



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] 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 EIR is an EU Regulation and as such it is part of the domestic law of the EU member states. It focuses on a decision on which state will have the main proceedings and then lets that state's national law govern those proceedings. The resulting decision is then recognised and enforceable in every EU member state (except Denmark). The MLCBI is a legislative text that is only a recommendation for adoption into the national laws of any state, even those outside of the EU. The EIR defines the COMI, while the MLCBI does not contain a definition of the COMI but rather refers to the EIR.

The advantage of the EIR's approach is that there is a unified implementation within the national legislation of the EU member states as far as the main proceedings and recognition and enforcement are concerned, and there should be no exceptions in the implementation, while with MLCBI the particular state's adoption of the recommendations may be full of partial and so leads to differences. The advantage of the MLCBI is that it covers states across the globe, including those outside of the EU. And it encourages implementation into a wide variety of legal systems allowing for keeping the local specifics.

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.

Upon recognition of a foreign procedure, main or non-main, the court should consider whether the rights and interests of the debtor, creditors and other interested parties are adequately protected. Further, paragraph 4 states that in case of foreign non-main proceedings, the court has to be satisfied that the relief relates to assets that should be administered under foreign non main proceedings, or concerns information required in that proceedings – in line with the enacting state’s law.

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 domestic creditors in an enacting state regarding commencement and participation in local proceedings regarding an insolvent debtor. Also, the claim of a foreign creditor is not to be given a lower ranking than that of general unsecured claims based on the creditor being a foreign one. Exceptions to this discrimination [non-discrimination!] rule may be applied in case of tax and social security related claims.

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?

In case of foreign main proceedings being recognised, the relief is automatic mandatory while with foreign non-main proceedings the relief is discretionary post recognition one granted by the court. Urgent interim relief can be granted upon application for the recognition. The recognition of foreign main proceedings provides for the following automatic mandatory reliefs: A stay of commencement or continuation of individual action on the debtor’s assets right or obligations; a stay of execution over the debtor’s assets; a suspension of any transfer or disposal of the debtor's assets. The court may alter the automatic reliefs if these are not protecting the interest of the parties (including the debtor). The right to commence domestic insolvency proceeding against the debtor is preserved.

In case of recognition of non-main foreign proceedings, the court has a discretion to provide any post recognition relief as it deems appropriate to protect the interests of the parties. These may include the following: suspension of rights to transfer assets, right to examine witnesses, right to obtain documents and books and records, right to control the debtor’s assets etc.

QUESTION 3 (essay-type questions) [15 marks in total] 5 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 the COMI of the debtor is in Germany, domestic proceedings were opened in Germany. If Bermuda adopted the MLCBI, the insolvency administrator from the German proceedings filed for recognition in Bermuda and the German proceedings were recognised as foreign main proceedings in Bermuda, as in Bermuda there is an establishment of the debtor and so possible assets and further creditors. The German administrator was approved as foreign representative in Bermuda. It appears that there are assets and/or creditors of the debtor in the US. The US adopted the MLCBI. The German insolvency administrator filed for recognition

of the German proceedings as foreign main proceeding in the US (COMI) and for recognition of the Bermuda proceedings (establishment) as foreign non-main proceedings.

Definitions and procedures need to be mentioned, with references to eg. Art.2, 15, 17, 6 ... MLCBI

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.

As the US adopted the MLCBI, the provisional liquidators should apply for an interim relief to protect the interests of the interested parties, in this case mainly the other creditors. The court should grant the interim relief until the foreign proceedings are recognised, upon which either mandatory (foreign main proceedings) or discretionary post recognition (foreign non main proceedings) relief should be granted. The relief should secure a stay of individual creditors' actions. The foreign representatives (joint liquidators) should have same rights as the domestic ones would have and should not be discriminated. Also, the rights of the foreign creditors should be equal to the rights of the domestic ones.

This answers should have been based on Art.10 MLCBI

Question 3.3 [maximum 4 marks] 1 mark

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 should ask for interim relief, putting assets and contracts of the debtor under stay/protection until the recognition is granted. While there is no immediate litigation pending against the foreign debtor, individual creditors from the US governed lease contracts and intellectual property licenses may call the termination clauses before the US Bankruptcy Code provisions apply (within the 35 days leading to the recognition hearing) upon recognition of the foreign proceedings.

This answer needs to be argued upon Art.19 MLCBI, with a discussion based on Art 20/ 21 MLCBI and an explanation as to why.

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 B adopted the MLCBI). Upon denial of the petition for recognition in Country B of the foreign proceeding (Country A proceedings) as foreign main proceedings, the foreign representative should open domestic insolvency proceedings in Country B and apply there also for recognition of the proceedings in Country A as foreign non main proceedings.

The foreign representative should have checked the criteria defining the COMI outlined under the EIR to establish where the main proceedings should be filed. The upon probably deciding that the COMI of the debtor is in country B, file for recognition of foreign non main proceedings (of country A) in country B.

Needs reference to Art.16 for the rebuttable COMI presumption, as well as procedures per Art eg. 15, 6 as well as a conclusion based on Art.17, 20... MLCBI

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

While the MLCBI does not define the COMI, it refers to the EIR definition. There are two factors determining the location of COMI:

- Where does the central administration take place?
- Is this place readily ascertainable by the debtor and creditors?

It would appear from the above facts that the COMI of Globe Holdings being in Cayman Islands is supported by the following aspects:

- Incorporation and registration in the Cayman Islands with all notices filed to the SEC in 2010.
- Cedar and Woods is the legal counsel representing them for a decade – a Cayman based law firm.
- Books and records maintained in the Cayman Islands
- Creditors are made aware via the prospectus of the Notes informs it is Cayman entity, including the tax consequences.
- The RSA approved by the Noteholders reflects the place of restructuring in the Cayman Islands
- The Scheme meeting was held in Cayman Islands (although possibly attended virtually also).

It would also appear that an establishment of the client is in the US based on the following:

- Board meets virtually, not physically present in Cayman Islands
- Employees, operations, and headquarters in the US.
- Debt (Notes) is governed by NY law.

Following the Sanction order by the Cayman Court, recognition of the foreign main proceeding is the US should be applied for at a US court. To obtain recognition under the Model Law, the application has to sufficiently prove that there is a foreign (main) proceeding and the applicant is a foreign representative.

To prove that the Sanction order of the Cayman court falls under the definition of a foreign main proceedings, it will be documented that:

- It was a proceeding at a court in Cayman Islands
- Collective in nature – all Noteholders represented.
- In a foreign state – Cayman Islands
- As restructuring process falling under the restructuring purpose.
- With the purpose to reorganize the affairs of the debtor, which is unable to pay his debts.

A foreign representative will have to document that he is person, appoint authorized in the Cayman proceedings to administer the reorganization.

Upon application for the recognition, an interim relief should be requested asking for Noteholders, which have not sanctioned the restructuring plan, cannot take action against the debtor's operation in the US. Including, the sale and proceeds of the sale of the headquarters in NY should be protected.

This is a fact-based application-type question, meaning that the MLCBI provisions should have been applied to the facts of the case. Moreover, this answer lacks alternative (rebuttal) scenarios and courses of action. Lacks definitions, procedures, and conclusions. No specific definitions and no references to the MLCBI.

*** End of Assessment ***

Marks awarded: 28 out of 50