INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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).

<u>ANSWER ALL THE QUESTIONS</u>

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 **<u>progressive harmonization of the law of international trade</u>**?

(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 **<u>proximate cause</u>** 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 **<u>two</u>** of the below hypotheticals demonstrate a more likely **<u>precursor to a "cross-border insolvency"</u>**?

(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 **<u>effect</u>** of such order's terms in jurisdiction B if jurisdictions A and B do **<u>not</u>** 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 <u>reasons for the development</u> 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] 9 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.

The key distinction between the application of the MLCBI and the EU Regulation on insolvency proceedings is that the EU Regulation directly becomes part of the domestic law of each EU Member State, so there is uniformity in the insolvency regulation.

One key benefit of the MLCBI, is that it can be adopted by any country in the world, so it has a greater reach. One disadvantage is that the MLCBI provisions can be modified by each country in the process of incorporation to the domestic law, which causes that the provisions may be different from country to country, even if the MLCBI is followed.

One key benefit of EU regulation is that, as it is a supranational regulation at the European level, there is uniformity in the insolvency regulation in all the member countries. One disadvantage is that the reach of the regulation is very limited, and other countries outside the EU are not eligible to access it, causing obstacles to cross-border insolvency proceedings with countries outside the EU.

Sidenote: Any country outside of EU can – with its sovereign decision – make the regulation part of its domestic law.

Question 2.2 [maximum 2 marks] 2 marks

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

The court should primarily consider if the requested relief satisfied the interest of the debtor's creditors and other interested parties, and if they will be adequately protected with the relief.

Also, if the relief relates to assets, the court should consider that the assets should be administered in the foreign non-main proceeding.

Question 2.3 [2 marks] 2 marks

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

Article 13 of the MLCBI states the "anti-discrimination principle", which objective is to protect the access rights for foreign creditors.

The protections granted to creditors under Article 13 of the MLCBI are:

a) Foreign creditors have the same rights regarding the commencement of, and participation in, a foreign proceeding
b) Does not affect the ranking of claims in the proceeding, except that the claims of foreign creditors shall not be ranked lower than the class of general non-preference claims.

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?

The key distinction in foreign main versus foreign non-main proceedings regarding the relief, is that the foreign main proceeding has automatic relief once is recognized, while the foreign non-main proceeding does not have it but only discretionary post-recognition relief.

This automatic relief granted to the recognized foreign main proceeding produces 3 automatic effects: a) a stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, b) a stay of execution against the debtor's assets, and c) a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

Information on discretionary relief is lacking incl. references to MLCBI provisions.

QUESTION 3 (essay-type questions) [15 marks in total] 6 marks

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.

The foreign main proceeding must have been filed in Germany, which is the jurisdiction where the debtor has its COMI, and gets the automatic mandatory relief. The likely result is … [?]

The foreign non-main proceeding must have been filed in Bermuda, because in that jurisdiction the debtor only has an establishment, without automatic relief but only discretionary post-recognition relief granted by the court according to Article 21 of MLCBI.

The recognition proceedings must have been filed in US, and the likely result is that the foreign main and foreign non-main proceedings will be recognized.

Missing references and definitions, eg. Art. 2, 15, 17, 6 etc. MLCBI

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 provisional liquidators, after having started the recognition proceeding in the US, must request the interim collective relief prior to recognition of foreign proceeding according to Article 19 of MLCBI to have a provisional urgent relief from the time of filing the recognition application until the application is decided upon.

With the interim collective relief granted, the provisional liquidators protect the debtor of execution against the debtor's assets that may result from the lawsuit filed.

The likely outcome is that the lawsuit will be rejected because the filing of recognition proceeding in the US does not imply tortious interference with contract rights of the US-based vendors. The debtor and the liquidators have the right to initiate the recognition proceeding to protect the company and to ensure the equal treatment of creditors around the world.

The answer should relate to 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 must request the interim collective relief prior to recognition of foreign proceeding according to Article 19 of MLCBI to have a provisional urgent relief from the time of filing the recognition application until the application is decided upon, to prevent from exercising the ipso facto clause. Must ask, according to Article 19 paragraph 1 (c), that the relief includes the relief mentioned in paragraph 1 (g) of Article 21, to make available the relief that would have been available under UK insolvency law.

The UK policy regarding ipso facto clauses now provides that certain ipso facto clauses in contracts for the supply of goods or services will cease to have effect once the debtor has become subject to certain UK insolvency proceedings. It is relevant to take into consideration for this matter the Pan Ocean case and it relevance.

If the requested relief is granted, since intellectual property licenses are a service contract, they will have no effect and will thus prevent the exercise of the ipso facto clause.

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?

At the outset, the foreign representative should have started a foreign main proceeding in Country B, because is the location in which the debtor's principal assets or operations are found.

Taking into consideration the ruling existing, the next action that the foreign representative can take is to request the commencement of a foreign non-main proceeding in Country B, based on the fact that in that jurisdiction the debtor has assets. Once initiated, apply for recognition and sell the assets.

Be careful not to confuse commencement of insolvency proceedings with recognition proceedings. Moreover, response/discussion should relate to the rebuttable COMI (Art. 16 MLCBI), as well as procedural provisions eg. Art.15, 6.. as well as Art.17 and 21 MLCBI

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.

In order to take effect in the US the Scheme reached in Cayman Islands and the Sanction Order, to bind US creditors, a recognition of foreign main proceeding must be initiated. Due to the fact that the only existing proceeding is the one on the Cayman Islands, and no foreign non-main proceeding was initiated, only the application for recognition of foreign main proceeding (the one on the Cayman Islands is required.

To enter the filing for recognition of foreign main proceeding, according to Article 15 of MLCBI, the application shall be accompanied by:

(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 the appointment of the foreign representative; or

(c) in the absence of evidence referred to in sub-paragraphs a) and b), any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative.

For this specific case, a certificate from the foreign court (court of Cayman Islands) affirming the existence of the foreign proceeding and the appointment of the foreign representative should be accompanied. Also, a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must be accompanied with the recognition application, in this case, only the filed on the Cayman Islands.

In the absence of public policy grounds in the US for denying the request for recognition, the request shall be granted if the requirements of Article 15 (2) of MLCBI are met.

Regarding the relief, on day one of the filing for recognition, the foreign representative must request for interim collective relief according to Article 19 of MLCBI, to obtain a provisional urgent relief from the time of filing the recognition application until the application is decided upon. The interim collective relief must include a stay of execution against the debtor’s assets to protect them.

Once the foreign main proceeding is recognized, the debtor will automatically benefit with the automatic relief according to Article 20 of MLCBI.

Since the automatic relief only stays the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations, or liabilities, the class action litigation being prepared in the US cannot be prevented or suspended.

This is a **fact-based application-type question,** meaning that the MLCBI provisions should have been applied to the facts of the case. Missing definitions Art.2 MLCBI, discussion regarding (rebuttable) COMI presumption (Art.16 MLCBI), alternative solutions and conclusions. Incomplete application of law to the situation.

*** End of Assessment ***

Marks awarded 27 out of 50