



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) assessment** for **Module 2A** of this course and is compulsory for all candidates who selected this module as one of their compulsory modules from **Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2A. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student ID.assessment2A]**. An example would be something along the following lines: 202223-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2024** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).

ANSWER ALL THE QUESTIONS

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 6 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] 7 marks

Question 2.1 [maximum 3 marks] 0 mark

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.

[Type your answer here] [?]

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.

Article 21 of the MLCBI details the courts discretionary power as it relates to relief granted upon recognition of a foreign proceeding, both main and non-main. The court must first determine whether any potential relief is integral to the safeguarding of the debtors' assets and/or creditors interests.

Furthermore, as per Article 21(4), where a foreign representative requests relief for a foreign non-main proceeding, the court must deem the assets under the law of the enacting State as admissible in the foreign non-main proceeding. This ensures that the relief granted is consistent with the foreign main proceeding. In any case, the request to the court for consideration of relief must come from the foreign representative.

Question 2.3 [2 marks] 2 marks

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

Article 13 of the Model Law pertains to the access of foreign creditors to the commencement and participation in an insolvency proceeding in the enacting State. Upon application

to commence an insolvency proceeding in the enacting State, paragraph 1 of Article 13 highlights that foreign creditors are provided the same rights as local creditors.

Moreover, while the access does not generally alter the ranking of claims in the insolvency proceeding in the enacting State, paragraph 2 outlines an exception. The claims of foreign creditors are granted the protection of a minimum ranking, meaning the claims of foreign creditors must not be given a lower ranking than general non-preference or rather general unsecured claims. Furthermore, this is immaterial if there is a local claim which ranks lower than general non-preference claims and an equivalent foreign claim. In this circumstance, the foreign claim would be ranked lower than general non-preference claims in accordance with the laws of the enacting State.

An additional condition is detailed in the footnote of Article 13, where the MLCBI allows for the chance for a local State to have refusal rights against the recognition of foreign tax and social security claims put forth by foreign representatives with regard to local distribution of the debtors' assets.

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?

Prior to the question of relief being posed, the court in the enacting State examines whether a foreign proceeding can firstly be recognised based on the jurisdiction of the debtor's COMI as well as the jurisdiction of the debtor's establishment. The aforementioned establishment must be in the enacting State.

More specifically, Article 2(b) of the Model Law defines a foreign main proceeding as a foreign proceeding which takes place in the State where the debtor has the centre of main interests ("COMI"). On the other hand, Article 2(c) of the Model Law defines a foreign non-main proceeding as a foreign proceeding taking place in a State where the debtor has an establishment as detailed in Article 2(f).

There is a distinct difference in the relief provided in foreign main proceedings and foreign non-main proceedings as set out in Articles 19-21 of the Model Law. While the MLCBI does not specifically define the term COMI, it can be used to determine the application of automatic relief. If the COMI is within a jurisdiction where foreign-main proceedings have commenced, Article 20(1) then states that automatic relief can be enforced when requested by foreign representatives.

In contrast, if the insolvency estate does not have a COMI in the jurisdiction where the foreign proceedings have commenced but rather an establishment within said jurisdiction then the foreign non-main proceedings cannot receive automatic relief. In this case, the court can provide discretionary relief as per Article 21(3).

QUESTION 3 (essay-type questions) [15 marks in total] 4 marks

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.

In this scenario, considering the jurisdiction of the debtor's COMI is in Germany, the court would deem the proceeding filed as the foreign main proceeding based on Article 2(b) of the MLCBI. Article 2(f) expressly states that an establishment is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services." Consequently, the Bermuda proceeding would be determined as the foreign non-main proceeding. If the foreign proceedings occur concurrently and as referenced above with the same debtor, Article 30(a) and (b) gives precedent to the foreign main proceeding with regard to any relief and recognition.

Pursuant to Article 15 of the Model Law, a foreign representative has the right to "apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed." The US recognition proceedings in this instance is required to provide an application that contains evidence that explicitly shows the need for recognition. Documentation related to the approval of all foreign proceedings, including those in Germany and Bermuda must be included in the application along with any further details of all foreign proceedings in respect of the debtor.

If the foreign representative is able to provide evidence that a foreign main proceeding is taking place in the State where the debtor's COMI is (Germany) and that a foreign non-main proceeding is taking place where the debtor has establishment (Bermuda). The US recognition judgment is likely to be successful. Notwithstanding, it is also crucial that the US court clarify, as per Article 3, that there are no international obligations related to specific treaties or regulations that would conflict with granting of recognition.

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.

[Type your answer here]

Question 3.3 [maximum 4 marks] 0 mark

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?

[Type your answer here]

Question 3.4 [maximum 4 marks] 0 mark

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

[Type your answer here]

QUESTION 4 (fact-based application-type question) [15 marks in total] 5 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.

It is clear from the details laid out in the file that proceedings were commenced in the Cayman Islands and based off of the company's incorporation, registration as that is the jurisdiction where the clients COMI resides making it the enacting State. These proceedings are considered the main insolvency proceeding because pursuant to Article 16(3) of the Model Law, there is rebuttable presumption that the jurisdiction of the registered office of Globe Holdings is the place of its COMI.

The publishing of Globe Holdings suspension from the NASDAQ Stock Market and would have negatively impacted its public reputation and when likely viewed by creditors would garner concern. The Scheme of Arrangement pursued by the main proceedings representative and Cedar and Wood within the Grand Court of the Cayman Islands was an apt recommendation to pursue. The Scheme allows the creditors to be involved and to have a say in how their interests should be addressed. While a scheme could be viewed as an additional expense to the insolvency proceedings, based off the understanding that there would be only one single class of creditors who would vote on the Scheme that would eliminate any class issues could be more cost efficient than any alternative.

Under the assumption that the Chapter 15 recognition proceedings in the United States Bankruptcy Court of one of the New York Districts were in fact commenced and thereafter a recognition order was successfully granted it would be both crucial to the aforementioned extension to the maturity of the Notes and could potentially impede the class action litigation. If this recognition was in fact not pursued in its totality, I would highly recommend that this is readdressed. It would be effective to inform the client that this US based foreign main or non-main proceeding, pursuant to Article 21(1) of the Model Law, would enable the court in the enacting State, the Cayman Islands, discretionary power to grant relief. It's important to note that majority of Globe Holdings subsidiaries are incorporated, employed and headquartered in the US. In accordance with Article 2(f), the establishment of Globe Holdings would be in US and this proceeding would be considered a foreign non-main proceeding which the court in the enacting State would not deny the recognition application.

Pursuant to Article 29(b) of the MLCBI, the court in the Cayman Islands would need to review any relief granted under Article 19 and 21 post-recognition in the US proceedings as the foreign non-main proceedings. While the foreign non-main proceeding cannot be granted an automatic stay, an option to present would be in relation to Article 21(2). If the foreign representatives provide adequate evidence to the court that a stay is crucial to the "just treatment of all holders claims" and "the protection of local claimants' protection" as it pertains to the class action litigation then it is likely that relief will be granted. Noting to the client that this would prevent this particular legal action and any in the near future is key.

As this question is a fact-based application-type question, it requires the MLCBI provisions to be applied to the facts of the case and substantiated with references and a discussion. The facts of the case should have been evaluated and assessed to determine the COMI location. Furthermore, the answer should contain as a minimum:

1. Definitions (COMI, establishment, foreign main/non-main proceedings etc.) with respective references to (if any) MLCBI provisions (*noted reference to Art.2 MLCBI for FNMP*)
2. A substantive discussion on the rebuttable presumption of the COMI (*noted reference to Article 16(3) MLCBI*) and alternative courses of action
3. The necessary papers to be submitted to the US Court per Article 15 MLCBI, public policy matters, etc..

*** End of Assessment ***

Marks awarded: 22 out of 50