



**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.

[The MLCBI is a model law which countries can adopt into their national law if they so choose, whereas the EIR is an EU Regulation which is a binding law on the Member States of the EU following adoption.

A key benefit of the MLCBI model law approach is flexibility. It does not require states that have chosen to adopt it (partially or fully) to notify some supranational body or other states that have chosen to adopt it. However, as a form of soft law, the precise method of adoption may vary between states, leading to a lack of uniformity.

A key benefit of the use of an EU Regulation is that it is binding and therefore ensures uniformity across all the EU states. However, given its binding nature, the reach of the EIR is limited and the process of its enactment was lengthier as a result.]

##### Question 2.2 [maximum 2 marks] 2 marks

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

[The Court should consider and be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected.]

##### 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, foreign creditors will be given the same rights as creditors domiciled in the enacting state without affecting the ranking of the claims in the enacting state. Foreign creditors cannot be accorded lower priority solely because of the fact that

they are a foreign creditor. This protects the foreign creditors by ensuring that they are granted equal treatment under the law of the enacting state and will not be discriminated against on account of their foreign status.]

**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 is whether automatic relief will be granted, or only discretionary post-recognition relief. It is only in the case of a foreign main proceeding that Article 20 provides for automatic mandatory relief, being a stay of the commencement or continuation of proceedings concerning the debtor's assets, rights, obligations or liabilities (save to the extent necessary to preserve the claims); a stay of execution against the debtor's assets; and a suspension of the right to transfer, encumber or dispose of the debtor's assets. In the case of non-main proceedings, no automatic relief is accorded.]

**QUESTION 3 (essay-type questions) [15 marks in total] 8 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 proceedings must have been filed in Germany, as the debtor's COMI is in Germany. Under Article 17, whether foreign proceedings are foreign main proceedings depends on the location of the debtor's COMI. As the debtor's COMI is in Germany, those proceedings will be the foreign main proceedings. The proceedings in Bermuda must be the foreign non-main proceedings, as the debtor only has an establishment there. Under Article 17, a foreign proceeding is a foreign non-main proceeding if the debtor has an establishment there. The US recognition proceedings will likely recognise the foreign proceedings. Automatic relief will be granted in respect of the foreign main proceedings in Germany, whereas applications will need to be sought for post-recognition reliefs.]

**Full marks for a substantiated answer with a discussion and references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 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.

[Nothing is likely to result as the act of commencing recognition proceedings by the liquidators is unlikely to be considered tortious interference with contract. As the claim for tortious interference is likely against the liquidators personally, the liquidators will have to contest the claim under US law. However, if the claim is



against the foreign debtor, the liquidators can seek a stay of the action under Article 19 pending the recognition proceedings or Article 21 after recognition.]

Requires discussion based on Art.10 MLCBI

**Question 3.3 [maximum 4 marks] 4 marks**

A foreign representative who administers assets in a debtor-in-possession-like restructuring proceeding in the UK commences a recognition proceeding in the US, setting the recognition hearing 35 days after the petition date due to the availability of the court. There is no litigation pending or threatened against the foreign debtor, but US-governed leases and intellectual property licenses have *ipso facto* clauses (that is, bankruptcy-triggered terminations) that are not enforceable under the US Bankruptcy Code. Based on these facts, explain what steps, if any, should the foreign representative take to protect the assets and why?

[The leases and IP licenses are governed by US law, and the applicable US law renders such *ipso facto* clauses unenforceable. This is therefore unlike the case of *Fibria Celulose S/A v Pan Ocean Co Ltd*, where the foreign representative from Korea tried to argue that Korean Insolvency Law should apply to render the *ipso facto* clauses null and void, even though the clauses were contained in contracts governed by English law, which did not render such clauses null and void. The US Court hearing the recognition proceedings is therefore unlikely to find that such clauses are enforceable. However, as there is no litigation threatened or pending, and because a notice of termination does not constitute the commencement or continuation of an action or proceeding, it is unlikely that any relief is required to be sought. ]

**Question 3.4 [maximum 4 marks] 2 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?

[From the outset, the foreign representative should have commenced insolvency proceedings in Country B. Alternatively, if they wanted to commence proceedings in Country A, they ought to have relied on the presumption in Article 16 that the COMI of the debtor is the country in which it has its registered office. However, as it is unlikely that the registered office alone is sufficient to show that the COMI is in Country A, where “not much more” is going on, the presumption is likely to be rebutted. Commencing proceedings in Country B to begin with will be the most practical step moving forwards.]

For full marks, discussion on Art.17, 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.

[Globe Financial Holdings Inc should seek recognition of the Cayman scheme. The scheme is a collective proceeding in a foreign state outside the US that is authorized or conducted under a law relating to insolvency under which the assets and affairs of Globe Financial Holdings Inc are subject to supervision by a foreign court, the Cayman Court, and for the purposes of reorganization.

Recognition can be sought on the basis that the COMI of Globe Financial Holdings Inc is in the Cayman Islands. This will allow the scheme to be recognized as a foreign main proceeding. Under Article 16, it is presumed that the registered office of Globe Financial Holdings Inc is the COMI. As Globe Financial Holdings Inc is registered in the Cayman Islands, this presumption applies. The registration also took place in 2009, and therefore cannot be said to have been for an untoward motive. Public filings also announced the incorporation, and local Cayman counsel organize board meetings (though the board members attend virtually). Additionally, another factor is that Globe Financial Holdings Inc's books and records are maintained in the Cayman Islands. It appears that Globe Financial Holdings Inc has a bank in the Cayman Islands, but this is unlikely to have been their primary bank as it was opened a few days ago whereas Globe Financial Holdings Inc has been registered in the Cayman Islands since 2009. The benefit of seeking recognition as foreign main proceedings is that automatic reliefs will be granted.

However, there are factors that point against the COMI being in the Cayman Islands. The Guide to Enactment focuses on the location of central administration and which is readily ascertainable as such by creditors. Therefore, it should also be argued in the alternative that recognition of the Cayman Island scheme should be as a foreign non-main proceeding. This is because Globe Financial Holdings Inc is a letterbox holding company that has no

business operations, and carries out all its actual business through subsidiaries incorporated under US laws and operating in the US. All of its employees are also in the US, and its headquarters are in the US. Therefore, central administration decisions are not made in the Cayman Islands, but in the US. This is where the principal assets and operations of Globe Financial Holdings Inc can be found, where its employees are located, where its commercial policy is determined, and its customers are in the commercial automobile insurance sector in the US. Its main contracts are therefore likely to be governed by US law. Globe Financial Holdings Inc is also under some subject and supervision by the SEC, at least until its shares were delisted. While the fact that the office is registered in the Cayman Islands and the fact that it has recently opened a bank account is not likely to be sufficient to show an “establishment”, the board meetings are organized from the Cayman Islands and it has facilities to maintain its books and records in the Cayman Islands. The expectations of the Noteholders were also that the contemplated restructuring would take place in the Cayman Islands.

The papers that must be submitted include a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative or a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative or other evidence acceptable to the US court showing the existence of the foreign proceeding and the appointment of the foreign representative. The Cayman Court should therefore be asked for this evidence for the purposes of recognition proceedings, if the Sanction Order is not considered to be sufficient proof. The application must also be accompanied by a statement identifying other foreign proceedings of Globe Financial Holdings Inc known to the foreign representative.

In the likely event that the scheme is recognized as a foreign non-main proceeding, no automatic reliefs will be granted. If recognition is granted, the stay on actions or proceedings should be sought, in order to ward off the brewing class action litigation in the US. ]

**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 proceedings etc) with respective references to any MLCBI provisions, a discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI, the necessary papers to be submitted to the US Court per Article 15 MLCBI, conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI.**

**\* End of Assessment \***

**Marks awarded: 32 out of 50**