



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] 9 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] 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.

A key distinction of the application of the MLCBI in contrast with the European Union (EU) Regulation on Insolvency Proceedings (EURIP) is that the MLCBI is a soft law approach to addressing the challenges of cross-border insolvency that creates allowance for enacting states to incorporate it into their respective domestic law either in part or in whole. Its applicability has no territorial restrictions. Conversely, the EURIP can be categorised as hard law, which is automatically incorporated into the domestic laws of EU member states upon its adoption. The application of the EURIP is restricted to the territorial borders of the EU.

The MLCBI's allowance for partial or full adoption and its focus on providing a procedural framework for promoting transparency and predictability in cross-border insolvency makes it less likely to disrupt the substantive insolvency laws of enacting states, and consequently more appealing for adoption. In contrast, the negotiation and adoption of hard law instruments like the EURIP is typically more time-consuming.

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.

In granting post-recognition relief under Article 21 of the MLCBI, the court should consider and ensure that the interests of the creditors and other interested persons, (including the debtor), are adequately protected.

Another key consideration is the nature of the foreign proceeding, i.e., whether it is a main or non-main proceedings. While the court may grant variegated reliefs in both a main and non-main proceedings, the grant of reliefs for non-main foreign proceedings will require

that the satisfaction of the court that the relief sought relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding. See By paragraph 3 of Article 21.

To determine whether the foreign proceedings is a main or non-main proceedings the court should consider whether the foreign proceedings was commenced in the debtor's COMI in which case it is a main proceedings, or whether it was commenced in a jurisdiction where the debtor has an establishment (within the meaning of the MLCBI) in which case the proceedings would be non-main.

Question 2.3 [2 marks] 2 marks

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

In furtherance of one of the tenets of the MLCBI, Article 13 makes insolvency proceedings in an enacting state accessible to foreign creditors. It affords foreign creditors protection from discriminatory exclusion from either participating and instituting insolvency proceedings against a debtor in an MLCBI enacting state. As it relates to commencing and participating in insolvency proceedings in the enacting states, foreign creditors are placed on the same pedestal as local creditors. However, the protection afforded foreign creditors does not impact the order of priority of claims obtainable in the enacting state, howbeit that the claims of foreign creditors cannot be ranked beneath those of the general unsecured creditors by reason that the claims are held by foreign creditors.

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?

In a foreign main proceedings, the following automatic mandatory reliefs are applicable upon the filing of an application for recognition:

1. Stay on execution against the debtor's assets;
2. Stay on the commencement or continuation of individual claims against the debtor's assets, rights and liabilities;
3. Abeyance of the right to encumber, transfer or alienate the debtor's assets.

The automatic mandatory relief is not available in a foreign non-main proceedings.

Also, additional considerations are prescribed for the grant of an appropriate post-recognition relief in a non-main proceedings. Please see paragraph 3 of Article 21.

Lacks explanation that art. 21 prescribes **discretionary relief by the court upon application by the foreign representative.**

QUESTION 3 (essay-type questions) [15 marks in total] 2 marks.

Question 3.1 [maximum 4 marks] 1 mark

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 proceedings must have been filed in Germany considering that the debtor's COMI is located there. The likely result of this is that the proceedings commenced in Germany would be classified as a foreign main proceedings for which Chapter 15 of the US Bankruptcy Code, would be applicable. As a foreign main-proceedings, the debtor would be accorded the benefit of the automatic mandatory relief upon filing the application for recognition.

What about Bermuda?

Furthermore, answer requires references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 17, 6 to substantiate answer and likely outcome.

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.

If the recognition proceedings is upheld by the US court as foreign main proceedings, it would effect as automatic stay on the claims for tortious interference

Requires discussion based on Art.10 MLCBI

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?

The preserve the assets pending the hearing and determination of the recognition petition, the foreign insolvency representative is advised to seek appropriate interim reliefs from the US court,

Requires discussion based upon Art.19 MLCBI and its definitions, as well as arguments and references to the provisions of Art 20 and/or 21 MLCBI as applicable.

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?

Considering that the foreign debtor only has its registered office in Country A without much more, the foreign representative should have sought the recognition of the foreign proceedings as a foreign non-main proceedings as opposed to a foreign main proceedings.

As a next step, the foreign representative can commence domestic insolvency proceedings in Country B.

Art.16 MLCBI is the main reference for “rebuttable COMI presumption” to explain why the COMI is weak and to support argument for FNMP application as alternative. References to Art.17, 21, 6 are also required for full marks.

QUESTION 4 (fact-based application-type question) [15 marks in total] 8 marks

Assume you received a file for a new client of the firm. The file contains the facts described below. Based on these facts, analyse key filing strategy to ensure a successful restructuring - specifically, whether to apply for recognition of main or nonmain proceeding or both (in light of COMI / establishment analysis), what papers need to be submitted, and what relief should be requested on day one of the filing.

The client is a Cayman Islands incorporated and registered entity. It is a financial service holding company for a number of direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States. Globe Holdings was initially formed as a Canadian company in 2009, under the laws of Ontario, Canada. A year later, following certain reverse merger transactions, it filed a Certificate of Registration by Way of Continuation in the Cayman Islands to re-domesticate as a Cayman Islands company and changed its name to Globe Financial Holdings Inc. When it re-incorporated in the Cayman Islands in 2010 (from Canada), Globe Holdings provided various notices of its re-incorporation, including in the public filings with the Securities and Exchange Commission (SEC). Around that time, Globe Holdings retained its Cayman Islands counsel Cedar and Woods, which has regularly represented Globe Holdings for over a decade. Globe Holdings has a bank account (opened just a few days ago) in the Cayman Islands from which it pays certain of its operating expenses. Globe Holdings often holds its board meetings virtually, and not physically in the Cayman Islands, and, having obtained support for a bond restructuring, all its regular and special board meetings have been organized by its local Cayman counsel virtually. The client also maintains its books and records in the Cayman Islands. Its public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes disclosed that Globe Holdings is a Cayman Islands company and explained the related indemnification and tax consequences resulting from Globe Holdings’ place of reformation.

Globe Holdings has no business operations of its own. The business is carried out through its non-insurance company non-debtor subsidiaries that are all incorporated under the US laws and operating in the US. All employees are in the US. The headquarters are also in the US.

In April 2017, Globe Holdings offered and issued USD 25,000,000 in aggregate nominal principal amount of 6.625% senior unsecured notes due in 2023 (referenced above as the Notes) governed by New York law.

In 2019, Globe Holdings recorded on its consolidated balance sheet a significant increase in liabilities. As a result, Globe Holdings worked with external professional advisors to

undertake a formal strategic evaluation of its subsidiaries' businesses. In September 2020, Globe Holdings announced that it was informed its shares would be suspended from the NASDAQ Stock Market due to delinquencies in filing its 10-K. Thereafter, on November 6, 2020, its shares were delisted from the NASDAQ stock market.

An independent third party is actively marketing the sale of the corporate headquarters located in New York including the land, building, building improvements and contents including furniture and fixtures.

Despite these efforts to ease the financial stress, the culmination of incremental challenges consequently resulted in Globe Holdings being both cash flow and balance sheet insolvent.

Globe Holdings retained Cedar and Woods, its long-standing Cayman Islands counsel, to advise on restructuring alternatives. Upon consultations with Cayman counsel and its other professionals, Globe Holdings ultimately determined that the most value accretive path for the Noteholders was to commence a scheme under Cayman Islands law, followed by a chapter 15 recognition proceeding in the United States, most notably to extend the maturity of the Notes and obtain the flexibility to pay the quarterly interest "in kind".

Globe Holdings expeditiously secured the support of the majority of the Noteholders of its decision to delay interest payments and restructure the Notes through a formal proceeding. Thereafter, on August 31, 2021, about 57% of the Noteholders acceded to the Restructuring Support Agreement (RSA) governed by the New York law. The RSA memorialized the agreed-upon terms of the Note Restructuring. When Globe Holdings approached its largest Noteholders regarding the contemplated restructuring, their expectations were that any such restructuring would take place in the Cayman Islands, which is reflected in the RSA.

On July 4, 2023, the client, in accordance with the terms of the RSA, applied to the Cayman Court for permission to convene a single scheme meeting on the basis that the Noteholders, as the only Scheme Creditors, should constitute a single class of creditors for the purpose of voting on the Scheme.

On July 26, 2023 the Cayman Court entered a convening order (the Convening Order) on the papers, among other things, authorizing the client to convene a single Scheme Meeting for the purpose of considering and, through a majority vote, approving, with or without modification, the Scheme. The Scheme Meeting was held in the Cayman Islands at the offices of Cedar and Woods. Given the Covid-19 pandemic, Scheme Creditors were also afforded the convenience of observing the Scheme Meeting via Zoom and in person via a satellite location in New York. Following the Scheme Meeting, the chairman of the Scheme Meeting (presiding over the meeting in person) reported to the Cayman Court that the Scheme was overwhelmingly supported by the Noteholders, with 91.83% in number and 99.34% in value voting in favor of the Scheme. The Sanction Hearing was held, and an order sanctioning the Scheme (the Sanction Order), which was filed with the Cayman Islands Registrar of Companies the same day.

During all of this time, a class action litigation was in the US was brewing but has been filed yet.

To determine the appropriate application for recognition to be made, it is needful to critically analyse whether the Cayman Island (where the Scheme was sanctioned) will qualify as Globe Holdings' COMI or as the jurisdiction where it has its "establishment".

The facts of the case suggest that the US court is likely to lean towards the view that Cayman Island is Globe Holdings' COMI, and as a corollary recognize the Cayman Island proceeding as a foreign main proceeding. My position is anchored on the interpretation given to the term "COMI" under the EIR (which is appurtenant to the MLCBI for the purpose) and the rebuttable presumption under Article 16(3) of the MLCBI, that the registered office of a debtor (Cayman Island in this case) is its COMI. Specific facts which appear to conform with the EIR interpretation of the term "COMI" include the following:

- A. the provision of various notices of its re-incorporation in Cayman Islands by Globe Holdings, including public filings with the Securities and Exchange Commission (SEC);
- B. retention of Cayman Islands counsel Cedar and Woods for over a decade;
- C. maintenance of Globe Holdings' books and records in the Cayman Islands; and
- D. Indications in Globe Holdings' public filings with the and the prospectus in connection with the issuance of the Notes that Globe Holdings is a Cayman Islands company.

By Article 2(f) of the MLCBI, an establishment is "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services". It is unlikely that Cayman Islands would be categorized as an establishment, given that Globe Holdings does not carry on any economic activity there, and has no employees there.

While the pendulum tilts towards the recognition of Cayman Islands as Globe Holdings' COMI, It is advisable for that a filing be made for the recognition of the Cayman Islands Scheme as both a foreign main or non-main proceedings. The advantage of applying for recognition as both a main and a non-main proceedings is that in the event that the US court would consider both applications, and may likely grant either of them. This would save time that would be otherwise lost were the court to consider and refuse a single application, in which case a second application may need to be made.

Papers to be submitted

The following documents should be submitted alongside the application for recognition:

- a. A certified copy of the convening order entered by the Cayman Court on 26 July 2023 and any duly appointed representative; and/or
- b. A certified copy of the Sanction Order and any duly appointed foreign representative; or
- c. In the absence of items (a) and (b) above, any other acceptable evidence of the existence of the of the Cayman Islands proceeding.

Additionally, a statement identifying any other foreign proceedings in respect of the debtor should be submitted.

Reliefs to be requested

The following interim reliefs may be sought on day one of the applications:

- a. A stay execution against Globe Holdings' assets;
- b. An order entrusting the administration of all of Globe Holdings' assets in the US to any appointed foreign representative or another person; and
- c. Suspension of the right to transfer, encumber or otherwise dispose of Globe Holdings' assets.

The answer should contain :

1. References to procedural provisions MLCBI, e.g. Art.15
2. Conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI

*** End of Assessment ***

Marks awarded 28 out of 50