



**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] 8 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 EU Regulation on Insolvency Proceedings is a treaty (?) which is binding on signatories, while the MLCBI is only a *recommendation* to states to govern their national law and is not binding. Therefore, in its application, the EU Regulation must be strictly adhered to whereas there is nothing to compel states to abide by and/or apply the MLCBI.

#### EU Regulation

The key benefit to the EU Regulation is that due to its binding effect on signatories, it allows for the achievement of uniformity and harmony between laws of the participating states, and thus achieves the goal of such global insolvency regimes. The disadvantage however is that it is undeniable that reaching a common consensus between all states as to what standard laws should bind each and every one of them is difficult, as each state will necessarily have independent priorities.

#### MLCBI

The key advantage to the MLCBI is that it is a far less intrusive approach, and allows for states to organically and perhaps over time, achieve a uniformity in their insolvency laws. It also facilitates cooperation as more and more states may at their own time, adopt the approaches of various national laws into their own as they are more widely adopted. However, the key disadvantage to that is also that the effects of the MLCBI will be far less immediate, and there may ultimately still be slight differences in the laws of each state given its non-binding nature.

**Regulation is not a Treaty but secondary law**

### 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 interests of the local creditors in the enacting State are adequately protected, pursuant to paragraph 2 of Article 21 of the MLCBI, or, in the case of granting relief to a foreign representative of a foreign non-main proceeding, the court must consider whether the relief relates to assets that, based on the law of the enacting State, should be administered in the foreign non-main proceeding, or concerns information required in that proceeding.

In short, such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.

**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 of the MLCBI protects creditors by granting them the same rights as creditors domiciled in the enacting State, including those regarding the commencement of, and participation in, local proceedings regarding the debtor under the insolvency law of the enacting State, without affecting the ranking of claims in the enacting State.

The claim of a foreign creditor shall not be given a lower priority than that of general unsecured claims solely because the holder of such claim is a foreign creditor.

**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 a foreign main proceeding, Article 20 of the MLCBI provides for *automatic* reliefs as of right, including that:

- (a) The commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- (b) The execution against the debtor's assets is stayed; and
- (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

On the other hand, in foreign non-main proceedings, such reliefs *may* be granted subject to the Court's discretion and upon application by the foreign representative, pursuant to Article 21 of the MLCBI. Such discretionary reliefs available in foreign non-main proceedings include:

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

The foreign proceedings must have been filed in Germany as Germany is the debtor's COMI, while the foreign non-main proceedings must have been filed in Bermuda.

The likely result of the recognition proceedings in the US depends on *when* the foreign main and foreign non-main proceedings were opened, and when they were decided.

If foreign main proceedings was opened first, and the US courts decided to recognise it, then the US courts will ensure that any relief that it grants in relation to the foreign non-main proceedings is consistent with the foreign main proceedings.

Conversely, if the foreign non-main proceedings was recognised first, then any relief granted must be reviewed by the court, and may be modified or terminated, if it is later found to be inconsistent with the reliefs under the foreign main proceedings.

Answer also needs references to definitions per Art.2, state the COMI definition peculiarities (ie. MLCBI does not define COMI etc.), and procedures per Art. 17, 15, as well as 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 liquidators will likely apply under Art 19 of the MLCBI for urgent provisional relief to protect the assets of the debtor/ the interests of the creditors.

Answer relates to Art.10 MLCBI

### 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 should seek provisional relief immediately after filing of the recognition application in the US, pending the determination of that recognition application.

Specifically, it should seek a stay of execution against the debtor's assets, entrusting the administration or realisation thereof located in the enacting State to the foreign representative or a Court-designated person, to protect and preserve the assets which are by their nature or by the circumstances susceptible to devaluation or dissipation, and seek the reliefs in Article 21 of the Model Law.

This will ensure that all of the debtor's assets are adequately preserved in the interim period.

**Answer needs discussion primarily based upon Art. 19, as well as a discussion on post-recognition relief substantiated with references to 20 MLCBI.**

**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 foreign representative should apply in Country B to seek recognition of the proceeding that is pending in Country A as a foreign non-main proceeding.

This could have been avoided if from the outset, the foreign representative had considered that Country B was in fact the COMI and had commenced the main proceedings there first. The reason is that the mere fact that the debtor has its registered office in Country A and not much more does not ipso facto make Country A the COMI. It should have considered the place of the operations where the debtor carries out its economic activities, for example.

**Needs discussions over alternatives and references to the "rebuttable COMI presumption" per Art.16 MLCBI, also with references to Art. 15, 17, 6 etc...**

**QUESTION 4 (fact-based application-type question) [15 marks in total] 2 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.

To ensure a successful restructuring, Globe Holding should file for a recognition of a main proceeding in the Cayman Islands, and *also apply* for recognition of a non-main proceeding in the US.

First, it should file for recognition of main proceedings in the Cayman Islands as it is Globe Holding's COMI, given that:

- (a) It is registered in the Cayman Islands;
- (b) Its books and records are maintained in the Cayman Islands;
- (c) It engaged regularly with counsel in the Cayman Islands; and
- (d) It operated a bank account in the Cayman islands

Second, the foreign non-main proceedings should be filed in the US given that Globe Holdings has significant assets and creditors in the US, such that Globe Holdings has an "*establishment*" in the US.

As part of the application in the Cayman islands, we will be required to submit evidence of Globe Holding's incorporation and registration in Cayman such as official company registration records, its banking records and its financial records such as audited financial statements.

As part of the application in the US, we will be required to submit evidence of Globe Holding's assets and liabilities in the US, including any lists of creditors, the relevant contracts, and any restructuring efforts Globe Holdings has taken with US creditors.

On the day of the filing, GH should request in the US recognition of the Cayman islands proceedings as the main proceedings, so that any reliefs in the US will be consistent with the reliefs granted in the Cayman Islands. It should also request provisional relief to stay the imminent litigation in the US, specifically in light of the pending class action suit. This will ensure that all of GH's assets are preserved in the interim.

**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:**

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

**\* End of Assessment \***

**Marks awarded : 26 out of 50**