INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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.

The key distinction is that these are different types of instruments with different aims. For example, the MLCBI does not aim to substantially unify insolvency law across the world.

Advantage of EIR: Legally binding on Member States.

Disadvantage of MLCBI: Not legally binding. A recommendation.

Advantage of MLCBI: Created and published in about 4 years after the creation of the UNCITRAL working group.

Disavantage of EIR: Took 40 years to implement.

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 whether the relief is necessary to protect the assets of the debtor or the interests of creditors (see Article 21). Article 22 also says that in granting (or denying) relief the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. This has been described as requiring a balancing act (see Digest). For completeness, if the recognition obtained is that of a foreign non-main proceeding (hereinafter referred to as "**NP**"), the court must also be satisfied that the relief relates to assets that, under the law of the enacting state, should be administered in the NP or concerns information required in that proceeding.

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 same rights as creditors from the enacting state as to the commencement of and participation in local proceedings regarding the debtor under the insolvency law of the enacting State. Foreign creditors cannot be ranked lower than other creditors only because they are foreign creditors.

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 that upon a foreign proceeding being recognised as a "foreign main proceeding" (hereinafter referred to as "**MP**") certain relief is available automatically (see Article 20), namely: (1) a stay of the commencement or continuation of actions against the debtor; (2) a stay of execution against the debtor's assets; and (3) a suspension of the right to transfer, encumber or dispose of the debtor's assets. Automatic relief does not follow recognition of foreign proceeding as a NP and is discretionary (see Article 21).

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.

As Germany is the debtor's COMI, that proceeding would be recognised as a MP in the US (based on the equivalent of Article 17 of the MLCBI). As the debtor has an establishment in Bermuda, that proceeding would be recognised as a NP.

The German proceeding would be given primacy over the Bermudian proceeding by the US. Co-operation between the German, Bermuda and US courts would be required and could take the form of a protocol / agreement for the coordination of relief, the administration of the entire liquidation estate, treatment of creditors, etc.

Answer requires 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.

If the JPLs did not apply for and obtain urgent relief from the time of filing, the vendors' action continue at least until the recognition decision.

Were the JPLs to obtain recognition of the foreign proceeding as a MP, the vendors' action would be suspended upon recognition being granted. If the foreign proceeding was recognised instead as a NP, the JPLs would need to satisfy the US court that a stay is necessary to protect the assets of the debtor or the interests of creditors.

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 foreign representative could apply for urgent interim relief in the form of a declaration that the ipso facto clauses are not enforceable as "additional relief that may be available to a trustee" (see sections 1519(a)(3) and 1521(a)(7) of Chapter 15).

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?

Assuming Country A and Country B have enacted legislation similar to the MLCBI, the foreign representative should apply for recognition of the foreign proceeding in Country A as a NP on the basis that there is at least an establishment in Country A. The foreign representative should seek an order entrusting he/she/it with the administration and realization of the debtor's assets located in the US. The foreign representative will need to explain why the relief sought is necessary to protect the assets of the debtor or the interests of creditors. It will also need to be demonstrated that the relief relates to assets that, under the law of Country B, should be administered in Country A. This might be a bit difficult to rationalise given the assets are located in Country B but there are plenty of decisions which have previously authorised this and one argument is that it is more efficient to have a single mechanism for the distribution of the debtor's assets (see Digest).

Art.16 MLCBI is the main reference for "rebuttable COMI presumption" which should be discussed and substantiated with references to Art.17, 21, 6 MLCBI.

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.

Whether to apply for recognition of the Cayman scheme as a MP or NP (or both) will depend on an analysis of whether the COMI of Globe Holdings (hereinafter "**GH**") is in the Cayman Islands (see Article 17 of the MLCBI/section 1517(b) of the US Bankruptcy Code).

Factors supporting a finding that GH's COMI is in the Cayman Islands include: (1) GH was incorporated and is registered in the Cayman Islands; (2) GH's books and records are maintained in the Cayman Islands; (3) GH has retained Cayman Islands Counsel for over a decade (who likely had dealings with the Noteholders before the restructuring became necessary); (4) GH has assets in the Cayman Islands (it has a bank account); (5) filings with the SEC state that GH is a Cayman Islands company (it is important that these filings were available to the public); (6) the prospectus provided to the the Noteholders stated that GH is a Cayman Islands company; (7) the RSA stated that the restructuring would take place in the Cayman Islands; (8) the Cayman Court supervised the restructuring process to date, issuing the Convening Order and the Sanctioning Order (see *Modern Land*); (9) the Scheme Meeting took place in the Cayman Islands; and (10) when the Company approached its largest Noteholders regarding the contemplated restructuring they expected that any such restructuring would take place in the Cayman Islands (see *Modern Land*).

As GH is registered in the Cayman Islands and therefore its registered office is in the Cayman Islands, there is a presumption that the Cayman Islands is its COMI under the MLCBI/Chapter 15. This is important and carries significant weight (see *Modern Land*). It would be a good idea to liaise with creditors to determine whether there may be an objections to GH seeking recognition of the Cayman scheme as a MP in the US as a lack of objections will also be persuasive (see *Modern Land*).

The most important factors which support a contrary finding that New York/the US is GH's COMI instead are: (1) GH's business is only carried out through its subsidiaries which are all incorporated and operating in the US; (2) GH's headquarters are in New York; (3) all of GH's employees are in the US; and (4) the Notes and the RSA were governed by New York law.

On balance, while there are good prospects in obtaining recognition of the Cayman scheme as a MP, there are significant factors which point to New York/the US being GH's COMI. That would be consistent with the fact that a class action is being prepared against GH in the US. In the interests of getting a potentially quicker resolution to the recognition (by avoiding a COMI analysis), it is recommended that GH apply for recognition of the Cayman scheme as a NP. Alternatively, GH could apply for recognition of the Cayman scheme as a MP and in the alternative as a NP (if that is allowed by the US court). When filing the petition, GH's foreign representative will need to comply with s 1515 of the US Bankruptcy Code (see also the Federal Rules of Bankruptcy Procedure).

The key relief that needs to be obtained is an order for the enforcement of the Scheme in New York/the US i.e. the discharge of the New York governed debt (the Notes) in accordance with the Scheme (see *Modern Land* which confirmed that recognition of a Cayman scheme can validly discharge / compromise New York law governed debt). Notably, this relief would not be available automatically if recognition was sought and obtained on the basis that the Cayman scheme was a MP so either way GH would have had to demonstrate to the US judge that this relief is necessary to protect the assets of the debtor or the interests of creditors (although with recognition as a NP GH also needs to demonstrate that the relief relates to assets that, under US law, should be administered in the Cayman Islands).

A stay should also be sought on the basis that the class action is brewing and would likely impair the restructuring/compliance with the Scheme.

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. For full marks, further application to the facts of the case would be needed. The answer should contain to the minimum:

1. Definitions eg (COMI, establishment, foreign main proceedings etc) with respective articles
2. A discussion on the rebuttable presumption of the COMI based on Article 16(3) MLCBI
3. The necessary papers to be submitted to the US Court per Article 15 MLCBI
4. Conclusive remarks with reference to Articles 19 through 22 MLCBI and 6 MLCBI.

*** End of Assessment ***

Marks awarded: 31 out of 50