



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 key distinction between the MLCBI and the European Union Regulation on insolvency proceedings is that the MLCBI is a global framework/template for the recognition and cooperation between different jurisdictions, whereas the European Union Regulation on insolvency proceedings is a legal instrument, that governs insolvency proceedings between EU member states.

The benefit of the MLCBI is that it is a global framework that can be adapted as needed by jurisdictions to fit their own legal systems. However, a disadvantage of it is that, because it's only a set of guidelines, it can be interpreted or applied differently by different jurisdictions.

The benefit of the European Union Regulation on insolvency proceedings is that it is a legal framework that applied to all EU member states. It governs proceedings, and aims to establish a unified framework. A disadvantage of it however, is that it only deals with cases involving EU member states, and so it has no standing outside of the EU.

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.

When granting post-recognition relief, the court should primarily consider whether the granting of that relief protects the assets of the debtor, and/or the interest of creditors.

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 deals with anti-discrimination in foreign proceedings. Article 13 protects foreign creditors rights in that they are treated the same as domestic creditors. Foreign claims are not to be ranked as lower than a general unsecured claim, just because of where the creditor is domiciled.

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 foreign main proceedings (i.e. where the court is satisfied that the proceedings were opened in the debtor's COMI), there is an automatic mandatory relief (i.e. automatic legal protections for the debtor). Article 20, which deals with automatic relief, states that automatic relief includes the following:

- i) A stay of the commencement of individual proceedings;
- ii) A stay in the execution against the debtor's assets; and
- iii) Suspension of the right to dispose or transfer of any assets.

In foreign non-main proceedings there is no automatic relief, but post-recognition discretionary relief. Pursuant to Article 21, the court must be satisfied that the relief sought by the debtor relates to assets that the court considers should be administered in the foreign non-main proceedings, or concerns information relating to those proceedings.

A similarity however is that both foreign main and foreign non-main reliefs do not apply until the recognition is granted. Therefore, should any relief be required on an immediate basis, under Article 19, the debtor could apply for interim relief.

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.

As the debtor's COMI is in Germany, the foreign-main proceedings would have commenced there. Recognition proceedings would have been commenced in the US to recognise the German proceedings as the foreign main proceedings. Assuming the recognition was successful, pursuant to article 20, automatic relief would have been granted.

As there is an establishment in Bermuda, the foreign non-main proceedings would have been filed there, as foreign non-main requires the debtor to have an "establishment" in that jurisdiction. Recognition proceedings could have also been opened in the US, to recognise these as foreign non-main proceedings. However, the relief granted by the US court in the Bermudan proceedings will be

discretionary. According to Article 21, the court must be satisfied that the relief relates to assets that should be administered in those proceedings, or concerns information relevant to those proceedings.

For full marks, a discussion on definitions and formalities (likely result) is required. You should mention Article 2, 15, 17, and 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.

The outcome is dependent on whether the Joint Provisional Liquidators (“JPLs”) are seeking recognition of foreign main or foreign non-main proceedings.

If the JPLs are seeking recognition for foreign main proceedings, and the recognition of the same was successful, then in accordance with Article 20, automatic relief would be granted, staying the commencement of these individual proceedings.

However, if the JPLs are seeking recognition of foreign non-main proceedings in the US, only post-recognition discretionary relief applied and the JPLs will need to apply to court seeking relief for the stay of the individual actions in relation to the contract legal actions. The court needs to be satisfied that the relief sought by the foreign representative relates to assets that the court considers should be dealt with in the foreign non-main proceedings.

The answer should be based on Art. 10 MLCBI.

Question 3.3 [maximum 4 marks] 3 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?

Ipsa-facto clause is a contractual provision that allows contracts to be altered or terminated upon one of the parties entering into insolvency proceedings.

Under Article 19, the foreign representative can apply to the court of the enacting state for interim relief. The purpose of Article 19 is to enable the enacting court to grant immediate relief where urgently needed assets or the interests of creditors are considered to be in jeopardy in the period before the hearing. It has been suggested that this includes situations where efforts to terminate contracts or take other detrimental business actions.

The foreign representative should apply to the court for provisional relief until the hearing. The fact that it is a debtor-in-possession-like restructuring, negates that purpose of the restructuring is so that the debtor can restructure its debts and streamline operations, whilst continuing to operate. The termination of these leases/licenses could be detrimental to the debtor, so the foreign representative should apply for relief on this basis.

For full marks discussion on subsequent steps to be taken by the foreign representative (eg. Art. 20/21 MLCBI) is required.

Question 3.4 [maximum 4 marks] 2 marks

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

The insolvency court in Country B would have denied the recognition of the insolvency proceedings as foreign main proceedings, because they did not consider Country A to be the debtor's COMI. The foreign representative has two options:

- i) the foreign representative could apply for recognition of the insolvency proceedings as foreign non-main proceedings; or
- ii) the foreign representative could commence insolvency proceedings where the debtor's COMI is considered to be. If country B is considered to be the COMI, foreign-main proceedings could be commenced in this jurisdiction. Similarly, if the COMI is considered to be in another jurisdiction (i.e. Country C), the foreign representative could commence proceedings in that country, and then apply to the court of Country B to recognise Country C's proceedings as the foreign-main proceedings.

At the outset, the foreign representative should have properly assessed the debtor's COMI.

For full marks, refer to COMI rebuttal and procedural Articles (eg Art. 16(3), 15, 6) MLCBI. For the next step, refer to Art. 17.2(b) MLCBI

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

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

The client is a Cayman Islands incorporated and registered entity. It is a financial service holding company for a number of direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States. Globe Holdings was initially formed as a Canadian company in 2009, under the laws of Ontario, Canada. A year later, following certain reverse merger transactions, it filed a Certificate of Registration by Way of Continuation in the Cayman Islands to re-domesticate as a Cayman Islands company and changed its name to Globe Financial Holdings Inc. When it re-incorporated in the Cayman Islands in 2010 (from Canada), Globe Holdings provided various notices of its re-incorporation, including in the public filings with the Securities and Exchange Commission (SEC). Around that time, Globe Holdings retained its Cayman Islands counsel Cedar and Woods, which has regularly represented Globe Holdings for over a decade. Globe Holdings has a bank account (opened just a few days ago) in the Cayman Islands from which it pays certain of its operating expenses. Globe Holdings often holds its board meetings virtually, and not physically in the Cayman

Islands, and, having obtained support for a bond restructuring, all its regular and special board meetings have been organized by its local Cayman counsel virtually. The client also maintains its books and records in the Cayman Islands. Its public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes disclosed that Globe Holdings is a Cayman Islands company and explained the related indemnification and tax consequences resulting from Globe Holdings' place of reformation.

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

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

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

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

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

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

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

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

On July 26, 2023 the Cayman Court entered a convening order (the Convening Order) on the papers, among other things, authorizing the client to convene a single Scheme Meeting for the purpose of considering and, through a majority vote, approving, with or without modification, the Scheme. The Scheme Meeting was held in the Cayman Islands at the offices of Cedar and Woods. Given the Covid-

19 pandemic, Scheme Creditors were also afforded the convenience of observing the Scheme Meeting via Zoom and in person via a satellite location in New York. Following the Scheme Meeting, the chairman of the Scheme Meeting (presiding over the meeting in person) reported to the Cayman Court that the Scheme was overwhelmingly supported by the Noteholders, with 91.83% in number and 99.34% in value voting in favor of the Scheme. The Sanction Hearing was held, and an order sanctioning the Scheme (the Sanction Order), which was filed with the Cayman Islands Registrar of Companies the same day.

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

In order to achieve a successful restructuring, Globe Holdings should apply to the US court for recognition of the Cayman foreign main proceedings. It can be argued that Globe Holding's COMI is in Cayman as:

- i) the location of Globe Holdings books and records is in the Cayman Islands;
- ii) the location of Globe Holding's primary bank is in the Cayman Islands (assuming this is the primary bank);
- iii) the Notes were issued by Globe Holdings (rather than the US subsidiaries) so COMI can be argued on the basis that the financing was authorized or organized in Cayman islands;
- iv) the scheme of Globe Holdings is being conducted in Cayman Islands under Cayman Islands law, with advice provided by its Cayman Islands legal counsel;
- v) the largest Noteholder's expectation was that any restructuring would take place in Cayman Islands, so it can be argues that its noteholders consider the COMI to be in Cayman Islands; and
- vi) Globe Holdings administration is taking place in Cayman Islands (i.e. its board meetings).

Notwithstanding the above, there are factors that point to Globe Holdings having COMI in the US, as:

- i) Globe Holdings business is carried out through its US subsidiaries, all of which are incorporated under US laws and operating in the US;
- ii) These subsidiaries therefore constitute Globe Holdings main assets (i.e. its assets are therefore all in the US);
- iii) employees are located in the US;
- iv) its headquarters are also in the US; and
- v) New York law governs its Notes.

However, if the US is its COMI, it doesn't appear that Globe Holdings has an "establishment" in the Cayman Islands, as there is no, as defined in the Model Law "economic activity with human means and goods or services" there.

Noting the above arguments for COMI being in Cayman Islands vs the US, the stronger argument is that COMI is located in Cayman. Furthermore, there is a case precedent for the US Court approving the foreign main recognition, in the decision re Modern Land (China) Co., Ltd, in which the US Bankruptcy Court held that a Cayman Islands scheme of arrangement recognized as a main proceedings would constitute a discharge of New York law governed debt.

A recognition application for foreign-main should therefore be filed in the US court, however there is a chance that the Court would view the COMI differently and the application be rejected.

The recognition application should be filed with:

- i) The Convening Order issued by the Cayman Court, authorizing Globe Holdings to convene the Scheme;
- ii) The minutes of the Scheme Meeting detailing the Noteholder approval of the Scheme;
- iii) The Sanction Order issued by the Cayman Court.

Noting that any recognition application should also be accompanied by a statement identifying all foreign proceedings that are known, as the class action litigation claim that is brewing in the US hasn't yet been filed, no document in relation to this would need to be filed with the application.

If the recognition application for the foreign main proceedings is approved by the US Court, then under Article 20, the following automatic relief will be granted:

- i) The stay of the commencement of individual actions or proceedings;
- ii) A stay of execution of the debtor's assets; and
- iii) A suspension of the right to transfer or dispose of any assets of the debtor.

The relief at i) above is required to prevent the class action litigation claim that is brewing in the US from being filed. The relief at iii) above is required in order to stop the third party from selling Globe Holdings' US headquarters and its fixtures and fittings / contents.

Noting that there is a class action claim brewing in the US, Globe Holdings should consider applying for interim relief under Article 19, seeking relief of i) and iii) above in order to protect its assets until the recognition application is heard.

For full marks, the requirements are: definitions and respective Articles MLCBI; Art. 16; and Art. 15 MLCBI. Otherwise good application of the MLCBI to the case.

*** End of Assessment ***

Marks awarded: 33 out of 50.