



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] 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] 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.

MLCBI and European Union (EU) Regulation on insolvency proceedings are both legal frameworks designed to address cross-border insolvency matters. The distinction between the two is that MLCBI is a model law developed by the UNCITRAL as recommendation and for adoption by individual countries globally instead of specific countries (i.e. soft law) mainly to promote a uniform approach for co-operation between states, including expediting and simplifying the recognition process of foreign proceedings and a framework for recognition in the enacting States; whereas EU Regulation is designed specifically to the European Union member states and even became directly part of the domestic law of the EU Member States. The effect of EU Regulation is not to harmonise the different insolvency regimes within the EU but provides rules for deciding which of the individual jurisdictions' insolvency regime applies in a particular case hence allowing for a single concerted approach to insolvency.

	MLCBI	EU Regulation
Advantage	MLCBI offers flexibility and global applicability for wide range of legal systems and facilitate cooperation in cross border insolvency on an international scale allowing countries to adopt.	In comparison, EU Regulation has streamlined and harmonized procedures to provide for insolvency proceedings within the EU. Due to the recognition of the insolvency proceedings in any EU Member State within the EU, it simplifies and expedite the process of dealing with cross-border insolvency matters.
Disadvantage	The specifics of how each jurisdiction adopts and applies the	Disadvantage being the scope is limited to EU members tates and

	model law may vary thus it lacks uniformity and may create challenges and uncertainties in cross-border insolvency proceedings.	does not have international applicability.
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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 should consider the impact of the relief granted to prevent unfairly prejudice the rights and interests of creditors, foreign representative and other parties involved, including the debtor. In other words, the court in the enacting state must consider the balance between the relief to be granted to foreign representative and the interest of those affected by the relief according as stipulated in Article 22. This is to ensure protection of the stakeholders.

To enable the above, the court may subject the relief to appropriate conditions. The court may also hear the request of the foreign representative or affected person and modify or terminate the relief.

Question 2.3 [2 marks] 2 marks

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

Allows for foreign creditors to have the same rights as the local creditors regarding the commencement of, and participation in, local proceeding under the insolvency laws of the enacting state.

In other words, foreign creditors and the local creditors have equal treatment. The same is the ranking of claims in the enacting state apply to both foreign creditors and local creditors (i.e. no lower priority given to foreign creditors due to the foreign nature).

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 foreign main proceeding is a proceeding taking place in the state where the debtor has COMI. Upon recognition of a foreign main proceeding, certain relief becomes automatic, such as a stay of execution against the debtor's assets.

Whereas a foreign non-main proceeding is a proceeding that takes place in a state where the debtor only has an establishment. The relief available in the case of a foreign non-main proceeding is not automatic but is at the discretion of the court.

If the foreign main proceeding was recognised first in the enacting state, any relief granted thereafter from Article 19 and Article 21 to a representative of foreign non-main proceeding must be consistent with the foreign main proceeding.

In terms of the hierarchy of proceedings, foreign main proceeding is given primacy as opposed to foreign non-main proceeding.

QUESTION 3 (essay-type questions) [15 marks in total] **8 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.

According to MLCBI, the foreign proceedings must have been filed in the states where the debtor has COMI and other states that debtor has an establishment.

The foreign main proceeding must have been filed in the state where debtor has COMI, i.e. Germany.

The foreign non-main proceeding must have been filed in Bermuda where debtor has an establishment, i.e. where debtor carries out a non-transitory economic activity.

The recognition proceedings were opened in the United States and to determine whether the foreign proceedings should be recognized and what type of relief, if any, should be granted. The result would depend on the specific circumstances of the case, including the nature of the debtor's assets, the claims of the creditors, and the laws of the involved jurisdictions.

Generally, upon recognition of the foreign main and non-main proceedings, the US court may grant a variety of reliefs such as a stay of execution against the debtor's assets, entrusting the administration or realization of the debtor's assets located in the US to the foreign representative, or suspending the right to transfer or encumber the debtor's assets. The exact reliefs would be at the discretion of the US court.

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

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 joint provisional liquidators have commenced a recognition proceeding in the US (Chapter 15 of the US Bankruptcy Code). They were sued and served with discovery in relation to their alleged tortious interference with contract rights of the US-based vendors of the foreign debtor.

It's likely that the US court will first consider whether the joint provisional liquidators satisfy the required characteristics of foreign representative under Article 17 of MLCBI and whether the insolvency proceedings can be recognised as foreign proceeding. The next consideration then be whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding".

In the event that the joint provisional liquidators are recognized as foreign representatives, they may be considered by the US court to grant reliefs the US court think appropriate. However in the event that the joint provisional liquidators are found to have unlawfully interfered with the vendors' contract rights, they may be held liable for damages.

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?

The foreign representative may seek interim relief between the commencement of the recognition proceeding and the recognition hearing from the court (Article 19 MLCBI) such as staying execution against the debtor's assets, suspending the right to transfer or encumber the debtor's assets.

Ipso facto clauses are not enforceable under the US Bankruptcy Code. The foreign representative may take steps to notify the parties affected by the US-governed leases and intellectual property licenses of this fact to prevent premature termination.

The foreign representative should also consider maintaining communication with creditors and contract parties to address any concerns and ensure cooperation.

Question 3.4 [maximum 4 marks] 1 mark

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

The foreign representative may consider to apply an appeal to the decision. However the foreign representative should first assessed which state is the debtor's COMI is in, i.e. where the debtor carries out transitory economic activity. If the debtor's COMI is not in Country A, which is likely the case due to it consist of establishment/registered office and not much more, it would be challenging to get the foreign proceeding recognized as a foreign main proceeding.

Alternatively, the foreign representative may apply for recognition as a foreign non-main proceeding. This would at least provide some level of recognition and cooperation. However the relief available to be granted would be more limited and discretionary.

Art.16 MLCBI is the main reference for “rebuttable COMI presumption” to discuss weak COMI and substantiate representatives actions. References to Art.17, 21, 6 are also required for full marks.

QUESTION 4 (fact-based application-type question) [15 marks in total] 2 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.

Main factor to determine a foreign proceeding to be main or non-main proceeding is where the COMI of Globe Holdings is in. However MLCBI does not have a definition of COMI.

Since Globe Holdings is incorporated and registered in the Cayman Islands with books and records safekept there, it could be argued that its COMI is in the Cayman Islands. This is supported by the fact that the company has a long-standing relationship with Cayman Islands counsel, holds its board meetings virtually that were organized by its local Cayman counsel, and has a bank account in the Cayman Islands. Therefore, Globe Holdings may apply for recognition of a main proceeding.

However, considering that Globe Holdings’ main business operations are carried out through its US-incorporated subsidiaries with employees and the headquarters located in the US, it is more convincing that the company not only has an establishment in the US but with its transitory economic activity. Therefore, applying for recognition of a nonmain proceeding in the US would also be a viable strategy.

The documents required for the Chapter 15 recognition proceeding in the US would include the petition for recognition, supporting document of the foreign proceeding (e.g. Convening Order and Sanction Order).

Globe Holdings may request for a stay of execution against the debtor's assets. This is to prevent any creditors from taking actions to collect their debts. This also provide Globe Holdings a breathing space to restructure its debts.

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 answer should contain as a minimum: definitions (COMI, establishment, foreign main/non-main proceedings etc.) with respective references to (if any) MLCBI provisions; A discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI and associated courses of action; The necessary papers to be submitted to the US Court per Article 15 MLCBI; Conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI

*** End of Assessment ***

Marks awarded: 27 out of 50