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] 9 marks

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

Question 1.1

Which one of the following international organisations' mandate is to further the **progressive harmonization of the law of international trade**?

(a) World Trade Organization.

(b) The United Nations Commission on International Trade Law.

(c) The United Nations Conference on Trade and Development.

Question 1.2

Which trend(s) and process(es) served as a **proximate cause** for the development MLCBI?

(i) Rise of corporations.

(ii) Internationalisation.

(iii) Globalization.

(iv) Universalism.

(v) Territorialism.

(vi) Technological advances.

Choose the correct answer:

(a) Options (i), (ii), (iii), (iv) and (vi).

(b) Options (i), (ii), (iii) and (iv).

(c) Options (ii), (iii), (iv) and (vi).

(d) All of the above.

Question 1.3

Which of the following statements **incorrectly** describe the MLCBI?

(i) It is legislation that imposes a mandatory reciprocity on the participating members.

(ii) It is a legislative text that serves as a recommendation for incorporation in national laws.

(iii) It is intended to substantively unify the insolvency laws of the foreign nations.

(iv) It is a treaty that is binding on the participating members.

Choose the correct answer:

(a) Options (ii), (iii) and (iv).

(b) Options (i), (ii) and (iv).

(c) Options (i), (iii) and (iv).

(d) All of the above are incorrect.

Question 1.4

Which of the below options reflect the **objectives** of the MLCBI?

(i) To provide greater legal certainty for trade and investment.

(ii) To provide protection and maximization of value of the debtor's assets.

(iii) To provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtors.

(iv) To facilitate the rescue of financial troubled businesses.

(v) To ensure substantive unification of insolvency laws of member-states.

Choose the correct answer:

(a) Options (i), (ii), (iii) and (iv).

(b) Options (ii), (iii) and (v).

(c) Options (ii), (iv) and (v).

(d) None of the above.

Question 1.5

Which **two** of the below hypotheticals demonstrate a more likely **precursor to a "cross-border insolvency"**?

(i) An insolvency proceeding is commenced in jurisdiction A, but a significant asset is located outside of jurisdiction A.

(ii) An insolvency proceeding is commenced in jurisdiction A and immediately transferred to a foreign jurisdiction B.

(iii) An insolvency proceeding is commenced in jurisdiction A, in which a group of affiliated debtors has its COMI as well as all assets and liabilities.

(iv) An insolvency proceeding is commenced in jurisdiction A, but certain liabilities are governed by laws of a foreign jurisdiction B.

(v) An insolvency proceeding is commenced in jurisdiction A, but all *de minimis* assets are located in foreign jurisdictions.

Choose the correct answer:

(a) Options (i) and (ii).

(b) Options (ii) and (iii).

(c) Options (iii) and (v).

(d) Options (i) and (v).

Question 1.6

A restructuring proceeding is commenced in jurisdiction A by a corporation with COMI in jurisdiction A and an overleveraged balance sheet. The court in jurisdiction A, overseeing the restructuring, entered a final and non-appealable order, approving the compromise and restructuring of the debt. The entered order, by its express terms, has a universal effect. Based on these facts alone, what is the **effect** of such order's terms in jurisdiction B if jurisdictions A and B do **not** have a bilateral agreement?

(a) Binding within jurisdiction B.

(b) Binding within jurisdiction B, but certain actions need to be taken.

(c) No effect within jurisdiction B.

(d) Likely no effect within jurisdiction B.

(e) Not enough facts provided to arrive at a conclusion.

Question 1.7

Which of the following statements set out the reasons for the development of the Model Law?

(i) The increased risk of fraud by concealing assets in foreign jurisdictions.

(ii) The difficulty of agreeing multilateral treaties dealing with insolvency law.

(iii) To eradicate the use of comity.

(iv) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

Choose the correct answer:

(a) Options (i), (ii) and (iii).

(b) Options (i), (ii) and (iv).

(c) Options (ii), (iii) and (iv).

(d) All of the above.

Question 1.8

Which of the statements below are incorrect regarding COMI under the MLCBI?

(i) COMI is a well-defined term in the MLCBI.

(ii) COMI stands for comity.

(iii) The debtor's registered office is irrelevant for purposes of determining COMI.

(iv) COMI is being tested as of the date of the petition for recognition.

Choose the correct answer:

(a) Options (i), (ii) and (iii).

(b) Options (ii), (iii) and (iv).

(c) All of the above.

(d) None of the above.

Question 1.9

In the event of the following concurrent proceedings, indicate the order of the proceedings in terms of their hierarchy / primacy:

(i) Foreign main proceeding.

(ii) Foreign non-main proceeding.

(iii) Plenary domestic insolvency proceeding.

Choose the correct answer:

(a) Options (ii), (i) and then (iii).

(b) Options (i), (ii) and then (iii).

(c) Options (iii), (i) and then (ii).

(d) Options (iii), (ii) and then (i).

Question 1.10

Which of the statements below are correct under the MLCBI?

(a) The foreign representative always has the powers to bring avoidance actions.

(b) The hotchpot rule prioritises local creditors.

(c) The recognition of a foreign main proceeding is an absolute proof that the debtor is insolvent.

(d) None of the above are correct.

QUESTION 2 (direct questions) [10 marks in total] 4 marks

Question 2.1 [maximum 3 marks] 0 mark

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 related with the COMI concepts. For the European Union Regulation on Insolvency proceedings, the definition of COMI helps to define the jurisdiction of the main proceeding. However, for MLCBI, COMI definition is related with the effects of recognition, mainly with the relief that could be determined for the debtor in cases of a foreign proceeding.

For MLCBI, COMI definition is related to the establishment definition and the place of the activities of the debtor are when filing the recovery request than to the registered office. For each case, the court can define where is the correct place to open the foreign proceeding, and if it will be the main or non-main foreign proceeding.

For the European Union Regulation on Insolvency proceedings, the place of the registered office of the debtor is presumed as being the COMI, not necessarily the place where the foreign proceeding were opened. This can be a benefit to the debtor or to the creditors, to determine where should be the main proceeding occur and if it will really be or not a foreign proceeding, and main or non-main one. Depending on the case, it can be a disadvantage for the debtor who will have the obligation to file the request where the registered office is, even if it´s assets are in somewhere else and must be considered as a non-main proceeding.

The statements in your answer are incorrect. COMI and establishment are not the same, and the MLCBI has a COMI presumption, similar to the EIR. The correct answer discusses eg the differences in national adoptions, development procedures, flexibilities or otherwise, advantages/disadvantages (recognition issues etc)

Question 2.2 [maximum 2 marks] 1 mark

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

The court should [primarily] consider the protection of the debtor´s assets or the interest of creditors. However, primarily, the court should consider if the relief will not interfere with the administration of another insolvency proceeding, including the main proceeding.

The answer: primarily creditor's interests.

Question 2.3 [2 marks] 0 mark

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

Under Article 13, the protections granted to creditors in a foreign proceeding is related to establish and confirm clear criteria for recognition and enforcement of an insolvency-related judgment.

This fair insolvency-related judgment will occur if the insolvency request fills all the conditions, as not being contrary to public policy, the documents required have been provided, the judgment is not subject to any grounds of refusal, for example.

Answer concerned the non-discrimination principle: foreign creditors have the same rights as local 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?

If the foreign proceeding is recognized as the foreign main proceeding, the relief will be granted as a mandatory condition (Article 20 of the MLCBI) This is a key distinction between the relief provided on Article 21, which is a relief based on the court´s discretionary power to decide.

It is also important that when the court grant relief to a foreign non main proceeding it should be noted that when the relief is related to assets, it must not interfere with the administration of another insolvency proceeding, and mainly the foreign man proceeding, to avoid conflicts with the rights of the debtor and creditors.

Other key distinction is related to the relief for arbitration matters. If the arbitral tribunal takes place on the same place of the foreign main proceeding, the stay will also cover the arbitration that can be considered with a mandatory limitation of the effectiveness of the arbitration agreement. But, if the arbitration takes place on another place than the foreign main proceeding, or the enacting Stante, it will be more difficult to grant the stay relief to the arbitration proceeding.

QUESTION 3 (essay-type questions) [15 marks in total] 6 marks

Question 3.1 [maximum 4 marks] 4 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.

According to MLCBI, the court of US (the enacting State) will analyse if the foreign proceeding and the foreign representative meet all the required characteristics and if there is no invocation of the public policy exception. (Article 17, (1), (a) to (d), Article 2, and Article 16(1).

Next step will be to determine that the foreign main proceeding will be in Germany, considering that the COMI of the debtor is there, and to determine that the foreign non main proceeding will be in Bermuda, considering that the debtor has an establishment there.

For the purposes of the foreign main proceeding in Germany, there will be an automatic mandatory relief. For the purposes of foreign non main proceeding in Bermuda, the court can grant an discretionary post-recognition relief

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.

In this case, the court will have to analyse the contract clauses to decide what types of relief can or cannot be granted if the foreign proceeding is recognized, even if it recognized as a main or non-main foreign proceeding.

This recognition can change regarding the site of the controlling law or the law governing the main contracts of the debtor, not only for the purpose of the grant of the relief but algo for the purpose of determining the COMI of the debtor.

The answer should be based upon Art.10 MLCBI (not relief)

Question 3.3 [maximum 4 marks] 2 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 can make requests regarding the protection of the debtor´s assets, and also can request an urgent grant relief, considering that it will be 35 days of interim until the hearing. It can include the stay of actions concerning the debtor´s assets, rights obligations or liabilities, the stay of executions, transfer or dispose of the debtor´s assets (Article 19 of MLCBI).

The foreign representative can also stand for the Gibbs Rule asking the US court to determine that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding, protecting the rights of the restructuring proceeding in UK.

Conclusion should also refer to Art 20 and/or 21 MLCBI. Missing definitions and related references

Question 3.4 [maximum 4 marks] 0 mark

A foreign representative, who administers the assets of an insolvent debtor in an insolvency proceeding pending in Country A (where the foreign debtor has its registered office and not much more), commenced a proceeding in Country B to recognise the foreign proceeding as the foreign main proceeding in order to sell certain assets within the territorial jurisdiction of Country B, but unfortunately the insolvency court considering the petition for recognition denied the recognition of the foreign proceeding as a foreign main proceeding. Explain what may or should the foreign representative do next? What should the foreign representative have done at the outset?

The foreign representative can file an appeal to the Court of Appeal requesting the reconsideration of the decision, trying to explain why this proceeding should be considered as the foreign main one.

The foreign representative should have given to the court enough elements that could proof that the location was the right one to be considered as the COMI, such as that the company on country B represents the location where financing was authorized; the location in which the debtor´s principal assets or operations are found; the location of employees, etc.

Need mention rebuttable COMI presumption and alternative actions with ref. Art.16 MLCBI; procedures per Art. 15, 6…etc.; conclusions per Art.17 and 21 etc.

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.

Although the company is a holding which the respective subsidiaries operates in the commercial automobile insurance sector, which, regarding insurance sector could require to be administered under a special regulatory regime and can be excluded from the Model Law for the enacting State, there is a information that the Company has no business operations of its own, being carried out through its non-insurance company non-debtor subsidiaries that are all incorporated under the US laws and operating in the US.

This information, that the company works through its non-insurance subsidiaries is important because confirm that the enacting State can qualify the proceeding as a “general” one, with the application of the Model Law.

The information that (i) the Company has its address under Cayman´s SEC; (ii) the board have meeting by videocalls; (iii) there is a recent bank account opened on Cayman Islands; and that (iv) the client maintains its books and records in the Cayman Islands doesn´t mean that these elements are enough to consider Cayman Islands as the Company Centre of Main Interest - COMI

In fact, despite the Model Law doesn´t have a specific definition of what COMI is, the jurisprudence understands (the Virgos-Schmidt Report) that COMI has to be identified by reference to factors which must be objective and ascertainable by third parties, results in the conclusion that the COMI is at New York, considering (i) the Notes negotiation governed under New York law; (ii) the corporate headquarters located in New York; (iii) all employees are in the US.

In that way, the counsel decision to commence a scheme under Cayman Islands law for the Noteholders, followed by a chapter 15 recognition proceeding in the United States was kind of right, but the decision to celebrate a Restructuring Support Agreement (RSA) governed by the New York law with the expectations that any such restructuring would take place in the Cayman Islands, because it reflects the RSA, and with that, constitute a single class of creditors, was a wrong expectation.

Even with the Cayman Islands court Sanction Order that sanctioned the Scheme to constitute the Noteholders as a single class of creditors, this Sanction Order can be modified or at least suspend with other court decision, rendered by New York court.

This is because the recognition process in the US can result in different understanding regarding the single class of creditors and regarding the restructuring proceeding taking place in Cayman Islands.

Considering that, as mentioned above, the COMI can be defined as being New York, the insolvency proceeding in New York would be considered as the insolvency foreign main proceeding and that decision changes everything. Mainly because of the imminence of the filing of the class action litigation in the US.

If the US court understands that New York is the place of the foreign main proceeding, on this process it will be grant an automatic relief, in this case in favor for the creditors of the class action, to protect

their rights, to prevent the disposition of the assets of the debtor, to consider the class action creditors as relevant creditors to participate on the restructuring proceeding, and everything that can protect the creditors from the decisions that could wrongly favor only the Noteholders on Cayman Islands.

Cayman Islands can be considered as a foreign non-main proceeding or the court can even not recognized Cayman Island as a foreign proceeding for the purpose of the Model Law, considering what the Company can proof regarding the "establishment" definition ("any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services") and the elements mentioned above about the Company in this place.

In respect of the papers needed to be submitted on the class action, article 15 of the Model Law states that the application must be accompanied by (i) a copy of the decision commencing the foreign proceeding and appointing the foreign representative; (ii) a certificate from the foreign court affirming the existence of the foreign proceeding on Cayman Islands; (iii) a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative; (iv) the Sanction Order, (v) any other evidence.

This question requires application of the MCLBI provisions on the facts of the case. Missing references to Art 2 (definitions), 16 (rebuttable COMI presumption), and conclusive statements with references to Art.19, 20, 21 as well as references to 22 and 6 MLCBI

*** End of Assessment ***

Marks awarded: 25 out of 50