



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] 6 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 legislative framework, whereas the EIR is a part of the domestic law of the EU Member States. As such, the MLCBI as soft law, provides a more flexible and adaptable solution to legislative disparities between nations, and facilitates cooperation among a wider network of nations, within a relatively short period of time. Concerns of sovereignty and different legislative approaches meant that the negotiation and adoption of the EIR was a much lengthier process. Further, its application is by definition limited to the EU. However, once enacted it would facilitate a much greater degree of harmony and efficient resolution of difficulties attending a cross-border insolvency]

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 exercising its discretionary power in relation to a foreign representative of a foreign, non-main proceeding, the Court in the enacting State must strike a balance between the interests of the foreign representative in the relief sought, and the interests of persons who may be affected by the relief (Article 22 of the Model Law). It must also consider the likely impact on other insolvency proceedings, especially the main proceeding. Another central consideration as shown in UK cases such as *Fibria Celulose S/A v Pan Ocean Co Ltd* and “the IBA Case” is whether the relief sought would be in conflict with substantive rights or settled public policy under the domestic law of the enacting State.]

Question 2.3 [2 marks] 2 marks

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

[Article 13 protects creditors in a foreign proceeding from discrimination before the Court in the enacting State, so that foreign creditors have the same rights as domestic creditors to commence and participate in domestic proceedings in the enacting State. It extends to ensuring that the claims of domestic creditors are not to be given priority over those of foreign creditors by reason only that the foreign creditor is foreign]

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?

[Recognition of a foreign proceeding as a foreign main proceeding affords automatic relief under Article 20 of the Model Law in the form of a stay of the commencement of proceedings against the debtor; a stay of execution against the debtor's assets; and a suspension of the right to transfer; charge or otherwise dispose of the debtor's assets. Such relief in a non-main proceeding may only be obtained pursuant to a request by the foreign representative prior to recognition (under Article 19 of the Model Law) or post-recognition (under Article 21 of the Model Law).]

QUESTION 3 (essay-type questions) [15 marks in total] 7 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.

[Since the COMI is in Germany, the proceeding filed in Germany will be the foreign main proceeding and so the proceeding filed in Bermuda will be a foreign non-main proceeding. As a result, an automatic stay of actions against the debtor in the US in favour of the German insolvency representative will be granted by the Court in the US upon recognition of the German proceedings. Further, if the Bermudian proceedings were recognised first, and any pre-recognition or post-recognition relief was granted in favour of the Bermudian insolvency representative, it will have to be reviewed and modified or terminated if inconsistent with the German proceedings which take precedence. Of course, if the German proceedings are recognised first, relief in favour of the Bermudian insolvency representative must be consistent with the German proceedings.]

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.

[Even if the foreign proceeding is a foreign main proceeding (which is suggested by the nature of the office of the foreign representative), so attracting automatic relief under Article 20 of the Model Law, this would not affect the right of domestic creditors to commence and continue individual actions in order to preserve their claims against the debtor. However, the continuation of the actions against liquidators would not preclude the foreign proceeding from being recognised nor prevent the joint provisional liquidators from applying for and obtaining relief not inconsistent with the domestic regime, having regard to the balancing exercise required under Article 22 of the Model Law.]

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?

[On these facts, the foreign representative does not need to take any steps in the US to protect the assets, as (following authorities such as *Fibria Celulose S/A v Pan Ocean Co Ltd* the acceptance or rejection of *ipso facto* clauses is a policy decision and the US domestic court will apply the policy decisions of the US - in this case, that *ipso facto* clauses are unenforceable.)

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?

[The foreign representative ought at the outset to have applied pursuant to Article 19 for interim relief, in this case a stay of execution against the debtor's assets to preserve them pending the application, and (if the assets are in jeopardy) entrusting the administration and realisation of the assets to the foreign representative or some other person appointed by the Court. This relief can be obtained whether the foreign proceedings are recognised and main or non main. It is not clear from the facts whether the foreign proceedings were recognised as non-main. In such a case, post-recognition relief under Article 21, in similar terms to the pre-recognition relief mentioned above, could be applied for to preserve the assets in Country B.

In any event, the foreign representative should seek the co-operation of the Courts in Country B to facilitate the Country A proceedings, pursuant to Article 25 of the Model Law. Co-operation is not dependent on recognition at all, and could include the

appointment of a person or body to act at the direction of the Court. If the foreign proceeding has not been recognised at all, the foreign representative could seek to initiate domestic insolvency proceedings in Country B pursuant to their standing under Article 11 of the Model Law, and co-operation could then include communication of information touching and concerning the assets, so as to co-ordinate the two proceedings for the more effective disposal and distribution of the assets.]

Art.16 MLCBI is the main reference for “rebuttable COMI presumption” as well as the possibility for FNMP. References to Art.17, 21, 6 are also required

QUESTION 4 (fact-based application-type question) [15 marks in total] 12 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.

[Having already commenced a Cayman Islands proceeding, the client should immediately seek recognition of this proceeding in the US. It will be vital to the success of the Scheme that it, and the Cayman Islands proceedings which led to it are given effect to in the USA since the bulk of the client's assets are located in the US where they are vulnerable to the claimants in the class action.

The client would be advised to seek recognition of the Cayman Islands proceedings as both non-main and main proceedings. If recognised as a foreign main proceedings, then there

would be an automatic stay pursuant to Article 20 of the Model Law, which would prevent the class action from being instituted (unless any of the exceptions apply).

The main question determining whether the Cayman Islands proceeding can be recognised as a foreign main proceeding is where the centre of main interest or “COMI” of the client is. While not defined in the Model Law, it has been established that the COMI for the purposes of the Model Law will be held to be where the central administration of the debtor takes place; and a place which is readily ascertainable as such by the debtors’ creditors. In addition to these considerations, the Court will consider a number of other factors such as the location of the debtor’s books and records; the location of employees; the location of the debtor’s principal assets or operations; the site of the controlling law or the law governing the debtor’s main contracts and the location from which reorganisation of the debtor is being conducted. Finally, there is a presumption under article 16 paragraph 3 of the Model Law that the registered office of the debtor is the COMI.

The date for determining the COMI is the date of commencement of the foreign proceedings, though the court in the enacting State can consider circumstances surrounding that date, particularly where recent changes make the purported COMI less likely to be so ascertained by relevant third parties.

As may be seen then, it is not clear whether or not the Cayman Islands will be held to be the client’s COMI notwithstanding that its registered office is located there (and has been located there for several years). While other factors support the Cayman Islands as the COMI, such as the fact that the restructuring proceedings are taking place in the Cayman Islands, and its books and records are located there, there are competing considerations, most importantly that the client’s substantive business is conducted in the US, its headquarters and employees are in the US and US law governs its principal contracts. However, it is submitted that it is significant that creditors and others dealing with the client were clearly advised that its registered office is in the Cayman Islands, as well as the tax consequences associated therewith. Moreover, the Noteholders indicated that they expected the restructuring to take place in the Cayman Islands as plainly disclosed to them in the RSA. As such, not only was the Cayman Islands *ascertainable* as the COMI, it was *ascertained* to be such by a significant class of creditors!

Nevertheless, even if only recognised as a non-main proceeding, a number of reliefs can still be obtained to assist in the preservation of the assets in the US. Indeed under Article 19 of the Model Law the client can seek pre-recognition relief in the form of a stay, and under Article 21 a stay post-recognition, though here the Court will pursuant to Article 22 perform a balancing exercise having regard to the interests of the claimants in the class-action suit. The client would be well advised to seek these reliefs on day 1 of the filing without awaiting the determination of the recognition proceedings.

The application for recognition must allow the Court to satisfy itself that the foreign representative and foreign proceeding qualify for recognition. Thus, pursuant to Article 15, the application must be accompanied by a certified copy of the decision commencing the proceeding and appointing the representative; a certificate from the foreign Court to this effect; or some other evidence acceptable to the Court of the existence of the foreign proceeding and the appointment of the representative - in this case, the Sanction Order would satisfy this requirement.

The restructuring under the Scheme is a proceeding which is administrative, collective in nature, authorised under a law related to insolvency, for the purpose of reorganisation, in a foreign state and under which the assets of the debtor are subject to control and supervision of a foreign Court. As such, it would meet the definition of a foreign proceeding

within the meaning of Article 2 of the Model Law. Provided that a person or body presides over the proceeding, that person or body would qualify as the foreign representative. On the facts it appears that there was such a body, led by a chairman.]

Good essay. However it should also contain definitions (establishment, foreign main/non-mail proceedings etc.) with respective references to (if any) MLCBI provisions
Conclusive remarks should make reference to 6 MLCBI
Otherwise, a good essay!

*** End of Assessment ***

Marks awarded: 35 out of 50