



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] 8 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.

Ans: MLCBI is a legislative text that is recommended to states for incorporation into their national law. Unlike MLCBI, which is only a recommendation, not a convention, and can therefore be considered as an example of “soft law”, the EU Regulations on the other hand is an example of “substantive law” which following adoption, directly becomes part of domestic law of each EU Member State. Further, unlike MLCBI, which can be adopted by any country, EU Regulations are limited to EU member states.

Key Benefit:

MLCBI – Flexibility and adaptability and enhanced corporation.

EU Regulation – Automatic recognition and uniformity amongst all EU member states.

Disadvantage:

MLCBI - Lack of uniformity and enforcement as MLCBI lacks binding force of law in any particular jurisdiction.

EU Regulations – Limited scope outside EU.

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.

Ans: In addition to mandatory stay and suspension under Article 20 the MLCBI authorises the court, following recognition of a foreign proceeding, to grant relief for the benefit of that proceedings. This post-recognition relief under Article 21 is discretionary. While Article 21 (1) of the MLCBI is drafted broadly, the appropriate relief the court of the enacting State can grant is not unlimited. Further, Under Article 22 of MLCBI it is stated that

while granting discretionary reliefs under Article 21 the court should ensure a balance between relief that may be granted to a foreign representative and the interest of persons that may be affected by such relief.

This balance is essential to achieve the objectives of cross-border insolvency legislation. The reference to the interest of creditors, debtors and other interested parties in Article 22, paragraph 1, provides useful elements to guide the court in exercising its powers under Article 21.

Question 2.3 [2 marks] 2 marks

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

Ans: Article 13 of the MLCBI protects the rights of the foreign creditors to the extent providing them the same rights as creditors domiciled in the enacting state regarding the commencement of, and participation in, local proceedings regarding the debtor under the insolvency law of the enacting state. Article 13 further clarifies that that the ranking of the claims of foreign creditors in the enacting State shall not be given lower priority than that of a general unsecured claim solely because the holder of such claim is a foreign creditor.

Question 2.4 [maximum 3 marks] 3 marks

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

Ans: Under Article 20 of MLCBI, upon recognition of a foreign proceedings that is a foreign main proceeding following reliefs are available:

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

The relief under Article 20 is an automatic relief which flows from recognition of foreign main proceedings and is not available in the case of foreign non-main proceedings. Thus, under MLCBI where the discretionary reliefs under Article 19 and 21 may be issued in favour of main and non-main proceedings, the automatic effect of relief under Article 20 only applies to the main proceedings.

QUESTION 3 (essay-type questions) [15 marks in total] 9 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.

Ans: In the present case since the COMI lied in Germany, the foreign main proceedings should have been filed in Germany. Further, since certain assets of the debtor in form of establishments are in Bermuda, the non-main proceedings should have been filed in Bermuda. Further, if required the recognition proceedings should be filed in United

States in case there is some interest of the creditors there or there are some assets of the debtor there as well.

This would have resulted in greater cooperation and coordination between different jurisdictions involved. The proceedings in Germany will take precedence over all other proceedings and will have the main jurisdiction over all the assets of the debtor. The other proceedings i.e., proceedings in Bermuda and US (being non-main and recognition) should be consistent with the foreign main proceedings. Thus, requiring co-operation and coordination from Bermuda and US (Ref: Article 30 (c) of MLCBI). The cooperation between the jurisdiction will achieve fair and efficient resolution of debtor's insolvency while respecting the interest of each creditors in each jurisdiction.

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

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.

Ans: In the present case the lawsuit alleges tortious interference with contract rights by the joint provisional liquidators, the US court would need to consider whether the joint provisional liquidators' actions were within the scope of their authority under the foreign insolvency law. If the joint provisional liquidators were acting in accordance with their duties under the foreign law, the US court may be inclined to dismiss the claim or stay the proceedings in deference to the foreign insolvency proceeding.

After such relief is granted, the joint provisional liquidators, as foreign representatives, will be immune from certain forms of discovery or litigation in the US courts.

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?

Ans: [Under Chapter IV Cooperation with Foreign Courts and Foreign Representatives, Article 25,26,27]

The foreign Representative shall take the following steps:

1. **Request for Cooperation from US:** The foreign representative should request for Cooperation with US courts for any direct or indirect assistance that may be required. [as per article 27 of MLCBI].

2. **Communication with US Counterparties:** The foreign representative may consider communication with US-based lessors and licensors to inform them about the ongoing restructuring process and recognition petition. This will help to build trust and cooperation amongst the stakeholders.
3. **Seeking Protective Orders or Injunctions:** In the light of ipso facto clauses that may trigger termination under the US leases and licences, basis the ongoing restructuring process the foreign representative may seek protective orders or injunction from the US court under Article 19 and 21 (g). This can help prevent any attempts to enforce the insolvency-triggered clauses. [as per article 19 or 21 of MLCBI].

Question 3.4 [maximum 4 marks] 3 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?

Ans: In the light of above facts, the foreign representative has two options:

- a) Appeal: A decision to not to recognise a foreign proceeding would normally be subject to review or rescission, as any other court decision. However, the Appeal of decision will be limited to the question whether requirements of Articles 15 and 16 were observed in deciding to recognise the foreign proceedings.
- b) Reevaluate evaluation of foreign main proceedings and apply in Country B – as recognition of non-main proceedings. In the facts of the present case this is a better suited option as the debtor except for having a registered office in Country A does not have any other consideration to establish COMI.

At the outset, the foreign representative should have evaluated the COMI for the debtor basis other considerations as well apart from merely the registered office. Accordingly, the foreign representative should have apart from the registered office placed on record considerations such as location of debtor's books and records, location where financing was organised or authorized, location where cash management system is run, location of debtor's primary bank etc to determine COMI in Country A. However, if none of these considerations existed, the foreign representative should have applied for recognition as non-main proceedings.

References to Art.17, 20, 21, 6 are also required

QUESTION 4 (fact-based application-type question) [15 marks in total] 6 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.

Ans: Based on the facts provided, the key filing strategy for Globe Holdings Inc. would involve applying for recognition of a main proceeding in the Cayman Islands and potentially also a non-main proceeding in the United States, specifically under Chapter 15 of the U.S. Bankruptcy Code:

Recognition of Main Proceeding in the Cayman Islands: Globe Holdings Inc. should apply for recognition of a main proceeding in the Cayman Islands, as it is incorporated there, and its centre of main interests (COMI) appears to be in the Cayman Islands based on several factors:

- a) The company is incorporated and registered in the Cayman Islands.
- b) It re-domiciled from Canada to the Cayman Islands, indicating a significant connection to the Cayman Islands.
- c) It regularly conducts board meetings virtually, indicating that the decision-making process is managed from the Cayman Islands.
- d) It maintains its books and records in the Cayman Islands.
- e) It has a bank account in the Cayman Islands.
- f) Its public filings with the SEC disclose that it is a Cayman Islands company and explain the related tax consequences.

Recognition of Non-main Proceeding in the United States: Since Globe Holdings Inc. has assets and operations in the United States, it should also consider filing for recognition of a nonmain proceeding under Chapter 15 of the U.S. Bankruptcy Code. This would allow it to seek additional relief in the United States to protect its assets and interests there.

Papers to be Submitted:

For the Cayman Islands main proceeding, Globe Holdings Inc. would need to submit a petition for recognition, along with supporting documents to establish its COMI in the Cayman Islands. Which will include certificate of incorporation, documents evincing that the company is maintaining its books and records in Cayman Island, Bank

Statement or confirmation of Bank confirming that the Bank Account of the Company is maintained in Cayman Island.

For the U.S. non-main proceeding, Globe Holdings Inc. would need to file a petition for recognition under Chapter 15 of the U.S. Bankruptcy Code, along with supporting documents showing details of assets located in US.

Relief to be Requested:

In the Cayman Islands, Globe Holdings Inc. should request necessary approval of the scheme of arrangement proposed in the Restructuring Support Agreement (RSA), which involves extending the maturity of the Notes and obtaining the ability to pay the quarterly interest “in kind”.

In the United States, Globe Holdings Inc. should request recognition of the Cayman Islands scheme of arrangement and any other relief in terms of co-operation and co-ordination necessary to protect its assets and interests in the United States.

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 eg (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, the procedures per Article 15 MLCBI, conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI.

*** End of Assessment ***

Marks awarded: 33 out of 50