 15:

- a. A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or*
- b. A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or*
- c. In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.*
- d. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.*

Article 16 provides that if the above decision or certificate indicates that the foreign proceedings and the foreign representative meets the definitions in Article 2 then the

enacting State is entitled to presume so as well. The COMI will also be presumed as the Registered Office.

Upon making the application to the US court, the Cayman representative will have an ongoing obligation to notify the court of any changes in the status of the foreign proceedings or their appointment.

Article 17 provides that the application must be decided as early as possible. In the absence of Article 6 public policy, the application will be granted as a matter of course provided that the Article 15(2) requirements are met.

Relief

Upon the filing of the foreign main proceedings application the US court will have the power to provide interim relief provided in Article 19. The court can provide urgent relief at the request of the foreign representative to protect the assets of Gable Holdings. Given that a class litigation action is brewing in the US this will be very important. Gable Holdings must apply for a stay of execution against its assets and for the assets located in the US to be entrusted and administered by the Cayman representative. In deciding whether to grant the reliefs in Article 19, the court is required to ensure that the interests of the creditors are balanced against the relief granted to the foreign representative. Article 22 provides that the court must be satisfied that the interests of the creditors are adequately protected. The court can also terminate or modify the relief granted.

The interim relief granted by the court will be terminated when the court determines the recognition application. If the application is granted then the automatic reliefs provided in Article 20 will be granted.

*** End of Assessment ***