



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] 7 marks

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which one of the following international organisations’ mandate is to further the **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.

MLCBI is not an obligatory bilateral or multilateral convention, but a model law, i.e. it is a soft law which a country may adopt in its internal regulations to achieve an effective and modern set of regulations for the cross-border insolvency. EIR is on the other hand, the obligatory regulations in the EU countries. The setback of the solution that insolvency regulation is defined through obligatory set of rules is that it takes a lot of time and effort to achieve sustainable results and consent between the countries involved in the process. The advantage of the MLCBI is that it has flexible solutions and it does not intend to harmonise insolvency rules, but to provide a procedural basis for the cooperation between the stakeholders (courts, insolvency administrator, creditors).

While MLCBI does not define the term of COMI, EIR does. In addition, EIR is clear on the issue of forum shopping, i.e. if the debtor has moved its registered office in the three months period prior to the commencement of the insolvency proceedings.

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 is entitled to grant post recognition relief in order to protect the assets of the debtor or interest of creditors. Such relief needs to be sought by the foreign representative and the court

decides within its discretionary powers. The court may grant relief which is not explicitly listed in the Article 21, which means it can decide on any type of relief that exists in the enacting state, for which the court deems they will achieve the intended purpose (Article 21(g)). In the addition of the Article 21 the Article 22 of MLCBI is also important for the understanding how the court should use its discretionary powers for the post-recognition relief. The court should be satisfied that the interest of the creditors, debtor and other interested parties are protected.

Question 2.3 [2 marks] 2 marks

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

Foreign creditors have the right of access to the insolvency proceedings in an enacting state, which means they have the same rights as local creditors to apply for the commencement of the insolvency proceedings and to submit their claims.

However, the rank of the claims (division in classes of creditors) is regulated by local insolvency laws. Therefore, they will have the same rank as local creditors in the same circumstances (for example if they are secured or non-secured creditors). This further means that foreign creditors are not discriminated in local proceedings.

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 relief in foreign main proceedings occurs automatically. This means in practice there is a stay of individual actions against the insolvent debtor (its liabilities, assets rights, obligations), stay of execution against the debtor and a debtor cannot dispose, sell, encumber its assets. In this manner the debtor is allowed with the “time to take a breath”.

In the non-main proceedings such relief does not happen automatically. Regarding the recognition of the non-main proceedings the court has discretion to decide if such relief will be granted. The court should make analysis if the rights of the creditors, debtors and other interested parties are adequately protected.

QUESTION 3 (essay-type questions) [15 marks in total] 10 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.

Having in mind that the debtor has its COMI in Germany, the main insolvency proceedings must have been filed in Germany. It is enough to have an establishment in Bermuda (not only assets), to have non-main insolvency opened in that country, so I would expect there the non-main proceedings over the debtor. The recognition proceedings in the USA are most likely commenced as the debtor has assets in the USA. It is reasonable to predict that the main proceedings from Germany would be recognized in the USA, since both countries adopted the MLCBI.

For full marks reference to related Articles (definitional, procedural, etc.) is required. A discussion is required on the FMNP, FMP, etc.

Question 3.2 [maximum 3 marks] 2 marks

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 there was a foreign insolvency proceeding, i.e. if there is a document proving that the proceeding has commenced in a foreign country (or petition for insolvency is filed), then the provisional liquidators had the right to file for a recognition of such proceeding in the US. In addition, there needs to be a document about their own provisional nomination. In this case, there is no tortious character of liquidator's conduct and no breach of any obligation of the liquidators. I would expect that the case against the liquidators is dismissed.

The answer should be 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?

Ipso facto clauses in the contract allow for the termination of the contract in case one of the contractual parties enter insolvency proceedings. Having in mind that US Bankruptcy Code prescribes that such clauses are not enforceable in the USA and that the US governing law is applicable, there will be no risk that lease contracts and intellectual property licences would be endangered, and therefore, in my opinion no action is needed to protect the assets until the hearing.

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?

The recognition is most likely rejected having in mind that the debtor COMI is not in Country A. Although COMI is not defined in MLCBI, the MLCBI relies on the concept of COMI defined by EIR. However, the establishment is defined in MLCBI in the Article 2 (f) as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. Therefore, the establishment does not exist if in the country of origin, the debtor has only assets, but if there is a non-transitory economic activity as in Country A in the case at hand, it should be deemed that the Establishment does exist.

Hence, the foreign representative should file a petition for the recognition of a foreign non-main insolvency proceedings, stemming from Country A (Article 17 2(b) of MLCBI).

This answer should have been primarily based on rebuttable presumption Art.16 MLCBI.

QUESTION 4 (fact-based application-type question) [15 marks in total] 10 marks

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

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

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

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

In 2019, Globe Holdings recorded on its consolidated balance sheet a significant increase in liabilities. As a result, Globe Holdings worked with external professional advisors to undertake a formal strategic evaluation of its subsidiaries' businesses. In September 2020, Globe Holdings announced that it was informed its shares would be suspended from the NASDAQ Stock Market due to delinquencies in filing its 10-K. Thereafter, on November 6, 2020, its shares were delisted from the NASDAQ stock market.

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

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

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

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

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

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

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

In order to assess if the scheme supported in the proceedings on Cayman Islands can be regarded as the main insolvency (reorganization) procedure, we must first determine if the debtor's COMI is on Cayman Islands. MLCBI does not define COMI, as Article 2 (b) only prescribes that the main proceedings is in the country where the debtor has its center of main interests. MLCBI further defines that the non-main proceedings exist in the country where debtor has the establishment, which is defined by Article 2 (f) as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. For the purposes of determining the COMI of the debtor, the interpretation of COMI from European Insolvency Regulation (EIR) and UNCITRAL Guide to Enactment.

There are several arguments to support that the debtor's COMI is on Cayman Islands. The central administration of the debtor is on Cayman Islands, as the local counsels organize their virtual meetings, books and records of the debtor are maintained on Cayman Islands, prospectus for the issuance of the Notes entail the information that the debtor is a Cayman Islands company, the reorganization of the debtor (Scheme) is performed on Cayman Islands.

There are, however, strong arguments for the position that the COMI of the debtor is in the USA. These factors include the following: the main business activity of the debtor is in the USA, the bank account of the debtor is opened on the Cayman Islands only few days ago, the meetings of the debtor's governing bodies is organized virtually and not physically on Cayman Islands, all employees of the debtor are located physically in the USA. In addition, it can be concluded that the debtors main bank accounts are in USA (indirect conclusion – as the bank account on Cayman Islands is opened since recently, it would be safe to assume that its main bank accounts is in the country where its main business activities are). The debtor was supervised by SEC, it was listed on the stock exchange in USA.

From these facts, I conclude that there are stronger arguments that the debtors COMI is in the USA and not on Cayman Islands. Therefore, the debtor should either commence the main insolvency (Chapter 11) proceedings in the USA in order to reorganize its business activities or it should seek the recognition of the non-main proceedings stemming from Cayman Islands.

For the recognition of the non-main proceedings, the foreign representative of the debtor should submit the following documentation prescribed by the Article 15 MLCBI: 1) a certified copy of the decision commencing the proceeding on Cayman Islands and on the appointment of the foreign representative or a certificate from the Cayman Island court about existence of the foreign proceeding and the appointment of the foreign representative. In addition, the statement identifying all foreign proceedings in respect of the debtor should be filed. As the official language on the Cayman Islands is English, no translation should be provided.

The debtor should seek the provisional relief for the staying of execution against the debtor's assets in the USA, Entrusting the administration or realization of all or part of the debtor's assets located in USA to the foreign representative, or another person designated by the court, suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor. Such measures would serve the protection of debtor's assets and interest of creditors until the court decides on the recognition of foreign non-main proceedings.

For full marks, you should address relevant Articles of MLCBI (not EIR!) eg but 16 MLCBI, to include other definitional and procedural articles. Otherwise, good application to the case.

*** End of Assessment ***

Marks awarded: 37 out of 50.