



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A
THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) re-sit 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 number.assessment2A]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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.**
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- 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 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. 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 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

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 of the following statements **incorrectly** reflects the main purpose of the Model Law?

- (a) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the protection and maximisation of trade and investment.
- (b) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, not including the debtor.
- (c) The Model Law is a substantive unification of insolvency law so as to promote co-operation between courts of the enacting State and foreign States and facilitation of the rescue of financially troubled businesses.

(d) All of the above.

Question 1.2

Which of the following statements is **unlikely** to be a reason for the development of the Model Law?

- (a) The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.**
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.
- (d) None of the above.

D is the correct answer

Question 1.3

Which of the following challenges to a recognition application under the Model Law **is most likely to be successful**?

- (a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.
- (b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.
- (c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.
- (d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.

Question 1.4

“Cross-border insolvencies are inherently chaotic and value evaporates quickly with the passage of time”. Which of the following rules or concepts set forth in the Model Law **best addresses** this feature of cross-border insolvencies?

- (a) The *locus standi* access rules.
- (b) The public policy exception.
- (c) The safe conduct rule.
- (d) The “hotchpot” rule.

Question 1.5

For a debtor with its COMI in South Africa and an establishment in Brazil, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Brazil. Both the South African foreign representative and the Brazilian foreign representative have applied for recognition before the relevant court in the UK. Please note that South Africa has implemented the Model Law subject to the so-called principle of reciprocity (based on country designation), Brazil has not implemented the Model Law and the UK has implemented the Model Law without any so-called principle of reciprocity. In this scenario, **which of the following statements is the most correct one?**

- (a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa’s principle of reciprocity, but the foreign non-main proceedings in Brazil will be recognised in the UK despite Brazil not having implemented the Model Law.
- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will not be recognised in the UK because the UK has no principle of reciprocity and Brazil has not implemented the Model Law.
- (c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will be recognised in the UK.
- (d) None of the statements in (a), (b) or (c) are correct.

Question 1.6

Which of the following statements regarding concurrent proceedings under the Model Law **is true**?

- (a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.
- (b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.
- (c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.
- (d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.

Question 1.7

When using its discretionary power to grant post-recognition relief pursuant to Article 21 of the Model Law, what should the court in the enacting State primarily consider?

- (a) The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.
- (b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.
- (c) The court should consider both (a) and (b).
- (d) Neither (a) nor (b) must be considered by the court.

B is the correct answer

Question 1.8

Which of the statements below regarding the Centre of Main Interest (or COMI) and the Model Law **is incorrect**?

- (a) COMI is a defined term in the Model Law.
- (b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.
- (c) While (for purposes of the Model Law) the COMI of a debtor can move, the closer such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was "ascertainable by third parties".

(d) None of the above.

Question 1.9

Which of the following types of relief have, prior to the adoption of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments, been declared beyond the limits of the Model Law?

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

(c) Both (a) and (b).

(d) Neither (a) nor (b).

Question 1.10

When for the interpretation of the Model Law “its original origin” is to be considered in accordance with article 8 of the Model Law, which of the following texts is likely to be of relevance?

(a) The UNCITRAL Guide of Enactment and the Practice Guide.

(b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.

(c) The UNCITRAL Guide of Enactment and the Judicial Perspective.

(d) All of the above.

Marks awarded: 8 out of 10

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

Question 2.1 [maximum 3 marks] 2

One of the elements of the definition of “foreign proceeding” as set out in article 2(a) of the MLCBI, is that the proceeding is “authorised or conducted under a law relating to insolvency”. Discuss whether a “foreign solvent winding-up proceeding of a debtor on just and equitable grounds” is likely to meet this element.

It seems unlikely that a foreign solvent winding up proceeding of a debtor on just and equitable grounds would meet the definition of foreign proceedings under the MLCBI Article 2(a) in its element that it is « authorised or conducted under a law relating to insolvency ».

Indeed, being a solvent winding up proceeding, it seems unlikely to come under the scope of a law relating to insolvency.

However, if it perspired that in a State a solvent winding up proceeding of a debtor was regulated by a piece of insolvency legislation, it could possibly still conform to the definition of a foreign proceeding, at least in the element of the definition as far as being « authorised or conducted under a law relating to insolvency ».

For full remarks, attention should have been given to the following points:

This very question was addressed by the English court in two instances: first *In the matter of Sturgeon Central Asia Balanced Fund Ltd* [2019] EWHC 1215 (Ch) and subsequently in a review application *In the matter of Sturgeon Central Asia Balanced Fund Ltd* [2020] EWHC 123 (Ch).

The wording “*under a law relating to insolvency*” is intentionally broad to encompass a range of insolvency rules, irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency. However, in the review application the English court held it to be contrary to the stated purpose and object of the MLCBI to interpret “foreign proceedings” to include solvent debtors, in particular actions that are subject to a law relating to insolvency which have the purpose of producing a return to members not creditors. [page 13, footnote 45]

Question 2.2 [maximum 3 marks] 2

The following **three (3) statements** relate to particular provisions / concepts to be found in the Model Law. Indicate the name of the provision / concept (as well as the relevant Model Law article), addressed in each statement.

Statement 1 *“This Article provides the ultimate safeguard to the sovereignty of the enacting State”*

Statement 2 *“This Article provides guidance on a key concept in the MLCBI that is not otherwise defined in it”*

Statement 3 *“The Article contains a rebuttable presumption that results from a recognition of a foreign main proceeding”*

S1 : Article 6 Public policy exception : it leaves a last resort safeguard that does not ever prevent a court from refusing to apply or accept an action that is contradictory to the law considered public policy in the State

S2 : Article 17 Decision to recognise a foreign proceeding : the key concept referred to is a debtor’s centre of main interests (COMI), which is one of the key elements to recognition, and yet is not defined by the MLCBI.

The correct answer is Article 16 (3)

S3 : Article 16 Presumptions concerning recognition : there are three presumptions in this article, notably that in absence of proof to the contrary the debtor’s registered office or habitual residence is presumed to be the centre of the debtor’s main interests.

Question 2.3 [2 marks] 2

While the concepts of COMI (Centre of Main Interest) in the European Insolvency Regulation and the MLCBI are similar, they serve different purposes. **Please explain.**

Indeed, the concepts of COMI in the European insolvency Regulation and the MLCBI are similar in that they both use similar factors for determining COMI, such as the location where the central administration of the debtor takes place, as well as consideration as to how creditors perceive the COMI of a debtor.

However, in the MLCBI, COMI is used only in order to determine the consequences of recognition (main insolvency proceedings with automatic relief if the COMI is in the State where the foreign proceedings have been opened, or non-main proceedings if the debtor only has an establishment and not their COMI in the enacting State). There is no reciprocity requirement or automatic recognition.

In EU law, COMI is used to determine in which State main insolvency proceedings should be opened, and consequently which State’s law takes precedence if competing insolvency proceedings are opened.

Question 2.4 [2 marks] 2

In terms of relief, what should the court in an enacting State do if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised? You should mention the most relevant article of the MLCBI. What (ongoing) duty of information does the

relevant foreign representative in each foreign non-main proceeding have towards the court in the enacting State? You are required to mention the most relevant article of the MLCBI.

The most relevant article that deals with two concurrent non main proceedings is Article 30(c) of the MLCBI. This article tells us that in the event of two concurrent foreign non main proceedings, there is no law of preference between the two. However, if after the recognition of one non main proceeding, another foreign non-main proceeding is recognised, the Court must examine the relief to be given, with the purpose of facilitation co-ordination of the two different foreign non main proceedings. The Court can grant, modify, or terminate relief for this purpose.

The foreign representative of each foreign non main proceeding has a duty of information to the Court in the enacting state based on article 26 of the MLCBI in that they must cooperate to the maximum extent possible, as well as an obligation to update the court on developments of the case (article 18), notably of any substantial change in the status of the recognised foreign proceeding or the foreign representatives appointment, or any other foreign proceedings concerning the same debtor that becomes known to the foreign representative.

Marks awarded: 7 out of 10

QUESTION 3 (essay-type questions) [15 marks in total] 11

A foreign representative of a foreign proceeding opened in State B in respect of a corporate debtor (the Debtor) is considering whether or not to make a recognition application under the implemented Model Law of State A (which does not contain any reciprocity provision). In addition, the foreign representative is also considering what (if any) relief may be appropriate to request from the court in State A.

Write a brief essay in which you address the three questions below.

Question 3.1 [maximum 4 marks] 4

Prior to making a recognition application in State A, explain how access and co-ordination rights in State A can benefit the foreign representative?

Access and coordination rights in implemented Model Law can highly benefit a foreign representative.

Indeed, they can provide the foreign representative with access to the courts of the enacting State, without foreign insolvency proceedings having been recognised in the enacting State. This can be illustrated by articles 9 and 11 of the MLBCI, which are articles that give automatic *locus standi* to foreign representatives, notably by giving direct access to Courts, and enabling the foreign representative to request a certain number of things before the enacting State's courts, notably the possibility to request the commencement of local insolvency proceedings.

By giving the foreign representative *locus standi*, the foreign representative can seek temporary measures to give breathing space to the distressed company. This can be vital in order to conserve the value of a debtor's assets, estate, or business, therefore increasing the chance of turnaround or creditor satisfaction. It also increases the efficiency of the foreign insolvency proceedings.

Access and coordination rights also allow the courts in the enacting State to determine what co-ordination among the jurisdictions is opportune and appropriate for optimal administration and of the insolvency.

These rights are very important, as the foreign representative can act quickly, without having to wait for recognition, in order to conserve a debtor's estate. Other articles of the Model Law, such as article 25, ensures cooperation in a large array of areas, without importance as to whether recognition is given or not (as cooperation should be given even when the said proceedings may not qualify for recognition under Article 17 of the Model Law).

Article 10 of the Model Law safeguards the undesired effects that could follow from a foreign representative manifesting themselves and bringing to the attention of a jurisdiction a state of insolvency of a debtor. Indeed, this article allows for a « safe conduct rule », meaning the court won't assume jurisdiction over all assets if alerted on a possible state of insolvency on the sole ground that the foreign representative has made an application for recognition of the foreign proceeding, or uses access rights.

Question 3.2 [maximum 6 marks] 4

For a recognition application in State A to be successful, briefly explain (with reference to relevant MLCBI articles) the minimum requirements for qualifying as a “foreign proceeding” and a “foreign representative” under the MLCBI. In addition, you are also required to list and briefly explain (with reference to relevant MLCBI articles) any other evidence, restrictions, exclusions and limitations that must be considered, as well as the judicial scrutiny that must be overcome for a recognition application to be successful.

For a recognition application in State A to be successful, it is necessary that the proceedings qualify as foreign proceedings and that the person applying for recognition qualifies as a foreign representative. Indeed, article 15(1) of the MLCBI states that : “a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed”.

In order to qualify as a foreign proceeding or a foreign representative, article 2 of the MLCBI indicated that :

“for the purpose of this law

(a) « foreign proceeding » means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation...

(d) « foreign representative » means a person or body including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceedings”.

Both of these terms contain a number of requirements in order to qualify as foreign proceedings or representative under the Model Law.

To qualify as a foreign proceeding, four elements must be characterised. Firstly, the proceeding must be of a collective nature, whether judicial, administrative, or interim. A collective discipline for organised treatment of insolvency must therefore characterise the proceedings. Secondly, the proceeding must be authorised or conducted by a law in a foreign State that is related to insolvency. Thirdly, article 2 tells us that the assets or affairs of the debtor must be subject to control or supervision by a foreign court. And finally, the proceeding must be for the purpose of reorganisation or liquidation.

To qualify as a foreign representative, article 2(d) tells us that two elements must be met. Firstly, the representative needs to be an appointed person or body authorised in the foreign proceeding. Secondly, the representative must be authorised either to administer the

reorganisation or liquidation of the debtor's assets and affairs, or to act as a representative of the foreign proceeding.

Once it is given that the requirements as to the qualification of a foreign proceeding and foreign representative have been met, and the court has verified this in concordance with Article 17(1)(a) and (b) of the Model Law (taking into consideration the presumptions in article 16 of the Model Law) there are other conditions that need to be met for a recognition application to be successful.

Next, in accordance with Article 17(1), it would be important that an application for recognition could not be thwarted by grounds to invoke public policy exceptions of article 6 of the Model Law. Article 17 (1) (c) tells us that the application requirements must meet those of article 15, paragraph 2, notably a certified copy of the decision opening the foreign proceedings, a certificate from the court that opened the proceedings affirming the existence of insolvency proceedings and the designation of a representative. If these documents are not available, any other evidence acceptable to the court can be used showing the existence of foreign insolvency proceedings. A statement must be issued by the debtor and/or the foreign representative that identifies all other foreign proceedings.

If this criterion is met, the court will next analyse, in accordance with Article 17(2) of the Model Law, whether the proceedings must be classified as main or non-main proceedings. If the debtor's COMI is in the foreign State where the proceedings have been opened, then the proceedings shall be considered foreign main proceedings, if not, foreign non-main proceedings. In order to consider whether the debtor's COMI is in the State that has opened the foreign proceedings, the third presumption of Article 16 must be observed, in that « in the absence of proof to the contrary, the debtor's registered office or habitual residence in the case of an individual is presumed to be the centre of the debtor's main interests ». If the debtor only has certain assets or an establishment in the foreign State (as defined by article 2(f) of the Model Law), then the proceedings will be recognised as foreign non-main proceedings. If there is neither COMI or an establishment in the foreign State, the proceedings cannot be recognised.

It must also be considered, that while the Model Law includes no provisions containing a reciprocity requirement, some States have included this requirement in relation to recognition.

For full marks on this question, the following points should have been addressed:

1. **Exclusions:** If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first of all check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
2. **Restrictions;- Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.

Question 3.3 [maximum 5 marks] 3

As far as relief is concerned, briefly explain (with reference to relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI, as well as any restrictions, limitations or conditions that should be considered in this context. For purposes of this questions, it can be assumed that there is no concurrence of proceedings.

As far as relief is concerned, and assuming there are no concurrent proceedings, the Model Law deals with this subject in Articles 19 to 24 of the Model Law.

The Model Law provides for pre-recognition relief. Indeed, Interim relief, prior to a decision for recognition, but as soon as the application is made, can be granted on the basis of Article 19 of the Model Law. Interim relief is granted where it is urgently needed to protect the assets of the debtor or interests of the creditors.

Post- recognition, article 20 of the Model Law provides for automatic mandatory relief if the recognised proceedings are considered foreign main proceedings. The effects are threefold :

- A stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities,
- A stay of execution against the debtor's assets,
- A suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

Relief under article 20 does not affect the right to open domestic insolvency proceedings.

Article 21 provides for the Courts discretionary power to provide post-recognition relief, where appropriate, to protect the assets of a debtor or the interest of the creditors. This relief must not interfere with the administration of another insolvency proceeding (in particular foreign main proceedings). The relief granted by article 21 is not unlimited and can be illustrated by certain English cases where the court determined certain limits to appropriate relief. For example, it has been decided by the English courts that:

- the enforcement of an insolvency related *in personam* default judgment is not covered by the Model Law (Rubin v Eurofinance SA),
- Applying foreign insolvency law to an English law governed contract is outside of the scope of relief the English courts can grant based on article 21 of the Model Law (Pan Ocean Case and Gibbs Rule),
- That an indefinite continuation of an automatic moratorium granted by a precedent relief order cannot be granted (the IBA case).

Article 22 of the Model Law provides that when the court in the enacting State grants or denies relief on the basis of articles 19 and 21, it must be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected. It must « balance » the interests of all parties. The Court can therefore condition relief to certain conditions, and if the foreign representative or an affected party requests it, the Court in the enacting State can modify or terminate the relief.

Article 23 invests a foreign representative with the power to avoid antecedent transactions that are detrimental to creditors. Article 24 gives a foreign representative standing (*locus standi*) to intervene in local proceedings.

For full marks on this point, the following points should also have been addressed:

1. Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
2. Public policy exception: The court in State A should based on Article 6 of the Model Law also again verify that the relief application is not manifestly contrary to public policy of State A.

Marks awarded: 11 out of 15

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

Global Shipping Company (“GSC”) is a shipping company incorporated under the laws of the Cayman Islands,¹ but it was primarily operated from the UK.² GSC filed for local insolvency proceedings in the Cayman Islands and local liquidators were appointed. Approximately one year after the opening of the Cayman Island insolvency proceedings, in which the liquidators of GSC worked primarily out of the Cayman Islands to deal with the various aspects of the GSC liquidation, it is decided by the GSC liquidators to make a recognition application in Texas (USA)³ due to the fact that some assets of GSC are located there as well as some creditors of GSC.

Question 4.1 [maximum 6 marks] 4,5

For this question, assume that you are the US judge dealing with the application by the GSC liquidators, as foreign representatives, for the recognition of the Cayman liquidation proceedings of GSC as either foreign main or foreign non-main proceedings. Focusing only on the assessment of whether the foreign proceedings qualify as “main” or “non-main” proceedings, how would you go about determining whether the COMI or an establishment of GSC existed in the Cayman Islands at the relevant time?

If we focus solely on the qualification of main or non-main proceedings, it is necessary to establish whether the debtor company (GSC) in the present case has a simple establishment in the Cayman Islands or its centre of main interests (COMI), in accordance with article 17(2) of the Model Law.

Firstly, article 16 (3) of the Model Law lays down the presumption concerning recognition that “in the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interests”.

Therefore, seeing as in our case, the debtor company is incorporated in the Cayman Islands, the presumption would be that the COMI of the GSC is situated in the Cayman Islands. In this case, the foreign proceedings would have to be considered main proceedings.

However, the facts of the case tell us that the company has primarily operated from the UK. Therefore, there could be grounds to prove that the COMI of GSC is actually in the UK, and if proven so, the proceedings could be considered foreign non-main proceedings.

In order to determine whether GSC’s COMI is in the Cayman Islands at the date of the opening of the foreign proceedings, two key factors the Model Law are mentioned:

- The location where the central administration of the debtor takes place,
- Which is readily ascertainable as such by creditors of the debtor.

If the main business operated out of the UK, it could appear to creditors that the COMI of the debtor would be the UK, and if the main and primary place for administering the affairs of the debtor is in the UK, then the COMI of the debtor could be determined to be the UK, overthrowing the presumption at article 16(3) of the Model Law.

It would be important to check the location of the debtor’s accounts, where financing of the activity and investments was carried out or authorised, where the principal assets are found,

¹ Cayman Islands has not implemented the Model Law.

² The UK has implemented the Model Law and for the purpose of this question it should be assumed that the UK has implemented the Model Law without any relevant changes to it.

³ The US have implemented the Model Law and for the purpose of this question it should be assumed that the US have implemented the Model Law without any relevant changes to it.

the principal operations in the exercise of the debtor company's activity are found, the domiciliation of the bank account, where any employees may work etc.

If it is determined that the COMI is in the UK and the presumption of COMI at the place of the debtor's registered office is overturned, then the proceedings will not be foreign main proceedings. However, in order to be classed as foreign non-main proceedings, in concordance with article 17(2) b, it would be necessary to characterise an establishment in the Cayman Islands *a minima*. Indeed, if neither COMI nor an establishment is situated in the Cayman Islands, then the recognition application could not succeed.

In order to establish whether GSC has an establishment in the Cayman Islands, we need to look at the article 2(f) of the Model Law, that defines an establishment as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services". The case facts until the present question do not give enough information to determine if an establishment can be characterised. If so, then the proceedings opened in the Cayman Islands could be recognised as non-main proceedings. If not, they cannot be recognised on the basis of the Model Law.

For full marks on this question, the following points should have been addressed and clarified:

1. **Appropriate Date for Determining COMI or Establishment:** While generally the date of commencement of the foreign proceedings is held to be the appropriate date for determining the debtor's COMI or the existence of an establishment, the US court may take a slightly different approach based on the *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals April 16, 2013) (which was recently followed in the UK in *Re Toisa Limited* – see footnote 88 on page 25 of the Guidance Text). The US court will most likely consider the date of the recognition application pursuant to the US Chapter 15 as the appropriate date for determining the COMI or the existence of an establishment.
2. **Conclusion:** The fact that the GSC liquidators have worked on the liquidation for one year primarily out of Cayman Islands should in any case be sufficient for the US court to determine that at the very least there is an establishment of GSC in the Cayman Island. Therefore, the US court should have no hesitation to recognise the Cayman Island liquidation proceedings of GSC as foreign non-main proceedings and possibly even as foreign main proceedings.

Additional facts for question 4.2:

GSC has so-called “representative offices” in Brazil and Nigeria,⁴ but these offices are mainly “letter boxes” and there are no employees. GSC does have a “proper” UK office where 20 employees work. Everything in the representative offices is done remotely, primarily from either the Cayman Islands or the UK office. GSC has both operations and assets in the US and the UK. GSC further has bank accounts with local banks in the US, the UK, Brazil and Nigeria, but its global operations are primarily financed by a number of bilateral loans in US\$ by a small number of local Cayman Islands banks, with whom GSC is very close. The total amount of GSC’s bank debt is US\$50m. In addition, GSC recently managed – through the savvy assistance of a well-connected Swiss banker – to issue private placement notes (PPNs) for a total amount of US\$10m to three sophisticated Swiss private investors. The Swiss investors insisted that the PPNs were governed by English law.

Question 4.2 [maximum 3 marks] 3

The GSC liquidators manage to open local insolvency proceeding in Nigeria; would those local Nigerian insolvency proceedings be recognised in the US as foreign non-main proceedings? If a recognition application under Chapter 15 is made before the US court in Texas, how likely is it that the requested recognition will be granted?

Chapter 15 is the U.S. domestic adoption of the Model Law on Cross-Border Insolvency.

In the facts given in the case, it is stated that GSC has a representative office in Nigeria, but the office is mainly a “letterbox” office with no employees. Everything done in this office is done remotely. There is a local bank account in Nigeria.

The definition of an establishment can be found in article 2(f) of the Model Law, that defines an establishment as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”.

When we confront the case facts to this definition, it seems very unlikely that the foreign proceedings in Nigeria could be recognised as foreign non-main proceedings, because it does not seem that an establishment in terms of the article 2(f) of the Model law is characterised. Indeed, there doesn’t seem to be a non-transitory economic activity with human means and goods or services in Nigeria.

To be sure, the jurisprudence relating to the term COMI and establishment and the Virgos-Schmit Report could be relevant.

Additional facts for question 4.3:

To facilitate reaching a restructuring agreement, the GSC liquidators decide to open US Chapter 11 proceedings. There they manage to reach a restructuring agreement with all the creditors, apart from the three Swiss holders of the PPNs who decided to completely refrain from participating at all in the US Chapter 11 proceedings of GSC. Since the restructuring agreement met the required thresholds of creditor support it was – according to US law – binding on all creditors of GSC, including the non-participating Swiss PPN holders. The reason the Swiss PPN holders did not participate in the US Chapter 11 proceedings of GSC, was that they would like to enforce their rights against GSC under English law and obtain full repayment

⁴ Brazil and Nigeria have not implemented the Model Law.

of their claims under the PPNs instead of the compromise reached under the US restructuring agreement of GSC. They are hopeful that the so-called “Gibbs Rule” under English law⁵ will help them in this respect.

Question 4.3 [maximum 6 marks] 5

What can the Cayman Islands liquidators do to avoid that the assets of GSC in the UK are available to the Swiss PPN holders and what do you expect the considerations of an English court to be if the liquidators decided to request a recognition of the US Chapter 11 proceedings in the UK together with such appropriate relief under the Model Law as implemented in the UK which – in effect – prevents the Swiss PPN holders from enforcing their English law claims against GSC under the PPNs?

The Cayman Islands liquidators could try and obtain pre-recognition relief based on article 19 of the Model Law. Indeed, interim relief, prior to a decision for recognition, can be granted as soon as the application for recognition is made. Interim relief is granted where it is urgently needed to protect the assets of the debtor or interests of the creditors.

Another option could be to analyse whether local insolvency proceedings in the UK could be opened that would prevent the creditors, this time under English law, from enforcing their claims against GSC.

If the liquidators (foreign representatives) file for recognition of the US Chapter 11 proceedings (foreign proceedings), together with appropriate relief under the Model Law which in effect prevents the Swiss PPN holders from enforcing their English law claims against GSC under the PPNs, the English Court would probably reason in a similar way to Mr Justice Hildyard in the “IBA Case”.

Indeed, in this case, a foreign representative requested appropriate relief under article 21 of the Model Law before the English court in the form of an indefinite continuation of an automatic moratorium that resulted from an earlier recognition order.

In short, the aim of the foreign representative was to effectively impose a reorganisation plan adopted by a Foreign State, that in that State was legally binding on all creditors. However, certain creditors that had unpaid claims under debt instruments governed by English law who had not submitted to the foreign insolvency proceedings, claimed that the Gibbs Rule applied, and that therefore a debt, governed by English law, cannot be discharged, or compromised by a foreign insolvency proceeding.

It was considered that the Model Law is not a gateway to impose foreign insolvency laws or give them priority over English contract laws. It is neither one of the “aims” or the “philosophy” of the Model Law to give this effect, and it must be considered that if this was the case, the Model Law might not be adopted and used as much as it is presently, as this would not contribute to security for creditors.

In the Pan Ocean case, that can also be quoted, the notion of using procedural advantages of the Model law in order to achieve substantive effect was also discussed. One of the conclusions drawn in this case decision was that the Model Law does not empower the Court to change substantive rights of creditors. Indeed, it is important equally to consider the articles

⁵ The Gibbs rule is derived from an English case of 1890 and stands for the proposition that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. Discharge of a debt under the insolvency law of a foreign country is only treated as a discharge therefrom in England if it is a discharge under the law applicable to the contract.

figuring in the Model Law on protecting creditors rights and balancing interests of parties (notably article 22 of the Model Law).

Marks awarded: 12,5 out of 15

*** End of Assessment ***

Total marks awarded: 38,5 out of 50