



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.

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.

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.

The correct answer is A

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.

The correct answer is B

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.

A foreign proceeding, with relation to a solvent entity that is being wound up on just and equitable grounds is unlikely to meet the element under the Model Law. Firstly, the Guide to Enactment and Interpretation of the Model Law specifically indicates that the terms of ‘law relating to insolvency’ has been used in the Model Law to ensure that the Model Law can be applied in circumstances where a debtor is in severe financial distress, or is insolvent.¹ It is unlikely that any company seeking to be wound up on just and equitable grounds falls within

¹ UNICTRAL Model Law Guide to Enactment pg 41 paragraph 73

the definition of financial distress or insolvency, or under relevant law, rather it is more likely because of other issues within the Company. This position was confirmed in English proceedings, where the court held that it would be contrary to the stated purpose and object of the Model Law to interpret foreign proceedings to include matters involving solvent debtors. On this basis, foreign solvent winding-up proceedings on just and equitable grounds is unlikely to meet the element of authorised or conducted under a law relating to insolvency.

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”*

Statement 1: The Public Policy Exception provided by Article 6 of the Model Law.

Statement 2: Recognition Decision relating to the COMI as set out in Article 17 of the Model Law.

The correct answer is Art. 16(3)

Statement 3: The Presumption of Insolvency as provided by Article 31 of the Model Law.

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.**

COMI under the EIR, the COMI determined the jurisdiction for the commencement of insolvency proceedings, while under the model law it determines only the consequences of recognition of a foreign proceeding. Essentially, the EIR provides for the COMI being the main determining factor for selecting the most appropriate forum for any insolvency proceedings, whereas under the Model Law, the COMI will be used to determine the concept of the whether or not multiple proceedings could be construed as being a foreign main or non-main proceeding. Thus, the EIR views the COMI as being a preliminary issue, rather than under the Model Law, where COMI may in fact be relevant where there is a multiplicity of proceedings.²

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.

² <http://www.uncitral.org/pdf/english/news/EleventhJC.pdf>

The most relevant article is Article 30(c), which provides that where there are two concurrent non-main proceedings, the court must either grant, modify or terminate such relief for the purpose of facilitating the co-ordination of these various proceedings. It is important to note that where there are 2 non-proceedings are on foot, the MLCBI does not provide for any form of preferential treatment of either proceeding.

For full remarks on this question, you should also address the duty to inform 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] 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?

The access rights provided to a the foreign representative under article 9 of the MLCBI can provide significant saving to both the costs of the representative and also provide significant streamlining of the recognition process given that the MLCBI gives direct access to the Courts in State A, as well as allowing the representative to commence domestic proceedings within State A, as long as they can demonstrate that the proceeding would otherwise meet the domestic requirements for insolvency proceedings. Further, the rights granted in terms of relief can provide immediate assistance to the foreign representative based on their direct access where appropriate applications are made (Article 19).

Articles 25-27 provides significant guidance and procedural directions and information to assist with the co-operation between the Courts of State A and the foreign representatives or foreign courts, which can assist when the parties are dealing with multiple proceedings, and to ensure that fair treatment and equal outcomes are provided to stakeholders across multiple jurisdictions and proceedings. Ultimately, this provides optimal results and consistent outcomes to all involved in the process.

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.

The minimum requirements for qualifying as a foreign proceeding as set out in Article 2(a) of the MLCBI are as follows:

- The proceeding must be in a foreign State and be either authorised or conducted under a law related to insolvency;
- The proceedings must be collective in their nature;
- The proceedings must be subject to the supervision or control of a foreign court (which means that the assets of the debtor are also subject to that jurisdiction); and
- The proceeding must be for the purpose of liquidation or reorganisation.

The minimum requirements for recognition as foreign representative as set out in article 2(d) of the MLCBI are as follows:

- The person (or body) needs to be an appointed and recognised person or body that is duly authorised within the foreign proceedings; and
- The authorisation of that person or body is to either administer the liquidation or reorganisation of the foreign proceeding.

In terms of the decision to grant recognition of the foreign proceeding, this is set out at Article 17 and includes the following:

- The recognition of the foreign proceedings does not fall within the public policy exception to recognition;³
- The foreign proceeding meets the definition in Article 2(a);⁴
- The foreign representative meets the definition in Article 2(d);⁵
- The application has been submitted to the correct court;⁶
- The application meets the requirements of article 15(2) pertaining to provision of certificates or evidence regarding the foreign proceedings.⁷

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. **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. **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] 3

³ MLCBI Article 17(1).

⁴ MLCBI Article 17(1)(a).

⁵ MLCBI Article 17(1)(b).

⁶ MLCBI Article 17(1)(d).

⁷ MLCBI Article 17(1)(c).

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 set out in article 19 of the MLCBI, pre-recognition relief is able to be granted by the court on and from the time of making the application. The available forms of pre-recognition relief include staying any potential execution against the assets of the debtor;⁸ entrusting any and/or all of the debtor's assets located in the state of the application to the foreign representative (or any other delegated person);⁹ suspending the right to encumber, transfer or otherwise dispose of debtor assets within this state; provide for the examination of witnesses or taking of other evidence or information concerning the debtor's assets, affairs, rights, obligations or liabilities; or granting any other appropriate relief that could be granted under the laws of this state¹⁰. It is important to note that the granting of any the above relief is only effective until the determination of the application for recognition;¹¹ and the court may refuse any of this relief if it interferes with any existing foreign main proceeding.¹²

Where the recognised proceedings are foreign main proceedings, some relief can be granted in terms of the commencement or continuation of individual actions or proceedings concerning any of the debtor's assets, rights, obligations or liabilities is stayed;¹³ as is any execution against the debtor's assets¹⁴ and the debtor's rights to transfer, encumber or dispose of any of their assets is also stayed.¹⁵

As set out in article 21 of the MLCBI, post-recognition relief (i.e. relief granted after recognition of the foreign proceedings) includes the commencement or continuation of individual actions or proceedings concerning any of the debtor's assets, rights, obligations or liabilities is stayed; (subject to any relief granted under article 20(1)(a))¹⁶ as is any execution against the debtor's assets (subject to any relief granted under article 20(1)(b))¹⁷ and the debtor's rights to transfer, encumber or dispose of any of their assets is also stayed, (subject to any relief granted under article 20(1)(c))¹⁸ provide for the examination of witnesses or taking of other evidence or information concerning the debtor's assets, affairs, rights, obligations or liabilities;¹⁹ or granting any other appropriate relief that could be granted under the laws of this state²⁰. Further, the Court can also grant an extension of any of the relief granted pursuant to article 19(1).²¹ For the Court to grant any post recognition relief, it must be satisfied that the relief relates to assets within this state and should thus be administered in the recognised foreign non-main proceeding, or would assist in providing required information for that proceedings.²² Further, the Court must also be cognisant of the interests of any local creditors in granting any of the above relief and ensure that their interest are adequately protected.²³

⁸ MLCBI Article 19(1)(a).

⁹ MLCBI Article 19(1)(b).

¹⁰ MLCBI Article 19(1)(c).

¹¹ MLCBI Article 19(3).

¹² MLCBI Article 19(4).

¹³ MLCBI Article 20(1)(a).

¹⁴ MLCBI Article 20(1)(b).

¹⁵ MLCBI Article 20(1)(c).

¹⁶ MLCBI Article 21(1)(a).

¹⁷ MLCBI Article 21(1)(b).

¹⁸ MLCBI Article 21(1)(c).

¹⁹ MLCBI Article 21(1)(e).

²⁰ MLCBI Article 21(1)(g).

²¹ MLCBI Article 21(1)(f).

²² MLCBI Article 21(3).

²³ MLCBI Article 21(2).

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

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: 10 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,²⁴ but it was primarily operated from the UK.²⁵ 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)²⁶ 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

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 determine whether the proceedings are foreign main or foreign non-main proceedings, the Court would need to be satisfied of the concept of the COMI in accordance with the concept of establishment as set out in article 2(f) of the MCLBI, as well as considering the operation of the Article 16(3).

Starting with article 2(f), an establishment is defined as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. Given that the debtor appears to have some significant assets in the Cayman Islands, it is entirely possible that the Cayman Islands is likely to be the location of the main interests particularly noting that the liquidators have spent substantial time and effort within the Cayman Islands, in the current liquidation. Notwithstanding this, 2(f) is only required where determining the foreign non-proceeding.

Further, and as set out in article 16(3), there is a rebuttable presumption that unless evidence is provided to the contrary, the registered office of the debtor’s is presumed to be the centre of the debtor’s main interests. We know here that as the debtor is registered in the Cayman Islands, its registered office is within the Cayman Islands.

²⁴ Cayman Islands has not implemented the Model Law.

²⁵ 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.

²⁶ 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.

However, given that we are aware that some or most, depending on the extent of the activities of GSC were carried out in the UK, it is entirely possible that this presumption could be rebutted. As the judge, I would need to see significant evidence of the exact operations in the UK, as given the conduct of the liquidators to date, and the operation of Article 16(3), it would appear that the Cayman Islands is the COMI, and as such should ultimately be recognised as foreign main proceedings.

For full marks on this question, you should discuss the following points more thoroughly:

1. **COMI:** While the term COMI is not defined in the MLCBI, the UNCITRAL Guide to Enactment provides guidance and follows the interpretation of the COMI concept under the European Insolvency Regulation. Two key factors for determining COMI are:
 - The location where the central administration of the debtor takes place; and
 - Which is readily ascertainable as such by creditors of the debtor

The facts and circumstances of the case ultimately determine where the actual location of the COMI of the debtor is and this determination is a holistic endeavour. In that context it should be noted that the COMI can move and that article 16(3) of the MLCBI contains a rebuttable presumption that the debtor's registered office corresponds with its COMI.

2. **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,²⁷ 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 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?

To determine a foreign non-main proceeding, any application must satisfy the definition of establishment as set out in article 2(f). Effectively, an establishment is any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. It would appear that the Nigerian offices do not fall within this definition, given that

²⁷ Brazil and Nigeria have not implemented the Model Law.

the offices are merely letterboxes with no employees (and thus there is no ‘human means’). Because of this, it is not particularly likely for the Nigerian proceedings to be recognised under the Chapter 15 application in the US.

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 law²⁸ will help them in this respect.

Question 4.3 [maximum 6 marks] 3

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?

There are a number of issues here – firstly and foremostly, the Court would need to consider whether the granting of relief would have any effect upon creditors who are subject to the UK Law. Notwithstanding the requirements of articles 15 and 17 for the liquidators to satisfy, ostensibly any such granting of relief could be contrary to public policy (article 6); and those interested creditors are protected (article 22(1)). Evidently, the UK proceedings would be considered as foreign non-main proceedings, which would give rise to the liquidators making an application for relief pursuant to Article 21. Most notably, article 21(1) would provide sufficient power to the liquidator to stay the commencement (or continuation if already underway) of any action against the debtor, but only where recognition could be granted. Any such action brought in the UK would of course be subject to principles of UK Law under the PPNs. Further, and As seen in the case of *In the Matter of the OJSC International Bank of Azerbaijan and the CBIR 2006 – Bakshiyeva v Sberbank of Russia et al* [2018] EWHC 59 (Ch) (the IBA Case) the application of the Gibbs Rule is still relevant. As it stood, the IBA Case confirmed that *inter alia*, the operation of the foreign insolvency proceedings (and thus foreign insolvency laws) did not override any rights or obligations under the principles of English contract law. Any such application by the liquidators to the UK Courts would be seen as a way to try and get around the Gibbs Rule. Given that the PPN’s are governed by UK Law and that US Law has effectively forced the resolution of the issue, then the application of the Gibbs Rule would ordinarily prevent such recognition.

For full marks on this question, also discuss:

²⁸ 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.

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 (article 17(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. 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.
3. 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: 10 out of 15

*** End of Assessment ***

Total marks awarded: 35 out of 50