



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 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.

The correct answer is D

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.

The correct answer is D

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.

The correct answer is C

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.

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: 7 out of 10

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.

It is unlikely that foreign winding-up proceedings of a solvent debtor will meet the requirement of being proceedings authorised or conducted under an insolvency related law. In a review application before the English court in the matter of *Sturgeon Central Asia Balance Fund Ltd* [2020] EWHC 123 (Ch), the court overturned the decision of the court of first instance which it held that the foreign winding-up of a solvent debtor would meet the aforesaid threshold. The court determining the review application stated that including solvent debtors, specifically actions aimed at procuring a return for members and not creditors, would be contrary to the stated purposed and object of the MLCBI.

Question 2.2 [maximum 3 marks] 3

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”*

The first statement relates to the public policy exception. Article 6 of the MLCBI determines that a court may refuse to take any action governed by the MLCBI if such action would be “manifestly contrary” to the public policy of the state in which the court operates.

The second statement is believed to relate to article 16(3) of the MLCBI, which determines that there is a rebuttable presumption that a debtor’s COMI coincides with its registered office or, in the case of a natural person, habitual place of residence. The MLCBI does not define the concept of COMI. The aforesaid article gives a measure of guidance on determining where a debtor’s COMI is situated.

The third statement relates to the rebuttable presumption created in article 31 of the MLCBI that recognition of a foreign main proceedings serves as proof of the debtor’s insolvency for the purpose of commencing proceedings in the enacting State.

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.**

The concepts of COMI in the European Insolvency Regulation (EIR) and the MLCBI are similar in that in determining a debtor’s COMI the location where the debtor’s central administration takes place which is readily ascertainable by its creditors will be a paramount consideration. The determination of a debtor’s COMI, in the context of the EIR, assists in determining in which jurisdiction main proceedings should be opened. With regard to the MLCBI, The Judicial Perspective of the MLCBI states that the COMI of a debtor has an effect on recognition and the relief available to assist foreign proceedings.

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.

Foreign non-main proceedings refer to foreign proceedings in a state where a debtor has an establishment, and which proceedings have been recognised by the enacting State. Where multiple foreign non-main proceedings are recognised by the enacting State (i.e. concurrent foreign non-main proceedings), none of the proceedings will be treated preferentially. The court of the enacting State will, in terms of Article 30(c) of the MLCBI be obliged to grant, modify or terminate relief for purposes of facilitating the co-ordination of the foreign non-main proceedings.

For full mark on this question, you should also discuss the duty to inform as regulated in Art. 18.

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] 1,5

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 rights provide foreign representatives and creditors with access to the courts of the enacting State. Such a representative is, by virtue of these rights, able to apply for the necessary relief to obtain some breathing space in the administration of the estate through the appropriate relief. Co-ordination rights allow the courts of the enacting State to determine the necessary co-ordination between jurisdictions or other necessary relief required to ensure that the insolvent estate is administered effectively to provide the best possible outcome for interested parties.

For full marks on this question, you should explain more detailed and address the following:

- Legal standing (Article 9 MLCBI): The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatically standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the “status” in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.
- Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other

words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?

- 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.
- Save Time & Costs: The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.

Question 3.2 [maximum 6 marks] 3

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.

Foreign proceedings, as defined in article 2 of the MLCBI, are characterised as being judicial or administrative proceedings, collective in nature, conducted pursuant to a law relating to insolvency in a foreign State by virtue of which proceedings the assets and affairs of a debtor is subject to the supervision of a foreign court for purposes of reorganisation of liquidation. This includes both final and interim proceedings.

A foreign representative, as defined in article 2 of the MLCBI, is a person or body, appointed on a final or interim basis, with the authority to administer the reorganisation or liquidation of a debtor’s assets or affairs in a foreign proceeding or to act as a representative in the foreign proceeding. It bears mentioning that the MLCBI does not require that a foreign representative be so authorised by a court specifically.

In order for a foreign proceeding to be recognised under the MLCBI, such a proceeding must have been opened in the jurisdiction where the debtor’s centre of main interest (COMI) is located, and the debtor must have an establishment in the enacting State.

Article 3 of the MLCBI deals with instances of conflict between the MLCBI and other international obligations. If the enacting State is a party to a treaty or international multi-State agreement which conflicts with the provisions of the enacted Model Law, the provisions of the treaty or agreement will prevail. The Model Law further determines, in article 6, that the courts of the enacting State may refuse to take any action governed by the MLCBI if such action would be “manifestly contrary” to the public policy of that State. Determining whether an action is manifestly contrary to a state’s public policy will have to be determined by the relevant court on a case-by-case basis.

For full marks on this question, you should also address the following points:

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. 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).

3. 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] 2,5

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.

The MLCBI deals with both the relief which a foreign representative can request pre-recognition (article 19) and post-recognition (article 21).

Interim collective relief granted urgently prior to the recognition of foreign proceedings can be requested by the foreign representative for purposes of protecting the assets of the debtor of the interests of creditors. Relief which can be considered or requested in such instances include a stay of execution against a debtor's assets and/or that the administration or realisation of a debtor's assets located within the enacting State be entrusted to the foreign representative or a person designated by the court. The purpose of the latter is to ensure that assets which are, by their nature of due to other circumstances, perishable, susceptible to devaluation or in jeopardy are protected and preserved. Further examples of pre-recognition relief which may be requested include suspending rights to transfer, encumber or dispose of the debtor's assets, making provision for the examination of witnesses and taking of evidence or delivery of information regarding the debtor's assets, affairs, rights and responsibilities and any other relief which would be available to a domestic representative in the enacting State.

Post-recognition of foreign proceedings, the courts of the enacting State have a discretionary power to grant the appropriate relief upon request of the foreign representative to ensure the protection of the debtor's assets and creditor's interests. This includes staying the commencement or continuation of individual actions against the debtor, staying execution against the debtor's assets and suspending the right to transfer encumber or dispose of any assets which are not automatically stayed. Further, post-recognition relief may make provision for the examination of witnesses and taking of evidence or delivery of information regarding the debtor's assets, affairs, rights and responsibilities, extending any pre-recognition relief granted by a court and any other relief which would be available to a domestic representative in the enacting State.

The relief which can be granted under the Model Law is not without its limitations. These limitations will differ between jurisdictions. The English courts have, for example, confirmed that the enforcement of an insolvency related default judgment *in personam* does not fall within the ambit of the Model Law. The English courts further determined that it could not grant relief in terms of which foreign insolvency law is applied to contracts governed by English law and

that it could not grant an indefinite continuation of the automatic moratorium resulting from a recognition order.

For full marks on this question, you should also briefly discuss the following points:

1. Adequate protection: Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the 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.

Awarded marks: 7 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?

Foreign proceedings initiated in a jurisdiction where a debtor’s COMI is situated will be regarded as foreign main proceedings whereas proceedings in jurisdictions where a debtor only has an establishment will be regarded as foreign non-main proceedings.

The concept of a debtor’s COMI is not defined in the MLCBI. The courts have held that the existence of a debtor’s COMI must be determined by considering objective factors which are easily ascertainable by third parties. This may include the presence of human resources, assets, liabilities, and operations within the jurisdiction. The MLCBI contains a rebuttable presumption that a debtor’s COMI coincides with the location of its registered office or his/her place of residence (article 16(3)). It must be noted that the mere presence of assets in a jurisdiction will not be sufficient to establish COMI.

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 MLCBI defines an establishment (article 2(f)) as a place of operations where a debtor carries out lasting economic activity with human means, goods and services.

GSC is incorporated under the laws of the Cayman Islands. It is thus presumed that it would have a registered office in this jurisdiction and, absent evidence to the contrary, there is a presumption that GSC's COMI is within the same jurisdiction as its registered office (article 16(3) of the Model Law) and, as such, GSC's COMI would be presumed to be in the Cayman Islands. The facts provided specifically state that GSC was predominantly operated from the UK. If GSC was merely incorporated in the Cayman Islands, but did not have a combination of substantial operations, human resources, and/or assets or liabilities within the jurisdiction, the registered office presumption may be rebutted.

For full marks on this question, you should provide more details on the application of facts of the case and discuss the following:

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.

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.

Question 4.2 [maximum 3 marks] 3

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 order for the Nigerian proceedings to be recognised as foreign non-main proceedings, the US courts must be satisfied that GSC has an establishment, i.e. a place of operations where a debtor carries out lasting economic activity with human means, goods and services, in Nigeria. At most, the Nigerian proceedings could be recognised as such.

⁴ Brazil and Nigeria have not implemented the Model Law.

From the facts available, GSC conducted its operations in Nigeria remotely through either the UK or the Cayman Islands offices. The Nigerian office was merely a “letter box” rather than an actual representative office where service or goods were provided through by way of human resources. Although GSC holds a bank account in Nigeria, its operations are financed by way of loans in the US and private placement notes issued by private Swiss investors.

Based on the facts available, the writer believes that adequate evidence does not exist to prove that GSC had an establishment in Nigeria and, as such, the recognition application will not be granted.

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 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] 4,5

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?

To prevent the Swiss creditors from executing against the UK assets of GSC or instituting or pursuing legal action which may result in an order against these assets, the liquidators should, firstly, apply for the recognition of the US proceedings in the UK. The recognition will trigger an automatic moratorium against execution against GSC’s UK assets as well as any litigation against it. To the extent that any execution or legal proceedings are not covered by the automatic moratorium, the liquidators may specifically apply for a stay thereof. If necessary, and should the Swiss creditors take any steps warranting same, the liquidators may apply for such a stay prior to the granting of the recognition order. As will be discussed more when addressing further aspects of the matter hereinbelow, it is recommended that the liquidators also apply for the opening of a parallel scheme of arrangement in the UK.

The English courts were confronted with a similar scenario in a matter involving the restructuring of the OSJC International Bank of Azerbaijan (“the IBA case”). In this matter, the liquidators of the aforesaid bank sought to an indefinite continuation of the automatic moratorium which resulted from the recognition of the foreign proceedings in order to circumvent the effects of the Gibbs Rule in respect of claims of two creditors of the bank.

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.

The court of first instance held that it was unable to grant the relief requested as the MLCBI does not allow it to vary or discharge substantive rights held by creditors under English law through procedural relief that would, effectively, conform those rights with the rights the creditors would have under the applicable foreign insolvency law. The court further remarked that the liquidators were at liberty to apply to open parallel restructuring proceedings in the UK, which would have enabled them to deal with the creditors' claims thereunder but failed to do so.

On appeal, the English Court of Appeal upheld the decision of the court of first instance and found that granting the requested relief would prevent English creditors from exercising their rights under English law in accordance with the Gibbs Rule and would prolong the moratorium after the conclusion of the foreign proceedings. With regard to the latter, the appeal court remarked that once the foreign proceedings have come to an end, there is no longer scope for orders supporting the proceedings to continue and/or be made. It is notable that the appeal court also referred to the fact that the foreign representatives could have applied to open parallel restructuring proceedings in the UK to enable them to deal appropriately with the creditors' claims thereunder. The MLCBI does not, according to the appeal court, intend that one would be able to override the substantive rights of creditors under the applicable laws governing their debts by virtue thereof.

Should the Cayman Island liquidators apply to the English courts for recognition of the proceedings and relief enabling them to deal with the Swiss creditors' claims, the courts would consider whether the relief requested would impede on the creditors' rights in terms of the English law and whether the appropriate relief had been requested. It is submitted that the liquidators, should they approach the English courts, should request that parallel scheme of arrangement be opened in the UK. This would enable the liquidators to have a restructuring plan approved and implemented despite the objections of certain classes of creditors (such as the Swiss creditors).

To receive full marks on this question, you should discuss in more detail if the US proceeding can be recognised, and if so how, and also the condition on adequate protection in Art. 22

Marks awarded: 12 out of 15

*** End of Assessment ***

Total marks awarded: 35 out of 50