



27/50 = 54%

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] **5 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] **2 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.

Where the EU Regulation applied specifically to EU member states and focuses on harmonizing the insolvency laws and procedures with the EU member states, the MLCBI has a global reach and can be adopted by countries without displacing any existing provisions in the law of the enacting State.

The key benefit for the application of the application of the EU regulation is that the automatic application of the regulation allows for a predictable framework between the states. However, the disadvantage of the EU regulation is that its scope is limited to the EU member states and does not extend to non-EU countries, which in many cases would not be practical.

The key benefit of the MLCBI is that it can be adopted by many countries as it is flexible and allows countries to adopt it without displacing their already existing rules. However, the disadvantage of this is that the application can vary from one State to another and can lead to uncertainty and add to the complexity of the proceedings. **MLCBI is not a treaty, does not substantively unify the insolvency laws and does not contain any requirement of reciprocity.**

Question 2.2 [maximum 2 marks] **1 mark**

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

When providing post-recognition relief under Article 21, court's primary consideration should be to ensure that the relief provided protects the assets of the debtor or the interest of the creditors, as well as ensuring that the relief granted is consistent with the domestic insolvency proceeding.

Deals with relief that may be granted upon recognition of a foreign proceeding, whether main or non-main

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 grants foreign creditors the same rights as the creditors domiciled in the enacting state with regards to the commencement of and participation in local proceedings regarding the debtor in the enacting State. However, this will not affect the ranking of the claims in the enacting State, except that the foreign creditors will not be given a lower priority than the general unsecured claims only because they are a foreign creditor.

Question 2.4 [maximum 3 marks] **2 marks**

What is a key distinction with respect to the relief available in foreign main versus foreign non-main proceedings?

With regards to the foreign main proceedings three automatic reliefs are provided once the foreign main proceeding has been recognized. The foreign representative of the foreign main proceedings can also request for the enacting State to hand over all or a part of the debtor's assets located in the State, as long as the court is satisfied that the local creditors' interests are protected. **Key among the relief is an automatic stay of actions against the debtor's assets within the territorial jurisdiction of the enacting State, also known as moratorium.**

However, the foreign non-main proceeding will not have the automatic reliefs and will have to request for the relief from the enacting State. The foreign non-main representative may also only request relief on the assets in the foreign state provided that the court of the enacting State is satisfied that the assets are administered in the foreign state and will not interfere with the administration of the insolvency proceeding.

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

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.

As the COMI of the debtor is Germany, it is most likely that a foreign main proceeding should have been filed in Germany. This will result in the German foreign main proceeding to have jurisdiction over the debtor's assets and liabilities. Once

recognized by the U.S recognition proceedings, the decisions by the German court can also be enforceable in US.

A foreign non-main proceeding could have been filed in Bermuda as the debtor has an establishment there. As a result, this proceeding will primarily affect the assets and liabilities which have been established in Bermuda.

Finally, in the U.S, the recognition proceedings have been opened. As such, these proceedings would recognize the foreign main and non-main proceedings as well as the extent to which the relief granted in the two proceedings is enforceable in the U.S. It is likely that the US Bankruptcy Court would recognize the German proceeding as a foreign main proceeding and Bermudian proceeding as a foreign nonmain proceeding, provided all requirements of Article 15 and Article 17 are met and so long as the relief requested does not violate the public policy of the US as noted under Article 6.

Question 3.2 [maximum 3 marks] **0 marks**

Joint provisional liquidators commenced a recognition proceeding in the US and immediately were sued and served with discovery in connection with their alleged tortious interference with contract rights of the US-based vendors of the foreign debtor. Explain the likely outcome.

The recognition of the proceeding and the lawsuit against the liquidators are two separate legal matters. As such, the recognition proceeding should continue to proceed independently.

The recognition proceeding had commenced to recognize and enforce the foreign insolvency proceeding in the United States. Therefore, if the foreign proceeding has been recognized by the U.S court, it may grant relief such as a protection of the contracts or a stay in the proceeding until the lawsuit against the liquidators has been settled.

The US court will likely have no jurisdiction over the JPLs or the suite commenced by the US-based vendors in the US. Article 10 of the MLCBI expressly protects foreign representative providing that the "sole fact that an application . . . is made to a court in this State by a foreign representative does not subject the foreign representative . . . to the jurisdiction of the courts of this State for any purpose other than the application." This will likely be the result particularly if the joint provisional liquidators (JPLs) were engaged in tortious interference in their personal capacity (and no independent jurisdictional basis exists).

Question 3.3 [maximum 4 marks] **2 marks**

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

Prior to a decision regarding the recognition application, according to Article 19, the court of the enacting state is entitled to grant urgently needed interim relief upon the application for the recognition of a foreign proceeding. For the foreign representative to acquire interim relief the court must be satisfied that the interest of the creditors and other interest parties is adequately protected.

The relief granted to the foreign presentative can include a stay of execution against the debtor's assets, entrusting part or all of the debtor's assets to the foreign representative, and any of the post-recognition relief provided for in Article 21 of the Model Law.

This will allow the foreign representative to take steps to protect the intellectual property licenses as they can communicate to the lease holders regarding the restructuring proceeding, as well applying a stay in any actions against these leases.

Article 17.2(a); Article 17.2(b); Article 20

Question 3.4 [maximum 4 marks] **2 marks**

A foreign representative, who administers the assets of an insolvent debtor in an insolvency proceeding pending in Country A (where the foreign debtor has its registered office and not much more), commenced a proceeding in Country B to recognise the foreign proceeding as the foreign main proceeding in order to sell certain assets within the territorial jurisdiction of Country B, but unfortunately the insolvency court considering the petition for recognition denied the recognition of the foreign proceeding as a foreign main proceeding. Explain what may or should the foreign representative do next? What should the foreign representative have done at the outset?

The foreign representative applied for a recognition of the proceeding as a foreign main proceeding. However, for a proceeding to be recognized as a foreign main proceeding it should be the 'centre of main interest' COMI of the debtor. Country A currently has the registered office of the debtor and as such may not be the COMI of

the debtor. As such, the proceeding cannot be recognized as a foreign main proceeding.

The foreign representative may be able to apply for a foreign non-main proceeding instead. In order to apply for a foreign non-main proceeding, the debtor is required to have an 'establishment' in the enacting State. An establishment is defined in the Model Law as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services'. As the debtor does have a registered office in Country A, they do have an establishment there. As such, the foreign representative should apply for recognition as a foreign non-main proceeding, and should have done this at the outset as well.

Article 15; Article 16(3); Article 17 and Article 21(e) of the MLCBI

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.

To ensure a successful restructuring, the foreign representative will have to consider a number of matters.

Key Filing Strategy

Firstly, the foreign representative will have to consider the recognition strategy for the client. In order to do this, the debtor's 'center of main interests' COMI will have to be determined in order to determine whether a foreign main or non-main proceeding should be applied for. The debtor's COMI is Cayman Islands as the debtor is incorporated there, holds a bank account, has books and records there, as well has a Cayman Islands counsel.

As such, the foreign representative should, under Chapter 15 of the United States Bankruptcy Code, apply for recognition of a foreign main proceeding for the Cayman Islands.

With regards to the business carried out in the United States, it may be beneficial if a non-main proceeding recognition is also applied for. This is because there are a number of valuable assets of the debtor such as, employees and the headquarters located there.

Papers to be Submitted

According to Article 15 of the Model Law, the following shall accompany the application for recognition of a foreign proceeding.

- ***A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or***
- ***A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or***
- ***In the absence of evidence referred to in above, any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative.***
- ***An application should also be accompanied by a statement identifying all foreign proceedings that are known to the foreign representative with regards to the debtor.***

Relief to be Requested

On the day one of the filing, the foreign representative may request interim relief to be granted until the recognition application is decided upon. The court may, at the request of the foreign representative, provide interim relief which can include:

- ***A stay of execution against the debtor's assets;***
- ***Entrusting the administration or realization of all or part of the debtor's assets located in the enacting state to the foreign representative;***
- ***As well as some post-recognition relief which is provided for in Article 21 of the Model Law, such as suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor.***

For the client, it is especially important for the foreign representative to request for a stay as well as suspending the rights to transfer, encumber, or dispose of the debtor's assets as there has been a class action litigation that has been brewing in the US but not yet filed. As such, by requesting for the relief, the foreign representative may be able to deal with any proceedings regarding the debtor during the period until the recognition proceeding has been decided upon.

* End of Assessment *