



**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] 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.

[Following adoption by a member state, the European Insolvency Regulation (EIR) directly becomes part of that member state's domestic law, whereas the MLCBI presents only a recommendation for adoption (in whole or in part) into the domestic legislation of a state and is therefore only an example of "soft law".

The key benefit of EIR becoming part of a state's domestic law is that it is adopted in its full form and the regulation on insolvency proceedings is therefore harmonised across the states that have adopted it. The disadvantage of this approach is that because it is directly applicable in a state's domestic legislation, the negotiation of these regulations/treaties between adopting states can be difficult and time consuming (as is the case with EIR).

The key benefits of the MLCBI as a "soft law" in contrast is faster adoption by states (around 55 jurisdictions have enacted it) and its flexibility in giving the adopting state the freedom to adapt elements of the MLCBI to its domestic legislation. The disadvantage of this approach is that adoption is not uniform and therefore there is no harmonisation of insolvency laws.]

##### 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 the necessity to protect the assets of the debtor and the interests of the creditors as per the preamble to Article 21. Article 22 of the MLCBI further specifies that in granting relief under article 21, the court must be satisfied that the

interests of the creditors and other interested persons, including the debtor, are adequately protected. In doing so, the court may subject the relief granted to conditions and/or to modify or terminate the relief (paragraphs 2 and 3 of Article 22; see also paragraph 197 of the Guide to Enactment and Interpretation of the MLCBI).]

**Question 2.3 [2 marks] 2 marks**

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

[Under Article 13 of the MLCBI, the protections granted to creditors in a foreign proceeding includes:

- (i) foreign creditors are granted the same rights (as local creditors) regarding the commencement of, and participation in, a proceeding in the enacting state; and
- (ii) the claims of foreign creditors cannot be ranked lower than general non-preference (unsecured) claims.]

**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?

[The key distinction with respect to the relief available in foreign main versus foreign non-main proceedings is that in foreign main proceedings, there is an automatic:

- (i) stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities (including actions before an arbitral tribunal);
- (ii) stay of execution against the debtor's assets; and
- (iii) suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor (see Article 20 of the MLCBI).

The relief is automatic and not discretionary as under Articles 19 and 21 of the MLCBI.]

**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.

[As recognition proceedings in the US have been opened, the foreign proceedings cannot have been filed in the US.

“Foreign main proceeding” is defined as a foreign proceeding taking place in the state where the debtor has the centre of its main interests. Going by this definition, there is a foreign main proceeding filed in Germany, where the debtor has its COMI.

“Foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a state where the debtor has an establishment...”. This would suggest that the foreign non-main proceeding has been filed in Bermuda where the debtor has an establishment.



Where there are concurrent proceedings, in the case of a foreign main proceeding and a foreign non-main proceeding, under the MLCBI, primacy is given to the foreign main proceeding (Article 30(a) and (b)), i.e., the proceeding filed in Germany.

However, both Bermuda and Germany have not adopted the MLCBI so the above primacy would not apply. The likely result is that both foreign proceedings would proceed following the respective domestic legislations without coordination amongst them. The insolvency practitioner of the Bermuda proceedings would need to apply to the courts of Germany to be recognised in the jurisdiction, and likewise, the insolvency practitioner of the German proceedings would need to apply to the courts of Bermuda to be recognised. ]

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.

[The US has enacted legislation based on the MLCBI. The joint liquidators are foreign representative who may sought recognition under MLCBI. As the COMI is in Germany where, as mentioned above, foreign main proceedings have been opened, there is automatic mandatory relief with an automatic stay of the commencement or continuation of individual actions or individual proceedings concerning the debtors' assets, rights, obligations or liabilities (Article 20) which allows time for the foreign representative to organise an orderly cross-border restructuring. ]

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?

[Assuming the foreign representative is recognised as such under the MLCBI and the debtor-in-possession like restructuring in the UK fulfils the criteria of foreign proceedings, the foreign representative could take the following steps to protect the assets:

- (i) given that the recognition hearing is 35 days after the petition date and in view of the possible adverse impact on the leases and IP license if the ipso facto clauses were triggered, the foreign representative could apply for urgently needed interim pre-recognition relief upon application for the recognition of the foreign proceedings based on Article 19 of the MLCBI, in particular, for the entrustment of the administration of the debtor's assets to the foreign representative "in order to protect and preserve the value of the assets that are ... in jeopardy".

- (ii) in addition, the foreign representative could apply for the following relief to be granted upon recognition:
- a. suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor pursuant to Article 21 (1)(c), i.e., suspending the leases and licenses of the intellectual property in view of the ipso facto clauses in particular, given that these clauses are not enforceable under the US Bankruptcy Code;
  - b. extending any interim relief granted pursuant to Article 19 above; and
  - c. any additional relief that may be available to a domestic liquidator/office holder in the US, for example, in connection with the ipso facto clauses that are unenforceable,
- in order to protect the assets.]

**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?

[The foreign representative could try to move the COMI of the debtor. (?)

At the outset, the foreign representative should have analysed the key filing strategy to ensure a successful restructuring and moved the COMI of the debtor. ]

Note: Art.16 MLCBI is the main reference for “rebuttable COMI presumption”. References to Art.17, 21, 6 are also required

**QUESTION 4 (fact-based application-type question) [15 marks in total] 3 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.

[The Cayman Island has not adopted the UNCITRAL MLCBI but the US and Canada have both done so.

The advantage of applying for recognition of foreign main proceedings or foreign non-main proceedings is the availability of mandatory reliefs with respect to a foreign main proceedings application, and discretionary reliefs with respect to the foreign non-main proceedings application. In this connection it would be useful [for whom? Not your client I suppose?] to have the US qualify as the foreign main proceedings because Article 20 of the MLCBI provides for automatic mandatory relief including a stay of the commencement or continuation of individual actions for individual proceedings concerning the debtor's assets, rights, obligations or liabilities. This would put a stay on the class action litigation that is brewing in the US but has not been filed.

For the US to qualify as a foreign main proceeding, COMI has to be in the US. Whilst COMI is not defined in the MLCBI, the key factors to determine COMI are:

- (i) the location where the central administration of the debtor takes place; and
- (ii) which is readily ascertainable by the creditors of the debtor.

From the facts of the case, the business of Globe 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. This would suggest that its COMI can be in the US.

Recognition of the US as a foreign main proceeding (*by whom? by US itself?*) also removes any concern that recognition under Chapter 15 of the US Bankruptcy Code is limited in territorial effect and would therefore not constitute a compromise of debt governed by US law (*Rare Earth Magnesium Technology Holdings Limited*) (note however the *Modern Land (China)* in which the US Bankruptcy Court held that a Cayman Islands scheme would constitute a substantive discharge of New York law governed debt, e.g. the USD25,000,000 6.625% senior unsecured notes due in 2023).

The reliefs for recognition of a foreign non main proceeding is only discretionary so will not trigger an automatic stay which is less useful.

The application for recognition shall be accompanied by the following documents as stipulated in Article 15:

- certified copy of decision commencing the foreign proceedings
- certificate from foreign court affirming the existence of the foreign proceedings and of the appointment of the foreign representatives;
- statement identifying foreign proceedings and the appointment of the foreign representative; and
- Translation of documents supplied.

The relief that should be requested include:

- Interim collective relief prior to recognition of a foreign proceeding (Article 19):
  - o A stay of execution against the debtor's assets; and
  - o Entrusting the realisation of all or part of the debtor's assets to the foreign representatives.
- Automatic mandatory relief set out in Article 20 including [but if you claim that the COMI is in US, how can Cayman proceedings trigger automatic relief? Should it not be discretionary considering it would be FNMP?]:
  - o A stay on the commence or continuation of individual actions;
  - o A stay of execution against the debtor's assets; and
  - o Suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtors.]

The essay receives marks for its references to procedural matters. However, it reveals issues in appreciation and interpretation of fundamental concepts (eg. FNP, FNMP, recognition, relief....) and their application to the situation.

*(Note similar concerns for questions 3.1 and 3.4)*

**\* End of Assessment \***

**Marks awarded: 28 out of 50**