INSOL INTERNATIONAL
FOUNDATION
CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) 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.

D is the correct answer

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.

A is the correct answer

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.

D is the correct answer

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.

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).

C is the correct answer

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.

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

Question 2.1 [maximum 3 marks] 3

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.

The element *authorised or conducted under a law relation to insolvency* was addressed in the UNCITRAL Guide to Enactment. As per the notes on the purpose of this element, it was identified that a sufficiently broad and encompassing definition was needed. Further in the UNICTRAL-Judicial Perspective, it was clarified that the definition would be irrespective of the type of statue or law and it is not necessary that the law in question is exclusively related to insolvency. An interpretation of this element, was down in the case of *Sturgeon Central Asia Balanced Fund Ltd [2019] EWHC 1215 (Ch),* where the question of whether a *foreign solvent winding up proceeding of a debtor on just and equitable grounds* would meet this criteria and could be interpreted as a 'foreign proceeding' was raised and ruled on. The English Court, in this decision held that winding up proceedings against foreign solvent debtors would *prima facie* qualify as foreign proceedings for the purposes of Section 2(a), in the first instance. On

a review application, the English Court, delved into the point of whether the interpretation met the 'just and equitable' criteria and held that the interpretation to include solvent debtors and winding up proceedings are subject to law relating to insolvency that have the purpose of returns to members of the body corporate and not the creditors and that such an interpretation would be contrary to the purpose of the MLCBI. Moreover, the purpose of Section 2(a) should be read as *the purpose of insolvency (liquidation) or severe financial distress (reorganisation).*

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*"

1. Statement 1 as a concept is contained in Article 6 of the MLCBI. The provision identified as the *public policy exception* empathizes that the MLCBI does not place restrictions or is in prejudice to the sovereignty of the enacting state. At the same time, the provision uses the term *manifestly* that requires a restrictive interpretation and application, subject to the discretion of the courts of the enacting State.
2. Statement 2 is in relation to the principle of the 'center of main interests' of a debtor which is not defined under the MLCBI but determines the consequences of the recognition of foreign proceedings. This also determines the concepts of "main" and "non-main" (secondary) proceedings against a single debtor.

Art 16(3) is the correct answer.

3. Statement 3 as a concept is contained in Article 31 of the MLCBI. The article comes into question primarily for the purposes of opening a domestic insolvency proceeding for the debtor in the enacting State. The rebuttable presumption contained in this provision is that the recognition of a foreign main proceeding is proof that the debtor is insolvent.

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**.

In relation to the COMI, as set out in the UNICTRAL-Judicial Perspective, in the EIR, the determination of COMI relates to commencement of main proceedings and the question of jurisdiction is about determining the main proceeding state / jurisdiction. In the MLCBI, the COMI determination relations to the effects of recognition of foreign proceedings and the relief that is available to assist the proceeding. Moreover, it could be argued that the COMI rule under the EIR is a wider definition give that the definition also takes into question concepts of administration, central administration and head office in relation to determining the COMI as set out discussed in the case of *Interedil Srl v. Fallimento Interedil Srl (Case C-396/09)* [2012]

Bus LR 1582, *Re Videology Limited* [2018] EWHC 2186 (Ch) and *Re Eurofood IFSC Ltd (Case C-341/04)* [2006] Ch 508

Question 2.4 [2 marks] 1

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.

Upon recognition of a foreign proceeding Article 21(1) of the MLCBI grants courts with discretionary powers to grant appropriate relief. Under Article 30(c), in the event of two concurrent foreign non-main proceedings, i.e., when no prior foreign main proceeding has been established, the court must grant, modify or terminate relief for the purposes of facilitation the coordination of the proceedings. The MLCBI does not contain a specific preference provisions between concurrent foreign non-main proceedings.

The MLCBI provides access rights to foreign representatives to communicate with courts which is further facilitated by recognition of the foreign proceedings which allow the court to provide the foreign representative with appropriate and more tailor made relief to promote optimal results. The mandatory cooperation provision is contained in Article 25 read with Article 27, which lists the means for cooperation.

For full remarks, the following should have been addressed:

- Article 18 of the Model Law (Subsequent Information) – The foreign representative has an ongoing information duty towards the court in the enacting State about (a) substantial changes to the status of the recognized foreign proceeding or the status of the foreign representative's appointment and (ii) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Marks awarded: 8 out of 10

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

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] 3

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

At the outset, it is significant to understand one of the key purposes of the MLCBI – to facilitate value creation, increase transparency in proceedings involving multiple jurisdictions and assets with time and cost savings. To enable this also requires a facilitator with the necessary access, communication and coordination with *locus standi* as is contained in Articles 9, 11 and 12 of the MLCBI. While the foreign representative is not automatically vested with rights or powers, the access and coordination rights are based on the need for recognition of a proceeding.

The role of a foreign representative with right to access, coordination and relief is to allow the foreign representative to seek *breathing space* and also the courts in this case State A, to determine whether the coordination among jurisdictions or other relief can be granted for optimal case resolution as explained in the UNCITRAL Guide to Enactment.

While Article 9 and 11 delve into situations of direct access where no prior recognition proceedings are required, for the present case, Article 12 raises the question of when recognition is required. The foreign representative has the standing (locus standi) to make petitions, requests or submissions concerning issues such as the protection, realisation or distribution of assets or cooperation with the proceeding.

Thus, in the present instance, the foreign representative can rely on the aforesaid principles to evaluate the scope of the initiating the recognition proceedings in State A.

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

- Cooperation: Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.

Question 3.2 [maximum 6 marks] 2,5

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.

As identified in the UNCITRAL Guide to Enactment, both the definitions of a foreign proceeding and a foreign representative are illustrative and list characteristics while limiting the scope of the application of the MLCBI. Section 2(a) of the MLCBI defines a foreign proceeding to mean *a proceeding (including an interim proceeding), that is either judicial or administrative, collective in nature, in a foreign state authorised or conducting under a law relating to the insolvency in which the assets and affairs of the corporate debtor are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation.*

A foreign representative is a *person or a body, including on appointed on an interim basis authorised in a foreign proceeding to administer the reorgansiation or liquidation of the debtors assets or affairs or act as a representative of the foreign proceeding.* The MLCBI does not specify that the foreign representative must be authorised by a foreign court (in this case State A)

For a recognition application to be successful reciprocity is not a barrier – it is important that the foreign proceeding and the foreign representative meet the criteria set out above and (i) the public policy exception under Article 6 has not been violated with (ii) the determination of the fact that the centre of main interests is in the state in which the foreign proceedings are opened – i.e. the determination of a foreign main proceedings. In the instant case as well, the court of State A will have to determine the existence of assets and establishment to recognise the proceedings – in the absence of which the application of recognition will be denied.

For full remark, these points should have been discussed:

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.
3. Sufficient evidence: Article 15 of the Model Law sets forth in paragraph 2 what evidence in respect of the commencement of the foreign proceedings and the appointment of the foreign representative must accompany the recognition application. A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must also accompany the recognition application (Article 15(3) of the Model Law).
4. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.

Question 3.3 [maximum 5 marks] 2

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.

Article 19-24 of the MLCBI provision for powers of a court to grant relief pre and post a recognition application – in the present instance the case of the State A insolvency court. Article 19 provides for interim relief upon the recognition of a foreign proceeding application and article 21 provides for post recognition relief. Article 20 lists a circumstance where automatic mandatory relief can be provided and the court must be satisfied on grounds of adequate protection of the assets. Powers of the foreign representative pre and post recognition are also different vis a vis limits.

Some post recognition reliefs (Article 21 read with Article 20) could be: (i) staying the commencement or continuation of individual actions or proceedings concerning the debtors assets, rights, obligations or liability, (ii) staying the execution against the debtors assets, (iii) suspending the right to transfer, encumber or dispose assets of the debtor, (iv)providing the examination of witnesses or the delivery of information concerning the assets, affairs, rights, obligations or liabilities, (v) interim reliefs under Article 19 prior to recognition such as entrusting the administration or realisation of debtors assets (all or in part) to the foreign representative.

MLCBI places restrictions on relief and a determination of what is *appropriate relief* in issues of moratorium, governing and applicable law to name a few. Cases of *Rubin v. Eurofinance SA, Fibria Celulose S/A v. Pan Ocean Co and the application of the Gibbs Rule* provide for some such limitations.

For full remarks, the following points should also have been addressed:

1. Adequate protection: Pursuant to Article 22 of the Model Law any interim relief under Article 19 of he Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
2. 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.
3. 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: 7,5 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] 3

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?

To answer this question, we need to first start with the definition of a foreign main proceeding which includes the term *centre of main interest* (COMI). While COMI is not specifically defined under the MLCBI, for the determination of a foreign non-main proceeding the determination of *establishment.* Supplemented by the definitional interpretation in the jurisprudence developed under the European Insolvency Regulation and the Virigos-Schmit Report, term establishment means *any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.* The determination of a *main* proceeding is also related to the nature of relief to a foreign representative and recognition of the proceedings.

For the present instance, a determination of the COMI as set out in the UNCITRAL Guide to Enactment is the *location where the central administration of the debtor takes place and which is readily ascertainable as such by the creditors of the debtor.* The circumstances to determine where the COMI lies would require a test of certain factors such as the location (i) of the books and records of the debtor, (ii) where financing was organised or authorised, (iii) where the

[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.

cash management system was run, (iv) which the debtors principal assets or operations are found, (v) debtors primary bank, (vi) location of employees, (vii), commercial policy, (viii) law governing contracts and jurisdiction, (ix) from which contracts of supply were organised to name of few.

For the present instance, the fact of GSC and its laws of incorporation becomes relevant and will determine whether COMI or an establishment existed in Cayman Islands.

For full remarks, the following shoud have been addressed:

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. Application of Facts: At the date of the commencement of the Cayman Island liquidation proceedings for GSC the presumption that GSC's COMI was in the Cayman Islands because its registered office was there could probably be rebutted because the facts also state that GSC was primarily operated from the UK. However, is that still the case at the time the recognition application is made before the US court in Texas after the GSC liquidators have worked primarily out of the Cayman Islands for one year dealing with all aspects of the liquidation? In other words, has after that one year following the opening of the liquidation proceedings the COMI of GSC shifted (back) to the Cayman Islands? Or, said another way, after one year in the liquidation proceedings, the presumption of article 16(3) of the MLCBI can no longer be rebutted, and therefore the COMI of the debtor is in the Cayman Islands?
3. 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 GCS 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.

[4] Brazil and Nigeria have not implemented the Model Law.

Question 4.2 [maximum 3 marks] 0

The GSC liquidators manage to opening 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?

In the context of opening of proceedings in Nigeria, the case of *Morning Mist Holdings Ltd v. Krys become relevant to determination of the debtors COMI.* The court in this case held that "*.. a debtors COMI should be determine based on the activities at or around the time the Chapter 15 petition is fined, as the statutory text suggests. But given the EIR and other international interpretations which focus on the regularity and ascertainably of the debtor's COI, a court may consider the period between the commencement of the foreign proceeding and the finling of a Chapter 15 petition to ensure that the debtor has not manipulated its COMI in bad faith….. any relevant activities including liquidation activities and administrative functions may be considered for COMI analysis."* This case was relied on in the UK in *Re Toisa Limited.*

Given the purpose of the proceedings is effective administration, the US courts should likely accept the recognition of proceedings.

The correct answer relies on the definition on Establishment, since the questions asks whether it can be recognised as a foreign *non*-main proceeding.

Additional facts for question 4.3: 2

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 11proceedings of GSC, was that they would like to enforce their rights against GSC under English law and obtain full repayment 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 law[5] will help them in this respect.

Question 4.3 [maximum 6 marks] 2

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 Model Law on Insolvency Related Judgments has relevance in relation to answering the question of enforcement.

[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.

In principle, the Gibbs Rule does not apply if the relevant creditor submits to the foreign insolvency proceeding, the rationale being that the creditor will be taken to have accepted that the law governing the foreign insolvency proceeding should determine the contractual rights that a creditor has elected to claim in that proceeding as set out in the case of *oJSC International Bank of Azerbaijan and the CBIR 2006 – Bakshiyeva v. Sberbank of Russia (IBA Case).* As an outcome of this case, instead of new proceedings, a parallel scheme of arrangement would be a better option and create less creditor class issues.

For full remarks, the answer should have disccussed the following points:

1. The US Chapter 11 proceedings may be recognised as foreign non-main proceedings in the UK: As the UK has implemented the MLCBI, the Cayman Islands liquidators could apply for recognition of the US Chapter 11 proceedings of GSC as foreign non-main proceedings. Based on the facts provided for Question 4 the COMI of GSC seems to be either in the Cayman Islands or in the UK so recognition as foreign main proceedings seems not possible (article17(2)(a) *juncto* article 16(3) of the MLCBI). The key question will be whether the operations that were conducted by GSC out of the US together with the existence of assets in the US and a US bank account would be sufficient to qualify as an establishment (as defined in article 2(f) of the MLCBI). Assuming it does, then recognition as a foreign non-main proceeding by the English court would be appropriate (provided all the other relevant requirements were met as well)
2. Available post-recognition discretionary relief: Following recognition, the Cayman Islands liquidators could – based on article 21(2) of the MLCBI – request the relevant UK court to entrust the distribution of GSC's assets located in the UK to them as the foreign representative so that these assets could be transferred to the US (or the Cayman Islands) and form part of the insolvency estate there. This, however, may be more difficult to argue if the UK court would determine the COMI of GSC to be in the UK, rather than in the Cayman Islands.
3. Adequate protection test of article 22 of the MLCBI: In the context of granting discretionary post-recognition relief under article 21 of the MLCBI, the UK court must be satisfied that the interests of creditors in the UK are adequately protected. The UK court may be hesitant to conclude that the English law interests of the three Swiss PPN holders are adequately protected if this type of relief is granted to the Cayman Islands liquidators.
4. The guidance from the IBA Case and the IBA Case Appeal: The fact pattern in Question 4 is similar to that in the *IBA* case [2018] EWCH 59 (Ch) and the *IBA* case appeal [2018] EWCA Civ 2802. In the *IBA* case an application was made by the Azeri foreign representative for an indefinite continuation of the automatic moratorium based on Article 20 of the Model Law that followed an earlier recognition order based on Article 17(2)(a) of the Model Law in which the Azeri insolvency proceedings were recognised as foreign main proceedings. Both Justice Hildyard in his decision of 18 January 2018 and the English court of appeal (CoA) in its decision of 18 December 2018 denied the request for the so-called "Moratorium Continuation Application". In the present case, if the Cayman Islands liquidators would be granted a moratorium based on article 21(1)(a) of the MLCBI, once the restructuring agreement has become final and binding on all GSC creditors in the US Chapter 11 proceedings, an UK court may hold that – as a matter of substance - the original purpose of the US Chapter 11 proceedings of GSC was achieved and the insolvency has run its course.
5. An indefinite moratorium is unlikely to be an appropriate relief the UK court will be prepared to grant: Assuming that the Cayman Islands liquidators would – in effect – also request an indefinite moratorium so as to avoid that the Swiss holders of the PPNs can exercise their English law rights under the PPNs, the real issue will be whether as a matter of settled practice the UK court should not exercise its power to grant the

indefinite moratorium where to do so would (i) in substance prevent the Swiss holders of the PPNs from enforcing their English law rights in accordance with the Gibbs Rule ("Issue 1") and / or (ii) prolong the stay after the Columbian insolvency proceedings have come to an end ("Issue 2").

- Issue 1: The UK court would need to be convinced that (a) the indefinite stay is necessary to protect the interests of the GSC creditors and (b) an indefinite stay is the appropriate way of achieving such protection. The factual evidence that can be brought before the court will ultimately decide Issue 1.
- Issue 2: Based on Article 18 of the Model Law, the CoA in the IBA case appeal held that had the Model Law ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

6. Pursue an English Scheme of Arrangement in or outside of UK insolvency proceedings: An alternative to pursuing recognition and relief under the MLCBI as implemented in the UK would be to commence a so-called Scheme of Arrangement in the UK alongside the US restructuring plan in the US Chapter 11 proceedings of GSC. In particular the so-called "Super Scheme" under the newly adopted Corporate Insolvency and Governance Act 2020 (CIGA) would allow for cross-class cram down in case the PPN holders would constitute a separate class and vote against the restructuring plan proposed by the Super Scheme. This Super Scheme could be pursued as part of a UK insolvency proceedings, such as an administration proceeding, or on its own outside of any UK insolvency proceeding.

Marks awarded: 5 out of 15

*** End of Assessment ***

Total marks awarded: 25,5 out of 50